



EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: Carers Trust South East Wales

Heard at: Cardiff **On: 28 October to 4 November 2019**

Before: Employment Judge S Moore
Members:
Mrs C Mangles
Mrs L Bishop

Representation:
Claimant: In Person
Respondent: Mr J Searle, Counsel

RESERVED JUDGMENT

1. The Claimant's claim that she was subjected to detriments on the grounds she had made protected disclosures does not succeed and is dismissed.
2. The Claimant's claims for unfair dismissal contrary to S100 and S103A of the Employment Rights Act 1996 does not succeed and is dismissed.
3. The Claimant's claim for disability discrimination does not succeed and is dismissed.
4. The Claimant's claim for holiday pay succeeds and is upheld. The Respondent is ordered to pay the Claimant the sum of £600.19.

Background and Introduction

1. This claim was presented on 11 November 2017. The Claimant is a litigant in person. The claim brought complaints as follows:
 - a) Disability discrimination (direct, indirect, failure to make reasonable adjustments, harassment and victimisation);
 - b) Unpaid holiday pay;
 - c) Detriment on the grounds of having made a protected disclosure;
 - d) Unfair dismissal for the reason or principal reason of having made a protected disclosure;
 - e) Automatic unfair dismissal contrary to S100 ERA 1996 (health and safety);
 - f) Automatic unfair dismissal contrary to S104 ERA 1996 (asserting a statutory right).
2. The claim under S104 ERA 1996 (asserting a statutory right) was struck out in a Judgment dated 24 May 2019.
3. The case was heard at Cardiff Employment Tribunal on Monday 28 October 2019, Tuesday 29 October 2019, Wednesday 30 October 2019, Thursday 31st October 2019, Friday 1 November 2019 and Monday 4 November 2019, with the decision being reserved. The Tribunal heard evidence from the Claimant and Mr A Hussain (under a witness order). Ms C Murphy had been issued with a witness order but that order was set aside for reasons set out below. For the Respondent the Tribunal heard from Mr G Howells and Mr R Bevan. A written statement was provided for Mr M Davies but he did not attend to give oral evidence. There was an agreed bundle of 591 pages.
4. The Claimant was provided with reasonable adjustments by way of frequent breaks.

Application by Ms C Murphy to set aside witness order and Respondent's application to adjourn the hearing

5. The Respondent had applied for a Witness Order for a former employee in the name of Ms C Murphy who conducted an investigation meeting with the Claimant on 21 August 2017 and subsequently informed the Claimant of her dismissal the following day. It was accepted by the Respondent that the actual decision to dismiss the Claimant was made by Mr Gareth Howells and that Ms Murphy was communicating the decision rather than being the decision maker.
6. The Witness Order was granted on 26 July 2019. Ms Murphy applied to have the Witness Order set aside in an email dated 31 July 2019 citing in summary that her mental health was under review, she was a new mother on maternity leave and her self-employed partner worked away in the

week and being self-employed had no-one to look after her infant child. Ms Murphy lives in Bradford and the Tribunal hearing is in Cardiff, therefore Ms Murphy would have been required to travel and stay away overnight on at least one night to attend the Tribunal hearing. Ms Murphy also set out in her letter a number of reasons why she did not believe she was a key witness for the Respondent and submitted that she was instructed to carry out the investigation and decision to dismiss the Claimant by Ms Judith Fiddler who is a Director of the Respondent's legal representatives.

7. The Respondent's response to set aside the Witness Order was 17 August 2019. In that response the Respondent alleged that Ms Murphy acted alone in 6 separate decision making processes whilst conducting the investigation and advising the Respondent. As well as that letter from the Respondent's representatives we have also taken into account the response to the Scott Schedules by the Respondent and the amended response in which they, until this hearing, asserted that they were not responsible for Ms Murphy's actions and did not accept vicarious liability for her conduct.
8. The parties had informed the Tribunal the week prior to the hearing that they agreed Ms Murphy would only be needed for one day either the Wednesday or Thursday. The Respondent appears to have assumed that the Tribunal would then make arrangements with Ms Murphy about when to attend. No-one liaised with Ms Murphy in respect of this arrangement. On the morning of the hearing, EJ Moore reviewed the correspondence as the Witness Order had not been set aside and Ms Murphy had not attended. Ms Murphy was contacted by Tribunal staff who confirmed that notwithstanding the Witness Order she would not be attending either on one day or any day for the reasons she had explained in her application to set aside the witness order.
9. Mr Searle had informed the Tribunal at a preliminary discussion on the first morning that the Respondent now accepted they were vicariously liable for the actions of Ms Murphy carried out in the course of her employment and in respect of her dealings with the Claimant. On learning that Ms Murphy would not be attending Mr Searle made an application to adjourn the hearing so as to secure the attendance of Ms Murphy on the basis the Respondent was faced with 25 disability discrimination allegations concerning Ms Murphy's conduct. Mr Searle was asked what would change in respect of Ms Murphy's attendance given there was already a witness order that had not been complied with. Mr Searle explained the Respondent would seek to "build bridges" with Ms Murphy to secure her attendance. This application was opposed by the Claimant on the basis that the proceedings had already been subject to significant

delay in reaching a hearing and had impacted severely on her mental health.

10. On the basis of the Respondent's letter dated 17 August 2019, notwithstanding what Mr Searle had told the Tribunal about trying to build bridges with Ms Murphy, we decided to set aside the Witness Order. The purpose of a Witness Order is to facilitate the attendance of a witness able to give relevant evidence on the part of the party seeking the Order and it was apparent to us that the attendance of Ms Murphy was so that the Respondent could cross examine Ms Murphy. For that reason, and also taking into account Ms Murphy's health and her personal circumstances, we set aside the Order.
11. As the Order was set aside we also rejected the application to postpone the hearing. In addition we took the following into account when refusing the application.
12. The Respondent cited a significant number of allegations they say only Ms Murphy could deal with, which emanated from the Claimant's Scott Schedules. We reminded both parties that we would be considering this claim on the basis of the claim as set out in the ET1 and we observed that the majority of the Claimant's allegations against Ms Murphy are not contained within the ET1 in any event. Considering the balance of prejudice, we did not agree that the Respondent was unable to have a fair trial without the attendance of Ms Murphy.
13. We also take into account that there was nothing before the Tribunal to indicate that even if we did postpone to secure Ms Murphy's attendance, that anything would be different when the hearing is reconvened. Ms Murphy was still required to attend this hearing under a Witness Order and has indicated to the Tribunal that she would not be able to attend even in the position of the Witness Order being live and therefore considering the delay already in this case proceeding to a Tribunal hearing, and the potential effect of an adjournment on the Claimant's health, it was our decision that the case must proceed.

Issues to be determined

14. A detailed history of the claim and the issues to be determined is set out in the record of the preliminary hearing dated 23 May 2019. There have been 4 preliminary hearings to try and identify the issues and clarify the Claimant's claims. The Claimant was ordered to produce Scott Schedules which resulted in 4 schedules containing 92 allegations many of which had not been advanced in her ET1, were repetitious and difficult to understand. The Claimant had done her best to clarify the schedules but

as of 23 May 2019 they remained, with respect to the Claimant, incomprehensible and unmanageable. Therefore, at the hearing on 23 May 2019 the Tribunal discussed the claims with the Claimant and sought to clarify the claims being brought and the issues to be determined. These were then recorded in the Order dated 23 May 2019 and the Claimant was provided with an opportunity to inform the Tribunal if she did not agree that the Order recorded her claims. She did not do so and therefore, the issues to be determined are as set out in the order save as follows:

15. Protected Disclosure detriments

16. We identified that the protected disclosure detriments set out in the Scott schedule¹ (16 in total) were entirely new matters which had not been referenced in the ET1. The only detriment advanced in the ET1 was that the Claimant had been dismissed.

Direct discrimination – less favourable treatment

17. In respect of the direct discrimination allegations of less favourable treatment (as limited to what had been advanced in the ET1 under the heading “Direct Discrimination” and the relevant entries in the Scott Schedules), there were five matters set out as follows:

- a) The Respondents reaction to her complaint of harassment (Father’s Day comment). This was at the meeting with Ms Murphy on 21 August 2017. The Scott Schedule described that Ms Murphy received her complaint with contempt by making an ugly face over her raised shoulder and a “ppfff” sound.
- b) The failure to investigate her complaint. This was described in the Scott schedule² as raising concerns and complaints about Ms Milton conduct and ineffective management of the finance department.
- c) The refusal to release details of the complaints against the Claimant.
- d) The conduct of Ms Murphy.
- e) The Claimant’s dismissal.

18. Victimsation detriments

19. We identified that the victimsation detriments set out in the Scott schedule³ (27 in total) were entirely new matters which had not been referenced in the ET1. The only victimsation detriment advanced in the ET1 was that the Claimant had been dismissed. The protected act

¹ Scott Schedule pages 72 – 1-6 of the bundle

² Page 158

³ Scott Schedule pages 72 – 1-6 of the bundle

advanced in the ET1 was the Claimant's complaint about Ms Milton that contained allegations of harassment.

