EMPLOYMENT TRIBUNALS

Claimant: Miss Gillian Bate-Jones

Respondent: Home Office

Heard at: Birmingham (over CVP)

On: 26, 27, 28, 29, 30 April and 5, 6, 7, 10, 11 May 2021

Before: Employment Judge Meichen, Mrs R Forrest, Mr J Kelly

Appearances:
For the claimant: Mr Brockley, barrister
For the respondent's: Mr Feeny, barrister

JUDGMENT

(1) The claimant's Equality Act claims are dismissed as the tribunal has no jurisdiction to hear them.

(2) The claimant's other claims fail and are dismissed.

REASONS

Introduction

1. This hearing took place over CVP. There were a few minor technical issues over the course of the hearing and one major difficulty. The major difficulty was that it proved impossible for the claimant to both observe and participate in the hearing. The claimant could observe with no issues but whenever she turned on her microphone to participate the audio quality of the hearing was adversely affected so that nobody could properly hear. Advice was sought from HMCTS staff with expertise in CVP and various solutions attempted. These all failed however and in the end it became obvious that the problem lay with the claimant's hardware.

2. The claimant was due to give evidence first and we were able to accommodate her in a Tribunal room so that she could attend the Tribunal building and give her evidence using the Tribunal's IT equipment. This worked with no issues at all.

3. The claimant was offered the use of the Tribunal room for the remainder of the case after she had concluded giving evidence but she (understandably) preferred to be at home. This meant she could see and hear the hearing but could not speak due to the audio issue described above. The claimant then decided to change devices from a tablet to a desktop. The claimant found this to be more convenient for her but it meant she could not be seen as it didn't have a camera. This did not present any issues as the claimant had given her evidence already and she confirmed she was happy to proceed as she could still see and hear everything. The claimant was able to communicate directly with Mr Brockley and we took breaks to enable her to speak to him when required. The claimant was also able to communicate with the Tribunal through the chat box and we told her that if she needed to raise anything such as a request for a break she could raise it there. This worked with no problems.

4. Notwithstanding the above difficulty neither party suggested that the fairness of the hearing was adversely affected by it being heard remotely and we were satisfied that there was no unfairness caused.

5. We therefore record that this was a remote hearing which was not objected to by the parties. The form of remote hearing was V: fully remote over CVP.

6. We took regular breaks (roughly every hour or so) as the claimant benefits from moving around due to her back condition and it is in our experience beneficial to take regular screen breaks in CVP hearings anyway.

7. We started with an agreed bundle running to 1167 pages. An agreed supplemental bundle of 47 pages was then provided during the course of the hearing.

8. The claimant gave evidence on her own behalf and was cross examined. She did not call any other witnesses.

9. The respondent provided statements on behalf of the following witnesses: Craig Haynes, Delvier Athwal, Jason Moore Read, John Leach, Neal Broad, Phillip Holliday. All of the witnesses gave evidence and were cross examined, with the exception of Mr Athwal. The reason why Mr Athwal was not called was because of last minute changes to the way in which the claimant put her case. We explain more about this below.

10. Both counsel helpfully provided written closing arguments to supplement their oral submissions. We have fully considered all the points made.

Case management issues

11. Prior to this hearing the case management history of this claim was rather convoluted and messy. The difficulties arose chiefly from failures on behalf of the claimant to adequately identify and particularise her claim. These difficulties continued at the hearing before us.

12. The relevant background is as follows. The claimant submitted her claim form on 21 December 2018, following early conciliation from 02 November 2018 to 02 December 2018.

13. In her claim form the claimant complained that she had been unfairly dismissed, victimised and was owed arrears in pay. However, it was later clarified that the claimant was not claiming victimisation in the Equality Act 2010 sense. It appears that it was later accepted that the claimant also pleaded a claim of whistleblowing.

14. A request for further and better particulars was made by the respondent on 28 February 2019. These were provided by the claimant on 15 March 2019. However at the first Preliminary Hearing in front of Employment Judge Self on 17 April 2019 the claimant's case remained unclear. Consequently, at that hearing the Employment Judge ordered that the claimant provide additional further and better particulars.

15. The claimant then submitted a document by email on 06 June 2019. This document was explained as being the additional further and better particulars, but it also included an application to amend the claim form. This amendment sought to add claims of a failure to make reasonable adjustments, harassment related to disability, victimisation and being subjected to a detriment because of trade union activities.

16. A hearing was set up to determine the claimant's amendment application. On the first day of that hearing, 30 August 2019, the claimant gave an indication that a further application to amend was going to be made. However, the amendments had not at that time been formulated to the degree needed in order to be considered.

17. The amendment hearing then went part heard in order to enable the second set of amendments to be properly formulated and served on the respondent.

18. The second application to amend was received by the respondent on 25 November 2019. The second day of the amendment hearing took place on 04 December 2019.

19. In his judgment EJ Butler decided that the claimant's application to amend made on 6 June 2019 should be allowed, except for the application to include a claim for victimisation. The application to amend dated 25 November 2019 however was refused. EJ Butler made it clear that he was only deciding in the claimant's favour on the first application "by the narrowest of margins". He also expressly recorded that time limits in relation to the claims remained a live issue to be determined at the final hearing.

20. EJ Butler's judgment was dated 13 December 2019 and sent to the parties on 17 December 2019.

21. The case then came before EJ Jones for a further preliminary hearing. By that hearing the claimant had still not properly particularised her claims and the Judge found that further particularisation was required to enable the respondent to properly respond to the claim. Consequently the claimant was ordered to provide yet more further and better particulars.

22. The case then came before EJ Connolly for a further preliminary hearing. EJ Connolly recorded the difficulties in identifying the claimant's complaints. She observed: *"It has taken a great deal of time and effort to clarify the claimant's complaints. They are spread over some 5 separate documents".*

23. EJ Connolly struck out an aspect of the claimant's case as it was misconceived in law.

24. EJ Connolly was able to produce a list of issues for the tribunal to determine. Even at that late stage however it was necessary to require the claimant to provide still more further and better particulars in respect of some of her claims. This was done.

25. At the start of the hearing before us it was explained that the claimant was relying on a second version of her witness statement as her first version had not provided evidence on all the allegations she was making. As a result of the further evidence provided in the claimant's second statement it had been necessary for the respondent to produce second witness statements for two of its witnesses: Mr Moore Read and Mr Broad. The parties agreed that we should consider the new statements and we agreed to do so.

26. However, Mr Feeny pointed out that even in the second version of the claimant's statement she had not given any evidence on a number of the allegations identified as part of EJ Connolly's order. Mr Feeny explained that he was instructed to apply for strike out in respect of those allegations. We gave Mr Brockley some time to take instructions and he confirmed that the claimant would withdraw the allegations where she had omitted to provide any evidence.

27. Subject to that both counsel confirmed that the issues continued in EJ Connolly's order was a complete and comprehensive list of all the issues we had to determine. We therefore attach the agreed list of issues as an appendix to this judgment, with the allegations that the claimant decided to withdraw struck through.

28. Notwithstanding the above however on day 4 of the hearing Mr Brockley made a further application to amend on behalf of the claimant. The application was to add a claim of a failure to pay notice pay. In summary Mr Brockley explained

that the claimant's case was that she was entitled to be paid 13 weeks' notice pay and she had not been paid any of it.

29. It was surprising that such an apparently obvious point had not been raised by the claimant any earlier, especially since she had made two other applications to amend, had had several opportunities to particularise her case and had been professionally represented from an early stage. We sought to understand from Mr Brockley why the application had not been made any earlier. Mr Brockley was not able to assist with that very much and we concluded that there was no good reason; it was probably down to oversight by the claimant and/or her advisers.

30. Mr Brockley referred to the fact that the claimant had identified notice pay as a head of loss in a schedule of loss but he also rightly accepted that this could not be taken as a pleading or an application to amend. The reality was therefore that the application was being made for the first time at a late stage - in the course of the final hearing.

31. The application to amend was opposed by the respondent.

32. We took into account the seminal decision in Selkent Bus Company Ltd v Moore [1996] ICR 836. The key principle when considering the exercise of the discretion to allow an amendment is to have regard to all the circumstances, and in particular any injustice or hardship which would result from the amendment or refusal to amend. A non-exhaustive list of potentially relevant factors to be taken into account is as follows: the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

33. We considered that the application to amend involved in substance the addition of a new claim. Although there was already a breach of contract claim this had nothing to do with notice. The application had been made extremely late in the day with no good reason why it could not have been made any earlier. The proposed new claim was substantially out of time. The application had been made part way through a final hearing when no evidence had been prepared by either party to deal with the issue. The claimant had not raised the claim at an earlier stage despite it being an obvious point and despite being given numerous opportunities to refine her case. All of these factors seemed to us to point firmly against allowing the amendment.

34. Applying the crucial factor of the balance of injustice and hardship we found that far greater injustice and hardship would be caused if the application were granted that if it were refused. This was mainly because the parties would have to take instructions and provide new evidence which would inevitably disrupt and delay the final hearing and would have jeopardised the case being concluded within the time estimate. We did not think the claimant would really face any prejudice or hardship if the application were refused because this was

a claim which she could and should have raised earlier and she still had the opportunity of bringing a claim for unpaid notice in the county court if she wished to do so. That possibility was expressly referred to by Mr Brockley in his submissions.

35. For those reasons we refused the claimant's application to amend.

Overall impression of the claimant's case

36. One reason why we have set out the case management history of this case in a bit of detail above is because it is relevant to our overall impression of the way this case has been presented. Our clear impression was that the claimant's case has been consistently presented in an unspecific and vague way with a distinct lack of attention to detail. This approach continued in the hearing before us. In short there was a lack of evidence put forward to substantiate the claims the claimant was bringing. Indeed, the paucity of evidence was acknowledged by Mr Brockley in his closing submissions. Even taking into account that the claimant only needed to show a prima facie case for some of her claims we considered that the evidence provided by the claimant was unclear and insufficient to substantiate the claims she had brought.

37. As an example we refer to issue 3.2.1 in the list of issues. This was an allegation that the respondent had a PCP of requiring the claimant not to take paid disability leave and that the PCP was applied to the claimant on a number of specific dates. We understand the claimant was alleging that she had medical appointments on those dates and that she had not been permitted to take paid disability leave to attend them. However there was then a lack of evidence either in the claimant's statement or in the bundle that we were referred to to explain what actually happened on those dates. For example we did not know what type of medical appointment the claimant had on those days or how she had communicated that to the respondent. Similarly we did not know if the claimant was alleging she had asked for disability leave on those dates and if so whether it had been refused and by whom and for what reason. This meant that Mr Brockley was only able to put the claimant's case on a very broad and unspecific basis. This was not very helpful, particularly since the events complained of included allegations dating back to 2013 and 2014. The witnesses that this was put to had no real understanding of what was being said to have happened. They were only able to make a general response to the thrust of the complaint. There was, in short, insufficient evidence put before us to find in the claimant's favour on the factual context which was said to underpin the allegation of discrimination.

38. We should say however that we have no doubt that the claimant is genuinely upset and aggrieved about her perceived treatment by the respondent. This was clear from the claimant's oral evidence.

The relevant law in relation to time limits and our approach to them in this claim

39. The unfair dismissal claim is in time.

40. As identified in EJ Connolly's list of issues the situation in respect of the whistleblowing and trade union detriment claims is that the latest date for an in-time act for these complaints is 3 August 2018 (the trade union detriment claim having been accepted as a relabelling amendment). The individual detriment claims which are in time are therefore only those relating to the dismissal process including the alleged failure to offer the claimant ill health retirement ("IHR"). Craig Haynes was the relevant decision-maker for these purposes. If we determine that those allegations are not well founded then the earlier allegations must be dismissed for want of jurisdiction, unless the claimant can satisfy the test for reasonable practicability (Royal Mail Group v Jhuti UKEAT/0020/16/RN).

41. The situation in respect of the claimant's Equality Act claims (failure to make reasonable adjustments and disability related harassment) is that these were introduced by way of amendment application as new claims by EJ Butler. Accordingly the date for the purposes of jurisdiction is the date that the amendment application was permitted (Galilee v Commissioner of Police of the Metropolis [2018] ICR 634). The relevant date for the Equality Act complaints is therefore 13 December 2019.

42. We do not accept Mr Brockley's argument that the date should be earlier on the basis that the Tribunal could or should have made its decision sooner after the hearing on 30 August 2019. Our view is that this approach would not be consistent with Galilee and it ignores the fact that it was the claimant who was responsible for the delay, as the postponement of the PH on 30 August 2019 was so that she could make a further application to amend, which was subsequently refused. In any event it would make little practical difference given that on either analysis the Equality Act claims are substantially out of time.

43. The earliest the Claimant alleges breach of the Equality Act is September 2013 and the latest is her dismissal (22 August 2018). The period of delay before she brought her claims is therefore between 16 months and just over six years.

44. Section 123 Equality Act 2010 states:

> *123 Time limits*
> *(1) Subject to sections 140A and 140B, 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.*
> *. . .*
> *(3) For the purposes of this section—*

(a) conduct extending over a period is to be treated as done at the e 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.

45. The claimant relied on there being a "continuing act" - in the sense that the individual acts she is complaining of should be viewed as sufficiently similar to constitute conduct extending over a period. However it is clear that the last possible act which could be said to form part of a continuing act would be the claimant's dismissal and the amendment was not made until 16 months after that so this is a case where the entirety of the claimant's Equality Act claims are out of time. We therefore considered it was appropriate to consider the jurisdictional position first of all.

46. We only have jurisdiction to consider the claimant's Equality Act complaints if we find that they were brought within such other period as we think just and equitable.

47. We remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor.

48. Although the tribunal has a wide discretion it is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit. There is no presumption that the Tribunal should exercise the discretion in favour of the claimant. It is the exception rather than the rule. These principles were clearly expressed in the case of Robertson v Bexley Community Centre 2003 IRLR 434:

> *"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*

49. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings. However, whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal should have regard. See Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050.

50. A list of potentially relevant factors which may be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

51. EJ Butler made a number of findings of fact in respect of the claimant's conduct of her claim from dismissal until the application to amend was made on 6 June 2019. On behalf of the claimant Mr Brockley encouraged us not to adopt those findings. Notwithstanding that submission the claimant had not put in any evidence to contradict the findings and they appeared to us to be at least in the main uncontroversial matters which were relevant to our decision. We can confidently make the following findings on the basis of the evidence before us:

    a. The claimant is intelligent and articulate.
    b. The claimant was an experienced trade union representative, having been appointed in 2011.
    c. The claimant raised a grievance on 28 February 2017. In her grievance she indicated that her complaint was about discrimination, harassment, bullying and victimisation, and included matters relating to her disability.
    d. The claimant had access to advice and support from senior officers in her trade union.
    e. The claimant had access to legal advice as she brought a personal injury claim against the respondent in 2016 and she also had legal insurance cover that she could use to receive legal assistance.

52. It seems to us that all of these factors point against the grant of an extension on just and equitable grounds. The claimant is in summary a reasonably sophisticated litigant, who was aware of her rights and formed a belief that she had been discriminated against in early 2017 at the latest. She then did not bring her claim until 2.5 years later despite having access to professional advice.

53. We took into account the following additional factors:

a. The claimant has failed to show a cogent case why it would be just and equitable to extend time. Indeed, as Mr Brockley effectively accepted in closing submissions, the claimant has failed to show any positive case why we should extend time.

b. The claimant did not have a good reason for failing to bring her claim earlier.

c. There is no evidence that the claimant would have been unable to bring a claim earlier. On the contrary in light of the findings above we find she could and should have brought a claim earlier.

d. Many of the allegations are historic and substantially out of time. The claimant's delay has been substantial.

e. The respondent has clearly struggled to obtain direct witness evidence in relation to a number of the historic allegations, and was reliant on constructing its case from limited documentary evidence which did not tell the whole story. An example of this was the decision not to progress the claimant's grievance where we had no witness evidence to explain the decision. We were not satisfied that we had all relevant document before us in relation to the historic matters - for example we did not have evidence of what was sent to Capita or their decision. The passage of time has had a clearly deleterious effect on the witnesses' memories and the claimant has been uncertain and inconsistent over the nature of the allegations. This all indicated the cogency of the evidence has been adversely affected by the delay.

f. We considered all the evidence to which we were referred and we concluded that we had not been referred to any compelling evidence which indicated the claimant had been or may have been discriminated against. There was nothing to indicate the Equality Act complaints were meritorious. On the contrary in light of the paucity of evidence we are in a position to say that they appeared to be weak claims. We refer to the example of the reasonable adjustments claim described above where it is extremely difficult to see how we could have reached a decision in the claimant's favour in the face of such a lack of any evidence and specificity about how the claimant put her case.

g. In all the circumstances we concluded the prejudice to the respondent in considering the out of time claims far outweighed the prejudice to the claimant in not considering them.

54. Taking all the above into account we decided that the Equality Act claims have not been brought within a period which we think is just and equitable and we do not have jurisdiction to hear them. We shall therefore dismiss them.

The relevant law in relation to the claimant's extant claims

Whistleblowing

55. For the claimant's whistleblowing claim the relevant parts of sections 43A and 43B ERA state:

> *43A Meaning of "protected disclosure"*
> *In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*
>
> *43B Disclosures qualifying for protection*
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the*

disclosure, is made in the public interest and tends to show one or more of the following –

…

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

56. There was no dispute in this case that (if it was a qualifying disclosure) the claimant's disclosure was made to the employer in accordance with s43C ERA 1996. The real issues in this case were whether the claimant disclosed information and if so whether she had a reasonable belief that the information she disclosed tended to show that the respondent had failed to comply with a legal obligation.

57. The EAT has stated that the test of 'belief' in section 43B establishes a low threshold. However, the reasonableness test clearly requires the belief to be based on some evidence — rumours, unfounded suspicions, uncorroborated allegations and the like will not be enough to establish a reasonable belief (Korashi v Abertawe Bro Morgannwg University Local Health Board).

58. If the claimant reasonably believed that the information tends to show a relevant failure there can be a qualifying disclosure of information even if they were later proved wrong. This was stressed by the EAT in Darnton v University of Surrey 2003 ICR 615, EAT. The EAT held that the question of whether a worker had a reasonable belief must be decided on the facts as (reasonably) understood by the worker at the time the disclosure was made, not on the facts as subsequently found by the tribunal. This case was cited with approval by the Court of Appeal in Babula v Waltham Forest College 2007 ICR 1026, CA , when it was made clear that a worker will still be entitled to the statutory protection even if he or she was in fact mistaken as to the existence of any criminal offence or legal obligation on which the disclosure was based. Where the legal position is something of a grey area, a worker might reasonably take the view that there has been a breach.

59. In Kilraine v London Borough of Wandsworth 2018 ICR 1850, the Court of Appeal held that 'information' in the context of S.43B is capable of covering statements which might also be characterised as allegations - 'information' and 'allegation' are not mutually exclusive categories of communication. The key principle is that, in order to amount to a disclosure of information for the purposes of S.43B the disclosure must convey facts.

60. A potential complicating feature in this case is that despite the claimant having presented her case on the basis that the disclosure relied upon was made to Phillip Holliday sometime between April and June 2013, her evidence before us was that in fact that the disclosure was made in February 2013. It was therefore under the old law and we may be required to consider whether the disclosure was made in good faith rather than in the public interest which is the test under the new law.

61. In Blackbay Ventures Ltd v Gahir [2014] ICR 747 the EAT set out a checklist that should be gone through when considering a protected disclosure claim:

"1. Each disclosure should be identified by reference to date and content.
2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.
3. The basis on which the disclosure is said to be protected and qualifying should be addressed.
4. Each failure or likely failure should be separately identified.
5. Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied on and it will not be possible for the appeal tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.
6. The tribunal should then determine whether or not the claimant had the reasonable belief referred to in section 43B(1) and under the "old" law whether each disclosure was made in good faith; and under the "new" law whether it was made in the public interest.
7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied on by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.
8. The tribunal under the "old" law should then determine whether or not the claimant acted in good faith and under the "new" law whether the disclosure was made in the public interest."

62. As to causation the relevant part of section 47B ERA states:

> *<u>47B Protected disclosures</u>*
> *(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*

63. Accordingly, a worker is protected from being subject to a detriment done on the grounds that she has made a protected disclosure. The leading authority on what is meant by the term "done on the ground that" is <u>Fecitt and others v</u>

NHS Manchester (Public Concern at Work intervening) [2012] ICR 372. In that case the Court of Appeal stated that: "*liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act."*

64. The EAT in Osipov v International Petroleum Ltd UKEAT/0058/17/DA explained the approach to be taken to drawing inferences and the burden of proof in whistleblowing detriment claims as follows

"Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference: see by analogy Kuzel v. Roche Products Ltd [2008] IRLR 530 at paragraph 59 dealing with a claim under s.103A ERA 1996 relating to dismissal for making a protected disclosure.
….
Mr Forshaw submits and I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:
(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.
(b) By virtue of s.48(2) ERA 1996 , the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight at paragraph 20.
(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."

Trade union detriment

65. Section 146 of the Trade Union Detriment (Trade Union & Labour Relations (Consolidation) Act 1992 states as follows:

A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—
(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,
(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so

66. The test to be applied in section 146 claims was summarised by the EAT in Yewdall v Secretary of State for Work and Pensions UKEAT/0071/05/TM, as approved by the Court of Appeal in Serco Ltd v Dahou [2016] EWCA Civ 832:

"We nevertheless find that, although clearly this is not necessarily a binding way for a tribunal to approach this statute, a very sensible way to do so would be to follow this structure which, in effect, follows the route of the Act as we see it to be:

> *(i) have there been acts or deliberate failures to act by an employer? On this, of course, the employee has and retains the onus;*
>
> *(ii) have those acts or deliberate failures to act caused detriment to the employee?*
>
> *(iii) are those acts in time?*
>
> *(iv) in relation to those acts so proved which are in time, where detriment has been caused, the question of what the purpose is then arises. We are satisfied that Mr Russell was right to concede — and, in any event, this is our judgment — that there must be establishment by a Claimant at this stage of a prima facie case that the acts or deliberate failures to act which are found to be in time were committed with the purpose of preventing or deterring or penalising i.e. the illegitimate purpose prohibited by s146 (1)(b) .*

This gives the same mechanism to sections 146 and 148 of TULR(C)A as is provided, for example, by section 63A of the Sex Discrimination Act 1975 , where the onus of proof only passes to the employer after the establishment of a prima facie case of unfavourable treatment on discriminatory grounds by the employee which requires to be explained. Once it requires it to be explained, then the burden passes to the employer. Plainly that, in our judgment, is correct in this case. Otherwise the employer will have the burden of giving some explanation in a case where it is not clear what it is he has to explain. It must be clear, and we agree with Mr Russell's concession and with Mr Powell's submission, that there is a case made out at the prima facie stage that the acts complained of, with the resultant detriment, were on the case for the Claimant for the purpose of preventing or deterring or penalising in respect of trade union activities. Once that prima facie case is established, then the burden passes to the employer under s148 ."

67. It is notable that the statutory language in s 146 TULRCA is one of motive, i.e. preventing or deterring, as opposed to the more indirect test of material influence for whistleblowing detriment claims.

Unfair dismissal

68. Regarding the claimant's claim for 'ordinary' unfair dismissal the relevant parts of the ERA state:

> *94 The right*
> *(1) An employee has the right not to be unfairly dismissed by his employer.*
> *. . .*
> *98 General*

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—
. . .
(a) The capability of the employee for performing work of the kind which he was employed to do
. . .
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

69. It is for the respondent to show that the reason for dismissal was potentially fair. The potentially fair reasons for dismissal include capability which is the reason relied on in this case.

70. As with dismissals for other potentially fair reasons in a capability dismissal (which in this case is argued to be on account of ill-health absence) the tribunal must determine whether dismissal for such reason falls within the range of reasonable responses open to an employer. In these types of cases, the essential framework for the Tribunal to consider was set out by the EAT in Monmouthshire County Council v Harris EAT 0332/14. Her Honour Judge Eady observed: '*Given that this was an absence-related capability case, the employment tribunal's reasoning needed to demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice'*.

71. The need to consult and the need for an employer to establish the genuine medical position is crucial. This has been emphasised since at least the case of East Lindsey District Council v Daubney 1977 ICR 566.

72. Ultimately, we must consider whether dismissal fell within the range of reasonable responses open to a reasonable employer. We remind ourselves that it is not for us to substitute our own view for that of the respondent.

73. The range of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.

74. As part of our decision making the tribunal will consider whether there were any procedural flaws which cause unfairness.

75. Guidance on that part of the exercise was given by the Court of Appeal in the case of OCS v Taylor [2006] ICR 1602, which clarified that the proper approach is for the tribunal consider the fairness of the whole of the disciplinary process. The court stated that our purpose is to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at a particular stage.

76. The Court went on further to say that the tribunal should not consider the procedural process in isolation but should consider the procedural issues together with the reason for dismissal as it has found it to be and decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss.

Unlawful deduction from wages/breach of contract

77. As was identified in EJ Connolly's agreed list of issues, the Claimant relies on two different alleged contractual entitlements – (a) disability leave and (b) sick pay at pension rate ("SPPR"). The essential issue for us to consider is whether the claimant did in fact have a contractual entitlement to be paid either of these two things.

Findings of fact

78. The claimant began her employment with the respondent on 29 September 1980. The claimant worked with the respondent for approximately 38 years which was almost the whole of her working career.

79. During her time with the respondent the claimant undertook multiple roles including immigration officer at passport control. At the time she was dismissed the claimant was employed at Birmingham Airport working as a frontline border force officer and the majority of her duties involved working on passport control.

80. The claimant was also from 2011 a trade union representative for the Immigration Service Union ("ISU"). The claimant had some responsibility for health and safety matters both in her capacity as a trade union representative and also in her main role. The claimant made a broad allegation in her witness statement that her activity as a trade union representative brought her into conflict with management whenever she was required to "fight the corner" for her members. However we saw no evidence of such a conflict. We accept in general terms that part of being a trade union representative can involve

challenging management but it does not follow to our mind that this inevitably leads to conflict in the way the claimant seemed to suggest.

81. The claimant has had problems with back pain for many years. She was required to take some sickness absence from work but the situation improved following spinal operations in 2011.

82. In 2012 the respondent ran recruitment campaigns to fill vacancies which were available to staff who wished to be promoted or transferred. One such campaign was for the position of Higher Officer ("HO"). That campaign attracted particular controversy.

83. The background to the HO recruitment was as follows. Initially two vacancies were advertised on 3 August 2012 but it was known that there would be a probable third vacancy arising during the campaign. Thirty two staff applied in total and three were not put through to sift as they were late applications. Nine applications then passed the sift stage and those candidates were put through to an assessment centre. In September 2012 the results of the assessment centre were received and only four staff had passed. Of those one candidate withdrew his application as he wished to pursue an alternative position.

84. The first round of interviews were held on the 21 September and four candidates were interviewed. The four candidates were the remaining three who had passed the assessment centre and one applicant who had applied for a transfer on a level basis. Of those four only one candidate passed the interview. As a result of the low number of passes Philip Holliday (Regional Director) made an application to the HR Director to interview any "near misses" (i.e. those who had narrowly failed the assessment centre stage). This application was granted.

85. A second round of interviews was then convened where a further five people were invited to interview. These were the near misses who had narrowly failed the assessment centre stage. As a result of those interviews two further candidates were offered and accepted positions. Those two people were Neil Broad and Deborah Brown. Deborah Brown is the wife of a senior manager within the respondent - Paul Harper. We understand that she continues to use her maiden name for professional purposes. There is no evidence that Paul Harper was involved in any way in the decision to promote Deborah Brown. There was no evidence put before us to support the claimant's suggestion that she was promoted because of nepotism, rather than merit.

86. As we have said the recruitment process was controversial. The claimant, along with others from her union, raised concerns over the procedure that had been adopted and in particular the decision to appoint those who had not passed the assessment centre stage of the exercise (i.e. the near misses). As a result of those concerns Alex Lawther sent an email on 24 February 2013 explaining in

some detail the process which had been adopted and the reasons for it. The purpose behind that email was to try and demonstrate to all staff that a fair and transparent process had been adopted.

87. The claimant's alleged protected disclosure in this case concerned the recruitment process for the HO role. The claimant says that in early 2013 she approached Philip Holliday and raised concerns with him including specific concerns over this recruitment campaign. It is relatively clear from the contemporaneous evidence that the claimant did have some kind of discussion with Mr Holliday in early 2013. In particular in an email from the claimant dated 1 April 2013 she refers to what she described as a "little chat" that she had with Mr Holliday where she expressed serious concerns over the way the HO recruitment had been handled. However that document does not provide any information as to the detail of the discussion and neither does any other contemporaneous document.

88. It's clear from the claimant's description of the discussion as a "little chat" that this was an informal discussion and as it occurred in or around February 2013 it is not surprising that Mr Holliday now has no recollection of it at all. The claimant believes that as a result of her discussion with Mr Holliday Mr Lawther, who was another senior manager, was removed from his post and not allowed to return to his role at Birmingham Airport. This was speculation on the claimant's part. The evidence which we heard on behalf of the respondent entirely satisfied us that Mr Lawther's move had absolutely nothing to do with any issue which was raised by the claimant. In fact we saw no evidence of any action at all being taken as a result of the matters raised by the claimant.

89. It is clear that the respondent was aware of the controversy generally over the HO recruitment exercise and the concerns raised by the trade union and it sought to address that through the email we have described above. But there's nothing to suggest that the "little chat" between the claimant and Mr Holliday had any particular effect. We concluded that whatever the claimant said to Mr Holliday at the time was not seen by him as particularly significant - probably because he was already aware of the trade union's concerns anyway - and he therefore took no particular action on it. There is no evidence that what the claimant told Mr Holliday was passed on by him to anyone else.

90. On or around 22 September 2013 the claimant sustained an injury to her back at work. The claimant explained in her witness statement that this injury was sustained because she was removing a computer processor unit from under a cramped desk. A dispute arose over whether this should be classed as a work related injury or not. This was important because if the injury was classed as work related it meant that the claimant was entitled to up to six months injury absence on full pay. Such absence is not under the respondent's procedures recorded as normal sickness absence and is not counted towards

unsatisfactory attendance warning trigger points. Trigger points initiate disciplinary action including dismissal under the respondent's procedures.

91. The respondent effectively outsources the decision making over whether a member of staff has suffered a qualifying work related injury to Capita. We were not provided with the evidence of what was provided to Capita to make a decision in this case nor any evidence as to how Capita reached their decision. However it is clear that Capita concluded that the claimant had not in fact suffered a qualifying work related injury. Due to the lack of evidence we cannot be sure as to the reasons for that but it appears to have been relevant that there were no witnesses to the injury which had been suffered by the claimant and there was some doubt over whether she had been tasked with the job of moving the processor unit which was the action which caused the injury.

92. What is manifestly clear is that the claimant was greatly aggrieved by the Capita decision. She regarded herself as having being failed by Capita and also formed the view that the information provided to Capita by her managers must have been misleading. We are not in a position to say whether this is accurate or not because we have not been provided with any evidence as to what the claimant's managers actually provided. However we have no doubt that the claimant's sense of grievance over the Capita decision and the process leading up to it was and is fiercely held.

93. Unfortunately the injury to the claimant's back caused her to have a significant amount of sickness absence. On 21 February 2016 the claimant was given a first written warning in respect of her attendance as a result of that absence. On 1 March 2016 the claimant appealed against that warning. On 29 April 2016 the claimant was sent the appeal outcome. The outcome was that the appeal was not upheld and the original decision to issue the claimant with a first written warning was confirmed. Notwithstanding that conclusion the appeal manager, Mr Terry, made a number of recommendations for the claimant's line manager.

94. The rationale for Mr Terry's decision was that as Capita had concluded that the injury was not a qualifying workplace injury there was no basis for the respondent to discount any absence. It can also be observed that under the respondent's procedures even if the injury to the claimant had been classed as a qualifying workplace injury only a maximum of six months absence could be discounted. The reality was that the claimant had exceeded the triggers for a warning even if the full six months had been discounted.

95. Mr Terry did find that the respondent had failed to follow its procedures in one respect in that there had been an insufficient number of keeping in touch meetings. This was as a result of the claimant's then line manager, Mr Broad, mistakenly applying the 2012 policy rather than the 2014 policy.

96. The claimant's sickness absences continued and were at such a level that she was issued with a final written attendance warning on 5 September 2016. The claimant did not appeal against this warning.

97. By 2016 the claimant was also pursuing a personal injury ("PI") claim against the respondent arising out of the injury which she had sustained at work in September 2013. The respondent had started to defend the proceedings by denying liability. Witness statements were then exchanged in November 2016. The respondent provided a witness statement from Jason Moore Read who had previously been involved in managing the claimant. The claimant was extremely upset to read the statement prepared by Mr. Moore Read. The claimant explained in her evidence before us that she believed the statement was full of lies and it made her feel physically and mentally sick.

98. The receipt of this paperwork obviously had an extremely negative effect on the claimant. She described herself in her statement as being in complete turmoil and total anguish. She said she was in tears and shaking. Even now over four years later she still finds the evidence to be most upsetting. It was clear to the Tribunal that much of the claimant's continuing sense of grievance concerning the respondent arose from the accident at work and the denial that that was a qualifying workplace injury. This sense of grievance was greatly strengthened by the subsequent defence of the personal injury proceedings seemingly on the basis that the claimant was not acting in the course of her duties when she sustained the injury.

99. Having said that however once the respondent had sight of the claimant's witness evidence in the PI claim it appears that they quickly changed their position and made the decision to admit liability. This resulted in the claimant's personal injury claim being settled. This involved the payment of money to the claimant which compensated her for the losses associated with that injury, including the pay she had lost. Notwithstanding that outcome however it is clear that the claimant remains highly aggrieved and upset over the respondent's conduct in relation to her injury and the initial response to her PI claim.

100. In February 2017 the claimant submitted a grievance to Paul Harper. The grievance outlined number of issues but it focused on complaining about the conduct of Jason Moore Read and it was clear that the claimant was most concerned about the evidence that he had given in relation to her workplace injury.

101. On 20 April 2017 a meeting was held with the claimant, her union representative and Mr Harper to discuss the claimant's grievance. The meeting was also attended by a HR casework manager and a note taker. This was a fairly lengthy meeting at which the claimant outlined her concerns in detail.

102. Despite the claimant having initially been told that there would be an investigation into her grievance the respondent eventually wrote to the claimant on 20 March 2018 to inform her that they had concluded that the threshold for a grievance investigation had not been met (although somewhat confusingly the letter also recorded that there was no evidence of bullying, harassment, victimisation or discrimination).

103. The claimant went off sick in April 2017 with back pain and she did not return to work at any stage prior to her dismissal.

104. On 31 August 2017 the claimant's union representative (who was also the general secretary of the claimant's union at the time) wrote to the respondent to say that she had discussed the options with the claimant and it was unlikely that she would return to work. The email referred to the fact that ill health retirement may be considered as an option but given that the claimant was already on nil pay it was suggested that it would be unreasonable to seek to extend her employment for a further prolonged period.

105. This email makes it clear that the claimant had already given her union instructions that (a) her health would not improve to the point where she was able to sustain a return to work, (b) ill health retirement was a possible option, and (c) her employment should be brought to an end fairly promptly on capability grounds.

106. This position was consistent with a telephone interview which the claimant had with her line manager, John Leach, on 24 October 2017. In that interview Mr. Leach asked the claimant when she thought she might be able to return to her duties. The claimant's response was that she had no idea and she referred to issues with her shoulder, spine and hip. Mr Leach also asked if there was any reasonable adjustments that he could make to get the claimant back to work. The claimant responded *"no, not really".*

107. In June 2018 Craig Haynes was appointed to be the decision manager in the claimant's case. He held a consideration of dismissal formal meeting with the claimant and her trade union representative on 22 August 2018. The claimant was now being dealt with under the continuous absence sections of the respondent's attendance management procedure. That procedure requires that dismissal must be considered whenever long term sickness absence has been continuous for 12 months. By August 2018 the claimant had been continuously absent for 16 months.

108. Throughout the period of the claimant's absence the respondent obtained advice and information from its occupational health provider.

109. The medical position appears to be accurately summarised in the occupational health physician's letter dated 14 November 2017. The consultant was not able to identify any likely return and recorded:

(i) The claimant was not functionally capable of returning to her full range of duties as described.
(ii) The claimant would not benefit from any adjustments as she was not currently fit to return to her duties due to the right shoulder injury, and the right leg pain and back pain.
(iii) There was evidence of stress at work but nothing recent as the claimant had been absent from work since May 2017.

110. In order to inform the occupational health provider's views a detailed report was requested and obtained from the claimant's consultant orthopaedic spinal surgeon. That report was dated 12 May 2018. It gave a comprehensive history of the claimant's back pain. That history records that the claimant had returned to the consultant's clinic in January 2014 following the accident at work. The claimant was treated with an injection and then a course of physiotherapy but the problems persisted. The claimant was eventually discharged from the consultant's clinic in September 2014.

111. The claimant was then well until January 2015 when she again presented at the clinic. This pattern seems to be repeated in the following years.

112. It is fair to point out that the consultant records that subsequent to the injury in 2013 the triggers for the claimant's deteriorating back pain had nothing to do with work. For example the consultant records that the claimant went on a 7 hour flight which was marred with extreme turbulence, she had then needed to climb into a people carrier and sleep in a hammock whilst on holiday. As a result of that the claimant again began to develop severe back and recurring leg pain. This was in 2015.

113. There was a further unfortunate non work related incident in 2017 whilst the claimant was off work. The claimant fell down some stairs and dragged her shoulder. This resulted in a new onset of back and leg pain.

114. Further, in March 2018 - again whilst the claimant was off work - she developed further pain after having twisted in bed to get a tissue as she had a cold and had sneezed.

115. The consultant's view was therefore that the claimant had a number of episodes of back and leg pain all of which would affect and impact on her functionality at work. The consultant's conclusion was that the claimant's condition was developing to a degree of chronicity and that she would struggle to fulfil her role in her current capacity. The consultant was unable to advise as to whether there was a foreseeable endpoint to the claimant sickness absence.

116. This report informed the occupational health advice which was sent to the respondent on 16 May 2018. That advice was given by a consultant occupational physician within the respondent's occupational health provider. Essentially the advice summarises the contents of the claimant's treating consultant's report and refers to her consultant's conclusion as to the lack of a foreseeable end point. This was the up to date medical evidence on which the respondent made their decision to dismiss the claimant.

117. By this time the respondent had obtained the information from the pension provider as to the relevant figures if the claimant were to take ill health retirement and the forms which the claimant would be required to fill in if she wished to apply for it. There is a dispute however over whether these were sent to the claimant. On the balance of probabilities we have concluded that the information was sent to the claimant by her line manager John Leach. We reached this conclusion because the contemporaneous evidence is consistent with the information having been sent to the claimant. In particular there was an email of 16 August 2018 which records that the forms had been sent by Mr Leach a few weeks ago and that nothing had been received back despite Mr Leach chasing the claimant.

118. Mr Leach also wrote to Mark Gribbin (who was at that stage the claimant's trade union representative) on 25 June 2018 and he referred to the fact that he had been trying to get the claimant to agree to a course of action as regards ill health retirement but it had been difficult to get a straight answer from the claimant.

119. In response to that Mr Gribbin wrote to Mr Leach to say that he had been working through the potential options in detail with the claimant. We considered that if the claimant and her union representative did not have the information about ill health retirement this would have been the ideal opportunity to say so. Moreover, it would not make sense for the union representative to say that he and the claimant were working through the options in detail if he did not have the information available.

120. Finally, the claimant's union representative wrote to Mr Leach again on 16 July in which he set out the claimant's position very clearly. What Mr Gribbin said was that he had discussed matters with the claimant and they both felt that ill health retirement was a protracted process and may well not succeed in her case. Again this strongly suggests that the claimant and her representative had the information in order to discuss and reach a position on the possibility of ill health retirement. It shows that the claimant had made the decision not to apply for ill health retirement.

121. Mr Gribbin went on to say that it was recognised that it was difficult for the respondent to sustain the claimant's absence as there was no return to work

foreseeable. Mr Gribbin explicitly said that the claimant acknowledged that the respondent would be justified in considering dismissal.

122. We should emphasise that under the civil service rules which were applicable to the claimant if she was dismissed for capability after such long service she could be entitled to a compensation payment. The claimant through her union made it clear that they believed that she should be entitled to a 100% compensation payment.

123. It is crystal clear to us that the claimant made a decision in conjunction with her trade union to focus on obtaining dismissal with 100% compensation rather than any other options such as ill health retirement or remaining employed in some capacity. In that context we consider it was accurate that Mr Haynes characterised the dismissal process as one that was being largely driven by the claimant and her union representative.

124. At the meeting on 22 August 2018 Mr Haynes asked a number of pertinent questions. Firstly in relation to ill health retirement Mr Haynes said that that had been explored and relevant paperwork had been sent to the claimant. Again the claimant did not say anything to indicate that she did not have the relevant paperwork. Mr Haynes asked the claimant if ill health retirement was something she wanted to consider and the claimant said it depends on the other options and the medical advice was vague and doesn't really state anything. The claimant's union representative then said doctors are naturally cautious and this advice was particularly vague. He indicated that in those circumstances the claimant did not see ill health retirement as a viable option. This was again clear evidence that the claimant and her union had made the decision that they did not want to consider ill health retirement as an option.

125. Mr Haynes pointed out that there were other options surrounding a possible return to work and asked the claimant directly if she would consider that as an option. The claimant's answer was that that would not be an option. The claimant was also asked if there was anything that the respondent could do to facilitate a return to work and she said that was not likely.

126. The claimant's union representative said that her injuries were all connected and there was no end in sight. The claimant emphasised the point that there was no prospect of an improvement and her consultants were not sure of a time frame. She referred to her spinal injury as her disc having exploded and she recounted serious issues with her knee as well.

127. At the end of the meeting the claimant's trade union representative explicitly said they did not want any return to work or other deployments as there was a level of vulnerability which could no longer be sustained. He again repeated that ill health retirement was not a viable option and so therefore they were looking at 100% compensation. Mr Haynes expressly asked the claimant

if she agreed with that summary – that ill health retirement or return to work was not an option - and the claimant said that yes she agreed.

128. Plainly, the respondent cannot have been left in any doubt as to the claimant's position at this meeting and the reality was that the claimant's position made dismissal an inevitability.

129. On 24 August 2018 Mr Haynes wrote to the claimant to inform her of her dismissal on the basis that she was unable to return to work within a reasonable timescale. The letter also informed the claimant that she would be paid the 100% compensation payment which she had been seeking.

130. The claimant did not appeal the decision to dismiss her. This is consistent with the claimant's decision to pursue dismissal with 100% compensation over any alternative option. In short, the claimant had achieved what she wanted in view of the circumstances around her health.

Conclusions on the claims

Whistleblowing

131. We consider first whether the claimant made a protected disclosure. We have to consider firstly whether the claimant disclosed information. This is not a straightforward matter because the claimant relies on one disclosure which she made to Mr Holliday in February 2013 orally in an informal "little chat". The claimant withdrew the allegation that she had made a further disclosure in April 2014 concerning her injury at work.

132. Since the disclosure relied upon was nearly 6 years before the claim and over 8 years before the hearing it was unsurprising that Mr Holliday had no recollection at all of what may have taken place. We also found that the claimant has not been entirely clear about the precise nature of the alleged disclosure and there is very little contemporaneous evidence to assist us. No other witness was called who could speak to what the claimant may have said.

133. We concluded that the claimant did have a discussion with Phillip Holliday in early 2013 in which she raised concerns about the HO recruitment process. However it was difficult to determine exactly what the claimant conveyed on this topic, which is necessary to decide whether or not she made a protected disclosure.

134. We think the claimant's contemporaneous description of the discussion as a "little chat" is accurate. It is likely to have been brief and lacking in detail. We do not think the chat had any particular impact and it was not seen by anybody at the time as significant. There is no evidence that the alleged disclosure was in any way controversial or that it caused any animosity towards the claimant or any problems for her. Put bluntly it was entirely inconsequential. As we have explained the claimant's assumption that Mr Lawther was moved

as a result of her raising her concerns was incorrect; we were entirely satisfied that he moved for unrelated reasons.

135. The claimant's evidence in her witness statement is that she raised a concern about nepotism and she then explained that to Mr Holliday as follows:

"A manager's wife was promoted ahead of other, apparently, better qualified candidates – where the relationship between the parties appeared to have been concealed from him as she used her maiden name and not her married name, hence concealing their relationship from those – including [Mr Holliday] - signing off the promotion. That was the 'Nepotism' the staff were so unhappy about."

136. However it was clear to the Tribunal that the claimant does not in fact have a clear recollection of the conversation with Mr Holliday. In her statement the claimant refers to further elaboration which she gave during her conversation with Mr Holliday which we felt was not consistent with the contemporaneous description of the conversation as a "little chat". Moreover, the claimant referred to people walking past and saying "nice knowing you" and "don't forget your p45". The claimant alleges that this was being said because she would be compelled to resign as a result of raising matters with Mr Holliday and she explained that perception to him at the time. We found this evidence was exaggerated. If that had happened it is likely that Mr Holliday would have said something about it and remembered the conversation. This led us to consider that we could place little reliance on the claimant's recollection of this informal discussion from many years ago.

137. We think it is more likely than not that the claimant had a short general conversation with Mr Holliday in which she quickly and without reference to any specific information mentioned concerns over the HO recruitment process. This is consistent with the description of the discussion as a "little chat" and the fact it had no particular effect. There were already concerns over the recruitment process generally (including from the claimant's union) and that was why it was decided that Mr Lawther would send the email explaining the procedure adopted and the reasons for it. The email had not been sent because of the claimant's "little chat" with Mr Holliday. We therefore concluded that in the claimant's discussion with Mr Holliday she did not convey facts. We find the claimant did not disclose information during her discussion with Philip Holliday on or around February 2013.

138. Notwithstanding this finding we considered the other key questions relevant to whether the claimant made a qualifying disclosure.

139. As to the breach of a legal obligation the claimant relied on an alleged breach of the civil service code. It was not argued that the code does in fact create legal obligations but rather the claimant had a reasonable belief that it did. The claimant's argument was that she reasonably believed that since the code included a requirement to act with integrity this meant the respondent had a legal obligation to do so, particularly with regard to the HO recruitment process.

140. We do not accept this argument. The claimant was a highly experienced immigration officer and an experienced representative in the specialist immigration union. There was absolutely no basis for her to believe that the code created legal obligations. There was no evidence put before us of anything which might suggest or imply that. There was not a case where there was a grey area over whether the code created legal obligations; rather there was no reason at all for the claimant to believe that it did particularly bearing in mind her experience and knowledge. The claimant did not in our judgement have a reasonable belief that the code created legal obligations. It follows that the claimant cannot have had a reasonable belief that the information disclosed tended to show a breach of a legal obligation.

141. Even if we had concluded in the claimant's favour about the contents of the discussion and took her case at its highest the information disclosed was:

a. That the claimant believed better candidates had not been recruited (although the claimant did not and has not identified those candidates).

b. That one of the candidates appointed was the wife of a senior manager and she used her maiden name so that the appointing managers were unaware of her marriage. The claimant did not however name Deborah Brown and she did not suggest that Paul Harper was one of the appointing managers. There was and is no evidence that this was the case.

142. We find that the information which the claimant alleged to have disclosed could not give rise to a reasonable belief that the respondent breached the code by failing to act with integrity. Just because the claimant believed better candidates were not appointed does not meant there was a failure to act with integrity. A recruitment process will almost always involve an element of subjective assessment and a different view on who the best candidate is does not suggest a failure of integrity. The claimant did not substantiate the assertion that better candidates were available as she failed to identify them or explain how they were better qualified.

143. The fact that Deborah Brown chose to use her maiden name at work is not a matter which suggests anything underhand and the claimant's apparent assumption that this was done to conceal her marriage simply does not follow. In the tribunal's experience it is not uncommon for married women to continue to use their maiden name for work purposes and this does not suggest a lack of integrity. Moreover, the information the claimant claimed to have disclosed was that because of Deborah Brown continuing to use her maiden name the appointing managers were unaware of her marriage. This would indicate that there had not in fact been a failure to act with integrity through nepotism as the appointing managers would be unaware of the marriage and therefore they cannot have appointed for that reason. This further indicates that the claimant's alleged belief of a failure to act with integrity cannot have been reasonably held.

144. For those reasons there is no basis on which we could possibly conclude that the claimant made a qualifying disclosure. We find that she did not.

145. In any event we saw absolutely no evidence that the alleged disclosure was a material factor for any of the subsequent treatment of the claimant. As we explained above it was simply a “little chat” which had no effect at all, i.e. it was inconsequential and not viewed by anyone as significant. The claimant referred to concerns about the recruitment process which Mr Holliday already knew were held by the union and which the respondent sought to address by Mr Lawther’ s email. The claimant did not discharge the initial burden of proof of showing that a ground or reason (that is more than trivial) for any detrimental treatment could have been the alleged disclosure. There was nothing to indicate that the alleged disclosure was a material factor in any of the respondent’s subsequent decisions.

146. There was therefore no basis on which we could possibly conclude that the claimant’s whistleblowing claims should succeed.

147. Accordingly all of the claimant’s whistleblowing claims fail and are dismissed.

Trade union detriment

148. At all material times the Claimant was an elected representative and a member of a trade union (ISU). As we understand it her claim is that she was subjected to detriments for the sole or main purpose of deterring her from taking part in the activities of the ISU, the “activities” being making representations to the respondent on behalf of ISU members. We accept in general terms that the claimant would have carried out such activities as part of her role. However, there are no examples of the claimant raising matters on behalf of her members which caused friction or irritation amongst the respondent’s managers. Similarly there was no evidence of any organisational dislike or distrust of trade unions, their representatives or members. We would therefore entirely agree with the respondent’s submission that there was a complete lack of evidence to suggest that the claimant’s activities as a trade union representative made any difference to the way in which she was treated at work. Accordingly we found this claim to be highly speculative and it lacked any proper foundation.

149. Nevertheless the claimant claims that she was subjected to ten detriments for the sole or main purpose of deterring her from taking part in the activities of ISU from September 2013 up until the date of her dismissal. Our findings on those were as follows:

149.1 There was insufficient evidence to find that the respondent had failed to record the fact that the claimant had suffered a workplace accident in circumstances where the respondent had admitted liability for the same in a civil court claim. It is unclear when and how the respondent was meant to have recorded this after the admission of liability. The respondent had not initially accepted that the claimant had a workplace accident but there was no evidence to suggest that was anything to do with trade union activities. It appeared to be because there were no

witnesses to the accident and there was doubt over whether the claimant was carrying out an activity which she had been tasked to do.

149.2 There was insufficient evidence to find that respondent caused an electronic file to be deleted in which details of the workplace accident had been retained. It was unclear how and when this was alleged to have taken place. Even if there had been a deletion there was no evidence to suggest that was anything to do with trade union activities.

149.3 The respondent's policy from September 2014 onwards meant that the claimant was not eligible to take paid disability leave in order to attend medical appointments and that is the most likely reason why she was not granted it. One allegation predates the 2014 policy that but is obviously hopelessly out of time. In any event there was no evidence to suggest that a failure to permit the claimant to take paid disability leave at any time had anything to do with trade union activities.

149.4 We do not accept that the respondent failed to make the reasonable adjustments which should have been made by virtue of the claimant's status as a disabled person within the meaning of the Equality Act 2010. The reality was that every time occupational health made recommendations for reasonable adjustments these were implemented. Given that we have found that we do not have jurisdiction to hear the reasonable adjustments claim we have not set out our findings on this in detail. Our essential conclusion is that there was no evidence to suggest that any of the failures alleged by the claimant relating to reasonable adjustments had anything at all to do with trade union activities.

149.5 It is unclear when the claimant alleged that the respondent ignored her request to be referred for an occupational health review. Her statement referred to events in 2014 but during cross examination she appeared to refer to 2016. In 2016 occupational health refused to arrange a further appointment and so this was outside of the respondent's control. In any event there was no evidence to suggest that any refusal was anything to do with trade union activities.

149.6 The allegation that Mr Moore-Read was unsupportive of the claimant and encouraged other managers to treat the claimant similarly was vague and unparticularised. There was insufficient evidence to make a finding that Mr Moore Read had ever been unsupportive or encouraged others to be so. In any event there was no evidence to suggest that Mr Moore Read's attitude to the claimant or his direction of others had anything at all to do with trade union activities.

149.7 The claimant's complaint that Mr Moore-Read made disparaging comments to her about her disability appears to relate to a conversation between the claimant and Mr Moore Read in 2012 when the claimant alleged that Mr Moore Read sought to prevent disabled employees using

medium stay parking spaces. Mr Moore Read denies this conversation took place and the tribunal preferred his evidence. It struck the tribunal as particularly unlikely that as a disabled person himself Mr Moore Read would have taken such an approach. Moreover, the documentary evidence in the bundle shows that he implemented the parking whenever the claimant needed it and, far from complaining, the claimant was happy with the parking arrangements (for example see her comments to OH in November 2014). In any event even taking the claimant's evidence at its highest there is nothing to suggest that Mr Moore Read's comments had anything to do with trade union activities. Even on the claimant's own case he was refusing access to all disabled employees not just the claimant.

149.8 There is insufficient evidence for the Tribunal to make any findings as to what information the respondent provided to Capita or whether Capita recorded that the claimant's workplace injuries were "self-inflicted". All we can say is that there appears to have been understandable reasons (which had nothing to do with trade union activities) why the respondent did not immediately concede that they were responsible for the injury - the lack of any witnesses and the doubt over whether the claimant had been carrying out a task she had been instructed to do. There is no evidence to suggest that the information provided by the respondent or the Capita outcome had anything at all to do with trade union activities.

149.9 The only meaningful instance which the Tribunal found of a failure to follow the respondent's sickness absence policies and procedures in issuing warnings to the claimant and in her dismissal was when Mr Broad mistakenly applied the 2012 policy's triggers for contact when it had been superseded by the 2014 policy. That was a mistake on his part which had nothing to do with trade union activities. There was also a delay in providing the dismissal outcome to the claimant but we were satisfied that the reason for that was because of the need to obtain authorisation for the 100% compensation payment. This too had nothing at all to do with trade union activities. Again even if the Tribunal had accepted there were other failures there was no evidence at all to suggest that they had anything to do with trade union activities.

149.10 In light of our findings above the tribunal did not consider that the respondent refused to consider the claimant for ill-health retirement ("IHR"). In fact the evidence showed that the respondent was willing to consider IHR as an option but in the end the claimant confirmed through her trade union representative that she did not want to apply. In any event there is nothing to suggest that the respondent's attitude around IHR had anything at all to do with trade union activities.

150. In relation to each allegation and generally the claimant failed to establish a prima facie case that any acts or deliberate failures to act could have

been connected with the purpose of preventing or deterring or penalising her in relation to trade union activities.

151. The bottom line is that in respect of each alleged detriment there was no evidence at all that it was done for the sole or main purpose of preventing or deterring the claimant from being a member of an independent trade union or penalising her for so doing and/or preventing or deterring her from taking part in the activities of an independent trade union or penalising her for so doing and/or preventing or deterring her from making use of trade union services or penalising her for so doing. It therefore follows that all of the claimant's claims for trade union detriment must fail.

152. In respect of the trade union detriment claimants predating the 3 August 2018 we find that we would find that we did not have jurisdiction to hear those. The claimant did not put forward a positive case on reasonable practicability and her evidence was that she did not want to bring a claim whilst still employed and was therefore waiting to see if she would be dismissed. As we found she is intelligent and articulate and she had, at the time, access to senior trade union representatives and solicitors. There was therefore no practical impediment to her bringing her complaints earlier, if she had so chosen.

Unfair dismissal

153. The reason for the claimant's dismissal was capability. She had been absent from work for 16 months and the medical advice (which the claimant agreed with) was clear and unambiguous that there was no foreseeable return to work date. This was what caused Mr Haynes to dismiss the claimant. For the avoidance of doubt we did not see any evidence that the dismissal or the process leading up to dismissal had anything to do with trade union activities or the claimant's alleged disclosure to Mr Holliday.

154. By reference to our findings of fact above we conclude that the respondent had thorough and current medical advice at the time of dismissal. Importantly, the OH advice was up to date, comprehensive, and conclusive. The OH physician had obtained a long and detailed report from the claimant's consultant and he had summarised that in his final report. The salient information from that report was that (a) the Claimant's condition was becoming chronic, (b) she may well struggle to fulfil her role at work, and (c) there was no foreseeable return to work.

155. It is also clear from that report that the claimant's ongoing absence was not work-related, for instance it documents setbacks due to falling and hurting her shoulder and twisting in bed. There were no indications of any reasonable adjustments which could possibly lead to the claimant returning to work.

156. We find that the respondent could not be expected to wait any longer for the claimant to return. There was simply nothing to indicate that a return was on the cards. It is relevant that in the dismissal hearing the claimant confirmed, via her trade union representative and in her own words, that she did not foresee a possible return to work.

157. As the claimant confirmed towards the conclusion of the hearing with Mr Haynes, dismissal was in fact the only conclusion reasonably open to him. This was the message consistently represented to Mr Haynes during the hearing and in communication beforehand by or on behalf of the claimant. The respondent properly consulted with the claimant and obtained her clear and concluded view.

158. In respect of IHR, the respondent took reasonable steps to ensure that it was considered and the claimant and her union were given a reasonable opportunity to comment on it. The reality was that the claimant and her union confirmed that she did not wish to apply for IHR. That was the claimant's own decision.

159. Despite the claimant's assertions to the contrary, the respondent had followed its policy for considering dismissal in cases of continuous absence. A statement from Mr Leach was provided and HR produced a case analysis for Mr Haynes. We did not identify any procedural flaw which may have caused unfairness (the delay in providing the outcome was not in our view meaningful and it did not cause any unfairness).

160. The claimant was also given a right of appeal. Although she now complains about the proposed appeal officer, this was not something she raised at the time. If she had concerns over his impartiality, she could have requested another manager hear the appeal. We found that the plain and obvious reason why the claimant did not appeal her dismissal was because she had reached the view that dismissal with full compensation was the best possible outcome for her at that stage.

161. In view of the above our conclusion is that Mr Haynes acted within the range of reasonable responses on the evidence and information available to him. The claimant's dismissal was fair.

Unauthorised deduction from wages/Breach of contract

162. The claimant relies on two different alleged contractual entitlements – (a) disability leave and (b) sick pay at pension rate ("SPPR").

163. We do not see how we can possibly have jurisdiction to hear the first complaint. The last alleged date of non-payment was 17 August 2016 and the claim was therefore brought substantially more than three months after the last alleged deduction and, as we have explained in other contexts, there was no impediment or reason why the claimant could not have brought her claims earlier. It follows from our other findings that it was plainly reasonably practicable for the claim to have been brought in time. Furthermore, in settling her personal injury claim the claimant compromised all claims for lost wages up to March 2017. Accordingly, there was no claim for underpayment outstanding upon dismissal.

164. In any event, we concluded that the claim must fail on the merits. As we have explained there was no contractual entitlement to paid disability leave in order to attend medical appointments from 2014. Therefore, the claimant's interpretation of disability leave did not exist at the material time. If the claimant elected to take holiday to attend appointments then there is no contractual entitlement to claim this back as unpaid wages.

165. In respect of SPPR, the claimant placed reliance on an email sent by Naylha Kusar of the respondent's HR support on 1 November 2017. This email suggested that SPPR should be paid whilst the respondent was making a decision as no one can be left without payment. However, it is clear that insofar as this constituted advice from the Respondent's HR department, it was the wrong advice. It is clear that under the terms of the policy the claimant was not entitled to SPPR because there was no OH advice to the effect that there was a reasonable prospect of her returning to work in the near future.

166. The claimant was not therefore contractually entitled to SPPR or paid disability leave and her claims about those must also fail and be dismissed.

Employment Judge Meichen

22 July 2021

APPENDIX – THE AGREED LIABILITY ISSUES

1. Time limits

1.1 Given the date the claim form was presented, the dates of early conciliation, and the date on which permission to amend was given, any complaint about something that happened before 3 August 2018 and/or all complaints of trade union detriment and/or under the Equality Act 2010 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Were the unauthorised deductions and/or public interest disclosure detriment and/or trade union detriment claims made within the time limits in sections 23 and/or 48 of the Employment Rights Act 1996 and/or s.147 Trade Union & Labour Relations (Consolidation) Act 1992? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made and/or the act or failure to which the complaint relates?
1.3.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.3.3 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.3.4 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.3.5 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Disability

2.1 It is agreed that the claimant had a disability as defined in section 6 of the Equality Act 2010 from September 2013 by reason of back / spinal pain.

3. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

3.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

3.2 A "PCP" is a provision, criterion or practice. Did the respondent apply the following PCPs:

3.2.1 A requirement that an employee do not take paid disability leave in order to attend medical appointments (contrary to the respondent's written policy) which the claimant says was applied to her on the following dates: 13 November 2013, 22 October 2014, 9 April 2015, 22 April 2015, 13 May 2015, 4 June 2015, 5 February 2016, 7 April 2016, 22 April 2016, 17 August 2016.

3.2.2 A failure to implement reasonable adjustments identified in the various Occupational Health and /or Doctor's reports commissioned by the respondent on the following dates: 8 July 2014, 10 November 2014, 22 January 2015 (and ensuing doctor's report dated 26 January 2015), 11 August 2017, 9 November 2017, 20 March 2018,16 May 2018.

3.2.3 A failure by Mr Moore-Read, Mr Broad and Mr Stillgoe to acknowledge disability unless the same were obvious (such as the instance where an employee had a prosthetic limb as in the case of Mr Moore-Read) as manifest on the following occasions:

(a) In or about mid-2012 Mr Moore-Read suggested that the claimant herself was not disabled and commented that she was not a blue badge holder
~~(b) Mr Neal Broad shouted at the claimant concerning the claimant's arranging of a medical appointment in such threatening terms that the respondent's Assistant Director, Ms Denise Heaney, was required to intervene to seek to manage the verbal exchange.~~
(c) Mr Broad arranged for the claimant to be required to conduct three complex interviews over three consecutive shifts. The claimant explained to him after the conclusion of the first interview that she felt unable to continue with the others and Mr Broad stated that he "did not care" and that the claimant should proceed to complete the remaining interviews. This occurred on or about the 17th or 18th of December 2014.
(d) Mr Broad allocated a particular case to the claimant concerning a Chinese national who was alleged to have arrived whilst suffering with tuberculosis. The claimant avers that Mr Broad's treatment of her was intended to demean her in front of another colleague. Mr Broad required the claimant to cite the relevant protocols and paragraphs of the relevant primary legislation in the expectation that she would not be able to do so (and, therefore, to cause her embarrassment and unease whilst another colleague was present). This occurred on a date after December 2014.
(e) Mr Broad failed to record a sickness absence correctly which the claimant raised with the respondent's Human Resources department and which the claimant was then required to raise with Mr Broad in order to ensure that she was fully paid during

the relevant period. The claimant's request for rectification of the error was met by Mr broad stating that he "didn't care" and would attend to it when he "got round to it" and that, instead, he would prioritise his own claim. This occurred in or about September 2016.
(f) Mr Broad, again, failed to record the claimant's sickness absence correctly and the claimant was not paid for the period to the end of October 2014.
(g) Mr Broad approached the claimant rather too closely and, whilst displaying a hostile demeanour, stated to the claimant that she was using crutches to make Mr Broad feel guilty. This was done in the presence of some of the claimant's colleagues. This statement was made, the claimant believes, to threaten her and to show that she was subordinate to Mr Broad (and that he, by virtue of his position, was permitted to behave in such a way.) This occurred in or about August 2014.

3.2.4 Failed to abide by its own procedures in relation to sickness absence, specifically, imposing inappropriate warnings on the following occasions

3.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that (in the same order and in relation to each of the PCPs above individually):

3.3.1 She exhausted her Holliday entitlement for the purpose of attending medical appointments which she might otherwise have allocated to Holliday 'proper' and/or she did not benefit from the additional aspect of the absence management procedure which would have applied had the leave been classified as disability
leave?
3.3.2 The application of any reasonable adjustment may have influenced the way in which the respondent saw the claimant fulfil her contractual role and her ability to do so, in spite of her disability, which, therefore, made her more liable to dismissal?
3.3.3 Because she did not have a visible disability, Mr Moore-Read (and other managers) were critical of her ability to perform in her role, without a valid reason. This led to a greater likelihood that the comments such as those attributed (by the claimant to Mr Moore-Read) would be made towards the claimant.
3.3.4 The claimant's disabling conditions led to a higher likelihood that she would be absent by reason of ill health which, when taken with the failure to abide by the sickness absence policy, made her dismissal more likely.

3.4 Did the respondent know or could it reasonably have been expected to
know that the claimant was likely to be placed at the disadvantage?

3.5 What steps could have been taken to avoid the disadvantage? The claimant suggests the following, again in the same order and in respect of each of the PCPs above individually:

3.5.1 (a) permitted the claimant to take paid disability leave in order to attend medical appointments and/or (b) permitted the claimant to accrue time off when attending medical appointments

3.5.2 See paragraph 3.2.2 above.

3.5.3 (a) a method of working whereby the claimant was not required to encounter Mr Moore-Read and/or

(b) an acknowledgement of the claimant's disability and an open mind to making the adjustments recommended and/or

(c) moved the claimant to an alternative location

(d) afforded the claimant autonomy in the discharge of her contractual duties

(e) applied the adjustments in 3.2.2 / 3.5.2 above

(f) permitted the claimant a parking space as close to her place of work as feasible.

3.5.4 (a) Disregarded any absence related to the claimant's disability and /or

(b) reviewed or modified the trigger dates which might lead to the implementation of the respondent's absence management procedure.

3.6 Was it reasonable for the respondent to have to take those steps and when?

3.7 Did the respondent fail to take those steps?

4. Harassment related to Disability (Equality Act 2010 section 26)

4.1 Did the respondent do the following things:

4.1.1 Mr Moore-Read was unsupportive and hostile to the claimant and encouraged other managers to act similarly towards her, specifically,

~~(a) He set the claimant tasks which she was expected to fail to complete, such as improving the health and safety audit score which the respondent received in Birmingham airport;~~
~~(b) The claimant was routinely challenged by Mr Moore-Read in particular in relation to a failure to discharge the health and safety role with which Mr Moore-Read was charged and which he, expressly or impliedly, delegated to the claimant. The claimant avers that Mr Moore-Read behaved in this way, not only to demonstrate that he was able to exert control over the claimant (beyond that ordinarily associated with the role between a manager and a subordinate employee), but to place the claimant in a position of conflict in the discharge of her duties as a trade union representative;~~

~~(c) The claimant was required to take on the role of locally nominated health and safety officer when she did not have the capacity within her working week to do so, without feeling subject to unnecessary stress and or pressure;~~
~~(d) Mr Moore-Read sought to take credit for the industry of the claimant such as to minimise or demean her achievements such as in the improvement in safety audit score (which rose from about 20% to 80% after the claimant took on this responsibility);~~
(e) Mr Moore-Read had cause to engage with the claimant in relation to the disabled status of various of the respondent's employees, who in some cases did not have a parent physical disabilities which were capable of being improved by the fitment of prosthetic limbs, and Mr Moore-Read failed to take the complaints made by the claimant, on behalf of these individuals, seriously and, as a direct act of bullying and or in retaliation to the raising of such complaints, Mr Moore-Read sought to deny the claimant's disabled status by suggesting that she, herself, was not disabled and commenting that she was not a blue badge holder;
(f) Mr Moore-Read refused to sign the necessary form of consent which was required to permit the claimant to park in parking spaces located closer to Birmingham airport and his justification for so doing was that the claimant was not possessed of a blue badge;
~~(g) When the claimant repeated her request for use of the closer parking spaces to other managers, Mr Moore-Read ensured that such requests were relayed to himself once more and the requests were, again, refused;~~
(h) As a result of the claimant's pursuance of a civil court claim for personal injury against the respondent, Mr Moore-Read gave a statement, the contents of which the claimant objected to, by way of a formal grievance. This grievance did not proceed to a formal investigation and Mr Moore-Read perceived this to be a personal victory which he made clear to the claimant by attending at her office too frequently, in order to emphasise the fact that the claimant's grievance against him had not proceeded

4.1.2 Mr Moore-Read stated to the claimant that she was not properly disabled

4.1.3 Mr Moore-Read stated to the claimant that she did not have a blue badge and that no statutory reasonable adjustments were required to be made for her

4.1.4 Failed to follow its own sickness absence policies and procedures in issuing warnings (such as an attendance warning) to the claimant and in her dismissal

4.1.5 Refused to consider the claimant for ill-health retirement

4.1.6 Failed to investigate the claimant's grievance about Mr Moore-Read read in a timely fashion or at all and failed to refer Mr Moore-Read's conduct for consideration by the professional standards unit

4.1.7 Dismissed the claimant

4.2 If so, was that unwanted conduct?

4.3 Did it relate to disability?

4.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. Protected disclosure

5.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

5.1.1 What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:

5.1.1.1 Verbally, between late April 2013 and June 2013 to the respondent's Regional Director, Mr Philip Holliday, that she was concerned the respondent was acting inappropriately in permitting the professional advancement of certain employees who were less well qualified than other candidates (such as the promotion of a manager's wife);

~~5.1.1.2 Verbally, in or about April 2014 to the respondent's HR department that a shared file on the IT system containing evidence about her injury at work had been deleted.~~

5.1.2 Did she disclose information?

5.1.3 Did she believe the disclosure of information was made in the public interest?

5.1.4 Was that belief reasonable?

5.1.5 Did she believe it tended to show that:

5.1.5.1 In respect of 5.1.1.1, that a person had failed, was failing or was likely to fail to comply with any legal obligation;

5.1.5.2 In respect of 5.1.1.2, that
(i) a person had failed, was failing or was likely to fail to comply with any legal obligation and/or
(ii) the health or safety of any individual had been, was being or was likely to be endangered and/or
(iii) information tending to show any of these things had been, was being or was likely to be deliberately concealed?

5.1.6 Was that belief reasonable?

5.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

6. Protected Disclosure Detriment (Employment Rights Act 1996 section 48)

6.1 Did the respondent do the following things from in or about September 2013 up until the date of the claimant's dismissal:

6.1.1 From 2014 Mr Jason Moore-Read subjected the claimant to bullying treatment, specifically, that set out as disability-related harassment in paragraph 4.1.1 above.

6.1.2 Bullying treatment by other managers who observed Mr Moore-Read's direction that the claimant should be bullied from about 2014, specifically:

~~(a) Mr Neal Broad shouted at the claimant concerning the claimant's arranging of a medical appointment in such threatening terms that the respondent's Assistant Director, Ms Denise Heaney, was required to intervene to seek to manage the verbal exchange.~~

(b) Mr Broad arranged for the claimant to be required to conduct three complex interviews over three consecutive shifts. The claimant explained to him after the conclusion of the first interview that she felt unable to continue with the others and Mr Broad stated that he "did not care" and that the claimant should proceed to complete the remaining interviews. This occurred on or about the 17th or 18th of December 2014.

~~(c) Mr Broad allocated a particular case to the claimant concerning a Chinese national who was alleged to have arrived whilst suffering with tuberculosis. The claimant avers that Mr Broad's treatment of her was intended to demean her in front of another colleague. Mr Broad required the claimant to cite the relevant protocols and paragraphs of the relevant primary legislation in the expectation that she would not be able to do so (and, therefore, to cause her embarrassment and unease whilst another colleague was present). This occurred on a date after December 2014.~~

(d) Mr Broad failed to record a sickness absence correctly which the claimant raised with the respondent's Human Resources department and which the claimant was then required to raise with Mr Broad in order to ensure that she was fully paid during the relevant period. The claimant's request for rectification of the error was met by Mr broad stating that he "didn't care" and would attend to it when he "got round to it" and that, instead, he would prioritise his own claim. This occurred in or about September 2016.

(e) Mr Broad, again, failed to record the claimant's sickness absence correctly and the claimant was not paid for the period to the end of October 2014.

(f) Mr Broad approached the claimant rather too closely and, whilst displaying a hostile demeanour, stated to the claimant that she was using crutches to make Mr Broad feel guilty. This was done in the presence of some of the claimant's colleagues. This statement was made, the claimant believes, to threaten her and to show that she was

subordinate to Mr Broad (and that he, by virtue of his position, was permitted to behave in such a way.) This occurred in or about August 2014.
~~(g) Mr Delvier Athwal took credit for having prepared a health and safety report which he had been charged to work upon with the claimant. The claimant had, in fact, undertaken all of the work and the meeting to discuss the report was convened at a time when Mr Athwal expected the claimant to be absent. The claimant believes that this behaviour was intended to demean her and to make her contribution to appear to be of no value. This occurred in or about the middle of 2016.~~

6.1.3 Caused an electronic file to be deleted upon which details of the claimant's workplace accident had been retained.

6.1.4 Failed to permit the claimant to take paid disability leave.

6.1.5 Failed to make reasonable adjustments which should've been made by virtue of the claimant's status as a disabled person within the meaning of the Equality Act 2010 as set out in section 3 above.

6.1.6 Ignored the request made by the claimant that she be referred for an occupational health review.

6.1.7 Mr Jason Moore-Read made disparaging comments to the claimant about her disability including the assertion that she was not disabled as she did not have a blue badge.

6.1.8 Caused, permitted or suffered a third-party organisation, namely
Capita, to record that the claimant's workplace injuries were self-inflicted

6.1.9 Failed to follow its own sickness absence policies and procedures in issuing warnings (such as an attendance warning) to the claimant and in her dismissal

6.1.10 Refused to consider the claimant for ill-health retirement?

6.2 By doing so, did it subject the claimant to detriment?

6.3 If so, was it done on the ground that she made a protected disclosure?

7. Trade Union Detriment (Trade Union & Labour Relations (Consolidation) Act 1992 s.146)

7.1 Was the claimant a member of a trade union, if so, which one?

7.2 Did the claimant undertake activities relating to the trade union of which he was a member, or any other?

7.3 Did the respondent do the following things from in or about September 2013 up until the date of the claimant's dismissal:

7.3.1 Failed to record the fact that the claimant had suffered a workplace accident in circumstances in which the respondent had admitted liability for the same in a civil court claim

7.3.2 Caused an electronic file to be deleted in which details of the said workplace accident had been retained

7.3.3 Failed to permit the claimant to take paid disability leave

7.3.4 Failed to make the reasonable adjustments which should've been made by virtue of the claimant's status as a disabled person within the meaning of the Equality Act 2010 as set out in section 3 above

7.3.5 Ignored the request made by the claimant that she be referred for an occupational health review

7.3.6 Mr Jason Moore-Read was unsupportive of the claimant and encouraged other managers to treat the claimant similarly

7.3.7 Mr Jason Moore-Read made disparaging comments to the claimant about her disability

7.3.8 Caused, permitted or suffered a third party organisation, namely Capita to record that the claimant's workplace injuries were self-inflicted

7.3.9 Failed to follow its own sickness absence policies and procedures in issuing warnings brackets such as an attendance warning) to the claimant and in her dismissal

7.3.10 Refused to consider the claimant for ill-health retirement?

7.4 If so, was it done for the sole or main purpose of preventing or deterring the claimant from being a member of an independent trade union or penalising her for so doing and/or preventing or deterring her from taking part in the activities of an independent trade union or penalising her for so doing and/or preventing or deterring her from making use of trade union services or penalising her for so doing?

8. Unfair dismissal

8.1 It being agreed that the claimant dismissed, what was the reason or principal reason for dismissal? The respondent says the reason was capability (long term absence).

8.2 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

8.2.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;
8.2.2 The respondent adequately consulted the claimant;
8.2.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
8.2.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
8.2.5 Dismissal was within the range of reasonable responses.

9. Unauthorised deductions

9.1 Did the respondent make unauthorised deductions from the claimant's wages by

9.1.1 failing to permit the claimant to take paid disability leave on the instances set out in 3.2.1 above

9.1.2 failing to pay the claimant sick pay at pension rate for the period May 2017 until 22 August 2018 which she was entitled to because her case was under active consideration

9.2 If so, how much was deducted?

10. Breach of Contract

10.1 Did this claim arise or was it outstanding when the claimant's employment ended?

10.2 Did the respondent do that set out in 9.1.1 or 9.1.2 above?

10.3 Was that a breach of contract?

10.4 How much should the claimant be awarded as damages?