Case Number: 1403532/2018
1403533/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	and	**Respondent**
Dr A Skrzypiec (1) **Professor R Pawlak (2)**		**University of Exeter**

Held at: Exeter by Video **On: 1 and 2 March 2021 (reading days)**
3,4,5 March 2021 (evidence on preliminary issues)
8 March 2021 (submissions on preliminary issues)
9,10,11 March 2021 (deliberation on preliminary issues)
12 March 2021 (Judgment on Preliminary Issues)
15 March 2021 (Hearing to confirm withdrawal)

Before: Employment Judge Smail
Mr J. Howard
Mr I. Ley

Appearances

Claimants: **Mr N. Smith (Counsel)**
Respondent: **Ms R Tuck QC**

JUDGMENT ON PRELIMINARY ISSUES

1. The Second Claimant (Professor Pawlak) did not make any protected disclosures within the meaning of s.43A of the Employment Rights Act 1996 and so the claims of detriment for having made protected disclosures are dismissed.

2. The Second Claimant was disabled within the meaning of s.6 and Schedule 1 to the Equality Act 2010 from 13 December 2018 with a recurrent depressive disorder and not before.

3. The Respondent had knowledge of the Second Claimant's disability from the occupational health report dated 2 July 2019.

4. The First Claimant (Dr Skrzypiec) was disabled within the meaning of s.6 and Schedule 1 to the Equality Act 2010 from 24 February 2017 with a mental impairment and not before.

5. The Respondent had actual knowledge of the First Claimant's disability on receipt of the sick noted dated 2 January 2018. The Respondent shows that it ought not to have known earlier than 13 November 2017.

6. It is not just and equitable to extend the time for bringing the Second Claimant's claims under the Equality Act 2010 in relation to the appeal outcome on 20 May 2016 and anything that took place before it.

7. It is not just and equitable to extend the time for bringing the First Claimant's claims under the Equality Act 2010 in relation to anything that occurred on or prior to 20 May 2016.

8. The First and Second Claimants withdraw the remainder of the claims. Those claims are not dismissed because the First and/or Second Claimants wish to pursue personal injury claims in the High Court in respect of the same or related matters.

9. There is no application for costs.

REASONS

1. This is our Judgment and Reasons on preliminary issues. They are given on day 10 of 23 days set aside for determination of all matters. Of necessity, the Tribunal has had to be efficient in the production of this document. The Tribunal considered it important to produce a reasoned document for the consideration of the parties rather than a verbal ruling with written reasons to follow at some loosely defined point in the future.

2. By claim forms presented on 30 September 2018, the Claimants claim race discrimination, disability discrimination, and the Second Claimant claims detriments for protected disclosures in addition. The Schedule of Loss for the First Claimant is in the sum of £1.44 million and for the Second Claimant in the sum of £2.3 million, plus interest.

3. The Second Claimant started employment with the Respondent on 16 April 2012. He was and remains Chair in Functional Cell Biology. The First Claimant started on 3 September 2012 and she was medically retired on 31 December 2019. She was a Medical Technologist and Research Fellow in the team led by her husband, the Second Claimant. The Claimants are Polish nationals.

4. The Second Claimant leads a team in neurobiology. The team consists of non-British nationals. The work, we are told, includes examining how memories and emotions are formed in the brain, including stress, fear and anxiety. The work involves experimentation on mice. A laboratory is at the

team's disposal in the Hatherly Building at Exeter University. The work is regulated by the Home Office because, amongst other things, it involves genetically modified mice.

THE PRELIMINARY ISSUES

5. Five matters fall for determination as preliminary issues:

(a) Whether the Second Claimant made one or more protected disclosures in his correspondence of 15 September 2015 to Professor Thornton and 7 April 2016 to Jacqui Marshall.

(b) Whether the Second Claimant was at any material time a disabled person and if so from when the Respondent had actual or constructive notice of that. Disability is wholly in issue in his case.

(c) Whether the First Claimant was at any material time a disabled person and if so from when the Respondent had actual or constructive notice of that. The Respondent concedes that the First Claimant was disabled with a mental impairment from November 2017 with knowledge from 2 January 2018.

(d) Whether it is just and equitable to extend time for the Claimants' discrimination claims including in the light of a concession made by the Claimants on 3 March 2021 at the outset of this full merits hearing, namely

1. "[The Claimants contend] there was a continuing course of discriminatory conduct on the part of Respondent up until they found out about Deborah Galley's departure from the Respondent in September/October 2017.The Respondent failed to inform the Claimants of her suspension and subsequent departure and as such they considered that they remained at risk from her. Failure to do so was a part of a continuing course of discriminatory conduct pursuant to s123(3) EQA 2010

2. Save for the matters that the Respondent has conceded as are themselves in time (see para 30 REJ Pirani's CMO dated 20/08/19) the Claimants concede that all other of their claims are out of the primary limitation period of 3 months pursuant to s123(1)(a). It is not now alleged that those matters form part of a continuing course of discriminatory conduct.

We still invite the Tribunal to consider whether, on the evidence and under section 123(1)(b) Equality Act 20010, it is just and equitable to extend the relevant period for the Claimants' claims to be considered brought within time."

We note the Respondent does not accept that there was a continuing course of discrimination as alleged ending in September/October 2017 but that is how the Claimants wish to argue their case. The Tribunal gave permission for amendments of the combined Particulars of Claim to give effect to the way the Claimants put their case and their concession.

(e) Whether it was reasonably practicable to present the Second Claimant's claim of detriment for having made protected disclosures 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 that act or failure to act is part of a series of similar acts of failures, the last of them; or within such further

period as the tribunal considers reasonable where it was not reasonably practicable to present the claim in time.

6. The claims the Claimants wish to take to a full merits hearing essentially revolve around:

   (a) Difficulties in the relationship between the Claimants and their team with Deborah Galley who was the Laboratory Manager and 'NACWO' officer, the Named Animal Care and Welfare Officer, and British.

   (b) The disciplinary process in March 2016 against the Second Claimant for (i) alleged bullying of Deborah Galley; (ii) breach of health and safety in July 2015 (iii) alleged failure to comply with Home Office licensing requirements; (iv) bringing the University into serious disrepute. The outcome of the process was that on 24 March 2016 the disciplinary panel concluded that the Second Claimant should be given a formal warning in respect of allegation (i) and that the warning should be in place for 12 months. It took no formal disciplinary action on allegations (ii), (iii) or (iv). It rejected (iv) but recommended that the Second Claimant should be given management advice. The Second Claimant was recommended to attend training in the animal welfare module in connection with his licence. It also recommended that he, his research group and all technical staff working in the laboratory undertake training on equality and diversity and bullying and harassment as a team within the next 6 months. The appeal outcome 29 April 2016 was that the warning was upheld but reduced from 12 to 6 months. Procedural criticisms were rejected. The allegation of race discrimination, first made in the letter of appeal, was rejected

   (c) Alleged disability-related matters around those matters and subsequently.

