THE EMPLOYMENT TRIBUNALS

Claimant: Dr S Stothard

Respondent: Durham University

Heard at: Newcastle upon Tyne **On:** 16, 17 and18 March 2020 (with deliberations on 19 March and 11 May 2020)

Before: Employment Judge Morris
Mr E A Euers
Mr M Brain

Representation:

Claimant: Mr R Gibson, Solicitor
Respondent: Ms K Barry of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant's complaint by reference to Section 95(1)(c) of the Employment Rights Act 1996 that she was dismissed by the respondent and, by reference to Section 94 of that Act her dismissal was unfair contrary to Section 98 of that Act is well-founded.

2. The claimant's complaint that, contrary section 47B of the Employment Rights Act 1996, she was subjected to detriment by the respondent on the ground that she had made a protected disclosure is not well-founded and is dismissed.

3. The claimant's complaint under section 21 of the Equality Act 2010 that, being a disabled person, the respondent discriminated against her in that it failed to comply with the duty to make reasonable adjustments, which is contained in section 20 of that Act is well-founded

4. This case shall now be set down for a hearing on remedy.

REASONS

Representation and evidence

1. The claimant was represented by Mr R Gibson, Solicitor, who called the claimant and Mr Philip Wayne, of the Buckinghamshire Grammar Schools ("TBGS"), to give evidence.

2. The respondent was represented by Ms K Barry of Counsel who called the following employees of the respondent to give evidence on its behalf: Ms Joanne Race, Director of Human Resources and Organisation Development; Ms Jennifer Sewel, University Secretary; Professor Jon Gluyas, Director of the Durham Energy Institute; Ms C Merrell, Deputy Executive Dean (Research) of the Faculty of Social Sciences and Health.

3. The Tribunal had before it in excess of 530 documents in an agreed bundle. The numbers shown in parenthesis below are the page numbers in that bundle.

The claimant's claims

4. The claimant had presented three claims to the Employment Tribunal as follows:

> 4.1. By reference to section 95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act") she had terminated her contract of employment in circumstances in which she was entitled to terminate it without notice by reason of the respondent's conduct; hence she had been constructively dismissed and, by reference to sections 94 and 98 of the 1996 Act, that dismissal had been unfair.
>
> 4.2. By reference to section 47B of the 1996 Act, she had been subjected to detriment by the respondent on the ground that she had made a protected disclosure.
>
> 4.3. By reference to section 21 of the Equality Act 2010 ("the 2010 Act"), she being a disabled person for the purposes of the 2010 Act, the respondent had failed to comply with its duty to make reasonable adjustments, which is imposed by section 20 of that Act.

The issues

5. The parties had produced a comprehensive agreed List of 29 Issues, which were adopted by the Tribunal. Being a matter of record, it is unnecessary to set them out in these Reasons; not least because the structure and content of that List of Issues is adopted below in relation both to the submissions made by the parties' representatives and the consideration of those issues by the Tribunal.

Findings of fact

6. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by it on the balance of probabilities.

6.1. The respondent is a well-known, extremely large, employer with significant resources including a sizeable HR Department. At the relevant time, the Centre for Evaluation and Monitoring ("CEM") was a self-funding external-facing Department of the respondent. Essentially, it provided educational assessment services for schools.

6.2. The claimant had been employed by the respondent, in CEM, since 6 December 2011. She was appointed as Entrance Test Project Manager and, on 4 October 2017, became Head of Education Data Science. She was due to take up her role as Assessment Partnership Director on 1 October 2018 but that never happened as on that date she was suspended and she subsequently resigned from her employment.

6.3. One of the contracts (61) held by CEM was with TBGS, which is a company comprising 13 grammar schools in Buckinghamshire. It wanted CEM to develop and compile a number of test papers for the selection of pupils for places in Year 7 of the schools; in effect, an 11+ entrance assessment. The contract ran from 1 November 2013 and ended on 31 October 2017.

6.4. The claimant was the lead person in setting the questions in the tests that were sat by candidates. The test papers were in the form of multiple choice questions that were marked electronically by a separate company using scanners with the results being sent to CEM to undertake a statistical analysis, which included standardisation to make appropriate adjustments, including for the ages of the candidates; one of the statisticians within CEM (in fact the lead statistician for the TBGS contract) was G. CEM then assessed a mean point and allocated a score for each candidate against that mean with the pass mark for the test always being 121. The results were checked by another CEM statistician and then by an independent consultant engaged by TBGS.

6.5. All children in Buckinghamshire automatically sat the tests and children from outside that County could elect to sit them. Issues arose for TBGS from the fact that out-county children generally appeared to score more highly than in-county children (313) and fewer local children, both in actual and percentage terms, were meeting the required pass mark. The evidence before the Tribunal was that this was because their parents simply used the Buckinghamshire test as a practice for other examinations (referred to as "test tourism") or as a backstop if their primary choice of secondary school was unsuccessful and out-county children were possibly being coached prior to sitting the tests. When, however, the out-county children who achieved the required pass mark were offered places at one of the Buckinghamshire schools many turned down those

offers. As a consequence grammar school places in Buckinghamshire were not being filled.

6.6. TBGS wanted to look at different approaches to address this issue and G produced a discussion paper "Alternative selection approaches for Buckinghamshire" (105). The claimant had no part in producing that document but had read it. Although the document was considered at a meeting of TBGS it ultimately did not adopt any of the approaches it contained. Instead, it decided to increase the number of candidates achieving the required score. Thus, against 8,923 candidates and 2,419 qualifying candidates for the 2014 entry, by the 2018 entry there were 9,827 candidates and 3,396 qualifying candidates (313). At no stage was any out-county candidate treated differently to any in-county candidate.

6.7. The increase in the number of qualifying candidates did, however, increase the number of in-county children who achieved the required pass mark: 1,144 in 2014 and 1,356 in 2018. The schools could then select from the total, increased, number of successful candidates by reference to non-academic criteria (for example, looked-after children, proximity and siblings) with the result that, by reference to such criteria, in-county children could be favoured in being offered places. The Tribunal had no evidence of the number of offers made. It is common ground between the parties that there was nothing unlawful about favouring in-county children in that way. Any unlawfulness potentially arose only from discriminating against out-county children contrary to the academic criterion.

6.8. CEM played no part in the selection of children to whom places at individual schools within TBGS were offered. That selection process was undertaken by those individual schools working with the local education authority, Buckinghamshire County Council.

6.9. On 27 September 2018 the claimant received an email from TBGS (171) referring to an enquiry it had received from TES, which was running a story that TBGS had been "secretly operating an illegal policy of marking admission tests differently for children living outside the county" and that "marking tests differently has been outlawed under The Greenwich Ruling." In that email TBGS asked if CEM would let it know if CEM was contacted about this. The original TES article is at page 164 with a version containing comments from TBGS at page 167.

6.10. The claimant forwarded the email to the CEM senior leadership team (170). Discussions within CEM ensued in which the claimant was involved and, within 22 minutes, Ms Emma Beatty, Executive Director of CEM, circulated a suggested response (in effect denying any wrongdoing) which was to be used if CEM were be approached. Within two hours of that, however, Ms Beatty had contacted Ms Rachel Clark (Legal Officer) to say that she had investigated the question in the TES article and had concerns. Later on 27 September Ms Beatty advised Ms Clark that she had undertaken further investigations and had identified additional issues giving cause for concern.

6.11. In the above context, meetings took place on 28 September between appropriate personnel of CEM culminating in a meeting at 2 o'clock on that day (191) that was attended by senior staff of respondent: the Vice Chancellor, Ms Tess Mantzoros (Head of Legal), Ms Sewel, Ms Beatty, Ms Rebecca Grundy (Communications Officer) and Ms Race. At the meeting, Ms Beatty advised that she had carried out some preliminary investigations into the allegation made in the article that caused her to be concerned that employees within CEM had potentially been knowingly involved in manipulating the entrance test results to favour in-county applications. According to Ms Race, Ms Beatty's clear recommendation was that there was a very serious matter needing investigation.

6.12. Those at the meeting were unanimous in agreeing that Ms Clark would speak to both the claimant and G to ensure that the facts were correct and that both should be suspended. Ms Race's evidence was that the reasons for the suspensions were as follows: this was a potentially serious issue in which they may both have participated in wrongdoing; there was a need to protect the integrity of any potential evidence for an investigation, the majority of which would be contained on CEM's computer systems and Ms Beatty thought there was a possibility that it could be tampered with; those at the meeting wished to ensure that the claimant and G were protected from any subsequent allegations that they had tampered with any evidence. Alternatives to suspension were discussed, for example working from home and undertaking alternative duties, but it was difficult to identify any alternative which would not require them to have access to the respondent's IT systems, including emails.

6.13. In oral evidence, Ms Race explained more succinctly that the allegation was that the claimant and G had "knowingly colluded with TBGS to skew the testing data".

6.14. An excerpt from the note of that meeting on 28 September records as follows:

> "The following actions were agreed based on the information to date: RC would take interview statements of SS and [G] with HS attending later. Statements were recorded on paper by GR and RC; the laptops/mobile devices of SS and G respectively would be taken and locked away by EB/RC; EB would remove their email access; SS and [G] would be suspended with pay with immediate effect on the basis of protecting them and the University for the purpose of undertaking a full investigation in the management of the contract; and PVC-SSH and EB would raise the issue with BDO for the purposes of the sale" (191).

6.15. The final remark in that note relates to the fact that at this point CEM was being offered for sale and a prospective purchaser had been identified. This was an additional aspect of the potential sensitivity of the 'fallout' from the TES article as it was feared that it could prejudice the sale.