20. We have therefore considered the claim based on the ET1, the list of issues in the Order dated 23 May 2019 and where that order references the Scott Schedules, the relevant entries in the Scott Schedules.
21. We make the following findings of fact on the balance of probabilities.
22. The Claimant commenced employment with the Respondent as an Executive Assistant on 7 July 2016. The appointment was initially part-time on 25 hours per week with a 6-month probationary period. On the first day of her employment the Claimant completed a work health assessment. The relevant sections of that assessment are set out as follows. Under the heading "Health History" there was a question: "Do you have any illness/impairment/disability (physical or psychological) that may affect your work?" The Claimant had crossed through the option of "yes" then circled the option "no", but underneath in the box where it indicated "if yes, please give details" had written "no effect on work".
23. A further question was whether the Claimant was currently taking any medication and the Claimant had circled the word "yes". In the box asking for details the Claimant had noted as follows: "**Levothyroxine – thyroid disorder, Priadel – depression**", and written alongside: "**both longstanding medications no ongoing adverse health effects.**"
24. Lastly to the question "Do you think you may need any assistance with your work or special adjustments at your place of work to help you do the job on offer?", the Claimant had circled "no".
25. Mr Howells reviewed this work health assessment on or shortly after the Claimant commenced employment. He decided that it was not necessary to refer the Claimant to Occupational Health. His reason was (and we accepted his evidence on this point) that it was not necessary as the Claimant had indicated that she did not require any adjustments on the work health assessment form. Mr Howells accepted also that he did not know that Priadel was a brand name or generic name for Lithium at the time he read the form. Mr Howells' evidence was that he made reasonable adjustments for the Claimant. He was content for the Claimant to have flexible work arrangements in terms of what time she arrived at the office and what time she left, was free to decide her working hours to a certain extent, allowed her to work from different offices, organise her own diary and had a less formal supervision structure in not having formal one to ones. Whilst we accept that this was accommodated in practice for the Claimant we do not find that this was specifically for the purpose of giving the Claimant reasonable adjustments. Mr Howells did not allow these practices in a proactive manner to provide reasonable adjustments. Moreover the

practices were permitted generally within the Respondents organisation. Nonetheless it is evident that Mr Howells was well aware that the Claimant had a condition of depression and was aware of this when offering her the role as Executive Assistant.

26. At the time the Claimant started employment, the Respondent had been going through restructure and a number of staff were in the process of being made redundant or had been made redundant. There was some resentment towards the Claimant for her being a new member of staff in the circumstances however no-one displaying resentment was later involved in providing statements that ultimately led to the reason the Respondent said the Claimant was dismissed.
27. It was accepted by the Respondent that the Claimant performed her role to a high standard from the outset. There is evidence that we saw in the bundle of Mr Howells praising the Claimant having been performing at a very high standard, references to her being 'truly amazing' and what would he do without her. The Claimant took over the payroll function from November 2016.
28. Throughout the period from when the Claimant started her employment and through to the first few months in 2017 we saw emails that indicated that there was a generally relaxed attitude in respect of the working relationships between work colleagues in the Respondents workplace. Nicknames for work colleagues were in use, for example the Claimant had named herself "Dora the Explorer", in reference to a children's cartoon character which apparently arose as she had got lost on the way to a work social function. The Claimant referred to herself as Dora the Explorer in several emails that we saw. The CEO Mr Howells was referred to as "Batman" by not only the Claimant but generally throughout the organisation and beyond. An external organisation that the Respondent were close to were also familiar with this nickname for Mr Howells. We also saw emails that Ms Milton was referred to as "J" by the Claimant on a number of occasions. We also heard that the Claimant and Ms Milton talked about buying Batman related gifts for Mr Howells, such as a bat phone and that the Claimant did actually buy Mr Howells gifts on a number of occasions. This was a practice within the Respondent. It was not just the Claimant buying Mr Howells gifts. A work colleague of the Claimant had bought her a mug and an inflatable unicorn. We do not find that there was anything of an inappropriate sexual nature in the buying of gifts as was later alleged by the Respondent.
29. Ms Milton was recruited as the Finance Manager in January 2017. Initially Ms Milton and the Claimant had a good relationship. Emails in the bundle between them showed as much with the Claimant offering Ms Milton

support in her new role. The Claimant alleged that she first raised issues about being pressurised by Ms Milton in February 2017 with Mr Howells which he denied. Even if this did happen we saw later emails between Ms Milton and the Claimant which did not corroborate that there was any tension in their relationship, for example, in April 2017 they were having email discussions about purchasing Mr Howells a “bat phone”.

30. On 22 May 2017 the Claimant was promoted to the role of Corporate Services Manager, this came with a pay increase to £27,500 per annum to reflect additional responsibilities. Ms Milton and the Claimant were Mr Howells’ direct reports. In April 2017 Mr Davies commenced a role within the Respondent as Finance Officer reporting to Ms Milton. Mr Davies had formerly worked at Cwm Taf. Cwm Taf had TUPE transferred to the Respondent shortly beforehand and he was offered and accepted the role of Finance Officer.

Week long campaign

Finance Department

31. The Respondent had undergone a period of change and had brought in a number of different organisations under TUPE transfers. Ms Milton was brought in to restructure and set up a number of new procedures within the Finance Department. The Claimant had previously been involved in running finance for the Respondent but once Ms Milton had been in employment for a number of months and the Claimant started her new role there was still a crossover of work. In June 2017 an issue arose in respect of some invoices and there was a disagreement between the Claimant and Ms Milton about how best to deal with that situation. The Claimant’s evidence was that a decision was taken to run some invoicing from an untested system. Invoices were generated and sent out, but it appears these invoices contained errors. The Claimant telephoned the software helpline for the programme that they were using called WebRosta. She was advised to delete the invoices and make the amendments required, run temporarily and check again before they were run permanently. Mr Howells gave evidence that there had been a disagreement between the Claimant and Ms Milton how to resolve this situation. Ms Milton had not wanted the invoices to be deleted and felt that the better way to deal with it was to issue credit notes in respect of the invoices. Mr Howells’ evidence was that it was not necessarily that the Claimant and Ms Milton were right or wrong but that they had different views about it. Ultimately Ms Milton was a qualified accountant and he trusted her judgment as to how this should be resolved, in particular with regards to how this would appear to the auditors.
32. This is important background as to what allegedly happened afterwards. The Claimant’s case is that Ms Milton then embarked on a week long

campaign of bullying and harassing her and this was due to the disagreement or the situation with the invoicing we have relayed above. This is said to have commenced on Monday 12 June 2017. The Claimant's evidence was as follows. On the Monday Ms Milton "stomped around the office like a spoilt toddler" and also slammed cupboard doors and drawers of Mr Davies with aggression. This was commented on by a work colleague called Ms Williams. On Tuesday 13 June 2017 there was an incident relating to the fire alarm. The Claimant's evidence is that the fire alarm had been faulty and was in the process of being tested after being repaired and they were aware that the fire alarm would therefore be going off shortly. As such when the fire alarm went off the Claimant assumed it was a test and did not tell anyone to evacuate, but on Ms Milton coming into the office she shouted at everyone to evacuate and then allegedly turned on the Claimant shouting as to why everyone was still in [the office]. The Claimant alleges that outside Ms Milton persisted in angrily shouting at her about the fire alarm situation and was aggressive in front of staff. The following day on 14 June 2017 the Claimant relates that Ms Milton had a meeting with Mr Howells in his office and that Mr Howells was off hand with the Claimant when he came out and that he later informed the Claimant that Ms Milton had asked to see him about the Claimant's deleting invoices and the fire alarm incident.

33. Later that day on 14 June 2017 the Claimant alleges that Ms Milton came into her office and started shouting and screaming at her this time in front of Mr Hussain and again Ms Williams. There then followed the Father's Day comment which was the comment relied upon for the Claimant's harassment claim. The Claimant alleged that Ms Milton stopped shouting, walked around to her side of the desk, leant against the cupboard and made remarks to the Claimant about Father's Day. Ms Milton commented words to the effect that 'it was Father's Day on Sunday and how difficult it must be for you, what with your father.'
34. The Claimant's case is that Ms Milton deliberately made this comment as the Claimant had previously informed her about her difficult relationship with her father. It is the Claimant's position this was deliberate and malicious comment by Ms Milton. The Claimant's evidence was that in conversation with Ms Milton in January 2017 she divulged details of her mental health difficulties and her family background and informed Ms Milton that she blamed her father for making her entire family mentally ill and had been bullied by her father as had other members of her family resulting in a tragic event in respect of a close relative. In other words it is the Claimant's position that Ms Milton was well aware of the link between her mental health and her father and therefore the comment made by Ms Milton about Father's Day was deliberately targeted comment of harassment related to her mental health.

35. According to the Claimant's evidence this remark was made in the presence of Mr Hussain who the Claimant called under a Witness Order to give evidence at the hearing. Mr Hussain gave his evidence on Tuesday 29 October 2019. Mr Hussain stated that he did recall an incident where Ms Milton had been shouting where he had been there with Ms Williams. Mr Hussain appears to have been talking about an incident when a Ms Hughes was present, but according to the evidence of the Claimant Ms Hughes was present on the Monday incident where Ms Milton was also said to have been shouting. Mr Hussain did not give any evidence that he heard the comment about the Father's Day comment when he gave his evidence to the Tribunal. We therefore have to determine whether or not on the balance of probabilities this comment was made by Ms Milton and also whether it was made in the malicious manner alleged by the Claimant. This is relevant to the question as to whether it was related to the Claimant's disability and also what was the purpose or effect of the comment.
36. We did not hear evidence from Ms Milton and only had the Claimant's evidence before us on this point. We considered the emails between Ms Milton and the Claimant at the time this incident is supposed to have taken place. We saw an email on the same day, 14 June 2017 between the Claimant and Ms Milton subject matter "lots of work at this end". It was initiated by the Claimant who raised with Ms Milton that she had 'borrowed' Ms Williams to assist her in the Finance Department. The Claimant was concerned that this was impacting on the work that she had to do for the Claimant. There is nothing in any of these emails that suggested that the Father's Day comment had been made. The emails were sent between 11:50 in the morning and 12:50 in the afternoon. We did not hear evidence as to when the Father's day comment was made other than it was in the afternoon and it was after the CEO had left work, so it was likely that these emails were sent before the comment is said to have been made and did not assist in making a finding of fact.
37. Emails after that incident dated 19 June 2017 do not indicate any serious issues between the Claimant and Ms Milton, for example, on 19 June 2017 the Claimant emailed Ms Milton at midday and offered assistance from Ms Reddy, a team member of the Claimant, to which Ms Milton replied that she really appreciated the offer of help, checked several times whether certain proposals will be OK with the Claimant and asked her for her opinion. The Claimant din a joking manner that she thinks perhaps "we" need a week in Florida and will check for deals later. This does not accord behaviour of someone who believed they had just been subjected to such a calculated and malicious comment.
38. We also noted that on 29 June 2017 the Claimant emailed Mr Howells privately outside of an email conversation that has just taken place with the Claimant, Mr Howells and Ms Milton parodying the email from Ms Milton

(see below). This demonstrated to us that the Claimant felt she was able to approach Mr Howells in this way and that she would have complained to him about the comment had it been made in the manner alleged.

