EMPLOYMENT TRIBUNALS

Claimant:	**Mr P Hall**
Respondent:	**Transport for London**
Heard at:	**East London Hearing Centre (by Cloud Video Platform)**
On:	**11, 12, 13, 14 and 18 August 2020; 12, 13 and 14 May 2021 (with the parties)** **17 and 18 May 2021 (in chambers)**
Before:	**Employment Judge Gardiner**
Members:	**Mr P Pendle** **Mr P Quinn**

Representation

Claimant:	In person (on 11-18 August 2020; part of 12 May 2021) No attendance (remainder of 12 May and 13-14 May 2021)
Respondent:	Ms R Thomas, counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Tribunal does not have jurisdiction to consider those complaints relating to acts or omissions which occurred on or before 10 January 2019. Those complaints are dismissed on that basis.**

2. **None of the Claimant's complaints of protected disclosure detriment, discrimination arising from disability or failure to make reasonable adjustments are well founded. They are therefore dismissed in any event.**

REASONS

1. Mr Hall is currently employed by Transport for London as an Engineer. In this claim, he alleges that his treatment at work during the period from 2014 to 2019 amounts

to disability discrimination (both discrimination arising from disability and a failure to make reasonable adjustments); and a series of detriment for making protected disclosures. At an earlier Preliminary Hearing, the Tribunal found that the Claimant was a disabled person, although not for the entire period covered by these proceedings. It concluded he was a disabled person from 1 November 2016. The nature of the Claimant's disability is a mental impairment which has been diagnosed as anxiety and depression.

2. All claims are disputed by the Respondent. The Respondent's case is both that the disability discrimination and protected disclosure detriment claims are without merit, and that several of the complaints are time-barred, given the date on which these proceedings were initiated by the Claimant contacting ACAS.

3. The Final Hearing started in August 2020. On day 5 of the Final Hearing in August 2020, the Tribunal granted the Claimant's application that the Hearing should be postponed. The Claimant had produced medical evidence about his current state of health which stated he was not well enough to continue to present his case.

4. Regrettably, there was then significant delay in resuming the hearing. This was the result of the Claimant's health not improving as quickly as had been hoped. The latest medical evidence about the Claimant's fitness was written in February 2021. This confirmed the Claimant was not fit to participate in the resumed Final Hearing at that stage, but the Claimant's GP was optimistic it would improve since then. The Claimant again sought to vacate these hearing dates in May 2021 on grounds of his health. However, his renewed applications were not supported by any up-to-date medical evidence. For reasons given both on 30 April 2021 in writing and orally on the first morning of the resumed hearing, the Claimant was refused a further postponement. The Claimant was not present to hear the outcome of his application on 11 May 2021 and has not appeared since then. He was sent a written record of the oral reasons.

5. Upon the refusal of his postponement application, the Respondent made an application for the Claimant's case to be struck out on the grounds that the Claimant was not actively pursuing his claim. This was refused, for reasons given orally and sent in writing to both parties, although the Claimant did not return to the CVP hearing to hear the outcome of his application. These reasons set out a timetable providing the times at which the remaining five Respondent witnesses would give their evidence. They invited the Claimant to re-join the hearing at any point if he felt able to do so; or alternatively to submit questions for the Tribunal to ask the Respondent's witnesses. The Claimant did not reappear at any point during the hearing, nor has he submitted any questions for the Tribunal to ask.

6. The Final Hearing proceeded to hear evidence from each of the five remaining witnesses for the Respondent in the Claimant's absence. They gave their evidence in turn and answered questions from the Tribunal. The Tribunal has endeavoured to explore the evidence with the Respondent's witnesses so as to address the points that the Claimant might have made had he been present to ask questions himself. At

the end of the evidence, Miss Thomas, Counsel for the Respondent, sent the Tribunal written submissions, to which she spoke orally. She answered questions from the Tribunal in relation to the issues set out in the List of Issues.

7. The issues for the Tribunal to determine were set out in an Agreed List of Issues. This was discussed with the parties at the start of the Final Hearing in August 2020. This discussion led to some minor revisions being made to the wording of particular issues at the outset of the hearing. There was also an agreed Chronology and Cast List, as well as a brief Opening Note from the Respondent's counsel.

8. During the first part of the Final Hearing the Claimant gave evidence and was cross examined. He also asked questions of the first of the Respondent's witnesses, Robert Frith. It was after Mr Frith's evidence had concluded that the Final Hearing was postponed. During the second part of the Final Hearing, in May 2021, the following further witnesses gave evidence on behalf of the Respondent: Mr Peter McCurry, Mr Bradley Stevens, Mrs Tricia Wright, Mr Simon Stockley and Ms Ailsa Buchan. Each of the Respondent's witnesses answered detailed questions from the Tribunal.

9. Reference was made during the Final Hearing to a bundle of documents with numbered pages that ended with page 690, although at points additional pages had been inserted. There were therefore more than 690 pages in total. The Respondent's counsel, Miss Thomas, submitted written closing submissions to which she spoke orally. In those submissions she suggested for the first time that the alleged protected disclosure made to Sir Oliver Health QC MP on 3 November 2017 was the subject of an amendment application heard by Employment Judge Russell which had been refused. Therefore, Respondent's counsel submitted it should not be considered by the Tribunal. Because this stance was contrary to the Respondent's position at the start of the hearing, when the Claimant was present, and as set out in the Respondent's Opening Note, the Tribunal has decided that this alleged protected disclosure is a live issue that the Tribunal is required to determine.

Factual findings

10. The Claimant started work for London Underground in 1998 as an engineer. Previously he had provided 22 years' service in the Royal Air Force, also in an engineering role. Although the identity of his employer has changed over time, since 1998 the Claimant has worked as an engineer on the Underground. Most recently, on 9 July 2017, he was TUPE transferred from London Underground Limited to Transport for London.

11. In 2009, he started work on a particular project, known as the Sub-Surface Upgrade Programme (SUP). This was subsequently retitled the Four Lines Modernisation Programme (4LM). In 2011, he was line managing a number of other engineers, including Ms Ailsa Buchan. He had a good working relationship with his team in general, and with Ms Buchan in particular. Ms Buchan is one of the witnesses in these proceedings. As a result of her own promotions, she has been the Claimant's line manager since July 2018.

12. The Tribunal finds that the staff working on the 4LM Programme were a mixture of permanent employees and contractors. Contractors would either be employed directly or would provide their labour through a service company, whether their own company or an umbrella company providing several staff. These contractors were referred to as Non-Permanent Labour (NPL). Shortly after starting work on this project, the Claimant was expected to report to Mr Eddie Currens. The Claimant did not have a good working relationship with Mr Currens. He became suspicious about the way that Mr Currens was working, particularly with how he was dealing with contractors. He was suspicious of how Mr Currens dealt with Pat Keegan, and how Mr Keegan dealt with another NPL worker, Tim Axe. In January 2013, he drafted a letter to Mr Steven Nuworgah, the HR Business Partner responsible for 4LM setting out his concerns. It was never sent.

13. The Claimant spoke to Mr Nuworgah in late 2013 about his perception of problems with the dynamics within the team. Whatever his belief, he did not allege that team working problems were the result of any desire to perpetrate wrongdoing – as he himself accepts in his witness statement.

14. However, on 8 February 2014, the Claimant sent an email to Mr Nuworgah, which he now says amounted to making a protected disclosure. In the subject line, the Claimant wrote "Highly Confidential". The email said: "Attached for processing please – hopefully self-explanatory". He said that the content of the attachment had been bothering him for some time and "I need to get it aired". He invited Mr Nuworgah to discuss the content with the Claimant's line manager, Paul Thomas. Mr Thomas was the Head of Engineering on the 4LM project. The attachment was a single page document, headed "Public Interest Disclosure – for investigation?". Under the heading there were three bullet points, followed by a series of questions. This was set out as follows:

- Patrick Keegan, SUP Engineering consultant, 6th Floor 200BPR, ongoing from the Metronet era. The same person as SRC Director – http://www.strategicrail.co.uk/about-us/our-people/director-profiles/
    - Re – Access to LUL information and supply chain – is this ethical?
    - Conflict, Declaration of interest?
    - Can it be investigated whether any LUL employee is gaining personal benefit from this arrangement?

- It is believed that the SUP employ between 5 and 25 'SRC people' as Consultants or NPLs (mainly Engineers, Managers?), these being sourced transparently via legitimate agencies. Ongoing practice from the Metronet era?
    - When the SUP headcount reduction occurred in July 13, how many SRC people (as a percentage) were released? Of the returners, how many have been from SRC?

- Do SRC people work as a Network within the SUP? Would they ever be put in a position whereby they might be tempted to further SRC goals to LUL's disadvantage?
- Can it be investigated as to whether any SUP LUL employees, are in a position to gain personal benefit from specifically seeking to hire SRC people?

- The right environment?

15. Given the heading and the contents of the document, the Tribunal finds that the Claimant was asking Mr Nuworgah to investigate whether the practice of engaging Strategic Rail Consultant (SRC) contractors risked a conflict of interest. The potential conflict was between their loyalty to London Underground Limited ("LUL") and their loyalty to SRC, because of the information to which they potentially had access during the course of their work for LUL. In particular, he was concerned by the possibility that LUL employees might be gaining personal benefits from the recruitment of SRC contractors. However, he did not disclose any specific facts tending to show that LUL employees were gaining personal benefits from this arrangement or indicating there had been a breach of a legal obligation or a criminal offence committed.

16. The Claimant followed up with a further email on 14 February 2014, in which he reiterated his request for an investigation. He asked that the investigation be carried out by someone outside of SUP Engineering. He asked if he could be interviewed by the investigator.

17. On 18 February 2014, the Claimant lodged a formal grievance. The focus of his grievance was his perception of the conduct of a manager, Eddie Currens. He described Mr Currens' conduct as "various acts of underhand scheming or behaviour ie 'jiggery-pokery' & other discriminatory behaviour". He alleged that Mr Currens was deliberately trying to make life difficult for him so he would resign. He said that this treatment had impacted on his health. By way of remedy, he asked for the Respondent to provide him with an apology, eight years guaranteed employment, his 'lost' length of service restored, and for his personnel file to be destroyed since 2010.

18. At some point in February 2014, the Claimant started a period of long-term sickness absence. The reason given for his sickness absence on medical certificates was anxiety and depression which he "strongly perceives to be due to work related problems".

19. A grievance hearing was held on 25 March 2014. It was chaired by Paul Thomas, Head of Engineering for SUP. Unfortunately, the notes of the grievance hearing are not available. The only document retained is a one-page sheet of proposed amendments to the hearing notes, provided by Mr Hall. This indicates that notes were taken and were sent to the Claimant for his comments. This is reinforced by the subsequent grievance outcome letter which says it is attaching two copies of the meeting minutes and asks him to sign and return a copy confirming his agreement.

20. There is a factual dispute as to what was discussed during this grievance hearing. The Claimant's case is that towards the end of the hearing, after the HR Manager present had departed as requested, Mr Thomas asked the Claimant about the email he had sent to Mr Nurworgah on 8 February 2014. His evidence was he told Mr Thomas that the Discipline Engineers had been seeking to make things awkward for him for a long time, and that Mr Currens had been trying to replace him with a consultant or an NPL. His evidence is that during this conversation he described unusual behaviour between Mr Pat Keegan and Mr Tim Axe, and alleged Mr Currens had been seeking to replace Ailsa Buchan with an NPL. When he queried this with his manager, he was told "Mr Currens likes employing NPLs". He asserted that Mr Currens and Mr Keegan were involved in wrongdoing and it needed to be properly investigated.

21. There is no evidence to contradict the Claimant's version of events. The grievance hearing minutes have not been provided and the Tribunal has not heard evidence from Mr Thomas or from Ms Giacobbe, the HR representative present for at least part of the hearing. In cross-examination, the Respondent challenged the extent of the detail provided by the Claimant on this topic. However, it did not assert that this topic was never discussed during the meeting. Therefore, the Tribunal accepts there was a discussion along the lines contained in the Claimant's witness statement at paragraphs 18-20.

22. On 25 June 2014, the Claimant had chosen to write to the relevant HR Manager dealing with his sickness absence. By this stage, this had become Sheila Fearon-McCaulsky. The letter was sent in advance of a Case Conference scheduled to take place on 26 June 2014 to discuss his ongoing health and reasons for absence. The Claimant says that this Case Conference was one of two different meetings on 26 June 2014. The Respondent says that there was only one meeting. The contents of the afternoon case conference meeting are recorded in a three-page long minute, at pages 96-98 of the bundle.

23. The Tribunal finds that there was a relatively short informal meeting attended by the Claimant and by Ms Fearon-McCaulsky and Ms Giacobbe that took place before the case conference. There are no notes of such a meeting on 26 June 2014. Nor is there any evidence to contradict what the Claimant says about the fact of this earlier meeting. Such a separate meeting is confirmed by the Claimant's reference, in his email of 7 July 2014, to a discussion on 26 June with Ms Fearon-McCaulsky. It is agreed that Ms Fearon-McCaulsky was not present at the second meeting.