6.16. On behalf of the respondent it was submitted that the decision to suspend the claimant was conditional upon the outcome of the meeting Ms

Clark was to have with her. The Tribunal does not accept that submission. It is clear from the above excerpt from the note of the meeting that Ms Clark's sole function was to "take interview statements of SS and [G]". There is no suggestion in that excerpt that Ms Clark's function was to "sense-check" the decision to suspend (as the respondent's representative submitted). That accords with the evidence of the claimant that there was no time between the conclusion of her meeting with Ms Clark and her suspension by Ms Symcox for there to be any reflection upon whether, in light of their meeting, the decision to suspend should be revisited. That is also borne out by the phrase in the above excerpt, "RC would take interview statements of SS and [G] with HS attending later", in that within that process between Ms Clark taking statements and Ms Symcox attending later there is nothing built in that might suggest that any discussion or reconsideration was to take place with anyone. Indeed, this very point was put to Ms Race when the claimant wrote to her on 12 October (222) to raise a formal grievance (see below) in which she stated, amongst other things, that she had been suspended "so promptly following a discussion that, whoever took the decision to suspend me, could not possibly have considered the contents of that discussion".

6.17. The meeting between Ms Clark and the claimant took place at 15.47 on 28 September. Although Ms Clark was accompanied by a note-taker, the notes of that meeting are barely adequate (174). It appears that there are times when the claimant seems to accept that the CEM tests had discriminated against out-county children but on the face of the notes that could either be as a result of unlawfully adjusting the academic criteria or increasing the total pool of candidates and, therefore, enabling the schools to select, from the qualifying candidates, in-county children by reference to non-academic criteria, which is not unlawful. Towards the end of the meeting (when the claimant's evidence is that she began to become concerned at the line of questioning) the answers indicate that there had been no unlawful conduct on behalf of CEM: for example,

> "all test papers marked in same way, irrelevant where children come from, same marking scheme, standardisation and rank order the same, the difference is what the standard deviation moving the children along the line"
>
> "the grammar schools they wanted to include children locally, not discriminate outside of the area" (177)

6.18. As had been agreed at the meeting on 28 September the claimant's suspension was effected by Ms Helen Symcox, HR Business Partner. She did so by coming into the claimant's office within a very few minutes of the conclusion of her meeting with Ms Clark. Ms Symcox then confirmed that suspension by letter of 1 October 2018 (184) the allegation being that the claimant,

> "processed assessment data for a third party in an unauthorised manner, which may constitute:

- A serious neglect of duty and responsibility;
- Bringing the University into serious disrepute;
- Deliberate falsification of official records;
- Misuse of confidential information of the University; and/or
- Fraudulent misuse of the University's property or name."

The Tribunal notes that these examples are taken from the list of examples of gross misconduct contained in the respondent's Disciplinary Regulation (124).

6.19. In that letter the claimant was also informed that it was "anticipated that an independent third party will carry out an initial investigation and thereafter the outcome of that investigation (along with additional investigation which is considered necessary) will be considered in accordance with the University's Disciplinary Regulations. Ernst & Young ("EY") were appointed as that third party.

6.20. On 3 October the claimant wrote to Ms Beatty setting out information that she considered was pertinent to the investigation, which she said was to be shared with relevant parties including EY. In that email the claimant provided a comprehensive explanation of the operation of the TBGS contract. She hoped that this would provide reassurance to the respondent that nothing untoward had taken place and that a terrible mistake had been made which would be quickly corrected.

6.21. On 11 October the claimant was invited to attend a meeting with EY (194) for which two dates were proposed. Amongst other things, she was told, "although this meeting does not form part of a University formal HR process, it may form part of any future investigations which may be carried out under the University Disciplinary Regulation". The claimant replied that day to say that she would not be in a position to attend either meeting.

6.22. As mentioned above, on 12 October the claimant wrote to Ms Race (222) to raise a formal grievance "against the decision to suspend me and commence a formal disciplinary investigation for alleged serious misconduct". She noted, amongst other things, that "CEM was not even named" in the TES article; that she believed the suspension was "a knee-jerk reaction without any evidence of wrongdoing" or "any basis for even alleging wrongdoing"; that it was "a serious breach of trust and confidence on the part of the University"; there was "absolutely no suggestion from the client we have breached" the contractual terms; on 28 September she had been suspended "so promptly following a discussion that, whoever took the decision to suspend me, could not possibly have considered the contents of that discussion". With regard to the reason for her suspension ("processing data in an unauthorised manner") the claimant asked the following questions:

- "What data?
- What processing by me?
- In what manner?

- On what basis has it been decided whatever I did was unauthorised?"

6.23. On 16 October, Ms Wendy Price, HR Business Partner, replied to the claimant (223) including as follows: "suspension is a neutral act and although it is not a sanction or an outcome of a disciplinary process, suspension does sit within the disciplinary regulation; therefore a grievance cannot be raised due to issues arising from the disciplinary regulation"; the decision to suspend would not be overturned but would be regularly reviewed; she was unable to provide a timescale for the conclusion of the EY review; she suggested that the claimant could raise her concerns with EY in her interview; she provided the following answers to the claimant's four questions:

- "Bucks Grammar school entrance test data
- Processing and oversight of data held within your area of responsibility with CEM
- Processing and oversight of data held within your area of responsibility with CEM
- at this stage these are allegations"

6.24. Ms Price concluded her letter by expressing an expectation that the claimant would engage with EY to ensure that she provided them with information and her understanding of the way in which the methodology the respondent used to standardise the entrance tests and how it may have changed over time. As an exception to normal practice it was agreed that the claimant could have trade union representation at the meeting.

6.25. The respondent suggests that the main reason that the claimant's grievance was not accepted to be pursued in accordance with this Grievance Regulation is found in paragraph 6.1b) of that Regulation, which provides that it may not be used for certain purposes including "handling of outcome of disciplinary or performance improvement proceedings" (109). In oral evidence, Ms Race explained that this phrase included a typographical error in that the word "of" should read "or"; she had been involved in the negotiation of the Regulation and it was very clear that that was the intention and that was how it had been operated in practice since. She further explained that she had not explained that to the claimant in her response at the time because it was such a fundamental understanding of hers that it did not strike her as a material issue; if the respondent had multiple processes running they would never get to the end. The trade unions agreed with that and no one had raised this point so far. At the time she thought it was the claimant who had not understood, which could have been addressed had she come to the meeting.

6.26. In the claimant's email of 23 October (237), she sought to raise two further grievances: first, that Ms Race had breached confidentiality in delegating her original grievance to Ms Price to respond to, which she had done sending a copy at the same time to Ms Symcox; secondly, that Ms Price's refusal to deal with her original grievance was a further breach of trust and confidence about which she was now also raising a grievance. In that email the claimant referred

to the above paragraph 6.1b) of the Grievance Regulation stating that it "merely excludes grievances about the handling of the outcome of disciplinary matters or performance improvement" and commented that her grievance was not about a disciplinary outcome but was about suspension and a decision to investigate under the disciplinary process. The claimant also sought further clarification of the allegations against her: Ms Price having stated that the investigation related to the processing and oversight of data held within her area of responsibility, the claimant asked, "What data? What processing? What am I actually supposed to have all done and why is it said to be wrongdoing?" The claimant also repeated her requests for the terms of reference of EY and sight of documents sent to them before she would attend an interview.

6.27. Ms Race replied by email of 23 October (239). She explained with regard to the first of the claimant's further grievances that such delegation to others within her Department was normal practice and, as to the second of her further grievances, she suggested that the claimant's concerns could be raised at the suspension review meeting that was to be held; she proposed 6 November at 10am for that meeting.

6.28. The claimant responded on 25 October (241) restating her position in respect of both the breach of confidence and the failure to allow her grievance to be considered under the Grievance Regulation. She noted that Ms Race had appointed Ms Symcox to handle the suspension review but she was the individual who had suspended her and it was her decision that the claimant was challenging under the grievance procedure. She stated that she would not attend the review meeting with Ms Symcox and that the review needed to be conducted by someone of appropriate seniority and independence. She asked Ms Race to appoint someone appropriate who was not the original decision-maker. The claimant stated further that she would not attend a meeting with EY until the decision to commence a disciplinary investigation had been independently reviewed in accordance with her grievance; also, that she wished to see the letter of instruction to EY and any information that had been provided to them.

6.29. Ms Race replied to the claimant on 29 October (248). Acknowledging the involvement of Ms Symcox and Ms Price to date she said that she had asked Ms Lucy Woods, Head of HR Business Partnering, to conduct the suspension review meeting and that the claimant's concerns about any potential disciplinary process could be raised within that meeting and did not necessitate a separate grievance being instigated. Ms Race repeated that the fact-finding review process being undertaken by EY was to determine what methodology the respondent used to standardise the TBGS entrance test and how this changed over time, and that the specific instructions to EY were confidential. She concluded that the respondent considered "it to be a reasonable instruction for you to attend meetings convened to consider governance issues and that includes any meetings with EY".

6.30. In parallel, on 30 October Ms Woods wrote to the claimant (252). She invited the claimant to "the initial meeting with EY" and continued that "this meeting is of the upmost importance and in line with the suspension guidelines,

you are therefore expected to attend". The claimant replied on 5 November stating, "I regret I will not be attending your meeting, as you are not independent of this process." This suggests some confusion as to whether the meeting was the meeting with EY or the suspension review meeting with Ms Woods.

6.31. The claimant also replied to Ms Race on 5 November (253). She noted, amongst other things, as follows: Ms Race saying that the fact-finding review was separate to the suspension and disciplinary process contradicted the email from Ms Price, which referred to EY conducting an investigation and asked the claimant to attend an investigation interview; she was contractually within her rights to raise her grievance and that someone of appropriate seniority and independence needed to be appointed to consider it; Ms Woods was not suitable as she managed both Ms Symcox and Ms Price and directly reported to Ms Race; she would respect the confidentiality of the instructions to EY but, "Fairness demands that I see what is alleged before I attend an important fact-finding meeting. I will not participate in a process of investigation by ambush"; she did not accept that it was a reasonable instruction for her to attend a meeting with EY and refused to do so noting that she had been,

> "(i) Wrongly suspended
>
> (ii) Wrongly subjected to disciplinary investigation
>
> (iii) Informed that my legitimate grievance about the above will not be actioned
>
> (iv) Instructed to attend an interview with a third party when I have not been told the instruction that third party has been given or the evidence that they have been shown."

6.32. The claimant concluded her email to Ms Race stating "I am now moving my complaint to a different forum as my efforts to persuade you to follow due process are being refused." That different forum turned out to be the respondent's Public Interest Disclosure Policy 'Whistle Blowing' (139).