39. The first time the Tribunal could see that the Claimant raised the Father's day comment with the Respondent was when she met with Ms Murphy on 21 August 2017 in which she informed Ms Murphy that she felt Ms (Milton) had been "mean" and that she felt this was a nasty comment regarding her mental health.
40. Taking all of the above into account, we find it is likely that the Father's Day comment was made by Ms Milton as it was raised by the Claimant in the meeting with Ms Murphy but we do not find that it was related to the Claimant's disability in the manner alleged. We find the more likely explanation is that there had been a conversation between the Claimant and Ms Milton about the Claimant's father which would have led Ms Milton to conclude that Father's Day might be an issue for the Claimant. None of the tone of the emails or any of the other evidence corroborating that Ms Milton would behave with the motivation alleged.
41. Continuing with the Claimant's allegation with regards to the week long campaign by Ms Milton in June 2017. According to the Claimant there was a meeting between her and Ms Milton on Thursday 15 June 2017 and it was at this meeting the Claimant believes that Ms Milton later alleged the Claimant put her fist in Ms Milton's face. The Claimant denies behaving in this way emphatically. Ms Milton's statement to Ms Murphy on 21 August 2017 relays an incident which she quotes as happening "a few weeks ago" when they had a meeting and the Claimant put her fist up to Ms Milton, was shaking and was "in her face". Ms Milton felt threatened and thought the Claimant was going to hit her. When asked why she did not raise a grievance or complain about that behaviour Ms Milton responded that she thought it would be petty as she is part of the Senior Management Team and it would create tension. There was tension between the Claimant and Ms Milton. The other employees interviewed by Ms Murphy felt that the Claimant was bullying Ms Milton. We have taken into account the Claimant's evidence and the likelihood of an individual not reporting such an incident if in fact it had taken place being a very serious matter. To then explain why it was not reporting as being petty was potentially implausible. We find that there had been an incident between the Claimant and Ms Milton but it was not in the manner described by Ms Milton.
42. If Ms Milton did have a vendetta against the Claimant this would have been the ideal opportunity had such an incident taken place for Ms Milton to have pursued that vendetta and made a formal complaint against the Claimant which she did not. This in our view supports that there was no deliberate campaign or vendetta of behaviour by Ms Milton against the Claimant.

43. The only contemporaneous evidence of tensions between the Claimant and Ms Milton around that time are contained in an email that the Claimant sent to Mr Howells on 15 June 2017 at 14:44pm in which she states "I need to leave the office now before I collapse". The Claimant says that the following day, which would have been Friday 16 June 2017, she met with Gareth Howells and was in a very distressed state, shaking, screaming, crying, she was like jelly in the office, kept breaking down and that Mr Howells told the Claimant he was glad that she trusted him enough to let him see her like that. Mr Howells was asked about this email and whether or not he was concerned about the language with reference to the Claimant collapsing and her behaviour the next day. He disputed that the Claimant was as the Claimant described. He recalled having a discussion with the Claimant about the fire alarm incident which he put down to a miscommunication in that Ms Milton had thought that it was a genuine fire alarm and was therefore concerned that no-one was exiting the building, but he did not accept that the Claimant reported to him in the way that she stated in her witness statement.
44. We find that the Claimant presented to Mr Howells as upset but not to the extent she later alleged. We do not believe Mr Howells would have taken no action if the Claimant was at the level of distress she alleged, based on his later actions and their close working relationship.
45. It is common ground that it was agreed the Claimant would go and work from the Cwm Taf office on Monday 19 June 2017. On Sunday 18 June 2017 the Claimant had drafted a long email to send to Ms Milton, Mr Davies and MS Williams regarding the incorrect invoicing situation that had arisen, referred to above. The Claimant emailed this to Mr Howells at 16:15 on 18th with the subject "I want to send this email to (the three named individuals above) but I won't if you tell me not to". Mr Howells replied on 19 June 2017 asking if the Claimant had a good weekend, noting he had read the draft email and acknowledged it showed there was a lot of work to do to get WebRosta right. He stated that there was nothing in the draft that should not be sent describing the email as reasoned and thorough. The Claimant replied words to the effect, 'just as well as I had sent it hours ago', and this had been sent through to Ms Williams, Mr Davies and Ms Milton on 19 June 2017 at 8:30am. There were some replies to the email that throughout the day which appeared to show a professional working relationship between the Claimant and Ms Milton (see above Florida comment email at paragraph 37).

Week long campaign – overall findings

46. We do not find that there was a week long campaign by Ms Milton to bully and harass the Claimant for the reasons set out above. There were some

issues between them but these were, viewed objectively and based on the evidence before us, no more than day to day issues arising between work colleagues.

July / August 2017 events

47. At the end of June 2017 Mr Howells emailed the Claimant and Ms Milton and acknowledged that there were pressures on the Claimant's team. He instructed Ms Milton to recruit temporary finance support and to contact some agencies. Ms Milton replied that she agreed but she wanted to put a work plan together first and also referenced "hating spending the money". Mr Howells replied the same day and repeated the instruction to Ms Milton to press on with temporary recruitment as the work plan is developed. Mr Howells was asked whether or not this happened and he told the Tribunal that no such temporary recruitment took place. The Claimant then privately emailed Mr Howells at 13:58 on the same day in which she wrote a parody of Ms Milton's reply as follows:

"Hi Gareth I am having (Ms Williams). That is the only solution and that will not change. You can get some cheap admin support, hire a new PA, ten a penny they are, pick one of them up anywhere, I will be spending the next week deciding my next move that will ensure I get (Ms Williams) and the entire organisation works around me. I am having (Ms Williams) and that's that. Kind regards, V Salt."

48. The reference to V Salt was the Claimant's comparison to Ms Milton and the character in Verruca Salt in Charlie and the Chocolate Factory. Mr Howells replied directly to the Claimant "just to say she won't be" and the Claimant replied back the words "good". It was clear that at that time that the Claimant and Ms Milton were in conflict over the resource of Ms Williams and how much time she should be spending assisting Ms Milton.

49. We were not taken to any further matters in July 2017 other than an exchange of emails where the Claimant appeared to be expressing upset that Mr Howells and Ms Milton had had a meeting, until around 11 August 2017. Mr Howells said on this date that the Claimant had left the office in tears. The Claimant denied this.

50. We were taken to a series of Facebook messages between the Claimant and Ms Prosser (Registered Care Manager at the Respondent) over the weekend of 12 August 2017. Without quoting the text messages in detail the conversation was focused entirely on issues between the Claimant and Ms Milton. In summary, the Claimant refers to Ms Milton being out of control, restricting Mr Howells access to one of the finance systems called XERO and mentions that she will raise a grievance if it is not sorted immediately. Ms Prosser appears to support the Claimant's position, stating she is pleased the Claimant was going to raise the issues with Mr Howells and that she should be supported.

51. On Sunday 13 August 2017 the Claimant emailed Mr Howells and requested a formal meeting advising there were some very serious issues that needed to be discussed including the immediate need to bring additional finance support into the organisation and referencing to now reaching crisis point. Mr Howells replies at 7:52am the next day and they agree to meet that morning.
52. There is a significant issue of dispute between Mr Howells and the Claimant about the discussion on 14 August 2017 and we take some care to set these out as this was the Claimant's first alleged protected disclosure that she relied upon. In paragraph 124 of the Claimant's ET1 the Claimant describes the meeting and alleges that she told Mr Howells she was in a poor mental state, expressed concern/impact in the way the Finance Department was being managed and that changes were desperately needed and also that herself and staff members were being adversely affected and that Ms Williams was also complaining about Ms Milton's conduct. In paragraph 127 the Claimant states she expressed concern for Mr Davies who needed help as his stress levels were obviously very high. She goes on to say that she told Mr Howells that Ms Milton's behaviour and harassment of her was discriminatory.

