mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr Paul Dacey**

Respondent: **The Commissioners of HM Revenue & Customs**

Heard at: **East London Hearing Centre**
On: **12, 13, 17, 18, 21, 22, 26, 27, 28 February 2019 and 1, 4, 5, 7, 8 March and 17 & 18 April 2019**

Before: **Employment Judge G Tobin**

Members: **Mr T Burrows**
Dr J Ukemenam

Representation
Claimant: In person
Respondent: Mr M Humphreys (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

1. **The claimant was not subjected to an underpayment of wages by the respondent, either in breach of his contract of employment or as an unlawful deduction of wages contrary to s13 Employment Rights Act 1996.**

2. **The respondent did not discriminate against the claimant on the grounds of his sex, in breach of s13 Equality Act 2010. This claim is also time-barred pursuant to s123 Equality Act 2010.**

3. **The respondent did not subject the claimant to any detriment on the grounds of any whistleblowing or protected disclosure, in contravention of s43B Employment Rights Act 1996. In addition, the claims identified under Issues 2.10.1, 2.12 and 2.25.1 to 2.25.5 are also time-barred pursuant to s48 Employment Rights Act 1996.**

4. **The respondent did not dismiss the claimant because he had made a protected disclosure, in breach of s103A Employment Rights Act 1996.**

5. The respondent did not unfairly dismiss the claimant, in breach of section s94 Employment Rights Act 1996.

6. The claimant was not harassed by the respondent, pursuant to s26 Equality Act 2010, on the basis of his disability.

7. The respondent did not discriminate against the claimant on the grounds of his disability by failing to make any reasonable adjustments in breach of ss20 and 21 Equality Act 2010.

8. Since the claimant has failed to establish any of his claims against the respondent, proceedings are hereby dismissed.

REASONS

The case

1. The first day of the hearing was taken up with dealing with preliminary matters, resolving applications about the admission and admissibility of documents, finalising the List of Issues and scheduling witnesses.

2. A List of Issues was determined by Employment Judge Russell at the Preliminary Hearing on 7 February 2019. At the substantive hearing, the Employment Judge went through the Agreed List of Issues in considerable detail. Clarification was sought on various points and some amendments were made. The Employment Judge impressed upon the parties at various stages on day 1 that further expansion of the List of Issues would not be accepted once the evidence commenced. This point was reiterated throughout the hearing. The final List of Issues, as amended, was agreed by the parties and the Tribunal and this was as follows. This is the List of Issues applicable at the commencement of the hearing (although the numbers have been amended and the reference to external documents deleted for clarity and ease of reading for this decision).

<u>The List of Issues</u>

I. THE FIRST CLAIM (Case No: 3200644/2017)

The Claim for Unlawful Deduction of Wages

2.1 Was the respondent entitled to stop paying the Criminal Investigation Directorate Attendance Allowance ("CIDAA")[1] to the claimant following the transfer of the claimant's role to a non-investigative Higher Officer post (at the same Civil Service grade) as a Casework Assurance Reviewer in the Independent Quality Assurance team on 26 October 2015? The claimant's case is that his role was Investigation Higher Officer in Fraud Investigation Services in the Operational Assurance team on 26 October 2016.

[1] Because of the length of this judgment, I have inserted a Glossary of Term at the end.

2.2 In particular, following the transfer of the claimant's role to a non-investigative Higher Officer post on 26 October 2015 (or as the Claimant says, Investigation Higher Officer on 26 October 2016):

2.2.1 Did the claimant have an express contractual right to receive the CIDAA; and/or

2.2.2 Did the claimant have an implied contractual right (through custom and practice) to receive the CIDAA?

2.3 Was the total amount of wages paid by the respondent to the claimant from February 2017 to the date of the claim less than the total amount of wages properly payable by the respondent? The claimant's case is that the relevant date is 26 October 2016.

The Direct Discrimination Claim

2.4 For the purposes of this claim, was there a material difference between the circumstances relating to the claimant and Ms Johal, ~~Ms Melody Bernard-Bell,~~ Ms Susan Hall ~~and Ms Charlotte Brown~~, the Claimant's chosen comparators, within the meaning of s13(1) and s23 Equality Act 2010 ("EqA")? The claimant will say that the correct names are Ms Suzanne Hall ~~and Mrs Charlotte Bourne (nee Browne)~~[2].

2.5 Did the Respondent treat the Claimant less favourably than Ms Johal, ~~Ms Melody Bernard-Bell,~~ Ms. Susan Hall ~~and Ms Charlotte Brown~~, (as per paragraph 4.2 of the Claimant's response to the Respondent's request for further information dated 16 October 2017[3]) because of his sex?

The Whistleblowing Detriment Claim: The Statutory Legal Issues

2.6 Taking the statutory provisions in s47B Employment Rights Act 1996 ("ERA"), this gives rise to the following legal issues for the Tribunal to determine:

2.6.1 Did the claimant make a Protected Disclosure(s) within the meaning of s43A to s43H ERA? And

2.6.2 Was the claimant subjected to a detriment by any act or deliberate failure to act by the respondent?

2.6.3 If so, was the act or deliberate failure to act by the respondent done on the ground that the claimant had made a protected disclosure?

The Asserted Protected Disclosures Relied on by the Claimant

2.7 Did the Claimant make each or any of the following asserted disclosures?

[2] As amended on first day of hearing.
[3] See page 42 of the hearing bundle.

2.7.1 On 5 May 2015 to Ms Cottis and Mr Holligan, each employees of the respondent, at a meeting at the respondent's premises in Alexander House, Southend, in respect of:

2.7.1.1 Failures by the Fraud Investigation Service ("FIS") to meet their disclosure obligations under the relevant legislation for criminal investigations.

2.7.1.2 Allegations of person(s) covering up wrongdoing within HMRC including unlawful and unauthorised methods of investigation in breach of the relevant legislation.

2.7.2 On 27 June 2015 to Mr Smith, in writing:

2.7.2.1 Mr. Boothroyd carrying out unlawful and unauthorised covert actions in breach of legislation and operating procedures. HMRC officials acting outside of policy and in breach of statute and deliberately covering up such wrongdoing.

2.7.2.2 Falsification of paperwork, misleading and untruthful comments by HMRC officials at the HMRC National Covert Operational Station, in breach of the relevant legal obligations and the Civil Service Code of Honesty and Integrity.

2.7.2.3 The matters set out in the claimant's Further Particulars of Public Interest Disclosure served on 22 December 2017 ("FPPD"), paragraph 4.1.6 and 4.1.7 and referred to in issue 3.7.1 above.

2.7.3 On 14 December 2015 to Ms Piggott at a meeting at the respondent's premises at Parkway House, Chelmsford:

2.7.3.1 Mr Thomas and Mr Terrell deliberately provided misleading and untruthful information, colluding with and coercing a junior HMRC officer into making misleading and serious corruption allegations, knowing that correct paperwork and authority was in place. Further colluding with Mr Boothroyd to submitting an Independent Police Complaints Commission misconduct referral containing untruthful and misleading information.

2.7.3.2 The matters set out in FPPD paragraphs 4.1.4 to 4.1.7 and referred to in issues 3.7.1 and 3.7.2 above.

2.7.4 On 3 March 2016, to Ms Piggott, in writing:

2.7.4.1 Mr. Thomas, the Claimant's former senior manager, had misled and been untruthful in providing information to the Crown Prosecution Service in respect of two tax fraud cases.

2.7.4.2 The matters set out in FPPD paragraph 4.1.3 to 4.1.7 and referred to in issues 3.7.1 to 3.7.3 above.

Collectively, the matters set out to in FPPD Para. 4.1.2 to 4.1.7 and referred to above defined as the "Asserted Disclosed Information".

2.7.5 On 8 March 2017 to Ms Holden, the Asserted Disclosed Information, with the exception of the matters set out in FPPD paragraph 4.1.3 and referred to in issues 3.7.3 above.

2.7.6 On 14 June 2017 to Ms Bartlett, the Asserted Disclosed Information.

2.7.7 On 21 February 2017 to Mr Madigan, the Asserted Disclosed Information.

2.7.8 On 13 March 2017 to Ms Jeffery, the Asserted Disclosed Information.

2.7.9 In late October 2016 and May 2017 to Mr Margree ~~both orally~~[4] and in writing, that personal property of the Claimant including money, held by the Fraud Investigation Service, had been stolen.

2.8 If so, did such disclosures amount to protected disclosures within the meaning of s43A to s43H ERA?

2.9 In addition to the issues for the Tribunal to decide in respect of asserted protected disclosures, the respondent has made a number of admissions. These are set out at paragraphs 43, 48, 52, 57 and 65 of the Defence.

The Asserted Detriments Relied on by the Claimant

2.10 Did the respondent do each or any of the acts, relied on by the claimant for the purposes of this claim? In particular:

2.10.1 The decision by Ms Jeffrey and Mr Madigan to instigate disciplinary action against the claimant. Such decision being actioned on 27 February 2017.

2.10.2 Each of Mr Madigan, Ms Jeffery, Mr Sanger, Mr Davies, being line managers of the claimant, ignored or failed to properly investigate the concerns raised by the claimant in the period February 2017 up to the lodging of the claimant's claim.

2.10.3 In or about May to June 2017, Mr Sanger, the claimant's manager, failed to submit an Occupational Health counselling[5] referral for work-related stress for which consent had been obtained.

2.10.4 ~~In or about May to June 2017, Mr Sanger, the claimant's manager, withdrew a successful job application by the claimant~~[6].

2.10.5 From April 2017 to the date of the claimant's claim, Mr Sanger, the claimant's manager, failed to set out and agree Performance

[4] Amended on first day of the hearing.
[5] As amended on day 1 of the hearing.
[6] Withdrew by claimant on 4 March 2019.

Management Review objectives for the current reporting year, and any meaningful duties and work for the claimant to carry out.

2.10.6 Throughout the period up to the lodging of the claimant's claim form, there was, on the part of the claimant's managers, a deliberate culture of delay and denial to prevent dealing with matters.

2.10.7 Throughout the period from February 2017 up to the lodging of the claimant's Claim Form, actions by the respondent's Human Resources group to manage the claimant as a specific case, issuing instructions to delay and deny, and preventing dealing with matters to isolate and control aspects of the claimant's employment. The particulars of this general allegation are, and are limited to:

2.10.7.1 The unreasonable delay to the claimant's grievance by HR changing the Grievance Decision Manager 3 times during the process.

2.10.7.2 HR, outside the relevant policy and procedure, contacting the section dealing with the Claimant's pay, and together with Mr Madigan instigating the cessation of the claimant's CIDAA, knowing that it was subject to an ongoing grievance and appeal by the claimant.

2.10.7.3 Ms Taylor interfering with the independent decision-making process, deliberately extending and causing unreasonable delays with disciplinary matters.

2.10.7.4 Failing to fully comply with a Subject Access Request, including purposely withholding material.

2.11 If the Tribunal finds that the respondent did do each or any of the acts relied on by the claimant and referred to above, did this amount to subjecting the claimant to a detriment within the meaning of s47B ERA. In particular:

2.11.1 Did the respondent's act have the consequences to the claimant so alleged; and

2.11.2 Did this amount to a detriment within the meaning of s.47B ERA?

2.12 Did the respondent's decision to cease to pay the CIDAA from October 2015[7] to the claimant amount to a detriment within the meaning of s47B ERA?

2.13 In addition to the issues for the Tribunal to decide in respect of the asserted detriments, the respondent has made a number of admissions. These are set out at paragraphs 77, 88 and 95 of the Defence.

[7] As amended on hearing day 1.

The Issue of Causation

2.14 Was the claimant subject to any detriment by an act of the respondent on the ground that he had made a protected disclosure(s)?

The Issue of Jurisdiction

2.15 To the extent that any of the claimant's claims/allegations fall outside the standard 3 months limitation period, as adjusted for the effect of early conciliation, does the Tribunal have jurisdiction to hear them?

II. THE SECOND CLAIM (Case No: 3200982/2018)

Automatic Unfair Dismissal

2.16 Was the reason or principal reason for the claimant's dismissal, the automatically unfair reason that he had made the following protected disclosures:

2.17 the protected disclosures in the first claim;

2.18 protected disclosures after 12 July 2017 as follows:

2.18.1 the claimant telling his managers, Yeshpal Sanger, Peter Davis[8] and Jill Jeffrey between July 2017 and December 2017, of his previous protected disclosures and complaints;

2.18.2 in management meetings the claimant providing those managers with copies of documents, showing them a copy of a whistleblowing template where the claimant had completed details of all the protected disclosures he had made and telling the managers that the protected disclosures had not been dealt with and had been covered up.

Ordinary Unfair Dismissal

2.19 Was the reason or principal reason for dismissal:

(i) related to the capability or qualifications of the claimant;
(ii) conduct;
(iii) some other substantial reason?

2.20 If the reason for dismissal is a potentially fair one, did the respondent act reasonably in all the circumstances (including its size and administrative resources) in treating it as sufficient reason for dismissal?

2.21 Did the respondent follow a fair procedure in dismissing the claimant, dealing with issues promptly, acting consistently, properly investigating and/or allowing the claimant an opportunity to put his case in full?

[8] Should be Peter Davies, corrected thereafter to avoid confusion.

2.22 Were alternatives steps and potential sanctions to summary dismissal considered reasonably?

2.23 Was the dismissal fair within s98(4) ERA 1996 and within the range of reasonable responses open to the respondent?

Protected Disclosure Detriment

2.24 Did the claimant make the protected disclosures relied on in the automatic unfair dismissal claim?

2.25 Did the respondent subject him to the following detriments:

2.25.1 In September 2017, Peter Davies failed to submit the claimant's occupational health referral for work related stress;

2.25.2 In September 2017, Mr Davies prevented the claimant from progressing with his career by unfairly re-assigning and/or cutting the claimant's workload, preventing him from carrying out any meaningful duties and not allowing him to undertake certain areas of fraud investigation service work;

2.25.3 In September 2017, Mr Davies failing to set and agree PMR objectives for the current reporting year and any meaningful duties or work for the claimant to carry out;

2.25.4 In December 2017, Mr Davies excluding the claimant from the team 2017 Christmas liaison function, so that the claimant had no knowledge of a team Christmas function being arranged until after the event;

2.25.5 In 2017, Mr Davies and other senior managers sending an email questioning the claimant's attendance on site at his former HMRC building where the claimant worked, attempting to get the claimant banned from being on site within this HMRC building;

2.25.6 In January 2018, Peter Davies isolating the claimant from his team by removing the claimant from the team compliment list of employees for the business unit and excluding the claimant from carrying out job functions to which the team was assigned and any operational work;

2.25.7 In January or February 2018, Peter Davies threatening the claimant with disciplinary action for being insubordinate, striking the claimant on the hand with a closed fist, shouting at the claimant and belittling him in a meeting;

2.25.8 In January of February 2018, Peter Davies failing to submit anything in relation to the claimant's performance management review or to put anything on the review;

2.25.9 In January or February 2018, Peter Davies failing to refer the claimant to occupational health;

2.25.10 David McGee[9] ~~and Rob Martin-Corbett~~[10], senior managers conducting a search of the Claimant's personal possessions in January or February 2018, without the Claimant's consent;

2.25.11 From July 2017 to February 2018, HR personnel interfering with independent local management decisions and unreasonably delaying dealing with grievances. HR instructing local management to isolate the claimant, to manage the claimant from afar and preventing compliance with subject access requests which had been submitted;

2.25.12 ~~From October to December 2017 2016~~[11]~~, Jim Madagan failing to comply with proper performance management, not setting out objectives and meaningful duties or proper work for the claimant to carry out and instead, instigating disciplinary action against the claimant in relation to fraud~~[12].

2.26 If so, did the respondent subject the claimant to those detriments because he had done the protected acts?

Disability Discrimination

2.27 The claimant relies on clinical depression in bringing his disability discrimination complaints. He contends that he has been a disabled person since 2013.

~~*Discrimination arising from Disability*~~

~~2.28 Did the respondent do the following acts:~~

~~2.28.1 From July 2017 to January 2018, Peter Davies not referring the claimant to occupational health;~~

~~2.29 Did Mr Davies do this because of something arising in consequence of the claimant's disability; namely that the respondent did not believe that the claimant was suffering from ill health and/or disability, and was exaggerating his illness?~~

~~2.30 If so, was the respondent's action a proportionate means of achieving a legitimate aim?~~[13]

Disability Harassment

2.31 Did the Respondent do the following acts:

[9] Should be David Margree
[10] Complaint against Mr Martin-Corbett withdrawn on 21 February 2019
[11] Amended on day 1
[12] Allegation withdrawn on 8 March 2019
[13] Allegation withdrawn on day 1

2.31.1 From December 2017 to January and/or February 2018, Peter Davies being hostile and intimidating to the claimant by:

2.31.1.1 shouting at the Claimant in a management meeting when the Claimant asked him about occupational health matters and disability. Mr Davies dismissed those matters and struck the Claimant on the hand.

2.31.1.2 In meetings in September 2017, November 2017, December 2017 and January to February 2018 when the claimant raised disability, Mr Davies was hostile and dismissive of the claimant's requests for a disability passport, occupational health referral, adjustments to his workload and job role?

2.32 If so, were those acts unwanted by the claimant?

2.33 Were the acts related to disability?

2.34 Did the acts have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or otherwise offensive environment for the claimant? In deciding whether the acts had that effect, the Employment Tribunal shall take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Reasonable Adjustments

First PCP

2.35 Did the respondent apply the following PCP: Requiring employees to work at the respondent's office?

2.36 Did the PCP put the claimant at the following disadvantage: The claimant has panic attacks and anxiety which interfered with his ability to work in an office?

2.37 Was the following a reasonable adjustment for the respondent to make in order to avoid the substantial disadvantage: Allowing the claimant to work from home when the symptoms of his mental illnesses were acute, to allow the claimant to continue to work, rather than not work at all?

Second PCP

2.38 Did the respondent apply the following PCP: Giving the claimant and other employees unfamiliar and unstructured work?

2.39 Did the PCP put the Claimant at the following substantial disadvantage: The claimant was less able to process such work efficiently because of poor concentration and muddled thinking, caused by his disability.

2.40 Was the following a reasonable adjustment for the respondent to have to make: Giving the claimant familiar, specific work and work priorities, to assist him in carrying out his work successfully.

Third PCP

2.41 Did the respondent apply the following PCP: Requiring employees to hot desk?

2.42 Did the PCP put the claimant at the following disadvantage: Not knowing where the claimant would be working each day exacerbated the symptoms of the claimant's anxiety, panic attacks and mental illness.

2.43 Was the following a reasonable adjustment for the respondent to have to make to avoid the substantial disadvantage: Allowing the claimant to work from home.

Fourth PCP

2.44 Did the respondent apply the following PCP: Requiring the claimant to work in isolation from other members of staff?

Did the PCP put the claimant at the following disadvantage: The PCP exacerbated the claimant's symptoms of anxiety and panic attacks?

2.45 Was the following a reasonable adjustment for the respondent to make to avoid the substantial disadvantage: Allowing the claimant to work with other team members.

Auxiliary Aid

2.46 But for the provision of auxiliary aids, namely a mobile telephone and surface pro tablet computer, would the claimant be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled?

2.47 The claimant contends that he was unable to work at home at times when he was too ill to come into the office if he was not given the auxiliary aids.

2.48 Was it reasonable for the respondent to provide a mobile telephone and surface pro tablet to the claimant, to enable the claimant to work at home, even when he was too ill to work in the office?

Holiday Pay

2.49 The claimant contends that he is owed 120 hours of leave in lieu, which he accumulated in the 2016 to 2018 leave years. He contends that this was a contractual entitlement and it could be carried over from one year to the next. The claimant claims £2,737.00 deducted from a partial payment of holiday pay to him.