6.33. On that same day, 5 November, the claimant wrote to Ms Sewel (copied to the Vice Chancellor) to raise her concerns under that Whistle Blowing Policy (257). She stated that the issue she was raising related to the refusal by the respondent's staff (specifically Ms Race) "to properly consider grievances made by staff as required by the University's Grievance Regulation", that it was a "contractual right of all University staff to be able to raise grievances" but that it had been her experience "that grievances are arbitrarily and summarily dismissed by the Director of Human Resources and Organisational Development without the required due process of independent investigation and consideration. This undermines the whole purpose of a grievance system and is not in accordance with the University's published commitment to the highest standards of integrity, probity and accountability". The claimant then briefly summarised the history of these matters before stating as follows:

> "I think this is a point of fundamental importance, not just for me but for anyone subject to suspension and disciplinary process. They have a right to challenge that decision and it is not for those making the decision to reject that challenge without proper investigation by someone who is independent and of appropriate seniority. That is the whole purpose of a grievance system."

6.34. Ms Sewel referred the claimant's complaint to Ms Gillian Campbell, the Head of the University Assurance Service. This accords with the Policy that she can appoint an investigating manager to undertake a brief preliminary investigation to ascertain whether there is a prima facie case to be considered before she decides what action is to be taken. That can be one of the following: a substantive investigation should be conducted, the matter should be considered under a different policy or referred to on appropriate external body, or no further action should be taken (142).

6.35. On 6 November Ms Race wrote to the claimant (264) replying to her email of the day before including as follows: her suspension was to ensure the safeguarding of relevant evidence; it was appropriate and normal practice for members of the HR team to review suspensions and Ms Woods had not been involved in the initial suspension decision; EY had been instructed by the respondent's Governance team and were carrying out a fact-finding investigation into the methodology the respondent used to standardise the TBGS entrance test and how this changed over time and although that investigation was not under the respondent's Disciplinary Regulations and was not focused on allegations against individual employees, it might be used to determine whether a disciplinary process should commence against employees; she asked the claimant to reconsider her refusal to attend a meeting with EY failing which they had agreed that they could put questions to her in writing for her to respond to but if that alternative was refused they would conclude their report without input from the claimant.

6.36. Also on 6 November Ms Race asked that the claimant's suspension should be reviewed (268) and, that afternoon, wrote to the pro-Vice Chancellor of CEM's faculty (270) to inform him that EY had secured all the evidence necessary for their investigation and, in her opinion, there was no longer an HR-related reason for continuing the claimant's suspension and she could return to work.

6.37. Ms Race then wrote to the claimant on 7 November (282). She explained that EY had almost concluded their investigation and had secured relevant data that would allow them to conclude their report. That being so, Ms Race lifted the claimant's suspension with immediate effect and informed her that Ms Beatty would discuss with her further practicalities of her return to work including the work that she would undertake. She concluded that if the EY investigation suggested that there may be a disciplinary case to answer the claimant would be provided with full details of any allegation to enable her to respond fully.

6.38. Ms Beatty and the claimant spoke by telephone on 8, 9 and 12 November. The claimant's notes (286 and 288) include as follows

- "EB expressed great surprise that I have found it stressful."
- "EB said that it had been a "significant investigation" and when I return to work "I would not be anywhere near Entrance Testing"
- "EB said that the expectation was that I would be in work on Monday. If not, I would need to take annual leave or get a medical certificate"
- "EB assured me that as far as she was aware there were no investigations relating to me personally."

6.39. By this stage the claimant was unwell and visited her doctor on 12 November who provided her with a medical certificate that she was not fit for work until 26 November, the condition being described as "Work-related stress causing flare up of colitis" (289). That certificate was later extended for a further two weeks from 26 November to 10 December 2018, the conditioning being described as "Work-related stress causing colitis" (292).

6.40. In relation to the claimant's whistleblowing complaint, although the evidence of Ms Sewel was that she was aware that Ms Campbell had liaised with HR by phone, the Tribunal heard no evidence as to what Ms Campbell actually did in relation to any consideration of the claimant's whistleblowing complaint. She did, however, produce a draft of a response for Ms Sewel to send to the claimant, which Ms Campbell sent to Ms Sewel by email of 16 November (290). The substance of that response was, "I understand that you have since been in contact with HR and that your immediate concerns have been addressed allowing you to return to work when you are able."

6.41. Ms Campbell was wrong on both counts: the claimant had had no meaningful contact with HR and her concerns were far from being addressed. In any event, the claimant denies receiving that email and Ms Sewel stated in evidence that she had failed to find any evidence that it had been sent. The Tribunal notes that Ms Sewel's explanation for why she thought there had been such contact with HR in the shape of the claimant attending a suspension review was only, "It was the absence of being told there had been no meeting, that led me to believe there had".

6.42. On 22 November 2018 the claimant wrote to Ms Beatty (294). Given that this is a complaint of constructive unfair dismissal it is an important email that bears setting out in full:

> "I regret to say that I feel I have no alternative other than to resign based upon the University's recent actions towards me which completely destroyed the trust and confidence in our working relationship.
>
> In brief, I have done nothing wrong. I have been subjected to an unfair suspension; at no stage have I been provided with any adequate explanation as to what I have allegedly done wrong; I have been wrongly subjected to disciplinary action; my grievances have been ignored and I

> have been subjected to a quite overbearing approach regarding a requirement to attend interview with EY, without any notification of their remit, evidence or issues I am to answer. No account has been taken of my health issues and the impact of your actions upon my health.
>
> In the circumstances, please accept this as my immediate resignation."

6.43. The following day Ms Race acknowledged the claimant's email but suggested that before she actioned the claimant's resignation she should meet with Ms Woods to have an opportunity to discuss the issues she had raised prior to making a final decision. The claimant replied on 26 November stating that she did not wish to meet Ms Woods and asking Ms Race to go ahead and action her resignation (296).

Submissions

7. After the evidence had been concluded, the parties' representatives made oral submissions, which addressed the matters that had been identified in the List of Issues in this case. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from its findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to its decisions. That said, the key points in the representatives' submissions are set out below.

8. On behalf of the respondent, Ms Barry made submissions by reference to the agreed List of Issues including the following.

Constructive dismissal

8.1. The claimant relies upon a breach of the implied term of mutual trust and confidence. Relying upon the decision in Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) [1997] ICR 606, that term is expressed to impose an obligation that the employer shall not:

> "…. without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

The suspension

8.2. Dealing first with the suspension, the claimant was suspended on 28 September. That was lifted on 7 November and she resigned on 22 November, 15 days later. The claimant not being told in discussions with Ms Beatty and Ms Clark that the respondent was thinking of suspension is a red herring: it is the decision itself that the Tribunal should scrutinise.

8.3. There were two considerations. The primary concern was to secure the evidence because all the information was IT-based not just in a filing cabinet; this would also protect the claimant from false allegations. This is made out by

the fact that her suspension was immediately lifted when EY secured the evidence and the respondent was prepared to have her back. The second red herring is that it was not just a question of whether the claimant would return to work as she would still be on restricted duties. She was not aware of the particular restrictions because discussions never got that far and any restrictions are not why she resigned. The claimant's suspension was not only to secure a file that was password protected. The respondent's concerns were more wide-ranging as the EY report makes clear including whether CEM was being asked to suggest unethical methods. It was not just about results or a single file. The evidence included emails, minutes and correspondence: for example, the email from Ms Race of 14 November 2018 refers to, "Copies of key documents for a disciplinary investigation (a number of emails and reports are mentioned in EY's report)" (289a) and there is the data referred to in Appendix C of EY's report (342) and the analysis contained in Appendix E (345). Further, even if the claimant is right that it was just one file, the respondent would not know that and it was right that it would close everything down until it did know. Additionally, it is clear from Appendix B of their report that EY undertook interviews swiftly and there was no significant delay.

8.4. The claimant states that the grounds for her suspension (184) were vague and too broad. It is easy to say, with hindsight, that they might have been better but they were broad at that stage because the respondent was not aware of the detail. Stating that the claimant "processed assessment data for a third party in an unauthorised manner" is reasonable against the backdrop of the discussions she had already had; and the very next day, 2 October, she wrote providing details. So to suggest that she did not know that the concerns were about how the contract was processing was disingenuous. She already knew of the TES article and had had discussions with Ms Beatty, she knew full well that CEM would come under scrutiny and she said in evidence that she assumed the meeting with Ms Clark was about the contract, which is supported by both the respondent's notes and the claimant's notes of that meeting.

8.5. There was a meeting at which information was shared. Ms Beatty had done some analysis, was concerned and the decision was taken to preserve the evidence. It was a provisional decision. Then Ms Clark reported to Ms Symcox that she had heard nothing to change the decision so Ms Symcox told the claimant that she was suspended. The respondent decided on the information, it was sense-checked, the decision was taken and it was communicated to the claimant.

8.6. The primary driver was to secure the evidence. Thus, the respondent had reasonable and proper cause for the claimant's suspension, was reliant on Ms Beatty and went about it in a reasonable way. The Malik test is satisfied in terms of the decision to suspend. The respondent had concerns regarding the contract and how it was administered. It is a research institution and the Vice Chancellor was concerned regarding reputational harm and press interest. It is irrelevant that CEM was not mentioned in the TES article.

8.7. The second consideration in the decision to suspend was that there were serious concerns regarding the way the contract was administered and which

potentially lead to results being skewed to favour out-county pupils. The respondent does not have to prove that the claimant was guilty of wrongdoing only that it had reasonable and proper cause to suspend, which it did.

The grievances

8.8. The claimant first raised a grievance on 12 October (222) regarding her suspension. She received a response on 16 October. It can be argued whether that was an appropriate response but the primary point is that the Grievance Policy does not allow grievances in respect of the suspension process, which is why Ms Price responded as she did but built in a review of the suspension, which is normal industrial practice. In any event, on the second page of her email, Ms Price talks about understanding the methodology, which is additional detail for the claimant to understand what the suspension is about.

8.9. That leads to the second grievance (227). The alleged breach of confidentiality is a complete misunderstanding of referring the grievance to another person in the team. The suggestion of a breach of confidentiality is a nonsense. The second matter relates to the interpretation of the Grievance Policy. It is accepted that Ms Race did not explore the wording on page 109 but she explained in evidence that she had drafted it and negotiated it with the trade union and no one had ever challenged the respondent's interpretation since 2010: she understood what it meant. If it was wrong, one would expect someone such as the trade union representative to mention it. It is common sense that if a grievance could be raised about suspension it would lead to a multiplicity of processes so the suspension review meeting is the appropriate forum. The claimant says that she wanted someone independent to look at the issues regarding her suspension but that is not how the suspension review meeting works: the person who suspended looks at any new information and reconsiders the suspension. The claimant chose not to attend. If she had she could have articulated her concerns; and she had experienced trade union representation throughout. If the respondent got the procedure so wrong he would have been the first to point it out but he did not.

Whistleblowing

8.10. This is another red herring in respect of constructive dismissal because at the point of her resignation the claimant did not know the state of play and her letter makes no reference to any concerns (294). For all she knew her complaint was being dealt with. Also, Ms Sewel thought the claimant's concerns were being addressed because she thought she had attended the suspension review meeting. It cannot be said that at the point of resignation it was on her mind: she does not mention it so it is not part of the constructive dismissal claim.

Reasons for resignation

8.11. When the suspension was lifted the claimant had phone calls with Ms Beatty. It was clear that the claimant was concerned about what people were saying and knew about the potential disciplinary process. The claimant was not

happy that a disciplinary process was still facing her: that was the real reason for her resignation.

Delay

8.12. Also, why did she delay in resigning? The majority of the issues were in place at the beginning of October and there was then a huge delay of a minimum of 2 weeks and at worst 4 to 5 weeks. This affirmed any breach (which is not accepted).

Reason for dismissal and acting reasonably

8.13. The respondent does not suggest that the claimant would have been dismissed. It did not know.

Protected disclosure

Disclosure of information and reasonable belief

8.14. The respondent does not take issue with these matters and accepts that the claimant's letter related to a "legal obligation".

Public interest

8.15. The respondent relies upon the decision in Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979. A disclosure is not in the public interest because someone says so. In this case the claimant is not saying that the respondent never deals with grievances. It was a personal issue that it had not dealt with her grievance. So her complaint is misconceived.

8.16. If not, it falls down on causation. Just failing to send a letter saying what the respondent was doing was overcome. Ms Sewel thought that a letter had been sent and that the claimant had attended the suspension review meeting. She was wrong but any failure had nothing to do with the fact that the claimant had raised whistleblowing issues; and it was not put to Ms Sewel that she did not do something because of the protected disclosure.

Disability discrimination

8.17. The respondent accepts that the claimant's suspension/the independent investigation was a provision criterion or practice (a "PCP") but the duty to make reasonable adjustments does not apply if the respondent did not/could not reasonably be expected to know that the claimant's disability was likely put her at the disadvantage. The respondent knew of the disability but could not know that the suspension or the invitation to attend the EY meeting could put the claimant to disadvantage. The claimant says that it caused a flare-up to her colitis but the respondent cannot avoid stressful meetings. So the claimant fails on substantial disadvantage as she is no different to others.

8.18. In any event adjustments were made. In respect of the suspension there were to be suspension review meetings and in respect of the EY investigation

the claimant could have trade union representation, which was not the norm; and she was advised of counselling and support available to her.

8.19. As to the claimant's suggested adjustments: a meeting to discuss potential suspension and restricted duties is not the way the world operates and until the evidence was secured there would be no difference; deferring suspension until medical evidence had been obtained from OH was nonsense; the process was done as quickly as was possible with EY conducting interviews within a couple of days and, given the third-party investigation, the respondent could not give timelines, with part of that being that the claimant would not attend the meeting which added to the delay; the suggestion that at an early stage the claimant should have been given all the information in advance was bewildering as the respondent had genuine concerns regarding the operation of the contract and if the claimant had been given all the information she could have tailored her evidence; undertaking a stress assessment was a red herring which is not mentioned elsewhere, it had occurred much earlier and was not an issue at the time.

Breach of contract

8.20. Although it was accepted that the claimant's contract of employment provided for six months' notice she was not entitled to that notice as there was no breach of contract.

9. On behalf of the claimant, Mr Gibson made submissions (in relation to which he relied upon the authorities of London Borough of Lambeth v Agoreyo [2019] EWCA Civ 322 and W A Goold (Pearmak) Ltd v McConnell and another EAT/489/94, both of which the Tribunal took into account) including the following.

Constructive dismissal

The suspension

9.1. Whether the respondent had reasonable cause to suspend the claimant is an objective test for the Tribunal. What the respondent believed is neither here nor there.

9.2. Those at the unminuted meeting on 28 September decided to suspend the claimant because they believed that she and G had colluded with TBGS to skew testing data. All they had was the newspaper article and Ms Beatty saying that she was concerned. Rereading the article, there is no reference to CEM or any suggestion that CEM knew about the TBGS meetings or the alternative processes. They did not have reasonable cause to suspend and the respondent did not think that originally given the response suggested by Ms Beatty in her email of 27 September that the test and scoring was identical for all candidates: that is what she thought and believed and it was the truth.

9.3. The Tribunal has no direct evidence of what Ms Beatty thought or knew, what she did, to whom she spoke and what they said. That was the missing element because the respondent had elected not to call her.

9.4. The respondent's second point is the need to secure evidence. The claimant's evidence had been pretty much unchallenged. The evidence is held on a database which is backed-up daily. There is a folder containing all the data and, with a flick of a switch, it can be secured. None of the respondent's witnesses could challenge that except what Ms Beatty had said. If that is the case it falls away as a reason to suspend.

9.5. The respondent seeks to suggest that it was a provisional decision to suspend and Ms Clark was to sense-check it. That is not borne out by the notes at page 189 where there is no reference to Ms Clark being briefed or sense-checking anything or discussing what was said to her by the claimant with Ms Symcox, and if there had been she would recorded it. Also, at page 191, there is no reference to the respondent's Head of Legal briefing anyone following the suspension meeting. The reality is what is recorded in the note timed at 14.00 and there is nothing there about sense-checking. It is clear that the decision was taken at 2 o'clock on 28 September. In any event Ms Clark's notes were never shown to the claimant, she was not told she was at risk, she challenges their content and it is clear that no allegations were put to her and no suggestion of wrongdoing. So as a basis to suspend it is distinctly lacking.

The grievances

9.6. The responses to each of the grievances were wholly inadequate: neither addresses the points raised. The respondent's position is, first, that the Policy does not permit a grievance in these circumstances and, secondly, it offered a suspension review meeting. In her second grievance the claimant directly quotes paragraph 6.1b). Her view is absolutely clear and make sense: an employee cannot raise a grievance regarding the outcome of a disciplinary process because the decision can be appealed. That is what the Policy says. It does not matter if it is a 'typo', it says that and it should be followed. Why did Ms Race not give her explanation at the time? Also, the Policy addresses "Overlapping grievance and disciplinary cases" at section 4 (130), which provides exactly for that scenario that both cases will normally be dealt with concurrently or, if not, the disciplinary process will be suspended. Why does that not say, 'You can't'? The claimant's interpretation of paragraph 6.1b) sits squarely with that provision whereas the respondent's interpretation is at odds with it.

9.7. Offering a suspension review meeting is not equivalent to dealing with the grievance because, first, it only looks at the suspension and, secondly, the people put forward are subservient to Ms Race and neither has the authority to overturn her decision, apart from not being independent. An academic who has been accused of criminality has challenged the decision on grounds that there is no evidence, that she does not think she should be suspended and does not know why she should be suspended. That is a serious challenge and the respondent is a large employer with a large HR Department and does not have anyone independent to look at the grievance, far less investigate it and respond to it.

Whistleblowing

9.8. It is right that this is not mentioned in the resignation letter but the question for the Tribunal is whether it is satisfied that it was part of the claimant's reasoning. Beyond doubt the claimant had raised her whistleblowing allegation and beyond doubt no one responded, and that cannot be appropriate.

A fundamental breach of contract

9.9. All of the above (the decision to suspend and the failures to deal with the grievances and the whistleblowing complaint) amount individually and collectively to a fundamental breach of contract.

Reasons for resignation

9.10. The submission on behalf of the respondent is not correct. The reasons are contained in the claimant's resignation letter; and she did not refuse to meet EY but only asked to see their terms of reference and the evidence upon which they intended to rely. The terms of reference are in the document at pages 201 to 216. Why would anyone want to withhold them? Particularly when the scope of the services is, "…. any proceedings which are brought by you in respect of allegations concerning the Buckinghamshire Grammar Schools contract". It was straightforward to disclose those terms of reference and there would be no breach of confidentiality. Nor would giving advance notice of the evidence before the interview have been inappropriate: litigation is not conducted by ambush any more.

Delay

9.11. The claimant resigned on 22 November having received a letter suspension on 1 October, and in that period had raised two grievances and one whistleblowing complaint to try to get the respondent to listen. That was not a delay.

Reason for dismissal and acting reasonably

9.12. These issues had been conceded on behalf of the respondent.

Protected disclosure

Disclosure of information and reasonable belief

9.13. These issues had also been conceded on behalf of the respondent.

Public interest

9.14. The claimant was clear about this when being cross-examined. She was raising not just a personal interest, it was in the interests of all employees at the respondent for the HR Department to administer the grievance procedures fairly. It was personal too but that is not the test any more.

Failure to investigate

9.15. Obviously the respondent failed to investigate the matters and also failed to respond. The Tribunal is invited to take the view that the respondent needs to explain its actions and has not done so; and for the respondent to accept 'we got it wrong' is not enough. The inference the Tribunal should draw is that the respondent had decided on a course of action and wanted this complaint to go away. The respondent was not in listening mode: it had set its face on a course of conduct and did not investigate the complaint. That is an omission and a detriment.

Disability discrimination

The PCP

9.16. The PCP had been conceded behalf of the respondent.

Substantial disadvantage

9.17. The substantial disadvantage is the impact on the claimant's health: stomach pains; having to rush to the toilet; mental health issues; having to take medication. That is the disability, so when she is subjected to things by the respondent she is less able to deal with them. The respondent says that it did not know but it did know that she had colitis and had agreed to do a stress assessment on 21 June 2018 (415).

The relevant matter

9.18. The "relevant matter" relied upon by the claimant is how the respondent went about dealing with her suspension, the investigation and the report of EY.

Reasonable adjustments

9.19. The respondent says that it suspended to protect the evidence and the claimant. If it is known that suspension causes harm it must be a factor to be taken into account. In those circumstances a reasonable adjustment for any employer is to obtain an OH assessment of the impact of suspension, and to meet the claimant to discuss the impact of suspension and adjustments that could be made. Such a meeting could and should precede the letter of suspension and should have been around the time of the meeting with Ms Clark.

9.20. The respondent obtained a medical report dated 18 October 2018 (418). It advised that the investigation should be carried out as quickly as possible and that the claimant should be given a timeline. There is no evidence that Ms Beatty did anything with that recommendation. How difficult would it have been to produce a timeline of what they were doing, when it was expected they would meet and what they intended to discuss?

9.21. Then the respondent would have the Tribunal believe that it is prompt for six weeks to elapse before the interim report of EY is produced on 9 November,

and the claimant was not even told about that. So from her perspective what happened between 28 September and 27 November? Nothing. One simple example of a reasonable adjustment would have been that when the respondent got the interim report it would send the claimant a copy and with it the letter of instruction that EY had issued, and call her in for a meeting and, in advance, outline the questions that they would like to ask or the areas they would like to cover.

Breach of contract

9.22. The claimant's contract of employment provides for six months' notice. If her complaint of constructive dismissal succeeds, so does that element; if it fails the contract claim falls with it

The Law

10. The above are the salient facts and submissions relevant to and upon which the Tribunal based its judgment. The Tribunal considered those facts and submissions in the light of the relevant law being primarily the statutory law set out below and relevant case precedents in these areas of law.

11. The principal statutory provisions (with some editing so as to be relevant to the claimant's complaints) are as follows:

11.1. Unfair dismissal - Employment Rights Act 1996

"94 The right.

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

"95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if

……

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

"98 General.

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

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

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

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

…….

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

11.2. Failure to make adjustments - Equality Act 2010

"20 Duty to make adjustments

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

"21 Failure to comply with duty

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

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

"39 Employees and applicants

(5) A duty to make reasonable adjustments applies to an employer."

11.3. Protected disclosures - Employment Rights Act 1996

"47B Protected disclosures

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

"43A Meaning of "protected disclosure"

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

"43B(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 of the following –

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

"43C (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –

(a) to his employer …."

Application of the facts and the law to determine the issues

12. The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

13. There is a degree of overlap between the complaints presented by the claimant that the Tribunal has considered, and each of the complaints was borne in mind throughout its deliberations. In such circumstances it is normally considered appropriate that a Tribunal should first deal with a claimant's complaint that a respondent failed to comply with a duty to make adjustments (and in this case failed to deal appropriately with the whistleblowing complaint) as such matters can be relevant to a complaint of constructive unfair dismissal but the claimant did not seek to rely upon the alleged failure to make reasonable adjustments as one of the bases for her assertion that the respondent had breached the implied term of trust and confidence. In any event, in this particular case, the Tribunal considers it appropriate to adopt the approach taken by the parties' representatives to the order of the complaints and issues arising as set out in the List of Issues referred to above.

14. In that respect a preliminary point is made that certain of the issues in relation to the complaint of unfair dismissal relate to remedy that was not addressed at the hearing and, therefore, is not addressed in these Reasons. That said, in the hope that it might be of some assistance to the parties, the Tribunal simply records that its preliminary view (subject of course to any further evidence and submissions that might be made on the point at a remedy hearing) is that in the claimant's schedule of loss the assessment, by reference to the decision in 'Vento' and subsequent updating, of an award in respect of injury to feelings appears at this stage to be 'about right'.

15. A second preliminary point, which relates primarily to the decision that the claimant should be suspended, is that in evidence Ms Sewel stated that she had nothing to add to the evidence that Ms Race had given earlier during the hearing as to what had occurred at the suspension meeting held on 28 September. As that might be described as being evidence of a negative and so as to avoid any doubt, the Tribunal put to her its impression of certain aspects of Ms Race's evidence: namely that in respect of what was described as being the factual basis of the concerns relating to the manipulation of data for the purposes of the TBGS contract those at the meeting relied solely upon the information provided by Ms Beatty, while other attendees (such as the Vice Chancellor and Ms Sewel herself) raised matters of the

potential reputational harm to the respondent. Ms Sewel agreed with that assessment of Ms Race's evidence adding only that the management of CEM had also had input in connection with the reputational harm aspect. That reliance of those at the meeting on the information provided by Ms Beatty is relevant given that although Ms Race undoubtedly did her best in seeking to convey to the Tribunal what Ms Beatty's input at that meeting had been, at best she could only give evidence as to what Ms Beatty had stated to the meeting and not as to the evidence that Ms Beatty had relied upon as the basis of her concerns. It is largely a matter for a party to decide whom it wishes to call to give evidence to a tribunal but it is certainly possible that the Tribunal's consideration of the issues in this case was hampered by not hearing from Ms Beatty personally.

Constructive dismissal

16. In this case the first question is whether there was a dismissal at all. As mentioned above, the claimant relied on section 95(1)(c) of the 1996 Act that she had resigned in circumstances where she was entitled to do so by reason of the respondent's conduct. That is commonly referred to as constructive dismissal.

17. The decision of the Court of Appeal in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 has stood the test of time for over 40 years. It is well-established that to satisfy the Tribunal that she was indeed dismissed rather than simply resigned, the claimant has to establish four particular points as follows:

> 17.1. The respondent acted (or failed to act) in a way that amounted to a breach of the contract of employment between the respondent and the claimant.
>
> 17.2. If so, that breach went to the heart of the employment relationship so as to amount to a fundamental or repudiatory breach of that contract.
>
> 17.3. If so, the claimant resigned in response to that breach.
>
> 17.4. If so, the claimant resigned timeously and did not remain in employment thus waiving the breach and affirming the contract.

18. To establish the required breach of contract, the claimant relies on a breach, not of an express term of her contract of employment but of the term implied into all contracts of employment that the parties will show trust and confidence, the one to the other. The decision in Malik is summarised by Hale LJ in Gogay v Hertfordshire County Council [2000] EWCA Civ 228 thus:

> "This requires an employer, in the words of Lord Nicholls of Birkenhead in Malik v BCCI [1998] AC 20, at p 35A and C,
>
> '. . . not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages. . . . The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer'. Lord Steyn emphasised, at p53B,

> that the obligation applies 'only where there is "no reasonable and proper cause" for the employer's conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship . . . '

19. In the first issue in respect of the complaint of constructive dismissal in the agreed List of Issues the claimant asserts that there were three aspects to that breach of the implied term. She relies on the following: her suspension; the respondent's failure to deal appropriately with her two grievances; the respondent's failure to deal appropriately with her whistle blowing complaint. The Tribunal will address each in turn.

The suspension

20. The first consideration in this regard is whether the respondent needed to conduct an investigation at all. At the outset of the matters leading to the claimant suspension, information was received from TBGS that TES intended to run an article that it had been secretly operating an illegal policy that had been outlawed under The Greenwich Ruling. The respondent then saw those allegations in print in that article in which specific reference was made to the tests, the test results and their being marked differently. The respondent operates in the public domain and its reputation is important; and the Tribunal accepts the evidence of its witnesses that it had been criticised in the past for being elitist, that it is heavily reliant upon income from research grants and, even acknowledging the anti-grammar school context of the article, there was the potential for CEM and therefore the respondent to be dragged into the allegations and consequent bad publicity. That being so, the Tribunal is satisfied that at that time, and specifically at the meeting on 28 September 2018, it was reasonable for the respondent to have cause for concern and decide that the allegations and any implications for CEM required investigation.

21. That finding accords with the oral evidence of Ms Race that Ms Beatty's clear recommendation was that there was a very serious matter needing investigation. The question in issue, however, is whether, in that context, and applying the approach of Lord Steyn in Malik, the respondent's conduct in suspending the claimant:

> 21.1. destroyed or seriously damaged the relationship of trust and confidence; and
>
> 21.2. was without reasonable and proper cause.

22. As Lady Hale noted in Gogay, "The test is a severe one". In this case, the claimant was informed that the allegation was that she had "processed assessment data for a third party in an unauthorised manner" and that might constitute serious misconduct of which five examples were given including, "Deliberate falsification of official records" and "Fraudulent misuse of the University's property or name", both of which the claimant assessed as being allegations of criminal conduct. The Tribunal is satisfied that it was reasonable for her to do so.

23. Also in relation to the first of the consideration set out above is the suggestion in the email of 16 October from Ms Price that "suspension is a neutral act". If that were to be so it is certainly arguable that suspension cannot destroy or seriously damage

the relationship but that is not how the Tribunal sees it. In Watson v Durham University [2008] EWCA Civ 1266 Lawrence Collins LJ said as follows:

> "For any person to be suspended from his or her employment pending the investigation of allegations of misconduct is a serious matter. It casts a shadow over the employee, and suspension is particularly serious if the person involved holds a public position or, as in this case, a position in higher education and especially so if the suspension drags on for an extended period while investigations are being made or a disciplinary process is being pursued."

24. The Tribunal is satisfied that that observation applies equally to the claimant in this case as does the observation of the Court of Appeal in that case that an employer's right to suspend an employee must not be exercised on unreasonable grounds. Further, the Acas Code of Practice, Disciplinary & Grievance Procedures (2015) does not suggest that suspension is a neutral act: rather that it should be made clear to a suspended employee that the "suspension is not considered a disciplinary action."

25. On the above bases, therefore, the Tribunal is not satisfied that suspension is a neutral act and notes that this was the assessment of the Court of Appeal in Agoreyo.

26. As to the first of the above considerations, therefore, the Tribunal is satisfied, first, that there was a serious allegation and that to be so accused by one's employer is clearly calculated to seriously damage the relationship between employer and employee and, secondly, such damage was not avoided on the basis that the suspension of the claimant was a neutral act.

27. The second of the above considerations of whether there was reasonable and proper cause for the suspension therefore comes into play. There are many factors that might have been brought into account in this connection including as follows:

> 27.1. First, in chronological order of what might have been considered by the respondent (but not based on an order of priority of the considerations by this Tribunal) there is the question of whether there was any reason to suppose that the claimant might be guilty of any wrongdoing. This would include whether, at this early stage, there was any basis for thinking that the allegations appeared to be made out and, if so, whether the claimant might have played any part in that. As recorded above, the only evidence available to this Tribunal in this respect was from Ms Race (to which Ms Sewel said she had nothing to add) to the effect that Ms Beatty advised the meeting on 28 September that employees within CEM had potentially been knowingly involved in manipulating the entrance test results to favour in-county applications and that this was a potentially serious issue in which both the claimant and G might have participated in wrongdoing. Although the authors of the EY Report interviewed Ms Beatty there is nothing in that Report which confirms that this was her view. Also with regard to the EY Report, there are several references to its authors having, for example, "seen evidence" or "identified evidence" that might have a bearing on this question of whether there was any reason to suppose that the claimant might have been guilty of wrongdoing but there was no evidence before the Tribunal that any of these matters identified by EY was known to the

respondent at the time the decision to suspend the claimant was made. The Tribunal considers the EY analysis at page 313 of their Report to be relevant to this first question. Although the respondent did not have the benefit of that analysis at the time, the Tribunal notes that the content of the table on that page was provided by one of CEM's statisticians and it is not satisfied, therefore, that CEM could not have fairly quickly undertaken its own consideration of the figures available to CEM. On the evidence presented to the Tribunal, it is not satisfied that such consideration would have indicated that the tests were favouring in-county candidates. It seems to the Tribunal that no one within the respondent appreciated at the time of the claimant's suspension (but on the basis of this evidence could have done) that although the number of in-county children being offered places increased: first, that did not mean that out-county children were discriminated against by reference to academic criteria; secondly, CEM had no influence over the selection of candidates by reference to the other non-academic criteria used by the schools.

27.2. A second factor is whether there were any alternatives to suspension. The Tribunal considers that a very practical alternative, at least initially, would have been to ask the claimant for an explanation of whether there might be any basis for the allegations made in TES. In that respect the claimant wrote a very comprehensive email to Ms Beatty on 2 October 2018 setting out how the TBGS contract operated and her role in it. She hoped that email would be read and it would be realised that the terrible mistake had been made, which would be corrected but there is no evidence that the email was considered at all. It is a reasonable inference that if the claimant could provide that information so quickly after her suspension, she could have been provided it fairly promptly before she was formally suspended. As to other options, Tribunal notes the evidence of Ms Race, that alternatives were considered such as the claimant working from home and undertaking alternative duties, but that it was difficult to identify any alternative which would not require her to have access to the respondent's IT systems, including emails. Self-evidently, that conclusion of the respondent is predicated on it not being possible to restrict the claimant's access to its IT systems, including emails, by any means other than not permitting her to work.

27.3. That therefore leads to a third factor that is related to the first of the reasons advanced by the respondent for the claimant's suspension; namely, that it was necessary to secure the evidence. Ms Race's evidence was that Ms Beatty reported to the meeting on 28 September that the majority of the potential evidence that would need to be protected for an investigation would be contained on CEM's computer systems. The claimant's evidence went further saying that the evidence that the respondent sought to secure was entirely electronically held. There is little between those two positions and the submissions of the respondent's representative on this point were more aligned to that of the claimant. She submitted that it was not just about results or a single file and referred to the various documents set out above including, for example, the email from Ms Race of 14 November 2018 that refers to, "Copies of key documents for a disciplinary investigation (a number of emails and reports are mentioned in EY's report)" (289a), Appendix C of EY's report (342)

and the analysis contained in Appendix E (345). While that might be right, there is nothing to suggest that those documents are not held electronically as the claimant stated: indeed it appears from those Appendices that the data and other documents referred to are held electronically. This being so, on the basis of the evidence before it, the Tribunal does not accept that it would not have been possible to secure the evidence that might potentially be required by restricting the claimant's access to the respondent's IT systems, including emails, by alternative means far less serious than suspending her from work. It accepts the claimant's evidence that all potentially relevant evidence being held electronically, the respondent's IT staff could have secured it swiftly, and that the permission she had to access certain folders on the system could have been restricted in a couple of minutes. Even if the claimant is wrong in her assessment of how swiftly this could have been attended to, the Tribunal is satisfied that the respondent could easily have denied the claimant access to its systems (probably with her agreement) during the time it took to put such measures in place. Additionally, most of the information relevant to the investigation was backed-up daily and, therefore, it was likely to have been archived on the respondent's email server, and the claimant was not challenged on her evidence that she could not access that anyway. The Tribunal also accepts the claimant's evidence that her emails could have been monitored but notes that such monitoring would not actually have been necessary given that it is recorded in the note of the meeting on 28 September (191), "EB would remove their email access". In short, the Tribunal is satisfied that any evidence that might have been required for any investigation could have been secured to the satisfaction of the respondent without the need to suspend the claimant.

27.4. This finding impacts upon the second reason for the claimant's suspension, which is that it was to protect her from false allegations that she had interfered with the evidence, in that the Tribunal is satisfied that once information had been secured in this way the claimant could not have been wrongly accused of interfering with it; and even if she had been, she would have had clear evidence to rebut such false allegations.

28. With regard to this consideration of there being reasonable and proper cause for the suspension, in Gogay Lady Hale stated as follows:

> "It is difficult to accept that there is no other useful work to which the claimant might not have been transferred for the very short time that it ought to have taken to make the further inquiries needed. It is equally difficult to accept that some other step might not have been contemplated, such as a short period of leave. In any event, given the timescale involved, what was the rush?"

29. The Tribunal considers that observation to be pertinent in this case also each element of which reflects its assessment of the decision to suspend in this case. Additionally, the Tribunal notes that Lady Hale continued that instead of what she referred to as being a cool, clear and structured response "what happened here was an immediate 'knee jerk' reaction" and that the employee in that case was "entitled to something better". While it might be going a little far to suggest that the respondent's

reaction in this case was 'knee jerk', the Tribunal is satisfied that it was an over-hasty reaction in all the circumstances more fully considered above.

30. Considering the evidence before the Tribunal in the round, it is satisfied for the reasons set out above that in respect of this issue the respondent's conduct in suspending the claimant did destroy or seriously damage the relationship of trust and confidence between the parties and was without reasonable and proper cause.

The grievances

31. The first of the claimant's grievances is contained in her letter of 12 October 2018 (222). The respondent accepts that it did not process that in accordance with its Grievance Regulation. It suggests that this was because paragraph 6.1b) of that Regulation (109) provides,

> "This Regulation may not be used for: ….
>
> b) handling of outcome of disciplinary or performance improvement proceedings"….. .

32. Furthermore, Ms Race's evidence was that the word "of" should read "or"; she had negotiated and agreed that procedure with the respondent's trade unions and that was the clear understanding. In the years since then it had never been suggested that the interpretation put forward by the respondent is incorrect and that advanced by the claimant is correct. Rather it has always been the practice that a grievance raised in respect of any aspect of the disciplinary process is not to be addressed by the grievance process.

33. Although that explanation as to the typographical error is offered now and was raised in the respondent's Response (ET3) (28) it was not provided to the claimant at the time despite the fact that she expressly advanced her interpretation of that paragraph in her email to Ms Race of 23 October (237):

> "The fact it sits in the disciplinary regulation does not prevent a grievance being raised about suspension or indeed the decision to conduct a disciplinary investigation at all. I would remind you the grievance procedure merely excludes grievances about the handling of the outcome of disciplinary matters or performance improvement. This is not a grievance about a disciplinary outcome. It is a grievance about suspension and a decision to investigate at all under the disciplinary process. It is a legitimate grievance and must be treated as such."

Ms Race did not respond to that argument.

34. The Tribunal accepts that the existence of a typographical error is a possibility but it is satisfied that that paragraph of the Grievance Regulation should be construed as it reads: namely, that the Regulation cannot be used for "handling of outcome of disciplinary or performance improvement proceedings". The Tribunal makes that finding for several reasons: first, on basic principles of construction in that there is nothing to suggest from a reading of that paragraph in that way that it is obviously

wrong; secondly, that Regulation stems from Statute 35 of the respondent which is part of its regulatory framework; thirdly, the claimant clearly put her interpretation of that paragraph to Ms Race at the time and was not corrected. For these reasons, therefore, the Tribunal is satisfied that the claimant was correct when she wrote in her second grievance letter of 23 October as set out above. As such, it follows that the finding of the Tribunal on this issue is that the respondent did not deal appropriately with this first grievance that the claimant raised in her letter of 12 October.

35. Turning to the claimant's letter of 23 October, she actually raised two grievances: first, that Ms Race had breached confidentiality in delegating her original grievance to Ms Price to respond to, which she had done sending a copy at the same time to Ms Symcox; secondly, that Ms Price's refusal to deal with her original grievance was a further breach of trust and confidence. As to the first of those grievances, the Tribunal accepts the explanation given by Ms Race to the claimant at the time, which she repeated in the course of these proceedings that such delegation to others within her Department was normal practice. In the experience of this Tribunal, that accords with normal industrial practice and is satisfied that the claimant's reliance on this element is misconceived. As to the second of those grievances, however, for the same reasons as are set out above in relation to the first grievance, the Tribunal is equally not satisfied that the respondent dealt appropriately with that second grievance.

Whistleblowing

36. This issue is whether the respondent dealt with the claimant's whistleblowing complaint of 5 November 2018 appropriately. That affords of a relatively easy answer in that it did not deal with that complaint at all. As set out above, Ms Sewel had referred the complaint to Ms Campbell but the Tribunal heard no evidence as to what Ms Campbell did in relation to any consideration of it. Ms Sewel explained that she was aware that Ms Campbell had liaised with HR by telephone and that, on 16 November, she had sent a draft of a response for Ms Sewel to send to the claimant. As set out above, the substance of that response was, "I understand that you have since been in contact with HR and that your immediate concerns have been addressed allowing you to return to work when you are able" but Ms Campbell was wrong on both counts and, in any event, the claimant denies receiving that email and Ms Sewel had not found any evidence that it had been sent. The explanation of why she thought there had been such contact with HR by the claimant attending a suspension review meeting was only, "It was the absence of being told there had been no meeting that led me to believe there had". The Tribunal does not find any aspect of Ms Sewel's explanation of these matters to be satisfactory.

37. In summary in respect of this issue, it is satisfied that the respondent failed to deal with the claimant's whistleblowing complaint appropriately.

A fundamental breach of contract

38. The next issue (numbered 2 in the List of Issues with regard to the complaint of Constructive Dismissal) is whether the actions or inactions of the respondent set out above amounted individually or cumulatively to a fundamental breach of the claimant's contract of employment.

39. As to the suspension, the Tribunal repeats that it is satisfied that the observation set out in the above excerpt from the decision of the Court of Appeal in Watson that suspension is particularly serious if the person involved holds a public position such as a position in higher education applies equally in this case.

40. In light of that decision and based upon its findings above, the Tribunal is satisfied, therefore, that the act of suspending the claimant did amount, individually, to a fundamental breach of her contract of employment.

41. In relation to the grievances, it was found in W A Goold (Pearmak) Ltd that there is "an implied term in the contract of employment that the Employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have". In this case, the respondent failed to provide that opportunity to the claimant and there was, therefore, a breach of that implied term. This is given greater emphasis in this case as the Grievance Regulation is made under Statute 35 of the respondent.

42. There remains the whistleblowing complaint. As found above, the respondent failed to deal with that complaint at all and the Tribunal does not find Ms Sewel's explanations for that failure to be satisfactory. Although the decision in W A Goold (Pearmak) Ltd was expressly related to an implied term of a contract of employment that employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of grievances, the Tribunal is satisfied that that principle is of equal application to a whistleblowing complaint and, therefore, that there is an equivalent implied term that an employer will reasonably and promptly deal with any such complaints. If, however, no such equivalent implied term exists, the Tribunal is satisfied that the respondent's failure to deal appropriately with the claimant's whistleblowing complaint did amount to a breach of the implied term of trust and confidence. On either basis, therefore, the Tribunal is once more satisfied that the respondent's failure in this regard did amount, individually, to a fundamental breach of the claimant's contract of employment.

43. Had the decision of the Tribunal on that point been to the contrary (i.e. that failure did not amount individually to a fundamental breach of the contract of employment), the Tribunal is satisfied that the failure to deal with the whistleblowing complaint did contribute cumulatively with the other two matters (the suspension and the failure to address the grievances) and, therefore, together they constituted a fundamental breach of the claimant's contract of employment.

Reasons for resignation

44. Issue 3 in respect of the complaint of constructive dismissal relates to the reasons for the claimant's resignation. The claimant set out her reasons in her email to Ms Race dated 22 November 2018 (294). In the first paragraph of that email she explained that her decision was based upon the respondent's "recent actions towards me which have completely destroyed the trust and confidence in our working relationship". In the second paragraph, she set out succinctly why that was the case referring to having done nothing wrong; having been subjected to an unfair suspension; not having been provided with any adequate explanation of what she had done wrong; having been wrongly subjected to disciplinary action; her grievances

having been ignored; her having been subjected to a quite overbearing approach regarding a requirement to attend interview with EY without knowing of their remit, evidence or the issues she had to answer; and no account having been taken of her health issues and the impact of those actions upon her health. On the basis of that letter but particularly in light of the claimant's oral evidence, the Tribunal is satisfied that that is an adequate and accurate summary of the reasons why the claimant tendered her resignation and does not accept the submission on behalf of the respondent that it was because the claimant was concerned about what people were saying and, particularly, was not happy that a disciplinary process was still facing her.

45. That said, accepting as it does that the reasons for the claimant's resignation are set out in that email of 22 November, the Tribunal does not accept that the third of the above issues (the failure to deal with the claimant's whistleblowing complaint) was a reason for her resignation or a factor contributing to it. It is not only that the claimant does not refer to that in her email, the Tribunal accepts the submission made on behalf of the respondent that as at 22 November, for all the claimant knew, her whistleblowing complaint, which she had made comparatively recently on 5 November, was in the course of being properly addressed.

Delay

46. The fourth issue in respect of this complaint is whether the claimant resigned without undue delay. She was informed of her suspension on the afternoon of Friday, 28 September 2018 and received written confirmation of that by email of 1 October. She resigned on 22 November 2018. The Tribunal does not consider that period of approaching eight weeks to be a lengthy delay by any standard and it is not as if during that time the claimant was accepting of her situation and continuing to work normally, to the extent that she was able. On the contrary, in that period she was fully active in seeking to have the decision overturned. It is unnecessary to repeat the chronology that is fully set out in the Tribunal's findings of fact but, by way of example only, she wrote her comprehensive letter of explanation to Ms Beatty on 2 October and engaged in telephone conversations with her thereafter, raised grievances on 12 and 23 October, engaged in correspondence with Ms Race and Ms Price and then ultimately raised her whistleblowing complaint on 5 November 2018.

47. In any event, delay itself is not the ultimate question; rather it is whether an employee has accepted or waived the employer's repudiation of the contract and has thus affirmed that contract. As was held in WE Cox Toner (International) Ltd v Crook [1981] IRLR 443, "Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it maybe evidence of an implied affirmation. Further, in Cantor Fitzgerald international v Bird [2002] IRLR out at 267, it was stated that affirmation is essentially the legal embodiment of the every-day concept of "letting bygones be bygones" and that in that case a delay of more than two months did not signify affirmation of the contract. The Tribunal is not satisfied that in this case there was any undue delay on the part of the claimant and, in any event, there was nothing in her conduct to suggest that she was waiving the breach, letting bygones be bygones and affirming her contract of employment.

48. In summary thus far (addressing issues 1 to 4 in respect of the complaint of constructive dismissal) for the above reasons the Tribunal is satisfied that each of the four points set out above arising from the decision in Western Excavating (ECC) Limited is made out: the respondent's conduct breached the contract of employment; the breach amounted to a fundamental or repudiatory breach; the claimant resigned in response; the claimant did not waive the breach and affirm the contract. This being so, the Tribunal is satisfied that the claimant's claim that she was dismissed by the respondent is well-founded.

49. This finding therefore leads to the standard issues for any employment tribunal in any complaint of unfair dismissal arising from section 98(1) and (4) of the 1996 Act that include what was the reason for the dismissal, whether that was a potentially fair reason and whether the respondent acted reasonably in treating that reason as a sufficient reason for dismissing the employee. Those matters are reflected in the agreed issues 5 and 6 in respect of the complaint of constructive dismissal. In this case, however, as was conceded on its behalf, the respondent has not advanced any reason for the claimant's dismissal and, therefore, her complaint that her dismissal by the respondent was unfair must succeed regardless of the question of reasonableness contained in section 98(4) of that Act.

50. In short, the Tribunal is satisfied that the complainant's complaint that she was dismissed by the respondent and that that dismissal was unfair is well-founded.

51. Each of the issues numbered 6, 7 and 8 in the agreed List of Issues in respect of the complaint of constructive dismissal relate to remedy and remain to be addressed at a remedy hearing in the future.

Protected disclosure

Disclosure of information and reasonable belief

52. As set out above, the respondent did not take issue with either the first or second of the agreed issues in respect of this complaint. The Tribunal is satisfied that the claimant's email of 5 November 2018 disclosed information which, in the reasonable belief of the claimant tended to show one of the matters listed in section 43B(1) of the 1996 Act. In this case, with reference to subsection (b), that the respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject; that obligation being contained in the claimant's contract of employment as reinforced by the fact that the respondent's Grievance Regulation stemmed from its Statute 35.

Public interest

53. In this respect, however, the principal point in issue between the parties is whether the claimant made her disclosure in the public interest.

54. In Chesterton Global Ltd Underhill LJ stated:

> "… in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment

> (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. … The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case …"

55. He continued (adopting and paraphrasing factors suggested by counsel for the respondent in that case) that the following factors would normally be relevant, albeit stressing "a strong note of caution" about giving too great weight to the first factor of the numbers involved:

> "(a) the numbers in the group whose interests the disclosure served … ;
>
> (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
>
> (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
>
> (d) the identity of the alleged wrongdoer …."

56. In this connection, the Tribunal notes several features contained in the claimant's email of 5 November that indicate that, far from being a personal complaint, she believed that she was making a disclosure in the public interest. She stated, for example, that the respondent had failed "to properly consider grievances made by staff as required by the University's Grievance Regulation", that it was a "contractual right of all University staff to be able to raise grievances" and "that grievances are arbitrarily and summarily dismissed", and summarised her position as being

> "I think this is a point of fundamental importance, not just for me but for anyone subject to suspension and disciplinary process. They have a right to challenge that decision and it is not for those making the decision to reject that challenge without proper investigation by someone who is independent and of appropriate seniority. That is the whole purpose of a grievance system."

57. The Tribunal also found persuasive the answers given by the claimant to questions asked of her during the Hearing. It was put to her that she was not suggesting that the respondent never considers grievances from anyone and responded that she was suggesting that HR decide what it would deal with. When asked if she was suggesting that the breach was personal to her, she replied that based on her experience, HR did not follow the procedure with her and therefore potentially would not do for others. She accepted that she did not have any evidence suggesting that the University did not deal with grievances other than that she had

raised two grievances and both had been dismissed, and her disclosure was therefore in the interests of everybody employed by the respondent. “It needed to be investigated if HR did this if they thought a matter was difficult; was this what they commonly do?” Asked how, as a personal matter, it was in the interests of the respondent, she answered, “What if the next person comes along and raises a grievance and HR says that they are not going to consider it because it is personal to you. It potentially impacts upon everyone. It is applicable to everybody.”

58. The Tribunal has considered the claimant’s evidence including her letter of 5 November and oral evidence as summarised above in the context of the guidance it draws from the decision in Chesterton Global Ltd. This includes the potential numbers involved, the important interest of employees in having grievances properly considered, the respondent’s failure to deal with the grievance not being inadvertent and the identity of the respondent. In this latter respect the Tribunal also notes that in that case (albeit subject to the “strong note of caution” referred to above) Underhill LJ recorded counsel’s argument that "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest – though he goes on to say that this should not be taken too far”. The respondent in this case is large and prominent in terms of the size of its relevant community.

59. Finally in this regard, the Tribunal reminds itself that the wording of section 43B is such that it does not need to be satisfied that the disclosure is actually made in the public interest but only that, “in the reasonable belief of the worker making the disclosure [it] is made in the public interest”. That is addressed in Chesterton Global Ltd in which it is stated that 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 ….. All that matters is that his (subjective) belief was (objectively) reasonable.”

60. Stepping back and considering both that guidance and the claimant’s evidence in the round, the Tribunal is satisfied as to this third issue in respect of the protected disclosure complaint that the claimant did reasonably believe that the disclosure that she made was in the public interest.

61. The fourth issue in respect of this complaint is whether the respondent failed to investigate the matters raised in the claimant’s letter. The Tribunal finds that there was such a failure as was conceded in Ms Sewel’s evidence.

62. There remains the fifth issue of whether that failure was a detriment to which the claimant was subjected on the ground that she had made a protected disclosure. That agreed issue contains two distinct elements: first, whether the respondent’s failure to investigate the matters the claimant had raised was a detriment to which she was subjected; secondly, if so, whether that was on the ground that she had made a protected disclosure.

63. That first element was not addressed in the submissions that the respondent’s representative made on its behalf and it is a reasonable inference that it is accepted that if there was such a failure (which the Tribunal has found) that was a detriment.

She did submit, however, that the claimant's complaint fell down on causation: i.e. the second element.

64. The Tribunal accepts that submission with regard to the second element. It is satisfied that the respondent's failure to investigate the claimant's complaint was primarily due to the misunderstandings of Ms Sewel and Ms Campbell that the matters had been resolved and, although they were wrong in that and wrongly failed to investigate the matters that the claimant had raised, the detriment that that caused to the claimant resulted from that misunderstanding and the resultant failing and was not on the ground of her having made a protected disclosure.

65. In summary of this fifth issue in respect of the protected disclosure complaint, therefore, for the above reasons the Tribunal finds that the respondent's failure to deal appropriately with the claimant's whistleblowing complaint did subject her to detriment but it is not satisfied that that was on the ground that she had made a protected disclosure.

66. In summary of its findings in respect of the protected disclosure complaint, the Tribunal is satisfied that the complainant's complaint that she was subjected to detriment by the respondent on the ground that she had made a protected disclosure is not well-founded and is dismissed.

Disability discrimination

The PCP

67. In relation to the first issue in respect of this complaint, the Tribunal accepts, as was conceded by the respondent, that the claimant's suspension/the independent investigation amounted to a PCP.

68. The representatives took the second, third and fourth of the issues together and it is convenient for the Tribunal to do the same. Although it was not directly addressed by either of the representatives, the Tribunal accepts that that PCP put disabled people at a substantial disadvantage in relation a relevant matter in comparison with persons who are not disabled. The respondent knew that the claimant suffered from colitis and, importantly, knew that stress could worsen that condition or at least the symptoms from which she suffered. That much is apparent from the letter from OH to Ms Beatty dated 18 October 2018 in which it is recorded that a consequence of the claimant's suspension is that "it is having a detrimental effect on her health". The letter continues as follows:

> "As you are aware she has a long term history of colitis and she has had an increase in symptoms since her suspension. She also feels it is having a significant effect on her mental health well-being. She is under the care of her GP and I have ensured she has the telephone number of the Education Support Partnership for support.
>
> I would advise to minimise further impact on her health that the investigation is carried out as promptly as possible and she is given an approximate timeline for when actions are expected to take place."

69. The Tribunal notes that that advice builds upon advice contained in an earlier letter from OH to Ms Beatty dated 21 June 2018 (415) in which the claimant's colitis is described as "a long term health condition" for which she has been prescribed appropriate medication and is under regular review, that the "symptoms of colitis increase when she had a flare up" and, in light of information included in the referral related to work issues it was "recommended that a stress risk assessment is carried out as soon as possible. The aim of a stress risk assessment is to identify potential and actual work-related stressors and the control measures required to reduce the risk as far as is reasonably practicable." The OH adviser then answered specific questions including that the claimant's medical condition "can be aggravated by work-related stressors" which, if not properly managed, could "result in poor health and well-being". There was no dispute between the parties that a stress risk assessment had not been carried out.

70. In light of the above, the Tribunal is satisfied that at the material time the respondent knew that the claimant suffered from the physical impairment of colitis and of the effects that could have upon her. It therefore rejects the submission made on behalf of the respondent that it did not/could not reasonably be expected to know that the claimant's disability was likely to put her at the disadvantage and although the respondent knew of the disability, it could not know that the suspension or the invitation to attend the EY meeting could put the claimant to disadvantage.

71. In the circumstances, the Tribunal is satisfied that the PCP did put the claimant at a substantial disadvantage given the colitis, the symptoms, the impact on her health and the effects that had on her day-to-day life and activities; further, that she was placed at that substantial disadvantage in relation to the relevant matter of how the respondent decided and implemented the suspension including the requirement for her to participate in the investigation that was conducted by EY.

Reasonable adjustments

72. That leads to the important fifth and sixth issues in respect of the disability discrimination complaint of whether the respondent failed to make reasonable adjustments and whether those put forward by the claimant would have been steps that it would have been reasonable for the respondent to take to avoid the substantial disadvantage.

73. In this regard the respondent's representative submitted that reasonable adjustment had been and pointed to the proposed suspension review meetings, the claimant being permitted to have trade union representation at the meeting with EY and her being advised of the counselling and support that was available. On the evidence available to it, the Tribunal considers the suspension review meetings to be the norm and the paragraphs in the respondent's letters relating to advice with regard to counselling and support appear to be standard. This is not to say that either of these matters should be disregarded but the Tribunal does not consider that they are adjustments made to address the disadvantage of the claimant. The trade union representation does appear to be specific to her but, given everything else that was occurring in respect of the claimant suspension, her grievances not being acknowledged as such and the insistence that she should meet with EY, the Tribunal

is not satisfied that that representation would have been sufficient to avoid the substantial disadvantage.

74. Addressing the steps contained in issue 6 of this complaint, the Tribunal is satisfied on the evidence before it as follows:

74.1. A meeting with the claimant to discuss potential suspension would have been a reasonable step for the respondent to take as would giving consideration to restricted duties in discussion with the claimant. Each of these elements is addressed above in relation to the Tribunal's findings as to whether there were any alternatives to suspension: first, what it describes as a very practical alternative, at least initially, of asking the claimant for an explanation; secondly, the steps that the Tribunal is satisfied could have been taken to restrict the claimant's access to the respondent's IT systems**.**

74.2. The Tribunal is similarly satisfied that suspension could have been deferred until medical evidence had been obtained from OH. While it is accepted that that would have been an unusual step to take, the Tribunal is not satisfied that between the date of the actual suspension and the date upon which an OH appointment could have been arranged (noting that an appointment did take place during the suspension) alternative measures could not have been put in place, probably with the agreement of the claimant, that would have met the reasons by reference to which the respondent decided that she should be suspended: as above, such measures could have included limiting the claimant's duties, restricting her IT access or even her taking a short period of paid leave.

74.3. It is convenient to consider together the third, fourth and fifth subparagraphs of issue 6 as they overlap. There is no dispute that the process was to be completed as quickly as possible and it might be that the claimant's stance delayed matters somewhat but not significantly so given that EY were able to proceed to complete their report; and in any event, the Tribunal is satisfied that her stance was reasonable in the circumstances notwithstanding the offer of trade union representation and, at a comparatively late stage, the provision of written questions in advance. The claimant was mainly requesting information regarding what she had done wrong, the letter of instruction to EY and their terms of reference, the documents, information and other evidence that had been provided to them and some indication of the issues to be addressed. The Tribunal does not consider that to be unreasonable in all the circumstances, account being taken of the position of the claimant as a disabled person, and does not accept (as was submitted on behalf of the respondent) that the information that the claimant was seeking would have enabled her to tailor her evidence.

74.4. The Tribunal is satisfied that the process ought to have been undertaken with greater transparency than occurred in relation to such as disclosing to the claimant the matters referred to above that she sought in relation to the EY investigation. The Tribunal understands that as the EY investigation was being undertaken independently of the respondent it was not in as strong a position as it would have been with an internal investigation to lay down a timeline but

does not consider that that meant that a timeline could not be provided at all. As the OH adviser in her letter of 18 October advised, the claimant should be given "an approximate timeline for when actions are expected to take place". The Tribunal is satisfied that the words "approximate" and "expected" would have given the respondent any flexibility it needed in this regard.

74.5. The sixth subparagraph of issue 6 is touched upon above. The OH recommendation that a stress risk assessment should be undertaken and the reasons for that were contained in the letter of 21 June 2018 but it seems that that simply did not occur. The Tribunal is satisfied that undertaking such a stress risk assessment would have been a reasonable adjustment factual basis.

Breach of contract

75. As was accepted by the respondent's representative the claimant's contract of employment provides for six months' notice. She was not given any notice of her dismissal.

Summary and conclusion

76. In conclusion, the unanimous judgment of the Tribunal is as follows:

76.1. The claimant's complaint by reference to Section 95(1)(c) of the Employment Rights Act 1996 that she was dismissed by the respondent and, by reference to Section 94 of that Act her dismissal was unfair being contrary to Section 98 of that Act is well-founded.

76.2. The claimant's complaint that, contrary section 47B of the Employment Rights Act 1996, she was subjected to detriment by the respondent on the ground that she had made a protected disclosure is not well-founded and is dismissed.

76.3. The claimant's complaint under section 21 of the Equality Act 2010 that, being a disabled person, the respondent discriminated against her in that it failed to comply with the duty to make reasonable adjustments, which is contained in section 20 of that Act is well-founded

76.4. This case shall now be set down for a hearing on remedy in respect of the claimant's two complaints that have been found to be well-founded.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENTJUDGE
ON 11 May 2020

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