First protected Disclosure – 14 August 2017

53. In the Claimant's Schedule of Protected Disclosures and the list of issues agreed at the preliminary hearing on 23 May 2019 it was clarified that the disclosure that the Claimant was relying on was the disclosure about Mr Milton having an excessive workload and that he was suffering very high levels of stress. The first time the Claimant says she made this protected disclosure was verbally to Mr Howells on 14 August 2017. Mr Howells did not accept this version of events of the meeting on 14 August 2017. Mr Howells was very clear that all of the issues the Claimant was raising on that morning were related to Ms Milton. He accepts that the Claimant told him she was being bullied by Ms Milton, others were too and that Ms Milton was lazy and incompetent and that she was taking the Claimant's staff due to the Finance Department needing more help. Mr Howells described the Claimant becoming upset at the meeting with her voice and body shaking, being clearly distressed and allegedly she came across as aggressive. Mr Howells says that he offered the Claimant the opportunity to bring a formal grievance procedure but this was refused by the Claimant. Mr Howells specifically denies that the Claimant mentioned anything about Mr Davies being stressed.
54. We preferred Mr Howells evidence on this point which we consider was corroborated to an extent by the Facebook messages between the Claimant and Ms Prosser where there is no mention of Mr Davies and the focus of

the Claimant's concern at that point in time, the weekend before this meeting, was all about Ms Milton. For these reasons we find the Claimant did not make the disclosure that is relied upon as her first protected disclosure.

55. Following that meeting Mr Howells decided that he wanted to ask the Respondents HR advisers to independently investigate the concerns that the Claimant had raised. Mr Howells emailed the Claimant later that day advising that he had reflected on what she had shared with him that morning and felt it important that the issues she raised were dealt with fairly and given the appropriate response for such serious allegations. Mr Howells informed the Claimant he had instructed Carers Trust HR to meet with her direct and discuss the concerns in more detail. They were in already due to be in Wales on 21 August 2017 for other reasons. This was an important detail as the Claimant alleges there was a conspiracy theory to investigate the Claimant rather than the Claimant's concerns, but as this email shows Carers Trust were already due to be visiting the Respondent for other reasons at the time at which Mr Howells arranged for the meeting to take place.

Second Protected Disclosure – 15 August 2017

56. On 15 August 2017 Mr Howells emailed both the Claimant and Ms Milton a workplan which set out a number of columns. Mr Howells wanted to understand what particular areas of work were being done by the Corporate Services Team and the Finance Team so that he could understand the need for additional resources and if more staff were needed. We had sight of the workplan and the Claimant was asked to comment on it and get back to him as soon as possible. She was asked whether or not she agreed it was reasonable to complete this by the end of the week, but if not the Claimant could let Mr Howells know. The Claimant was very concerned about the workplan and asked for an immediate discussion. It was at this meeting in which the Claimant says she made her second protected disclosure to Mr Howells. In her ET1 she described this as follows: (Paragraph 134) "On Tuesday 15 August the Claimant spoke again about her concerns with the CEO and brought her elevated levels of anxiety to his attention. She expressed how the entire situation was extremely sensitive, her heart was racing, she felt very uncomfortable and she was not very well". The ET1 does not mention anything about making a second protected disclosure about her concerns over Mr Davies's stress levels it only mentions her own stress but it was set out in the Scott Schedule and the list of issues agreed at the preliminary hearing on 23 May 2019. The Scott Schedule sets out the words used as follows (referencing a meeting Mr Davies had just come out of with Ms Milton):

“I don’t know what on earth has been said to him, but he is in a right state up there. Like an absolutely desperate state. I went on to express that I want to be able to tell him everything is going to be alright”.

57. The Claimant’s witness statement contained very little evidence about what words she said at this meeting. It stated:

“I also informed the CEO in the meeting that (Mr Davies) was in a right state up there and I attempted to explain.”

58. We accept that the Claimant may have mentioned that Mr Davies was stressed to Mr Howells at that meeting, but it was not the predominant driving area of the Claimant’s concern. The reason we have concluded this is that the meeting took place very shortly after Mr Howells had emailed the Claimant the workplan and the Claimant replied almost immediately saying that she was worried about the workplan. We find that the focus of the Claimant’s concern at that meeting or discussion with Mr Howells was about the workplan and not about Mr Davies stress levels.

Third Alleged Protected Disclosure – email 17 August 2017

59. On 17 August 2017 the Claimant had been at the Cwm Taf office and it is the Claimant’s case that she was informed by two other members of staff of their concern about Mr Davies’s stress levels. These were Ms Reddy and Ms Howden. The Claimant emailed Mr Howells on 17 August at 21:34 and relies on this as her third protected disclosure. The Claimant’s ET1 set out why this email amounted to a protected disclosure at paragraphs 141 – 143. There were two elements to this, first of all a repeat of the concerns for Mr Davies in respect of his welfare that his confidence was low and he was suffering from high stress levels behaving in a way never seen before and under so much pressure. Also the second element was that the Finance Department as a whole was under huge pressure and was being poorly managed, lacked coordination and change was desperately needed to meet the demands of the department.

60. The email relied upon was 2 pages of typed text. It was not clear which particular sections were relied upon as having alleged malpractice in the finance department. After relaying concerns for Mr Davies, the email was, on the whole, a narrative of work being undertaken by other staff to support the finance team. It described Ms Williams working on invoicing, finance queries by phone, setting up of orders and contracts for Cwm Taf and the need for finance to have an input on testing and analysis of invoicing. The particular sections cited in the Scott Schedule relating to alleged malpractice within the finance department) were as follows:

“I explain the impact the situation was having on other work that needed to be completed, highlighted jobs that should be moved into the remit of the finance department including “financial testing and analysis” but there was no short, medium

or even long-term plan to achieve this. I confirmed “four of us, myself, Clare and Lauren and Martyn” and “actively working on finance” but the “department lacks co-ordination on the most basic level” which was having “wider operational impact” and action must be taken “to meet the demands of the finance function”.

61. Following the Claimant sending that email to Mr Howells, Mr Howells forwarded that email to Chantelle Murphy and others at the HR support and stated as follows, *“Hi all, See below email that I haven’t responded to and at the moment I don’t plan on responding to. I will forward you another email shortly that I’m a little concerned about too.”* Ms Murphy then replied to Mr Howells but did not reply to his personal email address which he had used to forward that email, but replied to his Carers Trust email address to which the Claimant had access to. Ms Murphy replied as follows, *“Gareth, it would be our advice to speak with the staff mentioned in (A’s) email below, off site and privately just to see how they actually feel. Depending on what they say I can also use this in the meeting with her on Monday. I would not be responding or informing A that you are going to speak with staff separately. Kind regards, Chantelle”.*

62. The Claimant alleged that this was a deliberate act by Ms Murphy to cause her distress by deliberately replying to an email address to which she had access to. Even if this is the case, and we believe it is more likely that Ms Murphy inadvertently and mistakenly sent it to Mr Howells email work address, we were not able to see what in that email would have caused distress. Ms Murphy was suggesting that Mr Howells speak to the staff that the Claimant mentioned in her email originally complaining about the situation namely Ms Reddy and Ms Howden to see how they feel, which is not in our view was not an unreasonable position to take. If an employee is making complaint and they say that two people have spoken to them and given them information about that complaint it is not unreasonable to suggest to speak to those individuals.

63. As it stood Mr Howells did not speak to Ms Howden or Ms Reddy, but Ms Murphy did during her investigation which we deal with below.

Meetings on 21 August 2017 conducted by Ms Murphy

64. We did not hear evidence from Ms Murphy. We did have some notes that Ms Murphy had written which originally were redacted but were produced to us in an unredacted form voluntarily by the Respondent. The first time the Claimant had seen these redacted notes was during disclosure and the unredacted notes during the course of this hearing.

Meeting with Ms Milton

65. The notes record that Ms Murphy met with Ms Milton on 21 August 2017. Ms Murphy was investigating the Claimant's complaints that Ms Milton was bullying the Claimant. The notes record in summary as follows.
66. Ms Milton was aware of the allegations made against her by [the Claimant] and felt shocked and upset because if anything Ms Milton felt that the Claimant was bullying her. Ms Milton alleged that the Claimant put her fist in her face which we have dealt with above. Ms Milton alleged that the Claimant made lots of inappropriate remarks to everyone in the office, particularly Mr Howells and Mr Davies and he [Mr Davies] had commented on how he could not cope with the sexual innuendos from the Claimant. The Claimant was out of control when Mr Howells was not in the office. The Claimant was treated differently to everybody because she has a close relationship with Mr Howells and that she did not want to raise the incident about [the Claimant] or put in a grievance because she thought it would get swept under the carpet with Mr Howells taking the Claimant's side. She was unhappy about the allegations and wanted to know the next steps and if she will be taken to a disciplinary. It follows from this that Ms Milton understood that the allegations were against Ms Milton and not an were an investigation into the Claimant's behaviour at that stage.

Meeting with the Claimant

67. This was the meeting the during which the Claimant alleges she was subjected to direct disability discrimination.
68. We saw Ms Murphy's note of this meeting. We also had sight of the Claimants notes but these were handwritten and very difficult to follow. Ms Murphy's notes discuss the Claimant's allegations against Ms Milton. and record that the Claimant alleged Ms Milton was trying to 'pinch' the Claimant's staff, namely Ms Williams and Ms Reddy. The notes (in summary) relay instances of bullying including the week long campaign. In respect of the Claimant's mental health Ms Murphy records as follows:

"Incident regarding a Father's Day comment. [The Claimant] explained personal issues relating to her family's mental health – feels like Ms Milton was been (sic) mean about saying 'I bet Father's Day is hard for you too' – [the Claimant] felt this was a nasty comment regarding [the Claimant's] mental health."

69. The Claimant disputed Ms Murphy's notes as written with deceitful thrust with anomalies and significant omissions.
70. There were two allegations of less favourable treatment for the Claimant's direct discrimination claim said to have happened at this meeting.