4. Following completion of the revised List of Issue, the Employment Judge went through the schedule of proposed witnesses with the parties and identified the issues

relevant to those witnesses[14]. Following an indication from the Tribunal, it was agreed that the oral evidence of 3 of the respondent's witnesses was not necessary and their witness statements were admitted as evidence (with such weight attached to them as the Tribunal would deem appropriate during our deliberations).

The relevant law

Wages

5. Under s13 ERA a "worker" (which is a wider definition than "employee")[15] has the right not to suffer an unauthorised deduction from his pay:

> (1) An employer shall not make a deduction from wages of a worker employed by him unless –
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

6. The non-payment of wages, or the non-payment of holiday pay (in full or in part), could amount to an unauthorised or unlawful deduction of wages.

7. A deduction is defined in s13(3) ERA as follows:

> Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion… the amount of the deficiency shall be treated… as a deduction…

8. An employer may make a deduction to recover overpayments of wages or expenses previously paid by mistake to the worker: s14(1) ERA. Such overpayments are recoverable unless the employer has led the worker to believe the money was his and the worker had changed his position, for example, spends the money, and the overpayment was not the worker's fault: *Klienworth Benson Limited v Lincoln City Council and Others Appeals [1999] 2 AC 349*.

9. The contractual jurisdiction of the Employment Tribunal is governed by s3 Employment Tribunals Act 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623. The Employment Tribunal may hear a contract claim brought by an employee if the claim can be one that a court in England would have jurisdiction to hear and determine, and must arise or be outstanding on the termination of the employment of the employee, who seeks damages for breach of a contract of employment or any other contract connected with employment. Damages for breach of contract is capped at £25,000 in the Employment Tribunal: Article 10 of the aforementioned Order.

Sex discrimination

10. S13(1) EqA precludes direct discrimination:

[14] The issues that the parties determined were relevant to each witness was agreed by the parties and a table was drawn up by the Employment Judge which appears at Appendix 2.
[15] There was no dispute between the parties that the claimant was both a "worker" and an "employee". Nevertheless, I shall refer to the appropriate statutory designation when setting out the law.

> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

11. Under s4 EqA, a protected characteristic includes *sex* (or gender) and, as we shall see later, *disability*.

12. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

13. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination or harassment, and it is then for the employer to prove otherwise.

14. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence:

i. Has the claimant proved facts from which, in the absence of an adequate explanation, the Tribunal could conclude that the respondent had committed unlawful discrimination?

ii. If the claimant satisfies (i), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

The Court of Appeal in *Igen* emphasised the importance of *could* in (i). The claimant is nevertheless required to produce evidence from which the Tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prima facie evidence of a link between less favourable treatment and, say, the difference of race and not merely arising from unrelated events: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

Whistleblowing

15. The Public Interest Disclosure Act 1998 ("PIDA") provided for special protection for "whistle-blowers" in defined circumstances. The purpose of the PIDA is to permit individuals to make certain disclosures about the activities of their employers without suffering any penalty for having done so. The PIDA is convoluted at best, but its aim is to give protection to workers (which is wider than employees) who disclose specified forms of information using the procedures laid out in the Act. That protection is achieved through the insertion of relevant sections into the ERA which focuses on providing protection to workers in cases of action short of dismissal which has been taken against them (as well as dismissal itself) following their disclosure of information.

16. Section 47B(1) ERA states that :

> 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.

17. In order to gain protection from an alleged unlawful detriment, s43B ERA provides that the protected disclosure in question must be a "qualifying disclosure"; that the claimant must have followed the correct procedure on disclosure; and that the claimant must have suffered the detriment as a result of it.

18. Under s43B(1) ERA a qualifying disclosure means one that, in the reasonable belief of the claimant, is made in the public interest and tends to show one or more of the following:

(a) a criminal offence has been committed or is likely to be so;

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

(c) a miscarriage of justice has occurred or is likely to occur;

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

(e) environment has been, is being or is likely to be damaged;

(f) information tending to show any matter falling within any of the above has been, is being or is likely to be deliberately concealed.

In this instance, we are dealing with s43B(1)(a) and s43B(1)(b) and s43B(1)(c) and s43B(1)(f) ERA.

19. There must be a *disclosure* of *information* and not just a mere general allegation or an expression of opinion. A disclosure could convey information as part of an allegation and thereby be covered by the act: see *Cavendish Munro Professional Risks Management Limited v Geduld [2010] ICR 325*.

20. The ERA sets out the ways in which a disclosure may be made in order to gain protection. These are:

a. disclosures to the worker's employer or other responsible person: s43C;

b. disclosures made in the course for obtaining legal advice: s43D;

c. disclosures to a Minister of the Crown: s43E; and

d. disclosures to a "prescribed person": s43F. The list of prescribed persons is set out in the Public Interest Disclosure (Prescribed Persons) Order 1999 and includes people such as the Information Commissioner, the Civil Aviation Authority, the Environmental Agency and the Health and Safety Executive.

Where the worker cannot follow the above procedural lines of communication, disclosures that are made are permitted to other people:

e. in "other cases" which fall within the guidelines laid out in s43G. Essentially these are instances where the worker reasonably believes that the employer will subject him to a detriment if he follows the procedure noted in s43C; or where there is no "prescribed person" and the worker reasonably believes that evidence may be concealed or destroyed; or where disclosures have been made to the relevant people before. The reasonableness of the worker's actions are decided by reference to matters such as the seriousness of the relevant failure, whether the disclosure is made in breach of the duty of confidentiality, etc;

f. in cases of "exceptionally serious" breaches: s43H.

S43C ERA is the relevant provision in this case.

21. Detriment is not defined in the ERA, however, it is a concept that is familiar in discrimination law. A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to him had, in all the circumstances, been to his detriment. An unjustified sense of grievance cannot amount to a detriment, but it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of: see *Lord Hope in Shamoon v Chief Constable of the RUC* [2003] IRLR 285 per Lord Hope at [34] and [35]. Lord Scott held that the test must be considered from the point of view of the Claimant, thus: "…*if the victim's opinion that the treatment was to his or her detriment was a reasonable one to hold, that ought, in my opinion, to suffice*…" *Shamoon* per Lord Scott at [105].

22. In respect of causation, as is clear from the statutory language of s47B(1) ERA, it must be shown that any detriment was caused by some act or deliberate failure to act by the employer. Further, that there is a causal connection between the act relied on and the protected disclosure, specifically that the act was '…*done on the ground that*…' the claimant had made a protected disclosure. Thus, it is not sufficient for a claimant to show that they have made a protected disclosure and suffered a detriment as a result of an act done by the employer. The question at this stage will be what was the *reason* for the respondent's act or deliberate failure to act? In this context the Tribunal's attention is drawn to *Fecitt v NHS Manchester* [2012] IRLR 64, and in particular paragraphs 43-45, which includes "…*s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*…" *Fecitt* per Elais LJ at [45]. It is for a respondent to show the ground on which any act was done: s.48(2) ERA, such that the respondent must prove on the balance of probabilities that the act complained of was not on the ground that the claimant had made a protected disclosure.

23. S17 Enterprise and Regulatory Reform Act 2013 ("ERRA") introduced the requirement that the disclosure must be in the public interest. The standard is the reasonable belief of the worker, which is not a high obstacle. S18 EERA removed the requirement that the disclosure must be made in good faith; although it amended s49 ERA to allow tribunals to reduce compensation by up to 25% where a protected disclosure was not made in good faith. The burden for showing bad faith rests on the respondent: s48(2) ERA. In any event there must be a clear causative link between the detriment or dismissal

alleged and the disclosure before protection is given: see *London Borough of Harrow v Knight [2003] IRLR 140*.

Automatically unfair dismissal

24. Certain reasons for dismissal are deemed automatically unfair. This means that, if a Tribunal finds that the reason for the dismissal was one of these reasons it *must* make a determination that the dismissal was unfair. S103A ERA (as inserted by s2 PIDA) deals with whistleblowing. It states that:

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

Unfair Dismissal

25. The claimant also claims that he was unfairly dismissed in contravention of s94 ERA. S98 ERA sets out how the Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA. If the employer is successful at that first stage, the Tribunal must then determine whether the dismissal was fair under s98(4):

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

26. The s98(4) test can be broken down to two key questions:

a. Did the employer utilise a fair procedure?
b. Did the employer's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?

27. The respondent said that it dismissed the claimant for a conduct-related reason, pursuant to s98(2)(b) ERA. Although the claimant denies the misconduct in question, there is no dispute that this was a conduct-related matter. For misconduct dismissals, the employer needs to show:

a. an honest belief that the employee was guilty of the offence;
b. that there were reasonable grounds for holding that belief; and
c. that these came from a reasonable investigation of the incident(s).

These principles were laid down in *British Home Stores v Burchell [1980] ICR 303.* The principles were initially developed to deal with dismissals involving alleged dishonesty. However, the *Burchell principles* are so relevant that they have been extended to provide for all conduct-related dismissals. Conclusive proof of guilt is not necessary, what is necessary is an honest belief based upon a reasonable investigatory process.

28. Accordingly, so far as the unfair dismissal issue was concerned, the emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the circumstances, the respondent was justified in dismissing the claimant for the reasons given, i.e. in relation to the claimant's purported misconduct.

29. ACAS has issued a Code of Practice under s199 Trade Union and Labour Relations (Consolidation) Act 1992. Although the Code of Practice is not legally binding in itself, Employment Tribunals will adhere closely to the relevant Code when determining whether any disciplinary or dismissal procedure was fair. The ACAS Code of Practice represents a common-sense approach to dealing with disciplinary matters and incorporates principles of natural justice. In operating any disciplinary procedure or process, the employer will be required to:

- Deal with the issues promptly and consistently;
- Establish the facts before taking action;
- Make sure the employee was informed clearly of the allegation;
- Allow the employee to be accompanied to any disciplinary interview or hearing and to state their case;
- Make sure that the disciplinary action is appropriate to the misconduct alleged;
- Provide the employee with an opportunity to appeal the decision.

30. In *West Midlands Cooperative Society Limited v Tipton [1986] ICR 192* the House of Lords determined that the appeal procedure was an integral part of deciding the question of a fair process. Indeed, a properly conducted appeal can reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original hearing.

31. In judging the reasonableness of the employer's decision to dismiss, an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did in fact chose. Consequently, the question for the Tribunal to determine is whether the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden 2000 ICR 1283*. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA* and *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

<u>Harassment</u>

32. The definition of harassment set out in s26 EqA.

> (1) A person (A) harasses another (B). If-
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of-
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effects referred to in subsection (1)(b), each of the following must be taken into account-
>
> (a) the perception of B;
> (b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

33. The concept of *harassment* and *direct discrimination* are mutually exclusive. A complainant may contend that a particular act or acts amount to harassment or to direct discrimination, but not both. So where a complaint of harassment is raised, the complainant cannot also claim direct discrimination. To avoid this unnecessary duplication the definition of "detriment" does not include subjecting a person to harassment in s212(1) EqA.

34. European Union law defines harassment, under the Equal Treatment Directive (Recast) 2006/54 as:

> where unwanted conduct related to the [disability, etc] of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

35. The term "related to…" as opposed to the previous term "on the ground of…" (which is used in other prohibited discriminatory conduct) disapplies causation – *the reason why* issue – when dealing with harassment. As causation is not relevant to harassment, no comparator is needed.

36. If the conduct was intended to have the effect of violating dignity or creating a hostile, etc environment, it will amount to harassment irrespective of the actual effect. If there was no such intent then the conduct may be treated as having the effect of violating dignity or creating a hostile, etc environment only if *it should reasonably be considered as having that effect*. As part of that assessment, the victim's perspective is a relevant circumstance to take into account: s26(4) EqA. It is therefore for the Tribunal to decide, based on the evidence, whether the effect of the conduct was to create a hostile, etc working environment.

<u>Failure to make reasonable adjustment</u>

37. Under ss20-22 and schedule 8 EqA an employer has a duty to make reasonable adjustments in three situations:

i. where a provision, criteria or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers cases on *how* the job, process, etc is done;

ii. where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers the situation of *where* the job is done;

iii. where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers those cases where the provision of an *auxiliary aid* (e.g. special computer software for those with impaired sight) would prevent the employee being disadvantaged.

A failure to comply with any of these requirements renders that omission actionable as discrimination under s21 EqA. This claim is focused upon the first provision identified

above, although there is a claim in respect to the provision of a mobile phone and a tablet computer.

38. It is important to note that the duty to make reasonable adjustments arises only where the disabled person in question is put at a “substantial disadvantage" in relation to a relevant matter in comparison with persons who are not disabled. S212(1) EqA states that "substantial" means more than minor or trivial.

39. Although substantial disadvantage represents a relatively low threshold, the Tribunal will not assume that merely because an employee is disabled, the employer is obliged to make reasonable adjustments. The Tribunal is obliged to consider the nature and extent of the disadvantage in order to ascertain whether the duty applies and then what adjustments would be reasonable, see *Environment Agency v Rowan 2008 ICR 218 EAT*. We should avoid making generalised assumptions about the nature of the disadvantage and failing to correlate the alleged disadvantage with the claimant's particular circumstances.

40. The duty to make adjustments arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The reasonableness of the adjustment is an objective test: see *Smith v Churchills Stairlifts plc 2006 ICR 524 CA*.

41. The duty to make reasonable adjustments arises where a disabled person is placed at a substantial disadvantage "in comparison with persons who are not disabled": s20(3)-(5) EqA. If, as in this case, the identity of the non-disabled comparators are clearly discernible from the provision, criterion or practice (PCP) then there may be no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled persons: see *Fareham College Corporation v Walters 2009 IRLR 991, EAT*.

The witness evidence

42. We (i.e. the Tribunal) heard from the following witnesses:

1. Ms Sally Piggott (HR Specialist Factfinder)

2. Mr Nigel Holligan (Senior HR Caseworker)

3. Mr Jamie Gracie (HR Caseworker)

4. Mr James Madigan (Manager in the Independent Quality Assurance Team and the claimant’s line-manager from 20 October 2015 to 1 April 2017). Mr Madigan was recalled to provide further evidence.

5. Mr Martin Corbett (Branch Assurance Manager Fraud Investigation Service)

6. Mr David Margree (Assistant Director in the Fraud Investigation Service, Strategic Partnerships & Investigation Policy)

7. Ms Claire Holden (Compliance Manager and grievance decision-maker)

8. Ms Ruth Bartlett (Business Unit Head of Risk Intelligence Service and the appeal manager for the grievance appeal, appointed in March 2017)

9. Mr Ryan Grzebalski (HR Casework Manager)

10. Mr Peter Davies (Senior Officer and Manager within the Fraud Investigation Service Operational Assurance Team and claimant's line-manager from 21 August 2017 to 14 February 2018)

11. Mr Ramzan Khaliq (Head of Operational Assurance Team in Fraud Investigation Service)

12. Ms Mary Taylor (HR Caseworker)

13. Mr Neil Callan (grade 6 civil servant in Customer Compliance Group and dismissal officer)

14. Ms Judith Diamond (Assistant Director Large Business London and disciplinary Appeal Officer)

15. Mr Yeshpall Sanger (Senior Officer and Manager in the FIS Technical Team and claimants line manager from 1 April 2017 to 10 August 2017)

43. During the initial case management discussion on day 1, the Employment Judge questioned whether the Tribunal needed to hear from various witnesses. the respondent chose not to call Ms Christine Bell (Caseworker), Mr Ian Heywood (initial discipline Investigation Manager up to May 2017) and Mr Steve Billington (discipline Investigation Manager after Mr Hayward, appointed May 2017) as Mr Humphreys agreed with the Employment Judge that it was not necessary to hear "live" evidence from these witnesses. Although the Tribunal will give less weight to witness evidence that has not been given in person (and has not been submitted to cross-examination) the relevance of such evidence is more determinant than the weight attached to it.

44. The respondent witnesses were clear and straightforward in their evidence. The respondent's key witnesses were the claimant's line-managers, Mr Madigan, Mr Sanger and Mr Davies, the dismissing officer, Mr Callan, and the dismissal appeal officer, Ms Diamond. All these key witnesses gave honest accounts that did not exaggerate. Their accounts were consistent with the contemporaneous documents and also consistent with the evidence of each other and also the HR support officers. All witnesses accepted that the grievance process and the disciplinary process were not handled well. The time it took to deal with matters was inappropriate and there was an absence of robust management to resolve these processes in a timely manner. However, we accept their evidence that the claimant was awkward, prone to circumvent difficult questions and bombarded these witnesses with irrelevant accusations and documents. That the claimant was able to largely run rings around his perceived opponents for so long was largely a reflection on the respondent's officers attempts to pursue their task as fairly and transparently as possible.

45. The Tribunal was obviously aware that the claimant was dismissed by the respondent in January 2015 for, amongst other things, falsifying official documents and misrepresentation. Although the claimant was reinstated on appeal, the findings of gross misconduct stood in respect of the claimant's dishonesty and his lack of integrity. Whilst this was the starting point of the events under consideration, the Tribunal disregarded those

disciplinary findings in its assessment of the claimant's evidence. This was because, as the Tribunal could make primary findings of fact, it was important that we came to our own independent conclusion about the reliability and honesty of the claimant.

46. At the outset of the hearing, the Employment Judge raised the claimant's disability. We note that the claimant ticked "no" to whether he had a disability in his original Claim Form (July 2017) [p19] and "yes" in respect of his second Claim Form "Mental Health Disability so may require assistance for cognitive functioning" [p150]. The Employment Judge asked the claimant whether he needed any adjustments and agreed that the claimant would be given breaks when requested. Where the claimant asked occasionally long or convoluted questions of witnesses, the Employment Judge intervened to breakdown the question or ask the question in a slightly different way so that the claimant's case could be put to the various witnesses. This did not happen often. The Employment Judge emphasised to Mr Humphreys to ask short, single questions (which he did) and the Tribunal said at the outset that we would allow latitude in the time it took for the claimant to answer questions. When questions were to be asked of the claimant, Mr Humphrey provided an introduction about his line of questioning before asking questions and identified appropriate documents from the hearing bundle. The Employment Judge was proactive in explaining events, the law and process and areas of questioning to eliminate all possible confusion. Indeed, for evidence and cross-examination, the Employment Judge asked for bundle references throughout questioning so that the claimant could keep track of the relevance of all issues explored.

47. After the respondent had closed its case and before giving his evidence, the claimant raised his disability and said that the Tribunal should take into account his memory loss when dealing with his version of events. The claimant said that "memory problems" was part of his disability – i.e. clinical depression. The Tribunal is aware that depression is often associated with confusion or forgetfulness and that short-term memory loss can be a feature of more serious depression. The claimant produced:

- a letter dated 6 October 2015, which was over 3 years old and not relevant;
- a statement of fitness for work dated June 2018, i.e. 8 months previously, which states "… experiencing memory loss…"; and
- a letter from his GP dated 1 March 2019 which stated "… he is stressed, has low mood, poor concentration and memory".

48. The respondent objected to the late introduction of this material without any forewarning. The claimant had not sought to adduce medical evidence from a specialist or senior medical practitioner and there was no clear assessment undertaken of the claimant's mental health condition. Mr Humphreys indicated that, had the claimant raised these matters beforehand, then he would have requested a joint expert report to properly report on whether the claimant had a mental health incapacity issue and, if so, to what extent. Mr Humphreys complained that the manner in which the claimant sought to introduce this evidence was underhand and precluded a thorough medical assessment. The Tribunal took regard of the piecemeal evidence introduced on this point and we gave some weight to these documents, although the lack of a thorough and authoritative assessment meant we could only give this evidence limited weight.

