Case Number: 2600009/2018

EMPLOYMENT TRIBUNALS

Claimant: Miss Simone Tett

Respondent: Department for Work and Pensions

Heard at: Nottingham **On:** 6, 9,10 & 12 March 2020

Before: Employment Judge Clark
Mr Ahktar
Mr Hill

Representation
Claimant: In person
Respondent: Mr D Maxwell of Counsel

JUDGMENT

1. The claims of less favourable treatment on the ground the claimant was a part-time worker **fail and are dismissed.**

2. The claims of less favourable treatment on the ground the claimant was a fixed-term employee **fail and are dismissed.**

3. The claims of suffering detriments on the ground that she had made protected disclosures **fail and are dismissed.**

REASONS

1 Introduction

1.1 In this claim, Miss Tett alleges she was subjected to a number of detriments, the cause of action for which arises under three statutory provisions. They are said to arise from Miss Tett's status as a part-time worker, as a fixed-term employee and also on the ground that she had made one or more qualifying protected disclosures. We refer to these collectively as the "proscribed reasons".

1.2 In view of our overall conclusion, we wanted to say at the outset something more about the claim and the way it has been conducted. The claimant has acted in person throughout. The claims are legally and factually complicated.

There are difficult concepts including that of qualifying protected disclosures, comparators, causation and multiple allegations arising from multiple disclosures. Though covering a relatively short timeframe, the evidential landscape is made all the more complex by the fact that the claims take place within a dispute over her employment status, itself a complicated issue, and the application of the statutory status of apprentices. The reasonableness of the claimant's sense of grievance in some of the specific allegations is a matter that is properly challenged by the respondent. Stepping back from the detail, however, it is the case that on occasion the claimant received opinions about her rights from what were reasonably understood by her to be official and reliable sources. Those have reasonably led her to believe a state of affairs about her future employment options that was not correct. That may well explain the sense of grievance she holds.

1.3 Miss Tett has navigated these difficult concepts extremely well. She has faced additional difficulties in doing so caused by her ill health and we have sought to give as much assistance as is proper for her case to be properly put. We have also allowed the time necessary for Miss Tett to pause, regroup and gather her thoughts. It seems to be the case that her ill health has deteriorated since her employment ended but we have nothing before us to pass comment on the causation of that ill health. We are aware that Mr Maxwell, Counsel for the respondent, has also recognised the difficulties the claimant faced and we have noted his professional approach to discharging his own obligations in this context.

2 The Issues

2.1 The issues in the claim are set out in an agreed list of issues which we have adopted and, due to their length, set out in full in the attached annex.

2.2 We have structured our analysis around the 15 alleged detriments as, in many cases, they are said to arise because of more than one, and sometimes all three, of the alleged proscribed reasons.

2.3 There appeared also to be an allegation in respect of deficiencies in providing a statement of written terms of employment. As it is not possible to bring a claim under s.11 of the Employment Rights Act 1996 after employment has ended, this was clarified as going to remedy only, potentially engaging s.38 of the Employment Act 2002.

3 Evidence

3.1 For the Claimant we heard only from Miss Tett.

3.2 For the Respondent we heard from Mr Chris Chopping, a higher executive officer and decision-maker on the claimant's grievance/appeal against dismissal; Ms Karen Smith, the deputy team leader of the team the claimant worked in and Mr Gary Marshall, a grade 7 operations delivery manager who reviewed the claimant's grievance outcome.

3.3 We allowed a supplementary statement to be relied on which had been served by Mrs Smith shortly before the commencement of the hearing. It dealt with a limited number of matters arising from the claimant's evidence in the nature of matters for which permission would have been given for supplementary questions to be asked in chief in any event. Putting it in writing assisted all concerned and meant the claimant was on notice of the evidence the witness would give beforehand.

3.4 All adopted statements on oath or affirmation and were questioned.

3.5 We received a statement made by Ms Rebecca Stafford, the claimant's team leader and line manager for much of the time that she was employed. She did not attend and her evidence was received as hearsay and we gave it only such weight as we deemed appropriate.

3.6 We received a substantial bundle running to almost 900 pages and considered those documents we were taken to.

3.7 Both parties made oral closing submissions supplementing written submissions.

4 Facts

4.1 It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. Our role is to make such findings of fact as are necessary to answer the issues in the claim and to put them in their proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

4.2 The claimant was employed by the respondent between 5 September 2016 and 29 November 2017 when her employment ended by virtue of her resignation giving one week's notice. Had it not ended then, her fixed term appointment was due to end soon after on 29 December 2017.

4.3 Mrs Tett was deliberately not appointed through the usual civil service process sometimes referred to as an "open and fair competition". Her route into the DWP was through an initiative offered to certain unemployed individuals. In July 2016, the claimant was in receipt of job seekers allowance. In August 2016, she was invited to meet with a "work coach" and given the opportunity to participate in a fixed term apprenticeship scheme. This was scheduled to be a 12 month placement (actually 366 days) during which the claimant would be paid, trained and receive work experience. We find the purpose was intended to improve her prospects in the employment market in the future. She was one of about 12 job seekers who were offered this opportunity around the same time.

4.4 The claimant says one of the criteria for engaging in this type of apprenticeship through DWP job centre plus was that it was for "individuals lacking in work experience, qualifications and struggling to find work", deficiencies she says she did not have. Whether that is correct or not, she accepted the offer of a fixed term apprenticeship working full-time hours. We find the relevant full-time

contract to be 37 hours per week although we have noted there is an inconsistency in this between the relevant "employment" documentation and "training" documentation which refers to 37.5 hours. We find this was an error and nothing before us turns on this.

4.5 Despite what the claimant says in her closing submissions, we have no evidential basis for concluding that any concern was raised by the claimant about the full-time hours when the job was offered. For the respondent's part, the option for part-time working seems not to have been overtly considered during the appointment process and it seems all the offers made were for a full-time apprenticeship. There seems to be good reasons for that. We note, during the later discussions exploring the request to reduce hours, those involved had to take into account the training element of the apprenticeship and whether it would extend time for it to be completed. We find this is a relevant consideration and the likely explanation why full-time work was initially offered. Having said that, we know at least two of the apprentices would, in time, have their hours adjusted to part-time and it seems to us that had this been raised at the time of appointment, it is more likely than not that it would have been dealt with in the same positive way that it was in fact subsequently dealt with.

4.6 We find the appointment as an apprentice sought to conform to the requirements for a statutory apprenticeship within the meaning of the Apprenticeship Skills Children and Learning Act 2009 and was in any event part of a Government scheme designed to support young people into work. This was itself part of the "get Britain working" campaign and, latterly, as part of the Government's "Social Mobility" Agenda.

4.7 At the commencement of her employment, the claimant was issued with a letter from a manager called Phil Oakley dated 5 September 2016 and headed "Welcome to Department for Work and Pensions". The offer it contained was signed by the claimant on the same date. She also received a welcome letter setting out information for a new entrant to the DWP. Those documents set out basic information about the terms of the job, including pay, conditions about attendance etc. The appointment was subject to a probation period expiring on 4 March 2017.

4.8 Within a few weeks of starting, on 30 September 2016, the claimant also signed a "Talent Partnership Apprenticeship Learning Agreement". This agreement brought together the two parties to the employment contract with the third limb of the tripartite nature of an apprenticeship. It was signed by the employee, the employer and the training provider. The training provider was Capita Talent Partnership which would later change its name to Knowledgepool.

4.9 We find there was a well-established process for preparing a contract of employment and a statement of main terms of employment for all new starters to the DWP. We find something went wrong in respect of this as although some of the apprentices appointed received such a statement, the claimant and some others did not. That is, until it was chased some months later. We find

the contract we have seen was prepared on or around 25 October 2016. Whether another apprentice's details were used in error, or simply the draughtsman was mistaken, we find the start and finish dates in this contract to be incorrect. Otherwise, we find this accurately reflects the agreement between the parties and complies with the requirements of section 1(1) of the Employment Rights Act 1996.

4.10 The claimant was based at the Annesley office. We find a number of staff at this office worked under a range of different contract patterns and types. Some were full-time, some were part-time. Some were apprentices, some were not. Some were fixed term contracts, some were permanent contracts (in the sense of being of indefinite duration). One of the key protagonists in this case, Ms Stafford, was herself a part time employee.

4.11 In January 2017, DWP announced the proposal to close the Annesley service centre. Consultation started with the affected staff. At this stage, the apprentices were included in the formal consultation process and the claimant met with her manager on 23 February 2017. We find the exact date of the office closure was not yet known and there seemed to be some sense that it could close before the apprenticeships had concluded and we find that explains why the apprentices were included in the process at that initial stage. One of the main purposes for this process was to explore the employee's scope for redeployment. That is, their ability to relocate. The pro-forma records that the claimant was already concerned that the office closure would scupper any prospects of her obtaining permanent employment and in the course of the discussion, the claimant explained how her position as a single parent of a young son meant her mobility options were limited. She explained how she relied on the opening and closing times of commercial childcare providers. It also records her older daughter's ill health and Miss Tett's desire to be able to respond to either child's care needs. Despite this topic of discussion, it did not prompt the claimant to mention part-time working and whilst that was not the purpose of the discussion, it might be thought to have been an opportune moment to raise any desire to change working hours if that was an issue at the time.

4.12 Although the closure was officially in the "proposal" stage, we suspect what was being proposed was the "when" and "how", rather than the "if". We suspect the fact of a closure was rather more certain than that might suggest. The respondent had an established practice for handling office closures which involved temporary staff being employed to keep the services going as the permanent staff were gradually redeployed towards the end of the period before the actual closure. Very soon after the first consultation meetings it must have become clearer that not only would the office remain open until after the apprentices had completed their training, but that they were a valuable pool of temporary staff who could assist with winding down the office. We find, in anticipation of this closure, that on 24 February 2017 the apprentices were offered a contract extension to 29 December 2017. The document seeking

agreement to this offer was headed “Acceptance of Contract Extension” and by her signature, the claimant agreed to the following statement: -

> ***“I formally accept the offer of a contract extension with the Department of Work and Pensions to 29/12/2017.***
>
> ***In accepting this contract extension, I understand that I will retain the terms and conditions of my existing contract”***

4.13 We find the claimant’s subjective belief was that this was an extension to her apprenticeship contract. We find the person making the offer must have had the same subjective belief.

4.14 Mrs Tett’s probationary period concluded successfully on 5 March 2017. The probation review shows she was doing well on her NVQ but had experienced some difficulties in the relationships with some of her fellow apprentices when working for her first team leader, Debbie Browning. She had been critical of other apprentices’ performance and had been isolated by some of them. In order to support her, she had been moved to Lindsay Newsome’s team but she was the only apprentice there and it seems this was not conducive to her apprenticeship. The respondent recognised this and reorganised things so a number of apprentices were brought together under a team led by Beckie Stafford. Miss Tett was assigned to operational delivery work as a social fund call handler dealing with social fund loans, sure start maternity grants and funeral payments. She would remain working in that area until her employment ended. Miss Tett described the move as being very much appreciated and that it was a great team to work in. Mrs Stafford would subsequently be redeployed as part of the office closure and, for the final months of her employment, the claimant then reported to Phil Dawes.

4.15 We find the claimant had not raised any issues about working full-time hours during her first 7 months of employment. That is not to say that she did not find it challenging as a single parent and, on 3 April 2017, the claimant made a request to reduce her apprenticeship working hours. This was sent to the Annesley office manager, Emma Davies, who received her request and we find dealt with it in good faith. Beckie Stafford took the lead on exploring the arrangements. We find she also dealt with the request in good faith and looked into the effect it would have on the academic part of the apprenticeship. One possibility was that this might mean the time it would take to complete it had to be extended and we have seen reference to specific rules which do seem to have this effect when working time is reduced to below 30 hours. However, this seems not to have come to pass. Miss Stafford discovered that the process to change contracted hours was essentially the same as it was for all staff. She located the policy and application form and emailed it to the claimant on 7 April 2017. She sought further support from Capita. The emails we have seen show Capita and the respondent were approaching this request in a positive and constructive manner and this even included exploring the scope for child-care support.