71. The first was Ms Murphy's reaction to the Claimant's harassment comment. This was the Father's Day comment. The Claimant alleged that when she told Ms Murphy about the Father's Day comments Ms Murphy received her complaint with contempt by making an ugly face over her raised shoulder and a "ppfff" sound.
72. There was no mention of the alleged behaviour by Ms Murphy in any of the appeal documentation. The Claimant alleged at the appeal hearing that on dismissing the Claimant Ms Murphy had behaved in a different way in that she wryly smiled, laughed and had an attitude like doing a highland fling at the dismissal meeting. The Claimant demonstrated how she claimed Ms Murphy had behaved to the Tribunal and told the Tribunal Ms Murphy was "loving it".
73. Ms Heath's appeal outcome letter records that she had investigated the alleged "highland fling" behaviour and this was denied by Ms Murphy. We find that Ms Murphy did not receive the Claimant's complaint about the Father's Day comment with contempt by making an ugly face over her raised shoulder and a "ppfff" sound as it was not raised by the Claimant at the time and what was raised was a very different complaint against Ms Murphy. We also find that it was implausible that Ms Murphy would have behaved in this manner. She did not know the Claimant, there was no history between them and she was a HR professional engaged to investigate the Claimant's comments. There were no witnesses to the comment or the highland fling. Mr Hussain, whilst not at the first meeting did not corroborate any inappropriate behaviour by Ms Murphy at the second meeting when the Claimant was dismissed.
74. The second was described as "the conduct of Ms Murphy" in the ET1. In the Scott Schedule Ms Murphy is alleged to have talked in riddles making unclear comments including "you've read my emails", "this is not a witch hunt", "negative operational impact", "two wrongs don't make a right", "We'll keep this contained", "staff morale" and "we can restructure". The Claimant alleged these were harmful to her mental health her comparators were Ms Davies, Ms Milton, Mr Howells, Ms Williams and Ms Prosser on the basis Ms Murphy did not talk in riddles to them at their meetings. It is likely Ms Murphy may have made such comments given the context of the discussions she had with the Claimant. In relation to the comparators as a matter of fact the Claimant could not have known whether Ms Murphy did or did not make similar comments as she was not present at the meetings.
75. Ms Murphy's note records that the Claimant told Ms Murphy that she had spoken to Mr Davies and Ms Reddy and they also feel that Ms Milton does no work and how Mr Davies is under lots of pressure because Ms Milton keeps giving him lots of work to do. It also records that she does not want to raise a formal grievance but wants the issues resolving.

76. The Respondent relied on further investigation notes made by Ms Murphy arising from meetings between Ms Murphy and Ms Howden, Ms Reddy and Mr Davies from the following day. The situation evidently changed and moved away from an investigation into Ms Milton to an investigation into the Claimant's behaviour, but this is explained by what Ms Milton alleged in respect of the Claimant's behaviour.
77. The note of Ms Howden's statement to Ms Murphy is in summary as follows. Ms Howden says she has not seen Ms Milton bully the Claimant and states if anything it would be the other way around as the Claimant is loud and can sometimes be overbearing. Ms Howden had heard about the "showdown" from other members of staff but thinks it could have been exaggerated. She is not convinced that Ms Milton is a bully and that she does do work and knows that the Finance Team is backed up and busy. Ms Howden advised the Claimant could be very loud and has heard on occasion her being inappropriate with members of staff with the way she says and does things and also says that she feels allowances are made for the Claimant when she does things she is not meant to and refers to emails being rude and demanding and gets away with what she does as she has a close relationship with Mr Howells.
78. The note of Ms Reddy's statement to Ms Murphy is in summary as follows. Ms Reddy also states that she is not aware or seen Ms Milton bully or being mean to the Claimant, but that she works in another office. Ms Reddy asked if the meeting was confidential and confirmed that she had heard the Claimant say comments to Mr Davies that were inappropriate. Ms Reddy says she thinks the Claimant is a good manager. Ms Reddy was asked about the Claimant's email dated 17 August 2017 specifically the stress Mr Davies was under and Ms Reddy not wanting to work in finance. Ms Reddy agrees Mr Davies is busy and she has offered to help because that is her job. Ms Milton does not force her to do the work and she is happy to work in finance. Ms Reddy says it is the Claimant that comes into the office complaining about Ms Milton giving all her work to Mr Davies and not doing any herself.
79. Ms Murphy then interviewed Mr Davies. The note of Mr Davies' statement to Ms Murphy is in summary as follows. Mr Davies explained the work he has was a lot but he 'just gets on with it' because it needs to be done. Ms Milton is a good support to him and is always busy when he sees her. He says that there are three finance systems and that is why there is a backlog of invoices and he has never seen the Claimant be intimidated by Ms Milton, if anything it was the other way around. Mr Davies raised issues with Ms

- Murphy about the Claimant's inappropriate comments and informed Ms Murphy he did not feel comfortable with them. Some examples were as follows: when are you leaving your wife for me?, references to him being the Claimant's work lover and work boyfriend (made in front of other staff), which makes him feel uncomfortable and embarrassed as he was a happily married man and did not want anyone to think there was anything going on between them. Mr Davies also relates an incident where an employee came and asked about wires under the desk and reported that the Claimant said about the wires being twisted, "me and you should be twisted under that desk". He says it is hard to think of all the examples because it is constant and that the Claimant made comments about his wife and what [the Claimant] would do if they were alone to him if they were alone. He hadn't wanted to put in a grievance as [the Claimant] would "make his life hell" and he has asked to be moved away from her.
80. The Respondent relied upon a written statement from Mr Davies produced for the Tribunal. He did not attend Tribunal. It was not signed but dated 27 September 2019. Apart from it not being signed we have no reason to doubt it was a genuine statement from Mr Davies. Mr Davies left the Respondent's employment in April 2018. He confirms he was asked to attend a meeting with Ms Murphy on 21 August 2017 and that she had taken notes but it was informal. He was asked if he was stressed at work and did not really know why he was being asked this and replied he was busy and not stressed because of work. He also stated he did remember telling anyone he was stressed at work and had never discussed this with the Claimant. Ms Murphy asked him about inappropriate comments that had been heard by other staff in relation to himself and he confirmed they had been said.
81. Ms Prosser was interviewed on 22 August 2017. The Claimant told the Tribunal she believed this note had been fabricated by Ms Murphy. She also stated that she believed it was the Claimant bullying Ms Milton and Ms Milton always appeared to be busy. Ms Prosser stated that the Claimant affects the whole office with moods if she is in a good mood she bounces around and if she is in a bad mood she slams doors and ignores people. Ms Prosser stated she had heard inappropriate comments made to Mr Howells from the Claimant in meetings which makes her feel uncomfortable and that Mr Howells has let a lot of comments by the Claimant slide. She refers to the Claimant as a ticking time bomb, not being good for the staff or organisation. Ms Prosser's notes were not in line with the Facebook messages we saw between her and the Claimant a few weeks previously.
82. The Claimant was asked about the allegations in respect of Mr Davies under cross examination. The Claimant denied making all of the comments save she admitted she had referred to Mr Davies as a work boyfriend explaining her reason was because he was a friend at work who was a boy. She also admitted saying to work colleagues that if their husbands had met her first

they would not have married them or words to that effect. The Claimant says there was a sexually charged office and that the Claimant joined in rather than being the lead instigator of sexual innuendo. She described a sexually charged atmosphere as lighthearted and jovial and it had not sunk in anything could be regarded as manipulative or harmful.

83. We are not making findings on the Claimant's evidence contained in her witness statement about the alleged behaviour of other people in the context of the Respondents office being sexually charged. At no point prior to exchange of witness statements had the Claimant made the allegations previously and her statement made allegations against a number of individuals citing behaviour to which those individuals would not have the opportunity to comment on or give evidence on. We do not consider these allegations first raised in her witness statement against other individuals to be something that is relevant to these proceedings.
84. Turning back now to the events on 22 August 2017, Mr Howells evidence was that following meeting the staff we have outlined above Ms Murphy reported to him in a private what she had been informed by the staff. Mr Howells confirmed that he did not read the notes that Ms Murphy had written but relied on what she relayed to him verbally and reached the conclusion that the Claimant should be dismissed for gross misconduct. Mr Howells was particularly struck and upset to learn that staff had felt they could not come to him with their complaints as they perceived that he had too close a relationship with the Claimant and that any such complaints would effectively be swept under the carpet. It is for these reasons that he decided that summary dismissal was the only outcome. Mr Howell's witness evidence corroborated Ms Murphy's notes. If we were to accept the Claimant's evidence that they were all fabricated, we would be finding that Ms Murphy had fabricated the notes and that Mr Howells's was complicit in the fabrication and gave evidence to the Tribunal that was wholly untruthful, as well as Mr Davies' written statement. The more likely explanation is that the notes were not fabricated and the staff had made the complaints outlined above, as difficult as it is for the Claimant to understand or accept. Mr Howells was not prepared to carry out that dismissal himself, although it being his decision, he instructed Ms Murphy to call the Claimant into a meeting and notify her that she was being dismissed.
85. What happened next was important as it formed the basis of the Claimant's complaint about reasonable adjustments. The Claimant's reasonable adjustments case was that the Respondent should have followed a procedure akin to the ACAS Disciplinary Code of Practice and been more sensitive about the manner of her dismissal. Ms Murphy called the Claimant into a meeting in front of her colleagues although she did not declare what the meeting was about, Ms Murphy had evidently written and prepared the letter of dismissal which she was holding although there was no evidence