49. The claimant gave his evidence in a reasonably fluent manner. Other than the expected difficulties that a self-representing party might have in a long, multi-day case, the claimant did not exhibit any particular difficulties in asking questions in cross-examination or

answering questions when giving his evidence. He did not raise any problems. Following the Employment Judge's various explanations, the Tribunal had no concerns about the claimant's ability to follow events and present his version of events. Our concern was in respect of the reliability of the claimant's evidence.

50. The claimant was familiar with the hearing bundle and despite the volume of documentation (over 12 bundles) the claimant was able to take the Tribunal to most documents with little apparent difficulty.

51. Having heard the totality of the evidence, upon reflection, the Tribunal did not find that the claimant was a reliable witness. A common theme in this case was the hostility that the claimant displayed to his managers and some colleagues. Virtually every management instruction or HR request or any slip or omission was regarded by the claimant as a deliberate and coordinated response by his employers to muzzle or torment him. This is reflected in the large number and far-reaching claims brought against the respondent and the number of people of whom allegations had been made. This, and the claimant's unwillingness to ascribe more legitimate motives in the action of others, undermined the veracity of the claimant's evidence.

52. We were particularly concerned in respect of the claimant's evidence on the following matters.

a. The claimant wrote to Mr Callum on 1 February 2018 quoting an extract from what he described as the relevant collective agreement. First, the document was not a collective agreement, it was the joint trade unions proposal in respect of the CIDAA. However, second and more importantly, the claimant selectively quoted from this "Proposal" to give a misleading account of the ongoing entitlement of an allowance to Mr Callum. This was disingenuous to his employer, but the claimant repeated the point in his witness statement. We do not accept that this was a genuine attempt to give a different interpretation of a claimed entitlement, it was a deliberate attempt to pass off a false narrative.

b. The claimant said in evidence that he had a one-to-one meeting with Mr Madigan on 28 September 2016 and created a meeting note to support his evidence. We do not accept that this meeting occurred.

   The claimant's meeting note of 28 September 2016 was disclosed after the evidence of Mr Madigan. Mr Madigan was recalled to the hearing and he was very clear in his evidence that he did not meet the claimant on 28 September 2016. Mr Madigan referred to various contemporaneous documents – a meeting invite of 30 September 2016, the claimant's reply of 4 October 2016 and Mr Madigan's response of 5 October 2016 – which are not consistent with a one-to-one meeting having taken place on 28 September 2016. On 12 October 2016, Mr Madigan chased the claimant to set up the one-to-one meeting and requested the one-to-one meeting form once more. Again, this is not consistent with a meeting already having taken place on 28 September 2016. The claimant did not refer to a meeting on 28 September 2016 in contemporaneous meeting notes or correspondence and it was not until June 2018 (i.e. around 21 months later) that this was raised during his disciplinary appeal. There were various stages during the disciplinary process when he

could and should have raised his contention that the meeting occurred and disclosed his copy of the meeting notes.

Under the circumstances, the Tribunal rejects the claimant's contention that a meeting occurred on 28 September 2016. We prefer the evidence of Mr Madigan and the email exchanges around this time which are more consistent with his version of events. In respect to the claimant's note of this meeting, we are inevitably drawn to the conclusion that the claimant fabricated this document.

c. Part way through the hearing, the claimant introduced a document called *Reasonable Adjustment Passport* which he said had only recently been disclosed by the respondent. The claimant said that this document was relevant to the issue of reasonable adjustments. The claimant said that he brought this document to a meeting with Mr Madigan on 20 February 2017 and then he (i.e. the claimant) took it away. Mr Humphreys disputed the veracity of this document, but the document appeared highly relevant and it was admitted by the Tribunal on the basis that Mr Madigan was recalled to give evidence in respect of this document only. Mr Madigan denied ever having seen this document nor discussing the contentious issues raised in it with the claimant. It was the claimant's case that he had to constantly chase his managers to do things which he said they failed to do, e.g. OH referrals and his Performance Management Reviews, but his evidence on this point was that he merely showed this important document to Mr Madigan and then took it away without further reference. In addition, it is not credible that the claimant would have signed or initialled this document in 3 places but not sought his manager's signature on the document, which is an essential component of the Reasonable Adjustment Passport. Of significance, there is no email record of the claimant sending Mr Madigan the form (or even the draft form) and there is no contemporaneous email correspondence suggesting the document was completed.

   The document itself is dated 18 August 2016 with the claimant's amendment in respect of agreed adjustments dated 20 February 2017. However, the layout and spacing suggest that the document was completed at one time, which was disputed by the claimant. Furthermore, it looked as if there was no significant difference in the writing or presentation of these supposed later amendments (although we place less reliance on this point because the original document was not available for inspection). Finally, the claimant did make requests for a mobile phone and a tablet (referred to in the document) but despite pressing for these items in various emails and at meetings, the claimant did not make these requests as reasonable adjustments anywhere else.

   Given the above, we conclude that the claimant also forged this document for the Tribunal hearing.

53. We also accept Mr Humphreys' contention that the claimant falsified another document during his disciplinary appeal. The claimant argued that Mary Taylor should not have been involved as a fact-finding investigator in the claimant's disciplinary process because she was supposedly compromised by being involved with the HMRC lawyer

dealing with the claimant's separate Employment Tribunal case. The claimant produced a document which confirmed the scheduling of a meeting for 11 September 2017. The claimant's version of this document showed the meeting subject "Prognosis discussion". Ms Taylor said that the meeting related to a different employee and the claimant's document conflicted with both Ms Taylor's version of the document and the lawyer's copy, which showed "Prognosis discussion – LD". Again, we are drawn to the conclusion that the claimant altered his copy of the document by removing "– LD" from the subject line. We can draw no other conclusion than the claimant changed a document to support his contrary version of events, and that this is dishonest.

54. In our view, our assessment about the veracity of the claimant's evidence was not affected by his claim to have poor memory. When assessing the claimant's version of events and analysing his claims, we placed particular emphasis on the contemporaneous documents rather than the claimant's – or other witness' – recollection of events some months or years later.

Our findings of facts

55. We set out the following findings of fact, which we determined were relevant to finding whether or not the claims and issues identified above have been established. We have not decided upon all of the points of dispute between the parties, merely those that we regard as relevant to determining the central issues of this case as identified above. When determining certain findings of fact, where we consider this appropriate, we have set out why we have made these findings.

56. The claimant commenced working with the respondent on 25 September 1989. He was initially employed as an Assistant Officer in the Investigation Division. From 1996 the claimant was employed as a specialist criminal investigator, i.e. an Investigator and Covert Surveillance Officer within the Fraud Investigation Service Directorate ("FIS"), which was formerly the Criminal Investigation Division.

57. On 26 January 2015 the claimant was dismissed following findings of Gross Misconduct and Serious Misconduct. The reasons were set out a letter from Mr Peter Hollier and in an enclosed deliberations report. Mr Hollier found against the claimant in respect of the allegations of Serious Misconduct. He declined to give the claimant a written warning and categorise him as a "poor performer" and to manage him accordingly, because of the more serious findings of Gross Misconduct. Mr Hollier determined that:

> … [the claimant's] integrity and professionalism as a witness of truth will be constantly at the forefront of disclosure and the usefulness of Mr Dacey to Criminal Investigation Directorate is severely curtailed. The continued employment in our organisation is also impossible to sustain. He has been prepared to lie in his paperwork and lie on the telephone in respect of matters that were directly under his control and were not affected by the influence or direction of any other party…

58. On 22 September 2015, the claimant was reinstated following his successful appeal against dismissal. Ms Tracy Cottis (Appeal Manager) decided to uphold the claimant's appeal against dismissal. She stated:

> …
> The proven misconduct and gross misconduct offenses will instead be subject to a Final Written Warning extant for two years affective from 26 January 2015 until 25 January 2017.
> Should you commit another act of misconduct within this time, you are likely to be dismissed…
> You will be reinstated to your position as Higher Officer, Criminal Investigation with immediate effect without loss of pay….

> Please note that in line with the Guidance at para 13, HR 23010, Discipline: How to decide a penalty, due to the nature of the offence, it maybe inappropriate for you to remain in the same role following conclusion of disciplinary process. This will not be part of the penalty but will be decided by the Director when considering the consequences of the disciplinary penalty.
> Once this process is completed, a taking up duty letter will be sent to you confirming the date and arrangement for your return to work.

59. The respondent's Integrity Committee met on 23 September 2015:

> The concern is whether the individual can perform in the evidence chain. There are clearly honesty issues that have been proven, therefore it will be difficult in future prosecutions when he has to disclose what he has been charged with…
>
> The proven charges indicated that there is still a willingness for the officer [ie the claimant] to push the boundaries and to go outside the rules if the opportunity arises…
>
> TS agreed with everything that has been said in relation to the individual masquerading as another officer and in doing so brings both his integrity and honesty into question.
>
> RL asked if GR or TS was aware of any further cases for consistency purposes. RL stated that he is familiar with one instance where an officer was found guilty of gross misconduct [REDACTED]. The mitigation cited that they were on medication so their decision was not rational. The outcome was that subsequently they were excluded from the evidential chain.
>
> GR confirmed that the decision is clear. It is not right for him to return to the Criminal Justice environment, but the door is still ajar for the future and can then be considered at any time by the Integrity Committee. RL asked about possibilities for working in the civil arena, but TS said that integrity is an important aspect for civil staff.
> RL asked if he can't work in his criminal work area where can he work. GR said that this was an HR decision, although TS said there was no specific governance set-up for this type of instance.
>
> GR said that it is his view that we have done what we have been required to do and the focus is now on HR to take this forward. TS agreed that is indeed the case.
>
> RL said that working in Custom House, London may affect him personally, but we will eventually arrive at the right and proper building for him to work in...

60. The panel determined that the claimant was "unable" to return to his previous role, which was confirmed to the claimant on 12 October 2015 by the Chair of the Integrity Committee, Mr Graham Ranson:

> This means that you cannot continue in a role in HM Revenue & Customs undertaking work activities which can reasonably be anticipated to expose you to involvement in any evidential chain.
> The process of identifying which alternative options are available to you has commenced. In the meantime, I would encourage you to think about what other roles you could and would like to do and communicate them via your Keeping in Touch (KIT) manager.…

61. The claimant did not identify any roles which he was interested in pursuing. On 21 October 2015, Mr Ranson wrote to the claimant to inform him of arrangements to transfer him to the FIS Independent Assurance Team 'INQUAT'. INQUAT was the internal auditing section of FIS. INQUAT officers reviewed current and past work undertaken by both criminal and civil investigators.

62. The claimant was informed that he would join a team of reviewers working for Mr Jim Madigan and that his KIT manager was Mr Adrian Booth. The claimant was told that his transfer was effective from 26 October 2015 as this was the only suitable post that had been identified as being currently available within the FIS.

63. On 23 October 2015 Mr Mike Smith (Support Officer to Ms Cottis) wrote to the claimant to confirm:

> I am advised that your new post in INQUAT is not a post that is paid any allowances.
> However, in light of your managed move, and at management discretion, the allowances that you are currently in receipt of will be paid for a period of 12 months with effect from your effective date of transfer on 26/10/2015.
> After this period these allowances will cease.
> Payments and awards since 2013 are as per your statement.

64. The claimant responded later on 23 October 2015 with a letter informing the respondent that he wishes to raise a grievance and wanted to know how to go about it, upon which Mr Booth explained.

65. As the claimant's new manager, Mr Madigan was responsible for completing the paperwork in respect of the transfer. In his statement, Mr Madigan said that the claimant did not appear on the HR system, and he presumed that was because the claimant's computerised records had been removed following his dismissal. Mr Madigan arranged to reinstate the claimant on the IT system. He queried with Mr Smith the claimant's entitlement to the CIDAA because his statement says, and we accept, that a member of his team would not ordinarily receive this allowance.

66. Mr Madigan and Ms Bell's statements described the CIDAA allowance as compensation – extra pay given to compensate employees for working unsocial hours and overtime. Mr Madigan said in evidence that no one in his team received CIDAA because their work was conducted within normal operating hours. Furthermore, Mr Madigan drew the Tribunal's attention to Mr Smith's email of 3 November 2016 which communicated that the non-payment/non-entitlement of the CIDAA was specifically authorised by Ms Cottis (the reinstating office).

67. Mr Booth arranged for an introductory return to work meeting to take place in the second week of November 2015. The meeting was rearranged for the claimant's convenience and scheduled to take place nearer to the claimant's home. The claimant was due to return to work on 24 November 2015 at Euston Tower; however, the claimant went off sick (appropriately certified) and did not return to work until 18 August 2016 (which was 9 months later).

68. On 9 August 2016, the claimant was assessed by the respondent's occupational health ("OH") provider. The claimant had attributed his absence to work related stress, anxiety and depression. The OH adviser said that the claimant was planning on resuming work and, in her opinion, he was medically fit to do so. The OH adviser recommended a phased return to work with reduced attendance and reduced hours, increasing over 4 to 8 weeks. She recommended training and mentoring and endorsed the respondent's efforts to find the claimant a workplace closer to his home. The OH adviser noted that there were "on-going outstanding issues" (which we take to include the claimant's grievance) and she recommended that this be resolved promptly. The OH adviser also opined that the claimant would benefit from additional counselling and that as the claimant had completed all the counselling sessions available to him through the employee assistance programme and from his GP, therefore, that Mr Madigan *may wish to consider* funding additional counselling from his local budget. The OH adviser said that a member of her team would be in touch to help progress this. However, we accept Mr Madigan's evidence that no follow up contact was made from the OH department.

69. Mr Madigan held a return to work meeting with claimant on 10 August 2016 during which the OH recommendations were discussed. Mr Madigan offered a phased return to work but the claimant declined this. It was arranged for the claimant to work closer to his

home, out of the Chelmsford office. A mentor (Mr Docherty), who worked at the Stratford Office, was appointed.

70. Mr Madigan explained that the OH provider said that they would be in touch regarding additional counselling sessions. This did not happen and Mr Madigan accepted that he did not follow up on this, nor did the claimant for a while.

71. In his statement, Mr Madigan brought up the subject of a *disability passport* which lists adjustments which need to be made for appropriate staff members wherever they may be working in the organisation. The disability passport entitles an employee, for example, to take appointments in working time on full pay or states that an employee might not be able to do overnight stays, etc. Mr Madigan contended that there was no necessity for the claimant to have a disability passport at this stage as the OH report did not point to any appropriate adjustment other than working nearer to his home, which was accommodated.

72. On 23 October 2015, the claimant raised a formal grievance about the procedure applied in his reinstatement, the notified basis for transfer and associated issues with the process. The claimant's grievance expanded considerably from his initial complaints (in respect of his reinstatement) into allegations of serious wrongdoing (including illegal activities by colleagues). The respondent accepted that it did not uphold the claimant's grievances, which may have amounted to detriment. We do not make any specific findings of fact in the chronology of the specific allegations raised and when they were made as the claimant did not detail these in either his witness statement or his submissions and he was not able to detail this in his oral evidence.

73. On 23 November 2015, the claimant pressed Mr Smith to appoint a specialist factfinder to investigate his whistleblowing concerns and his grievance complaints. The claimant complained about the delay in dealing with his complaints as Mr Angus Cuthbertson was appointed 3½ months previously to investigate the claimant's whistleblowing complaint and this has not been progressed.

74. On 24 November 2015, the next day, Mrs Sally Piggott, was appointed as a specialist fact-finder. She held a meeting on 14 December 2015 with the claimant to clarify the extent of his grievances. The claimant informed Mrs Piggott that he had more information to supply and Mrs Piggott waited for this until February 2016 when, despite many chasers, the claimant had supplied no more information. At this point Mrs Piggott passed the grievance to the HR Advisor, Mr Holligan and commented that some of the claimant's complaints were already being addressed separately, namely his pay situation and subject access request.

75. No progress was then made until September 2016 when Mr Holligan told the claimant that documentation was still being awaited. A deadline for the production of the said documents was set at 30 September 2016. When nothing was forthcoming, Mr Holligan proposed, in correspondence, that the grievance should be closed, but a senior HR partner, Ms Pearson, disagreed. As a result, Ms Judith Sweatman was appointed as decision maker in November 2016. She subsequently withdrew from the process and was replaced by Ms Claire Holden in December 2016. Ms Holden held a grievance meeting with the claimant on 8 March 2017; this dealt with historic grievances and whistleblowing allegations. On 27 March 2017 Ms Holden wrote to the claimant with her decision. She did not uphold the claimant's grievance and her decision was accompanied by a comprehensive decision-making deliberation document [pp1856A-O].

76. In early February 2017 Mr Madigan realised that the claimant had continued to receive the CIDAA in error. Mr Madigan had not been informed of this *overpayment* and referred to his manager, Ms Jeffrey, and Ms Pearson of HR. Mr Madigan then reported the matter to the respondent's Integrity Committee on 14 February 2017 [p1477, pp1480-1486].

77. The claimant appealed Ms Holden's decision on 10 April 2017 and an appeal meeting, conducted by Ms Ruth Bartlett, was held on 14 June 2017. During this meeting the claimant confirmed that all aspects of Ms Holden's decision had been covered along with his whistleblowing concerns. Ms Bartlett issued an appeal outcome on 20 July 2017 supported by her deliberation document [pp2228-2232]. In rejecting the substance of the appeal, Ms Bartlett in summary: (1) acknowledged the delay in the process but said that this did not affect the ultimate outcome, she also mentioned that much of the delay was attributable to the respondent waiting for the claimant to provide extra documentation; (2) said that the whistleblowing concerns had been addressed; and (3) determined that the complaint against the decision of the Integrity Committee should have been made directly to them. She said her decision was final.

78. The claimant was invited to a disciplinary hearing on 21 November 2017 by Neil Callan, Decision Manager. Mr Callan stated:

> The formal meeting will consider the allegations that you failed to notify your manager or HRSC of the continued receipt of an allowance that you knew had ceased to be payable, resulting in an overpayment of salary. This is raised under departmental gross misconduct in accordance with HR23007.

79. Mr Callan enclosed a copy of the investigation report of Mr Steve Billington and proceeded to address the issue of delay. He said that at the original investigation meeting in July 2017 the claimant had identified some papers that he contended may be missing, and that he (i.e. Mr Callan) allowed the claimant further time to supply these papers, resetting deadlines at the request of the claimant. Mr Callum said that the claimant had not supplied him with any further paperwork and that the disciplinary hearing would go ahead in the absence of these papers. He went on to say that he was willing to consider the outstanding papers should the claimant submit them to him prior to the disciplinary hearing.

80. The disciplinary hearing proceeded on 26 January 2018. The claimant's substantive defence rested on 2 main strands:

i. He denied the allegation on the grounds that the allowances were still due.

ii. The PMR ("Performance Management Reviews or Report") showed that the payments of the allowance were known to the manager in October 2016 and December 2016.

During the course of the meeting it was agreed that the claimant would provide Mr Callan with various documents by 2 February 2018 and that Mr Callan would provide his "decision within 5 days if possible".

81. An outcome meeting was scheduled for 13 February 2018, which the claimant did not attend due to his ill health. Consequently, Mr Callan posted the letter to the claimant by special delivery. The dismissal letter attached Mr Callan's detailed 14 page "Decision-managers deliberations" report [pp2723-2736].

82. In respect of the claimant's first strand of defence, i.e. whether the CIDAA was due, Mr Callan said:

> Mr Dacey has recently presented significant amounts of historical information to me in support of his postulation that the CIDAA allowance continue to be due. However, I note that the issue of whether the CIDAA allowances are due to Mr Dacey have been the subject of a grievance and grievance appeal process and his complaint was not upheld.
>
> …
>
> Mr Dacey received a decision from Judith Sweatman.
> Mr Dacey disagreed with this decision and following representations a new Decision Manager was put in place.
> Mr Dacey then received a further decision from Claire Holden as Decision Manager.
> Mr Dacey disagreed with this decision and submitted an appeal to Ruth Bartlett.
> Mr Dacey had an appeal hearing and received a decision from Ruth Bartlett.
>
> …
>
> In conclusion, Mr Dacey objected to the cessation of the allowance, but it is clear that this has been investigated and that investigation concluded that in the circumstances, the cessation of the allowance was appropriate.
> I then considered whether on the balance of probabilities, Mr Dacey was aware that the allowance was due to cease and I have concluded that whilst initially he disputed this, it is clear he was advised that this should cease and as such when this failed to happen. He had a responsibility to advise his manager or HRSC and ensured that the allowance was stopped.

83. As to whether the claimant notified his manager, or CSHR of the continued receipt of this allowance, Mr Callan went on to say:

> At the decision meeting I asked Mr Dacey directly whether any conversations took place about Mr Dacey still receiving the allowances. Mr Dacey directed me to his PMR discussions on 20 December 2016 with Jim Madigan.
>
> The extract from this PMR reads:
>
> '... T&S and Pay issues remain, being dealt with. Outstanding issues with London Pay and Allowances still not dealt with and remain outstanding, queried by JM November, need to understand why and be resolved for continuance. Grievance complaints; Appeal; and Whistleblowing concerns still remain outstanding, not dealt with, and unresolved, this has been the case since November 2015 (13 months ago) and for the earliest since 2013…'
>
> I conclude that this does not meet the standard on evidence that is required from Mr Dacey to constitute notification to his manager or HRSC of the continued receipt of the CIDAA allowances
>
> This is principally for 2 reasons:
>
> 1) This discussion takes place in December i.e. nearly 3 months after the allowance is due to cease. Given the lapse of time the matter is urgent as payments are continuing and this required immediate and unequivocal action
>
> 2) It doesn't mention anywhere in the PMR documents that payments of the CIDAA allowances are still being received.
>
> At the Decision Meeting Mr Dacey took an action point to provide his PMR 6-monthly Review October 2017 referencing Allowance issue, this has not been received to date by me.
>
> The conclusion I have drawn from a review of the presented evidence is that Mr Dacey has relied on remarking in broad terms on outstanding issues rather than explicitly informing his manager that allowance payments were continuing.
>
> I have not received as evidence from Mr Dacey information as to times, places or notes of conversations with FIS managers or HRSC to support Mr Dacey's position that the required level of disclosure regarding the payments continuing took place.

84. Mr Callan concluded that the claimant failed to notify his manager or CSHR of the continued receipt of an allowance that he knew had ceased to be payable and that this resulted in an overpayment of his salary. Mr Callan determined that this was Gross Misconduct in accordance with the respondent's disciplinary policy HR23007. His decision was that the claimant should be summarily dismissed, i.e. dismissed without notice.

85. The claimant accepted in evidence that he received his dismissal letter the following day, so his effective date of termination was 14 February 2018.

86. The claimant appealed the decision on 28 February 2018. The claimant appealed both the decision and the process followed, contending that there were considerable procedural errors. His grounds of appeal are contained within the bundle at pages 2758 to 2763.

87. The appeal hearing proceeded, at the third attempt, on 17 April 2018. The hearing was chaired by Ms Judith Diamond (Assistant Director, Large Business London).

88. The appeal outcome was delayed because the claimant made a number of further submissions and the appeal officer experienced a family bereavement.

89. On 20 June 2018 Ms Diamond informed the claimant that his appeal was not upheld and that the original dismissal decision was confirmed. A detailed decision document was provided which dealt with the issues raised at the substantive appeal hearing and also the supplementary submissions [pp3262-3298].

90. Ms Diamond concluded as follows:

> Neil Callan decided that Mr Dacey failed to notify his manager or HRSC of the continued receipt of an allowance that he knew had ceased to be payable, resulting in an overpayment of salary. The decision turned on his key findings which he set out in his deliberations:
>
> - Mr Dacey was advised that the payment of the CIDAA should stop and was aware that that was intended to happen
> - Mr Dacey was aware that the payment of CIDAA did not stop as intended. He was aware of the amount of salary paid into his bank and checked his payslips
> - When the payments did not stop as intended, Mr Dacey had a responsibility to advise his manager or HRSC and ensure that the allowance was stopped
> - Mr Dacey did not notify his continued receipt of the allowance after the four monthly payments from October 2016 to January 2017
> - The total amount overpaid for the four months was £4430 gross which equated to £2737.68 net
> - Mr Dacey could not be regarded as having continued to receive the payments in good faith
>
> The evidence I have taken into account in reviewing Neil Callan's decision includes:
>
> - HMRC guidance
> - The IG report
> - Correspondence between Mr Dacey and Mr Callan
> - The notes of the decision meeting on 26 January 2018
> - Neil Callan's deliberation document
> - Evidence provided by Mr Dacey to Neil Callan before the decision meeting, on the morning of the meeting and after the meeting
> - The verbal and documentary evidence from Mr Dacey at the appeal meeting on 17 April 2018
> - Mr Dacey's 'Supplementary submission' of 24 April 2018
> - Further emails from Mr Dacey on 1,2,3 and 4 May 2018

In my email of 4 May 2018, I wrote to Mr Dacey asking him to ensure that I had received any new evidence by close on 31 May to enable me to consider it. I have not taken into account Mr Dacey's emails of 4,5 or 6 June as they were received after 31 May 2018.

I am asked to include my reply to two specific questions:

- Was the decision consistent (was the decision taken consistent with HRMC policies and/or similar decisions taken in similar cases previously)?
  Yes. The decisions about Mr Dacey's and the penalty were made in accordance with the departmental guidance about discipline.
- Was the decision proportionate (was the decision taken fair and reasonable in the circumstances)?
  Yes. I consider that Neil Callan's decisions about Mr Dacey's conduct and the level of the penalty were fair and reasonable in the circumstances. I have taken into account all the further evidence provided to me until 31 May 2018. In the light of that further evidence I still consider that the decisions were proportionate. I am therefore not upholding the appeal.

Our determination

91. During the case management discussions at the outset of the hearing, the Employment Judge made it clear that the determinations would reflect, and be in accordance with, the List of Issues (as amended) and this was emphasised at various stages during the course of the hearing.

I. THE FIRST CLAIM (Case No: 3200644/2017. Claim received: 8 July 2017)

<u>The wages claims: Issues 2.1 to 2.3</u>

92. This claim was brought as both a contractual claim (i.e. a claim of breach of contract) and as a statutory unlawful deduction of wages claim (pursuant to s13 ERA).

93. The claimant's breach of contract claims have no merit. The claimant accepted in cross-examination that the CIDAA was non-contractual. There was no express contractual provision in the claimant's contract of employment entitling him to receive a CIDAA nor was there any express contractual right for the claimant to receive the CIDAA arising from any of the various policy documents presented by the respondent at the hearing (see in particular pp2278).

94. The claimant relied on the provisions contained in a document entitled "Proposals" which detailed "the Official Side proposals for change to the configuration of some additional payments within the Criminal Investigation Directorate of HMRC…" This is a combined trade union or staff side consultation document, which the claimant said was accepted by management and thereby became a collective agreement. The respondent denied that this was a collective agreement and the claimant was not able to adduce any evidence to support the supposed acceptance by the respondent of these *proposals*. Although the respondent did not accept that this document formed part of the claimant's contract, Mr Humphreys did accept, on behalf of the respondent, that the document set out accurately how the CIDAA was to be administered.

95. Proposal 11 reads as follows:

> Those staff in receipt of the CI[D]AA as at 30th June 2012 will be able to maintain existing levels of additional remuneration by transferring onto the newly created payment commensurate with CIAA. No financial detriment will occur for individuals making this transition.
>
> …

> Where staff are allowed or required by CI[D] (or CHISOPs) Management to move to post which attract lower (or no) additional payments, those staff in post and in receipt of an allowance on 1st July 2012 will retain that tier of payment (and will be expected to deliver attendance in line with the expectations within the payment they receive).
>
> Where staff are allowed or required by CI[D] (or CHISOPs) Management to move to non-operational posts but retain an allowance it is anticipated that they would do so on detached duty terms and for a limited (12 month) period.

96. The claimant contended that the final paragraph above did not apply to his circumstances because his role remained an operational post whereas that provision was expressly for moves to a non-operational post. This is not correct. It is clear from both the Integrity Committee's determination of 23 September 2015 and from the nature of the claimant's (new) role in INQUAT following his transfer of 21 October 2015 that the claimant was moved to a non-operational role. The claimant was removed from the chain of custody because of the disciplinary findings in respect of his dishonesty. The respondent transferred him to a quality assurance role – this was not an investigation role. Mr Khaliq, the claimant subsequent line manager, explained in evidence why the claimant's new quality assurance role did not attract the CIDAA and why 2 of 17 staff members (i.e. Mr Charles Dunbavand and Ms Taz Johal) received CIDAA as part of their enumeration. That was because their roles required them to be available at short notice to support the duties and functions of investigation enquiries and (unlike the claimant) they were not excluded from being part of the evidential chain for operational caseloads.

97. Irrespective of the contractual force of these Proposals, the document is consistent with the respondent's dealings with the claimant. The claimant was moved from an operational role in investigations to a non-operational role in INQUAT. Even if the penultimate provision applied the claimant could not possibly meet the expectation that he could work within the expectations of a CIDAA-post as he was specifically excluded from work engaged with a criminal chain of custody.

98. The claim had also brought his wages claim on the basis of *custom and practice* (issue 3.2.2). In cross-examination the claimant relied on the supposed interpretation of custom and practice by his trade union and his assertion that this is now written into other employee's contracts. Terms are implied into contracts of employment where a court or tribunal is satisfied that the term is necessary to give business efficacy to the contract, or where the term is so obvious that the parties must have intended it to be a binding provision. It is only appropriate to imply a term or provision to the contract where, on a consideration of the express terms of the agreement and the facts and circumstances surrounding it, an implication arises that the parties actually intended the term in question to be part of their original contract. There are rare circumstances where a term may be implied because it is the normal custom and practice to include such a term in contracts of that kind. In such circumstances, the proposed term must be *reasonable, notorious (i.e. well-understood) and certain* and that the contract operated over a prolonged period of time in such a way as the party relying upon the custom and practice can demonstrate that the contract was performed in a manner consistent with the claimed implied term. The claimant put his case in respect of custom and practice as follows: *irrespective of the circumstances, if an employee received the CIDAA then that would entail a permanent alteration to their pay arrangements that cannot be withdrawn*. There was a whole dearth of evidence from trade union representatives or from or about comparators to establish that this custom or practice was reasonable, notorious or certain.

99. The respondent witnesses Ms Bell, Mr Khaliq and Ms Holden and Ms Bartlett all disputed the claimant's contention that once he was given the CIDAA this benefit continued regardless of any change to the job he undertook. The respondent's position has always been the CIDAA attached to the role undertaken and not the employee, i.e. it was not a personal allowance that once conferred could not be removed. This is entirely consistent with the documents that were available.

100. The claimant accepted in cross-examination that the Respondent had a right to move him to his new role. Indeed, this was also confirmed in the decision of Employment Judge Burns in the London Central Employment Tribunal (case number: 2201681/2015) promulgated on 4 March 2016:

> I find that the Claimant was reinstated on 23 September 2015 and not re-engaged. The formal decision to relocate him was made after the re-instatement decision. Furthermore, both under the mobility clause in the Claimant's employment contract (clause 15 on page 114) and under HR guidance HR 590002, the Respondent had power, under the reinstated contract, to move the Claimant's workplace as it has done.

101. In respect of the unlawful deduction of wages claim, the CIDAA was never properly payable following the Integrity Committee's decision.

102. If the underlying basis of the ineligibility of the claimant's pursuit of this allowance is not clear enough, Mr Smith informed the claimant in very clear terms on 23 October 2015 that his new post in INQUAT did not qualify for the CIDAA and – at management's discretion – the CIDAA allowance previously paid would cease to be paid to him after a period of 12 months from his effective date of transfer on 26 October 2015.

103. The Tribunal accepts that the claimant genuinely believed that he should have retained the CIDAA. He closed his mind to any reasoning to the contrary. He also did not see that Ms Cottis' decision to reinstate him had been surprisingly generous, but instead saw the respondent's management as weak and he sought to exploit his opponent's lack of resolution for his own benefit. This perception of the respondent's lack of resolution was confirmed by a 12-month period of adjustment. The die was cast, and the claimant's perception of his employer's prevarication and impotence was confirmed. Notwithstanding that Mr Smith's/Ms Cottis' decision of 23 October 2015 was clear to the Tribunal, the claimant ignored this with scant regard.

104. There was no breach of contract – fundamental or otherwise – so the question of whether the claimant affirmed (i.e. waived) the breach does not arise.

105. The claimant's s13 ERA wages claim relies upon establishing that the non-payment of his CIDAA from February 2017 and the recovery of the CIDAA allowance paid from 26 October 2016 represented a shortfall in the total remuneration payable. As we find above the claimant was not entitled to the CIDAA following his reinstatement to work and his transfer to INQUAT it follows that this claim cannot succeed. We will deal with the respondent's recovery of overpaid wages under Issue 3.49

<u>The Sex Discrimination Claim: Issues 2.4 to 2.5</u>

106. The claimant's sex discrimination claim did not make sense. He contended that the differential treatment (by which we take to mean less favourable treatment) occurred each month he was not paid his CIDAA, which he stated as happening from February 2017 to 30

September 2017. We presume he framed his claim in this matter so as to connote that this claim was ongoing and thereby brought in time.

107. There was no evidence at all that the respondent had made a decision each month not to pay the claimant the appropriate allowance and, given the circumstances of this case, it would be senseless to suggest so. If that was the claimant's case, then such an allegation flies in the face of all of the evidence we heard, and the respondent would have a very easy victory.

108. The less favourable treatment was the *decision* to remove the claimant's CIDAA. The *consequence* of this decision was the reduction in the claimant's pay. The claimant did not content that the respondent was responsible for an ongoing situation or a continuing state of affairs in which male employees (or even male ex-CID investigation officers) were treated less favourably because of their sex (similar to *Commissioner of Police of the Metropolis v Hendricks 2003 ICR 350 CA*). The claimant did not contend that the employer operated a discriminatory regime, rule, practice or principal extending over a period so an act that affects an employee will not be treated as continuing. Even so that act has ramifications which extend over a period of time: see *Barclays Bank plc v Kapur & Others 1991 ICR 208 HL*.

109. Mr Smith conveyed the decision to the claimant that he would no longer be paid the CIDAA on 23 October 2015. This is the date that the alleged discrimination arose and the point at which we assess the claimant's complaint of direct discrimination. The consequence of this decision extended over a prolong period of time. So this claim is out of time pursuant to s123 EqA the discriminatory act occurring on 28 October 2015. Notwithstanding we heard this complaint and determined it as follows, we deal with the limitation point under "Jurisdiction – out of time complaints" below.

110. The claimant relies on 2 named comparators for this claim, Ms Johal and Ms Hall. In order to be a comparator for these purposes there must be *no material difference between the circumstances of each case*: s.23(1) EqA. Neither Ms Johal nor Ms Hall are appropriate actual comparators because:

i. Neither comparator had been subject to a restriction such that they could not be part of the evidential chain, as was the case with the claimant.

ii. Neither Ms Johal nor Ms Hall were required by the respondent to change roles, such that the CIDAA may no longer have been payable.

iii. Ms Hall did not work in quality assurance or audit, the area the claimant worked in.

iv. Ms Johal was doing a role substantially similar to Mr Charles Dunbavand (male) and a role that qualified her for the CIDAA and although the claimant disputed this, we accept the evidence of Mr Khaliq.

Consequently, neither Ms Johal nor Ms Hall are appropriate comparators in this case.

111. We considered this claim on the basis of a hypothetical comparator, i.e. a woman in materially the same circumstances as the claimant, and specifically one who had been moved out of the chain of evidence and into INQUAT (or some substantially similar work).

112. There was no evidence before the Tribunal to suggest that such a hypothetical comparator would have been treated any differently from the claimant, specifically:

i. There is nothing in the deliberations of the Integrity Committee to infer that the claimant's sex played any part whatsoever in their considerations. The Integrity Committee was made aware of another instance where an officer was found guilty of gross misconduct (as was the case with the claimant), but this officer's sex does not appear to have been considered and the unidentified comparator was specifically raised in order to ensure consistency of treatment.

ii. As set out above, Mr Khaliq identified a man and a woman who received the CIDAA, and we have accepted under our determination in respect of the wages claim above, that the allowance attached to roles and not individuals.

113. There was no evidence nor apparent irregularity in the claimant's appointment to INQUAT by Mr Ranson or in the cessation of the CIDAA by Mr Smith and/or Ms Cottis to raise an inference that the removal of the claimant's CIDAA this had anything to do with his sex. This is important in respect of the *Barton/Igen* analysis in respect of reversing the burden of proof. However, even if the decision was free from discrimination, it still could be tainted by the discriminatory effect. In this regard, there was no comparator in similar circumstances to the claimant – actual or hypothetical – that retained the CIDAA. The claimant has not proved fax from which, in the absence of an adequate explanation, we could conclude that the respondents had committed unlawful discrimination. The first stage of the *Barton/Igen* test has not been met. In any event, the claimant's sex discrimination claim was so weak that it was obvious from the outset that this claim was so speculative that it was fundamentally misconceived.

Whistleblowing

114. The legal test is set out in section 2.6 of the List of Issues

The asserted protected disclosures: Issue 2.7

115. In the case management discussion at the outset of the hearing, the Employment Judge quizzed the claimant in respect of his reliance upon the whistleblowing disclosures. The key question was whether the content of the whistleblowing disclosures triggered the detriments claimed or whether the claimant relied upon the fact that he had made whistleblowing disclosures as causing the various detriments claimed and his dismissal. The claimant said that he relied upon the fact that he made was disclosures but also the number or volume of whistleblowing disclosures as relevant to the detriments suffered (including his dismissal). The claimant said that he did not rely upon the specific information disclosed in respect of causation, merely the fact that he had made various public interest disclosures on each of the occasions identified. On the basis that the claimant merely relied upon the fact that he had made at least one disclosure, rather than the specific content of the protected disclosures, the respondent has admitted that the claimant had asserted the protected disclosures identified in Issues 2.7.1, 2.7.2, 2.7.3, 2.7.4, 2.7.5, 2.7.6 and 2.7.9. Consequently, the asserted protected disclosures that are in dispute are at Issues 2.7.7 and 2.7.8.

116. In respect of Issue 2.7.7, it was the claimant's contention that he made protected disclosure(s) to Mr Madigan at Euston Tower on 21 February 2017. The claimant said that this related to information conveyed in connection with allegations against the claimant's ex-Senior Managers David Thomas and Simon Tyrell and investigator David Boothroyd and amounted to 7 protected disclosures.

117. In evidence Mr Madigan disputed his conversation with the claimant. First, the claimant's witness evidence provides no details as to this conversation, he merely asserts that he raised whistleblowing concerns. Mr Madigan provided a credible explanation in his oral evidence. A conversation occurred on the day in question, but this was in a telephone call, and not at Euston Tower as contended by the claimant. Mr Madigan said that the conversation arose from a telephone call from the claimant following Mr Madigan's email to the claimant at 13:38 that day in which he attached (and quoted) Mr Smith's email of 23 October 2015 about the cessation of the CIDAA. Mr Madigan was clear in his evidence that his telephone conversation related only to the removal of the claimant's allowance and the claimant's objection. The conversation was strained and the claimant was acrimonious. Mr Madigan described claimant as confrontational and refusing to accept any explanation that he was not entitled to the allowance. The claimant was agitated and used (in the Tribunal's estimation) excessive and unacceptable language to his line-manager, i.e. "get your arse down to Stratford tomorrow" and called him "pathetic" on several occasions. Mr Madigan was very clear that the claimant only raised issues about his CIDAA and did not refer to any protected disclosure.

118. Both Mr Madigan and the claimant wrote emails following this conversation. The claimant's email later that day is more expansive than Mr Madigan's justifiable outrage at his treatment from the claimant. Significantly, neither refer to any possible protected disclosure. This is because there was no protected disclosure, and we are satisfied to accept Mr Madigan's account as the more credible version of events.

119. With regard to Issue 2.7.8, Ms Jeffery did not attend the Tribunal hearing and the respondent said that she was unavailable because she had retired from the respondent's employment sometime before the end of November 2017. We were not presented with any documentation to suggest that the respondent had sought to adduce evidence from Ms Jeffery or that she declined to participate nor did the respondent seek to adduce a statement or some other written account of Ms Jeffrey's version of the purported exchange on 13 March 2017. The respondent did not refer the Tribunal to any documentary evidence relevant to this purported disclosure.

120. The claimant did no more than assert that this was a protected disclosure in his witness statement and the details of the contents of the disclosure (as set out in the FPPD document) appeared the same as that relied upon for the protected disclosure alleged at 2.7.7. The respondent had accepted the claimant's assertion that he made some protected disclosures, and the respondent had not adduced any evidence (or even a letter from Ms Jeffrey) to dispute that Issue 2.7.7 was not a protected disclosure. However, we cannot make a determination that a party has made a protected disclosure, merely on the basis that they assert that they did. We need to satisfy ourselves that the claimant disclosed information and that this disclosure of information met with the s43C ERA requirements. The alleged disclosure took place in March 2017, so this was relatively recent exchange. The respondent was clear that they do not accept that a protected disclosure was made so we expected the claimant to provide a full account of his exchange with Ms Jeffrey. This was not a written exchange, so there were no index documents available. However, as the

exchange is important to the claimant's case, we would have expected him to confirm the disclosure in writing shortly thereafter or to have made reference to the fact that he had made a whistleblowing disclosure in correspondence with Ms Jeffrey or others. The absence of such a record is significant. However, it is primarily the claimant's inability to explain the context of the disclosure and to recount what he said that precludes us from accepting that this amounted to a protected disclosure. Under the circumstances, we do not accept that the claimant made a protected disclosure to Ms Jeffrey on 13 March 2017.

121. We note that we have already accepted that the claimant has made 7 protected disclosures. These disclosures were qualifying disclosures pursuant to s43B(1)(a) ERA and/or s43B(1)(b) ERA and/or s43B(1)(c) ERA and/or s43B(1)(f) ERA. The qualifying disclosures amounted to protected disclosures because they were made to the claimant's employer, pursuant to s43C(1)(a) ERA.

<u>The asserted detriments – Issues 2.10 to 2.13 – and causation – Issue 2.14</u>

122. It is worth restating at this point that the claimant must establish that any detriment claimed was "done on the grounds that" the claimant made the protected disclosure (see s47B(1) ERA).

123. Many of the alleged detriments are prima facie out of time and we will deal with this under Issue 2.15.

Asserted detriment 2.10.1

124. Ms Jeffrey did not instigate disciplinary action against the claimant. We are satisfied that Ms Jeffrey was made aware of the claimant's ongoing receipt of the CIDAA by Mr Madigan but all significant steps in response to this were taken by Mr Madigan. Mr Madigan's "instigation" relates to his report to Internal Governance after receiving advice from Ms Sheena Pearson of HR [p1477, pp1480-1486]. It was Internal Governance who decided that there was a case to answer which should proceed to a disciplinary (see hearing bundle pages 2213-2224) and Internal Governance made that decision based on the evidence, having investigated the matter including interviewing the claimant (see pp2154-2204).

125. We are satisfied with Mr Madigan's explanation that he made the initial report to Internal Governance because he believed that there was wrongdoing on the claimant's part. This is consistent with the contemporaneous documents. The claimant had not informed Mr Madigan of any overpayment in wages and Mr Madigan undertook a preliminary investigation which established the claimant had continued to receive payment of the CIDAA after October 2016, when the allowance should have stopped. This appeared to be in breach of policy HR41010, which classified such conduct as gross misconduct.

126. Notwithstanding that referring this matter to Internal Governance may have constituted a detriment, we are satisfied that Mr Madigan had good reason to pursue this issue through the correct investigation and disciplinary channels and by referring the matter to Internal Governance. The report to Internal Governance and the ensuing disciplinary action had nothing to do with any protected disclosures made by the claimant.

Asserted detriment 2.10.2

127. On 23 October 2015 the claimant raised his first grievance. This was in respect of "the procedure applied in my alleged reinstatement". The claimant thereafter raised various grievances at various points. In fact, the claimant bombarded various officers of the respondent with enquiries and complaints and raised all sorts of issues which did not appear to refer to the claimant's discontent with the terms of his reinstatement. The extensive documentation was not clear and during the hearing, we (i.e. the Tribunal) went to painstaking efforts to try to understand:

- how many grievances the claimant had, in fact, raised;
- when they were raised; and,
- the substance of each grievance.

Unfortunately, the claimant was not cooperative with these fairly straightforward enquiries. It is not clear that the respondents fully understood where the claimant's various complaints ended and his grievance began. Mrs Piggott initially, then Mr Holligan followed by various HR officials and decision-makers failed to get to grips with the totality of the claimant's grievance. This was primarily the claimant's fault because he refused reasonable requests to set out his grievance clearly. The claimant brought a suitcase full of documents, which he said both set out his complaints and also provided appropriate evidence, to various meetings with managers and HR officials and this is not good enough. It is the claimant's primary obligation to set out his grievance in an intelligible format. He did not.

128. In any event, the claimant's line managers at the relevant time were Mr Madigan (from 20 October 2015 to 1 April 2017) and Mr Sanger (from 1 April to 10 August 2017). Ms Jeffrey was never the claimant's line manager and Mr Davies line-managed the claimant after the first claim was lodged.

129. The claimant raised his initial grievances with Mr Adrian Booth (of FIS), on 23 and 29 October 2015, who passed it on to Human Resources for investigation by a specialist factfinder (Mrs Piggott). Mr Madigan was clear in his evidence that he was aware of the claimant's grievance(s) but that, so far as he was aware, these were being dealt with by HR. Mr Madigan also came to be aware that the claimant had made some whistleblowing disclosures but none of these disclosures were aimed at, or implicated, him. Mr Madigan's evidence, which we believe, was that the claimant's grievance was dealt with by HR. There is some credence to this view as the respondent's grievance procedures (and disciplinary procedures) provided for a separate investigatory process and then a referral to a detached manager appropriately trained in the relevant procedure to make an "independent" determination.

130. In his evidence, Mr Sangar effectively repeated the same account given by Mr Madigan. He did not see that it was his role to become embroiled in the claimant's grievance process. That matter was initially dealt with by HR, who appointed discrete managers. This point was reinforced by the claimant's dealing directly with the relevant HR officers (Mrs Piggott, Mr Holligan, Mr Gracie, Mr Grzbalski and Ms Taylor) and the relevant managers (Ms Holden and Ms Bartlett).

131. Notwithstanding we do not find that Mr Madigan or Mr Sanger (or even Ms Jeffrey and Mr Davies) subjected the claimant to this alleged detriment, there is no basis to conclude that any possible detriment by these 4 individuals could be done on the ground of a protected disclosure, which was not aimed at them or did not implicate them in any

purported misconduct or was not initially (nor during these relevant times) disclosed to them.

Asserted detriment 2.10.3

132. In evidence Mr Sanger confirmed that he referred the claimant to occupational health and told him so on 18 July 2017 (see p2152-2153). At the hearing, it was the claimant's case that Mr Sanger completed but deliberately did not submit the OH referral form. Because the occupational health provider (ATHOS) failed to act on Mr Sanger's referral does not mean that Mr Sanger did not make the referral, intentionally (as is the claimant's case) or otherwise.

133. We reject the claimant's allegation, primarily because we believe Mr Sanger's evidence and we find that he did make the OH referral in July 2017. Mr Sanger wrote to the claimant's successive line-manager, Mr Davies on 15 and 19 December 2017 specifically referring to this referral.

134. On 17 May 2017 Mr Sanger and the claimant discussed the claimant's OH report of August 2016. The claimant raised the OH referral that Mr Milligan said he would undertake. Mr Sanger said that he would raise this with Mr Milligan to see if there was any contact from the OH nurse, which he did promptly. Mr Milligan said that the OH nurse had not come back to him. He said in evidence the claimant's attendance had improved so he did not pursue the matter; although he discussed this with the claimant in December 2017, the claimant did not provide his consent for the referral. Rather than do his utmost to assist expediting the OH referral, the claimant seized upon a further opportunity to criticise his managers in the ensuing email trail. The delay was compounded by the claimant's carping about the procedure adopted and the need for him to provide consent to any OH referral.

135. The reference in the OA Assist report from Ms Lisa Quigley, Occupational Health Adviser of 9 August 2016 read:

> In my opinion, Mr Dacey would benefit from some additional counselling to support him with his return to work. He has completed all the counselling sessions available to him through the employee assistance programme and his GP and therefore you may wish to consider funding additional treatment from your local budget. A member of our team will be in touch shortly to help you progress this.

136. Proceeding this issue, the report said: "Mr Dacey is planning on resuming work and in my opinion he is medically fit to do so". The report recommended a phased return to work on reduced hours and changing the claimant's workplace to reduce his travelling time. Significantly, the report recommended pressing on to resolve the claimant's workplace complaints.

137. In the circumstances of this complaint, we were not convinced that exploring possible additional counselling sessions was a detriment. The claimant had undertaken workplace counselling and, we believe, also counselling provided by his GP. He had returned to work without the recommended phased return because he wanted to avoid the commensurate loss of earnings that working reduced hours entailed. His attendance was unproblematic and, most significantly, he did not report any problems to Mr Milligan or chase this referral separately for some considerable time. Even if the claimant was able to establish that there was additional counselling available and that this was a cost-effective use of available resources, there is no evidence to establish that such additional

counselling (however long it might be) would have benefits for the claimant and such an assertion is speculation.

138. Even if we were wrong about whether the failure to refer the claimant to OH amounted to a detriment, we accept Mr Sanger's evidence that this was in no way whatsoever motivated or influenced by the claimant's protected disclosures. Mr Sanger said that he was aware at some point that the claimant had made whistleblowing disclosures, but he was not sure when he became aware. Mr Sanger said there was no need for him to become involved in the claimant's whistleblowing dispute and when dealing with the claimant, he said, he was keen to avoid discussing this or otherwise becoming involved in such an intractable dispute.

Asserted detriment 2.10.5

139. We reject this asserted detriment. Mr Sanger became the claimant's line manager on 1 April 2017. Just after this, on 13 April 2017, Mr Madigan assessed the claimant's performance for the preceding year (2016/2017) as "Development Needed". Mr Madigan had been managing the claimant remotely following his change of location and he told the claimant he was available to discuss this matter on 18 and 19 April 2017, or, failing that 2 May 2017. The claimant was not satisfied with this assessment and by this time, the claimant had a fractious relationship with Mr Madigan (and we note that a similar pattern seemed to develop with all his managers to various degrees). The claimant was on annual leave for the first proposed discussion dates and whilst an exchange occurred on 2 May 2017, the matter was not discussed. Mr Madigan saw this exchange as an end to his dialogue – and no doubt his dealings – with the claimant. Mr Sanger did not meet with the claimant until 11 May 2017, so at the outset of his management of the claimant, the claimant had refused to sign off his year-end performance management report from Mr Madigan.

140. We do not accept that Mr Sanger failed to set out the claimant's PMR objectives for the ensuing year, nor that he gave the claimant meaningful work to carry out. We prefer the evidence of Mr Sanger (as opposed to that of the claimant) that at the meetings of 11 May 2017 and 17 May 2017 they discussed the claimant's current working arrangements and Performance Management Reviews (or Reports) ("PMR"). Mr Sanger went through with the claimant his work in INQUAT and further explained the assurance work around unannounced visits. On 5 June 2017 Mr Sanger sent the claimant the aide memoir for completing the PMR's by email, and by email on 28 June 2017 Mr Sanger records discussing the PMR previously, which he said needed to be finalised. Again, Mr Sanger chased the claimant again for his completed PMR on 13 July 2017.

141. It is clear to the Tribunal that Mr Sanger attempted to engage meaningfully with the claimant, both in respect of the allocation of duties and in attempting to agree the PMR. The claimant did not complete the PMR and, as he was required to do so, his objectives could not be agreed. The claimant was confrontational, argumentative and unwilling to accept his managers' authority. Mr Madigan had raised performance issues, which no doubt made it more difficult for his new line-manager to set appropriate performance indicators for the ensuing year. We accept from the documentation that the next set of PMRs were not agreed. The fact that the new PMR objectives did not meet with the claimant's approval does not establish that Mr Sanger was to blame for the failure to set out and agree PMR objectives. Mr Sanger raised both the claimant's work and the PMR objectives at the first meetings and thereafter chased the claimant for completion of these. If there was a

detriment, we are clear that it was a self-imposed detriment arising from the claimant's refusal to cooperate with reasonable instructions from his new line-manager to complete the appropriate documentation for the PMRs. Consequently, we do not see any detriment as pleaded, but if there was a detriment not completing the PMR's then this was entirely the claimant's responsibility.

Asserted detriment 2.10.6

142. The detriment claimed under this point is ill-defined and far ranging. The claimant lodged his first Employment Tribunal Claim on 8 July 2017. Following the claimant's reinstatement to work, he had 2 line-managers – Mr Mulligan and Mr Sanger. We are satisfied that both of these managers were actively and positively trying to re-incorporate the claimant to work.

143. Mr Madigan was a supportive manager. This was demonstrated by:

i. In the return to work meeting on 10 August 2016, Mr Madigan went through the recommendations of the OH report, he identified what adjustments and support was required for the claimant and he put those adjustments in place.

ii. Following their meeting on 20 December 2016, on 9 January 2017 Mr Madigan wrote to the claimant to address the claimant's concerns about being placed under the line-management of Mr David Thomas as a result of a departmental reorganisation. Mr Madigan confirmed that not only would an alternative role be sought for the claimant, but that in the meantime he would continue to manage the claimant.

iii. On 15 February 2017 Mr Madigan emailed the claimant following up on issues raised by the claimant concerning change of role, performance markings, attendance, outstanding leave and current work. This was not "delay and denial" on the part of Mr Madigan, but rather his seeking to address issues relevant to his management of the claimant. In that email Mr Madigan also raised the possibility of a further OH Referral following up on the counselling sessions mentioned in the August OH Report. Mr Madigan had also done this in December 2016.

144. Mr Sanger was also a supportive manager, which (in addition to his actions in relation to putting in place meaningful work, the PMR and following up the OH referral) was also demonstrated by:

iv. Mr. Sanger also sought to agree and implement a stress reduction plan for the claimant around May 2017 and June 2017.

v. On 28 June Mr. Sanger emailed the claimant following up on a number of issues, including:

- the claimant's stress reduction plan;
- the claimant's PMR with appropriate templates;
- a completed "DSE";
- chasing what the claimant went home sick on 1 June 2017;
- chasing the RFTU cases update;

- chasing the KMA response;
- an update on work undertaken with Kylie Martin in respect of unannounced visits;
- his (i.e. Mr Sanger's) progress report on the claimant's request for the Surface Pro;
- Whether he (i.e., Mr Sanger) needs to become involved with HR in respect of the claimant's leave and carry forward leave; and
- a progress report from their meeting of 7 June 2017.

145. The case in respect of these detriments is not made out.

Asserted detriments 2.10.7

146. This tranche of alleged detriments related to the role of HR in the management of the claimant, the grievance process and the decisions of the designated decision makers up to July 2017. We heard from the relevant HR officers (Mrs Piggott, Mr Holligan, Mr Gracie, Mr Grzebalski and Ms Taylor) and the relevant grievance managers (Ms Holden and Ms Bartlett). Clarification of their role was sought from each witness and all witnesses were consistent and emphatic – HR's role was to advise and not to decide; the managers were to make decisions, of which, HR might have some input into the decision-making process, but ultimately it was for the managers to decide. Mr Holligan went further than the other witnesses to say that he believed his role was to ensure that the decision-makers made a decision consistent with the circumstances of the case and the facts presented so, he believed that he had an overseeing role as well as an advisory role. the other HR witnesses felt that it was not their role to monitor or audit the decision-makers. Mr Holligan's evidence was not necessarily inconsistent with the views of his colleagues; he merely saw an enhanced role for HR, whereas all others HR officials saw HR's role strictly as a support function. This slight discrepancy might reflect Mr Holligan seniority or wider experience. However, there was nothing that Mr Holligan took issue with in the decision-makers' actions or conclusions, so this point is entirely academic. In contrast to the clear evidence of the respondent's witnesses, the claimant was not able to adduce positive evidence on this point, he merely contended that HR had more of a controlling role, far in excess of even that asserted by Mr Holligan.

147. In respect of Issue 2.10.7.1, there was not 3, but one change in the grievance decision-makers. There were 3 grievance decision-makers appointed: Ms Judith Sweatman, Ms Holden and Ms Bartlett. The change in grievance decision-maker occurred around November 2016 from Ms Sweatman to Ms Holden. It was not clear from the evidence why Ms Sweatman ceased to be a grievance decision-maker. The claimant could not proffer any clear evidence in this regard and Mr Humphreys could not assist. In submissions, Mr Humphreys said that it was a personal decision by Ms Sweatman, which is supported by various emails.

148. There is no doubt that there was a considerable delay to the Grievance. The first grievance was raised in late October 2015 and the grievance decision-making meeting occurred on 8 March 2017. The grievance outcome letter was sent on 27 March 2017. The claimant appealed against the grievance outcome on 10 April 2017 and the appeal was eventually concluded on 20 July 2017. Having scrutinized events thoroughly, we are satisfied that a substantial amount of the delays was due to the claimant. The claimant promised to provide further information and documentation threat grievance and caused

delay by not providing this material. Further delays occurred due to various complaints the claimant directed towards people dealing with his grievance.

149. The claimant's failure to provide the additional information or supporting documents that he promised is not the fault of the respondent's HR. The HR officers gave the claimant extensive opportunities to provide all relevant information. For example:

i. In the fact-finding meeting on 14 December 2015 [p858-872] the claimant stated that he had further information to provide and was requested to provide it at various stages [pp 860, 863 and 871].

ii. By 9 February 2016 nothing further had been provided [p906].

iii. On 12 February 2016, in the absence of a response from the claimant, Ms Pigott referred the matter back to Mr. Holligan [p915].

iv. On 21 March 2016 no further documentation had been provided by the claimant [p957]

v. On 17 May 2016 no further documentation had been provided by the claimant [p988]

vi. There is then an email chain ending at page 1235 in the hearing bundle in November 2016 including exchanges with the claimant, that shows during this period no further documentation had been provided by the claimant.

150. Mr Holligan proposed to close down the claimant's grievance in November 2016 because the claimant had not provided the information he had promised. However, the claimant was overruled by a more senior HR colleague, Ms Pearson. Ms Pearson's actions clearly demonstrates that the respondent was not seeking to delay or deny the claimant's grievance.

151. We conclude the delays in the grievance was not due to the actions of HR. In addition, there was no evidence that this was related to any protected disclosure and we could not see how the delays in this process could be related to any protected disclosures made by the claimant.

152. The claimant's concern in respect of Issue 2.10.7.2 centres around the respondent's – HR and Mr Madigan's – actions in stopping the CIDAA payments to the claimant, whilst he had an ongoing grievance in respect of this relevant allowance. This allegation appears to the Tribunal to be absurd. The claimant was told on 25 October 2015 in very clear terms that his CIDAA would cease 1 year from the effective date of his transfer to INQUAT. If the claimant's entitlement to the CIDAA was arguable before that date, then Mr Smith/Ms Cottis clarified the position beyond doubt. The claimant subsequently raised a grievance about the decision to remove his CIDAA, so the grievance post-dated the respondent officials' very clear – and correct – interpretation of the claimant's entitlement to additional allowances.

153. The Employment Judge asked various witnesses, including the claimant, if there was a *status quo* provision in the grievance procedure and, so far as the Tribunal could ascertain, there was no procedure providing for the continuance of a contractual provision while the dispute about the said provision is resolved. Therefore, even if there was a status

quo provision applicable (which there was not) this was unlikely to apply because there was no grievance in force at the time Mr Smith informed the claimant of the cessation of the CIDAA.

154. Mr Madigan discovered the overpayment on 2 February 2017. Mr Milligan discussed the matter with his manager, Ms Jeffrey, and thereafter sought senior HR advice from Ms Pearson, whom Ms Jeffrey had contacted in the interim. Ms Pearson assisted in stopping this overpayment and thereafter confirmed to Mr Madigan that the HR advice was that a reference to Internal Governance was appropriate in the circumstances.

155. The claimant had received pay that he was not entitled to. He was not entitled to this money both: (a) under his contract of employment and (b) incontrovertibly because Mr Smith told him that the allowance would come to an end. Therefore, HR and Mr Madigan acted rationally and appropriately in stopping the CIDAA at that point.

156. The reference to HR acting outside any relevant policy or procedure is irrational in the circumstances. The claimant's line manager saw a pay irregularity and acted promptly to address this; the Tribunal would be surprised if HR did not assist in such circumstances. The fact that the allowance was subject to a grievance should not have stopped addressing this overpayment in the circumstances of this case.

157. In respect of 2.10.7.3, Ms Taylor was asked by her manager, Mr Grzebalski, on 17 May 2017 to undertake a review of the documentation in respect of the claimant's appeal. This was before the grievance appeal outcome. This did not interfere with any independent decision-making process, although the claimant did not put any evidence of this to Mr Taylor.

158. Ms Taylor was appointed to replace the HR caseworker, Mr Brian Eagar, in the claimant's disciplinary case during September 2017 because the claimant had complained about Mr Eagar. The Tribunal was unsure why this allegation had been included in the List of Issues because it post-dates the claimant's first claim. Nevertheless, as it was included as an issue, we will deal with it. Ms Taylor's role was to provide specialist advice and otherwise support the disciplinary decision-maker, Mr Callan. We were unsure what precise detriments Ms Taylor was supposed to have subjected the claimant to as, again, this was not raised directly with her at the hearing. There were no suggestions put to her as to how she interfered with independent decision-making or how she extended or caused any unreasonable delays. In any event, we read her witness statement carefully and went through the appropriate documents. We regarded Mr Taylor as a credible witness and there was no reason we could see to reject her version of events. Under the circumstances, alleged detriment 3.10.7.3 fails.

159. Issue 2.10.7.4 dealt with the issue of Subject Access Requests ("SARs"). The Employment Judge expressed his concerns in respect of these allegations during the hearing. The Data Protection Act 1998 (which was replaced by the Data Protection Act 2018) provides a mechanism for the disclosure of personal information or data held by an employer in respect of an applicant. Such SARs are outside the Employment Tribunal's scope for ordering the disclosure of relevant documentation. The Employment Tribunal has a separate process for the disclosure of documents *relevant* to the claim(s) in question. This gives scope for the Tribunal to order a party to disclose relevant information and to take appropriate steps if any disclosure order is not complied with. As stated above, the Employment Tribunal process is limited in ordering disclosure of relevant documents.

Individuals may use SARs to see a more expansive picture of the information held by an employer, but such avenues are normally used for speculative enquiries, effectively *fishing trips*. The claimant did not rely on the Tribunal process of disclosure, so it is difficult to see that he was denied access to important documents. The claimant made the point at various stages during the hearing that the respondent had withheld information and documentation. When Mr Humphreys and/or the Tribunal asked him precisely what documentation he said had been withheld the claimant was not able to identify such documents with any precision.

160. The hearing bundle ran to 12 lever arch files. However, during the course of the hearing the respondent provided the claimant with even more documents. There were no important documents that the claimant could identify that were disclosed' late or had not been disclosed at all, which could have possibly amounted to a detriment. A general assertion that one side has hid or destroyed documents is very easy to make and equally easy to deny. Such accusations do not help determine issues and the Tribunal could not take this allegation any further.

161. In responding to the lack of specifics for this purported detriment, the claimant identified approximate dates of SARs in his third witness statement, which was provided part way through the hearing. We accepted the respondent's submission that the claimant did not identify the contexts or scope of the SARs; the way in which the respondent's reply, or lack of reply, was said to be deficient, and who was responsible for such failures. Under the circumstances, because we cannot identify if documents have been withheld and, if so, what material has been withheld and whether that material was relevant, we cannot see that there is a detriment in this allegation. In the form that this detriment was presented, it wasted a considerable amount of the parties' and the Tribunal's time in striving to understand such cobbled assertions.

Asserted detriment 2.12

162. The claimant contended that the respondent's decision to cease to pay the CIDAA also amounted to a detriment (within the meaning of s47B ERA). As stated above, the reason that the respondent ceased payments of the CIDAA in February 2017 was because the claimant was not entitled to this money. The respondent's officers (Mr Smith and Ms Cottis) genuinely believed the claimant was not entitled to an allowance linked to work that he no longer undertook. It was relevant that it was the claimant's previous misconduct that debarred him from undertaking the work that he wanted the extra pay for, so the respondent was, understandably, not particularly sympathetic to the claimant's arguments. Nevertheless, Mr Smith gave a very clear determination on 23 October 2015.

163. Although the Tribunal did not hear directly from Mr Smith or Ms Cottis, their decision was closely scrutinised in the claimant's grievance and in the grievance appeal and at the Tribunal hearing. The fact that Mr Smith allowed for a period of adjustment of 12 months, consistent with the respondent's practice for the loss of allowance, implies that this was not related to the claimant's protected disclosure. Furthermore, the Tribunal is in no doubt that the respondent's removal of the CIDAA was ensuring that the allowance was applied fairly and consistently and not to anyone not contractually entitled to receive the additional payment. The removal of an allowance for which the claimant had no entitlement to was not a detriment.

Causation

164. Of the detriments alleged above, only 2.10.1 could be identified as an actual detriment, and we have set out above, we are satisfied that Mr Madigan had good reason to refer the claimant to Internal Governance. Mr Madigan believed the claimant had committed some form of misconduct by not declaring his continuous receipt of an allowance that he knew he was not entitled to. We regard Mr Madigan's assessment as honest and wholly appropriate in the circumstances.

165. We do not find the other asserted detriments listed above (2.10.2 to 2.10.7 inclusive and 2.12) amount to detriments. For completeness, if these matters were to be found detriments then we accept Mr Humphreys' submission that these alleged detriments had nothing to do with any protected disclosures made by the claimant. The detriments were not done *on the ground that* the claimant had made one or more protected disclosure.

a. Each respondent witness, when it was put to them, denied that the claimant's protected disclosures had anything to do with their actions towards him and we accept the evidence of the respondent witnesses.

b. There was no documentation before the Tribunal to support the conclusion that any detriments were done *on the ground that* the claimant had made a protected disclosure.

c. The chronology does not support the claimant's contention. Specifically, the Tribunal could not detect that there was any evidence of a change in the respondent's behaviour or the way the claimant was treated either side of a protected disclosure. We accept Mr Humphrey's submission that this is important because if an act is done *because of* a protected disclosure one would expect to see different treatment of the employee before and after the disclosure.

<u>Jurisdiction – out of time complaints</u>

166. From 6 April 2014, a claimant would not normally be allowed to bring a claim in an Employment Tribunal unless he informed ACAS of the complaint, thereby giving ACAS the opportunity to try to resolve the case by *early conciliation* ("EC"). The claims presented by the claimant of those covered by the EC regime: see s18(1) Employment Tribunal Act 1996.

167. The claimant issued proceedings in respect of the first claim on **8 July 2017**, which was exactly 1-month after the issue of the ACAS EC Certificate. The date of receipt by ACAS of the EC notification was **12 May 2017** and the date that ACAS issued the EC certificate was **8 June 2017**. The Early Conciliation Rules Of Procedure allow an extension to the normal time limits of up to a full calendar month (and a further 2 weeks if an extension has been granted and certified by ACAS). In respect of the claimant's proceedings, the "stop the clock" provisions of a possible 28-day extension do not apply as he can rely on the more generous 1-month extension because of his proximity to issuing proceeding. Therefore, the claimant's 3-month time limit is deemed to run for events prior to 8 June 2017. Consequently, we determine that any detriment arising before **7 March 2017** (i.e. 4 months before proceedings were commenced) is out of time unless this forms part of a *continuing act* under the relevant legislative provision.

Is the claimant's wages claim out of time?

168. There is a 3-month time limit for presenting a wages complaint to an Employment Tribunal under section 23(1) ERA. In the claimant's case, the operative date is "the date of payment of the wages from which the deduction was made": s23(2)(a) ERA. In this case, the claimant complains of a series of deductions – monthly from February 2017 onwards – so the 3-month time limit starts to run from the date of the last deduction in the series: s23(3) ERA. As the non-payment of the CIDAA was ongoing at the time that the claimant brought the first proceedings, this complaint was brought in time.

Is the claimant's direct discrimination claim out of time?

169. Complaints of unlawful discrimination must be presented to an Employment Tribunal before the end of the period of 3 months beginning with the date of the act complained of: s123(1)(a) EqA. There is, however, an escape clause which allows a Tribunal to consider any such complaint, which is out of time provided that it is presented within "such other period as the employment tribunal thinks just and equitable": s123(1)(b) EqA.

170. We say above that the direct discrimination complaint relates to Mr Smith/Ms Cottis' decision not to allow the claimant to be paid the CIDAA. In this regard, the statutory provision is different from that related to time limits for the non-payment of wages. The fact that Mr Smith provided for a period of adjustment of 1 year meant that the claimant was told that the consequences of this decision would not take effect until October 2016. In fact, the respondent continued to pay the claimant in error until this was spotted by Mr Madigan on 2 February 2017 and on or around 8 February 2017 he put in place measures to cease the overpayment of the CIDAA. Mr Milligan notified the claimant on 21 February 2017 of the CIDAA cessation. The parties were in agreement that the CIDAA payment was not included from the claimant's pay from February 2017 onwards, so the last (over)payment was made in January 2017.

171. The claimant was advised in clear and unequivocal terms that a decision had been made to cease payment of the CIDAA, so the limitation runs from 23 October 2015 when the decision was made and/or conveyed to the claimant.

172. Notwithstanding that was a key part of the respondent's case and it was identified on the List of Issues, none of the claimant's 3 witness statements respond to claims potentially being out of time or provide information that may be relevant to the Tribunal assessing whether it may be appropriate for the Tribunal to exercise its discretion to allow these claims to proceed. When he was asked by the Tribunal about delays in bringing proceedings the claimant said that he did not understand Employment Tribunal limitation rules, that he was ill for part of this time, that his wife suffered a close bereavement and that the Tribunal should exercise its discretion to allow such complaints to proceed out of time. It was unclear as to whether the claimant was talking about the delays in respect of the first proceedings (3200644/2017) and/or the second proceedings (3200982/2018) so we assumed that he meant both claims. The claimant did not refer to any documentary evidence in respect of how his illness might have affected his ability to issue proceedings sooner, and there was no medical report to support any prolonged period of incapacity with sufficient recovery to issue proceedings. We did not hear evidence from the claimant's wife in respect of the effect that the death in her close family had upon the claimant.

173. In considering whether to exercise its discretion, the Employment Tribunal should consider the prejudice that each party would suffer as a result of granting or refusing an extension of time and we should have regard to all the other relevant circumstances of the case. There is no presumption that Tribunal should extend time, the claimant must persuade the Tribunal that it is just and equitable to do so: *Robertson v Bexley Community Centre [2003] IRLR 434*. According to *ABM University Local Health Board v Morgan UKEAT/0305/13*. The relevant questions are:

a. Why was it that the primary time-limit had been missed?

b. Why, after expiry of the primary time-limit, was the claim not brought sooner than it was?

So the task for the Tribunal is first to determine the extent of the delay and then the reason for the delay.

174. Notwithstanding that Mr Smith/Ms Cottis' decision had continuing consequences, the decision to cease payment of the CIDAA occurred on 23 October 2015. The decision was clear, it was promptly communicated to the claimant and the claimant understood the full implications of this decision because he responded with a grievance. The primary time limit in respect of this alleged detriment expired on 22 January 2016 and the claimant issued proceedings on 8 July 2017, which was almost 18 months later.

175. The claimant raised a grievance promptly in response to the alleged discriminatory act, so it is difficult to understand why he could not issue proceedings within the appropriate timescale. In any event, ignorance of rights to make a claim in the Employment Tribunal is normally no defence: see *University of Westminster v Bailey EAT0345/09*. This is particularly the case as the claimant was represented by various trade union officials throughout the period under review and we see from the documentation that the claimant had trade union support during the limitation period. It has never been the claimant's case that he was provided with incorrect advice from his trade union representatives.

176. That said, the consequences of the alleged discrimination (i.e. the actual pay reduction) did not come into effect until the end of January 2017, although the claimant did not know of this until 21 February 2017. Yet, the claimant still did not issue proceedings within the appropriate time limit and maximum EC extension from when he knew the money had been stopped. The claimant brought his claim over 4½ months later, which is even outside the maximum EC extension available. Had the claimant issued proceedings more promptly after Mr Madigan told him the overpayment would cease then we might have exercised our discretion more favourably to him.

177. The Employment Judge raised at the outset of proceedings that the Tribunal would need to carefully consider the issue of time limits, continuous acts and the appropriate discretion (*reasonably practical* and, as in this instance, *just and equitable*) in respect to all claims as these extended over a prolonged period of time. Indeed, the Employment Judge raised the need to consider the respondent's contentions in respect of claims being out of time at various stages, the claimant adduced 2 further witness statements during the hearing and further additional documents. None of this information related to the jurisdictional issues. The claimant was asked about the delay to issuing proceedings at the end of his evidence and he appeared perplexed about time limits and peeved that he should explain his delay in issuing his Claim Form. His account of his illness lacked

specifics and we note that throughout the limitation period, the claimant pursued a grievance and actively corresponded with his employers. We were not provided with any information about when Mrs Dacey's father died, nor how this delayed the claimant issuing proceedings (for up between 3 to 4 months) so it was difficult to take this into account when exercising discretion.

178. We can see no good excuse why the primary time-limit had been missed. The proceedings were not issued within a reasonable time thereafter. Our starting point is that limitation periods ought to be observed.

179. We note that the claimant did not raise possible sex discrimination either through the prolonged grievance process or during his grievance appeal. We did not regard this as a relevant feature for determining the claimant's sex discrimination complaint, but it is highly relevant when we are asked to exercise discretion to allow a late claim to proceed that the claimant had never previously raised the discriminatory issue.

180. The Tribunal was aware of the case of *Anyanwu & Another v South Bank Students' Union & Another 2001 ICR 391 HL*, which held that it was a matter of public interest that discrimination cases are permitted to proceed to a full hearing as they are inevitably fact sensitive and it is important that they proceed to a full hearing so that facts can be established in order to minimize the risk of injustice.

181. In determining prejudice, as we have determined that the claimant's sex discrimination case has no merit, there can be no prejudice to the claimant in striking out an un-meritorious claim. The prejudice to the respondent in terms of cost and Tribunal time is set against the public interest consideration of discrimination cases proceeding to a full determination.

182. Notwithstanding we have determined that the claimant's sex discrimination complaint has no merit, we also conclude that this claim is out of time. We refuse to exercise our discretion to waive the jurisdictional point so that the direct sex discrimination complaint is now time-barred in any event.

Is the claimant's whistleblowing detriments claims out of time?

183. The claimant's complaints that he had been subjected to various detriments for making protected disclosures must be presented to an Employment Tribunal before the end of the period of 3 months beginning with the date of the act or failure to act to which the complaint relates, or, where the act or failure to act is part of a series of similar acts, the last such act or failure to act: s48(3)(a) ERA. As with the claimant's discrimination complaints, the Tribunal has the power to extend the time limit for a "reasonable period". However, for claims of whistleblowing detriments the test is different; the Tribunal should only extend time if we are satisfied that it was not *reasonably practicable* for the complaint to have been presented in time: s48(3)(b) ERA.

184. Where an act extends over a period of time, the date on which it will be deemed to have been done (for the purposes of calculating the time limit) is the last day of that period: s48(4)(a) ERA. Where there has been a deliberate failure to act, the time limit will begin to run on the date when the deliberate failure to act was "decided" on: s48(4)(b) ERA. In the absence of evidence to the contrary, an employer will be taken to decide on a failure to act when it does an act inconsistent with doing the failed act. If no inconsistent act is done, then

the employer will be taken to have decided on a failure to act when the period expires within which it might reasonably have been expected to do the failed act if it was to be done: s48(4)(b) ERA..

185. The Court of Appeal in *Ezsias v North Glamorgan NHS Trust 2007 ICR 1126 CA* held that a similar approach to *Anyanwu* should generally be taken in whistleblowing case, i.e. that only in exceptional cases should the case in question not proceed to a full determination, because whistleblowing claims have much in common with discrimination cases in that they involve an investigation into why an employer took a particular step and the public interest demands that whistleblowing claims should proceed to a full hearing to minimise the potential for injustice..

186. Detriment 2.10.1 and 2.12 are the only detriment allegations that are out of time. Both allegations represent single-event allegations and do not form part of a continuous act. Notwithstanding that these claims did not succeed, for completeness, we conclude that they were out of time in any event.

187. We considered the exercise of our discretion. In respect of allegation 2.10.1, The claimant was informed by Mr Madigan of his report to internal governance on 28 February 2017 and allowing for the maximum EC extension, this complaint is still over a week out of time. There is no evidence to specifically account for this week's delay in issuing proceedings. In respect of allegation 2.12, this appears to be 16½ months out of time and again there is no detailed and specific explanation as to the delay in commencing a claim merely generalised assertions.

188. We considered the claimant's evidence and submissions set out above in respect of his sex discrimination complaint. We noted the absence of a specific explanation as to the delays and also the lack of corroborative evidence. We were not willing to exercise our discretion on the grounds of the claimant's illness nor his family bereavement.

189. In respect of the claimant's ignorance of the law, such that this might be an excuse, the claimant was represented by his trade union throughout. Under the circumstances, we determined that it was reasonably practical for the claimant to bring a claim within the appropriate limitation period. As before, although we have given a determination in respect of allegations Issues 2.10.1 and 2.12 we also conclude that these 2 claims are time-barred in any event.

II. THE SECOND CLAIM (Case No: 3200982/2018. Claim received: 12 May 2018)

<u>Jurisdiction – out of time complaints</u>

190. The List of Issues does not provide for a determination in respect of time limits for the claimant's second claim. The fact that no party raised this as an issue before the case management discussion on day 1 did not preclude the Tribunal resolving this issue. Time limits are jurisdictional matters. It does not need the respondent to raise as defence that a claim or claims were out-of-time. The ERA and EqA require proceeding to be commenced within 3-months of detriments or dismissal or less favourable treatment. Compliance with the appropriate time limits determine whether the claimant has the right to bring a claim. So the Tribunal should have regard to this in any event.

191. The second complaint was received on **12 May 2018**. The Claim Form quotes and EC number are 235041/18/10 although the ACAS EC certificate was not included in the hearing bundle. The Tribunal has given the claimant the benefit of the doubt and has calculated the time limits on the basis of the longest EC period extension of 1 calendar month. If this is not correct and if it this has any bearing on the claims, then the Tribunal will address this in an application to review. Therefore, we proceed on the basis that any claim in respect of a discreet matter (i.e. not part of a continuous act) is out of time if the act in question occurred on or before **11 January 2018**.

192. Asserted detriments 2.25.1, 2.25.2, 2.25.3, 2.25.4, 2.25.5 are prima facie out of time on the basis of the dates of the detriments identified. As we determine these detriments below and have rejected these complaints, it cannot be contended that these detriments amounted to a continuous act; notwithstanding all of these allegations were made against Mr Davies.

193. As stated above, the Employment Tribunal has a discretion to allow claims to proceed in respect of the public interest disclosure proceedings, if we are satisfied that it was not reasonably practical for the complaints to be made in time and that the claimant issued proceedings within a reasonable period thereafter. Time limits require observation and our discretion should not be exercised without clear and sufficient reason. We take into account the claimant's evidence in respect of his ill-health and the family bereavement but again we register our concerns about the lack of specific evidence and the lack of corroboration in circumstances where we would expect clear and cogent supportive evidence. For the reasons considered above, we do not accept that it was not reasonably practical for the claimant to commence proceedings within the appropriate time limit. Consequently, 5 of the claimant's 11 public interest disclosure detriments are time-barred.

194. In respect of the discrimination cases, all of the disability harassment and reasonable adjustment cases are in time because of the date of the discrete act complained of, or because they represent a claimed continuous pattern of discriminatory conduct over a period ending within the appropriate time limit.

<u>The asserted protected disclosures at 2.17 and 2.18</u>

195. The Tribunal accepted that the claimant made the protected disclosures identified at 2.17.

196. The protected disclosures that the claimant contends occurred after 12 July 2017 appear to be twofold telling his managers of his previous complaints (Issue 2.18.1) and providing those managers with the documents of the complaints (2.18.2). As a matter of law, informing someone that you had previously made a public interest disclosure is <u>not</u> a disclosure. A disclosure must convey facts or relevant information. The disclosure can be made as an allegation – because conveying fact and making an allegation are not necessarily mutually exclusive. However, there must be a *disclosure of relevant information*.

197. With respect to the protected disclosures the claimant contended that he made to Mr Sanger, the Claimant referred Mr Sanger to a handwritten note of a meeting of 17 July 2017. This mentioned the claimant showing Mr Sanger "some emails (but not collected)" and referred a few pages later to the claimant not being happy with the way that the

department treated him (with an asterix which the claimant said indicated that he gave Mr Sanger a further document). Neither copies of the emails nor the further document were produced at the hearing and Mr Sanger said that he could not remember the details of this purported disclosure. Mr Sanger stated in his witness statement that while he managed the claimant, he did not know of the nature or content of the claimant's whistleblowing allegations and we believe him. The claimant's case on this point was quite clear; he did not make the whistleblowing disclosure at this meeting, he said that he referred to an email and another document which contained the disclosure. We are satisfied with Mr Sanger's account that he did not go through this documentation, nor did he take any disclosure documents away from this meeting. As these documents have not been produced and as the claimant could not describe the documents in any detail, we not satisfied that they could meet the requirements of s43B ERA.

198. Having heard the totality of the claimant's evidence, we do not regard the claimant as a reliable witness. We regard Mr Sanger as a reliable witness. These are such circumstances that, if a whistleblowing disclosure had been made to him, we would expect Mr Sanger to remember. Mr Sanger was clear that he could not remember receiving the emails or another document, which is an honest and frank account, consistent with not receiving the disclosure. We cannot be clear that the alleged disclosures satisfied the requirements of a public interest disclosure so under the circumstances, we do not accept that a protected disclosure was made to Mr Sanger.

199. The claimant contended that he also made protected disclosures to Mr Davies who became the claimant's line-manager on 21 August 2017. Mr Davies' statement was emphatic, and his oral evidence was equally clear, the claimant did not make any protected disclosure to him. The claimant was difficult to manage – he was uncooperative and argumentative. He was resistant to the authority of his managers. Mr Davies described the same occurrence at every meeting he had with the claimant, where the claimant would push a bag or file of papers at him and say, "have a read". We are in no doubt that this was a tactic of the claimant to draw his managers into a wider dispute in an attempt to nullify their attempts to effectively manage him. Had the claimant genuinely wished to resolve his various complaints, then he would have cooperated fully with the attempts of the human resources practitioners and the appropriate decision-makers to catalogue the claimant's various complaints and progress towards a hearing without delay. Mr Davies was resistant to the claimant's attempts to obfuscate. He did not want to be drawn into the multifarious disputes that the claimant had with his employers, so he declined to accept any documents. This is a credible and clear response to the claimant's behaviour. Mr Davies was also clear and consistent in his written and oral evidence that he did not discuss any alleged disclosures with the claimant and the claimant did not use words to him such as "whistleblowing", "protected disclosures" or similar. Given that we cannot reconcile the contradictory evidence between Mr Davies and the claimant, we prefer to accept Mr Davies' account. Therefore, we do not accept the claimant made a protected disclosure to Mr Davies.

200. With respect to the protected disclosures the claimant contended were made by Ms Jeffrey between July 2017 to December 2017, the claimant did not refer to such disclosures in his witness statements nor did he identify any documents that we could determine supported or corroborated that such disclosures were made. The claimant merely asserted that he made these disclosures with no specific detail as to when or where they were made and the content of such a disclosure. It troubled us that we did not hear

from Ms Jeffrey; Mr Humphreys informed the Tribunal that following the events under scrutiny Ms Jeffrey had retired from the respondent and, surprisingly, no one had asked if she would participate in these proceedings. Although it was not satisfactory that we did not hear Ms Jeffery's version of events, the primary burden is on the claimant to establish the nature of his disclosure and whether it met the s43C ERA requirements and he failed to do that. Consequently, we do not accept that the claimant made a protected disclosure to Ms Jeffrey. Under the circumstances we accept the respondent's submission

Automatic unfair dismissal: Issues 3.16

201. Unlike the claimant's alternative claim for (ordinary) unfair dismissal (pursuant to s94 ERA), a claim for automatic unfair dismissal entails a detailed assessment with the Tribunal making an appropriate determination of the reason(s) for the claimant's dismissal. The Tribunal will need to determine whether or not there was a causal link between the protected disclosures and the decisions of the dismissal officer and the appeal officer.

202. It was the claimant's case that there was a conspiracy to dismiss him because of his protected disclosure. This involved, at least, Mr Madigan and Mr Callan and Ms Diamond.

203. It was the claimant's position in the disciplinary process, and also at the hearing, that he told Mr Madigan, his line manager, that he continued to receive the CIDAA after October 2016. This was put to Mr Madigan a number of times during the hearing and Mr Madigan was unambiguous in his evidence: that from 26 October 2016 to February 2017 the claimant did not inform him that he was continuing to receive the CIDAA. Mr Madigan's evidence on this point was consistent with contemporaneous documents and in particular his report to internal governance of 14 February 2017.

204. Furthermore, on 23 March 2017 Mr Milligan wrote to the claimant "Please provide me with any emails or other correspondence you have received to indicate payment of allowances would continue to you after October 2016". Rather than meet a straightforward question, with a straightforward answer, the claimant sought to question his line-manager as to why he asked this question, why he had not provided a progress update as previously requested and other matters. When Mr Madigan responded that day that Internal Governance had asked him to request the information he asked (if it existed), the claimant again refused to answer a direct question. Confrontation and refusal to co-operate appeared to be the claimant's standard response to his employers.

205. Mr Madigan was aware that the claimant had made protected disclosures. By the time that Mr Callan and Ms Diamond made their decisions, they were also aware that the claimant had made protected disclosures. However, none of these 3 central players and particularly the dismissal officer and appeal officer were aware of the substance of the disclosures. Nor were they involved in the whistleblowing procedure.

206. The Tribunal is satisfied that Mr Madigan was truthful in his repeated responses that the claimant had not told him that he continued to receive the CIDAA beyond when the claimant was informed that the allowance would no longer be paid, so the disciplinary charges at the heart of this case had substance.

207. Mr Callan set out in detail, in his oral and written evidence to the Tribunal, and more importantly in his contemporaneous detailed deliberation document his reasons for dismissing the claimant [pp2723-2736]. We record the salient points above under our

findings of fact. Mr Callan's deliberation document is a genuine and honest account of his consideration of the claimant's wrongdoing and we are satisfied that the claimant was not dismissed for a reason related to his making of a protected disclosure, singularly or cumulatively.

208. Again, we heard detailed evidence from Ms Diamond and considered her witness statement. We gave particular weight to the detailed explanation provided in her appeal deliberation document [pp3263 – 3298], which again was prepared at the time she came to her decision. We also find that this explanation of Ms Diamond's appeal was credible and truthful. We do not find that the appeal officer's decision to uphold the claimant's dismissal was anything to do with the claimant's protected disclosures.

Ordinary unfair dismissal

209. The reason for the claimant's dismissal related to his conduct, i.e. the failure to alert his managers or HR of the ongoing receipt of the CIDAA. Although the claimant denied the misconduct in question, the allegations (and ensuing dismissal) were based on the claimant's misconduct, which is a permissible reason for dismissal, pursuant to s98(2)(b) ERA.

210. The s98(4) ERA test can be broken down to two key questions:

i. Did the respondent utilise a fair procedure (Issues 3.20 and 3.21)?
and
ii. Did the respondent's decision to dismiss fall within the range of reasonable responses open to a reasonable employer (Issues 3.22 and 3.23)?

211. In terms of the fairness of the procedure adopted, i.e., the dismissal process, the claimant merely complained about the delay. So far as the Tribunal could ascertain the only viable breach of the ACAS guidelines or other contention of procedural unfairness were in respect of the respondent's failure to deal with the procedure promptly and the claimant's subsequent contention that he was not dealt with consistently (which we have dealt with in respect of his sex discrimination complaints).

212. Mr Madigan referred this matter to Internal Governance for investigation on 14 February 2017. On 31 August 2017 Mr Billington completed his investigation report and submitted this to Mr Callan. This was 6½ months after Mr Madigan first raised the disciplinary matter. Mr Callan first invited the claimant to a disciplinary hearing on 21 November 2017, which was over 2½ months after he received the investigation report and over 9 months after the disciplinary referral. The disciplinary hearing eventually proceeded on 26 January 2018, which was over 11 months from the initial disciplinary referral. The claimant was dismissed some 3 weeks later, by coincidence, on the anniversary of the disciplinary referral. Yet the delays continued. The claimant confirmed his intention to appeal promptly, on 19 February 2018, and provided his substantive appeal on 28 February 2018. He was invited for an appeal meeting 3 weeks later, although the appeal hearing did not take place until 17 April 2018. The appeal decision was sent to the claimant on 20 June 2018, which was over 4 months after the claimant announced his intention to appeal and over 1 year and 4 months after the disciplinary process began.

213. It is astonishing that the respondent took 16 months to complete a disciplinary, dismissal and appeal process. It is the responsibility of the respondent to conduct their disciplinary procedures promptly. The claimant bears responsibility to cooperate with the respondent; however, the primary obligation is very clearly on the employer to conduct their disciplinary process fairly and without delay.

214. Much of the delay arose from illness or in arranging convenient meeting dates. There were some significant delays in waiting for documents and responses from the claimant. HR officers provided support and helped coordinate the various stages; however, Mr Billington, Mr Callan and Ms Diamond were the decision-makers in respect of the investigation, the disciplinary and the appeal processes respectively and they bear the responsibility for the inordinate time that it took to deal with this matter.

215. The claimant contended at the hearing that the delay in determining the disciplinary allegations was unfair in itself, which was a bit rich given his tactics of delay and obfuscation. The Tribunal pressed the claimant on whether he could highlight where the delay caused any significant unfairness; however, other than complaining that the process had gone on for far too long (which we accept), the claimant was not able to identify where the delay caused or contributed to a significant procedural unfairness.

216. The whole disciplinary process should be carried out without unreasonable delay. The ACAS Code emphasises importance of establishing the facts and putting allegations to the employee promptly before recollections fade. In *RSPCA v Cruden 1986 ICR 205 EAT* and unjustifiable delay of 7 months before disciplinary proceedings were commenced against the employee made an otherwise fair dismissal unfair, even though the employee he suffered no prejudice. However, The facts of this case are different from *Cruden* and throughout the period identified in paragraph 212, the claimant was aware of the ongoing disciplinary issue and made various representations in respect of these. Of overwhelming significance, the claimant and respondent were dealing with the claimant's grievance, the grievance hearing, the claimant's appeal against his grievance, the grievance appeal hearing and the grievance appeal outcome during this period.

217. We scrutinized the minutes of the disciplinary and appeal hearings and the decisions of both Mr Callan and Ms Diamond very carefully and we conclude that the delay did not detract from the claimant's ability to defend himself against the allegation and, although unnecessarily lengthening events, it did not undermine the fairness of the process or the underlying decision. The detriment that the disciplinary case hung over the claimant's head for some time is set against our conclusion that if the relevant respondent officials had pursued their task with appropriate punctuality, then the claimant would have been dismissed months earlier.

218. We accept the respondent's summary that the following key factors were present in both Mr Callan's and Ms Diamond's decision:

a. The respondent classified the claimant's misconduct as gross misconduct, according to the relevant disciplinary procedure: HR policy HR410410.

b. This policy required all employees to check their payslips each month to ensure that all payments were correct. Furthermore, this is repeated on employees' payslip, including the requirement to highlight any error. The claimant was warned that the continued receipt of any incorrect payment may be a disciplinary matter

[p3320]. In any event, the claimant confirmed to Mr Billington, during the investigation, that he scrutinized his payslip and was aware of the continued payment of the CIDAA and the claimant did not report this because he contended that he was entitled to the allowance.

c. Knowingly receiving payments which the claimant was told ceased to be payable after October 2016 was an act of dishonesty as there was a positive obligation on the claimant to highlight the overpayments to his employer.

d. The fact that the claimant's employer was HMRC was relevant, bearing in mind the claimant's employer is in a unique and trusted position as the collector of taxes in the UK and its officers – including the claimant until recently – had far ranging powers commensurate with that role. This demanded the highest standards of honesty and integrity from staff.

219. We are satisfied that Mr Callan's and Ms Diamond's lengthy decisions fulfilled the *Burchell test* in that both the dismissing officer and the appeal officer had a genuine belief in the claimants guilt; that they had reasonable grounds upon which to base this belief; and the respondent had carried out a reasonable investigation prior to the dismissal.

220. The finding of gross misconduct is presumptive of dismissal; nevertheless, an employer still needs to consider the surrounding circumstances, including mitigation. The claimant had the opportunity to proffer his mitigation and Mr Callan specifically considered whether a final written warning could be an appropriate outcome. Given that the claimant had already a final written warning (for a dishonesty related offence), Mr Callum decided that the claimant should be dismissed without notice.

221. We find that the claimant's dismissal was within the range of reasonable responses open to this respondent and as such the dismissal was fair within s98(4) ERA.

<u>The protected disclosure detriments: Issue 2.25</u>

Alleged detriment 2.25.1

222. This allegation relates to Mr Davies' failure to submit an OH referral for the claimant in September 2017. Mr Davies became the claimant's manager on 21 August 2017, in evidence (which we accept) he said that he understood that an OH referral had been made by the claimant's previous manager, Mr Sanger, and that Mr Sanger had prepared a stress reduction plan for the claimant. The claimant did not raise any work-related stress or any other health issues with Mr Davies until the end of November 2017. Therefore, there was no reason for Mr Davies to submit a OH referral in respect of work-related stress until he knew of the claimant's work-related stress so we do not accept that the claimant suffered from a detriment in this regard. Nevertheless, even if a detriment could be made out, it cannot be attributed to anything other than Mr Davies' lack of awareness that the claimant needed to be referred to occupational health.

Alleged detriment 2.25.2

223. Mr Davies disputed in evidence that he subjected the claimant to the career detriments alleged in September 2017. Mr Davies contended that the claimant continued to have work reviewing cases to complete and that he also sought to provide the claimant with

further work which was evidenced in the transcript at page 422 to 433 of the hearing bundle. The claimant was not allowed to review ongoing criminal cases as that may have placed him in the evidential chain, which the claimant was precluded from because of his previous gross misconduct.

224. At the hearing, the claimant did raise a work plan document with Mr Davies which appeared to be a planning document from before April 2017 and therefore pre-dates the period under scrutiny. More notably, for the period when the claimant started to be managed by Mr Davies, of the 6 areas the claimant identified that he could work, Mr Davies said only one area 'Notebooks' was available to be taken forward, a civil project which was allocated to someone else who he maintained was better suited to it.

225. If the claimant suffered some disadvantages from progress in his career, then this was because of his previous dishonesty (and the finding of gross misconduct) and also his unfortunate confrontational demeanour when dealing with his managers. We determine that the claimant was not subject to this detriment as alleged.

Alleged detriment 2.25.3

226. We set out above that the claimant was uncooperative with Mr Davies' predecessor (Mr Sanger) in respect of agreeing PMR objectives and we find that to be the case with his new manager. Mr Davies said that he attempted to discuss objectives at his first meeting with the claimant and the claimant responded that he was still in dispute with Mr Madigan's assessment and until that dispute was resolved he would not agree to further objectives. The claimant's line-managers were entitled to expect cooperation from the claimant in determining the work that the claimant could undertake in his new role and in identifying how this work would be measured and assessed. In respect of September 2017, this was not forthcoming from the claimant and he continued with his enmity and circumvention. We set out under the preceding purported detriment that the claimant was offered further work. Given that the claimant was reinstated by the skin of his teeth, we are amazed why he did not seek to knuckle down and try to rebuild bridges with colleagues and managers even if that entailed undertaking work that did not necessarily appeal to him. Nevertheless, he chose not to and continued to blame others for every perceived misfortune.

227. Mr Sanger and Mr Davies seemingly regarded the claimant as dysfunctional and seemingly attempted to avoid being drawn into the claimant's ongoing brawl with the HMRC establishment. Mr Sanger and Mr Davies should have addressed the claimant's maladjusted behaviour earlier; however, the fact that the claimant's line-managers chose to manoeuvre away from skirmishing with the claimant is not enough to amount to a protected disclosure detriment. So under the circumstances, this detriment is also rejected.

Alleged detriment 2.25.4

228. Despite the claimant's assertion to the contrary, the claimant was invited to the 2017 Christmas meal. This is evidence that page 4366 of the hearing bundle. The claimant contended that this document was falsified – although not to Mr Davies. This was denied by Mr Khaliq, whom we note did not attend the Christmas lunch. There was no expert evidence supporting that the document was fabricated, and this contention merely amounted to conjecture by the claimant. Under the circumstances, we prefer the evidence of Mr Khaliq, so this allegation is not accepted.

Alleged detriment 2.25.5

229. The evidence that the claimant contended supported this allegation was simply not there. The claimant took us to an email at page 4487l in the hearing bundle. However, it was not clear that the email was either to or from Mr Davies and Mr Davies specifically denied any knowledge of this email which predated his role as the claimant's line-manager. Of most importance, is that any reasonable interpretation of the email does not support the claimant's allegation that Mr Davies or other senior managers were attempting to get the claimant banned from a HMRC building. This alleged detriment is also rejected.

Alleged detriment 2.25.6

230. Mr Davies said that he did not remove the claimant from any list of employees, and we believe him. Mr Davies said that he believed the document that the claimant bases this allegation on was a work in progress document from the Team HUB. Mr Davies said that he did not create this document, nor did he have any editorial rights over it. In any event, other team members were also missing from the document. We accept Mr Davies' assertion that he never excluded the claimant from any operational work or any operational work list. We also accept Mr Davies evidence that the claimant refused work that he said he was not trained for, that the claimant indicated he did not want to be trained for certain work and that he only wanted to do FIS Criminal work. We also accept Mr Davies evidence that he said the claimant was resistant to talking about the work he had undertaken and that he was aggressive and hostile at meetings.

231. We do not know why the claimant was not included in this particular list of employees, but we would deduce that it was based on one (or more) of his colleagues' genuine apprehension that the claimant did not did not undertake any allocated work so it was difficult to ascribe him on the relevant list. We determined there is no detriment in this allegation.

Alleged detriment 2.25.7

232. This alleged detriment relates to a meeting on 1 February 2018, which the claimant provided a covert recording for that was played to the Tribunal. Mr Davies said that he did not know that the claimant was recording that meeting.

233. We note that, according to Mr Davies, the purpose of the meeting was to discuss an occupational health referral, a stress reduction plan and address reasonable adjustments to support the claimant and we are satisfied that Mr Davies approached the meeting positively. The claimant was around 45 minutes late to this meeting, but this did not provoke Mr Davies because Mr Davies said that was the norm for the claimant. Mr Davies described the claimant's rude and aggressive behaviour in his witness statement. He said that he found the claimant's behaviour distressing which he expanded upon in his oral evidence and which we accept.

234. We listened to the recording several times. We were astonished at the claimant's behaviour towards his line-manager. The claimant was aggressive and raised his voice to Mr Davies. Mr Davies denied striking the claimant's hand and we do not determine that he did from listening to the recording. We are in no doubt that the claimant made the surreptitious recording in an attempt to cast Mr Davies in a bad light. The claimant was

provocative, and our interpretation of Mr Davies behaviour was that he was frustrated with the claimant's behaviour, yet appropriately restrained.

235. Mr Davies' account of the claimant's uncooperative and pugnacious behaviour was consistent with the evidence of Mr Madigan and Mr Sanger, and both described the difficulties in dealing with the claimant. Towards the end of the tape, Mr Davies raised possible disciplinary action. This was not a detriment, as from our interpretation of the claimant's behaviour (which the claimant recorded at the meeting) disciplinary action was thoroughly appropriate. We suspect Mr Davies did not follow through on disciplinary action because he did not know that the meeting had been recorded and the meeting was not independently witnessed. Following the meeting, Mr Davies decided that he would not meet the claimant again without an independent witness. It is disappointing and indicative of a flawed working relationship when an employee's manager feels compelled to take such steps because of the poor behaviour of an employee. Mr Davies' exasperation was not inconsistent with the claimant's previous 2 line-managers and merely reflected an escalation in the claimant's reluctance to accept his managers' authority.

Alleged detriment 2.25.8

236. This alleged detriment is dealt with under 2.25.3. No detriment.

Alleged detriment 2.25.9

237. This follows events alleged detriment 2.25.1, As soon as the claimant informed Mr Davies of his illness, on 30 November 2017, Mr Davies acted promptly making enquiries of HR who replied to him on 4 December 2017 making a number of recommendations including the claimant completing an accident report (which Mr Davies understood to be form HRACC1). The claimant did not complete the report as requested and over the course of December 2017 and January 2018, Mr Davies chased the claimant 3 times to complete the form: 13 December 2017 [see p2401-2402], 19 January 2018 [see p2421] and 31 January 2018. [See p2511].

238. What emerges from these documents is that Mr Davies was seeking to complete what he understood to be the necessary steps to making the OH referral. At the hearing the claimant objected to the need to complete an accident form. We were not clear that this was a significant issue at the time. However, assuming it was, Mr Davies was a civil servant, and he needed paperwork to be completed so he could action the claimant's request. HR referred him to an accident report which may or may not have been the most appropriate form to complete. However, instead of complying with straightforward request the claimant preferred to bicker about a wholly irrelevant matter. This implied to the Tribunal that the claimant was more interested in finding something to argue about rather than facilitate an OH referral. This did not represent a detriment to the claimant.

Alleged detriment 2.25.10

239. We are not going to spend much time dealing with this purported allegation because, frankly, this allegation was a waste of Tribunal time. The respondent needed the space at its office and, we accept, had been asking the claimant to remove his property for months and years. On 26 February 2018 Mr Margree undertook an audit of the claimant's property, which various respondent officers have been pressing for the claimant to remove over many years. When asked the claimant could not provide us with a satisfactory answer as to

why he did not collect his property, so we deduce that the claimant did not remove his personal property just to be awkward. Mr Margree undertook an audit in the presence of the claimant's trade union representative after taking HR advice. If the claimant objected to what he saw might be the search of his property, then he should have taken his stuff away. No detriment.

Alleged detriment 2.25.11

240. This is a very wildly drawn allegation. The claimant contended that HR interfered with independent local management decisions. It is difficult to see what decisions the HR officers are contended to have *interfered* with as this was not made clear at the hearing. So far as the management of claimant was concerned, the evidence of each HR official was clear – they offered a support service to decision-makers. This role did entailed offering advice when consulted, but both the HR officers and the managers – which we take to mean, Mr Madigan, Mr Sanger and Mr Davies – were very clear, that HR offered a support service and local management.

241. There was no evidence that HR instructed management to isolate claimant. The claimant was not managed from afar on the instructions of HR. He was managed remotely on the basis of the availability of managers and the disability-related adjustments of attempting to locate the claimant nearer to his home. There is no evidence that HR prevented compliance with the SAR or that any delay in disclosing the voluminous documents sought under the Data Protection Act amounted to a detriment. Allegation rejected.

<u>The claimant's disability</u>

242. The claimant contended that he suffered from clinical depression and that he was a disabled person, under s6 EqA, 2013. The respondent accepted that, at all material times, the claimant was a disabled person in relation to clinical depression only.

243. The Tribunal did not have the benefit of a disability impact statement. Nor did the claimant going to detail in his witness statements about the precise effects of his disability. Nevertheless, disability was conceded, and, notwithstanding the lack of detail, the Tribunal saw no reason not to accept the concession made.

<u>Disability Harassment: Issues 2.31 – 2.34</u>

244. The definition of harassment is set out in Issue 2.34. The claimant complains about the meeting of 1 February 2018 (Issue 2.31.1.1) and meetings in September 2017, November 2017, December 2017 and January 2018 (Issue 2.31.1.2)

245. We have addressed the meeting of 1 February 2018 in respect of the claimant's contention that he was treated less favourably because of the protected disclosures he had previously made. Our assessment of this meeting was very critical of the claimant's poor behaviour. He went into the meeting of 1 February 2018 with a covert recording device looking to provoke Mr Davies into some form of confrontation, so that he could use it against him later. The exchange did not amount to harassment by Mr Davies towards the claimant. It amounted to disingenuous and combative behaviour by the claimant.

246. The claimant did not attend many full team meetings and we accept Mr Davies evidence that the claimant's attendance was haphazard. When he was asked by Mr Davies on one occasion, the claimant said he would not go to the team meeting because Charles Dunbavand was going to be there. Indeed, Mr Davies described the claimant is not doing very much work, so he was not missed at team meetings. Mr Davies said that he asked the claimant on several times what work or what type of work he was doing, and the claimant said that he was working on his disciplinary investigation and his grievance. Mr Davies reminded him of an agreement where the claimant could spend 20% of his time on such matters and the rest on operational work and development, but the claimant replied, "you are not the one who might lose their job!"

247. Mr Davies reported that the claimant would frequently arrange other meetings to avoid seeing him and that the claimant did not accept invites to other meetings he had arranged so he did not know whether the claimant would be attending various meeting or not. The claimant was also off sick for some period in September 2017, so it was difficult for us to work out which meetings the claimant did attend with Mr Davies during the period September 2017 to February 2018. So far as we can see there were 2 meetings where the claimant met with Mr Davies.

248. Mr Davies met the claimant around 21 September 2017 where the conversation centred on the claimant's annual leave and 30 November 2017 to discuss the claimant's health, but where the claimant seemed to interrogate Mr Davies about who he had been in contact with. At this meeting, Mr Davies asked the claimant for a photocopy of his sick note and the claimant told him to "photocopy it yourself". The meetings Mr Davies arranged with the claimant for 21 December 2017 and 25 January 2018 were cancelled because the claimant arranged doctor's appointments for those days. There are no clear allegations as to what Mr Davies said or did, which could be said to amount to harassment during these 2 meetings or over this period. Given that we prefer Mr Davies' evidence to that of the claimant where there is a straightforward conflict of accounts, we do not believe that Mr Davies harassed the claimant. Given the lack of specifics about Mr Davies purported hostility and dismissive approach, we do not accept that Mr Davies said or did anything that could reasonably amount to harassment of the claimant.

<u>Reasonable adjustments: Issues 2.35 – 2.48</u>

249. The respondent made a number of adjustments to accommodate the claimant's disability:

a. Following from the August 2016 occupational health report, the respondent made a number of adjustments to assist the claimant return to work and continue his employment. These adjustments were set out in the return to work meeting on 10 August 2016 [p1108 – 1109].

b. Mr Madigan, who had implemented the earlier OH report, raised with the claimant possible further OH referrals in December 2016 and February 2017.

c. Mr Sanger attempted to agree a stress reduction plan with the claimant and made a further OH referral in July 2017.

d. One of the main purposes of the meeting of 1 February 2018 was for Mr Davies to make an OH referral.

250. The claimant did not make any requests for reasonable adjustments at this time and he did not make a claim in respect of the respondents purported failure to make reasonable adjustments until May 2018, notwithstanding that the claimed reasonable adjustments go back to the period of the first claim.

First PCP

251. The claimant was not able take the Tribunal to any document or correspondence in which the claimant either asked to work from home or where this could be inferred as appropriate. Whilst it was the claimant's case that homeworking should have been considered by the respondent, that was not his contention at the material times. There was only 1 OH report produced. The respondent sought to have this updated, but the claimant did not cooperate with the various referral processes. We were not clear when the symptoms of the claimant's mental illnesses where acute so we could not identify a precise timeframe that the contended need to make such reasonable adjustments would arise.

252. The claimant was moved to quality assurance work because of his previous dishonesty. The Tribunal was not satisfied that the claimant could be trusted to work from home, particularly as it was a common feature from Mr Madigan and Mr Davies especially that the claimant was not actually undertaking productive operational work. Therefore, because of the nature of the work he was supposed to do, he needed access to mentors and other colleagues but also because of the documented concerns in respect of his indolence he required a greater degree of supervision.

253. Following the claimant's return to work on 18 August 2016, he was moved to an office more local to his home and he worked flexible hours. These were the adjustments that the claimant agreed on his return to work (see pp1087-1089 and pp1108-1109]. Had the OH report or the claimant ever raised working from home then this may have been explored. However, this is an after-the-event criticism of the respondent that has no force. This complaint is not accepted.

Second PCP

254. The claimant was moved from work that he was familiar with because of his dishonesty. The claimant's dishonesty did not arise from his disability so as he was not dismissed, then the claimant would have needed to undertake work that he was not familiar with. At no point did the claimant say that he had problems processing work because of poor concentration and muddled thinking. Indeed, his dealings with his managers was calculated and cynical so for the greater part of his interaction with his line-managers and others, the evidence is to the contrary that he suffered from the disadvantage set out at Issue 2.39.

255. The claimant was offered work in Quality Assurance, similar to what he had been undertaking previously, e.g. the 13 'oils' cases provided in November 2016 [pp1388 – 1389] and the work around unannounced visits provided by Mr Sanger.

256. In line with the OH report, the claimant was given specific support to learn new areas of work and support him in performing that work, e.g. the return to work meeting in November 2016 identified in 'Development Needs' 3 product areas and named contacts in

each one and Mr Sanger allocated a support person to help the claimant with the unannounced visits work.

257. We do not accept that the respondent failed to make any required reasonable adjustments in this regard.

Third PCP

258. The claimant did not raise any objection against hot-desking at any time. This was not raised in the claimant OH report or elsewhere to show that any adjustment needed to be made in respect of this. There was no corroborative evidence that working in a hot-desk environment caused or exacerbated any anxiety, panic attacks or other mental illness from the claimant and we would have expected this to be independently evidenced if this point was to have any force in circumstances where the claimant did not raise any concerns.

259. The claimant agreed in cross-examination that there was no hot-desking policy at the respondent's Chelmsford office where the claimant worked up to February 2017. We accept Mr Sanger's evidence that at the Strafford Office the claimant usually sat at the same desk and that hot-desking was for visitors. We reject the claimant's contentions in respect of this point.

Fourth PCP

260. There was no provision, criteria or practice requiring the claimant to work in isolation from other members of staff. The claimant wanted to work nearer from home and the respondent moved him to Chelmsford initially and then, following the closure of the Chelmsford office, to the Stratford office. This was part of a different reasonable adjustment to allow the claimant to work nearer to home. He worked with other colleagues from FIS at both these offices and, we are satisfied, he had easy access to mentors, managers and other colleagues. This allegation is rejected.

Auxiliary aid

261. The claimant said that he was put at a substantial disadvantage by not been given a mobile telephone and a surface pro tablet computer. Mr Sanger and Mr Davies both gave evidence that the claimant requested the provision of a blackberry mobile phone and the tablet when these became available to HMRC staff. Initially these were allocated on the basis of need and the claimant could not satisfy any particular need because his work was not peripatetic, and he had not raised (nor was it deemed a reasonable adjustment) to work from home. The mobile phone and tablet were also rolled out to more senior staff after those who had a particular need. Given that the respondent made reasonable adjustments to move the claimant to a workplace nearer home, and to accommodate more flexible hours, we cannot see and there is no evidence to suggest that the claimant would want to, or could, work at home when he was too ill to come to the office. The claimant's impairment was mental – based on clinical depression. So there was no evidence that when the claimant was fit to work, he could not travel a short distance and work reduced hours at the office.

262. The claimant made his request for 2 auxiliary aids without raising these as reasonable adjustments. He did not refer to the OH report as this had not been recommended nor did he raise any other medical evidence to support this contention. The

lack of a work issued mobile phone and a work issued tablet did not cause the claimant substantial disadvantage.

Holiday pay

263. In respect of the claimant's holiday pay, we accept the respondent's submission in this regard.

264. The claimant contended that he was owed 120 hours of leave in lieu for the 2016 to 2018 leave years. The claimant's holiday year ran from 1July to 30 June.

265. In cross-examination, the claimant accepted that his holiday entitlement for a full year was 226.8 hours, although 161.5 hours for Year 2017/18 because he was dismissed on 13 February 2018. Working backwards:

- For Year 2017/18. the claimant took 147.6 hours, leaving outstanding 13.9 hours;

- For Year 2016/17, the claimant took his full entitlement, so there was no outstanding holiday is carried forward.

- For the Year 2015/16, the respondent accepted that the claimant was owed 226.8 hours.

- Therefore, for the period claimed 226.8 + 13.9 = **240.7 hours** were due from the respondent to the claimant.

266. The claimant was paid holiday pay in respect of **319.2 hours** on dismissal [p3325]. Therefore, there was no shortfall in holiday pay as contended, and, in fact, the claimant was paid more than he was entitled to.

267. When the above figures were put to the claimant, he said that his holiday entitlement arose from the period before 2015/16 but that period was outside the claimant's claim (as identified for the List of Issues) and we did not receive a satisfactory computation of what money was owed.

268. Under the circumstances, we are satisfied that the claimant has no shortfall in the holiday pay identified.

Reimbursement of the money deducted from the claimant's holiday pay

269. The respondent deducted £2,737.68 from the claimant's final holiday pay. This was identified as an overpayment of salary and set out in a letter dated 17 February 2017 sent to the claimant. The claimant said that he did not received this letter, but a deduction in respect of an overpayment of wages is not dependent upon the claimant been informed prior to the deduction.

270. The respondent's letter makes it clear that the overpayment relates to the CIDAA from 26 October 2016 to 31 January 2017. Overpayment of wages may be deducted from payments made to the claimant, pursuant to S14(1)(a) ERA. As we have found the claimant was paid the CIDAA for the period of recovery and as we have found the claimant was not entitled to this allowance, it follows that the respondent is entitled to seek recovery.

Summary

271. All of the claimant's claims as follows are rejected:

- the shortfall of wages (in respect of the CIDAA and the claimant's outstanding holiday pay);
- sex discrimination;
- public interest disclosure detriments;
- automatic unfair dismissal;
- unfair dismissal;
- disability harassment; and
- the respondent's failure to make reasonable adjustments

272. The claimant's claims in respect sex discrimination and 2 public interest disclosure detriments for the first proceedings and 5 public interest disclosure detriments for the second proceedings are out of time and the Tribunal has not exercised its discretion (in accordance with the EqA and ERA) so these claims are time-barred.

273. Accordingly, proceedings now dismissed.

Appendix 1: Glossary of Terms

CIDAA	Criminal Investigation Directorate Attendance Allowance
Claimant	Mr Paul Dacey
CSHR or HRCS	Civil Service Human Resources
EC	Early conciliation
EqA	Equality Act 2010
ERA	Employment Rights Act 1996
ERRA	Enterprise and Regulatory Reform Act 2013
FIS	Fraud Investigation Service
FPD	Claimant's Further Particulars of Detriment, served 26 February 2017
FPPD	Claimant's Further Particulars of Public Interest Disclosure, served 22 December 2017
HR	Human Resources
INQUAT	FIS Independent Quality Assurance Team

OH	Occupational Health
PID or PIDA	Public Interest Disclosure Act 1998
PCP	Provision, criterion or practice
PMR	Performance Management Report or Performance Management Reviews
Respondent	HM Revenue & Customs
SAR	Subject Access Request (under the Data Protection Act 1998)

Appendix 2: List of witnesses relevant to identified issues

Name	**Evidence relevant to issues:**
The claimant - Paul Dacey	All issue
Claimant's work colleagues	
Martin Corbett	PID detriment: 2.25.10
Ramzan Khaliq	Wages claim: 1 - 3 Sex discrimination: 4 - 5
David Margree	PID disclosure: 2.7.9 PID detriment: 2.25.10
Claimant's managers	
Peter Davies	PID disclosure: 2.18.1 PID detriments: 2.10.2; 2.10.6; 2.25.1 - 2.25.9 Disability harassment: 2.31 Reasonable adjustments: 2.35 - 2.48 Holiday pay: 2.49
James Madigan	PID disclosure: 2.7.7 PID detriments: 2.10.1; 2.10.2; 2.10.6; 2.10.7.2; 2.25.12 Reasonable adjustments: 2.35 - 2.48
Yeshpall Sanger	PID disclosure: 2.18.1; 2.18.2 PID detriments: 2.10.2; 2.10.3; 2.10.4; 2.10.5; 2.10.6 Reasonable adjustments: 2.35 - 2.48

HR officers	
Christine Bell	Wages claim: 1 - 3 Sex discrimination: 4 - 5
Steve Billington	None identified. Background
Jamie Gracie	PID detriment: 2.25.11
Ryan Grzebalski	PID detriment: 2.10.7
Ian Heywood	PID disclosure: 2.17
Nigel Holligan	PID disclosure: 2.7.1 PID detriment: 2.10.7
Sally Piggott	PID disclosure: 2.7.3 2.7.4 PID detriment: 2.10.7
Mary Taylor	PID detriment: 2.10.7; 2.10.7.3
Grievance process: decision-makers	
Ruth Bartlett	PID disclosure: 2.7.6 PID detriment: 2.10.7.1
Claire Holden	PID disclosure: 2.7.5 PID detriment: 2.10.7.1
Disciplinary process – decision-makers	
Neil Callan	Automatic unfair dismissal: 2.16 - 2.18 (inclusive) Ordinary unfair dismissal: 2.19 - 2.23
Judith Diamond	Automatic unfair dismissal: 2.16 - 2.18 (inclusive) Ordinary unfair dismissal: 2.19 - 2.23

Employment Judge Tobin

Dated: 1 July 2019