4.16 Despite the prompt and helpful response, the claimant did not initially complete the form and, instead, lodged a formal grievance to Emma Davies dated 10 April 2017. This is said to be a protected disclosure and for that reason we set out the relevant parts in full (as it was written).

> ***Firstly, I would like to make it clear my request to reduce my working hours is not under provisions set out in the employment rights act 1996 as a statutory right to request extra work after working for 26 consecutive weeks with an employer.*** (she then sets out a hyperlink to an ACAS guide on the provision)
>
> ***I am requesting the changes to my working hours due to grievance of maladministration and abuse of power.***
>
> ***At no time have DWP and/or Capita Talent Partnership informed all make the policy clauses about working less hours due to caring responsibilities which applied to me as a lone parent with full residency by court order with a young son clearly publicised.***
>
> ***I should not have been made to suffer in silence, this is now why given my new understanding after research and with supporting documents I am taking action as quickly as possible.***
>
> ***I'm not work shy I have good work ethics. I do not generally ask to be in this situation and my son didn't ask to be put in breakfast and after school club which is unaffordable to me every day and looked after by other people. Parenting is not just about earning money to look after him, I as a parent and he as my child he needs me there at the end of the day. His welfare is of paramount importance.***
>
> ***And this is only a phase he will grow older and more independent in the future I will be able to work full time but now we need the support and understanding we deserve.***
>
> ***Doing everything myself especially the research I have had to put in these last few weeks has been unfair. My son who has in the past few weeks seen that I as his parent have been upset and stressed. It has also ruined our plans during annual leave days.***

4.17 The grievance continues, setting out the work pattern that the claimant was seeking. This was only 7 days after the initial request and only 3 days after she had been invited to complete the application template. There had been no decision, still less a rejection of her request. In fact, there had been every indication that her request was being considered genuinely. We found the position taken by the claimant to be odd to say the least. Miss Tett denied her response was unreasonable but was unable to explain to us the rationale for such a strenuous complaint in these circumstances. Bizarrely, though her grievance arose from her desire to reduce her hours to part time, it explicitly ruled out an application under part 8A of the Employment Rights Act 1996. Miss Tett's reason for this when questioned was that this was something she felt she was entitled to and so should not have to ask for it.

4.18 Pausing there, we observe how everyone perceives the world around them in a unique way. We all view the world from our own perspective and based on our own experiences and in doing so we can genuinely and honestly hold the belief that our own perceptions give us. Miss Tett has genuinely and honestly

advanced her perception of what had happened during her 14 months of employment. In a number of cases, and this is one, we have not been able to objectively reach the same view of the situation as she, subjectively has. That does not necessarily mean her view is not genuine or honest.

4.19 Returning to the grievance, despite her protestation that she would not make a request under the statutory right, she did then decide to complete the employer's application template.

4.20 At the time of the grievance, Miss Stafford, was continuing with her research and sought information about the claimant's original appointment details and the identity of the original work coach. It seems the purpose of this enquiry formed part of her efforts to resolve the claimant's request for part time working. She requested copies of the adverts for the apprenticeship position.

4.21 On 25 April 17, Emma Davies wrote to the claimant giving her the outcome of her request for a contract change. The request was granted. This was around three weeks after the initial application. The claimant accepts the response was quick but does not accept that giving her what she had asked for within three weeks showed a sympathetic response. The changes took effect from 8 May 2017. The claimant's contracted hours were reduced to 17.57 per week. (this appears to us to be a FTE of around 0.47 and whether full time is 37 or 37.5. We cannot reconcile the later reference to 0.59). In view of the amount of email traffic that was generated across the three parties to the apprenticeship, and the need to ensure the technical requirements for the NVQ and other aspects of the apprenticeship were still met, we find the 3 weeks it took to turn around the application to be particularly prompt.

4.22 The claimant alleges that from the time of her reduction to part time working hours, she was excluded from staff forums when senior managers visited and was not provided with information about them, or the minutes afterwards. She compares herself to a colleague called Charlotte Boyd. We have not been taken to any evidence about Charlotte Boyd's circumstances. We learned that she was also an apprentice who also reduced her full-time hours.

4.23 We find these staff forums are briefings where a small number of junior staff, usually around 10, are selected to meet with a senior manager for a briefing on what is happening in the department. Volunteers are sought and if more than 10 ask to attend, some selection takes place. We find the claimant had attended at least one of these sessions previously.

4.24 We are not satisfied that the claimant has established that she was excluded or even that a request of hers was declined. We are satisfied of two broad points arising from the surrounding evidence and going to the relationships in the workplace. The first is that had she been declined an opportunity to attend in circumstances that she felt were in anyway unfair, that would have been reflected in some contemporaneous reference or complaint. We note there was no complaint or challenge raised by the claimant during her employment. The claimant has demonstrated she is both intelligent and prepared to state her

position, particularly where she feels she or others have suffered an injustice. Having seen the manner and frequency with which the claimant communicated with her managers about other issues in the workplace, the absence of this issue being raised leads us to conclude it was not viewed as a problem by the claimant at the time. Nor do we find there was any request to be considered for a future staff forum which we find is highly relevant as the highest the claimant can put her part time worker claim is that the initial invitation to express an interest might have occurred on a day that she was not scheduled to work.

4.25 The second is that, had the claimant expressed an interest in attending, the team leader and managers would, on balance, have responded in a positive manner as must have been the case when she did in fact attend such a session. Within that, however, is the practical reality that if more than 10 or so employees expressed an interest in attending, someone has to perform a selection and some will be disappointed.

4.26 Not only do we find there are a number of part time workers in this working environment, but Beckie Stafford was herself a part time worker. We are satisfied that there was no sense of annoyance or aggravation held by any of the claimant's managers arising from the fact that the claimant reduced her hours to part time.

4.27 At the end of the financial year 2016/17. The claimant underwent an end of year review with her manager. She did well in that and received what are locally termed "box markings" of 1 or 2. However, the claimant alleges she wasn't paid a performance bonus compared to all other employees who received a box marking of 1 or 2. It seems not to be contentious that there were other permanent AO employees who did receive a performance bonus upon achieving the necessary box marking. We are unable to say when the bonus was actually paid to them other than it would have been in the months following the end of the financial year.

4.28 This end of year review process ordinarily includes a process called a consistency check. The claimant had done some research on the DWP intranet and discovered that apprentices should be treated differently. On 27 April, she emailed Lindsey Newsome, who had been her team leader at the relevant time and was therefore the person best placed to deal with the end of year performance issues, and included an extract from the relevant policy. The extract said,

> ***People Performance***
>
> ***Employees on the DWP AO Apprenticeship programme should not be included in a consistency check meeting for end of year reviews.***

4.29 This caused Miss Newsome to become concerned that she may not have done things correctly and she sought to review her practice. As with the claimant's request for part time working, we find it was also received in good faith and dealt with conscientiously by Miss Newsome. She sought clarification from colleagues and managers, explaining she had held a review meeting with the

claimant, she was already aware that there should not be a consistency check element but she was concerned that, based on what the claimant had told her, she perhaps should not have done anything. She chased this and was told that the apprentices should have a review but the "consistency check" element was replaced with a different mechanism for scoring their performance. In short, they should be included as a developmental tool. In the course of these emails, it came to light that the claimant had attached only part of the paragraph in the guidance she had extracted. The remaining part states:-

> ***Employees on this programme should be allocated a performance rating based on their objectives and behaviour against competencies – which should have been set recognising the nature of their apprenticeship and training requirements and the fact that they are not expected to contribute to the business in the same way as other employees. They should not be included as part of the guided distribution.***

4.30 We accept that there was a general misunderstanding that the apprenticeship employees were not eligible to receive a bonus. The result of the further enquiries was communicated to all the apprentices in an email dated 16 June 2017. The opening paragraph of which credits the claimant with raising the issue in the first place and confirms that apprentices will have an end of year review performance score added to the system which will inform a payment of a performance bonus. In the claimant's case, we find she was paid her performance bonus in August 2017. We reach the finding as to the time of payment purely on the way the claimant has framed her complaint of delay continuing up to July. Once the team managers were aware of the new interpretation for apprentices, we find the eligibility was immediately rectified. We accept that all other AOs who were eligible for a bonus received one, whether they were permanent or employed on a fixed term. We also find the omission, and the later entitlement, applied to all apprenticeships whether full time or part time.

4.31 It is around late April 2017, and whilst discovering the AO Apprentices manager's guide, that the claimant first learned of the term "fair and open recruitment" and its cognates. The significance and consequences of the difference between a "fair and open" competition and a "non-fair and open" bite in the future treatment of the employment within the civil service. An employee working temporarily, or recruited under a specific scheme or for a specific purpose, such as the apprentices gaining their work experience and qualification, is not eligible for appointment to a permanent post without first going through a fair and open selection process. This could have particular implications in a redundancy situation where the staff affected hope to be redeployed into other permanent posts without having to go through the usual competitive process. In this case, we find the apprentices at the Annesley office were not eligible for redeployment. It seems to us that part of the reason for that state of affairs is that the fixed term contract that underpinned each apprenticeship was planned to end before the closure would eventually take effect. Therefore, so far as the apprentices were concerned, they were not at risk of losing any period of the employment that they otherwise had by virtue of

that contract. We cannot see that the policy and legal framework governing the apprentices and/or the underlying fixed term contract serves to put them in any better position to obtain permanent posts than would have been the case if the office had not closed.

4.32 We need to say something more about the concept of fair and open competition as a basis for selection. It is not just a policy, it originates in section 10 of the Constitutional Reform and Governance Act 2009. That, in turn, is turned into operational guidance in the "Civil Service Commission Recruitment Principles 2015 (April)". Those principles, are restated in various other related policies including the Redeployment Policy and the document discovered by the claimant, the "AO Apprenticeships. A Manager's Guide 2016/17".

4.33 We interpret the effect to give rise to one simple rule. Every appointment to a permanent post must be recruited through a fair and open selection process. However, there are limited exceptions within the recruitment principles. Those principles are set out in Annex A which opens with the following: -

> ***Exceptions, by definition, are exceptional. The law requires that selection for appointment to the Civil Service must be made on merit on the basis of fair competition. The commission may only except appointments from this requirement where it believes this is justified by the needs of the civil service or is necessary to enable the civil service to participate in a government employment initiative.***

4.34 There are ten exceptions defined in the principles. Exception 1 relates to temporary appointments and is strictly limited to business need and in cases where the appointment is for a period of up to 2 years without needing specialist permission. Had the respondent chosen to create short, fixed term posts to cover the closure of the Annesley office, it seems likely they would have been recruited under this exception.

4.35 Exception 2 his headed "support for government employment programmes" and provides so far as is relevant: -

> ***departments may appoint, for up to a maximum of 2 years, individuals who are either eligible for support under government programs to assist the unemployed ….***

4.36 We find it was through this second exception that the claimant and her fellow apprentices were appointed without the need to undergo a selection process based on fair and open competition. The only other relevant exception is found in exception 10 which is headed "conversion to permanency: administrative and industrial grades". It provides, so far as is relevant: -

> ***where departments have made appointments under exception 1 or 2 at administrative and industrial grades, they may make those individuals permanent after 12 months of the original appointment. Decisions on permanency must be on the basis of a fair and merit-based process, where the individuals compete with permanent staff within that department at the same and more junior grades.***

4.37 It can be seen from exception 10 that apprentices could have become permanent employees but to do so they would still have had to undertake a fair

and merit-based (as opposed to open) competitive selection process. It seems to us that the only material difference between a fair and open competitive selection process and what is described in exception 10 may be encapsulated in the difference between what might be called “external” vacancies and “internal” vacancies. In both cases, however, there is a competitive process before selection. No one is simply slotted into a new post under these provisions.