- that anyone saw the contents of that letter. The Claimant was told without any prior warning that she was being dismissed due to confidential anonymous complaints and she was instructed to pack her things and leave the building.
86. Ms Murphy also met with Ms Williams but these notes were not in the bundle. There were messages between Ms Williams and the Claimant after her dismissal which suggest that Ms Williams may have been more supportive of the Claimant in her interview with Ms Murphy as they appeared to have a close relationship and Ms Williams was very upset about the Claimant's dismissal.
87. The dismissal letter given to the Claimant dated 22 August 2017 stated that the Claimant's employment had been terminated following a large number of complaints rendering her unsuitable for the role. The Claimant was paid one month in lieu of notice. The Claimant was accompanied at the dismissal meeting by a colleague Araf Hussain from whom we heard evidence. He attended under a Witness Order that the Claimant had applied for. We also had sight of Facebook Messenger messages between the Claimant and Mr Hussain.
88. In relation to the dismissal itself this had a devastating effect on the Claimant who at the time was not told what the content of those complaints were, only that there had been numerous complaints against her. That day and the day after the Claimant described herself as in a desperate state and admitted that she tried to contact Mr Howells by telephone on many occasions. Mr Howells produced a schedule of the calls that the Claimant had made to him and the Claimant candidly accepted there may have indeed even been more calls than was recorded by Mr Howells, but the level of calls were such that Mr Howells felt that it was necessary to report the Claimant's conduct to the police as on the one occasion he had to answer the telephone to the Claimant she had stated to him words to the effect of "ha ha you know what's coming next don't you".
89. The Claimant sent a series of emails to the Respondent's Board requesting an explanation concerning her dismissal and wanting a further explanation beyond unfair innuendo and confidential anonymous complaints. The Claimant's email was responded to by Tessa Heath of the Respondents HR advisers in which she reiterated that the reason for termination was due to a number of complaints against the Claimant and that she had checked with the employees who made the complaints and they wished to remain anonymous and therefore they declined to give the Claimant any further information. The Claimant had informed Ms Heath in an email of 23 August 2017 sent at 1:48am that she was in shock at the circumstances, especially

so having raised a complaint that turned into an investigation against her and relating to her mental health. Ms Heath replied to the Claimant on 25 August 2017 stating that they were taking her grounds of appeal from her correspondence of 23 and 25 August 2017 and set these out as (1) that she had not received copies of complaints against her and (2) the decision to terminate her employment resulted from raising a formal complaint, the complaint relating to bullying and mental health.

90. The Claimant disagreed with that grounds of appeal as specified by Ms Heath and stated that she was appealing under her rights provided by the Equality Act 2010 and requested a telephone appeal due to her mental state. Ms Heath had requested that the Claimant provide her certain information in her email of 25 August 2017 namely, details of what she was referencing as her mental state, specifically if this was caused by the bullying, or if she was bullied on the basis of any mental condition. Ms Heath asked her if she was stating she had a pre-existing health condition and to supply information and details including when this was disclosed to the Respondent. To that end the Claimant sent a further email on 27 August 2017 advising that she had made a disclosure on Thursday 17 August 2017 in good faith concerning the health and welfare of an employee. She described that her disability had been disclosed on the relevant employment forms and her mental health vulnerability had been discussed with Mr Howells on frequent occasions including discussions regarding her long-term reliance on medication. A further email was sent also on 27 August 2017 alleging that she had been subjected to harassment in the workplace relating to disability, suffered unfavourable treatment, the dismissal could not be objectively justified amounting to discrimination arising from disability, victimisation and also the dismissal was automatically unfair as she had taken action about a health and safety issue.
91. Ms Heath sent a further response on 31 August 2017 disclosing notes of the Claimant's meeting with Ms Murphy, a copy of the Claimant's email to Mr Howells of 14 August 2017 and a copy of Mr Howells email of 14 August 2017 between himself and Ms Murphy. Ms Heath confirmed that they agreed to hold a telephone appeal as a reasonable adjustment and the panel would consist of herself and a member of the board. The Claimant clarified in response that as a member of the board was going to hear her appeal she wished to have the meeting in person and send a further email later that the grounds for appeal stemmed from the protection triggered under the Equality Act 2010 extending to discrimination arising from disability and a failure to make reasonable adjustments. The Claimant was invited to attend a formal hearing on 12 September 2017. The letter from the Respondent attempted to summarise the Claimant's grounds for appeal and stated the appeal hearing would be conducted by Tessa Heath and Richard Bevan at the Torfaen Carers Centre.

92. The Tribunal did not hear evidence from Ms Tessa Heath and there was no explanation as to why we did not hear evidence from the person that conducted the appeal. Mr Bevan's witness evidence was largely unhelpful as he had not participated in the decision to uphold the dismissal.
93. There was a detailed letter dated 28 September 2017 setting out matters discussed at the appeal and rejecting the appeal. The Claimant's dismissal was upheld. The panel (which appeared to consist of just Ms Heath) concluded that the reason for dismissal was the confidential anonymous complaints and not for any other reason.
94. Lastly, although not pleaded, the Claimant told the Tribunal that another employee called Mr Morgan had been summarily dismissed without any procedure who also had less than two years' service. The Respondent accepted he had been so dismissed but did not accept the circumstances surrounding his dismissal were similar.

Holiday pay claim

95. The Respondent's holiday year runs from 1 April to 31 March. The Claimant was entitled to 25 days holiday plus 8 days bank holiday. It was the Claimant's case that she had not taken any holiday at the point that she was dismissed. The Respondents were unable to produce the Claimant's holiday card/record and stated it had been lost. The Respondent therefore relied upon a series of diary entries in the Claimant's outlook calendar and/or Mr Howells outlook calendar to evidence what holiday they say had been taken. This evidence was confusing. There were five different days where the Claimant had marked a series of entries indicating she was either on half day and one on 25 April 2017 which stated "annual leave". Underneath there were diary entries for Mr Howells as on one of the notes he was recorded as having annual leave from 17 – 24 April 2017 and then underneath there is an entry simply marked "A half day". Furthermore some of the entries have been redacted suggesting that it was Mr Howells calendar otherwise it would not make sense for the Claimant's own holiday calendar records to be redacted.
96. The Claimant's evidence was that the entries referring to her half days can be explained as she put notes in Mr Howells diary to let him know she would not be in and this might be for a number of different reasons. She was able to explain on three of the occasions why she had not been in, one as she had taken her mother for a medical appointment and the two others were where she was attending Governor meetings which would relate to public duty time off and not holiday. The Claimant's explanation for the days marked as time off was she was in receipt of toil.

97. We find that although there was no formal toil policy that the Claimant did work significant extra hours with incidents of her working on Sundays and coming in on other weekends. For these reasons and the absence of any explanation from the Respondent we accept the Claimant's evidence that she had not taken this particular time off as holiday. We find that the Claimant is entitled to an outstanding 5.5 days holiday pay at the rate of £109.12 and we award the Claimant £600.19 in respect of outstanding holiday pay.

Confidential Report to the Board

98. During the disclosure process the Claimant was provided with a confidential report to the Board which had been authored by Ms Murphy. We had sight of this confidential report. As it did not form part of the Claimant's claim we make no findings about that report as it is not relevant to these proceedings.

The Law

Public Interest Disclosure Claim

99. The Claimant relied on sub sections 43B (b), (d) and (f).

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—

.....

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

.....

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

.....

(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.

100. In **Kilraine v Wandsworth London Borough Council [2018] ICR 1850**, the Court of Appeal held that the concept of information in S43B (1) was capable of covering statements which might also be allegations. In order for a statement to be a qualifying disclosure it had to have sufficient

factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) and this was a question of fact for the Tribunal. The disclosure should be assessed in the light of the context in which it is made.

101. Where the disclosure is said to be a breach of a legal obligation (S43B (1) (b)), if the legal obligation is obvious then it need not necessarily be identified (**Bolton School v Evans [2006] IRLR 500** (EAT upheld by CA)) and **Blackbay Ventures Ltd v Gahir [2014] ICR 747**). If it is not obvious, the source of the legal obligation should be identified by the Tribunal and how the employer failed to comply with it. 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 (**Eiger Securities LLP v Korshunova [2017] ICR 561**).

Reasonable belief and public interest

102. In **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2018] IRLR 837**), the following approach when considering reasonable belief was set out (per Lord Justice Underhill:

“26. The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase "in the public interest". But before I get to that question I would like to make four points about the nature of the exercise required by section 43B (1) .

27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

29. *Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.* ⁴

30. *Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para. 17 above, the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.* “

103. Public interest is not defined in ERA. The question is whether in the worker reasonably believed the disclosure was in the public interest, not whether objectively it can be seen as such. **Chesterton** also discussed the issue of public interest (paragraphs 34 and 37) - this was a case where the disclosure was in relation to a breach of the employee's own contract).

Detriment claim

104. We did not hear any submissions from either party that the dismissal was in consequence of the detriments (per Underhill LJ, para 78 Osipov and acknowledged as not yet finally resolved by Lord Wilson in Royal Mail Group and Jhuti). The dismissal element of the claim was advanced in the ET1 as contrary to S103A of ERA 1996.

Causation

105. If the employee establishes that they made protected disclosures and there were detriments, S48(2) ERA 1996 provides it is for the employer to show the ground on which any act or deliberate failure to act was done, only by showing that the making of the protected disclosure played no part whatsoever in the relevant acts or omissions. The standard of the burden of proof required is if the protected disclosure materially influences (in the

sense of more than a trivial influence) the employer's treatment of a whistleblower (**Fecitt v NHS Manchester [2012] ICR 372**).

106. An employer will not be liable if they can show the reason for the act or failure to act was not the protected act but one or more features properly severable from it (**Martin v Devonshires Solicitors [2011] ICR 352, Panayiotou v Kernaghan [2014] IRLR 500**).