24. In relation to this earlier meeting, the Claimant says he told Ms Fearon-McCaulsky about the relationship between Mr Currens and Mr Keegan but admits he does not recall the exact words he used. Given the lack of detail in the Claimant's evidence, and the absence of any reference to this meeting in the case conference meeting minutes, we find the content of the discussion in the morning meeting did not go significantly beyond what is recorded in the case conference minutes.

25. These minutes, at item 3, suggest that there was a discussion during the case conference about the issue that the Claimant had raised with Mr Nuworgah in his email on 8 February 2014. The Claimant's case is that this whole item was not discussed during the afternoon case conference. Rather the notes are derived from the discussion during the morning meeting. The minutes were sent to him at some point, although it is not possible for the Tribunal to be confident when these were sent. The Claimant submitted detailed comments on the accuracy of the notes, although again it is not possible for the Tribunal to determine when these comments were provided. In relation to item 3, he asked for the entire item to be deleted. He said "This was not discussed at the case conference. I consider it to be a breach of trust that it has appeared in these minutes". There is no version of the minutes which has been signed by both the Claimant and by Mr Campbell who chaired this case conference.

26. In circumstances where the Claimant is the only witness in this Hearing who was present during the meeting, we accept the Claimant's version of events. It is supported by his proposed amendments and by his repeated reference in subsequent email exchanges to there being misconduct on the part of Ms Giacobbe in including these details in the minutes of the afternoon meeting.

27. On 26 June 2014, Mr Thomas wrote to the Claimant with the outcome of the grievance. He had decided not to uphold the grievance, whilst acknowledging that there had been some tension between Project and Discipline Engineers. He recommended that the Claimant and Mr Currens engage in mediation. The grievance outcome letter dealt only briefly with the issues raised by the Claimant. It did not deal with the allegations of wrongdoing involving the use of contractors or the propriety of the specific relationship with Mr Keegan that had been discussed towards the end of the grievance hearing.

28. On 30 June 2014, Ms Fearon-McCaulsky emailed the Claimant to tell him that Mr Thomas had concluded his grievance and had sent the outcome to him by post. She asked for him to confirm once he had received it. On 7 July 2014, the Claimant emailed Ms Fearon-McCaulsky, confirming he had received the grievance outcome letter that morning. He said he had not yet received a copy of the grievance hearing notes. He concluded "Further, I have not received any update to the discussion we had on 26 June – any update would be much appreciated." This was a reference to the informal meeting that had taken place in the morning.

29. On 10 July 2014, Ms Sheila Fearon-McCaulsky replied. The focus of the email was on the purported protected disclosures made to Mr Nurworgah on 8 February 2014. This was following on from the informal meeting she had had with the Claimant on 26 June 2014, and from the Claimant's request for an update on this discussion in his email dated 7 July 2014. Ms Fearon-McCaulsky wrote as follows:

"I have reviewed all of the information that you sent to Steve Nuworgah and note the following:

1. You asked Steve and your line manager Paul, to keep the matter confidential between the 3 of you.
2. You have asked a number of questions and sought data to assist you to ascertain whether there is an issue.
3. You have not provided any evidence to substantiate your claims.

Please be advised that your email will not be handled as a Whistleblowing complaint but thank you for bringing these matters to our attention."

30. The Tribunal does not find that Ms Fearon-McCaulsky had conducted any investigation into the matters raised in the Claimant's email to Mr Nuworgah on 8 February 2014, by the time she wrote this email. Prompted by the discussion at the informal morning meeting on 26 June 2014, and by the Claimant's email of 7 July 2014, Ms Nurworgah had done no more than review the contents of the 8 February 2014 email.

31. On 11 July 2014, the Claimant chose to appeal the rejection of his grievance. Towards the end of July 2014, the Claimant returned to work. His fitness to do so was confirmed in an occupational health report dated 29 July 2014. On 4 August 2014, the Claimant emailed Debbie Giacobbe withdrawing his grievance appeal. He did not give any reason for doing so in the email. He apologised for any inconvenience caused.

32. Ms Fearon-McCaulsky's line manager within the HR Department was Mr Allman. Around September 2014, Mr Allman was replaced by Mr Peter McCurry. On 18 November 2014, there was a meeting between Mr McCurry and the Claimant. Mr McCurry took notes of what was discussed during that meeting on his iPad. It is clear from the notes of that meeting that the Claimant was dissatisfied with the time it had taken to deal with his grievance, which he believed was outside the normal process and timescales. In addition, he complained about the conduct of Ms Giacobbe. He considered she had referred in the minutes of the Case Conference meeting to confidential whistleblowing matters which had been raised during an earlier meeting on the same day.

33. The Tribunal thinks it is likely the Claimant referred during this meeting to his unresolved concerns about the propriety of the relationships between permanent staff and contractors, and specifically to the relationship between Mr Currens and Mr Keegan. This is because, notwithstanding the rejection of his grievance and the withdrawal of his appeal, this was still an issue that was troubling the Claimant. Given that Mr McCurry was relatively new to his role and this was the first meeting with the Claimant, it is likely that the Claimant would have gone into this issue to some extent. We find he had repeated the same points he made to Mr Thomas at the end of the grievance hearing. We do not accept Mr McCurry's evidence that the issue was only raised in the most general terms and that he assumed the Claimant was referring to breach of confidentiality in relation to an occupational health report. He would have needed to have had sufficient understanding of the Claimant's complaint about Ms Giacobbe in order to consider it appropriate to seek her views on what the Claimant was raising.

34. Following the meeting, Mr McCurry attempted to investigate the Claimant's complaint about Ms Giacobbe's conduct. Unfortunately, by this point, Ms Giacobbe was on long-term sick leave herself. This prevented him from speaking to her to obtain her version of events.

35. On 22 December 2014, Mr McCurry provided an update as follows:

> "My investigations into the PMA situation have been extensive and time-consuming. I believe that I have a way forward but I would ask you to bear with me for a little bit longer while I take the necessary action".

36. However, there was a further delay in getting back to the Claimant and in keeping the Claimant updated on the extent of the investigations. On 18 February 2015, the Claimant emailed Mr McCurry again, complaining about the lack of action taken in response to the concerns he had been raising and had discussed with a member of the SUP Senior Leadership Team in March last year. The Tribunal finds this was a reference to the discussion at the end of the grievance hearing with Mr Thomas on 25 March 2014.

37. The Claimant's email went on: "Recently my suspicions have been aroused – incompetence or cunning that then inadvertently or otherwise provides an opportunity for a specific supplier organisation. Some recent emails tend to support the theory." He added "Please would it be possible for me to speak confidentially to an anti-fraud investigator".

38. Mr McCurry spoke to the Claimant on the telephone on or around 24 February 2015. The phone call lasted a few minutes. The Claimant alleged that Eddie Currens and Pat Keegan were seeking to perpetrate fraud against the company in relation to a contract tender process. The Claimant said he thought they were looking to get rid of him and replace him with a contractor. This was based on him seeing Mr Currens and Mr Keegan speaking to each other and then looking up at the Claimant. He said he had raised this issue previously but was unsure whether it had been investigated. Mr McCurry said he would speak to someone about this to look into the issue further.

39. Prompted by this conversation, Mr McCurry spoke to the Head of Commercial Construction, Ms Barrett. Mr Barrett told him that there had been a general investigation into the relationship between TFL and its delivery partners. It had not been prompted by a specific complaint. It had concluded that there had been no wrongdoing. Mr McCurry did not feed this information back to the Claimant or otherwise provide the Claimant with an update on this issue.

40. The Claimant emailed Mr McCurry again on 17 June 2015, picking up on Mr McCurry's email on 22 December 2014. He said: "I would appreciate if some assumptions could be developed and shared?". He said that he continued to feel low and said that his mood had been exacerbated by how his absence had been handled. He asked for an apology for the way he had been treated, alternatively he asked for a meeting with Mr McCurry.

41. Mr McCurry responded on 30 June 2015. He said that he thought it unlikely that Ms Giacobbe would return to work. If that was the case, then he would be unable to pursue his enquiries. He offered the Claimant a meeting when the Claimant had returned from annual leave to "work out a supportive way forward". Despite this offer, Mr McCurry did not arrange a meeting with the Claimant at that point.

42. In the middle of 2015, the Claimant's line manager changed to Robert Frith.

43. In November 2015, the Claimant was due to attend a "Behavioural Based Safety Session". He emailed Mr Frith on 26 November 2015 to say he needed to withdraw from the event "due to personal reasons". In the email he said that he was feeling extremely low. He alleged that there had been further attempts to cause him personal harm through a campaign led by an unnamed individual. He said that the Respondent was failing in its duty of care towards him.

44. On 27 November 2015, Mr Frith spoke with Sophie Cooper, Assistant HR Business Partner. She advised him to meet with the Claimant to better understand his concerns. The Claimant and Mr Frith met to discuss these concerns. As recorded by Mr Frith in a contemporaneous email, the Claimant considered that there were unresolved HR/management issues that were preventing him from drawing a line under the past. He considered that the management of his original grievance had been inappropriate, in that some of the information included confidential information about his health. He was critical of the way he had been managed in the past, and the way his grievance had been handled by Mr Thomas. He said he was now keen to reopen the grievances at Director level. At the end of the meeting, Mr Frith said he would discuss matters with HR.

45. Mr Frith spoke to Ms Cooper again. It was agreed she would speak to Mr McCurry. Ms Cooper spoke to Mr Frith again at the start of December 2015. She told him that historical matters were being dealt with. He should focus on managing current issues.

46. On 6 January 2016, the Claimant sent a further email to Mr McCurry. He said that he still had issues in the workplace which were impacting negatively on his mood. He blamed his former manager who he alleged was still negatively influencing his current manager. He explained his decision to withdraw his grievance as a decision taken "being that a fair outcome was unlikely based on the handling of the situation by the PMA [ie Ms Giacobbe]. Additionally, the PMA's breach of confidence that I mentioned when we last met". He requested an interview with the HR Director. In his response, Mr McCurry said he did not understand the benefit of escalating the matter to his line manager. He encouraged him to raise a further grievance if the Claimant remained unhappy with his treatment, and to make use of the counselling services available. He offered to meet up with the Claimant.

47. At about this time, the Claimant asked if he could work from home on days when he had not been sleeping well. Mr Frith told him he should attend the office every day, given his management responsibilities and given the constant interaction required with members of the team and other stakeholders. If he was not well enough to travel

to work, he should take the day off as sick leave to recover rather than working from home.

48. Mr McCurry met with the Claimant on 12 January 2016. The Tribunal accepts that the Claimant again referred to his concern about business relationships. He said that he did not see how it was ethical that Mr Keegan was being employed as a consultant at the same time that his company (SRC) was bidding for contract work. He considered that there was a conflict of interest given Mr Keegan was both representing the Respondent and SRC at different meetings. Mr McCurry said he would talk to someone about this. Mr McCurry said that there was little that he could do in relation to the complaint about the behaviour of Ms Giacobbe, given that she had now left the organisation.

49. Following the meeting, Mr McCurry contacted Mr Frith. Mr McCurry said that the Claimant had had difficulties in his relationship with his previous manager, but those difficulties had been investigated. He did not provide Mr Frith with specific details and did not say that the Claimant was making whistleblowing disclosures. Mr Frith reassured Mr McCurry that the Claimant had started with him with a clean slate. Mr McCurry did not disclose the Claimant's identity as a potential whistleblower to Mr Frith.

50. Mr McCurry passed on this reassurance to the Claimant in an email dated 12 February 2016. The Claimant responded, recalling that Mr McCurry had promised to speak with Mr Thomas regarding the actions of Ms Giacobbe. He repeated his request for an escalation to the HR Director, because he did not seem to be making progress with Mr McCurry. Mr McCurry wrote back to the Claimant on 15 February 2016 saying he would speak to Mr Thomas to seek his views.

51. At the end of January 2016, Mr Frith emailed certain members of the 4LM team, following recent feedback from the team about the Claimant's performance. He asked these individuals for a review of the Claimant's current performance with respect to his roles and responsibilities. On 8 February 2016, Mr Frith held a meeting with Mr Hall and others to discuss the concerns about the Claimant's performance. Notwithstanding this discussion, within days team members emailed Mr Frith with further concerns about the Claimant's performance. The concerns related to his evident frustration and his unwillingness to do what was asked of him.

52. At the Claimant's annual performance review held in March 2016, the Claimant was awarded a grade of 2. The meant that he had "demonstrated a good standard of performance and behaviours in some areas, improvement needed in others". Although the Claimant was dissatisfied with his grading, he did not appeal against the grade awarded. There is no evidence before the Tribunal to indicate that the Claimant's grading was not the grading that his performance merited. In the absence of such evidence, we find that the grading was appropriate for the Claimant's performance. We also accept the Respondent's evidence that the Claimant's grading was based on the quality of his performance when he was at work and was not negatively impacted by periods of absence when he was off sick.

53. The Claimant asked for a meeting with Mr Frith to discuss the negative feedback within his end of year report. The meeting took place on 29 April 2016. There are no notes of this meeting in the bundle. We accept Mr Frith's evidence as to what was said during this meeting. Mr Frith told the Claimant that the dissatisfaction about his performance came from several individuals. The Claimant continued to refute that there were any legitimate issues concerning his performance.