4.38 On 4 May 2017, Miss Tett took steps to explore with HR her “non-fair and open AO apprenticeship” and sought a copy of the contract of apprenticeship. On 8 May 2017, Mr Donnelly provided her with the contract which attached an annex entitled terms and conditions of employment. The document is the one already referred to which was prepared on or around 25 October 2016 but was neither signed nor issued to the claimant. Had it been, it would immediately have come to light that the start and finish dates were incorrect. It made clear that the employment with DWP as an Administrative Officer Apprentice was for a period of 12 months from the date of entry. It identified the “scheduled end date” as 31 August 2017. Aside from this error, the terms specifically state:-

> ***your employment commences on 30 August 2016 and will end, without the need for further notice, when your apprenticeship ends. Extensions may be granted by the Department, at its discretion.***

4.39 It is material to record that Victoria Cureton, a more senior manager at the centre, was the daughter of Karen Smith. Karen Smith was the deputy team leader to Beckie Stafford, the team in which the claimant worked for most of her time. Victoria Cureton left the Annesley office soon after the claimant started. We accept that Victoria Cureton was ultimately responsible for ensuring the contracts of employment were issued to staff within her office although we find it more likely that they were prepared by HR/shared services under the usual system. It is part of the claimant’s case that Victoria Cureton failed to issue those contracts on time, that the failure became known to Karen Smith who, in turn, sought to exact some retribution on the claimant for bringing her daughter’s failings to light. We do not accept there is any evidence to support this and we accept Mrs Smith’s evidence that she had no discussions with her daughter about her day-to-day work or responsibilities. We are satisfied that, in any event, the delay in issuing contracts was an oversight and not any conscious act on the part of anyone.

4.40 The claimant alleges that after her reduction in hours, her team leader Beckie Stafford and another colleague, Mark Allsop-Sinclair, referred to her as “.59 of a person”. In response, Miss Stafford explains that staff contracts are referred to by reference to the full-time equivalent (“FTE”) basis and that she herself, working 33.75 hours per week, is shown as “0.91 of an FTE”. She accepts it is entirely possible that as the claimant was a part-time member of staff her FTE ratio may well have been referred to in discussions about workload and resources however any reference to it would not have been in any way

derogatory or unfavourable. We find this is an entirely plausible and the more likely explanation.

4.41 In reaching our findings of fact, we again find it particularly informative that this was not an issue at the time. We have noted a feature of some of the claimant's claims is that they appear to have been reconstructed through the lens of the dissatisfaction that arose at the end of her employment. We find the relationship with her managers was reasonably good and we have seen evidence of her being supported on many occasions. We do not therefore find there was any inappropriate comment made about her ration of full time working that could in anyway be interpreted in a derogatory way. We accept there is a practice of workforce planning which identifies part time workers available hours as a fraction of the full time equivalent. We find the claimant has recalled a discussion about her post and not, as she now recalls it, a detrimental comment about her. We find the fact that the claimant's post was not in fact 0.59 of an FTE to be supportive that this was something the claimant has mistakenly overheard and or mis-remembered.

4.42 On 5 July 2017, the closure of the Annesley Service Centre was confirmed.

4.43 On 18 July 2017 the claimant attended work as planned. She was seen by Emma Davies to be present but the office system, called "pulse", had not shown her as having logged on or as having taken any calls. We find the reason was that she was continuing to deal with a domestic situation concerning her daughter who was in Guatemala, had become ill and she was trying to support her return to the UK. Ms Davies asked Mrs Smith to find out what was wrong. She did and the claimant was given some space to resolve her issues. Later that morning, the claimant was still not yet working. Again, Ms Davies asked Mrs Smith to speak with the claimant. We find Mrs Smith again found the claimant to be visibly upset and not taking calls. They had a deeper conversation about the issues causing the upset being that her daughter was stranded in Guatemala. Mrs Smith does not recall anyone mentioning that the claimant's daughter was ill and, indeed, the claimant's contemporaneous email does not say as much. Mrs Smith's passed on the message from Ms Davies, in what we accept was a matter of fact way, that she had to decide if she wanted to take leave or, if she was remaining at work, she would have to start taking calls from customers. We do not find this to be an unreasonable response. The claimant was shown compassion and was offered the opportunity to take either annual leave at short notice if that was what she wanted or to reschedule her working week. In other words, to swap her working days. There is some difference in recollection of timing between late morning and early afternoon but nothing turns on that.

4.44 Miss Tett alleges Karen Smith spoke to her harshly. She alleges she had been refused permission to leave work until later that day. It seems to us that the way things unfolded during the morning explains why it was not until early afternoon that the claimant eventually went home.

4.45 The claimant reported these matters to Debbie Browning by email. [339]. Within the body of the email, the claimant does set out her complaint in terms of

> ***"in the afternoon I was approached and asked what my intentions were taking calls that people calling about me not being on the phones and if I was going to use annual leave this is unacceptable and uncompassionate in many ways".***

4.46 Despite this limited passage, we cannot say the email is fairly characterised as a complaint. It immediately goes on to say: -

> ***I appreciate that no harm was meant and it was someone trying to do their job***

4.47 Miss Tett does advance this as an example of the culture of the Annesley office as a place that people are not allowed to be off sick. She relies on this as a protected disclosure and so we set out the criticism which says:-

> ***"However, I am concerned and have seen and witnessed that DWP Annesley is a place that feels you can't even be unwell or have an emergency or use the toilet without . (I am sorry I don't even know what word to use)***
>
> ***yet really you are all nice people and human but have us all walking on egg shells constantly***

4.48 This complaint sits within the context of an email expressing particular gratitude and opens with "thank you". It goes through the circumstances the claimant was in, in respect of her daughter returning to the UK, and the support that she had received from colleagues. Its principal purpose was to say that she would not be in work the following day as they had arranged (i.e the swap of working days) as she had to travel to London to collect her daughter from the airport. It ends expressing how much she :-

> ***"appreciated the space she was given that day and that she felt support for experienced [colleagues] and outer (sic) knowledge that what she was doing was the right thing to do"***

4.49 Overall, we find there is little difference between the accounts of Miss Tett and Mrs Smith. Where there is difference, we prefer Miss Smith's recollection of the incident.

4.50 On 24 July, Beckie Stafford sent an email to the claimant and other apprentices concerning what had originally been planned as a potential second consultation one-to-one meeting. We find the need for this meeting was overtaken by the fact that it was now known that the apprenticeships would be ending before the Annesley office finally closed.

4.51 On 25 August 2017, the claimant contacted Ged Donnelly in HR to ask for confirmation of the correct end date of her apprenticeship amongst other questions. We find he replied stating :-

> ***"your apprenticeship ceases on 6 September 2017 and extension to employment in DWP will be as an FTA or temp employee. You should be issued with a new contract to reflect this is your apprenticeship contract has expired"***

4.52 In the same email exchange, he was asked by the claimant whether after she is converted to an FTA would she be able to apply for vacancies internally. He replied: -

> ***"Yes you can if you have successfully completed your apprenticeship qualification, under the exemptions outlined in the civil service recruitment principles document..."***

4.53 We find this to be a reference to exception 10 which we have already found requires there to be an application and a competitive process based on merit. It is clear that Mr Donnelly's answer was subject to the condition that the apprenticeship was not only completed, but *successfully* completed.

4.54 On Thursday 24 August 2017, the claimant alleges as she was leaving work she said "see you next Tuesday" to which the Deputy team leader, Karen Smith replied to her "yeah you cunt, I've always wanted to say that to you, see you next Tuesday, C.U.N.T". She says she walked back and asked Ms Smith "did you just call me a cunt?" in response Beckie Stafford is said to have giggled and said "is that what it means?". This is denied by Miss Smith. In her hearsay evidence, Miss Stafford describes a situation when she overheard a colleague say the word "couldn't" in such a way that caused her to turn in her chair and ask if she'd heard correctly, believing the word that had been used was in fact cunt. If that is the occasion that the claimant is referring to it seems common ground that no complaint was raised.

4.55 Miss Smith denies using the word cunt. She describes something closer to the claimant but says it was her who used the phrase "see you next Tuesday… I have always wanted to say that". She says it was simply because it was ahead of the bank holiday weekend and none of them were expected to be in the office on Monday 28th of August 2017.

4.56 We find there was no complaint raised by anybody. Once again, in the context of this case particularly we find the absence of any contemporary reference to this to be so out of what would be expected of the claimant that it leads us to conclude this exchange did not happen in the way it is now alleged. Clearly there is some reconstruction going on in the course of doing one's best to remember events and we are satisfied that this has been influenced by the negative view of the respondent at the time. We are not satisfied that anything was said in any way which could be regarded as offensive.

4.57 Based on our finding of fact, preferring the account of Mrs Smith, we are satisfied that this was said as a humorous observation in the circumstance of finding herself leaving and not returning until the following Tuesday.

4.58 On 25 August 2017 the claimant was sent two letters from Beckie Stafford. The first letter was an invitation to an "end of contract meeting" for her contract coming to an end on 29 December 2017, the second was headed "notification of fixed contract expiration 29/12/2017."

4.59 On 29 August, and not September as alleged, the claimant raised a complaint on behalf of one of the other apprentices alleging that they had been employed for one day short of the required period and was therefore entitled to one extra day's pay.

4.60 Around the same time, the claimant alleges that she reported that two of her talent coaches had been subject to racial discrimination whilst on site at Annesley Service Centre. We have no further information about this allegation and find it most surprising that we have not been taken to any contemporaneous complaints or reference to matters of such significance. We simply cannot find an evidential basis to accept this as a fact.

4.61 On 30 August 2017 the claimant received an email from Beckie Stafford concerning her earlier enquiry with Ged Donnelly and what she understood to be her ability to apply for internal vacancies. This was described as "exemption 10 - bypassing fair and open policy". The email suggests that Ged initially indicated that it was possible. That may be a misreading of what he was actually saying. Miss Stafford looked into this and responded explaining her interpretation and conclusion that it was not. She said: -

> ***I looked into exception 10, conversion to permanency: administrative and industrial grades.***
>
> ***I have also looked at the procedures for ending fixed term appointments, on the intranet.***
>
> ***You can see extracts from both of these documents, and also links to the full versions, in the email below that I sent to Ged.***
>
> ***Having looked at both guidance's it appears the reason Ged had been able to apply exception 10 in the scenario he had was because his team had permanent vacancies, in the role that the person had been performing.***
>
> ***As you are aware Annesley office is one of the offices which will be closing, and so there will be no permanent vacancies here.***
>
> ***Having discussed this with Ged he is uncertain if the guidance would support you in applying for internal vacancies (those advertised at levels 1 and 3) and bypassing the fair and open policy or not. Therefore, I am going to seek advice from CCAS to clarify. I will update you in due course.***

4.62 We understand the reference to "CCAS" to be to the specialist division of HR that deals with complex cases. The claimant alleges this query was never raised with CCAS. We find it was and are supported in that conclusion by the fact that later that morning Miss Stafford emailed the claimant again to pass on the "SOP reference number" and invited her to chase this while she was on annual leave if she felt the need.

4.63 Respondent's guidance to managers explains the purpose of recruiting apprentices as being:-

> ***to take people who would not otherwise be successful in securing employment, training and educate them; and give them experience of working environment – so that they leave it up to 12 months (366 days) in a much better position to return to***

the labour market to find gainful employment, or to successfully compete at a fair and open competition with the the civil service (our emphasis)

4.64 From 6 September 2017, that is after the conclusion her 366 days as an apprentice, Miss Tett alleges she was excluded from taking the fire register and producing team statistics. We do not accept she was excluded. We find the fire register to be an administrative task with no real developmental benefit. It is a task which has to be done twice a day in order to simply record who was in the building in each team. It is done in the morning, at around 8 am, and again immediately after lunch. We accept that the person doing the morning register had to be in work at 8am to take the register. This was before the claimant's start time. We find this task was the responsibility of the team leader who typically performed it every day. In her absence, her deputy would perform it. It was not routinely delegated beyond that. The only rare exception was if both the team leader and deputy were absent as occurred on one occasion when Charlotte Boyd was asked to do it. We find she was selected because she met two very basic criteria. Firstly, she started work at the necessary time of 8am and secondly because she sat opposite Mrs Smith and had ready access to the necessary register.

4.65 In very similar circumstances, the production the team statistics can only be done by the team leader. We accept it is a process that requires training in the specific piece of software used to do it and which is only accessible to certain staff. We find it was not a task that could be delegated to an administrative officer. We find that set of affairs exists irrespective of the employment status of that individual. To the extent that others had assisted the manager by collating any data on separate spreadsheets, we do not accept that amounts to them "producing the team statistics".

4.66 During September the claimant alleges she was reprimanded for wearing casual clothes even though it was a "dress down" day. She suggests she was treated differently to Sophie Muirhead although we have no evidence of her circumstances. We infer she is a comparator on the basis she was someone who was aware the dress up day had been cancelled and was not "picked on" by the Beckie Stafford as Miss Tett alleged she was.

4.67 We find the facts of this incident are not how the allegation might first have reasonably been understood. That is not to say we found against the claimant, our findings are drawn from the fact that her own account was itself at odds with how the allegation might first have been understood. It is common ground that there was a relaxation of normal office dress as the office moved towards its closure. "Dress down" days became the norm. The exception was if there was to be an official visitor attending then the staff would be told to "dress up" to what had previously been the usual standard of smart office attire. A visit had been planned on this particular day and the "dress up" instruction sent around in an email. Late on the day before, the visit was cancelled and a subsequent dress down email sent around. It seems Beckie Stafford was aware of the first email but not the second. Accordingly, she attended the next

day in her "dressed up", smart attire, when the other staff in the team were wearing dress down attire. The allegation is that this angered Beckie Stafford and she reprimanded the claimant. Our findings do not characterise the response as anger. It seems to us that it is inherently more likely that in this situation of ignorance, Ms Stafford would have been concerned about the claimant's attire when she first encountered her. Ms Stafford's state of mind, albeit mistaken, would obviously have been to question why the claimant was in dress down clothing. We cannot see anything to link this exchange to the claimant's employment status.

4.68 On 19 September 2017 claimant emailed Beckie Stafford chasing her new contract as a FTA and was told that the issuing of contract was done by HR. The claimant was invited to contact HR.

4.69 On 20 September 2017 Beckie Stafford sent a holding email to the claimant concerning the exemption 10 simply confirming that; -

> ***"shared services were unable to answer the query and she would update her again more."***

4.70 The question was answered later that day in the email from Ged Donnelly. He said: -

> ***an apprentice who has successfully completed an apprenticeship would be entitled to apply for an internal vacancy where the vacancy goes through a fair and open selection process. The apprentice cannot apply for a job role where there would be no selection process as they have not been through a fair and open process previously when taking up their apprenticeship.***

4.71 On 26 September 2017 Miss Tett and Beckie Stafford met concerning the impending expiry of the claimant's employment. By letter of the same date Miss Stafford confirmed that the claimant's employment would terminate on 29 December 2017. The claimant was given a right to appeal against the dismissal within 10 working days. The letter made clear that grievances about the decision not to extend or renew the contract would be treated as an appeal. Other issues should be raised under the departmental grievance procedure.

4.72 The claimant refused to sign this letter and raised a grievance. She alleged various less favourable treatment and concerns including the following matters.

a) That whilst she understood there was no legal duty to redeploy her from her apprenticeship contract, from 6 September 2017 she was an employee on a fixed term appointment.

b) That she has been treated less favourably as a fixed-term employee compared to permanent employees in that the employer has failed to give her protection against redundancy or dismissal.

c) That the employer failed to consider its obligations during the centre closure consultation.

d) The employer misled or withheld information to HR and all trade unions and that the employer misled or withheld information to the claimant.

e) That she has missed out on redeployment pooling since 6 September.

f) That she had not been consulted with nor has anyone advised her of the criteria for selection process for redundancies.

4.73 The claimant sought to be included in a redeployment pool with immediate effect with a view to the employer doing everything possible to find her an alternative post.

4.74 The claimant was then in contact with an individual called Freddie Lupson of the Civil Service Commission. It was not made clear to us who he was or what authority he or his organisation had over the situation the claimant was in. On 4 October 2017 he wrote to the claimant stating: -

"it appears from the email that you are allowed to apply for internal roles"

4.75 It is not clear what email he is referring to but we are clear in our findings that what he says is not inconsistent with exception 10. The claimant was in a position to apply for internal vacancies which were being recruited to through an open and merit based process. We have no evidence before us to show that there were any such vacancies available at the material time and, in any event, we find she did not apply for any roles. We suspect that even if such vacancies had existed, the claimant's previous stated restrictions on her mobility would have engaged and the remote setting of the Annesley centre would have meant it unlikely any of the other bases operated by the respondent would have been suitable.

4.76 The appeal process continued and the claimant was invited to a hearing to be chaired by Mr Chopping. The claimant takes issue with the fact that her grievance went straight to an appeal with no prior hearing. It was however clear from the terms of the decision letter that an appeal was the next stage. We find the respondent was reasonably entitled to conclude the grievance was connected with the decision to terminate and to engage with it under its appeal process.

4.77 The appeal took place on Thursday, 12 October 2017 at the Annesley Service Centre. Also present were Danielle Harvey, the claimant's union representative, and Mark Alsop-Sinclair, attending as notetaker. The Claimant was provided with notes of the meeting and invited to make representations as to their accuracy which she did. Various amendments were accepted and the claimant then made further observations on the notes which were not agreed with.

4.78 On 25 October 2017, Mr Chopping wrote to the claimant explaining his decision to dismiss the appeal. He upheld the original decision, but not before getting expert policy interpretation on the service implications of the various policies engaged. In essence. Mr Chopping was persuaded by the fact that the claimant had been appointed to the one-year apprenticeship and then provided with an

extension by way of a fixed term appointment. He concluded the effect was that the extension had been under part 4 of the guidance on recruiting fixed appointments. That was itself justified due to a significant business redesign, i.e. the closure of the Annesley office. He did not consider any of the exemptions raised affected the decision. On this issue of the policy guidance, we find that the way the claimant competently advanced her case before Mr Chopping at the appeal lead him to the conclusion that she was aware of the various guidance on the appointment fixed temporary employees. In particular, the reference to the Q&A guide to the purpose and limitations of such appointments. Consequently, when he drafted his outcome letter he referred to questions 24, 26 and 27 of that guide. He did not attach the guidance he referred to.

4.79 The claimant received the outcome letter on 26 October 2017, a day she was not in work due to annual leave. We find it was both posted in hardcopy to the claimant's workplace and sent to the claimant by email. The fact she was not in work meant she could not log onto the intranet until she next attended the workplace.

4.80 On that day the claimant emailed Ged Donnelly once again seeking a copy of the guidance referred to. He provided the guidance to her and in a later email he stated: -

> ***I just had a conversation with Freddie Lupson for the CS Commission regarding your line manager preventing you from applying for internal vacancies. Freddie confirmed what we have already discussed that under exemption 10 the CS Recruitment Principles Document you are able to apply for any internal or external vacancies across all CS departments.***

4.81 We find the reference to "preventing you from applying" more likely reflects the way questions had been put to Ged Donnelly and not his view that that is what had happened. The only sense in which the claimant had been prevented from applying for internal vacancies was to the extent that she was not "slotted in" to alternative vacancies which had, by then, otherwise been subject to a recruitment freeze in order to provide redeployment opportunities to the permanent members of staff displaced by the closure of the Annesley service centre. That, of course, would not meet exemption 10. Beyond that slotting in process, we find Miss Tett was not prevented from making any application.

4.82 On round 26 October 2013 the claimant's line manager Beckie Stafford was redeployed within the respondent's business. Phil Dawes took over the claimant's line manager.

4.83 On 26 October 2017 the claimant wrote back to Mr Chopping arguing that her grievance was not simply about the decision to dismiss her but also failures in not supporting her to find alternative work and seeking the same opportunities permanent employees were being given to get employment with the civil service.

4.84 On 27 October Mr Chopping responded. He said that the role of the appeal manager and that to that extent he has concluded his role. However, whilst we did not necessarily see any substantive difference between a decision to dismiss and an allegation that steps to avoid a dismissal had not been take, we find he did acknowledge the separate issues raising the claimant's letter and confirmed that "this had been passed on for further guidance", the confirmation of which he was awaiting.

4.85 On 30 October, the claimant informed Emma Davies that she had contacted ACAS. It is alleged that in response and in front of her colleagues in the open office environment, Emma Davies raised her voice and shouted "I will sort you out". At one level, there is no direct evidence from Ms Davies contradicting this. The best evidence the respondent can advance is that from Mrs Smith that she would have heard something shouted and she can recall nothing. There is some force in that and we would accept that this environment was not one where aggressive shouting across the floor would happen such that, if it did, it is likely to be overheard and would very much stand out in any witness's recollection. However, Mrs Smith cannot say that she was always present and therefore the comment could have been said when she was out of the room or distracted.

4.86 We therefore have to ask ourselves whether we can accept the account from Miss Tett. We have been given absolutely no context for this alleged comment. Even if not directly heard, we find it would have become known to anyone working that day and would have had a range of obvious immediate consequences on the day which are also absent in the evidence before us. We infer from the claim that the claimant suggests it was meant in a hostile sense but even if it was said, we find the actual words attribute could also be said in a wholly supportive sense. We therefore find the most persuasive reference point in the evidence is the absence of any supporting evidence. This and a number of other allegations do not feature in any contemporaneous email or complaint or challenge. We find the claimant was active in corresponding with her managers, she had raised a number of issues, some of greater significance than others, and at the time of this allegation she had established contacts with HR and shared services with whom she could and would have been able to raise concerns and complaints. She was aware of the grievance procedures and clearly was fully aware of the intranet and policy framework in her employment. We do not accept that she could have been subject to anything approaching bullying in the workplace and not raise it somewhere. The fact that it does not feature in the contemporaneous documents at all leads us to conclude that it either did not happen at all or, perhaps more likely, that the claimant is mis-recalling an exchange about an innocuous matter in which those words or words to that effect were used. Whatever did happen, we find it was not the aggressive comment it is being portrayed as.

4.87 On 31 October 2017, an email from John Hogg of the training provider, confirmed that the final date of apprenticeship is the date that the apprentices'

file is sampled by the independent quality assessor. He advised her that it was appropriate to "date her paperwork as at today's date" which would then allow him to request her certificates. The reference to "dating paperwork" was because the claimant had to complete the paperwork to bring about the conclusion of her apprenticeship. We find she refused to sign these documents saying she couldn't sign in good faith because she felt the dates it referred to were wrong.

4.88 In October 2017 claimant alleges she was excluded from "walking the floor" to assist colleagues in familiarisation with the new telephone system. We do not accept as a fact that the claimant was excluded from this role. The department had introduced a new telephone system. Guidance was given to all staff, including the claimant, on how to operate it. In addition, it was decided to give extra training to a small number of volunteers so that they could support the rest of the staff by floor walking for a short time on the day the new telephone system was activated, just to make sure the other staff were coping with the new system. There was limited, if any, developmental opportunity contained in this task which was very short lived, concluding within one day. The claimant did not volunteer. She did not challenge the fact that others were undertaking the floor walking although she says that this was because she did not know about it until it happened. However, if it was genuinely considered by her not only to be a detriment, but one she was subjected to on one of the proscribed grounds now relied on, one might have expected it to have been raised on one form or another. The fact that it wasn't is consistent with it not being seen as a detriment at the time and we find accordingly.

4.89 The high point in the claimant's allegation is that the invitation to volunteer for this task may have been made on a day when she was not working. We do not have the evidence to make that finding, nor is there evidence of the make-up of the workforce who were in a position to volunteer. We know that there was a large number of part time staff and that as the year went on, the proportion of fixed term to permanent staff increased as the permanent staff were redeployed. The claimant has not established any basis on which we could conclude the decision to seek volunteers on the day and in the way that was used was in any way influenced by knowledge or belief of her particular circumstances.

4.90 On 30 October, we find the claimant sent an email to knowledge pool asking them "not to certificate the apprenticeship". We accept this request stood out as a most unusual state of affairs which prompted them to make enquiries with her.

4.91 Faced with the end of her fixed term employment, the claimant had set about looking for alternative employment. On 6 November she contacted Gary Marshall as she had the potential offer of new employment, subject to obtaining a satisfactory reference. We find an employment reference request had been made to the respondent about the claimant. We find its policy and practice for all staff was that references were handled by shared services, not the individual

managers and that the content of references was limited to factual matters such as dates of employment and job role. We do not accept other staff had received employment references written by managers directly. It is alleged that shared services were refusing to release the reference. We cannot reach that finding. We do find that the claimant was concerned she was in danger of losing the position because there was delay and we do find that there was what might reasonably be seen as a delay. She chased the reference accordingly. However, we find the request was handled in exactly the same system as would apply to any employee and there is no evidence to demonstrate that what happened with it was in anyway influenced by the fact that it was for the claimant.

4.92 On 7 November 2017, Mr Chopping contacted the claimant again to confirm that the matters she had raised in her grievance and dealt with by him in his appeal hearing was now to be reviewed by Gary Marshall. As a result, he was taking no further action. We find that Mr Marshall set about his task in good faith and genuinely sought to understand the issues raised by the claimant. He undertook a detailed paper review of the claimant's employment history and considered that against the relevant policies. On 16 November 2017, Mr Marshall wrote to the claimant setting out the results of his review. He concluded: -

> ***you accepted a conditional appointment, as a DWP apprentice AO, through non fair and open competition on 5 September 2016. The contract was given to you on 25 October 16, confirming the terms as full-time and ending on 31 August 2017. It further explained that you would work towards level 2 NVQ qualification (GCSE equivalent). On 5 March 2017, it was confirmed that your probationary period had been successfully completed.***
>
> ***Six months before your Apprenticeship concluded, you were offered a contract extension to 29 December 2017, which you accepted. You have since completed your apprenticeship to the original timeline of 366 days, but it seems that you have not supplied the paperwork required, in order for the associated certificate to be issued.***
>
> ***The extension to your contract effectively moved you onto a FTA, extending your employment beyond the period of the initial Apprenticeship.***
>
> ***The business rationale for the short extension was a significant business redesign. Annesley is closing, with an expectation that permanent members of staff will be redeployed to other parts of DWP. This process is now underway and such contract extensions were agreed to cover work temporarily, as we lose staff.***
>
> ***You will recall that the site closure was first proposed in January 2017, at which point you were included in the initial round of interviews (or what 1:1s). Closure was not then finally confirmed until July, by which time your line manager was advised that you would not be included in the next phase of 1:1s. This advice has since been checked and confirmed as correct with our HR practitioners.***
>
> ***Regrettably, this means that you cannot be included in the ongoing redeployment activities. This is not regarded as less favourable treatment.***

4.93 It seems all the advisers and managers that reviewed the claimant's employment history shared the same subjective understanding that the

extension to the end of December 2017 had the effect of changing its nature from apprenticeship to a fixed term contract.

4.94 The claimant commenced a period of sickness absence due to work-related stress with effect from 21 November 2017.

4.95 On 22 November 2017. The claimant emailed Emma Davies, Phil Dawes and HR attaching a letter of resignation. The letter stated, as written in the form it was written: -

> ***Please accept this email as my formal notice of resignation with date of this day 22/11/2017.***
>
> ***I hereby give you one week's notice which as per ACAS help and advise line will start of the day after this date which will be the 23/11/2017, therefore my last working day will be Wednesday, 29 November 2017.***

4.96 The claimant's employment terminated on 29 November 2017.

4.97 On 31 January 2018, a Mr Froud of Knoweldgepool wrote to the claimant on behalf of the Federation for Industry Sector Skills & Standards, the designated certifying authority for England. He enclosed her apprenticeship certificates which record the apprenticeship completion date as being 31 January 2018. It also records the two academic elements awarded by the City and Guilds of London Institute of "Functional Skills Qualification in Mathematics level 1" as being awarded on 8 September 2017, and the "Level 2 Diploma in Customer Service" as being awarded on 19 January 2018.

5 Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("the 2002 Regulations")

5.1 The first issue is whether the 2002 Regulations applied to the claimant at any stage of her employment with the respondent. The significance of this is found in two exceptions.

5.2 Regulation 18 of the 2002 regulations provides

> **18. Government training schemes etc.**
>
> ***(1). These Regulations shall not have effect in relation to a fixed-term employee who is employed on a scheme, designed to provide him with training or work experience for the purpose of assisting him to seek or obtain work, which is either—***
>
> ***(a) provided to him under arrangements made by the Government, or***
>
> ***(b) funded in whole or part by an Institution of the European Community.***

and at regulation 20: -

> **20. Apprentices**
>
> ***20.-These Regulations shall not have effect in relation to employment under a fixed-term contract where the contract is a contract of apprenticeship, an apprenticeship agreement (within the meaning of section 32 of the Apprenticeship, Skills, Children and learning Act 2009) or approved English apprenticeship***

agreement (within the meaning of section A1(3) of the Apprenticeship, Skills, Children and learning Act 2009).

5.3 There is no dispute between the parties that the initial 12 months period amounted to an apprenticeship. To the extent that the claimant challenges the delay in which the written contract and section 1 statement was provided to her so as to mean the agreement fell outside the statutory form of apprenticeship under the 2009 act, we are satisfied it remained a contract of apprenticeship and, in any event, the nature of the employment remained one which fell within the exception contained in regulation 18 being part of a government scheme designed to provide an unemployed person with training or work experience for the purpose of assisting him to seek or obtain work.

5.4 The central issue argued is whether the extension to her contract of employment extended the existing contractual arrangement or created a new, separate contractual relationship of a different nature. There is also a further possibility that even if the extension did extend the existing appointment, it ceased to be "an apprenticeship" at a point in time when the apprenticeship was completed.

5.5 We accept Mr Maxwell's submission that the later subjective opinions of Mr Chopping and Mr Marshall are of no assistance to us in discerning the objective assessment of the parties' intentions at the time the contract was formed or in this case varied by way of extension.

5.6 The fact that the extension was offered and accepted so early in the original 12 months period is highly informative of what was objectively happening. This extension was not made *subject to* completing the apprenticeship and it was done explicitly as an extension to the *existing contract*, the terms of which would not change. Conversely, it is beyond doubt that the trigger for the extension was the potential closure of the Annesley site and the business need to keep it running until its closure, as other permanent staff would be leaving after being redeployed. Nevertheless, it was expressly stated to be on the same terms and no new contractual documentation was issued. Further, if there was an intention to form a new contract to succeed the apprenticeship, there was at that time no way to determine when the "start date" of that new contract would be. It might have been the case, later in the apprenticeship, that any of the apprentices required an "extension" for the purpose of completing the apprenticeship and it was simply too early to know if they would all succeed. If that need had arisen later in the year, it is our view that the parties would not have altered that which they had already agreed to in February.

5.7 For those reasons, we are satisfied that the objective intention (and indeed the subjective understanding) of the parties <u>at the time</u> of the contractual variation was that the existing apprenticeship contract, originally intended to expire on 5 September 2017 in the claimant's case, was extended to expire on 29 December 2017.

5.8 We then go on to consider whether, notwithstanding this principal conclusion, the tripartite apprenticeship actually came to an end before the contract such that all that remained was the bipartite contract of employment. If so, we need to decide whether such a state of affairs means the contract, though continuing, changed its character from a contract of apprenticeship to a mere contract of employment.

5.9 Although the apprenticeship is anticipated to take one year, it may take longer and provision is made for extensions or, alternatively, an employer might say that one year was enough time and end the employment. Conversely, an apprentice may do very well and may even start with some modules of the relevant qualification in hand. It is therefore conceivable that such an individual could complete the qualification part of the apprenticeship contract before the period of employment concluded. Indeed, the claimant seemed to argue that she had finished her "apprenticeship", on 24 August 2017 when her talent coach sessions ended. No one is suggesting this turned the remaining two weeks of the original apprenticeship contract into a different type of contract. In any event, even if there is some legal effect on the underlying contract at the moment the apprenticeship is successfully concluded, the question then becomes when did the claimant successfully conclude the apprenticeship.

5.10 The most compelling evidence we have before us on that question is in the certificates issued by the awarding body in respect of the apprenticeship. Mr Froud of Knoweldgepool dated this at 31 January 2019. On that basis, we cannot conclude that there was a date earlier than the end of the claimant's employment when it could be said she was still employed but had otherwise completed her "apprenticeship". We note even Ged Donnelly repeatedly referred to the "*successful completion*" of the apprenticeship in his emails to the claimant. Even if we were of the view that the essential nature of the contract could change during its fixed term duration, which we are not, we cannot apply that to the facts of this case.

5.11 Of course, the only reason this is in issue in this case is because the 2002 Regulations explicitly exclude certain types of employment. Perhaps unsurprisingly in the context of what the 2002 Regulations are trying to do, the exceptions focus on the underlying fixed term contract by which the apprentice or government trainee is employed. Because we have concluded that there was only one contract, which was extended, and because we are satisfied that that contract was a contract of apprenticeship, or alternatively in any event a government scheme designed to provide the claimant with training or work experience for the purpose of assisting her to seek or obtain work, we are satisfied that the exception is made out throughout. The effect is that we do not have jurisdiction to consider a claim of less favourable treatment under the 2002 Regulations.

5.12 However, even if we are wrong in that conclusion, there are in any event other reasons why such claims would not succeed when the further issues are analysed.

6 Qualifying protected disclosures

6.1 It is an essential element of a claim of detriment for making a protected qualifying disclosure that the worker has made one. Section 43A of the Employment Rights Act 1996 defines a "protected disclosure" as:

> **"[…] a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."**

6.2 Section 43B provides, so far as is material:

> **"(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—**
>
> **[…]**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;"**

6.3 The disclosure must be "of information". (Cavendish Munro Professional Risk Management Limited v Geduld [2010] ICR 325), that is conveying facts as opposed to allegations although a disclosure may also make an allegation and the distinction is not necessarily binary.

6.4 Information disclosed must “tend to show” one of the relevant failures set out in s.43B(1)(a)-(f) of the Act and the nature of the failure must sufficiently identify the relevant failure, albeit it need not be in strict legal language (Fincham v HM Prison Service UKEAT/0991/01) but in some disclosures the nature of the failure may be perfectly obvious from the context.

6.5 The degree of belief or the requirement that the worker has a 'reasonable belief' means that the belief need not be correct but only that the worker held the belief and it was reasonable for her to do so. Accordingly, it can be a qualifying disclosure if the worker reasonably but mistakenly believed that a specified malpractice was occurring: (Darnton v University of Surrey).

6.6 Whether a disclosure made after 25 June 2013 is made in the public interest (as opposed to in good faith) depends on whether a section of the public benefits or has an interest in the matter of the disclosure which can include private contractual matters. (Underwood v Wincanton PLC [2015] UKEAT 0163).

6.7 We then move on to determine whether that protected disclosure is a qualifying protected disclosure. Sections 43C – G provide the persons and circumstances to whom a disclosure may be made so as to render it a protected qualifying disclosure.

6.8 There are 10 disclosures alleged. We consider each against the direction above.

6.9 The first disclosure is that “In about March 2017, the Claimant disclosed by email in her grievance that the Respondent was requiring her to do something that she was not contractually obliged to do”;

6.10 Much of what we say here applies to all of the alleged protected disclosures and that is characterised by the absence of any real development of the alleged disclosure, and in some cases any evidence at all, in the case before us. The grievance in March 2017 was principally about the claimant’s full time working and necessarily conveyed information that she was working full time and wanted to reduce her hours. To that extent she was contractually obliged to work full time and we are not satisfied that can amount to information that she reasonably believed tended to show any of the relevant failures, in particular that her employer was failing to comply with a legal obligation. It may be possible to construe the grievance in the context of a right to apply to vary her contractual terms but we cannot say there is any reasonable basis for a belief at that time that the legal duty to consider such an obligation was not being applied or even taken seriously. We found it was and that the request was promptly granted and any belief to the contrary was not reasonably held. Whilst the claimant rejected the respondent acted sympathetically, she accepted it acted promptly. On any analysis, there can be no reasonable belief that she had at the time of the grievance conveyed facts which tended to show the relevant failure.

6.11 We are equally satisfied that the request to change hours and the grievance that followed was very much personal to the claimant. Whilst others might have had similar or comparable circumstances, there is nothing about this grievance which persuades us it, or any disclosure contained within it, was done in the public interest.

6.12 The second is that in around August or September 2017, the Claimant disclosed to the Government Whistleblowing website that, in terms, two people from ethnic minorities had been treated very poorly.

6.13 We can deal with this swiftly. We simply received no evidence of this allegation and this must fail both in terms of us being satisfied that it was a protected disclosure and also because of the necessary causal link between any disclosure and the alleged detriment. We have nothing before us to suggest any of the individuals alleged to have subjected the claimant to a detriment had any knowledge of any such communication.

6.14 The third is that in or around 1 November 2017, the Claimant disclosed to Gary Marshall that she had been excluded.

6.15 We have not been taken to this particular communication and are unable to assess the facts conveyed. To that extent the claimant has not established that she made a protected qualifying disclosure. The highest that can be said is that part of her grievance generally was that her status meant that she was unable to be redeployed and had been excluded from the redeployment pool. Even if there is within her communication with Gary Marshall facts which tended to

show the relevant failure, we cannot see that this would amount to anything which could be said to be reasonably believed to have been in the public interest.

6.16 The fourth is that on 27 July 2017 the Claimant disclosed to Debbie Browning the content of the conversation with Karen Smith and poor treatment of employees generally.

6.17 We understand that this is referring to the email in fact dated 18 July thanking Debbie Browning for the support in response to her daughter's situation and return to the UK. We have found that within what is otherwise a particularly grateful and complementary email of the employer's response to her situation the claimant did pass comment about the way the office "feels". We take that to be a reference to anecdotal opinion. We are unable to see within that email that there was any information conveyed which tended to show a relevant failure. Recognising that information and allegations are not mutually exclusive, we nonetheless reach a conclusion that the opinion contained in this criticism is firmly at the allegation end of the spectrum as explained in Cavendish Munro. We are not satisfied that the claimant has established she made a protected disclosure.

6.18 The fifth is said to occur in both emails and by telephone from April 2017 to November 2017 disclosed to Ged Donnelly that the apprenticeships were being run poorly and that there was a more appropriate course that could be provided. It is a generalised course of dealings that we simply have not been taken to in the context of where the information is which she is said to have conveyed and which is said to have tended to show the relevant failure. However, taking the allegation as it is put, an accusation that apprenticeships were being run poorly has the feel of an opinion that states an allegation and in itself suggests the opinion was something short of a breach of any legal obligation. Protected disclosures are not made out simply because what is happening could be done better. In the absence of clear indication of the information said to have been conveyed, we are not satisfied that the claimant has established this alleged protected disclosure.

6.19 The sixth is that in October 2017, the claimant disclosed via the Civil Service Commission website and by telephone to Freddy Lupson that she had received "misleading information".

6.20 We have not been taken to anything that shows the alleged disclosure to the civil service website. Not only is this fatal to us being able to determine whether the contents of any such disclosure satisfied the legal test of a protected disclosure, but even taking the allegation at face value we have considerable doubts that receiving misleading information could, in the context for this case, tend to show the necessary relevant failures. Moreover, we have received no evidence capable of establishing a finding that any of the individuals alleged to have subjected the claimant to detriments had any knowledge of what had been passed to this civil service commission website. In

the absence of clear indication of the information said to have been conveyed, we are not satisfied that the claimant has established this alleged protected disclosure.

6.21 The seventh is that in about April 2017 the claimant disclosed by email to Ofsted that there had been a lack of support and communication between the Respondent and Capita, which was having a negative effect;

6.22 Again, we have not been taken to anything that shows the alleged disclosure. There is nothing in the circumstances of the allegation itself which inherently identifies a potential relevant failure. In the absence of clear indication of the information said to have been conveyed, we are not satisfied that the claimant has established this alleged protected disclosure. Nor can we be properly satisfied that Ofsted is a prescribed person for the purpose of receiving the substance of the alleged disclosure.

6.23 As with the other alleged third party disclosures, there is nothing to establish an evidential basis for us finding those alleged to have subjected the claimant to detriments knew of this alleged disclosure.

6.24 The eighth is that in In April 2017 the claimant disclosed via the Whistleblowing website to OfQual that City & Guilds did not know that the Claimant and other apprentices were undertaking City & Guilds qualifications and that exams were not being invigilated correctly;

6.25 We are faced with exactly the same evidential vacuum in our analysis of this alleged disclosure as we were for the seventh and we necessarily reach the same conclusion.

6.26 The ninth is that in February 2017, the claimant disclosed by email to City and Guilds that there was a group of apprentices doing City & Guilds qualifications;

6.27 Again, we are in exactly the same position and reach the same conclusion as we did for the previous allegation.

6.28 The final alleged disclosure is that In November 2017, disclosed by telephone to the ICO that the Claimant's data was being disclosed to others.

6.29 Again, we have no evidential basis for the allegation. We dismiss this allegation for the same reasons as before. Similarly, as with all of allegations 6 to 10, they are said to be to an external body where we also have simply no basis to establish any knowledge on the part of the individuals who are said to have subjected the claimant to detriment on the ground of the disclosure.

7 The Relevant Law on Detriments

7.1 Regulation 5 of the Part-Time Workers (Prevention of less favourable treatment) Regulations 2000 provides, so far as is relevant,

> ***(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—***
>
> ***(a)as regards the terms of his contract; or***

(b)by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if—

(a)the treatment is on the ground that the worker is a part-time worker, and

(b)the treatment is not justified on objective grounds

7.2 The comparison has to be with an actual comparator employed at the same time although a claimant may rely on their own changing circumstances to demonstrate the comparison. The comparison is with how a worker "treats", and not how it "*would treat*" thus excluding the hypothetical comparison.

7.3 In considering a complaint, regulation 8(6) provides

(6) Where a worker presents a complaint under this regulation it is for the employer to identify the ground for the less favourable treatment or detriment.

7.4 The effect is that the claimant must establish she has been treated less favourably against her comparator. Only when we are satisfied there is less favourable treatment do we then go on to consider the reason for it, at which point we turn to the respondent to discharge the burden under regulation 8(6). (*Calder v Secretary of State for Work and Pensions EAT 0512/08*). What is important is that we identify what it was that was operating on the mind of the employer.

7.5 Similarly, regulation 3 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 provides, so far as is relevant: -

1) A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee—

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) Subject to paragraphs (3) and (4), the right conferred by paragraph (1) includes in particular the right of the fixed-term employee in question not to be treated less favourably than the employer treats a comparable permanent employee in relation to—

(a) any period of service qualification relating to any particular condition of service,

(b) the opportunity to receive training, or

(c) the opportunity to secure any permanent position in the establishment.

(3) The right conferred by paragraph (1) applies only if—

(a) the treatment is on the ground that the employee is a fixed-term employee, and

(b) the treatment is not justified on objective grounds.

(4) Paragraph (3)(b) is subject to regulation 4.

> ***(5) In determining whether a fixed-term employee has been treated less favourably than a comparable permanent employee, the pro rata principle shall be applied unless it is inappropriate.***
>
> ***(6) In order to ensure that an employee is able to exercise the right conferred by paragraph (1) as described in paragraph (2)(c) the employee has the right to be informed by his employer of available vacancies in the establishment.***
>
> ***(7) For the purposes of paragraph (6) an employee is "informed by his employer" only if the vacancy is contained in an advertisement which the employee has a reasonable opportunity of reading in the course of his employment or the employee is given reasonable notification of the vacancy in some other way.***

7.6 Regulation 4 defines further the concept of objective justification as

> ***(1) Where a fixed-term employee is treated by his employer less favourably than the employer treats a comparable permanent employee as regards any term of his contract, the treatment in question shall be regarded for the purposes of regulation 3(3)(b) as justified on objective grounds if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment.***

7.7 As with Part-Time workers, the comparison requires a comparison with an actual employee (regulation 3(1)) and the burden of showing the reason for less favourable treatment adopts the same statutory formula (regulation 7(6)).

7.8 The law concerning detriment for making a qualifying protected disclosure is found principally in part IVA of the Employment Rights Act 1996 and the right itself at section 47B of the 1996 Act. It provides: -

> ***(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***

7.9 The burden is set out in a subtly different from in section 48(2) which provides: -

> ***On a complaint under subsection …(1A)…it is for the employer to show the ground on which any act, or deliberate failure to act, was done***.

7.10 However, our conclusions in respect of the alleged disclosures means this burden is not engaged. Nevertheless, we consider each of the detriments and in each case consider whether it is made out as a detriment at all and, where it is, the grounds, or reason why, the alleged detriment occurred.

8 Detriment 1 - "From 6/9/17 onwards - the Respondent not seeing if there was alternative work for the Claimant"

8.1 This is put only as a claim of under the 2002 Regulations. For the reasons already given, it did not apply to this employment and for that reason the claim under the regulations must fail. However, even if the regulations did apply we are satisfied it would still fail for three other reasons.

8.2 Firstly, we are entirely satisfied that the reason why, or "grounds on which" this treatment was done was principally the application of the Civil Service Recruitment Principles applying the requirements in s.10 of the Constitutional

Reform and Governance Act 2009. In other words that all appointment was conducted through fair and open competition coupled with the fact that the claimant's fixed term employment was not at risk as a result of the closure of the office.

8.3 Secondly, the claimant relies on Sophie Muirhead as a comparator. We have been told next to nothing about her circumstances. We understand that she was a permanent employee. It is an essential aspect of a claim under the 2002 regulations that there is an actual comparator on which the alleged less favourable treatment can be assessed. We were told not everyone one of the permanent staff were redeployed. Some did stay to the closure and receive a redundancy/severance payment. We are unable to say what circumstances the comparator was in. Beyond that, a more fundament issue is that an essential and material aspect of the comparator to test the matters in issue must be that she was a permanent employee who had been so employed without having had to go through a fair and open competition. The necessary comparison to establish less favourable treatment has not been satisfied.

8.4 Thirdly, to the extent that it could be argued that the claimant's status as an apprentice, taken on without reference to the fair and open competition principals, could be said to be a proxy for her fixed term contract status, we are satisfied that such an approach is objectively justified. It is a legitimate aim to comply with a statutory obligation. It was pursued in a proportionate way at three levels. One is the way limited exceptions are provided for to allow other legitimate aims to be pursued, such as in the way the claimant was appointed. Secondly, it was proportionate to apply it in a situation where there were other staff at risk of redundancy and where other measures were being introduced to secure as many local internal vacancies as possible for those displaced staff. Thirdly, this was not a situation where the claimant's fixed term was jeopardised by the closure of the office, her employment was due to end before that decision took effect. Beyond those matters of objective justification, nothing happened to prevent the claimant from applying for any internal vacancies where there was a fair and merit based selection process. As we found, she did not make any such applications.

8.5 We would add that it would be odd that the closure of the office and the other staff being at risk of redundancy should be a basis for the claimant improving on the position she would have been in had it not closed. It must be remembered, and she readily accepted, that she had no entitlement to employment beyond the fixed term. That was to continue only to the end of December. Had the office not closed, there is nothing to say she would have obtained employment with the DWP and we are certain that any such permanent employment that might then have existed would not have been obtained without first going through some form of fair and structured process testing the merits of applications. That may not be "open", in the sense of it being restricted to internal candidates only but to that extent, the policy treated the claimant advantageously.

8.6 Had the closure happened early in the apprenticeship, we can see more force in an argument being developed that the claimant might have had legitimate expectation to be redeployed so that the contract could run its course. That, however, did not arise on the facts of the case here.

9 Detriment 2 - "From 6/9/17 the Respondent not allowing the Claimant to apply for internal vacancies"; comparator: Thomas Webster

9.1 This is also a claim based only on her status as a fixed term employee. It must also fail for the same reasons that the regulations are excluded but, in addition, even if we were able to consider this claim it would fail.

9.2 As a matter of fact, we are satisfied that the claimant was permitted to apply for internal vacancies that were being recruited to through a fair and merit based competition. The real issue for the claimant was that there seem not to have been any such vacancies. Her permanent colleagues who were at risk of redundancy were not applying for internal vacancies so much as being redeployed or "slotted in" to vacancies in the locality as a means of avoiding that redundancy. In fact, we heard from Mr Marshall that there were individuals who would have been content to accept voluntary severance packages but for whom the respondent found alternative work. Such individuals were required to take up the alternative employment.

9.3 As to the constituent elements of the statutory claim, we are also not satisfied that the claimant has established the necessary comparator. We know nothing about Thomas Webster and his circumstances.

9.4 Again, the underlying reason for the state of affairs the claimant was in was not her fixed term status per se, but the fact that she had obtained her post without going through a fair and open competition. That is material to the circumstances necessary in any comparative exercise. One can immediately conceive a situation where, had she been appointed to her fixed term role through a fair and open process and had her fixed term not otherwise been ending before the closure took effect, she might have been able to identify a permanent AO with whom to compare herself. That is not the situation we are faced with here.

9.5 In any event, the alleged treatment, at least to the extent that the claimant was not redeployed, is objectively justified for the same reasons as detriment 1.

10 Detriment 3 - "From 6/9/17 excluding the Claimant from staff forums convened to host senior visitors and failing to provide information about them including minutes, including 20/10/17 and 20/11/17"

10.1 This is put as a claim in all three causes of action, alleging it was done on the ground of or because of all and any of the proscribed reasons.

10.2 For reasons that we set out in our findings of fact, we are not satisfied that the alleged detriment is made out.

10.3 The comparator relied on is Charlotte Boyd. We make clear that no comparator is needed for the protected disclosure claim although, of course, pointing to different treatment may be deployed as an evidential tool. We know Ms Boyd was an apprentice, and therefore employed on a fixed term. We also know that she reduced her hours to part time later in her time with the respondent. It follows that to the extent Ms Boyd is a proper comparator, it cannot establish less favourable treatment on those two grounds. Beyond that we do not know anything more about her circumstances and in particular whether she had sought to attend staff a forum and, if so, whether she was selected. In short, the claimant has not established the evidence for the necessary comparison to show less favourable treatment even if the detriment was made out.

11 <u>Detriment 4 - "In October 2017, excluding the Claimant from floor walking to assist colleagues in familiarisation with the new telephone system"</u>

11.1 This is put as a claim in respect of all three causes of action.

11.2 The comparator is David Chapman. Again, we have no evidence to explain his role and why he is said to be an appropriate comparator. That in itself means we have to reject this allegation.

11.3 For the reasons set out in our findings of fact, we do not accept that the claimant was consciously excluded from this role and therefore that the alleged detriment is not made out. For that reason, the claims under all three causes of action fail.

11.4 Additionally, this was one of a number of claims allegedly improperly influenced by Miss Tett's part time status where the high point in the claimant's case is that the possibility that any request for volunteers may (not that that they in fact were) have been made on a day when she was not working. Even if it is possible to view this as being less favourable treatment on the ground of part time working, we are satisfied that such an approach would be objectively justified and proportionate. This was a minimal additional role with minimal developmental benefits, to be undertaken over a few hours and is a situation that would be proportionate to ask those at work on that day. It would equally disadvantage full time staff who were on leave. It would not disadvantage other part time staff who were at work that day. Weighed against the minimal disadvantage that might, at an absolute stretch, be identified in these circumstances, the approach was proportionate and objectively justified.

12 <u>Detriment 5 - "From 6/9/17, excluding the Claimant from taking Fire Register and producing team statistics</u>

12.1 This is also said to apply to all three causes of action.

12.2 The comparator is Charlotte Boyd. We do know that on one occasion she was asked to complete the fire register when both the manager Beckie Stafford and her deputy Karen Smith were not in work.

12.3 We found this was an administrative task with no real developmental benefit. It is a task which has to be done twice a day in order to simply record who was in the building in each team. It was done once in the morning, at around 8 a.m., and once immediately after lunch. We accept that the person doing the morning register had to be in work at 8 a.m. to take the register. We find this task was the responsibility of the team leader or, in her absence, her deputy. It was not routinely delegated. The only exception was as occurred in the case of Charlotte Boyd on the occasion she was selected only because she started work at the necessary time of 8 a.m. and because she sat opposite Mrs Smith and had ready access to the necessary register.

12.4 We also found the claimant was not excluded from this task, as alleged. The reason why she was never asked to do it was twofold. Firstly, on most days there would always be either or both the team leader and the deputy team leader at work. The task was never delegated. Secondly, the claimant did not start work at 8 a.m. and would not have been an obvious choice to instruct her to complete this task.

12.5 Beyond those reasons, we accept this would be viewed as an additional chore and not being asked to do it could not, reasonably, be seen as a detriment.

12.6 The production of team statistics can only be done by the team leader. We accept it is a process that requires training software that is only accessible to certain staff was not a task that could be delegated to an administrative officer. We accept that set of affairs exists irrespective of the employment status of that individual.

12.7 In short, there is no link whatsoever to the claimant's employment status or the fact that she had made any protected disclosures.

13 <u>The sixth is "On 30/10/17, being told "I will sort you out …" by Emma Davies.</u>

13.1 This is also said to be an allegation put on all three causes of action.

13.2 We have found at the highest that some words were said consistent with this but that they were not said in the manner or tone that is now placed on them in the context of this claim. Our conclusion of fact is that there could not reasonably be a detriment.

13.3 Beyond that, we have nothing in the context to establish why such a comment would be in any way motivated or prompted by the claimant's employment status or materially influenced by the fact she may have made a protected qualifying disclosure.

14 <u>The seventh is "During November 2017, delay in providing the Claimant with a reference"</u>

14.1 This is said to occur because of the claimant's fixed term status. As we have found the 2002 Regulations are not engaged in the claimant's case, this claim must fail.

14.2 In any event, we have received no evidence of Donna Duru in the context of her obtaining a reference other than she was a part-time apprentice. We have no evidence from which we could properly reach a conclusion that she requested a reference or that it was provided quicker than that for the claimant. However, it seems to us that as an apprentice, she must also have been a fixed term employee and as such could not be used as a comparator.

14.3 In any event, we are not satisfied that the claimant was treated any differently. The use of shared services may simplify the process for some purposes, it may also create other problems. Delay is potentially one of them. The claimant's experience may well be properly described as a poor one, but it was not because of any of the proscribed reasons.

15 <u>The eighth is "During November 2017, failure of an individual (Emma Davies) to give the Claimant a personal reference"</u>

15.1 We repeat the conclusion we reached for the seventh allegation for the same reasons. The only additional point to add is that a separate comparator was relied on namely, Frances Warner Thomich. We have no evidence about the comparator's circumstances on which to assess the question of less favourable treatment.

16 <u>The ninth is that "Between about April 2017 and July 2017, failure to pay performance bonus"</u>

16.1 This is put as a complaint in respect of part-time working only.

16.2 It cannot be in respect of fixed term status as this occurs at a time when it is common ground the claimant was an excluded category of worker as an apprentice. It seems to us, however, that the apprentice status is at the heart of the reason why there was potentially a delay in paying the performance bonus and that this is the high point of this allegation as a proxy for her fixed term status.

16.3 On our findings, the underlying issue is simply one of the local managers being under the mistaken belief that apprentices (whether full time or part time) were not entitled to the bonus as they were otherwise excluded from the "consistency check" part of the annual review. The claimant championed this point on behalf of herself and all the apprentices. The matter was taken up in good faith and researched. The conclusion was that the apprentices were entitled to it and the claimant received he bonus in or around August 2017.

16.4 As a fact, therefore, we found there was no *<u>failure</u>* to pay the bonus, at best there was *<u>a delay</u>* in paying it. The claimant has not established it would otherwise have been paid in April or May, but we accept that other AO's not on the apprenticeship scheme and otherwise entitled to receive it, did receive it before she did.

16.5 However, this cannot have been because of her part time status as this bonus related to the performance review up to 31 March 2017, at which point she was

full time. It also follows that any full-time apprentice who otherwise met the performance marking of 1, 2 or 3 would not have bene paid it until the claimant challenged the entitlement of apprentices. The reason, or grounds, on which any delay occurred was the mistaken belief that apprentices were not eligible. This allegation fails.

17 <u>The tenth detriment is "In October 2017 , being sent a grievance outcome letter from Chris Chopping referring to information on the intranet"</u>

17.1 This is put as a claim in respect of part time working. In essence, the allegation is that the outcome letter referred in summary to internal guidance available on the intranet. The claimant received the letter on a day that she was not at work and therefore could not access the intranet until she was next in work. We simply do not accept that any reasonable employee would regard this as a detriment and, objectively viewed, it is not reasonable to do so. In any event, it is no more a detriment to part-time staff than it is to full-time staff in the same situation who were to receive such a letter on a weekend or a day of annual leave or a day on which they were out of the office.

17.2 There is no comparator relied on or advanced. This claim must fail.

18 <u>The eleventh alleged detriment is "From 8 May 2017 being addressed directly as ".59 of a person" by Beckie Stafford and Mark Allsopp Sinclair"</u>

18.1 We have found that this was not said, or at least was not said in the context that is suggested in the allegation. In accordance with our findings of fact we are unable to accept it can reasonably be regarded as a detriment.

18.2 To the extent it, or anything of the sort, was said and can be said to be a detriment on the he ground of her part time status, we are satisfied such reference would be objectively justified. It is common place for individual post holders, particularly in public sector settings or other employers who budget staffing against a designated "establishment" of posts to refer to them by reference to their whole, or full, time equivalent. It is part of budget management. Unless there is anything pejorative about the manner in which it is referred to, which we have not found, the reference to such a post holder is proportionate means of dealing with the legitimate objective of workforce planning and managing the available workforce resource.

19 <u>The twelfth is "In September 2017, not being told about a change to the "dress down" policy, resulting in being reprimanded by Beckie Stafford"</u>

19.1 This is said to be a complaint on the ground of Miss Tett being a Part time worker.

19.2 We have no evidence of the circumstances of the alleged comparator, Sophie Muirhead, from which to draw any conclusion on less favourable treatment. We infer she is a comparator on the basis she was aware the dress up day had

been cancelled and was not spoken to by the Beckie Stafford as the claimant alleges she was alleged.

19.3 We do not accept there is evidence of detriment in this allegation. The parties agree there was a relaxation of normal office dress as the office moved towards closure. Dress down became the norm.

19.4 To the extent that the claimant's allegation has now been put in terms that she was reprimanded for dress down clothing on a day which was dress down, this is on the basis that Beckie Stafford was not informed of the change of visitor. There is nothing in the facts that relate in any way to the claimant's employment status. That, we are entirely satisfied, had no bearing on the circumstances of what Beckie Stafford understood and what she said to the claimant on arriving at work. This claim must also fail.

20 <u>The thirteenth is "In July 2017, after (at about 8.20am) the Claimant told Debbie Browning, Lyndsey Newsome, and Emma Davies that her daughter was in Guatemala and needed urgent medical attention, and requested that she could go home"</u>

20.1 This is an allegation of part time working. It is put in terms of 5 discrete allegations:-

a) "Denying that request to go home;"

b) Not advising the Claimant that she could go home until 1.13pm;

c) Not providing a private area for phone calls in relation to the above;

d) Being subjected to unsympathetic questioning; and

e) Between 12pm and 1pm, being told in an allegedly aggressive manner by Karen Smith that "you will have to take annual leave or get on the phones"

20.2 The comparator relied on is Donna Duru. We have no evidence to explain why she is a comparator. To be a proper comparator she must have been a full-time apprentice with an equally pressing desire to leave work in response to which she was treated more favourably. We simply do not have the evidence to support such a conclusion. There is no comparator that establishes the less favourable treatment.

20.3 In any event, there are elements of the factual findings which do not support the claim. The claimant was allowed to go home. The claimant was given space and time in response to her predicament. The questioning of the claimant, such as it was, may have been to the point but the surrounding context cannot support a conclusion it was unsympathetic. The claimant's own email expressing thanks for the way things were dealt with and acknowledging Miss Smith was simply doing her job put the measure of the exchange into context. Nothing about the interactions that day were in anyway whatsoever related to her part time status.

21 The 14th is "On 24/8/17 Karen Smith saying "yeah you're a cunt, I have always wanted to say that to you, see you next Tuesday C.U.N.T";"

21.1 This is said to be a detriment on the ground of either or both Miss Tett's part time worker status and the making of a protected qualifying disclosure. We have dismissed the latter and that cannot stand. In any event, we are not satisfied this claim could succeed.

21.2 In the first instance, based on our findings of fact which prefer the account of Mrs Smith, we are not satisfied that assessed on an objective basis the claimant was subject to a detriment. The only part of the exchange that could be said to take the comments out of the crudely humorous and into the area of detriment was the allegation that Miss Smith stated how she "had always wanted to say this to you". We have not found that to be the case. Looking at the situation in the round, the words said were said as a humorous observation in the circumstance not seeing someone until the following Tuesday. There is nothing to suggest this was in anyway influenced by any alleged disclosure, still less is there any evidence that Mrs Smith knew or believed the claimant had made any disclosures. Similarly, there is nothing to base any conclusion that this was in any way motivated by the fact the claimant was a part-time employee.

22 The fifteenth is related to the previous allegation and is that **"On the same day, Beckie Stafford laughing when the above was reported; and saying "is that what it means" "**

22.1 Again, we are satisfied this cannot objectively or reasonably amount to a detriment. On the basis that the original statement was said in the manner that we have found it to be, the response from Beckie Stafford simply does not amount to a detriment. It is unreasonable to regard it as such and objectively it is not. Moreover, there is nothing which suggests this response was materially influenced by the fact or belief the claimant had made a protected qualifying disclosure, or the claimant's part time worker status.

22.2 It follows from our conclusions that, even if there has been a protected qualifying disclosure, we dismiss the claim of detriment.

23 Summary of Conclusions

23.1 As there are no claims which succeed on their merits, we have not addressed the issue of jurisdiction.

23.2 Similarly, the provisions of s.38 of the Employment Act 2002 do not engage in this case. We are not satisfied however, that there was a failure to provide a written statement of main terms as at the date that the claim was presented.

EMPLOYMENT JUDGE CLARK

Case Number: 2600009/2018

31 May 2020
JUDGMENT SENT TO THE PARTIES ON
8 June 2020
AND ENTERED IN THE REGISTER
FOR SECRETARY OF THE TRIBUNALS

APPENDIX

IN THE MIDLANDS EAST EMPLOYMENT TRIBUNAL (NOTTINGHAM)

CLAIM NO. 2600009/2018

B E T W E E N:-

MISS SIMONE TETT

Claimant

AND

THE DEPARTMENT FOR WORK AND PENSIONS

Respondent

SCHEDULE OF ISSUES

Ss 1 and 4 ERA 1996: Failure to provide particulars of employment

1)

a) Did the Respondent: (1) fail to provide a written statement of particulars within 8 weeks of 5/9/16 in breach of ss. 1 and/or 4 ERA 1996; and (2) when it did, did the statement fail to comply with s. 1 and/or 4?

b) Did the Respondent fail to provide a written statement of particulars within 8 weeks of [the relevant date in] February 2017 in breach of ss. 1 and/or 4 ERA 1996; and (2) when it did, did the statement fail to comply with s. 1 and/or 4?

c) Did the Respondent fail to provide a written statement of particulars within 8 weeks of 6/9/17 and (2) when it did, did the statement fail to comply with s. 1 and/or 4?

Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002

2) (1) **Did the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 apply to the Claimant at any stage or were they excluded by reason of reg. 18;**

(2) If they did apply at any stage, was the Claimant treated less favourably by the Respondent than it treated a comparable permanent employee, on the ground that she was a fixed-term employee, in relation to:

a) From 6/9/17 onwards - the Respondent not seeing if there was alternative work for the Claimant; comparator: Sophie Muirhead

b) From 6/9/17 the Respondent not allowing the Claimant to apply for internal vacancies; comparator: Thomas Webster

c) From 6/9/17 excluding the Claimant from staff forums convened to host senior visitors and failing to provide information about them including minutes, including 20/10/17 and 20/11/17; comparator: Charlotte Boyd;

d) In October 2017, excluding the Claimant from floor walking to assist colleagues in familiarisation with the new telephone system; comparator David Chapman

e) From 6/9/17, excluding the Claimant from taking Fire Register and producing team statistics; comparator Charlotte Boyd

f) On 30/10/17, being told *"I will sort you out …"* by Emma Davies.

g) During November 2017, delay in providing the Claimant with a reference; comparator: Donna Duru;

h) During November 2017, failure of an individual (Emma Davies) to give the Claimant a personal reference; comparator: Donna Duru; Frances Warner Thomich

(3) If so, was it justified on objective grounds?

Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000

3) (1) W**as the Claimant treated less favourably by the Respondent than it treated a comparable full-time worker, on the ground that she was a part-time worker, in relation to:**

a).From April 2017 excluding the Claimant from staff forums convened to host senior visitors and failing to provide information about them including minutes, including 20/10/17 and 20/11/17; comparator: Charlotte Boyd;

b) In October 2017, excluding the Claimant from floor walking to assist colleagues in familiarisation with the new telephone system; comparator David Chapman

c) From 6/9/17, excluding the Claimant from taking Fire Register and producing team statistics; comparator Charlotte Boyd

d) Between about April 2017 and July 2017, failure to pay performance bonus; comparator: [all employees who received box marking 1, 2 or 3]

e) On 30/10/17, being told *"I will sort you out …"* by Emma Davies.

f) In [November 2017], being sent a grievance outcome letter from Chris Chopping referring to information on the intranet; comparator: [C unable to specify comparator]

g) From 8/5/17 being addressed directly as ".59 of a person" by Beckie Stafford and Mark Allsopp Sinclair; comparator: Sophie Muirhead

h) In September 2017, not being told about a change to the "dress down" policy, resulting in being reprimanded by Beckie Stafford; comparator: Sophie Muirhead

i) In July 2017, after (at about 8.20am) the Claimant told Debbie Browning, Lyndsey Newsome, and Emma Davies that her daughter was in Guatemala and needed urgent medical attention, and requested that she could go home (comparator: Donna Duru);

i) Denying that request;

ii) Not advising the Claimant that she could go home until 1.13pm;

iii) Not providing a private area for phone calls in relation to the above;

iv) Being subjected to unsympathetic questioning; and

v) Between 12pm and 1pm, being told in an allegedly aggressive manner by Karen Smith that *"you will have to take annual leave or get on the phones"*

j) On 24/8/17 Karen Smith saying "yeah you're a cunt, I have always wanted to say that to you, see you next Tuesday C.U.N.T";

k) On the same day, Beckie Stafford laughing when the above was reported; and saying "is that what it means"

(2) If so, was it justified on objective grounds?

S. 47B ERA - detriments on ground of protected disclosures

4) (1) Did the Claimant make a qualifying disclosure within the meaning of section 43B(1)(a) ERA 1996 and/or s. 43B(1)(b) in that, with relevant reasonable belief:

a) In about March 2017, the Claimant disclosed by email in her grievance that the Respondent was requiring her to do something that she was not contractually obliged to do;

b) In around August or September 2017, the Claimant disclosed to the Government Whistleblowing website that, in terms, two people from ethnic minorities had been treated very poorly;

c) On around 1/11/17 the Claimant disclosed to Gary Marshall that she had been excluded;

d) On 27/7/17 the Claimant disclosed to Debbie Browning the content of the conversation with Karen Smith and poor treatment of employees generally;

e) By email and by telephone from April 2017 to November 2017 disclosed to Ged Donnelly that the apprenticeships were being run poorly and that there was a more appropriate course that could be provided;

f) In October 2017 disclosed via the Civil Service Commission website and by telephone to Freddy Lupson that she had received "misleading information";

g) In about April 2017 disclosed by email to Ofsted that there had been a lack of support and communication between the Respondent and Capita, which was having a negative effect;

h) In April 2017 disclosed via the Whistleblowing website to Ofqual that City & Guilds did not know that the Claimant and other apprentices were undertaking City & Guilds qualifications and that exams were not being invigilated correctly;

i) In February 2017, disclosed by email to City and Guilds that there was a group of apprentices doing City & Guilds qualifications;

j) In November 2017, disclosed by telephone to the ICO that the Claimant's data was being disclosed to others.

(2) If so, did the Claimant make any such qualifying disclosure to a prescribed person within s. 43C - 43H ERA 1996?

(3) If so, was the Claimant subjected to a detriment or detriments on the ground of any such disclosure(s), in that:

a) From April 2017 excluding the Claimant from staff forums convened to host senior visitors and failing to provide information about them including minutes, including 20/10/17 and 20/11/17;

b) In October 2017, excluding the Claimant from floor walking to assist colleagues in familiarisation with the new telephone system;

c) From 6/9/17, excluding the Claimant from taking Fire Register and producing team statistics;

d) On 30/10/17, being told *"I will sort you out …"* by Emma Davies;

e) From 8/5/17 being addressed directly as ".59 of a person" by Beckie Stafford and Mark Allsopp Sinclair;

f) On 24/8/17 Karen Smith saying "yeah you're a cunt, I have always wanted to say that to you, see you next Tuesday C.U.N.T";

g) On the same day, Beckie Stafford laughing when the above was reported; and saying "is that what it means".

Jurisdiction: time

5) In respect of any claim, does the Tribunal lack jurisdiction because:

(a) It is out of time pursuant to (i) s. 48(3) and/or (4) ERA 1996 alternatively (ii) the ETs (England & Wales) (Extension of Jurisdiction) Order 1994 alternatively (iii) s. 123 EA 2010 alternatively (iv) reg. 7 FT Employees (Less fAvourable Treatment) Regs 2002 alternatively (v) reg 8 the PT Workers (Less Favourable Treatment) Regs 2000; and

(b) In the case of (i) and (ii), the Claimant has not shown that it was not reasonably practicable for her to present her claim on time; and, if it was not, she did not present it within such further time as was reasonable; and

(c) In the case of (iii) to (v), it is not just and equitable to extend time.