S100 Health and Safety Unfair Dismissal

107. The Claimant relied upon S100 (c) and (e) ERA 1996. An employee has the right not to be unfairly dismissed if the reason (or if more than one) principal reason is :

c) he brought to his employer's attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

.....

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger

S103A Unfair Dismissal

108. An employee has the right not to be unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

109. There is a different causation test to the detriment claim as the disclosure must be the primary motivation rather than a material influence

Disability Discrimination claims

Direct Discrimination

110. Section 13(1) of the Equality Act 2010 provides that direct discrimination takes place where a person treats the claimant less favourably because of disability (the relevant protected characteristic) than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

111. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in **Igen Ltd v Wong [2005] IRLR 258** regarding the burden of proof (in the context of cases under the then Sex discrimination Act 1975).

Indirect Discrimination

112. Section 19 of the Equality Act 2010 provides:

- (1) **A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
- (2) **For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—**
 - (a) **A applies, or would apply, it to persons with whom B does not share the characteristic,**
 - (b) **it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
 - (c) **it puts, or would put, B at that disadvantage, and**
 - (d) **A cannot show it to be a proportionate means of achieving a legitimate aim**

113. The EHRC Code of Practice on Employment provides that the phrase 'provision criterion or practice' should be construed widely so as to include for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.

114. The PCP must be of neutral application. A PCP can be a one-off decision (**British Airways Plc v Starmar [2005] IRLR 862**). A liberal rather than overly technical approach should be adopted when considering PCP's. However a one off flawed disciplinary procedure will not satisfy the low threshold (**Nottingham City Council v Harvey EAT 0032/12**).

115. In **Essop & Ors v Home Office (UK Border Agency) & another [2017] ICR 640** the Supreme Court identified six salient features of the definition of indirect discrimination: First, there was no express requirement for an explanation of the reasons *why* a particular PCP put

one group at a disadvantage when compared with others. Second, whilst direct discrimination expressly required a causal link between the less favourable treatment and the protected characteristic, indirect discrimination did not. Instead, it required a causal link between the PCP and the particular disadvantage suffered by the group and the individual. Third, the reasons why one group might find it harder to comply with the PCP than others were many and various. The reason for the disadvantage did not need to be unlawful in itself or be under the control of the employer or provider. Both the PCP and the reason for the disadvantage were 'but for' causes of the disadvantage: removing one or the other would solve the problem. Fourth, there was no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. Fifth, it was commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. Sixth, it was always open to the respondent to show that his PCP was justified. There was no finding of unlawful discrimination until all four elements of the definition in s 19(2) were met. The essential element was a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual.

Failure to make reasonable adjustments

116. Sections 20 and 21 of the Equality Act 2010 set out the duty to make reasonable adjustments. In this case, it is the duty arising under S20 (3) EQA 2010. The Tribunal must consider first of all the PCP applied by the employer, secondly the identity of non disabled comparators (where appropriate) and thirdly the nature and extent of the substantial disadvantage suffered by the Claimant. (**Environment Agency v Rowan 2008 ICR 218, EAT**).

Conclusions on Protected Disclosures

117. As a finding of fact we decided that the Claimant did not make the first verbal disclosure on 14 August 2017 and this element of her claims fails.

118. We therefore consider the remaining three disclosures as follows.

Protected Disclosure 2, 3 and 4 relating to Mr Davies

119. Our findings of fact about these alleged disclosures are at paragraphs 56-59 and 76 above.

120. We have concluded that the words used by the Claimant when disclosing information about the stress she believed Mr Davies to be under did not amount to a qualifying disclosure. This conclusion is in

respect of all three disclosures as the words used were the same or very similar.

121. Having regard to the guidance in **Kilraine** we do not consider that these statements had sufficient factual content and specificity to show any of the matters as relied upon by the Claimant namely that there was a failure to comply with a legal obligation, that the health and safety of Mr Davies was endangered and or there was concealment of either.
122. We do not even think they amounted to allegations. The most accurate description for the information is that they were an opinion or belief held by the Claimant (and not even one that was not corroborated by Mr Davies or anyone else) that Mr Davies was very stressed.
123. The legal obligation relied upon was set out in the ET1 under the heading “Whistleblowing”.⁴ This was set out as “the Respondent has breached its legal obligations to identify and manage problems in the organisation with work related stress and to take reasonable steps to prevent harm to health and safety that is being caused by work...”
124. There was a further reference to a reliance on S43 (B) (1) (a) (criminal offence) but this had not been pursued by the Claimant. The Claimant goes on to cite S33 (1) (a) of the health and Safety at Work Act 1974.
125. A disclosure that an employee is in a “desperate” state due to stress could have a tendency to show his employer is breaching his obligation of duty of care to protect his well-being.
126. However what was fatal to the Claimant’s claim was the public interest element. The disclosure was not about the Claimant’s contract of employment but as it related to one work colleague we considered it was a workplace dispute as discussed in **Chesterton**. We have considered the intent of the statutory protection is not to apply to private workplace disputes but also the caveat from Chesterton that this is not an absolute bar. Applying the guidance in **Chesterton** we conclude as follows:
- a) The number of employees affected was one (Mr Davies);
 - b) The extent to which Mr Davies himself said he was not as described by the Claimant leads us to conclude that he was not affected by the wrongdoing disclosed even if the Claimant believed he was. It could not even be said to be a marginal effect on Mr Davies. He simply was not as described by the Claimant and there was no evidence that there was any wrongdoing by the Respondent let alone deliberate. In fact the only

⁴ Page 33 of the bundle

matters the evidence showed Mr Davies had been affected by was the Claimant's behaviour towards him.

- c) When this was explored at the preliminary hearing with the Claimant, the Claimant explained she believed it was in the public interest as other members of staff were concerned that Mr Davies was "going over the edge" as being sufficient to make the disclosure in the public interest.⁵ Although we find that the Claimant did hold this belief it was not a belief that a reasonable person would have held based on the facts and circumstances at the time of the disclosure. The belief was not supported by anyone else not even Mr Davies.
- d) The identity of the Respondent – as a charity who provides care and support for careers' this potentially could mean maltreatment of staff could be in the public interest. However this is outweighed by the two factors above.

127. Taking all of the above into account we find that even if there was a disclosure of information it was not in the public interest.

Protected disclosure 3 relating to alleged state of the finance department

128. We now deal with our conclusions on the second element of the email of 17 August 2017 where the Claimant raises concerns about the state of the finance department.

129. In relation to the concerns the Claimant raised about the finance department (see paragraphs 59-60), this was, inexplicably pleaded as a qualifying disclosure under S43B (1) (d) (health and safety).⁶ There was no basis in our judgment for the information relayed in this email about the finance department that could have tended to show that the health and safety of an individual was being or was likely to be endangered. This was probably an error in the schedule but we must consider the case as advanced.

130. The Claimant had cited malpractice was taking place in the finance department in her ET1.

131. It was also set out later in the schedule as a disclosure under S43 B(1) (b).⁷

⁵ Page 228, para 21 (c) of the Order

⁶ Page 81-84 of the Scott Schedule

⁷ Page 84 of the Scott Schedule

132. In our judgment the information relayed by the Claimant regarding her perceived state of the finance department also did not satisfy the qualifying disclosure or public interest test.
133. Firstly, the information was not information that tended to show the Respondent was failing to comply with a legal obligation. It was an opinion about shortcomings in the finance department. It did not allege and fraud or wrongdoing and focused on system issues and being understaffed.
134. Secondly the legal obligation was not apparent from the information. We do not know what the legal obligation was. There had been some considerable effort by the Tribunal in case management to understand the Claimant's claims but this remained the position even as of the hearing.
135. Thirdly, although we acknowledge the Claimant genuinely believed what she was relaying, and we have no reason to think there were not the issues she relayed, the information was not in the public interest. We are not seeking to trivialize the importance the Claimant attached to this information and her concerns for the finances of the Respondent. However we concluded that the information about the shortcomings of the finance system were not matters of concern that should or would attract public interest.
136. As the Claimant has not established she made a qualifying disclosure her claims under S47B (detriments) and automatic unfair dismissal fail.
137. Even if the Claimant had established she had made a qualifying disclosure we would have concluded that the detriment claim as advanced must fail as the detriment relied upon was her dismissal.

S100 and S103A- Unfair Dismissal – Health and Safety Claim and protected disclosure claim

138. There was no evidence that the Claimant was dismissed for the reason or principal reason for the dismissal was that the Claimant had brought to her employers attention by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety. The same applies for the protected disclosure complaint. We set out the reason we conclude the Claimant was dismissed in paragraph 139 (e) below.