54. Shortly after this meeting, on 4 May 2016, the Claimant emailed Mr Frith to say he would not be coming into work. This was because he was feeling "exceptionally low at present". He gave two reasons. The first related to the longstanding grievance issues on which he had not received an update from Mr McCurry. The second was the manner in which his performance had been managed over the last year.

55. The Claimant returned to work on 10 May 2016. His behaviour continued to cause Mr Frith concern. He was absent from his desk for long periods of time. On 23 May 2016, Mr Frith received a detailed email from a Senior Project Manager. It recorded that Manager's recollection of an incident that day when the Claimant had been aggressive and angry. This resulted in Mr Frith arranging to have a further meeting with the Claimant. This took place on 25 May 2016. During the meeting, Mr Frith suggested that the Claimant should be referred to occupational health. He noted the Claimant was increasingly agitated. He was twitching and scratching the back of his neck and complaining about a headache. The Claimant agreed that a reference to occupational health would be appropriate. Around this time, Mr Frith had considered putting the Claimant on a Performance Improvement Plan due to his rating of 2. Given the health issues that had become apparent, he decided to delay any Performance Improvement Plan until the Claimant's health had been further investigated.

56. As he had promised in his email of 14 February 2016, Mr McCurry had attempted to contact Mr Thomas to discuss the Claimant's historical concerns. For whatever reason Mr Thomas did not respond. The matter was then overlooked, only being picked up in May 2016 when Mr McCurry sent a further email to Mr Thomas. Eventually Mr Thomas sent a detailed email on 25 May 2016, recording his view that the grievance was conducted in accordance with the Respondent's procedures. He then specified the respects in which this had been done, in six numbered points.

57. Prompted by this response from Mr Thomas, Mr McCurry emailed the Claimant on the same day. He said that while there had been some gaps in response, which he attributed to Debbie Giacobbe's working patterns, there was nothing that indicated she had been lacking in her duties or failed to perform the PMA role. He concluded that "there is nothing else which we can meaningfully do in respect of your historic situation and I am treating this matter as closed".

58. Mr Frith referred the Claimant to occupational health. The appointment took place on 9 June 2016, and an occupational health report was sent to Mr Frith on 10 June 2016. Dr Trond Eggum, Occupational Physician, did not consider it appropriate to re-refer him to counselling. His advice was that the work issues that the Claimant perceived as the triggering cause for his symptoms needed to be "fully addressed to minimise

the risk of recurrence of his symptoms and sickness absence". He considered that the Claimant was fit to work in his full role without restrictions. He did not recommend any reasonable adjustments. Mr Frith did not consider this was helpful advice, given he felt that the previous issues had already been dealt with.

59. In the middle of 2016, Mr Frith was moved to another area of the business and ceased to be the Claimant's line manager. Mr Long took over the role of line manager. He and Mr Frith discussed whether the stresses inherent in the Claimant's role as Lead Project Engineer might be contributing to the Claimant's difficulties. They discussed whether the Claimant should be found another, less stressful, role following a proposed reorganisation. The Claimant was told by Mr Long that his role may no longer exist as part of this reorganisation, but the Respondent would try its best to find him an appropriate alternative role. However, contrary to Mr Long's expectation at the time, the proposed reorganisation did not proceed and the Claimant remained in the same role.

60. On 13 January 2017, the Claimant emailed Mr McCurry again. His email recorded his belief that Mr McCurry would either have resolved the problems he had discussed with him a year earlier in an acceptable manner; or would have escalated matters to his Director. He went on to write:

"Instead, I believe you discussed with my manager, Rob Frith, this action unwittingly or otherwise created a very negative approach towards me from Rob, my performance suffered and the situation caused me further distress. During 2016 I experienced a further two periods of mental health sickness absence … I am now seeking some feedback in relation to the public interest wrongdoing concern I raised in 2014 ie whether it was investigated and outcome etc – I propose formalising this request in a letter to the HR Director".

61. In his response on 19 January 2017, Mr McCurry reminded the Claimant he had told him on 25 May 2016 that the issues he had raised about Debbie Giacobbe were closed. He said he had no knowledge of the public interest wrongdoing claim, but "I am sure you will have kept records to be able to follow it up with the appropriate parties to whom [it] was originally sent". He noted it was "perfectly reasonable and legitimate action" for him to speak to Mr Frith. He said he had no evidence of unfair treatment from Mr Frith or from Mr Long since he had taken over as the Claimant's line manager. He said if the Claimant had evidence to the contrary then he should follow the correct procedure and raise a formal grievance. There was a further email exchange initiated by the Claimant in February 2017 to which Mr McCurry replied the following month. Given the wording of the Claimant's email, Mr McCurry said he was now less clear on what the Claimant's actual issues were. He disputed the Claimant's recollection that he (Mr McCurry) had advised the Claimant on two occasions he knew someone who would investigate his concern. Mr McCurry reiterated that the Claimant should raise a formal grievance if he still had a concern.

62. At the Claimant's end of year performance review in March 2017, the Claimant was awarded a performance rating of 2. Initially Mr Long had awarded him a rating of 3,

but this had been revised downwards at a calibration meeting in mid-March 2017. The purpose of the calibration meeting was to ensure consistency between the ratings given across this area of the Respondent's business. The rating decision was a group decision to which several individuals were party. Again, the Claimant did not appeal against this rating. It appears from an email on 15 March 2017 that six individuals who had been initially awarded a rating of 4 by their line managers were re-graded as a 3 during the calibration meeting. It is unclear how many other employees had their rating adjusted from 3 to 2, as was the case for the Claimant. Given the number regraded from 4 to 3, it is unlikely that the Claimant was the only employee to be regraded from 3 to 2.

63. In April 2017, Simon Stockley became the Claimant's formal line manager. He had had some involvement in the management of the Claimant's work before this date. This included approving the Claimant's requests to work from home. Mr Stockley reviewed his emails over the period of 2017-2018 to check how many times the Claimant had asked to work from home. This indicated that the Claimant had only asked for work from home on two or three occasions. Each request was approved. The Claimant did not ask Mr Stockley for permission for work from home on a more regular or permanent basis.

64. On 3 July 2017, Mr Long wrote to the Claimant confirming the Claimant's performance rating. The consequence was that the Claimant was not eligible to receive a performance related pay increase. His salary and all other terms and conditions remained unchanged. Mr Long promised the Claimant he would agree a development plan to assist him in bringing his performance up to the required standard. On 16 August 2017, Mr Long was chased by HR to set out the management action that had been agreed to improve the Claimant's performance. In his reply on 25 August 2017, Mr Long stated that Mr Stockley was now the Claimant's line manager. He had discussed the Claimant's performance with Mr Stockley. They had agreed that a local plan would be implemented that would help the Claimant better achieve his position as a member of the wider team. Mr Stockley's evidence is this plan was discussed on an informal basis.

65. On 20 August 2017, the Claimant wrote a letter to Tricia Wright, the HR Director. It was headed "Individual Grievance". The contents of the letter drew a distinction between the background to his grievance and his grievance itself. The background was the team working difficulties he was experiencing, and its impact on his mental health. The grievance was "the manner in which HR staff have conducted themselves in relation to my situation, creating further problems for me at work and impacting on my wellbeing". Whilst his grievance was not confined to Mr McCurry, he did name him specifically as having been "negligent in the handling of my situation". He expected there to be a hearing with her to consider his complaint and to discuss appropriate redress. A further copy was sent by email on 29 August 2017.

66. Ms Wright acknowledged the grievance on 30 August 2017 and allocated Ms Fearon-McCaulsky to handle the grievance. Ms Fearon-McCaulsky wrote to the Claimant to ask for more information about the content of the grievance. She said that once

further information had been provided, she would appoint a grievance chair to take the matter forward. In a letter on 16 September 2017, which was sent again by email on 20 September 2017, the Claimant clarified his complaint was twofold. The first part concerned a breach of confidentiality by Debbie Giacobbe in 2014, which had caused him to abort his previous grievance. The second part concerned Mr McCurry's response to his meeting with him on 12 January 2016. He considered Mr McCurry had indicated he would develop a fair resolution of the situation, but instead had spoken to his line manager Mr Frith which had "created further problems for me at work".

67. Ms Fearon-McCaulsky told the Claimant in an email on 28 September 2017 that Tricia Wright would not be hearing his grievance. This caused the Claimant to email Ms Wright again, requesting that she take personal responsibility for hearing his grievance and for providing a resolution. On 4 October 2017, Ms Fearon-McCaulsky informed the Claimant that Ms Sharples had been appointed to hear his grievance. At the time, Ms Sharples was Head of Stations in another part of the business. On 10 October 2017, the Claimant wrote again to Ms Wright, again asking to have a discussion with her about his grievance and "the business ethical wrongdoing concern which I raised previously and which I believe is fundamental to the workplace behaviours that I endured". He added he had discussed this wrongdoing concern with Mr McCurry previously. Although Mr McCurry, he said, had promised an investigation, he had never been told of investigation outcome. He said that there was "an element of denial of knowledge of this concern within HR". He ended by asking Ms Wright to "provide some options to resolve the overall situation and provide closure on this matter". On 27 October 2017, Ms Fearon-McCaulsky warned the Claimant she may need to find another Chair as Ms Sharples had moved to a different role.

68. The Claimant chose to contact his local MP to discuss his perception of the unfair way he was being treated at work. He met Sir Oliver Heald QC MP at his constituency surgery on 3 November 2017. He told him that there was a consultant named Pat Keegan working within his department and at the same time he was a director of a business (SRC) which was tendering for contracts with the Respondent involved in London Underground Upgrade work. He said he was concerned about the risk of possible procurement fraud.

69. Sir Oliver emailed the Mayor, Sadiq Khan, on 6 November 2017, referring to concerns the Claimant had raised with a senior manager in 2014 about possible procurement fraud. He said his constituent had not received a response and asked if the HR Director could discuss the issue with the Claimant. Mr Khan responded to say the matter had been brought to the attention of the HR Director.

70. By mid-November 2017, the Claimant had been told that Ms Wright would hear any appeal against the outcome of his grievance. She would not chair the grievance hearing. On 23 November 2017, the Claimant emailed Ms Wright asking for his grievance to be suspended. His reason was that there was a "public interest issue that runs in parallel with my grievance" and he wanted that public interest issue to be

investigated first. This was supported in a further email from Sir Oliver Heald on 5 December 2017.

71. On 7 December 2017, Ms Wright wrote to the Claimant informing him she was referring his concerns to the Internal Audit Department. This was explained as action taken because he had classified them as whistleblowing and a protected disclosure. Mr Rob Brooker, the Head of Fraud, contacted the Claimant on 21 December 2017. He asked the Claimant to give him an outline of the issues concerning the wrongdoing he wanted to report. He suggested he could meet with the Claimant at a time and location which was convenient to the Claimant. In his reply, the Claimant asked Mr Brooker to speak to Mr McCurry to obtain an explanation of the issues before the two of them met. Mr Brooker forwarded the Claimant's email to Mr McCurry, asking for further information.

72. The Claimant met with Mr Brooker on 18 January 2018. Both described this as a brief meeting, in subsequent documents. The reason for the brevity, according to Mr Brooker's email on 31 January 2018, was that the Claimant left the room when he asked him for details of the nature and extent of the wrongdoing and the people involved. Mr Brooker explained that without these details he would not be able to progress a fraud investigation. In his response, the Claimant said Mr Brooker's approach appeared "aligned with preserving the 'cover up', rather than properly investigating this matter". Mr Brooker responded saying he was unable to proceed without any further detail and therefore considered the matter closed.

73. The Claimant wrote again to Ms Wright on 6 February 2018. He complained to Ms Wright about Mr Brooker's decision to close the internal audit investigation. He said he had "developed the opinion that someone has influenced the audit team to close down this investigation prematurely, presumably this is so as to preserve the cover-up that has existed to date". He asked for the matter to be placed with an external authority for independent investigation, adding that it may benefit from the intervention of the TfL Commissioner for resolution. In her response, Ms Wright confirmed that the investigation could not proceed without the Claimant providing the relevant details and encouraging the Claimant to provide them.

74. Even though this internal audit process had ended, the Claimant did not take any steps to re-activate his grievance at that point. Having asked for the grievance to be suspended, we find that the onus was on the Claimant to ask for it to be reactivated.

75. In March 2018, Mr Stockley awarded the Claimant a rating of 3 for his performance during the year 2017/18. This rating was upheld during the calibration meeting. This indicates that the Respondent's perception was his performance had improved during 2017/18.

76. Shortly thereafter, the Claimant had a disagreement with a Senior Project Manager (SPM). The Claimant told the SPM he was not prepared to carry out the work that the SPM had asked him to do. The SPM reported the matter to Mr Stockley who attempted to discuss it with the Claimant. Mr Stockley tried to explain that the

Claimant's stance was perceived as obstructive. The Claimant was unwilling to accept any criticism of his approach on this issue. Shortly thereafter, the Claimant started another period of long-term sick leave.

77. Back in November 2017, the Respondent had instigated an organisational review of the engineering branch. The rationale for the reorganisation was set out in a written Business Case. In essence, the Respondent wanted to create a single engineering function within the Respondent for roles previously carried out either within the Respondent or within London Underground Limited. All engineers were placed into a pool which represented the area of the business in which they were working. The Claimant was placed into Pool K for roles within Engineering Services. There were 130 people placed in the pool and 130 new roles in this part of the business – although the number of people in the pool subsequently reduced to 113.

78. All existing staff were to be allocated to one of three roles, that of Senior Engineering Leader, Senior Engineer or Engineer. Within the Claimant's part of Pool K, Electrical and Mechanical (E&M), there were five Senior Engineering Leader roles, 22 Senior Engineer roles and 42 Engineer roles. Despite the different titles, only Senior Engineering Leaders would have specific line management responsibilities. Other engineers may have supervisory responsibilities on a project-to-project basis depending on the composition of the project team. There was to be no difference in pay levels for existing staff between those allocated to each of the three roles. All three roles remained within pay Band 3. Staff were invited to express an interest in a particular role. If they did so, they underwent an online assessment and were allocated a mark out of 20. The marks were then taken into account in deciding which roles to allocate to which engineers. This was done at a 'Wash Up' meeting. The decision makers were three managers – Dave Parkyns, Head of Profession, Building Services; Sharon Duffy, Head of Transport Infrastructure; and Ademola Oweye, Principal Engineering Leader for E&M.

79. By the time of the Expressions of Interest exercise, the Claimant was off work on sick leave. He had previously asked that he be made exempt from the Expressions of Interest application and assessment process, due to longstanding issues that remained unresolved. Mr Paul Thomas initially told him that he still had to submit an Expression of Interest. Subsequently Mr Thomas corrected this, telling him that this was not necessary as the Claimant was on long-term sick leave. He would be placed in the organisation. He asked the Claimant to indicate any role preference he had. In his response, the Claimant said he would be "most suited to a role that is as similar as possible to my current role, as someone with 40 years engineering experience I feel I'm best suited to a role that requires an element of supervisory leadership".

80. Because the Claimant had not participated in the formal Expressions of Interest exercise, he had not undergone any online assessment. As a result, he had not been allocated a score. He was not assigned an average score or otherwise given a score based on his annual performance review or other evidence. There is no evidence as to what was discussed about the Claimant during the Wash Up meeting. The result for the Claimant was he was allocated the role of Engineer. He was informed that

this was his new role in a letter dated 25 June 2018. The Claimant regarded this as a demotion.

81. On 7 July 2018, the Claimant wrote to Mr Stockley in response to his invitation to a meeting to review the Claimant's sickness absence. He said he was experiencing depression as a consequence of "workplace problems which remained unresolved over several years and which were further compounded by HR's handling of the situation". He asked for the sickness absence review meeting to be postponed until after confirmation of which senior HR manager had ownership of his case and "their thoughts on possible options for resolution". The Claimant's union representative, Chris O'Brien, also started emailing on the Claimant's behalf at this time. The Claimant sent a further letter to Sheila Fearon-McCaulsky on 15 July 2018, asking her to confirm the name of the Senior HR Manager to whom the matter had been escalated.

82. It appears from an email sent by the Claimant to his union representative on 22 July 2018 that the Claimant was contemplating issuing employment tribunal proceedings. His email noted he was thinking of referring to ACAS for early conciliation. On 23 July 2018, Ms Fearon-McCaulsky agreed to refer the matter to her line manager Mr McCurry. Mr McCurry wrote to the Claimant on 30 July 2018 noting that there were two ongoing issues. The first was the issue of his return to work. The second was the 'business ethics concern' previously raised by the Claimant. He said that in the absence of evidence, the Respondent was unable to take this second matter any further forward. In the absence of further evidence, he considered the matter closed.

83. There was a meeting between the Claimant and Mr McCurry on 22 August 2018, which was also attended by the Claimant's union representative. As recorded in the meeting notes, the Claimant accepted that there was no physical evidence to support his belief that a contractor was in cahoots with his line manager who wanted to get him to leave and be replaced by someone from the contractor. He said he had a strong suspicion and believed that there would be an investigation. Mr O'Brien said he believed that there had been a cover up. The Claimant alleged the ill health resulting from his treatment had prevented him from being selected for two promotions because he had not been able to give of his best. Mr McCurry discussed the possibility of a settlement sum being paid to the Claimant, although he had no authority to make any offer.

84. Following the meeting, Mr McCurry spoke to Ms Barrett to refresh his memory on what she had previously told him about an investigation into contractors. She confirmed again, as she had done previously, that there had been an investigation into the relationship between the Respondent and its delivery partners as well as the procurement rules and tender process and no wrongdoing had been found.

85. Mr McCurry wrote to the Claimant on 13 September 2018 following his discussion with Ms Barrett. The letter was headed "Without Prejudice". Of relevance to the present dispute, he said this:

"At the time you raised your concerns with Steve Nuworgah there had already been investigations into the relationship between the Company and their Delivery Partners within CPD. Your claim did not provide any physical evidence and were based on your perception of how you had been treated.

I can therefore understand why it was not felt necessary to speak to you directly. You should have received an update of what was happening and I apologise that this did not happen."

86. The letter went on to acknowledge that these past matters had had an impact on the Claimant's health. However, Mr McCurry did not accept that without this he would have got either of the "promotional roles" for which he had applied. As a result, he had "discounted any recompense for your perceived loss in these areas". He said that he did not feel it was appropriate to overturn the performance management process. He noted that "your health and attendance will have been taken into account by your Line Manager and you had the option to appeal any performance rating at the time". He ended the letter by apologising again for the Claimant not receiving better communication at the time of the original complaint. However, he did not make any offer of compensation.

87. On the Claimant's behalf, Mr O'Brien responded to express his disappointment with this response. He asked for another meeting. That prompted a further email from Mr McCurry which was sent to Mr O'Brien alone. The email largely reiterated what had been said previously, although it referred to the Claimant's position in relation to the outcome of the recent reorganisation as a "conspiracy narrative".

88. Following the reorganisation, Ms Buchan became the Claimant's line manager. She was one of the five successful candidates for the role of Senior Engineering Leader. As previously mentioned, Ms Buchan had previously had a good working relationship with the Claimant at a point when it was the Claimant who was line managing Ms Buchan. The Claimant was one of 15 engineers (both Engineers and Senior Engineers) for whom Ms Buchan was the line manager.

89. Ms Buchan's first involvement was at a sickness absence review meeting held on 1 August 2018. The discussion ventured in part into the historical matters that the Claimant felt were responsible for his ill health and his criticisms of the role played by HR. In advance of the meeting, Mr Stockley had asked the Claimant to bring forward any reasonable adjustments suggested by his GP that would enable the Claimant to return to work. The Claimant confirmed he was not asking for any particular adjustments. The meeting concluded with Ms Buchan saying she would try to get the balance between trying to avoid giving the Claimant demanding work, but not providing boring work. She suggested that they tried to work together to agree a phased return to work.

90. Thereafter the Claimant continued on sick leave. Ms Buchan continued to communicate with the Claimant by text, by phone and by email. During November 2018, Ms Buchan was struggling to speak to the Claimant. On 22 November 2018

she emailed the Claimant asking him to contact her so they could discuss his absence. She warned him that failing to keep in contact with his line manager without good reason was defined as unauthorised absence. She also told him his sick pay would reduce from full pay to nil on 5 January 2019.

91. Ms Buchan and the Claimant spoke on 26 November 2018. The Claimant told her he considered Mr McCurry was the single person accountable for her state of health. The Claimant said he would be booking an appointment with his doctor now he had concerns for his physical health. He said he would be writing again to Mr McCurry. He would revisit the benefits of an occupational health referral once Mr McCurry had reconsidered his situation.

92. There was further email correspondence between the Claimant and Ms Buchan over the subsequent weeks. In an email on 21 December 2018, Ms Buchan confirmed the business was not prepared to do anything further regarding the issues the Claimant had been escalating over the last few years. Having spoken to Mr McCurry, Catherine Watt in HR and to Ms Buchan's line manager Dave Parkyns, these matters were considered closed. Ms Buchan wrote that if the Claimant "had any evidence of impropriety, then you have an open case with Internal Audit". She encouraged the Claimant to provide his consent for a referral to occupational health and asked him if he would be interested in obtaining a pension quote. She ended the email in this way:

"Finally, I really hope that you are feeling some improvement since beginning medication as detailed below and that you are able to enjoy the festive season with your family."

93. On 8 January 2019, the Claimant wrote to Ms Buchan informing her that his trade union representative had unexpectedly withdrawn his support. He believed "Chris has been put under duress by HR, alternatively someone senior within TfL have decided it would be appropriate to offer some inducement to Chris, thereby encouraging him to turn against me … Furthermore it would not surprise me if TfL HR are seeking to exert some political influence over UNITE (possibly via the Mayor's office) in order to maintain this concealment". He made a similar allegation in a further letter on 16 January 2019. His letter made no reference to Ms Buchan's question about whether he would be interested in obtaining a pension quote.

94. On 10 January 2019, Dave Parkyns sent an email to other managers updating them on the situation in relation to the Claimant. The email noted that the Claimant had mentioned on the telephone he had now instructed a solicitor and planned to take the original case to the Police and to the Office of the Rail Regulator.

95. In an email on 16 January 2019, the Claimant referred to a previous discussion that had taken place, presumably with Ms Buchan, under the heading "pension". The Claimant's email did not express any dissatisfaction with Ms Buchan for having raised the issue of an ill health early retirement pension.

96. In January 2019, the Claimant sought a meeting with Clive Walker, the Director of Risk and Assistance. He wanted to convey information to Mr Walker. Mr Walker

responded in an email dated 31 January 2019 to say he had been made aware of the Claimant's request for a meeting. He asked "if you are now able to share details of the alleged wrongdoing, then I will be happy to arrange for my new Head of Fraud, Richard Mulling (copied) to meet with you to discuss these. However, in the absence of any details regarding what is alleged there is little value in a meeting". He ended his email by saying that "any allegations that you raised would be dealt with as a whistleblowing disclosure and will be entirely separate to any HR cases involving you that may currently be ongoing".

97. The Claimant was insistent that he should meet with Mr Walker and was unwilling to meet with Mr Mulling, despite his role as Head of Fraud. Because the Claimant was not willing or able to provide further information to substantiate his concerns, this channel of communication was not progressed.

98. On 1 February 2019, the Claimant alleged that his poor health had overtaken consideration of the grievance he had raised back in August 2017. He went on to write that following a meeting with Mr McCurry on 22 August 2018, his grievance against him had been further exacerbated, being that Mr McCurry had reneged on what had been agreed at that meeting. He asked whether "the business considers my grievance as open, or closed?".

99. On 6 February 2019, Ms Buchan emailed the Claimant. She stated that Mr McCurry had confirmed that the Claimant's grievance was closed on the grounds that it was a repeat of issue which have already been fully addressed. Her email continued "in the absence of any further OH advice I would like to convene a meeting to discuss next steps". She attached a letter organising a meeting. This had been adapted from a standard template for use as part of the sickness absence review procedure. That letter invited him to a meeting on 14 February 2019. It warned him that if he could not remain in his current role or be redeployed "we will also need to discuss your continued employment with TfL. You should be aware that dismissal on medical grounds is likely to be considered under these circumstances. I have enclosed the ill health estimate authority form should you wish to obtain a pension quote".

100. The meeting did not take place as scheduled. Ms Buchan continued to try to arrange a sickness review meeting, but without success. The Claimant's health was reviewed by occupational health on 20 March 2019. This noted that the Claimant was on antidepressant medication which had been increased in the last week. He had uncontrolled symptoms of stress and depression. He had had telephone counselling with AXA. The occupational health adviser stated he was currently not fit for work in any capacity owing to uncontrolled symptoms of stress and depression. He would benefit from face-to-face counselling or other treatments via his GP. His condition was a reaction to work issues and "these may be areas that the business explores further in order to expedite a return to work".

101. During the period from May to July 2019, the Claimant made a formal complaint against UNITE in relation to the representation he had received. He said that "UNITE full time officials appear to be offering me advice as if they were speaking on behalf

of my employer!". He wrote to Len McCluskey, UNITE's General Secretary, asking him to make strong personal representations to the Respondent. In a five-page long response dated 25 June 2019, written by Vince Passfield, the union's Deputy General Secretary, the Claimant's complaint was rejected. The letter noted that Chris O'Brien "suggested you had little or no information that he was aware of which would have supported your whistleblowing claims regarding an award of a particular TfL contract. He confirmed support had previously been provided by you however at some stage you decided to engage assistance through another recognised local Union and therefore Chris felt it inappropriate to continue assistance".

102. Ms Buchan was not party to this correspondence between the Claimant and his union. The Claimant told Ms Buchan in an email on 7 July 2018 that his complaint to the union remained unresolved and he would be escalating the matter with UNITE as Ms Buchan had suggested. The Claimant did not appear to have accepted the detailed explanation given by UNITE in their letter. In her response the following day, Ms Buchan wrote that "the allegation that someone at TfL put your previous rep under duress or offered him an inducement to stop representing you needs to be referred to UNITE in the first instance to investigate. If they find that someone at TfL did act in such a way, then they should refer that to us for further investigation."

103. On 3 June 2019, the Claimant presented his employment tribunal claim, having initiated early conciliation on 10 April 2019. In an email dated 7 July 2019, the Claimant emailed the Respondent saying he did not believe it was feasible to develop a successful return to work plan at the moment, although "it may be possible once the Employment Tribunal process has completed".

104. On 17 July 2019, the Claimant emailed Owen Granfield at UNITE, enclosing his ET1 form and the ET3 he had received in response from the Respondent. He asked that UNITE provide legal support to his case, by provision of access and representation by a qualified solicitor. He asked for a response by 26 July 2019.

105. On 25 July 2019, the Claimant received another lengthy letter from UNITE. This stated that the issues stem from his alleged 'whistleblowing' in 2014 and therefore predated him joining the union. As a consequence, he was not eligible for legal assistance. The letter also noted that much if not all of his claims appeared to be out of time. It then went on to review the merits of the claims he was bringing. The letter in the bundle does not appear to be a complete version, although neither side appears to have noticed this when agreeing the contents of the bundle.

106. On 27 July 2019, the Claimant wrote again to Mr Len McCluskey. He said that Mr Passfield's letter of 25 June 2019 further reinforced his belief "that TfL have coerced UNITE to turn against me". He did not provide any evidence of the Respondent's involvement to justify such a belief. In response, Mr Granfield wrote to him on 30 July 2019, dismissing his complaint against the union, on the basis that the union had acted in accordance with its rules in deciding not to provide the Claimant with assistance. This was because the issues related to matters which arose before the

start of the Claimant's membership. He said he would be closing his file on this complaint and wished him well for the future.

LEGAL PRINCIPLES

PROTECTED DISCLOSURE DETRIMENT CLAIMS

107. The three essential features which must be established if a claimant is to succeed in a claim for protected disclosure detriment are:

a. Establishing that the claimant has made a protected disclosure;
b. Establishing a subsequent detriment;
c. Making the necessary causal connection between the protected disclosure and the detriment.

108. Protected disclosures are qualifying disclosures made in circumstances that are deemed to be protected by the Employment Rights Act 1996 ("ERA 1996").

Qualifying disclosures

109. So far as is relevant to the present case, qualifying disclosures are defined as follows, under Section 43B:

> (1) In this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one 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) …
> (d) That the health or safety of any individual has been, is being, or is likely to be endangered;
> (e) …
> (f) That information tending to show any matter falling within any one of the proceeding paragraphs has been or is likely to be deliberately concealed.

110. The starting point is that the disclosure must be a "*disclosure of information*" made by the worker bringing the claim. That disclosure must have two features. Both are based on the belief of the worker, and in both cases that belief must be a reasonable belief. The first is that at the time of making the disclosure the worker reasonably believed the disclosure tended to show wrongdoing in one of five specified respects in Section 43B(1); or deliberate concealment of that wrongdoing. The second is that at the time of making the disclosure, the worker reasonably believed the disclosure was made in the public interest.

111. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 Sales LJ noted that allegations could amount to disclosures of information depending on their content

and on the surrounding context. He set out the following test for determining whether the information threshold had been met so as to potentially amount to a qualifying disclosure: the disclosure has to have *"sufficient factual content and specificity such as is capable of tending to show"* one of the five wrongdoings or deliberate concealment of the same. It is a matter *"for the evaluative judgment of the tribunal in the light of all the facts of the case"* (paras 35-36).

112. The Tribunal needs to assess whether, given the factual context, it is appropriate to analyse a particular communication in isolation or in connection with others. In *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540 (EAT), Slade J (at para 22) said that *"an earlier communication can be read together with a later one as embedded in it, rendering the later communication a protected disclosure, even if taken on their own they would not fall within Section 43B(1)(d)*". Whether or not it is correct to do so is a question of fact.

113. In *Kilraine*, one of the alleged protected disclosures was made using these words: *"There have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented*". In itself, this lacked sufficient factual content and specificity. The oblique reference to other documented instances did not incorporate other documents by reference. In *Simpson v Cantor Fitzgerald Europe* [2020] ICR 236, the EAT upheld the ET's decision not to aggregate 37 communications to different recipients in order to assess whether there was a protected disclosure. This was upheld on appeal to the Court of Appeal.

114. So far as the reasonable belief that the disclosure tends to show wrongdoing, there are two separate requirements. Firstly, a genuine belief that the disclosure tends to show wrongdoing in one of the five respects (or deliberate concealment of that wrongdoing). Secondly, that belief must be a reasonable belief. If the disclosure has a sufficient degree of factual content and specificity, then that belief is likely to be regarded as a reasonable belief (*Kilraine* at paragraph 36).

115. The belief has to be that the information in the disclosure tends to show the required wrongdoing, not just a belief that there is wrongdoing (*Soh v Imperial College of Science, Technology and Medicine* EAT 0350/14). What is reasonable within Section 43B involves an objective standard and its application to the personal circumstances of the discloser. A whistleblower must exercise some judgment on his own part consistent with the evidence and the resources available to him (*Darnton v University of Surrey* [2003] IRLR 615, EAT). So, a qualified medical professional is expected to look at all the material including the records before stating that the death of a patient during an operation was because something had gone wrong (*Korashi v Abertawe Bro Morgannwg University Health Board* [2012] IRLR 4 at paragraph 62). However, the disclosure may still be a qualifying disclosure even if the information is incorrect, in that a belief may be a reasonable belief even if it is wrong: *Babula v Waltham Forest College* [2007] ICR 1026.

116. In relation to each of the five proscribed types of wrongdoing, there is a potential past, present or future dimension. For instance, in relation to breach of a legal obligation, the reasonable belief must be that the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation. So far as future wrongdoing is concerned the phrase *"is likely to*" has been interpreted as meaning more than a mere possibility. In *Kraus v Penna* [2004] IRLR 260 the EAT held that to be a qualifying disclosure, the information disclosed should tend to show,

in the claimant's reasonable belief, that failure to comply with a legal obligation was "*probable or more probable than not*".

117. So far as criminal offences under Section 43B(1)(a) are concerned, it is not necessary that the criminal offence believed by the worker to have been committed even exists, let alone has been breached. It is sufficient that the worker reasonably believes that a criminal offence has been committed: *Babula*. In that case the claimant reasonably believed that the subject of the disclosure had committed an offence of incitement to religious hatred, when there was no such offence at the time. For the same reason, to amount to a qualifying disclosure, it is not necessary that the worker spells out the precise criminal offence that they have in mind.

118. So far as breaches of a legal obligation under Section 43B(1)(b) are concerned, any legal obligation potentially suffices, including breach of an employment contract: *Parkins v Sodexo* [2002] IRLR 109]. Employment Tribunal cases have held that a wide range of legal obligations are potentially applicable. A belief that particular conduct amounts to discrimination is a *"breach of a legal obligation"*.

119. It is not necessary for the disclosure to allege actual or likely illegality or breach of a legal obligation if it is to be capable of qualifying for protection. However, whether the worker mentions criminality or illegality or health and safety in their disclosure, or whether it is obvious that they had these matters in mind are relevant evidential considerations in deciding what they believed and the reasonableness of what they believed. They are not an additional legal hurdle (*Twist DX Limited v Armes* UKEAT/0030/20/JOJ at paragraph 84-87). Where the breach of a legal obligation is not obvious, a Tribunal should identify the source of the legal obligation to which the claimant believed that the employer was subject, and how it had failed to comply with it. Merely believing that conduct 'was wrong' could be a belief that the employer had breached a moral or lesser obligation, which would be insufficient (*Eiger Securities LLP v Korshunova* [2017] ICR 561). In that case, the claimant complained to her line manager that it was wrong for him to trade from her computer, without identifying that he was the person trading rather than her and told him what her clients thought of this behaviour.

120. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, the disclosure in issue related to an occasion when the worker had raised a child safeguarding issue and claimed to have received an inadequate response. The tribunal held that this did not tend to show breach of a legal obligation, and this was upheld in the Court of Appeal. As the Court of Appeal noted, nothing in the Particulars of Claim or the witness statement indicated that the claimant had a particular legal obligation in mind. It was only later that her representative suggested a potential breach of the Children Act 2004 and the Education Act 2002.

121. Section 43B(1) also requires a claimant to have a reasonable belief that the disclosure was in the public interest. This requirement has two components – first a subjective belief, at the time, that that the disclosure was in the public interest; and secondly, that the belief was a reasonable one.

122. What amounts to a reasonable belief that disclosure was in the public interest element was considered by the Court of Appeal in *Chesterton Global Limited v Nurmohamed* [2018] ICR 731. The Court of Appeal considered that a disclosure

could be in the public interest even if the motivation for the disclosure was to advance the worker's own interests. Motive was irrelevant. What was required was that the worker reasonably believed disclosure was in the public interest in addition to his own personal interest. So long as workers reasonably believed that disclosures were in the public interest when making the disclosure, they could justify the public interest element by reference to factors that they did not have in mind at the time.

123. Underhill LJ, giving the leading judgment, refused to define "public interest" in a mechanistic way, based merely on whether it impacted anyone other than the claimant or whether it impacted those beyond the workforce. Rather a Tribunal would need to consider all the circumstances, although the following fourfold classification of relevant factors was potentially a *"useful tool"*:

    a. The numbers in the group whose interests the disclosure served – although numbers by themselves would often be an insufficient basis for establishing public interest;

    b. The nature and the extent of the interests affected – the more important the interest and the more serious the effect, the more likely that public interest is engaged;

    c. The nature of the wrongdoing – disclosure about deliberate wrongdoing is more likely to be regarded as in the public interest than inadvertent wrongdoing;

    d. The identity of the wrongdoer – the larger or more prominent the wrongdoer, the more likely that disclosure would be in the public interest.

124. Underhill LJ said that Tribunals should be cautious about concluding that the public interest requirement is satisfied in the context of a private workplace dispute merely from the numbers of others who share the same interest. In practice, the larger the number of individuals affected by a breach of the contract of employment, the more likely it is that other features of the situation will engage the public interest.

Protected disclosures

125. Apart from the last disclosure, the alleged disclosures were made to the Claimant's employer. As a result, if the alleged disclosures are qualifying disclosures, then they will be protected disclosures (Section 43C Employment Rights Act 1996).

126. There are additional requirements that need to be satisfied if the alleged disclosure made to the Claimant's MP, Sir Oliver Heald QC, is to amount to a protected disclosure. These requirements are set out in Section 43G, which is worded as follows:

    43GDisclosure in other cases

    (1)A qualifying disclosure is made in accordance with this section if—

    (a). . . . . .

    (b)the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c)he does not make the disclosure for purposes of personal gain,

(d)any of the conditions in subsection (2) is met, and

(e)in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2)The conditions referred to in subsection (1)(d) are—

(a)that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b)that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c)that the worker has previously made a disclosure of substantially the same information—

(i)to his employer, or

(ii)in accordance with section 43F.

(3)In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a)the identity of the person to whom the disclosure is made,

(b)the seriousness of the relevant failure,

(c)whether the relevant failure is continuing or is likely to occur in the future,

(d)whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e)in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f)in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4)For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

127. The Claimant must establish he had a reasonable belief that the disclosure and any allegations contained within it was substantially true. Guidance on the identical wording which is also found in Section 43F is found in the IDS Handbook on Whistleblowing at Work at paragraph 4.32:

"It should be noted that S.43F requires that the worker reasonably believed that the information disclosed, and any allegation contained in it, was *substantially* true. The word 'substantially' appears to require the worker to believe on a rational basis that the majority of the information and/or allegations contained within the disclosure is

true. If he or she reasonably believes that only elements of the information and/or allegations are accurate, the worker may well find it difficult to convince a tribunal that this condition has been met. The same would be true if the worker's allegation was to the effect that there was habitual malpractice or wrongdoing on a large number of occasions. If the worker's evidence deals only with one or two such occasions, there is a danger that the tribunal will conclude that he or she did not reasonably believe that the allegation was substantially true. This would not matter in the case of an internal disclosure to the employer, since such a belief is not a precondition for making a protected disclosure under S.43C(1)(a). It does matter, however, where the disclosure is made to a prescribed person pursuant to S.43F."

128. In addition, the Claimant must establish that he has not made the disclosure for personal gain, that it is reasonable for him to make the disclosure and one of the three further requirements in Section 43G(2). In *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] IRLR 374 at paragraph 27, Sir Patrick Elias LJ provided this commentary on the effect of Section 43G:

25. The structure of the legislation, therefore, is that disclosure to "other bodies" should be a last resort and only justified where disclosures to the employer or a regulated body would, in the circumstances, not be adequate or appropriate. The justifiable reasons for not raising the concerns with the employer or a prescribed body (where there is an appropriate one) are that the worker reasonably believes that the employer will victimise him if he takes that step; or that there is no prescribed body and he believes that evidence of the alleged wrongdoing will be destroyed. He is also relieved from the need to disclose the information to his employer if he has already disclosed it either to the employer or a regulated body. The section does not say in terms that he can only legitimately disclose to another body if the employer or the prescribed body has failed properly to deal with the original disclosure, but if the employer has dealt with it, or can reasonably be expected to do so, that will be highly relevant to the question whether the disclosure is reasonable. It is one of the factors which subsection (3) expressly requires a tribunal to take into account when considering the reasonableness question. It will often be unreasonable to make the disclosure to a third party in those circumstances.

Detriment

129. In *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] IRLR 374 at paragraph 27, Sir Patrick Elias LJ summarised what in law amounts to a detriment in the context of a whistleblowing claim. He said this:

> 27. In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the viewpoint of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases. In *Derbyshire v St. Helens MBC* [2007] UKHL 16; [2007] ICR 841, paras. 67-68 Lord Neuberger described the position thus:
>
> > "67…. In that connection, Brightman LJ said in *Ministry of Defence v Jeremiah* [1980] ICR 13 at 31A that "a detriment exists if a reasonable

> worker would or might take the view that the [treatment] was in all the circumstances to his detriment".
>
> 68. That observation was cited with apparent approval by Lord Hoffmann in *Khan* [2001] ICR 1065, para 53. More recently it has been cited with approved in your Lordships' House in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"."

28. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective.

Causation

130. Section 47B ERA 1996 is as follows:

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

131. Section 48 ERA 1996 is as follows:

(1A) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

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

132. The effect of these sections is that it is for the worker to prove, on the balance of probabilities that there was a protected disclosure; that there was a detriment; and that the employer subjected the claimant to the detriment. If so, then the burden shifts to the employer to show the ground on which the detrimental act was done: Section 48(2) ERA. If a Tribunal rejects the reason advanced by the employer, then it is not bound to accept the reason advanced by the worker, namely that it was on the ground of a protected disclosure: it is open to the Tribunal to find that the real reason for the detriment was a third reason.

133. The Tribunal must consider what, consciously or unconsciously, was the employer's motivation for the detrimental treatment. Causation will be established unless the protected disclosure played no part whatsoever in its acts or omissions: *Fecitt v NHS Manchester* [2012] ICR 372, CA. The result is that there will be a sufficient causal connection if a protected disclosure was one of several reasons for the detriment,

even if it was not the predominant reason. It is enough if it was a material influence, in the sense of being more than a trivial influence. There is no need to consider how a hypothetical or real comparator would have been treated.

Time limits – protected disclosure detriment claims

134. Under section 48(3) Employment Rights Act 1996, a detriment claim brought on the ground that a claimant has made a protected disclosure must be brought within three months of the date of the act or the deliberate failure to act giving rise to the detriment, unless it was not reasonably practicable to do so. In the latter case, the detriment claim must be brought within a reasonable period.

135. Earlier acts or deliberate failures to act are still in time if they are part of an act extending over a period, where the last date of the period is within three months; or where they are part of series of similar acts or failures and the last of them is in time.

136. In *Arthur v London Eastern Railway Limited (trading as One Stansted Express)* [2007] ICR 193, Mummery LJ said that there must be some relevant connection between the acts within the three-month period and those outside the period. The mere fact that they were all acts alleged to have been committed against the claimant would not by itself be sufficient. It is relevant to ask: "Were the acts committed by different perpetrators organised or concerted in some way and why did they act as they did?" Mummery LJ did not rule out the possibility of a series of apparently disparate acts being shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure (paragraph 35).

137. In *Royal Mail Limited v Jhuti* UKEAT/0020/16/RN Simler J at paragraph 34 said that whether or not there is a relevant connection is a question of fact. All the circumstances surrounding the acts will have to be considered.

DISABILITY DISCRIMINATION

Discrimination arising from disability

138. Section 15 Equality Act 2010 is worded as follows:

(1) A person (A) discriminates against a disabled person (B) if-

a. A treats B unfavourably because of something arising in consequence of B's disability; and

b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

139. The first issue for the Tribunal to assess is whether the treatment alleged to be a detriment was influenced to any significant extent by any consequences of the disability. This requires a focus on the reasoning in the mind of those responsible for the detrimental treatment. The Tribunal needs to consider the conscious or unconscious thought processes of the alleged discriminator, keeping in mind that their actual motive in acting as they did is irrelevant.

140. In *York City Council v Grosset* [2018] ICR 1492, the Court of Appeal considered the extent of knowledge that was required under Section 15(1). In short, there is none. If there is a causal link between the consequences of the disability and the dismissal, it is not necessary that the decision makers knew of that connection (see paragraph 39).

141. Section 15(2) provides a limited statutory defence. That is that there is no discrimination arising from disability if the Respondent shows that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability. However, as Sales LJ put it in *Grosset* "if the defendant does know that there is a disability, he would be wise to look into the matter more carefully before taking unfavourable action" (paragraph 47). By reference to an example at paragraph 5.9 of the EHRC Employment Code of Practice, he stated (at paragraph 51) that "it is not suggested that the employer has to be aware that the employee's loss of temper was due to her cancer, but only that the employer should be aware that she suffers from cancer (ie so that the employer cannot avail himself of the defence in subsection 15(2))". Here if the employer knows that the Claimant suffered a reaction to chemicals with some ongoing impairments, it is not necessary that the employer should also know of the Claimant's pain levels or their effects or that the medication taken for this condition had particular side effects.

142. If the dismissal decision was influenced by any consequences of the disability, then it is for the Respondent to show, under Section 15(1)(b) on the balance of probabilities that the decision was justified. That requires that the Tribunal form its own assessment of whether the dismissal was a proportionate means of achieving a legitimate aim. This is a different analysis from the range of reasonable responses approach required when considering the unfair dismissal claim.

143. In assessing proportionality, the Tribunal must assess whether on a fair and detailed analysis of the working practices and business considerations involved, the decision was reasonably necessary in order to achieve the legitimate aim (*Hardys & Hansons Plc v Lax* [2005] ICR 1565). In *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160, Lord Justice Elias said (at paragraph 26)

> "An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment — say allowing him to work part-time — will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the

employee to remain in employment has not been made, the dismissal will not be justified.

144. The EHRC Employment Code of Practice states as follows (at para 5.21):

"If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."

Failure to make reasonable adjustments

145. The Tribunal must assess whether the Respondent applied a provision, criterion or practice which placed the Claimant at a substantial disadvantage in comparison to those employees not sharing his disability. If so, the duty to make reasonable adjustments is engaged. The Tribunal must then consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

146. In order for the disadvantage suffered by the employee to be "substantial" it must be more than minor or trivial: *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 at paragraph 21.

147. Paragraph 20 of Schedule 8 to the Equality Act 2010 is worded as follows:

"An employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know … that the employee has a disability and is likely to be placed at a disadvantage."

148. The burden of proof is on the Claimant to establish the existence of the provision, criterion or practice and to show that it placed him at a substantial disadvantage - see *Project Management Institute v Latif* [2007] IRLR 579 at paragraph 45. In other words, to establish that the duty to make reasonable adjustments has been engaged.

149. Thereafter the onus remains on the Claimant to identify the potential reasonable adjustments with a sufficient degree of specificity to enable the Respondent to address them evidentially and the Tribunal to consider the reasonableness of providing them.

150. It is no part of the duty to make reasonable adjustments for the employer actively to consult the employee about what adjustments should or could be made: *Tarbuck v Sainsbury's Supermarkets* [2006] IRLR 664. In *Rider v Leeds City Council* EAT0243/11, the EAT reaffirmed that the carrying out of an assessment as to what reasonable adjustments might be made in respect of a disabled employee was not, of itself, capable of amounting to a reasonable adjustment.

151. At the point where the duty to make reasonable adjustments has been engaged, and the Claimant has identified one or more potential reasonable adjustments, the burden of proof is reversed. The Respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved – *Latif* at paragraphs 53-54.

152. The reasonableness of the steps to be taken to avoid the disadvantage is to be determined on an objective basis: *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 at paragraph 73.

153. Guidance as to the considerations that are relevant in assessing reasonableness is provided in paragraph 6.28 of the Employment Statutory Code of Practice. The Tribunal is required to have regard to this Code when considering disability discrimination claims.

Time limits under the Equality Act

154. Section 123 Equality Act 2010 is worded as follows:

Time limits

(1) Subject to section140B proceedings on a complaint within section 120 may not be brought after the end of—

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

(2)Proceedings may not be brought in reliance on section 121(1) after the end of—

(a)the period of 6 months starting with the date of the act to which the proceedings relate, or

(b)such other period as the employment tribunal thinks just and equitable.

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

155. The three-month time limit runs from the date of the discriminatory act or discriminatory omission. In a case where the discriminatory omission is a failure to make reasonable adjustments, time runs from the date when, if the employer had been acting reasonably it would have made the reasonable adjustment (*Kingston Upon Hull City Council v Matuszowicz* [2009] ICR 1170). The Tribunal should have regard to the facts as they would reasonably have appeared to the Claimant, including what the Claimant had been told by the Respondent (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

156. In employment tribunal cases, the three-month statutory time limit for issuing claims is prescribed for good reason. Extending that time limit should be the exception, not the rule. The onus is on the Claimant in each case where an extension is sought to

show why it would be just and equitable to extend the time limit (*Robertson v Bexley Community Centre* [2003] IRLR 434 at paragraph 25). The Tribunal will consider all the circumstances, paying particular attention to the prejudice that will be caused to each party if the discretion to extend time is exercised or refused.

CONCLUSIONS

PROTECTED DISCLOSURE DETRIMENT CLAIM

Alleged protected disclosures

Disclosure 1.1: On 8 February 2014 to Mr Nuworgah in an email

157. The Claimant's email of 8 February 2014 disclosed the following information: (1) Patrick Keegan was both a consultant within the department and also a director of SRC and would have access to information about London Underground Limited and about the supply chain; (2) that there were between 5 and 25 SRC staff people by LUL or the Respondent as consultants or NPLs; (3) that, in the Claimant's view, there was the possibility that SRC people might be tempted to further SRC goals to London Underground Limited's disadvantage; and (4) that London Underground Limited employees might be in a position to gain a personal benefit from seeking to hire SRC people.

158. The Tribunal does not find that this information contained sufficient factual specificity such as could be reasonably believed as tending to show either that a criminal offence had been committed, was being committed or was likely to be committed; or that a person had failed, is failing or was likely to fail to comply with a legal obligation. The information disclosed merely identified a potential conflict of interest.

159. Further the Tribunal does not find that the Claimant had a genuine belief that the information he was disclosing tended to show a criminal offence or breach of a legal obligation. This is not asserted in the Claimant's witness statement. It is evidentially significant that the disclosure itself did not refer to any legal obligation or allude even in general terms to an alleged criminal offence. Rather, the Claimant considered that the opportunities for access to information where there might be a conflict of interest raised ethical concerns.

160. Even if (contrary to the Tribunal's finding) the Claimant did have a genuine belief in actual or potential wrongdoing in the respects required by the statutory wording, then the Tribunal finds this was not a reasonable belief. The Claimant did not refer to any sufficiently cogent evidence supporting a reasonable belief of a criminal offence or breach of a legal obligation either in the disclosure itself, or in his witness statement.

161. As a result, the Claimant's contention that this email was a protected disclosure fails. It is not necessary for the Tribunal to consider whether the Claimant had a reasonable belief that disclosure was in the public interest.

Disclosure 1.2: On 25 March 2014 to Paul Thomas in person

162. The Tribunal's findings of fact as to what the Claimant said to Mr Thomas at the conclusion of the grievance meeting are set out above, at paragraphs 20 and 21. The Claimant's words contained several allegations, but insufficient factual specificity which could be reasonably believed as tending to show breach of legal obligation or a criminal offence. Whilst the contents of the Claimant's witness statement (at paragraph 18-20) suggest he believed that the information he was disclosing tended to show wrongdoing, there is nothing to indicate that he believed this wrongdoing was a breach of a legal obligation or was a criminal offence. We do not find that he had such a belief. Had he had such a belief, then we would have found this was not a reasonable belief, given the paucity of the evidence supporting the Claimant's allegations both in the disclosure itself and in the evidence as to the factual context in which the disclosure was made.

163. As a result, we do not find that Disclosure 1.2 was a qualifying disclosure. It is unnecessary for the Tribunal to find whether the Claimant had a reasonable belief that the information he was disclosing was in the public interest. Because it was not a qualifying disclosure, it was therefore not a protected disclosure.

Disclosure 1.3: On 26 June 2014 to Sheila Fearon-McCaulsky and Debbie Giacobbe in person

164. Whilst we have found that there was a meeting between the Claimant and Ms Fearon-McCaulsky and Debbie Giacobbe on the morning of 26 June 2014, as the Claimant alleges, we have not been able to make detailed findings of fact as to what was discussed during this meeting. Whilst the Claimant recalls mentioned the relationship between Mr Currens and Mr Keegan, he does not recall the exact words used. His witness statement does not provide any detail of what he said about the relationship between Mr Currens and Mr Keegan. Therefore, we do not find there was a disclosure of information with the necessary degree of factual specificity such as is capable of tending to show a breach of a legal obligation or a criminal offence. It is therefore not necessary for us to find whether the Claimant had a reasonable belief that the information he was disclosing was in the public interest.

165. We are not asked to decide whether any matters raised by the Claimant during a separate afternoon meeting, not attended by Ms Fearon-McCaulsky, amounted to a protected disclosure. Indeed, the Claimant's case has been that he did not make any disclosures during the afternoon meeting and it was Ms Giacobbe who inappropriately referred to these matters in the minutes, based on what she had been told in the morning meeting.

Disclosure 1.4: In October/November 2014 to Mr McCurry in person

166. We have found that this disclosure was effectively the same disclosure made to Mr Thomas at the conclusion of the grievance meeting on 25 March 2014 (Disclosure

1.2). As a result, this disclosure was not a qualifying disclosure and therefore not a protected disclosure for the same reasons.

Disclosure 1.5: In February 2015 to Mr McCurry in an email

167. The Claimant's email of 18 February 2015 refers to "a sensitive issue", to the Claimant's suspicions that there has been "incompetence, or cunning" in relation to "a specific supplier organisation", and to "a theory" that the Claimant has as to what is going on. The email does not explain the Claimant's theory or provide any factual details as to the basis for his suspicions. It is therefore not a disclosure of information with sufficient factual specificity such as is capable of tending to show a breach of a legal obligation or a criminal offence. It therefore cannot be a qualifying disclosure. This was therefore not a qualifying disclosure. It is not necessary for the Tribunal to consider whether the Claimant had a reasonable belief that such a disclosure tended to show wrongdoing in these specific respects or that the disclosure was in the public interest.

Disclosure 1.6: In February 2015 to Mr McCurry over the telephone

168. In this telephone conversation, which took place on or around 24 February 2015, for the first time the Claimant made an allegation of fraud. He said this fraud was being perpetrated by Mr Currens and by Mr Keegan in relation to the contract tender process. The Tribunal finds that this was an allegation of a criminal act but did not contain the disclosure of information required to be a qualifying disclosure. The only information disclosed was what the Claimant had witnessed about the body language shown in the conversation between Mr Keegan and Mr Currens and how they had responded when they realised they had been seen by the Claimant. This was not information with sufficient factual specificity that tended to show breach of a legal obligation or that a criminal offence had been, was being or was likely to committed.

169. Whilst we find that the Claimant had a genuine belief that Mr Keegan and Mr Currens were engaged in conduct that could amount to a fraud, this was not a reasonable belief that the information contained in the disclosure tended to show such a fraud, given the limited information disclosed to the Respondent. Therefore, we find that this is not a qualifying disclosure. It is not necessary to decide whether the Claimant had a reasonable belief that disclosure of this information was in the public interest.

Disclosure 1.7: On 12 January 2016 to Mr McCurry in person

170. There was a disclosure of information about the dual status of Mr Keegan as both a consultant and as involved in the company that was bidding for ATC contract work. However, we do not find that the Claimant had a genuine belief that the information tended to show there was a breach of a legal obligation or a criminal offence. When giving evidence about this conversation in his witness statement, he referred twice to this conduct as being potentially unethical. There is no evidence from the Claimant that he genuinely believed there was a breach of a legal obligation or a criminal offence. His belief, we find, was that the practice was unethical, rather than unlawful. Had he considered it unlawful, then it is likely he would have used that word or used

an equivalent phrase. In any event, we do not consider that any such belief would have been a reasonable belief, given the limited information provided in the disclosure. We do not need to decide whether the Claimant had a reasonable belief that disclosure was in the public interest.

171. It was not a qualifying disclosure and therefore was not a protected disclosure.

Disclosure 1.8: On 3 November 2017 to Sir Oliver Heald QC MP orally

172. Given what we have found was said by the Claimant to his MP in the constituency surgery on 3 November 2017, there was a disclosure of information with sufficient factual specificity. By this point, the Claimant genuinely believed that there was fraud, which would be a criminal offence. But this was not a reasonable belief that the information in the disclosure tended to show there had been a criminal offence, based on the limited information the Claimant provided to Sir Oliver, namely the mere fact that Mr Keegan had two roles, one working for the Respondent and one working for SRC. It is therefore not necessary for the Tribunal to consider whether the Claimant had a reasonable belief that disclosure was in the public interest.

173. The same communication also contained an assertion that there had been a cover up of fraud. There was no information disclosed tending to show that there may have been a cover up, other than the Claimant's belief that there had been an investigation and that the Claimant had not been interviewed by a fraud investigator as part of that investigation. Therefore, whilst the Claimant may have had a genuine belief that there had been a cover up, this was not a reasonable belief based on the information contained within the alleged disclosure.

174. Furthermore, making a disclosure to a Member of Parliament does not attract the status of being a protected disclosure unless the further requirements set out in Section 43G are satisfied. Those requirements would not have been satisfied here in relation to the alleged fraud because we find that the Claimant did not reasonably believe that the information disclosed and any allegation within it was substantially true. He had insufficient supporting evidence for such a belief to be a reasonable belief. Had this hurdle been surmounted (and had it been a qualifying disclosure), the Claimant would have surmounted the other hurdles imposed by Section 43G. So far as the disclosure of alleged fraud, the Claimant was repeating a disclosure he had previously made to his employer and it was reasonable for him to raise it with his MP, given it is reasonable to refer allegations of fraud to an MP and given that the Claimant believed that the failure was continuing or may recur in the future.

175. However, we would not have found that these Section 43G hurdles were surmounted in relation to the alleged cover up, because the Claimant had never previously disclosed information to his employer that tended to show that wrongdoing was being deliberately concealed. Furthermore, we do not find that the Claimant reasonably believed that the alleged cover up was substantially true, given the lack of supporting evidence.

Alleged protected disclosures - conclusion

176. The Tribunal does not consider that any of the alleged protected disclosures were protected disclosures as required by the statutory wording set out in the Employment Rights Act 1996. As a result, the protected disclosure detriment claim must fail. In case we are wrong in relation to the alleged protected disclosures, and because it was fully argued, we go on to consider whether the Claimant has established the alleged detriments set out in the list of issues.

Alleged detriments

177. We consider each of the alleged detriments in turn as they are numbered in the list of issues within the Final Hearing Bundle.

Detriment 5.1: Ms Fearon-McCaulsky failing to provide details of the progress of the investigation following the Claimant's disclosure of his concerns to her in June 2014

178. The Tribunal has found the Claimant discussed the 8 February 2014 email sent to Mr Nuworgah with Ms Fearon-McCaulsky at an informal meeting on 26 June 2014. Prompted by the Claimant's follow up email of 7 July 2014, Ms Fearon-McCaulsky emailed the Claimant on 10 July 2014 indicating that his email to Mr Nuworgah would not be treated as a whistleblowing complaint. Whilst the Claimant's email to Mr Nuworgah asked for an investigation, we have found there was no investigation. There was therefore no failure by Mrs Sheila Fearon-McCaulsky to provide details of the progress of any investigation.

179. As a result, it is not necessary for the Tribunal to consider the issue of causation in relation to this alleged detriment.

Detriment 5.2: On 26 June 2014, Ms Giacobbe distributing minutes of a sickness case conference which included references to the Claimant being a whistleblower

180. We have found that Ms Giacobbe wrongly included reference at item 3 of the draft minutes to matters not discussed during the afternoon meeting. This included concerns that the Claimant had previously raised with Mr Nuworgah which he had characterised as "Highly Confidential". In so doing, information about his allegations was shared more widely than was necessary. We find that this was a detriment in failing to respect the Claimant's request that this allegation should be treated confidentially.

181. We find, on the balance of probabilities, that Ms Giacobbe took the decision to include the matters raised initially with Mr Nuworgah in an attempt to record the extent of the Claimant's concerns raised with her on that day in the only document that minuted those discussions, given that the earlier meeting had not been minuted. In doing so, she overlooked the potential breach of confidentiality that this would cause. She was not influenced by the content of the disclosures to deny the Claimant's right to confidentiality. As a result, even if we had found that there was a protected disclosure, the Claimant's complaint of protected disclosure detriment would have failed for lack of causation.

Detriment 5.3: In July 2014, Mr McCurry failing to resolve the Claimant's grievance

182. Mr McCurry was not the chair of any grievance hearing considering the Claimant's grievance. The Claimant's grievance lodged in February 2014 had been considered by Mr Thomas, not by Mr McCurry. Mr McCurry had no involvement in the Claimant's case until September 2014. Mr McCurry therefore did not cause the Claimant any detriment in the respects he alleges.

Detriment 5.4: In February 2015, Mr McCurry failing to provide details of the progress of the investigation following the Claimant's disclosure of his concerns.

183. We have found that Mr McCurry did not feedback details of the progress of the investigation to the Claimant or otherwise provide him with an update on this issue. The Claimant therefore suffered a detriment in the respect alleged. However, we find that there was no causal connection between this detriment and the Claimant's disclosures. On the balance of probabilities, it was an oversight by Mr McCurry not to get back to the Claimant on this issue. It was not influenced by any earlier disclosures.

Detriment 5.5: In January 2016, Mr McCurry disclosing the Claimant's identity as a whistleblower to Mr Robert Frith

184. We have rejected the Claimant's factual allegation in this respect. There was therefore no detriment to the Claimant in the way he alleges.

Detriment 5.6: In 2016, Mr Frith's outcomes of the Claimant's annual appraisals and performance awards

185. We have found that the 2016 annual performance grading of 2 was the grading that was justified by the Claimant's performance level.

Detriment 5.7: In July 2016, Mr Nick Long informing the Claimant that his role as Lead Project Engineer had been discounted, despite knowing that the role was due to continue for another 18 months

186. This is dealt with in paragraph 59 above. There was a potential reorganisation which may have led to the reduction from two to one in the number of Lead Project Engineers needed. Given this and concerns about the levels of stress that the Claimant was experiencing in the role it was appropriate for Mr Long to discuss with the Claimant that he may be better moved to a less stressful role. The reorganisation did not take place and so the Claimant continued in his original role. Mr Long did not know the reorganisation would not proceed when he raised the subject with the Claimant. There was therefore no detriment.

Detriment 5.8: Between August 2017 and January 2018, Tricia Wright's inaction in addressing the Claimant's concerns

187. We do not find that Ms Wright's responses to the Claimant's correspondence with her can fairly be characterised as inaction. She had referred the Claimant's concerns

to internal audit for their investigation and she had offered to chair any appeal if the Claimant's grievance was rejected by the person appointed to hear the grievance.

Detriment 5.9: In July 2018, by the Respondent demoting the Claimant

188. After the reorganisation, the Claimant was on the same pay and the same terms and conditions. The role still involved a degree of supervisory responsibility, albeit no line management responsibility. However, his status was lower. He had gone from being a 'Lead Project Engineer' in the old structure to becoming only an 'Engineer' in the new structure. The Respondent's witnesses accepted that this change in status could be perceived as a demotion. We find that this was the Claimant's perception and that this was a reasonable perception. We therefore find that this was a detriment.

189. There is no causal connection between this detriment and the alleged disclosures. There is nothing to indicate that those deciding on the Claimant' role post reorganisation who were present at the Wash Up meeting knew of any of the alleged protected disclosures.

Detriment 5.10: In August 2018, Mr McCurry failing to offer financial compensation as he had intimated either to stay or to leave his employment in a meeting on 22 August 2018 by way of settlement of the Claimant's grievance

190. At the meeting of 22 August 2018, Mr McCurry had done nothing more than indicate he would go away from the meeting and consider whether the Respondent could propose a financial settlement to resolve the Claimant's grievance. He had not promised that there would be such a settlement offered. Therefore, there was no failure to honour a promise made and there was no detriment in failure to make an offer of financial compensation.

Detriment 5.11: In September 2018, the Respondent coercing the Claimant's trade union representative to withdraw his support of the Claimant

191. We find this has not been factually established. We accept the reason given on Mr O'Brien's behalf for his decision to withdraw as set out in our findings of fact. He withdrew because the Claimant had not provided any evidence to support his allegations of impropriety in relation to the use of contractors, and these matters predated when the Claimant had joined UNITE. There is no evidence at all there was any coercion from the Respondent for Mr O'Brien to withdraw his support of the Claimant. The alleged detriment is therefore rejected.

Detriment 5.12: From December 2019 to June 2019, the Respondent coercing the Claimant's trade union not to support the Claimant thereby preventing the Claimant from making use of trade union services at the appropriate time

192. We accept the reason given in the correspondence from the union for the union's decision to withdraw from supporting the Claimant with resolving his issues, if necessary through employment tribunal proceedings. It regarded the matters that the Claimant was raising as matters that arose before the start of the Claimant's membership. It also noted that the Claimant had sought assistance from another Trade Union. It was acting in accordance with its rules in deciding not to support the

Claimant with the issues he wanted to raise. The alleged detriment is therefore rejected.

Detriment 5.13: On 6 February 2019, Ms Ailsa Buchan informing the Claimant that his grievance was closed when it had not been properly investigated or concluded

193. We have found that Ms Buchan told the Claimant in her email of 6 February 2019 that his grievance was closed. We consider that this was a detriment in that there was not a proper basis for this decision to be taken and communicated to the Claimant. In late 2017, the Claimant had asked for his grievance against Mr McCurry to be suspended. He now wanted this grievance to be reactivated, relying in part of his perception of how Mr McCurry had treated him at a meeting in August 2018. It was inappropriate for Mr McCurry to play any part in deciding whether a grievance about his conduct should be continued or regarded as closed. This grievance, insofar as it concerned Mr McCurry, did not concern matters that had already been fully addressed. Therefore, the Tribunal rejects the reasons given by the Respondent for deciding not to progress this grievance.

194. Whilst it was inappropriate for Mr McCurry to close down a grievance into his own conduct, we do not find that this was influenced to any extent by any disclosures made by the Claimant. We find it is more likely that the only reason for the decision to close down his grievance was taken because of an erroneous belief that the matters had already been addressed.

Detriment 5.14: On 6 February 2019, the Respondent encouraged the Claimant to take medical retirement when there were no grounds for doing so

195. The Tribunal does not find that the Respondent encouraged the Claimant to seek medical retirement. In raising the possibility that the Claimant might ask for a pension quote, the Respondent was quite reasonably providing the Claimant with a potential option in circumstances where he had been on long-term sick leave and the issues that appeared to be prompting his sickness were not readily capable of resolution. We have found the Claimant did not object at the time to reference being made to the issue of an ill health early retirement pension. She had discussed this issue in a phone call with Ms Buchan. The Claimant had appeared willing to consider the financial basis of a termination package at the meeting he had held with Mr McCurry in August 2018. Therefore, the Tribunal does not find that the Respondent inappropriately encouraged the Claimant to take medical retirement.

Detriment 5.15: On 6 July 2019, the Respondent not investigating the Claimant's concern that someone had coerced the Claimant's trade union representative into withdrawing his support of the Claimant

196. There was nothing whatever to indicate that there had been any coercion by any of the Respondent's staff into persuading the Claimant's trade union representative to withdraw his support of the Claimant. None had been advanced by the Claimant other than the fact he was no longer being supported. In such circumstances, it was reasonable for the Respondent to ask the Claimant to raise this concern with the

union himself, rather than expect the Respondent to conduct its own investigation. The Claimant had not chosen to raise a formal grievance on the matter, which is likely to have prompted such an investigation. Therefore, there was no detriment to the Claimant.

Protected disclosure detriment - Time limits

197. Had we not decided to reject each of the Claimant's protected disclosure detriment claims on their merits, we would have decided that the Tribunal did not have jurisdiction to consider those detriments that occurred on or before 10 January 2019. This is the relevant date for limitation purposes, given that Early Conciliation was initiated on 10 April 2019.

198. The Tribunal will have no jurisdiction to consider detriments that occurred on or before 10 January 2019 unless they form part of series of similar acts committed by the Respondent which continues after this date; or it was not reasonably practicable to issue proceedings in relation to earlier detriments within the three-month time limit prescribed in the Employment Rights Act 1996.

199. The detriments that we have found amount to detriments are as follows:

    a. Detriment 5.2: Ms Giacobbe inappropriately distributing case conference minutes including confidential matters concerning the Claimant's confidential whistleblowing allegations. This was done on 26 June 2014.

    b. Detriment 5.4: Mr McCurry failing to provide the Claimant with an update into the investigation following disclosure of the Claimant's concerns. This was in February 2015.

    c. Detriment 5.9: In July 2018, demoting the Claimant. This decision was taken by those individuals who took part in the Wash Up meeting.

    d. Detriment 5.13: On 6 February 2019, Ailsa Buchan closing down the Claimant's grievance.

200. If these four events formed part of a continuing act or a series of similar acts then they would all be within time, because the last event in the sequence occurred within the primary limitation period. We do not find that they were a continuing act or a series of similar acts. The events are different in nature, carried out by different individuals with different roles, and there are significant time intervals between each of the events.

201. Furthermore, we consider it was reasonably practicable for the Claimant to have instigated employment tribunal proceedings before he did, given he was receiving regular advice from one or other of the trade unions to which he belonged; one of his email refers to considering instigating early conciliation in July 2018; and he apparently had sought help from a solicitor at the start of 2019.

DISABILITY DISCRIMINATION

Discrimination arising from disability

Alleged detriments

Detriment 11.1: In 2016 and 2017, Mr Long did not invite the Claimant to discuss development plans, despite the Respondent's policy that a plan be developed as a consequence of his performance rating

202. The performance rating for 2015/16 and the consequential steps taken or not taken to help him improve his performance, cannot amount to Section 15 discrimination arising from disability. This is because the Claimant's condition only met the threshold for disability at a later point, namely from 1 November 2016 onwards.

203. The Claimant's performance in 2016/17 attracted a final rating of 2, after it had been adjusted downwards at the calibration meeting. We have found that this rating was appropriate based on the Claimant's performance over that period. HR encouraged Mr Long to put the Claimant on a performance improvement plan. Mr Long decided to manage the Claimant's performance locally, reasoning that a formal performance improvement plan was likely to be more stressful for the Claimant, and therefore not conducive to an improvement in his performance. Far from this failure being a detriment for the Claimant, it was a benefit to him, in reducing the amount of stress he would be facing. We do not find it amounts to unfavourable treatment.

Detriment 11.2: On 3 July 2017, Mr Long gave the Claimant a low performance related pay award

204. The Claimant's low performance related pay award was the direct result of the performance rating he had achieved in the year 2016/2017. Although initially Mr Long had awarded him a rating of 3, this had been downgraded to 2 as a result of the calibration process. The Claimant chose not to appeal. The low performance related pay award was therefore the consequence of the Claimant's performance rating. It does not amount to unfavourable treatment.

Detriment 11.3: On 6 February 2019, the Respondent suggested that the Claimant obtain an ill-health pension quote

205. We have already considered this detriment when discussion Detriment 5.14. This was not unfavourable treatment, nor could it reasonably be regarded by the Claimant as one, given the extent to which he had been off sick and given he was no longer receiving sick pay. It was providing the Claimant with financial information about the consequences of applying for ill-health early retirement such that he could make an informed choice.

Something arising in consequence of the Claimant's disability

206. Because we have rejected the three respects in which the Claimant alleges he suffered unfavourable treatment, we do not need to consider whether this treatment

was because of something arising in consequence of the Claimant's disability. However, for completeness, we go on to address this issue.

207. At paragraphs 14.1 to 14.6 of the List of Issues, the Claimant lists six features which he argues arose in consequence of the Claimant's disability. There are "the Claimant's inability to concentrate and to articulate and structure his responses to interview questions"; "the Claimant's difficulty in concentrating and communicating with others"; "the Claimant's irritability"; "the Claimant was underperforming as a consequence of his difficulty concentrating and communicating with others"; "the Claimant's difficulty in engaging and communicating at work"; "the Claimant's absence from work".

208. We accept that the Claimant was absent from work on occasions after 1 November 2016, and this was a consequence of the Claimant's disability. However, we do not have sufficient evidence to find that the Claimant had the remainder of the difficulties alleged in paragraphs 14.1 to 14.5.

Proportionate means of achieving a legitimate aim

209. Finally, and in any event, we would have found that the various treatments criticised by the Claimant were proportionate means of the Respondent achieving its legitimate aims. The relevant legitimate aims in relation to issues 11.1 to 11.2 were that performance should be accurately assessed and rewarded; and that appropriate steps should be taken to tackle underperformance. The specific steps taken in relation to the Claimant were a proportionate means of achieving those aims.

Discrimination arising from disability - Time limits

210. In relation to allegations 11.1 and 11.2, the unfavourable treatment about which the Claimant complains only occurred significantly before 10 January 2019. These events do not form part of a continuing act with allegation 11.3, which is in time.

211. The onus is on the Claimant to show why it is just and equitable to extend time to enable these allegations to be determined on their merits. The Claimant has failed to do this. The Claimant needs an extension of around two and a half years in relation to events in mid- 2016, and an extension of one and a half years in relation to events in mid-2017. For parts of this period the Claimant was well enough to attend work and perform his duties. He also had assistance from his trade union for some of the period and was contemplating issuing early conciliation during 2018. Allegations 11.1 and 11.2 concern the conduct of Mr Long and he is no longer in the role he was in when he was the Claimant's line manager, and has left the Respondent's employment. He has not given evidence to the Tribunal. To that extent, the Respondent is potentially prejudiced in responding to this allegation at this point in time.

212. Therefore, and in any event, the Tribunal would have decided that it did not have jurisdiction to consider the Section 15 claim on its merits.

Failing to make reasonable adjustments

Provisions, criteria and practices

213. The Claimant argues that there were the following provisions, criteria or practices (PCPs):

    a. The requirement for the Claimant to attend work five days a week at Endeavour Square office with the project team;

    b. The requirement that the Claimant be occupying his desk throughout the working day; and

    c. The requirement that the Claimant had to remain in scope for the Respondent's transformation programme.

214. The Tribunal finds that the Respondent did not have a requirement that the Claimant attend work five days a week at the Endeavour Square office, as part of a general requirement that prohibited homeworking. On occasions, the Claimant asked for and was granted permission to work from home by Mr Stockley. We find that this was done because there was no general prohibition on working from home, even if the general expectation was that staff in the Claimant's position would regularly work from the office.

215. There is no evidence that the Claimant was required to occupy his desk throughout the working day. However, Mr Frith did tell him that if he was too unwell to travel to work, then he should not be working from home but should be taking the day as sick leave. The Tribunal accepts this was said because there was a general practice that those who were not well enough to travel would not be permitted to work from home.

216. The Tribunal agrees with the Claimant that there was a requirement that the Claimant had to participate in the Respondent's transformation programme to be offered a job in the new structure. However, the participation was modified in the case of those who were on long-term sick leave in that they were not expected to complete an online assessment.

Substantial disadvantage

217. There is no evidence that the Claimant was at a substantial disadvantage as a result of the Respondent's approach to homeworking. On the limited occasions when the Claimant asked to be permitted to work from home, he was permitted to do so. There was only one occasion on which the Claimant asked to work from home when he said he was too ill to travel to work. On this occasion, he was told he ought to be taking the day as sick leave. The Tribunal rejects the contention that the Claimant's disability placed the Claimant at a substantial disadvantage in relation to the Respondent's approach to homeworking, whether in relation to the first or the second alleged PCP.

218. There is no evidence that the Claimant was placed at a substantial disadvantage in being required to participate in the transformation programme in order to obtain a future role in the organisation. This might have been the case if the Claimant had been required to undergo an online assessment as with those candidates who were not on long-term sick leave. However, being on long-term sick leave, the Claimant was excused from this requirement. There the Tribunal does not accept that the Claimant was placed at a substantial disadvantage.

Alleged reasonable adjustments

219. The Claimant's case is that the Respondent should have taken the following steps by way of reasonable adjustments:

    a. From 2016 to late 2019, discuss informally a proposal for homeworking

    b. From 2016 to late 2019, applying the formal process for establishing reasonable adjustments

    c. In mid-2016, discussing informally any perceived timekeeping anomalies

    d. From 2016 to early 2018, discussing and agreeing opportunities for the Claimant to move away from his current role

    e. From February 2018 to mid-2018, to remove the Claimant from scope of the Respondent's transformation programme.

220. The Tribunal rejects the Claimant's case that each of these proposed reasonable adjustments was a step it was reasonable for the Respondent to take to avoid this disadvantage.

221. The first three proposed reasonable adjustments are not capable of amounting to reasonable adjustments, given the effect of *Tarbuck v Sainsburys Supermarkets*, referred to above. A discussion about proposed adjustments is not a potential reasonable adjustment. Therefore, informal discussions about proposals for homeworking; applying the formal process for establishing reasonable adjustments; informally discussions about any perceived timekeeping anomalies, and discussions about opportunities for the Claimant to move away from his current role cannot amount to reasonable adjustments.

222. The Claimant has not identified the role to which he says he should have been moved. Therefore "agreeing opportunities for the Claimant to move away from his current role" is not clear enough to amount to a potential reasonable adjustment.

223. Finally, it would not be a reasonable adjustment to remove the Claimant from the scope of the Respondent's 'transformation' programme. Far from making it easier for the Claimant to secure a job in the new structure, such an adjustment would deprive the Claimant of the potential roles only available as a result of participating in the programme, and specifically of being considered for a new role during the Wash Up meeting.

Reasonable adjustments – time limits

224. With the exception of the first and second alleged failure to make reasonable adjustment complaints, the remainder of the Claimant's failure to make reasonable adjustment complaints ended before 10 January 2019, and are therefore out of time, unless the Claimant can establish that time can be extended on the basis that it would be just and equitable to do so. As formulated in the agreed list of issues, the remaining three alleged failures to make reasonable adjustments do not have a specific date but span a period. The time limit in relation to a reasonable adjustment claim starts on the date by which the particular adjustment ought to have been taken. Therefore, even on the Claimant's own case, the first and second alleged reasonable adjustment complaints have been issued well outside the primary limitation period, because on the Claimant's case the alleged adjustments should have been made by 2016.

225. For the same reasons as in relation to the claim for discrimination arising from disability, the Tribunal refuses to extend time to enable otherwise out of time claims to be considered on their merits. It would not be just and equitable to do so. The Claimant has not explained why the claim was not issued earlier than it was, and why it was not issued within the required time limits. The Respondent has been potentially prejudiced in not being able to call evidence from Mr Long, who was the Claimant's line manager before Mr Stockley during the period it is claimed that reasonable adjustments should have been made. On this basis, the balance of prejudice would have led the Tribunal to decide it had no jurisdiction to determine the Claimant's reasonable adjustment complaints in any event.

Employment Judge Gardiner
Date: 3 June 2021