7. It is sensible to look at the matter on the basis of three periods:

   (a) The period when Deborah Galley was the laboratory manager, namely April 2013 to August 2015;

   (b) The disciplinary process between September 2015 and 20 May 2016 (the appeal outcome);

   (c) The remainder.

   The Claimants suggest period (b) ends with the failure to inform them that Deborah Galley had left the Respondent in September/October 2017. The

Tribunal prefers the disciplinary appeal outcome to mark the end of the period because the Second Claimant had engaged Slater and Gordon solicitors to assist him in defending him at this point. It is also controversial whether there was an obligation on the Respondent to inform the Claimants that Deborah Galley had left the Respondent's employment bearing in mind she moved out of the Second Claimant's laboratory on 21 April 2016. There is a substantial gap between 20 May 2016 and the September/October 2017 with no allegations made. There is no continuing course of conduct between those periods. The matters are not linked.

8. The Claimants agreed to tabulate their specific liability allegations in the list of issues document which has been treated as a 'living' document adding and deleting issues as the case refined. The allegations with dates are as follows.

Reasonable adjustments: both Claimants

PCPs:

1. Was a PCP applied by or on behalf of the Respondent? The PCP alleged by the Claimants are in para 141.1, 141.2 (First Claimant) and 173.1, 173.2 (Second Claimant) of the Grounds of Claim namely:

   a) for Ms Galley to manage, inspect, oversee and / or attend the Second Claimant's laboratory, where the [First/Second] Claimant worked
   b) for Ms Galley to engage, in her role as laboratory manager of the Second Claimant's laboratory and / or an employee of the Respondent, with the [First/Second] Claimant

Failures:

Date	**Allegation / Cause of Action**
March 2016 – *[April 2017 (R) / October 2017 (C)]*	The behaviour, role, presence and / or risk of presence of Ms Galley in the Hatherly Laboratories and in particular the Second Claimant's laboratory caused or substantially contributed to the injury which the Claimants' sustained to their mental health
March 2016 – *[April 2017 (R) / October 2017 (C)]*	The continued presence and / or risk of presence of Ms Galley in the Hatherly Laboratories and the role which she performed attending the Second Claimant's laboratory after March 2016 and June 2016, despite adjustments being agreed; and up to about *[April 2017 (R) / November 2017 C)]*
March 2016 – *[April 2017 (R) / October 2017 (C)]*	The Respondent failed to ensure or take reasonable steps to ensure that the Claimant did not suffer from (foreseeable) injury to her mental health
March 2016 – *[April*	The Respondent failed to ensure or take reasonable steps to ensure that Ms Galley did not have contact with the Claimants in the work environment and / or failed to change Ms Galley's role or otherwise ensure that she had no role or

2017 (R) / October 2017 (C)]	responsibility in respect of and did not attend and was not present in the Second Claimant's laboratory
June 2016 – *[April 2017 (R) / October 2017 (C)]*	Despite agreeing in about June 2016 that Ms Galley would not have access to the Second Claimant's laboratory or approach his team members, including in particular the First Claimant, the Respondent: 8. Failed to ensure or take reasonable steps to ensure that Ms Galley did not have contact with the Claimants in the work environment and / or failed to change Ms Galley's role or otherwise ensure that she had no role or responsibility in respect of and did not attend and was not present in the Second Claimant's laboratory; 9. Permitted Ms Galley to continue to attend, be present in and / or perform a role in respect of the Second Claimant's laboratory and / or come into contact with the Claimants in the work environment; 10. Failed to ensure or take reasonable steps to ensure that the Claimants did not suffer from (foreseeable) injury or further injury to their mental health; 11. Between April 2017 and October 2017 failure to inform the Claimants that Deborah Galley would not be in a position to attend the laboratory. 12. Failed to inform the Claimants that Deborah Galley's employment with the Respondent had terminated on or about 01/09/17.

Reasonable Adjustments: First Claimant only

This claim is in time

PCP:

2. Was a PCP applied by or on behalf of Respondent? The PCP alleged by 1st Claimant is in para 141.3 of the grounds of claim namely in respect of the payment of sick pay that the Respondent will pay salary of 6 months full pay and 6 months half pay during ill health to an employee with over 3 years of employment service

Failures:

Date	Allegation / Cause of Action
July 2018	The application of the terms and provisions of the Respondent's sickness policy to the First Claimant in about July 2018 resulted in the First Claimant's pay being reduced to £70 on 30 July 2018 due to recoupment of an overpayment and half pay was paid from August to Nov 2018. The Respondent failed to • Despite its knowledge of the First Claimant's ill health, to make any adjustments or take reasonable steps between November 2017 and July 2018 to address the First Claimant's ill health or assist her to return to work; • To make any adjustments or take any reasonable steps in about July 2018 to disapply the provisions of the sickness policy and

	pay the First Claimant her salary in full.

Discrimination arising from disability

Unfavourable treatment

Date	**Allegation / Cause of Action**
March 2016 - *[April 2017 (R) / October 2017 (C)]*	Permitting Ms Galley to continue to attend, be present in and/or perform a role in respect of the Second Claimant's laboratory and/ or come into contact with the Claimants in the work environment from March or April 2016 onwards, and that, from June 2016 onwards it did so despite having agreed not to and despite knowing that such contact with Ms Galley would have a negative impact on the Claimants' health
30 July 2018	Reducing the First Claimant's pay to £70 on 30 July 2018 (First claimant only)

Race Discrimination (direct)/ Harassment

Ms Galley

Date	Allegation/Cause of Action
Approx. 15 April 2013 onwards	Soon after her appointment as a laboratory manager on 15 April 2013, Ms Galley informed a member of staff that they needed to learn to say "no" to academics and that she would make an example out of the Second Claimant's laboratory and team. Ms Galley withdrew, curtailed or limited her assistance for the Second Claimant and his team as a laboratory manger and / or used her position to instigate a number of disciplinary and other investigations in respect of the Second Claimant. Ms Galley persuaded or sought to persuade others to make allegations against the Claimants (and members of the Second Claimant's team) and to isolate the Claimants (and members of the Second Claimant's team), treat them adversely and hostilely and harass them.
15 April 2013 -	Ms Galley engaged with the Claimants and members of the Second Claimant's team in a different manner to the way in which she engaged with other laboratories in Hatherly.
12 February 2015	Unprofessional email from Ms Galley to the Second Claimant
2 / 4 June 2015 -	Ms Galley was verbally aggressive towards the Second Claimant and members of his team
1 July 2015	Ms Galley conduct and behaviour was delaying the Second Claimant's experiments
28 October 2013, 31 July 2014	Ms Galley responded discourteously, curtly and intemperately to reasonable requests which the Second Claimant sent her by various emails

and 31 July 2015	
July 2015	Ms Galley withdrew her assistance from or further curtailed or limited her assistance as a facility manager to the Claimants and the Second Claimant's team.
24 July 2015	Ms Galley made allegations and raised concerns with her manager, Peter Biggs about the Second Claimant and about Health and Safety in his laboratory.
30 July 2015	Ms Galley emailed Professor Thornton making a formal complaint about the Second Claimant.
4 August 2015	Ms Galley reported concerns about how the Second Claimant had completed returns for the Home Office.
11 August 2015	Ms Galley emailed Ms Farish a formal letter of complaint against the Second Claimant
14 September 2015	Ms Galley further complained about the Second Claimant to Professor Thornton. She alleged that he had breached his Home Office project licence in respect of animal research by conducting or permitting animal surgeries to be conducted after 4pm.
7 September 2015	Mr Carter interviewed Ms Galley. She maintained and expanded upon her complaints and assertions that the Second Claimant had acted inappropriately towards her from about October 2013.
Pre 29 April 2016	Ms Galley had acted inappropriately and had harassed or bullied members of the Second Claimant's laboratory team, including her, by attacking them, spreading false rumours and having inspections and investigations conducted
March 2016 onwards	Ms Galley disregarded the agreement that she would not have access to the Second Claimant's laboratory or approach his team members, including the Claimants.

Respondent:

Date	Allegation / Cause of Action
September 2013 onwards	Despite its knowledge of the conduct of Ms Galley and the allegations of the Claimants (and other members of the Second Claimant's team, including the Second Claimant) about the conduct and behaviour of Ms Galley, the Respondent did nothing to address those matters or properly investigate them nor to protect the Claimants from them.
September 2013 onwards	It ignored and / or did not address the Claimants' complaints
August 2015 – May 2016	It subjected the Second Claimant to allegations of misconduct, investigations and formal disciplinary proceedings and did so when such an approach and the decisions in those proceedings were not objective or fair; there was no real objective or fair evidence to support such approach; the objective and independent evidence supported the assertions and complaints of the Claimants and other members of the Second Claimant's team about Ms Galley; and there was no objective evidence or basis for a difference in treatment to that of Ms Galley. The Second Claimant was subjected to that disciplinary process, despite Ms Galley not being subjected to it, even though she breached her personal Home Office Licence and the Animals (Scientific Procedures) Act 1986, complaints were made about her behaviour and the Home Office inspector questioned her knowledge

9 September 2015	It did not include the evidence of the First Claimant in the investigation of the Second Claimant, her husband
October 2015	Dr Brown and Professor Randall treated the Claimants, and all members of the Second Claimant's team, less favourably and / or supported Ms Galley's discriminatory approach;
March 2016 – *[April 2017 (R) / October 2017 (C)]*	It did not take steps to protect the Claimants' from the conduct or presence (or risk of presence) of Ms Galley in the Hatherly Laboratories despite agreeing to do so in June 2016 and / or knowing about the Claimants' ill health.
April 2017 – October 2017	Failure to inform the Claimants that Deborah Galley would not be in a position to attend the laboratory.
1 September 2017	Failed to inform Claimants that Deborah Galley's employment with the Respondent had terminated on or about 01/09/17.
June 2016	It denied that it had agreed that it would take steps to protect the Claimants from the conduct or presence of Ms Galley in the Hatherly Laboratories.
November 2017 – 24 July 2018	Despite knowing about her ill health, it did not address or take any or any adequate steps in respect of the Claimants' ill health
12 July 2018 – 16 August 2018	The Respondent refused to provide the Claimant's with material and information which might exonerate the Second Claimant from the disciplinary findings and conclusions to support their assertions against Ms Galley and alleviate the stress and ill health from which they suffered.
10 September 2018	The Respondent failed to provide full and appropriate information in response to the Claimants' subject access request
30 July 2018	The Respondent stopped the First Claimant's pay without consulting or informing her that it was doing so or why it was doing so. (first claimant only)

<u>Victimisation</u>

Detriments:

Date	**Cause of Action/Detriment**
September 2015	Mr Carter not investigating the 2nd Claimant's complaints, along with the complaints of others, properly or at all
March 2016	Professor Charman and the Respondent not investigating the 2nd Claimant's complaints, along with the complaints of others, properly or at all
24 March	Despite the complaints of the Claimants and the others, the disciplinary

2016	panel requiring the 2nd Claimant, and others, to undertake training on equality and diversity and bullying and harassment as a team within 6 months.
April 2016 & May 2016	Despite the complaints of the Claimants and the others, the appeal panel requiring the 2nd Claimant, and others, to undertake training on equality and diversity and bullying and harassment as a team within 6 months
9 September 2015 & 2 October 2015	Mr Carter failing to record the 1st Claimant's complaints including those of race discrimination, not including her evidence in the disciplinary investigation of the 2nd Claimant and not investigating her complaints, along with the complaints of others.
April 2017 – October 2017	Failure to inform the Claimants that Deborah Galley would not be in a position to attend the laboratory.
1 September 2017	Failed to inform the Claimants that Deborah Galley's employment with the Respondent had terminated on or about 01/09/17.
12 July 2018	the Respondent refusing, without a proper basis, to provide the Claimants with information in respect of the Employment Tribunal proceedings concerning Ms Galley pursuant to their Freedom of Information Requests
10 September 2018	the Respondent failing to provide the Claimants with full and material data in respect of their subject access requests
August 2018 onwards	The Respondent not inviting the 2nd Claimant to sit on recruitment panels in respect of the recruitment of prospective members of academic staff

<u>Protected Disclosure Detriments</u>

Ms Galley

Date	Allegation/Cause of Action
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March 2016 onwards	Ms Galley disregarded the agreement that she would not have access to the Second Claimant's laboratory or approach his team members, including the Claimants.

Respondent:

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	objective or fair; there was no real objective or fair evidence to support such approach; the objective and independent evidence supported the assertions and complaints of the Claimants and other members of the Second Claimant's team about Ms Galley; and there was no objective evidence or basis for a difference in treatment to that of Ms Galley. The Second Claimant was subjected to that disciplinary process, despite Ms Galley not being subjected to it, even though she breached her personal Home Office Licence and the Animals (Scientific Procedures) Act 1986, complaints were made about her behaviour and the Home Office inspector questioned her knowledge
9 September 2015	It did not include the evidence of the First Claimant in the investigation of the Second Claimant, her husband
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10 September 2018	The Respondent failed to provide full and appropriate information in response to the Claimants' subject access request
30 July 2018	The Respondent stopped the First Claimant's pay without consulting or informing her that it was doing so or why it was doing so. (first claimant only)

THE LAW

Protected Disclosures

9. By s.43A of the Employment Rights Act 1996 a protected disclosure means a qualifying disclosure as defined by the Act. By s.43B(1) a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following - (a) that a criminal offence has been committed, is being committed or is likely to be committed; (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; (c) that a miscarriage of justice has occurred, is occurring or is likely to occur; (d) that the health or safety of any individual has been, is being or is likely to be endangered; (e) that the environment has been, is being or is likely to be damaged; or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed

10. By section 47B of the ERA 1996 an employee has the right not to be subjected to any detriment done by an employer on the ground that the employee has made a protected disclosure.

11. In this case whether the Second Claimant had a belief that he was making a disclosure in the public interest arises for consideration. We have been referred to Dobbie v Feltons Solicitors UEAT/0130/2/00 a decision of the HHJ Tayler in the EAT handed down as recently as 11 February 2021. It considered the guidance of Underhill LJ in Chesterton Global Ltd v Nurmohamed [2018] ICR 731 (Court of Appeal). Underhill LJ made five points about the nature of the exercise required by Section 43B(1).

> The Tribunal has to ask (a) whether the worker believed at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.
>
> Secondly, element (b) in that exercise requires the Tribunal to recognise as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was made in the public interest; and that is perhaps particularly so given that the question is of its nature so broad textured. The Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the Tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that the view is not as such determinative.
>
> Third, the necessary belief is simply that the disclosure is in the public interest. That particular reasons or why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the workers seeks, as not uncommonly happens, to justify after the event by reference to specific matters which the Tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons why he thought at the time that the disclosure was in the public interest, they may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a Tribunal might find that the particular reasons why the worker believed the disclosure to be in the public

interest did not reasonably justify his belief, but nevertheless find it to be reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.

Fourth, while the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it. Lord Justice Underhill was inclined to think that the belief did not in fact have to form any part of the motivation in theory.

Fifthly, Lord Justice Underhill did not think that there was much value in trying to provide any general gloss on the phrase "in the public interest". Parliament had chosen not to define it and the intention must have been to leave it to Employment Tribunals to apply it as a matter of educated impression. The essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and that those that serve a wider interest.

11. The particular issue in Chesterton Global was whether a disclosure which is in the private interests of the worker making it becomes in the public interest simply because it serves the private interests of other workers as well. At paragraph 35 of his judgment Lord Justice Underhill stated that -

> "An approach to the concept of public interest which depended purely on whether more than one person's interests was served by the disclosure would be mechanistic and required a making of artificial distinctions. It would be extremely unsatisfactory if liability depended on the happen stance of the circumstances of other employees."

12. It was in his view clear that the question whether a disclosure was in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest. That was in his view the ordinary sense of the phrase "in the public interest". If there were any doubt about the matter, the position is clear from the legislative history. The essence of the *Parkins v Sodexho* error, which the 2013 act was intended to correct was that a worker could take advantage of whistle blower protection where the interests involved were personal in character. Such an interest does not change its characters simply because it is shared by another person.

13. He continued later, the statutory criterion of what is in the public interest does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. He was not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. He certainly expected Employment Tribunals to be cautious about reaching such a conclusion because the broad intent behind the amendment of Section 43B sub-section 1 is that workers making disclosures in the context of private work place disputes should not attract the enhanced statutory protection accorded to whistle blowers – even where more than one worker was involved. He was not prepared to say never.

14. In a whistleblowing case where the disclosure relates to a breach of the workers own contract of employment or some other matter where the interest in question is personal in character, there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker, doctor's hours being an example. It may be useful to make reference to the following matters (a) the numbers of the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrong doing disclosed; (c) the nature of the wrong doing disclosed, including whether it is deliberate for the identity of the alleged wrong doer – the larger or more prominent the wrongdoer in terms of the size of its relevant community, the more obviously should a disclosure about its activities engage the public interest.

16. HHJ Tayler suggested that the essential distinction was between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest.

Disability

17. By section 6 of the Equality Act 2010 disability is defined as follows:

> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> (6) Schedule 1 (disability: supplementary provision) has effect.

18. Schedule 6, paragraph 2 deals with long-term effects:

> (1) The effect of an impairment is long-term if—
>
> (a)it has lasted for at least 12 months,
>
> (b)it is likely to last for at least 12 months, or
>
> (c)it is likely to last for the rest of the life of the person affected.

Likely is to be taken as meaning could well.

> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

19. Paragraph 5 deals with the effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a)measures are being taken to treat or correct it, and

(b)but for that, it would be likely to have that effect.

(2) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.

20. As to the Respondent’s knowledge or constructive knowledge – what the employer might reasonably have been expected to know - of any disability we have been referred to A Ltd v Z [2020] ICR 199 (EAT). This is authority for the proposition that when determining whether an employer had the requisite knowledge for the purposes of section 15(2) of the Equality Act 2010, only actual or constructive knowledge as to the disability itself was needed, not the causal link between the disability and its consequent effects which led to the unfavourable treatment; that the employer had to show that it was unreasonable for it to be expected to know that a person suffered an impediment to his physical or mental health which had a substantial or long-term effect; that the question of reasonableness was one of fact and evaluation, which had to be objectively and coherently reasoned by the tribunal, taking into account all relevant factors and balancing the likelihood of inquiries of the employee about disability yielding results with the dignity and privacy of the employee; and that section 15(1)(b) of the Act allowed for objective justification of discrimination on the part of the employer and required the tribunal to weigh the business needs of the employer, having regard to its size and resources, against the discriminatory effects of the action taken.

Time Limits

Equality Act 2010

21. By section 123(1) of the Equality Act 2010, a complaint to an Employment Tribunal may not be brought after the end of (a) the period of three months starting with the date act which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable. By subsection (3) of section 123 conduct extending over a period is to be treated as done at the end of the period. This provision consolidates the pre-existing limitation law on discrimination claims.

22. The appellate courts have provided some useful dicta to guide the employment tribunal in exercising it’s in the decision making on limitation under these provisions. In Robertson V Bexley Community Centre [2003] IRLR 434 (CA) Auld LJ said ‘time limits are exercised strictly in employment cases and there is no presumption that a tribunal should exercise its discretion to extend time on the just and equitable ground unless it can justify failure to exercise the discretion; the burden is always on the claimant to convince the tribunal that it is just and equitable to extend time. The exercise of discretion is the exception rather than the rule.’ In Chief Constable of

Lincolnshire Police v Caston [2010] IRLR 327, the Court of Appeal dismissed any suggestion that Auld LJ's comments in Robertson were to be read as encouraging tribunals to exercise their discretion in a restrictive manner. According to Sedley LJ there was no principle of law dictating how generously or sparingly the power to enlarge time is to be exercised. Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case is not a question of either policy or law; it is a question of fact and judgment, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.

23. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 (CA) Underhill LJ suggested the previous Keeble factors approach to considering the discretion, namely importing the considerations under s.33 of the Limitation Act 1980 in relation to extending the three year personal injury limitation period, was not the right approach. The correct approach is to assess all the factors the Tribunal considers relevant including in particular (a) the length of and reasons for the delay and (b) whether the delay has prejudiced the respondent, for example by preventing or inhibiting it from investigating the claim while matters were fresh.

Protected Disclosure Detriment

24. By section 48(3) of the Employment Rights Act 1996, an employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a)where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on; and

in the absence of evidence establishing the contrary, an employer a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

FINDINGS ON THE PRELIMINARY ISSUES

Protected Disclosures (Second Claimant only)

25. The Second Claimant relies on 2 pieces of correspondence which he says include protected disclosures. The first is an email to Professor Thornton dated 15 September 2015 relating to a phone call on 14 September 2015 concerning alleged licence breach. He confirms his defence to Deborah Galley's allegation that the laboratory was in breach of licence conditions by performing animal surgery after 4pm. He suggested she was artificially exaggerating day-to-day issues and report them as breaches by way of harassment of members of his laboratory. This was obstructing his important research. Exeter was at that time the biggest animal facility with 5 different mouse colonies. There were several other colonies they would like to bring to Exeter. They had just set up the production of lentiviral vectors in the lab and would like to introduce new cutting-edge in vivo techniques (optogenetics). He had several major grant applications in mind.

26. We accept that the Second Claimant believes his research is in the public interest, and that he was alleging, in effect, that Deborah Galley was breaching her contract of employment by not acting in good faith. However, he did not believe that he was making a disclosure in the public interest. That is different. He was referring to an operational issue in the day-to-day functioning of the laboratory, defending a complaint from Deborah Galley. In no sense did he believe, for example, that he was blowing the whistle. He did not think he was serving a wider interest than his own personal, professional interest. This was not a protected disclosure.

27. The Second piece of correspondence was a letter to Jacqui Marshall dated 7 April 2016. It was his letter of appeal against the disciplinary outcome of 22 March 2016. It was written with the assistance of Slater and Gordon solicitors whom the Second Claimant had instructed to advise and assist him with the disciplinary process.

28. This lengthy document does make allegations, and discloses information, relating to breaches of the ACAS code, race discrimination, disability discrimination, bullying and harassment and breaches by Deborah Galley of her contractual obligations. The letter plainly was a protected act for the purposes of victimisation under the Equality Act 2010. However, the Second Claimant in raising these matters did not, as a matter of fact, believe he was making disclosures in the public interest. The context contradicts this. He was defending himself against disciplinary charges brought against him. He was not blowing the whistle: he was defending himself. We note that Slater and Gordon did not include a paragraph to the effect that the letter was making protected disclosures. Again, this is because of the context. The context is private. He did not believe he was serving a wider interest.

29. Accordingly, the Second Claimant did not make any protected disclosure and the claims of detriment for having made protected disclosures are dismissed on that basis.

Slater and Gordon

30. The Second Claimant did not volunteer in his supplemental witness statement dated 22 February 2021 designed to explain the delay in issuing proceedings that he had instructed Slater and Gordon in the course of the disciplinary proceedings. Instead, he told us at paragraph 1:

    'We did not know the law because we had never needed it. It would not have occurred to a reasonable foreign person that the time limits for bringing a claim against their employer could be 3 months.'

    And then at paragraph 6:

    'We did not know until this meeting with Giles Powell on 4 June 2018 [probably 5 June 2018] that there was a limitation period for bringing Employment Tribunal claims. I was not informed by Giles at our initial meeting that any of our claims were out of time but just that we had to bring a claim urgently to ensure we were in time.'

31. The Tribunal on two occasions indicated that they might struggle to accept this evidence once it had become clear under cross-examination that the Second Claimant had instructed Slater and Gordon in connection with the disciplinary process. The lengthy letter of appeal was full of law and could only have been written with the assistance of solicitors. The Tribunal indicated that it would need some persuading that Slater and Gordon had not advised as to time limits in the event that the Second Clamant was unhappy with the disciplinary outcome. It invited the Second Claimant to disclose any documentation from Slater and Gordon which would corroborate the Second Claimant's evidence in his supplemental witness statement.

32. The considered position of the Second Claimant, following a short adjournment to consider the matter, was that he was under no obligation to disclose any documentation concerning Slater and Gordon and would not be doing so. The Tribunal was invited to draw such conclusions as it deemed fit.

33. We reject the Second Claimant's evidence that he did not know he had 3 months to bring a claim to the Employment Tribunal about the matters set out in his letter of appeal. On the balance of probability, he knew this from 7 April 2016 at latest. He had taken care to instruct a firm of solicitors with appropriate expertise for the task in hand. The supplementary witness statement was misleading. It was an error of judgment and has implications for the Second Claimant's credibility. We approach his evidence with caution.

34. We do accept that he resolved to explore bringing appropriate proceedings in respect of the First Claimant when the extent of the First

Claimant's illness became clear after November 2017. That reasoning does not apply with equivalent force to his own position.

The concession on 'conduct extending over a period'

35. The matter of time limits had been considered before Regional Employment Judge Pirani at a preliminary hearing on 20 August 2019. It had been resolved to deal with time limits at the conclusion of the full merits hearing so that the Tribunal could make findings on whether the more recent matters were linked to the earlier matters by way of a continuing state of affairs, the statutory concept for which is 'conduct extending over a period'. The Claimants' legal team applied in advance of the full merits hearing to vary that because they did not want to get to the end of the full merits hearing only for the claims or any part of them to fail for time limits reasons, the costs of the full hearing having been incurred. This was consented to by the Respondent. At the outset of this hearing, the Tribunal required this position to be recorded in writing because, as the Tribunal observed, it was frequent for this type of matter to be determined at the end of a full merits hearing once all the facts had been found. Mr Smith was clear that he wanted the Tribunal to accept that it was not appropriate to link the matters post the departure of Deborah Galley from the Respondent as conduct extending over a period or a continuing act. That was a carefully considered position of the Claimants recorded in writing having taken advice from Counsel and solicitors. Accordingly, the Tribunal accepts this and we have a preliminary issue on time.

Disability of Second Claimant (Professor Pawlak)

36. The issues here are what mental impairment (if any) did the 2nd Claimant have between October 2015 and September 2018? During that period did that impairment have a substantial and long term adverse effect on the 2nd Claimant's ability to carry out normal day to day activities? *S6(1) Eq Act.* If the 2nd Claimant is found to be disabled under the Eq Act from October 2015 onwards, when did the Respondent have actual or constructive notice of this?

37. Examination of the GP records is instructive. The first relevant entry we can see is 3 December 2015 when he is prescribed a low dose of citalopram for stress at work, not able to sleep and feeling low. Citalopram is an antidepressant. It is taken from that time to 8 March 2016. He was signed off between 9 February 2016 and 9 March 2016. On 8 March 2016 he informed his GP that he has been vindicated by the Home Office and could return to work. It was resolved to reduce citalopram and stop when ready. Mental health problems are next mentioned on 11 April 2016 when complaint is made of ongoing problems with the facility manager. He was again very low and could not work effectively. It was questioned whether he was victim of racial bullying. Zopiclone was prescribed for sleeping. A letter was written by the GP to occupational health in respect of both Claimants.

38. Dr Harris wrote a letter 'to whom it may concern' on 13 April 2016. She suggests that for 8 months he had exhibited biological symptoms of depression, triggered by a situation at work. The Tribunal can see 5 months from the medical notes not 8. She records that the actions of the manager seem to amount to bullying, possibly racially so. She suggested the symptoms were unlikely to resolve unless the situation was tackled. She suggested that the university arrange it so that the manager had no contact with the Claimants. She recorded that both Claimants were struggling to work in an effective way.

39. On 17 May 2016 he reported to his GP that he was still in an impossible position. He was of low mood. Poor sleep. Feels he 'would be better off dead'. He was represcribed citalopram and sertraline, another anti-depressant. The Second Claimant suggested sertraline because his wife was on it.

40. He was next seen on 17 June 2016 when it was recorded the situation was better as the manager had been moved. He stops taking Citalopram but continued to be prescribed with sertraline. It appears sertraline is stopped post February 2017.There were some depression screening questions posed by a practice nurse on 27 February 2017. There is no further consultation about the Second Claimant's mental health until June 2018. There is reference to his wife's hospital admission in December 2017. He has been on sleeping pills throughout.

41. The next consultation in connection with depression symptoms is 4 June 2018. He wished to restart sertraline. He complained of symptoms of low mood, inability to feel pleasure and early morning waking. It is recorded that previously he had problems with his employer. Sleep was poor. Previously he had had suicidal thoughts but 'not in recent years'. He asked for evidence that he attended. That was given on a compliments slip stating he had attended with depression. The following day we know that Giles Powell of Counsel was consulted in London under the Bar's direct access scheme. On 10 July 2018 the Second Claimant asked for a referral for a medico-legal psychiatric report and Dr Bickerton was suggested. Sertraline was prescribed. On 15 November 2018 the sertraline dosage was increased and he was also prescribed diazepam. There is a further consultation on 21 November 2018 with stress and poor sleep. He is signed off with stress between 13 December 2018 and 9 January 2019. We leave analysis of GP notes as at January 2019.

42. On 7 March 2016 Karen Markes of occupational health met with the Second Claimant. She recorded that he presented with low mood and anxiety which he associated with an allegation of bullying being made against him by a colleague. This was during a month he was signed off work. His health was described as vulnerable and symptoms of low mood and anxiety were impacting on his speed of working and motivation. He would be fit to attend a disciplinary hearing on 21 March 2016. In her

opinion, it was unlikely that he was disabled within the meaning of the Equality Act at that time, although such was a legal question.

43. In response to the GP letter dated 13 April 2016, there was a meeting with Karen Markes on 18 April 2016. Professor Pawlak discussed the GP's letter with Karen Markes and in particular the recommendation that they have no contact with the manager. A draft occupational health report was passing between them back and forth with the Second Claimant's desire to include the recommendation about having the manager moved. It seems that Ms Markes would not incorporate the recommendation that Deborah Galley be moved as an adjustment. We understand it would be very difficult for her to do that when the Second Claimant was about to be the subject of a disciplinary hearing for having allegedly bullied Deborah Galley. The Second Claimant's hope, no doubt, was to present an occupational health recommendation that DG be moved in the course of that disciplinary hearing.

44. On 13 June 2016 the Second Claimant saw Dr Lian a Consultant Occupational Health Physician a member of the University's occupational health team. He had been off, Dr Lian thought, for 6 weeks returning in March 2016. The Second Claimant reported that was for a work-related matter. He informed Dr Lian that the university had moved [Deborah Galley]. He said he was feeling better now. He was fit to remain at work. There were some residual symptoms. He was advised to review medication. An adjustment would be to allow him to attend clinical/counselling appointments. Dr Lian did not arrange to see him again. This is not sufficient to put the Respondent on notice that the Claimant was a disabled person.

45. There is a big gap in terms of dealings with occupational health from 13 June 2016 to 4 June 2019 when a referral is sent to Dr Lian.

46. On 18 December 2018 the Second Claimant sent in a sick note dated 13 December 2018 stating depression. On 1 February 2019 the university recorded that the Second Claimant was working part-time from home and occasionally in the lab. There seems to be a phased return to work until 13 March 2019.

47. He sees Dr Lian on 2 July 2019. There was an ongoing exacerbation of an underlying psychological medical condition. He was fit to work with the adjustments of periods of working from home; additional support from colleagues for PhD students; not undertaking line management of staff so as to allow time for publications. In terms of disability, Dr Lian concluded that as he had a medical condition ongoing for over 1 year which if untreated could impact on his ability to perform normal activities, it was likely he was disabled. This is the first time the Respondent is told by its occupational health that the Second Claimant is disabled.

48. On 14 June 2016 the Second Claimant wrote to Mark Wilson of HR and Professor Morgan stating that he understood Deborah Galley would be

moved to a different section of the building until the new Life Sciences Institute was opened later in 2016. He noted that Deborah Galley was back in the medical school and the Claimants would have contact with her. Until that matter was resolved he and his wife would be working from home. He referred back to the GP letter of 13 April 2016, suggesting that their injuries would be permanent unless Deborah Galley was permanently moved.

49. Aside from a reference to the First Claimant's breakdown in November 2017, the next document in the Second Claimant's medical bundle is reference to being signed off in December 2018.

50. The Second Claimant has provided a disability impact statement dated, we believe, 26 November 2020. It is general in nature and not as specific as the GP notes that we have been through.

51. There are a number of medical reports in the form of expert opinion. Dr Bickerton, Consultant Psychiatrist, wrote a report on 28 February 2019. Of necessity, it was written from the perspective of hindsight and based considerably on what he was told by the Second Claimant. Dr Bickerton expressed the opinion that the Second Claimant was disabled by reason of depression without psychotic symptoms. The stressors were first his work situation and secondly and later the deterioration of his wife's mental health.

52. The detail of interference with day-to-day activities is limited. It is stated in general terms that he was chronically tired, demotivated, miserable and found it difficult to concentrate and complete even simple tasks.

53. Professor Anthony Cleare wrote a report on 27 November 2020. The cover of the report suggests the interview with the Second Claimant was on 6 February 2020. This report was obtained by the Respondent. Professor Cleare did not have the GP records. He confirms a diagnosis of a depressive disorder.

54. There is also a medical report from Dr Hernandez dated 22 February 2021. He is the treating psychiatrist and first met the Second Claimant on 14 December 2020. Again, much of the report is based on what he is told by the Second Claimant.

55. It is difficult for the Tribunal to identify when the Claimant became disabled. The most reliable contemporaneous evidence is the GP notes, themselves. There certainly was a period of depression between December 2015 and June 2016 with some periods off work. Occupational health meetings with Markes in March and April 2016 and Lian in June 2016 do not confirm disability because he is improved. The likelihood of substantial interference with day to day activities even if unmedicated is not established at this point on the balance of probability. There is insufficient detail.

56. Occupational health was not consulted again until June 2019 following a relapse in December 2018. There was a consultation in June 2018 but that coincided with instructing Giles Powell. There was no request for occupational health involvement at that time.

57. Whilst disability was asserted in the course of the disciplinary process, the Respondent had no basis to accept this given the position of occupational health around this time. On our findings, disability was not established at this point. It became established on 13 December 2018 with a clear relapse. Actual knowledge was the confirmation by occupational health in June 2019.

58. On the balance of probabilities, we find that the Claimant was disabled with the necessary element of duration established from 13 December 2018 and the Respondent had knowledge from June 2019.

59. Mr Smith placed considerable reliance on the GP's letter of 13 April 2016. However, that was sent too early in the history for the likelihood of 12 months duration to be established on the balance of probability. That was in any event contradicted by the occupational health reports in March, April and June 2016.

<u>Disability of the First Claimant (Dr Skrzypiec)</u>

60. The first relevant entry in the GP records appears to be 9 October 2015. She reports that a complaint has been made against her and that it has been escalated and not sorted. Constantly anxious and frightened. Can neither settle nor sleep. Crying all the time. Unable to concentrate. She was prescribed diazepam and sertraline and was signed off from 9 to 23 October 2015 with work related stress causing anxiety and depression. There is a consultation on 13 October 2015. Nosebleeds were attributed by the First Claimant to sertraline. Sertraline was reinstated on 23 October 2015. She was signed off from 23 October 2015 to 6 November 2015.

61. The next consultation is on 15 January 2016. Low mood persists. She remains on sertraline. On 1 February 2016 it was reported she remained really low in mood. She was not sleeping. She was struggling with home life and looking after the children. She complained of a manipulative manager at work. She was signed off from 1 February to 1 March 2016. On 12 February 2016 she reported having a terrible time at work. Sick note was extended to 12 March 2016. On 25 February 2016 she reported feeling bullied and that unfair allegations were being made against her and her husband. Still on diazepam but tablets only to be taken when needed.

62. On 10 March 2016 she was much better. The Home office and colleagues had been supportive recognizing lies in the allegations. May be fit for work on a phased return. Still on diazepam and sertraline.

63. On 29 March 2016 she still was very anxious. She did not feel able to work. She was signed off until 12 April 2016.

64. On 22 April 2016, she had no energy, a lot of anxiety, promised changes at work had not happened. On 25 April 2016 she felt much better on diazepam. There was still an issue at work. The university did not believe her and her husband. Felt bullied by the manager. Only way that could be resolved is by removing the manager from the department. Sick note backdated to 12 April and extended to 25 May 2016. On 9 May 2016 she asked for sleeping tablets. There was a medication review on 25 July 2016 which controlled the amount of sertraline prescribed.

65. So, there were regular consultations October 2015 to May 2016. She was back at work from on or about 25 May 2016 until 3 December 2017 covered by a backdated sick note from 2 January 2018.

66. The next important consultation is on 24 February 2017. It did not sound to the GP as though things had significantly changed since spring 2016. First Claimant still was maintaining she was bullied by the manager. Panic attacks when going passed the manager's workplace. Sertraline continued. GP suggested a fundamental change was required: address anxiety rather than cover it up with medication. That said, the First Claimant was still at work.

67. On 11 November 2017 she fell unconscious for 20 minutes and was taken to hospital where she was discharged the same day. She was seen at home by the GP on 13 November 2017. Depression was floated as the diagnosis. On 16 November 2017 the Second Claimant called the ambulance about the First Claimant, but the paramedics did not think it warranted to take her to hospital. The GP spoke with him and he reported delusional behaviour by his wife. The GP suspected psychosis on 16 November 2017. That day she was lying on sofa with eyes closed not communicating.

68. On 18 November 2017 she was sectioned to a psychiatric hospital in Barnstaple. She had delusions saying her husband was poisoning her. She was discharged on 27 December 2017.

69. She was seen by the GP on 2 January 2018. Still felt paranoid about her husband. She was on olanzapine, an anti-psychotic drug. Would be willing to pay for psychotherapy. At this consultation she was signed off backdated to 3 December 2017 and prospectively to 2 February 2018. Consultations on 8 and 11 January did not change the position. On 13 February she was signed off until 2 March 2018. She was off all medication but still not ready to go back to work. Would like therapy. On 21 March 2018 she was signed off until 12 April 2018. She had been to Poland and seen a psychiatrist and put on anti-depressants. On 17 April 2018 there was a medication review and she was signed off until 16 May 2018.

70. On 15 May 2018 the First Claimant wrote a very delusional email to the police complaining about an HR colleague. It is clear from this email that she was very ill indeed.

71. On 29 May 2018 the GP feared the First Claimant was relapsing. The delusions contained in the email to the police were repeated in the GP's surgery on 4 June 2018. A sicknote was backdated to 16 May 2018 prospectively to 15 July 2018. She was prescribed venlafaxine (anti-depressant) and risperidone (anti-psychotic) in June 2018.

72. In October 2018 she was hospitalised in Poland. The next GP consultation was on 3 November 2018. Schizophrenia was being diagnosed in the mental health team. Clozapine, an anti-psychotic was prescribed. A sick note was backdated to 10 October 2018 and prospectively to 9 January 2019.

73. There may be a gap in sick notes between 15 July 2018 and 10 October 2018; that does not mean she was fit to work during this period: she was not.

74. The Respondent knew she was signed off between October 2015 and March 2016. She attempted a return to work in March 2016. On 7 April 2016 the First Claimant wrote to Professors Shore and Morgan and Mr Wilson of HR. It was reported that she had visited a psychiatrist in Poland. She complained about false allegations being made against her. What had happened to them was like a Tsunami.

75. The GP letter of 13 April 2016 referred to above follows suggesting that the manager not have contact with the Claimants.

76. On 29 April 2016 Karen Griffiths of Occupational Health recorded that the First Claimant based on their meeting was not fit for work. Multiple features of low mood and anxiety. This was going back to October 2015 approximately 6 months. She was unable to provide a timescale for recovery. Ordinarily mediation would be recommended but it was not clear that this was acceptable to either party. Given the length of time she had been feeling symptomatic, Karen Griffiths could not rule out the possibility that the First Claimant was disabled under the Equality Act 2010.

77. Occupational Health sought a report from the First Claimant's GP surgery in or around May 2016. The surgery replied by letter dated 26 May 2016. It records that the attempt to return to work in March 2016 failed. The long-term prognosis depended on whether the manager was moved or not. The letter said it was in the Respondent's hands.

78. That is the tenor of the message around this time: solve the problem by moving the manager. As a matter of fact, Deborah Galley moved out of the laboratory on 21 April 2016. This was consensual. Marcus Mitchell was assigned the laboratory management duties for the Pawlak

laboratory. Matt Isherwood, a laboratory technician, took on the role of the main contact for the Pawlak group in the Biological Services Unit. Galley did remain the NACWO but contact would be minimal. Deborah Galley was not the manager from 21 April 2016 and so consistently with the position that the problem could be solved by moving the manager, the likelihood of 12 months duration on the balance of probability was counter-indicated prospectively when Deborah Galley was moved. The Respondent had reason to believe that the episode of mental health would end then. In fact, the First Claimant worked between 26 May 2016 and 13 November 2017. The Respondent knew that the First Claimant and her husband were named as co-principal authors of an application for a Leverhulme trust award which was successful in October 2016.

79. The First Claimant did complain about sightings of Deborah Galley on 22 September 2016 and 25 January 2017 but as far as the Respondent was concerned the First Claimant was working and there was no need for occupational health assistance during the period May 2016 to November 2017.

80. Deborah Galley having moved meant that it was not likely even in the sense of ‘could well’ that the illness would persist a further 5.5 months. The stress factor had been removed.

81. The First Claimant had a very significant relapse in November/December 2017

82. There is a report from Dr Slinn, Consultant Psychiatrist, dated 8 February 2021. She expressed the view that the First Claimant developed an adjustment reaction in October 2015. By April 2016 it was suggested she was developing prodromal symptoms of schizophrenia which became paranoid schizophrenia by November 2017. Disability, she surmises, crystallised on the October 2016 anniversary of the October 2015 onset.

83. The Tribunal sees the logic in that as a matter of hindsight. But in terms of dealings with the Respondent there was little communication in respect of health matters post occupational health involvement in May 2016 and the decision to move Deborah Galley from the laboratory. We note the GP consultation in February 2017 and the continuation of the prescription of sertraline but there are no messages coming into the Respondent about this and there is insufficient detail of substantial interference with day to day activities.

84. Doing the best it can, the Tribunal finds that the requisite long-term nature for disability was only confirmed by the 24 February 2017 GP consultation. The Respondent did not know about that. It did learn of the breakdown in November 2017 by the sick note sent on 2 January 2018. So, whilst disability was established on the balance of probability in February 2017, the Respondent’s actual knowledge was 2 January 2018 and the Respondent shows that it ought not to have known earlier than 13 November 2017, the date of the commencement of the First Claimant’s

breakdown. The First Claimant was working May 2016 to November 2017, Deborah Galley having been moved.

<u>Is it just and equitable to extend time for the Second Claimant's claims under the Equality Act 2010?</u>

85. The Second Claimant had the advice of Slater and Gordon during the disciplinary process including the appeal. He, as he did tell us, made a decision at that point not to 'fall out with his employer'. He made a considered decision not to bring a claim then. What prompted him to consider bringing proceedings was the extent of his wife's illness as revealed in November/December 2017. He arranged to consult Giles Powell of Old Square Chambers on 5 June 2018 under the Bar's direct access scheme. The period of ACAS consultation was 8 June 2018 to 8 July 2018. Giles Powell took until 30 September 2018 to issue the claims. He also settled personal injury negligence proceedings in the High Court which we have been told are in time. It is difficult to assess the priority of the Tribunal claims compared to the High Court ones, save that the Claimants successfully resisted attempts to stay the Tribunal proceedings pending the High Court ones, and indeed the opposite has happened. Bearing in mind existing time limits issues, Mr Powell would not have compounded delays had the proceedings been issued immediately after the 1 month conciliation period. We have seen that the Second Claimant repeatedly chased Mr Powell and his chambers for the commencement of proceedings. The delay in issuing the Tribunal proceedings compounded the Second Claimant's time limits problems rather than being the original cause of them.

86. The Respondent does not show any evidential prejudice in any material particular. The internal solicitor, Mrs Johnson, could point to no document she could not obtain and no issue in relation to which she could not collate evidence showing the Respondent's position. There remains, nonetheless, the financial and time prejudice of having to defend claims brought out-of-time.

87. The merits of the Second Claimant's claims are uncertain at this stage. It is, however, a feature of the case that the villain of the piece, as far as the Claimants are concerned, is Deborah Galley. Ms Galley was on the administrative side of the university, not the academic. In terms of function and status she was junior to the Second Claimant who was the Professor in charge. It is on the face of it perplexing as to how such a person could not be effectively dealt with by the Professor in charge. What we cannot say at this stage is that time limits are potentially obstructing a strong liability case held by the Second Claimant. They obstruct a case of uncertain merit.

88. The reason for the delay was a positive decision not to bring a claim at the end of the disciplinary process. This was an informed decision because the Second Claimant had Slater and Gordon assisting and advising him. It does not help us that he was not forthcoming about this in his witness statement.

89. There is no continuing act/act extending over a period in the Second Claimant's case post the outcome of the appeal on 20 May 2016. In our judgment it is not just and equitable to extend time to 30 September 2018. There is a 3 month time limit. The Second Claimant made an informed decision not to bring a claim within that period. His wife's deterioration in November/December 2017 provides a reason for considering her claims, not his.

<u>Is it just and equitable to extend time for the First Claimant's claims under the Equality Act 2010?</u>

90. There is no continuing act/act extending over a period in the First Claimant's case post the outcome of the appeal in her husband's disciplinary outcome on 20 May 2016.

91. In respect of that matter and all prior matters the First Claimant relied upon the Second Claimant to represent her interests. She will have known he consulted Slater and Gordon around that time. She did not make any independent enquiry of her own rights. It has not been suggested there was any conflict of interest between them about that. She will have agreed not to bring claims around the time of the conclusion of the disciplinary process. She does not say otherwise.

92. The merits of the First Claimant's claims up to 20 May 2016 are uncertain, also. It is not clear that time limits are obstructing prima facie strong claims.

93. If it had been found that the Respondent should have known about her disability prior to November 2017, and the First Respondent's breakdown in November 2017 was the reason viable claims for disability discrimination were not brought, then the Tribunal would have discounted delays caused by the illness and extended time for disability discrimination claims. However, it is not understood that any issue benefits from that.

94. If the First Claimant has a viable negligence action in respect of related matters in the High Court, she is not precluded from pursuing that by the more restrictive Employment Tribunal limitation rules.

95. The position on the Respondent's prejudice is the same as under consideration of the Second Respondent's position.

96. The reason for the delay in bringing claims in relation to the first 2 periods of the claims as set out in paragraph 7 above is that the First Claimant was party to a considered decision not to bring claims in respect of those matters in May 2016. It would not be just and equitable to extend time in respect of those matters to 30 September 2018.

CONCLUSIONS

97. The Second Claimant (Professor Pawlak) did not make any protected disclosures within the meaning of s.43A of the Employment Rights Act 1996 and so the claims of detriment for having made protected disclosures are dismissed. The time limits issue on this therefore falls away

98. The Second Claimant was disabled within the meaning of s.6 and Schedule 1 to the Equality Act 2010 from 13 December 2018 with a recurrent depressive disorder and not before.

99. The Respondent had knowledge of the Second Claimant's disability from the occupational health report dated 2 July 2019.

100. The First Claimant (Dr Skrzypiec) was disabled within the meaning of s.6 and Schedule 1 to the Equality Act 2010 from 24 February 2017 with mental impairment and not before.

101. The Respondent had actual knowledge of the First Claimant's disability on receipt of the sick noted dated 2 January 2018. The Respondent shows that it ought not to have known earlier than 13 November 2017.

102. It is not just and equitable to extend the time for bringing the Second Claimant's claims under the Equality Act 2010 in relation to the appeal outcome on 20 May 2016 and anything that took place before it.

103. It is It is not just and equitable to extend the time for bringing the First Claimant's claims under the Equality Act 2010 in relation to anything that occurred on or prior to 20 May 2016.

Employment Judge Smail
Date: 15 March 2021

Judgment & Reasons sent to the parties: 08 April 2021

FOR THE TRIBUNAL OFFICE