Conclusions on Disability Discrimination

Direct Discrimination

139. The Claimant's claim for direct discrimination was set out in her ET1 at page 33 of the bundle and the direct discrimination Scott schedule at pages 156-223. We are only determining those matters set out in the ET1 and expanded on in the Scott Schedule as the Scott Schedule sought to raise other allegations that had not been pleaded and there was no application to amend. This alleged less favourable treatment was as follows:

- a) The Respondents reaction to her complaint of harassment (Father's Day comment). This was at the meeting with Ms Murphy on 21 August 2017. The Scott Schedule described that Ms Murphy received her complaint with contempt by making an ugly face over her raised shoulder and a "ppfff" sound. We found Ms Murphy did not behave in this way. This claim therefore fails.
- b) The failure to investigate her complaint. This was described in the Scott schedule ⁸as raising concerns and complaints about Ms Milton conduct and ineffective management of the finance department. The Respondent did investigate the Claimant's complaint. They instructed their HR advisors to meet with the Claimant and the other relevant persons who could have been in a position to provide information about the Claimant's allegations in her complaint. The outcome of the investigation did not support the Claimant's complaint and in turn raised matters of serious concern about the Claimant's behaviour.
- c) The refusal to release details of the complaints against the Claimant. The Respondent did refuse to release the confidential anonymous complaints. The first time the Claimant saw these was the hearing. However there was no evidence this was because of the Claimant's disability. The reason was in our judgment that the Respondent had assured the individuals who gave witness statements was that their statements would remain confidential. At least two expressed concern in the notes that their statements would remain confidential and Mr Davies is recorded as saying he had not raised a grievance as the Claimant "would make his life hell".
- d) The conduct of Ms Murphy. Whilst Ms Murphy may have made some of the comments alleged they do not appear to be comments related to or because of the Claimant's disability.
- e) The Claimant's dismissal. In relation to all of the allegations of less favourable treatment in respect of the direct discrimination claim there is no evidence to substantiate the Claimant's claim that her treatment was because of her disability. We have concluded that the reason for the Claimant's dismissal was the information gathered by Ms Murphy from her investigation into the Claimant's allegations. Ms Murphy commenced her

⁸ Page 158

investigation by considering the Claimant's allegations against Ms Milton. Upon interviewing Ms Milton, she raised concerns that the Respondent were entitled to investigate further. These were serious matters in particular the allegations involving Mr Davies who then corroborated the allegations.

140. There is no doubt the Claimant feels extremely aggrieved that her complaint against Ms Milton ultimately led to her dismissal. But it was not the complaint that caused the dismissal, it was the information gathered in investigating that complaint that led the Respondent to conclude the Claimant was guilty of misconduct namely her inappropriate behaviour towards Ms Milton but more so Mr Davies.

141. In terms of the manner of the Claimant's dismissal and the procedure that led to it dismissed, it was very clear and the Respondent were candid in their evidence and submissions that the fact that the Claimant had less than 2 years' service which the Respondent concluded meant that they could dismiss her without following a procedure. That was the reason that the Claimant was treated the way that she was and not because of her disability. The Claimant's ET1 set out that she relied upon a hypothetical comparator. The Scott schedule cited comparators of Mr Davies, Ms Milton, Mr Howells, Ms Williams and Ms Prosser. The Claimant also cited another comparator in her witness statement (Mr Morgan). As he had not previously been pleaded as a comparator we are not dealing with this comparator it being raised for the first time in the Claimant's witness statement.

142. The Claimant's ET1 stated that a number of complaints had been made against Ms Milton and she was not disabled with mental health problems, depression, anxiety and she had been treated more favourably by the Respondent than the Claimant. We do not find that Ms Milton's circumstances were materially the same circumstances as the Claimant's. Ms Milton had the Claimant making allegations against her and those were the complaints, but this must be contrasted with the complaints against the Claimant or the allegations against the Claimant that had been made by Ms Milton and in particular Mr Davies where the allegations were of sexual innuendo and no such complaints had been made against Ms Milton.

Indirect discrimination

143. In relation to the first PCP (a practice or policy of following no procedure to dismiss an employee with less than two years' service). Mr Searle accepted that this was a valid PCP and we had heard evidence of another employee namely Mr Morgan who had also been dismissed with no procedure having had less than 2 years' service. This in itself fundamentally undermined the Claimant's indirect disability discrimination claim as the PCP had been applied to him and there was no evidence he had a disability.

144. In relation to the other three PCPs relied upon they were not in our judgment PCP's within the meaning of Section 19 EQA 2010. They were not of neutral application. They were one off decisions and we heard no evidence that they were even in theory capable of being applied to others. Furthermore we have no evidence of what the substantial disadvantage was said to be. The Claimant articulated the effect of the dismissal upon her rather than what the particular disadvantage was.

145. For these reasons the indirect discrimination claim must fail.

Reasonable Adjustments

146. Dealing with the first question of whether the Respondent knew or could reasonably have been expected to know the Claimant was a person with a disability.

147. Mr Howells accepted that he knew the Claimant had depression and he had reviewed her declaration on her appointment and decided that there was no need to take any further action, relying on the Claimant's declaration that no adjustments were needed.

148. As we found above PCP's 2-4 were not valid PCP's.

149. It was agreed that the first PCP was capable of being a valid PCP. There was evidence that the Respondent had dismissed two employees' with less than two years' service without following any procedure.

150. The next question was whether this PCP put the Claimant at a substantial disadvantage. The ET1 cited the failure to adhere to the ACAS code of practice on disciplinary and grievance procedures and that her mental disablement meant she was particularly disadvantaged but did not say how or why. We looked to whether the suggested steps that could have been taken assisted us with this question. The Claimant asserted that following a fair procedure would have avoided the disadvantage but we were still left asking the question how it would have done so.

151. In our judgment, the Claimant's case was, in reality, that persons with mental health conditions would be less able to cope with the consequences of this practice rather than pointing to any actual disadvantage. This was apparent from the Scott Schedule where the Claimant stated as follows: ⁹

"I have been substantially disadvantaged by the practice of dismissing me without providing a proven case against me or a justification to do so. I have been caused so much additional distress. Having a legitimate reason to dismiss me after a legitimate

⁹ Disability Scott Schedule page 160

investigation would have helped me as a mentally disabled employee who was far worse affected by this practice.”

152. This was a case where, the Respondent admits, no procedure was followed to dismiss the Claimant. She was called into a meeting and told she was dismissed with immediate effect. The duty to make reasonable adjustments is to avoid the substantial disadvantage. Whether one exists is a question of fact and assessed on an objective basis.

153. Mr Searle made a submission effectively the reasonable adjustments claim was an unfair dismissal claim “ the back door”. We do not doubt that the Claimant was distressed by the manner of her dismissal. But we agree with this submission. In the absence of evidence as to what the disadvantage was this claim must fail.

Harassment Claim

154. Our primary conclusion is that the harassment claim is out of time. The Claimant alleges that it was made on 14 June 2017. The Claimant contacted ACAS on 2 September 2017 (“Day A”) and the date of issue by ACAS of the early conciliation certificate was 2 October 2017 (“Day B”). accordingly the claim should have been presented by 2 November 2017, but it was not presented until 11 November 2017.

155. The harassment claim was a ‘one-off’ complaint and was not said to be connected to conduct extending over a period of time. We heard no evidence and it was not put by the Claimant that it would be just and equitable to extend time.

156. Nonetheless, we go on to consider the harassment complaint having heard the evidence.

157. Our findings of fact concluded that Ms Milton had made the comment about Father’s Day (see paragraphs 33-40 above). The Claimant’s case is that it was related to her disability. In the Scott Schedules the context of this was explained as follows.

The Claimant had told Ms Milton that she blamed her father for making her entire family mentally ill and that she blamed mental health conditions solely on the effect of bullying.

158. Therefore, according to the Claimant, when making the comment, Ms Milton knew it specifically related to the Claimant’s disability. This would be the relevant context in deciding whether the comment was related to the Claimant’s disability as the comment was not, in our judgment, inherently a comment that would be understood to be harassment on the grounds of a mental health condition. On the face of it there is no obvious correlation with

expressing sympathy about an upcoming Father's Day and a person's mental health.

159. We did not hear from Ms Milton so had no evidence, other than the Claimant's evidence, on why she made the comment to the Claimant and whether that could have been connected to her knowledge about the Claimant's health.
160. If we accepted the Claimant's evidence, that it was a calculated and malicious comment due to the disclosures she had made to Ms Milton about her mental health and her father, then we would have no difficulty in finding there had been disability related harassment.
161. The reason we do not draw this conclusion is that we found that the evidence did not support that the Claimant had found the meaning in the comment in the way she now alleges. This has two results – firstly that the evidence does not show Ms Milton made the comment as a disability related comment. Secondly that the comment was not made by Ms Milton with the purpose **or effect** of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
162. In respect of the effect of the comments, in the absence of finding it was related to the Claimant's disability, we also conclude that it would not be reasonable to have the effect as described by the Claimant. In other words, we do not think the Father's Day comment could reasonably be considered to have the effect the Claimant complains of.

Victimisation

163. The Claimant's victimisation claim was set out in page 35 of the bundle in her ET1. This provided that the protected act was the Claimant's complaint about her treatment by Ms Milton that contained allegations of harassment under Section 26 of the Equality Act 2010.
164. It follows therefore that the Claimant's complaint of victimisation is that she complained about the Father's Day comment. The Claimant raised the issue with Ms Murphy as it is referenced in Ms Murphy's notes of the meeting with the Claimant on 21 August 2017 (see paragraph 68). In our judgment informing a HR representative that someone had made a nasty comment about your mental health would amount to a protected act.
165. The Claimant complains that the detriment was the decision to terminate her employment. Accordingly, in order for the Claimant's claim of victimisation to be made out, she must show that the decision to terminate

her employment was because she had complained about Ms Milton to Ms Murphy the previous day in that meeting.

166. We have already found that the decision to terminate the Claimant's employment was due to the complaints that the Respondent had received about the Claimant from Ms Milton and Mr Davies in particular corroborated to some extent by Ms Howden and Ms Reddy and Ms Prosser and that the Claimant did not have sufficient continuous service so as to have gained the right not to be unfairly dismissed. The Claimant's detriment, namely the dismissal was not because of her protected act but for these reasons.

Employment Judge Moore
Dated: 27 January 2020

REASONS SENT TO THE PARTIES ON
.....2 February 2020.....

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS