# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs D Haggerty**

**Respondent:** **The Modality Partnership**

**Heard at Sheffield** **CVP** **On:** **10, 11, 12 and 13 August 2021**
**17 August 2021 (in chambers)**

**Before:** **Employment Judge Brain**
**Members:** **Mr N Pearse**
**Mrs S Robinson**

**Representation**

**Claimant:** **In person**
**Respondent:** **Mr R Ryan, Counsel**

# RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant's claim of unfavourable treatment for something arising in consequence of disability (brought under sections 15 and 39(2) of the Equality Act 2010) succeeds.
2. Upon the claimant's complaint brought under section 103A of the Employment Rights Act 1996:
   2.1. The disclosures made by the claimant to the respondent on 5 October 2020 and 8 October 2020 qualified for protection under section 43B of the 1996 Act.
   2.2. The principal reason for the dismissal of the claimant was that she made those protected disclosures.
3. Upon the claimant's complaint brought under section 100(1)(c) of the 1996 Act:
   3.1. Upon 5 and 8 October 2020, the claimant brought to the respondent's attention by reasonable means circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety;

3.2. The principal reason for the claimant's dismissal was that she had done so.

4. Upon the claimant's successful complaint brought under the 2010 Act, no reduction to the claimant's compensation shall be made pursuant to the Law Reform (Contributory Negligence) Act 1945.

5. Upon the claimant's successful complaints brought under the 1996 Act, it is not just and equitable for there to be any reduction to the claimant's compensatory award.

# REASONS

***Introduction***

1. The Tribunal heard evidence in this case over the course of four days between 10 and 13 August 2021 inclusive. Helpful submissions were then received from each party. Unfortunately, there was insufficient time for the Tribunal to deliberate in chambers upon the conclusion of the hearing on 13 August 2021. Accordingly, the Tribunal reserved judgment. The panel deliberated in chambers on 17 August 2021.

2. The Tribunal has determined the claim in the claimant's favour. As judgment was reserved, we now set out our reasons for the conclusions reached.

3. The Tribunal heard evidence from the claimant. On behalf of the respondent, evidence was called from:

   3.1. Emma Nicholson. She is employed by the respondent as a senior care navigator.

   3.2. Dr Elizabeth Dobson. She is an executive partner and GP with the respondent. Dr Dobson took the decision to dismiss the claimant.

   3.3. Dr Bushra Ali. She too is a GP and partner of the respondent. Dr Ali heard the claimant's appeal against dismissal (which was not upheld).

4. The claimant worked for the respondent between 3 June 2019 and 10 February 2020 as a care navigator. She worked at the respondent's practice at Oakfield Court, Hull. This is also known as the New Hall surgery.

5. In paragraph 8 of the respondent's grounds of resistance, the respondent is described as *"a GP super-partnership that operates nationally. A super-partnership is made up of GP practices who come together to form one single partnership. By being part of a larger group of practices the respondent can be more efficient in the way it works. The respondent engages approximately 1359 employees nationally which includes salaried GPs and 36 partners".*

6. It is not in dispute that the claimant was summarily dismissed by the respondent on 10 November 2020. In sum, the claimant was dismissed by the respondent arising out of incidents of concern to the respondent which occurred during the first week of September 2020 and upon 8 October 2020.

7. This matter benefited from a private preliminary hearing which came before Employment Judge Wade on 8 February 2021. She identified the complaints being made by the claimant as:

   7.1. Unfair dismissal relying on sections 100(1)(c) and 103A of the 1996 Act; and

   7.2. Unfavourable treatment for something arising in consequence of disability relying upon sections 15 and 39(2) of the 2010 Act.

***The issues in the case***

8. Employment Judge Wade identified the issues in the case. It is worth setting them out here (as she described them in the case management minute):

*"The issues the Tribunal will decide are as follows.*

*1. Disability allegations – section 15.*

*1.1 [It is unlikely to be in dispute that the claimant was a disabled person at the material time by virtue of her cancer diagnosis].*

*1.2 Did her unprofessional behaviour on 8 October 2020 arise in consequence of disability and that she experienced greater Covid fear than those without her disability and her behaviour was in consequence of that fear.*

*1.3 If the claimant proves her behaviour was something arising in consequence of her disability, was the respondent's decision to dismiss her a proportionate (appropriate and reasonably necessary) means of achieving a legitimate aim (to be clarified if pleaded in an amended defence)?*

*2. Unfair dismissal*

*3. Was the principal reason for the claimant's dismissal that she:*

3.1. *Said to Dr Moult on 5 October 2020 words to the effect that a patient should not have been seen or brought into the surgery when awaiting a Covid test;*

3.2. *Said to Ms Nicholson on 8 October words to the effect that students should not be coming in because there was not 2m distance between colleagues and government guidelines were not being followed?*

3.3. *[If these comments are proven it is unlikely to be in dispute that they meet the requirements of Section 100(1)(c) or Section 43B and even if it is the Tribunal may be best helped by going to the reason why question: what was the principal reason for the claimant's dismissal – was it these comments or the unprofessional behaviour she accepts happened?*

3.4. *If the Tribunal comes to decide the technical points having found the comments above were made:*

*3.4.1. when the claimant said these things, did she reasonably believe when saying them that the health and safety of herself or colleagues was likely to be at risk,*

*3.4.2. or that in saying so she reasonably believed she was acting in the public interest?"*

4. Employment Judge Wade then set out the issues that arise upon the question of remedy should the claimant succeed with some or all of her claims. By consent, it was agreed at the outset of the hearing before this Tribunal that remedy issues will be dealt with upon a later date if required save for any remedy issues which may arise out of the claimant's conduct.

5. Upon the first morning of the hearing, Mr Ryan confirmed that no issue was taken by the respondent that the claimant is a disabled person for the purposes of the Equality Act 2010. The relevant disability is cancer, in particular throat cancer with which the claimant was diagnosed in 2016. By paragraph 6 of schedule 1 to the 2010 Act, those with cancer are protected by the 2010 Act as disabled persons from the point of diagnosis. Mr Ryan also confirmed that for the purposes of the complaint brought under section 15 of the 2010 Act, the respondent raises no issue around knowledge of the claimant's disability.

***Factual findings***

6. The claimant's contract of employment is in the bundle commencing at page 94. This gives her job title as care navigator. There was no job description for the role (or at any rate the Tribunal was not taken to such). The claimant said that the role of care navigator is essentially to act as a first port of call for patients who contact the surgery, to triage calls and make appointments for patients as required.

7. At the material time of the events with which the Tribunal is concerned, the claimant was operating in a room which could accommodate up to nine care navigators. During the course of the hearing, some agreed photographs were produced. This shows that the care navigators' workstations were arranged so that several care navigators would be seated quite close together at their individual workstation.

8. Until 1 September 2020 the claimant's line manager was Emma Boyeson. In paragraph 3 of her witness statement, Mrs Nicholson says that she became the senior care navigator (and the claimant's line manager) at the New Hall Surgery at Oakfield Court with effect from 4 September 2020.

9. The claimant's account (given when she was recalled to give evidence upon this point) is that she received an email from Emma Boyeson on 1 September 2020 to say that she would no longer be the senior care navigator with effect from that day. Mrs Nicholson said in evidence that Emma Boyeson notified those under her (Emma Boyeson's) line management on 2 September 2020 that there had been an error in notification and that she was in fact to remain the senior care navigator up to and including Friday 4 September 2020. Emma Nicholson took over the line management of the claimant and the other care navigators at New Hall Surgery with effect from Monday 7 September 2021 (and not on 4 September *per* her witness statement).

10. Therefore, we find that on 1 September 2020 the position as far as the claimant was concerned was that Emma Boyeson was no longer her senior care navigator. There was no evidence that the claimant had been told who was to replace Emma Boyeson. The position was only made clear the following day, 2 September 2020 when the claimant received confirmation that Emma Boyeson would remain as her line manager until 4 September with Emma Nicholson to take over that role with effect from 7 September.

11. This is of significance because a chain of events concerning a patient started on 1 September 2020. These events assumed some significance as we shall see.

12. In evidence before the Tribunal, the claimant explained that on 1 September 2020, Julie Chilvers, a fellow care navigator, had taken a telephone call from a patient. The claimant said that the patient had been abusive during the telephone call. She had heard the call taken by Julie Chilvers. The issue that had arisen was about the assignation of the patient to the correct clinician. The patient was described by the claimant as a *"difficult bleeder"* (by which she meant that there was a need for him to see a particular clinician). The patient called back the same day. The claimant happened to take this (second) call.

13. During the course of the hearing, the respondent produced a copy of the relevant *"consultation information sheet"* about this matter. Given the significance which the respondent attached to the events during the first week of September around this issue, it is surprising that this important document was not within the bundle and that it was only produced during the course of the hearing.

14. The relevant entry is dated 1 September 2020 (timed at 17:31). The entry was made by the claimant. It is described as an administration note. The claimant then recorded that the patient "*called clearly angry about an earlier booking and call which had resulted in the call being terminated. PT [patient] would not let me get a word in initially. But was able to explain that I could see that an error had been made with the booking of the appointment and the appropriate clinician, advised that I had heard the call which resulted in the termination of the call and this was due to patient screaming so loudly at team member I could hear word perfect as to what had been said. I apologised for the incorrect booking, informed caller as to the extreme circumstances we are currently working and errors do happen and that going forward to mention at the time of booking to mention that bloods needs to [be] with certain people and that we work very hard and are doing our best but we will not tolerate abuse at any level."* The claimant said in evidence that she considered herself to have diffused the situation. The contemporaneous note corroborates the claimant's evidence before the Tribunal. We find that the patient made two calls on 1 September and they proceeded as described by the claimant. There was no evidence to the contrary.

15. At page 114 there is an email from Tracey Barker. She holds the role of multi-site manager and governance lead within the respondent. This email was addressed to the claimant and is dated 3 September 2020. It is headed *'[name of patient] complaint.*' Tracey Barker wrote:

    *"You sent me the below task regarding the above patient:*

    *Tuesday 1 September 17:39 – Dawn Haggerty.*

    *Patient would like a call back to complain about the service he has received in regards to the booking of appointments, time waiting on phone and the general overall service. Advised you would call back within two working days.*

    *The patient needs to be aware that any complaint needs to be put in writing, via our website or through a practice email address. Please contact the patient to advise."*

16. The claimant's position was that she had raised the matter on 1 September 2020 with Tracey Barker and not with her line manager Emma Boyeson. This was because of uncertainty about the line management structure and her having been told by Emma Boyeson on 1 September 2020 that she (Emma Boyeson) would no longer be the senior care navigator. The claimant's account was that the respondent had not given the care navigators any clear direction as to the identity of the new senior care navigator to replace Emma Boyeson. In the event, as we know, it was clarified on 2 September 2020 that Emma Boyeson would continue to be senior care navigator until 4 September. That clarification was, of course, the day after the relevant patient complaint.

17. The claimant said in evidence that she told the patient, during her discussion with him of 1 September 2020, to put his complaint in writing. She then said that the patient informed her that he could not write so she told him that management would call within two working days. When she was recalled to give evidence about this issue upon the fourth day of the hearing, the claimant confirmed that she had told the patient to reduce his complaint to writing and that she believed that he had said that he had difficulties with reading and writing. The claimant said that in any case, he has the right to complain verbally.

18. On 4 September 2020, the claimant emailed Mrs Barker. She said:

*"I really am not willing to call this patient back, he was extremely angry and upset with the service [and] had been very abusive to Julie [Chilvers] 20 minutes prior to my call where I physically heard him word perfect screaming at Julie. I tried my best to diffuse the complaint. I resolved the issue he had called for, advised as to a prevention method to prevent the issue happening again. But he was insistent that he speak with a manager. I followed the training I received both on Bluestream and here on site and advised a manager would return his call within two working days. I feel for me to call back three days later and advise the patient he needs to put his complaint in writing in any format I feel [would] reignite the situation, and undermine the advice he had originally been given by myself."*

19. In another late-introduced document, the respondent produced a copy of the claimant's training record. This shows that she had complaints training on 28 July 2019. She achieved a score of 87 and the training was said to be complete. The respondent adduced no evidence as to what this training consisted of or its content nor the significance of a score of 87.

20. At the same time, the respondent produced two versions of the complaints policy. It was not made clear which of these was current at the time of the events with which the Tribunal is concerned. However, at all events the complaints policy contemplates an ability for individuals to raise verbal as well as written complaints as both of the policies produced provide for such. The suggestion from Tracey Barker in her email addressed to the claimant of 3 September 2020 (page 114) that a complaint must be put in writing is unsustainable in light of the respondent's own policy which plainly contemplates the possibility of a verbal complaint.

21. In evidence given under cross-examination, Dr Ali maintained that patient complaints have to be put in writing. However, Dr Ali had not read the policy at the time with which she dealt with the claimant's appeal. It appears to the Tribunal that the claimant was more familiar with the respondent's policy than were senior members of the respondent.

22. When she was recalled to give evidence about this issue on the fourth day of the hearing, Emma Nicholson explained that on 7 September 2020, in her first day in role as senior care navigator in New Hall, she called the patient. She appears to have resolved the matter satisfactorily. She observed that it was not brought to her attention by him that he was unable to read and write and there was nothing upon his records to suggest such inability.

23. The matter came to Emma Nicholson's attention through discussions she had with Emma Boyeson and Tracey Barker. This is what prompted Emma Nicholson to call the patient. Emma Nicholson said that where a care navigator is uncomfortable speaking to a patient it was expected that they would speak with their senior care navigator who would then take on responsibility for making the call. She also confirmed that the patient had the right to make a verbal complaint.

24. Under questioning from the panel, Emma Nicholson confirmed that the claimant had taken the right course when raising issues of concern with Tracey Barker upon her instruction issued to the claimant to call the patient back to ask him to put his compliant in writing. When asked whether the claimant's stance was correct, Mrs Nicholson said that it was "*if she felt unable or uncomfortable".*

25. Mrs Nicholson confirmed that after she had called the patient on 7 September 2020, she discussed the matter with the claimant. She spoke to the claimant about the complaints process and effectively offered words of reassurance to the claimant that she (Mrs Nicholson) as senior care navigator would take on difficult calls. The Employment Judge asked Mrs Nicholson whether she had told the claimant that she had done anything wrong in the way in which she had handled the incident. She said that she had not notified the claimant of any wrongdoing. Again, she said that she told the claimant that she was there for support. Mrs Nicholson confirmed that she had not raised the issue with anybody else within the respondent and as far as she was concerned, matters had ended with her call to the patient of 7 September and her words of comfort for the claimant.

26. As we shall see, an issue was raised against the claimant subsequently that she had been insubordinate in not following Tracey Barker's instructions. Mrs Nicholson was asked by Mr Ryan whether in her view any insubordination had occurred around this incident. The only insubordination, in Emma Nicholson's judgement, was that Emma Boyeson had not recorded her conversations with others upon the matter. She did not appear to consider the claimant guilty of any insubordination or indeed wrongdoing about the matter. She did not identify any insubordination on the claimant's part when asked.

27. Mr Ryan sought to impugn the claimant's credibility upon her account about the issue of the patient's inability to read or write. He rightly drew to the Tribunal's attention that this fact was omitted from the consultation information sheet completed by the claimant upon the day. When the claimant was interviewed in connection with matters on 20 October 2020 (by Helen Thompson, multi-site practice manager) the issue of the patient's literary abilities was raised. A copy of the interview notes (the contents of which were not disputed by the claimant) is in the bundle commencing at page 242. The question of literacy was raised by the claimant (in reply to the sixth question asked of her by Helen Thompson). The relevant references are at pages 245 and 246. There the claimant said that she was *"not sure that the patient could write".* Mr Ryan was right to point out

that the claimant had not said in terms that the patient had told her that he could not read or write. In evidence before the Tribunal the claimant said that he had told her that, but she had doubted that he was telling the truth.

28. It is not the case, as was suggested by the respondent, that the claimant was only raising the issue of the patient's literacy during the course of this hearing. She had certainly raised a general question about what to do if a literacy issue arises during the course of her interview with Helen Thompson and also had called into question the relevant patient's literacy ability. That having been said, there is some merit in the respondent's submission to the Tribunal upon the claimant's credibility given that she appeared to be going further in evidence (about what the patent told her) than she did at the material time. Further, the Tribunal accepts Emma Nicholson's account that such information would be readily available from the patient's records. It is probable, in our judgment, that key information such as this would be readily available to care navigators in order to furnish good and efficient care to patients.

29. In the final analysis, however, the issue of what the claimant said about the patient's literacy seems to us to be very much a side-issue. Whatever impact there may be upon the claimant's credibility about the literacy issue cannot detract from the fact that the claimant followed the respondent's processes by recording the patient complaint upon the confidential information sheet record and effectively calling upon Tracey Barker for support when Tracey Barker gave her an instruction which the claimant found to be uncomfortable. Upon Emma Nicholson's account, the claimant did nothing wrong by effectively asking somebody more senior than her to take the matter up with the patient given the difficulties which presented upon the handling of his complaint.

30. Criticism of the claimant for involving Tracey Barker in the matter is misplaced. On 1 September 2020, when the incident occurred, the claimant had been told (in error it seems) that Emma Boyeson was no longer to be her senior care navigator. There was no evidence that the respondent had told the claimant that Emma Nicholson was going to replace Emma Boyeson. There was no evidence that the respondent had told the claimant or the other care navigators with whom to raise patient complaint issues were they to require support upon them. The claimant was left to do what she thought was right given the lack of clear managerial direction.

31. Furthermore, no action was taken against the claimant after Emma Nicholson had discussed the matter with Emma Boyeson and Tracey Barker upon Emma Nicholson taking up her role on 7 September 2020. Words of reassurance were given to her by the claimant. In Emma Nicholson's view, such criticism as there was ought properly to be directed at Emma Boyeson for poor record keeping. The claimant could reasonably consider the matter closed.

32. The claimant fairly accepted that she had been undiplomatic when she said in the email of 4 September 2020 that she was *"not willing*" to call the patient back. The claimant accepted that softer words such as *"reluctant"* or "*uncomfortable"* may have been more apt. However, this does not detract from a finding that where a care navigator finds a situation uncomfortable, they are (according to Emma Nicholson) entitled to pass the matter on to a senior care navigator to deal with.

33. In all the circumstances, in the Tribunal's judgment, there could be no reasonable basis upon which for the respondent to conclude (as they later did) that the claimant acted in an insubordinate manner in dealing with this issue. Dr Ali's view that the incident demonstrated a tendency upon the part of the claimant to *"question every decision made by management"* was hyperbolic in circumstances where the evidence of a senior care navigator was that the claimant was acting entirely properly in accordance with recognised procedures where a care navigator finds the situation uncomfortable.

34. As has been said, no further action was taken by the respondent against the claimant about the events which occurred during the first few days of September 2020. The matter was then resurrected by the respondent during the course of the investigations into the events of early October 2020.

35. The Tribunal now turns to the incident which occurred on 5 October 2020. By way of introduction to this issue, it is helpful to cite some helpful background information that appears in Dr Dobson's witness statement. She says as follows:

*"(12) Initially New Hall Surgery was a cold site, meaning no patients with Covid symptoms were asked to attend this site. Throughout spring 2020 I triaged and undertook home visits for "hot patients", ie patients displaying Coronavirus symptoms, changing clothing and wiping down after each visit.*

*(13) I had been aware of staff sensitivity and Covid concerns and when I was in the New Hall premises, I tried to stay out of the way and remained in a clinical room.*

*(14) I think the New Hall site was more sensitive to Covid concerns [than other surgeries within the practice] and feared infection. On 5 October 2020, one of the care navigation team at New Hall went home with a temperature of 38.7, they subsequently tested negative, however, I suspect that the number of staff self-isolating had increased the general level of concern."*

36. Against this background, Dr Dobson says in paragraph 25 of her witness statement that (during the course of her disciplinary hearing), *"The claimant brought up the issue that a patient who had been exposed to Covid-19 attended the practice and the claimant was not happy about it, even though a doctor, who had the requisite authority and had decided the patient needed to be seen, had confirmed that they could attend. I asked why the claimant had questioned the doctor on this issue when this was not within the remit of her role. The claimant accepted that it was not within her role to question a doctor on an issue such as this."* This issue arose on 5 October 2020.

37. In evidence given under cross-examination, the claimant did not take issue with the essential premise of Dr Dobson's witness evidence. The issue arose on 5 October 2020 and involved another GP within the surgery, Dr Moult. The claimant said that she felt it appropriate to highlight to Dr Moult that the patient who had turned up at the surgery had been in close contact with somebody (a child, it seems) who had been tested positive for Covid and who was displaying Covid-like symptoms.

38. When the claimant cross examined Dr Dobson about the incident of 5 October 2020, she (Dr Dobson) said that it was a matter of clinical judgment as to whether the patient needed to be seen. The patient in question (who had been

in contact with a positive Covid case) was displaying symptoms of urinary tract infection.

39. Dr Dobson said in evidence that it was Dr Moult's judgment that the patient should attend the surgery for examination. The claimant put it to Dr Dobson that she (the claimant) was questioning whether the patient needed to be seen face-to-face. Dr Dobson replied that it was a question of "*balance between care of staff and care of patient."*

40. As has been said, at the disciplinary hearing conducted by Dr Dobson on 5 November 2020, the claimant raised the issue of what had happened on 5 October 2020. The relevant notes commence at page 189 of the bundle. When the claimant raised the issue, Dr Dobson is recorded as saying that, *"a doctor had decided that that patient needed to be seen."* The claimant protested that urine samples should not require the patient to attend in person. Dr Dobson asked, "*is it within your role to decide who should attend the surgery? … why did you question a doctor?"* Dr Dobson then went on to say, "*everyone is potentially positive which is why we make a judgment. It is not for [the claimant] to question a clinician's decision. [Dr Dobson] asked [the claimant] judgment would add value to a patient's care. [The claimant] responded "no". [Dr Dobson] followed by asking "so why is it expressed?"* It is clear from these exchanges that a dim view was taken by Dr Dobson of the claimant having questioned the need for the patient to attend surgery.

41. We find that on 5 October 2020 the claimant did raise with Dr Moult a concern about the patent attending the surgery because of the patent having been in contact with a positive Covid case. We find that her doing so was received badly by the respondent who perceived there to be something of an impertinence in her questioning Dr Moult's clinical judgement.

42. We now turn to the events of 8 October 2020. The claimant sets the scene in the first paragraph of her witness statement. This is as follows:

*"On the morning of 8 October 2020, I'd arrived at work to carry out my daily duties. Within approximately half an hour I was aware of a conversation between Emma Nicholson (senior care navigator) and the team I worked with. Emma had informed the care navigators that later in the day, three students would be coming into the office, to sit beside us and shadow our work. Colleagues were voicing their concerns. I immediately asked Emma if I could have a word; (the day previously I had attended a routine ENT appointment after suffering throat cancer [in] 2016). Emma replied "go on". I stated I was unhappy with this information, the previous day's appointment had raised concerns which resulted in a two week wait test required (generally only applicable for suspected cancer). Pages 208 and 209 in the bundle. I stated that I had concerns for my health. The office was laid out with three working pods, each pod containing three workers."*

43. The claimant's account of the layout as described in the final sentence just cited in corroborated by the photographs to which we have already referred. The respondent (fairly and correctly) did not put in issue the claimant's evidence about her medical appointment on 7 October 2020. In any case, page 208 corroborates the claimant's evidence that she was seen at the Hull University Teaching Hospitals NHS Trust in clinic on 7 October 2020. This shows that chemo/radiotherapy was completed in June 2016. Following a report from the claimant to her GP that she had experienced swallowing problems a swallow x-

ray was taken on 7 October 2020. Thankfully, in the event this did not show any gross abnormalities. Confirmation of this was communicated by the consultant to the claimant's GP on 27 October 2020.

44. It is the claimant's case that she feared that the swallowing problems which she had experienced in early October 2020 portended the return of cancer. Plainly, she faced an anxious wait for the outcome of the tests following the investigations which were carried out on 7 October 2020. The Employment Judge asked Dr Dobson whether, given the circumstances, in her medical opinion an individual's behaviour may be adversely affected by the stress of being in such a situation. Dr Dobson fairly replied in the affirmative. She said that such a circumstance made the claimant's behaviour on 8 October 2020 (of which the respondent complains) *"more understandable.*" Dr Dobson said that were it not for those particular medical circumstance, *"she may behave differently".*

45. Dr Ali expressed similar sentiments. She commented that she was able to fully understand the claimant's distress at the time. She said, under questioning from the panel, that those circumstances could well have affected the claimant's behaviour on 8 October 2020 and that the circumstances "*will have made it more difficult for her to control her behaviour".*

46. For her part, Emma Nicholson says (in paragraph 7 of her witness statement) that, *"On 8 October 2020, so around one month into my new role at New Hall, I explained to the care navigators, including the claimant, that some graduate interns were going to be coming into the practice in the care navigation room to see how appointments were booked. There was only going to be one intern at any one time and only for brief periods."*

47. In evidence given to the Tribunal, Mrs Nicholson told us that the interns had actually arrived already when she made the announcement to the care navigators. The interns were in another part of the building.

48. Dr Dobson appeared to accept, when questioned by the Employment Judge, that the first that the claimant knew of the arrival of the interns was that very morning. However, Dr Dobson said that medical students, interns and the like come and go in the surgery all the time. She said that the interns would be sitting with the care navigators only for between half-an-hour and an hour and even then, only one at a time. In the event, the claimant was not in fact required to have somebody sitting near her.

49. Mrs Nicholson's account, in paragraph 9 of her witness statement is that, *"After returning from a brief meeting, before I had chance to sit down, four of the care navigators, including the claimant, started saying very loudly, and all at once, that they didn't feel protected. They were very loud and aggressive when speaking to me. The claimant in particular was very aggressive. The claimant, who was seated about two meters from my desk, and did not need to raise her voice at all, had much more to say than the other three care navigators involved. The claimant was louder and more to the point, she did not mince her words and was very direct in everything she was saying. I got the impression that she felt that she had the right to speak on behalf of everyone, as though she was the ringleader."*

50. The general tenor of Emma Nicholson's witness evidence about the events of the morning of 8 October 2020 is very much in keeping with paragraph 9 just cited. She says that the claimant *"continued to speak and it felt like she was performing for others in the room".* She accused the claimant of speaking *"very loudly in a raised and aggressive tone of voice".* She says that she felt *"attacked*". She said, *"I would describe the claimant's tone as mean".* She accused the claimant of being the *"loudest and most aggressive of the four".* who *"continued to berate me in front of an audience".* She describes herself as feeling "*extremely harassed and bullied during this incident*." She suggested that the claimant's approach was "*highly unprofessional, aggressive and intimidating."*

51. The claimant's account in the first paragraph of her witness statement went on to say that Mrs Nicholson said that the respondent's managers would not be happy about the claimant's stance. In paragraph 14 of her witness statement, Mrs Nicholson says that the claimant said, *"I don't care if management aren't happy because I'm not happy"* and *"the Modality management do not give a fuck about us".* No issue was taken by the claimant that she had uttered an expletive. She said that she could not recall whether it was the expletive cited by Emma Nicholson in paragraph 14 of her witness statement or another expletive in very much the same vein by which she conveyed her forthright view that the respondent's management had a lack of care for the care navigators. It is not necessary for the Tribunal to make a finding as to which expletive was used by the claimant. She accepts doing so and that her behaviour in that instance was unprofessional. Upon that basis, we accept the evidence of Emma Nicholson in paragraph 14. The claimant also accepted that she said words to the effect that she did not care if the respondent's management were unhappy because she was not happy about the situation either. We accept that the claimant's remark that *"I don't care if management aren't happy because I'm not happy"* was precipitated by Mrs Nicholson saying that management would be unhappy about the claimant's perspective. We make this finding for the reasons now given and summarised in paragraph 54.

52. It was suggested on behalf of the respondent that the claimant threatened to *"down tools".* This the claimant denied. Upon this issue, we prefer the evidence of the claimant.

53. There is a striking contrast between what Emma Nicholson said in the course of the investigation undertaken by Helen Thompson on the one hand and what she said in her witness statement on the other. The latter clearly highlights the claimant in quite pejorative terms as behaving aggressively, being the ring-leader and acting in a performative way in front of the others. The Employment Judge asked Mrs Nicholson if she could point to where, in the contemporaneous account given by her to Helen Thompson, she had singled out the claimant in such pejorative of terms. She accepted that she had told Helen Thompson of the behaviour both of the claimant and three other care navigators (being Emma Boyeson, Julie Chilvers and Judy West) but had not highlighted the claimant as behaving any worse than the other three.

54. It is difficult to understand why, in those circumstances, her evidence before the Tribunal was in such condemnatory terms about the claimant. Mrs Nicholson offered no explanation. The diametrically different accounts given to the Tribunal on the one hand and to the respondent contemporaneously with the events in question is bound to weigh heavily with the Tribunal when weighing

the credibility of Emma Nicholson's account. Upon this basis, therefore, we find as a fact that the claimant did not say words to the effect that she was going to down tools and encourage others so to do and made her remarks about management unhappiness in response to Mrs Nicholson's observation about the likely management response to the claimant's concerns.

55. The claimant plainly feared catching Covid. She considered herself to be at greater risk than others due to the cancer which impacts upon her respiratory function. Dr Dobson fairly accepted that Helen Thompson's assessment of the risks posed by the claimant's cancer as not affecting her respiratory system was incorrect. Helen Thompson's handwritten addendum to the risk assessment carried out in March 2020 (at pages 111 and 112) to this effect was therefore accepted by Dr Dobson to be incorrect. That said, the claimant accepted that she had not been placed in one of the shielding categories of those particularly vulnerable to Covid.

56. Therefore, the claimant justifiably considered herself to be at an above average risk from catching Covid but was not so vulnerable that she was required to shield and stay away from the workplace. The claimant also said that she did not wish to remain at home and wanted to work. She said that financially she could have afforded to remain at home but was motivated to work in order to assist during the pandemic. Her position was that she was prepared to accept some risk by going into work and going about day-to-day activities such as shopping in the supermarket. However, her objection to the introduction of the interns was upon the basis that it was unwise to add further risk factors.

57. The claimant was also concerned initially that the interns were students. She was concerned that young people were more accepting of Covid risks and had a perception that their lifestyles increased the risk of catching it and spreading it to others (while they themselves may be asymptomatic or only suffer from mild symptoms).

58. The claimant fairly accepted that she was disabused at the time by Emma Nicholson of the notion that the interns were undergraduate students. However, the Tribunal can understand how the claimant arrived at the conclusion that the interns were students. The claimant came into the conversation only part way through Emma Nicholson's announcement to the care navigators as the claimant was engaged upon a patient call at the outset. Mrs Nicholson's own account is that she introduced them as *"graduate interns".* That being the case it is understandable that the claimant formed the impression that the interns were students albeit that, factually, this was not the case. The claimant also expressed misgivings about the wisdom of training interns in any case given that by the time they entered practice, their learning may well have become out of date given the fast moving Covid situation.

59. The claimant's acceptance of risk, as has been said, extended to a willingness to go to work each day and go about day-to-day activities. The claimant and the three other care navigators investigated by Helen Thompson had effectively formed an informal bubble within the workplace. At the time, the relevant guidance was to socially distance at *"one meter plus".* This meant keeping a one meter social distance from others coupled with other mitigating factors such as mask wearing.

60. In summary, therefore, the situation as it presented upon the morning of 8 October 2020 may be succinctly put in this way. The respondent, as was

routine, was engaged in the training of graduate interns. This required them to view the operation of the respondent's whole organisation including the care navigators' work. Emma Nicholson was told about this at very short notice and had the task of imparting the news to the care navigators. The introduction of strangers into the care navigators' room was unwelcome given the circumstances prevailing in the autumn of 2020. Strong views against the introduction of the interns were expressed by all including the claimant. The claimant behaved no worse in the expression of these views than did others. The claimant herself was prepared to accept some risk but was very reluctant to enhance that risk by having strangers introduced into the care navigator's room. The respondent did not require the claimant to have somebody sitting near to her while she performed her duties and the respondent took measures to mitigate the risk to the care navigators by having only one intern in the room at a time.

61. Emma Nicholson reported the matter to Helen Thompson (who is her direct line manager). A decision was taken to suspend the claimant along with Emma Boyeson, Judith West and Julie Chilvers. They were suspended on 9 October 2020. Caroline Rawcliffe, the respondent's general manager, instructed Helen Thompson to carry out an investigation.

62. Helen Thompson interviewed all four of the care navigators who were the subject of suspension. She also interviewed Emma Nicholson and four other witnesses. This culminated in an investigation report.

63. It is unfortunate that the investigation report that appears in the bundle is rendered impossible to understand because of the number of redactions. An unredacted copy was produced during the course of the hearing.

64. Helen Thompson recommenced that Julie Chilvers and Judith West be given formal disciplinary counselling regarding appropriate workplace conversations. She recommended that the claimant face a formal disciplinary hearing. She made a like recommendation for Emma Boyeson.

65. On 28 October 2020 Helen Thompson wrote to the claimant. She confirmed that her investigation had been concluded and she was recommending that matters proceed to a formal disciplinary hearing. On 30 October 2020 Dr Dobson wrote to the claimant inviting her to attend a disciplinary hearing to be held on 5 November 2020.

66. This letter (dated 30 October 2020) is at pages 128 and 129. The hearing was convened to consider the following five allegations against the claimant:

    - *Using foul, inappropriate and unprofessional language within the workplace contrary to page 24 of the Modality staff handbook – conduct and standards policy during an incident at the practice on 8 October 2020 where it is alleged that in front of others you advised that "Modality management don't give a fuck/shit about us."*
    - *Using unprofessional language within the workplace contrary to page 24 of the Modality staff handbook – conduct and standards policy during an incident at the practice on 8 October 2020 where it is alleged that in front of others you advised your line manager Emma Nicholson that you "don't care if management are unhappy because I'm unhappy".*

- *Behaving in an unprofessional manner contrary to page 24 of the Modality staff handbook – conduct and standards policy during the morning of 8 October in which you advised your colleagues that you would "down tools" which could be perceived as suggesting you intended to participate in unauthorised strike action.*
- *Acting in a manner which is likely to cause another individual to feel hurt or upset contrary to page 15 Modality staff handbook – bullying and harassment policy, specifically that you participated in a group conversation on 8 October 2020 which applied undue pressure to Emma Nicholson and in which Emma Nicholson was shouted at and criticised in front of others by yourself.*
- *Serious insubordination as defined by page 27 Modality staff handbook – disciplinary policy – failure to follow a line management instruction issued by a member of the senior leadership team Tracey Barker on 4 September 2020 via an email in which Tracey instructs you to call the patient and explain our complaint policy and which you replied to, to advise that you are unwilling to complete this request."*

67. Extracts from the relevant policies were attached to the letter. The claimant was also furnished with a copy of the investigation report.

68. The notes of the disciplinary hearing which took place on 5 November 2020 are at pages 189 to 193. We have referred to some extracts of this already. The additional salient parts of the notes are as follows:

    - The claimant did not dispute that she uttered the expletive about Modality management's alleged lack of care. She raised as mitigation that *"she thought she had pre-cancer cells on the tongue on the Wednesday (7 October 2020) but now knows it was because of previous radiotherapy and scar tissue but this did cause extra pressure".*
    - The claimant accepted that she did say words to the effect that she was unconcerned if the respondent's management were unhappy because she too was unhappy. The claimant did not advance, as mitigation for this remark her cancer scare upon this issue. This is a position which the claimant consistently maintained throughout the hearing. (She only advanced as mitigation the cancer scare in relation to the utterance of the expletive).
    - The claimant said that she could not recall saying words to the effect that she would *"down tools".*
    - The claimant offered an apology should she have made Mrs Nicholson feel bullied and harassed. The claimant said (at page 190) that it would have been appropriate for the claimant to raise her concerns with Emma Nicholson privately.
    - Upon the incident in September 2020, the claimant accepted that she ought to have used the words "uncomfortable" or "unhappy" instead of "unwilling" in her email to Tracey Barker. Sent on 1 September 2020.

69. On 9 November 2020, Dr Dobson wrote to the claimant (pages 194 and 195). She said that a decision had been taken to terminate the claimant's employment with immediate effect.

70. Dr Dobson said in the letter of 9 November 2020 that, *"Having deliberated over the evidence available, a decision has been reached taking the following into account:*

    - *Your admittance of the use of inappropriate language, stating "the Modality management do not give a fuck/shit about us" which is in breach of conduct and standards policy and which took place during an incident at the practice on 8 October 2020, and which was also done in front of others.*
    - *Your admittance and inappropriate manner to which you advised that you "don't care if management are unhappy, because you are unhappy".*
    - *Serious insubordination as defined by page 27, Modality staff handbook disciplinary policy in that you failed to follow a line management instruction issued by a member of the senior leadership team on 4 September 2020, via an email in which you were instructed to call the patient and explain our complaint policy and which you replied to advise that you are unwilling to complete this request."*

71. The third and fourth issues set out in the invite letter (cited in paragraph 68) appear either to have been unfounded by the respondent or not pursued by them. (This was the *"down tools"* comment and the behaviour towards Emma Nicholson on the morning of 8 October 2020).

72. The claimant availed herself of her right of appeal. The appeal was heard by Dr Ali on 26 November 2020. The notes of the appeal are at pages 196 to 203.

73. During the course of the appeal, the claimant drew Dr Ali's attention to the cancer scare which she had experienced on 7 October 2020. She said that her *"emotions were a little bit heightened"* because of it. Again, she fairly accepted using the expletive and expressing the view that she was unconcerned whether management were unhappy about Emma Nicholson raising the concerns about the introduction of the interns into the care navigators' room because the claimant was herself unhappy.

74. The claimant said that *'If she could turn back time, she would have insisted on a one to one with Emma [Nicholson] and have said we could go somewhere private when she had asked Emma for a word."*

75. Dr Ali dismissed the claimant's appeal. She said that the decision to dismiss the claimant stands. She added that, *"No new evidence was given and I felt that the prior incident was relevant in demonstrating a lack of respect for authority within Modality partnership".* The *"prior incident"* is that of September 2020.

76. It is plain that Dr Ali's focus, as evidenced by the letter of 2 December 2020, was upon an expectation that the claimant should bring something new to the appeal to persuade her that the appeal should be allowed. She told the Tribunal that this was the first time upon which she had conducted an appeal against dismissal. When asked by the panel the purpose of the appeal, she replied that it was *"an opportunity to provide some new information – further evidence – something different to explain it".* Only under prompting from the panel did Dr Ali accept that part of her remit was to review Dr Dobson's decision. Dr Ali's assertion that she recognised her reviewing function was therefore unconvincing.

77. Dr Dobson was asked by the panel what the claimant would have had to say or do in order to save her position. Dr Dobson said that she was concerned that the claimant did not see a problem with how she had conducted herself on 8 October 2020. She said that the claimant's *"health concerns cannot trump what we do. If her health concerns are so great then she has to be at home".* Dr Dobson indicated that the claimant's position may have been saved had she demonstrated insight.

78. Dr Ali's evidence was very much in the same vein. Dr Ali said that the claimant felt that she had done nothing inappropriate in early September 2020. She had, according to Dr Ali, wrongly asserted that she had given the patient correct information. She said that the claimant had not demonstrated sufficient contrition or recognised the impact of her behaviour upon Emma Nicholson.

79. Dr Ali said that members of staff are expected to *"manage and control our emotions to deal with others life events. A care navigator needs to be able to control this."* She went on to say that the cancer scare would have *"made it more difficult for her to control her behaviour. Patients do not want to see someone with their own issues. They want a robot who is very caring. I have to wonder if she is in the right job."*

80. Dr Ali expressed concerns about the claimant's conduct of the patient complaint issue in early September 2020. She commented that she (the claimant) could not see the link between what happened in September 2020 and on the morning of 8 October 2020. Dr Ali expressed concerns that the claimant felt that she could question every decision taken by management. She said that the claimant may not have wished to call the patient back because the patient was not *"a nice man".* However, she said that she could not have those unwilling to perform such tasks within her organisation.

81. Dr Ali said that she would only be satisfied with a complete and unreserved apology. She maintained that it was a reasonable decision to dismiss the claimant.

82. Dr Ali placed particular reliance upon the September 2020 episode. When asked what the position would be were it not for that, Dr Ali said that she would offer the claimant the opportunity of working from home. This would serve to remove her fears around contracting Covid, particular in light of her cancer scare. Dr Ali attached particular significance to the claimant having given wrong advice to the patient as to how to go about making his complaint.

83. The issue of working from home in fact arose out of the evidence given by Dr Dobson. This was not referred to in the evidence-in-chief of either Dr Dobson or Dr Ali and nor was the possibility of it mentioned to the claimant at any stage during the disciplinary and appeal process. (At all events, the Tribunal was not taken to any contemporaneous mention of the possibility of working from home).

84. Dr Dobson said that an alternative role would be available within the respondent working upon e-consultation. She confirmed that all of the claimant's hours could be filled undertaking this task.

85. The claimant was the only one of the four care navigators in question to have less than two years of service.

86. Emma Boyeson's disciplinary hearing was conducted by Dr Dobson. She said that she distinguished Emma Boyeson's position from that of the claimant because Emma Boyeson had *"seen how she behaved would have been uncomfortable for Emma Nicholson."* It is noteworthy, when looking at Helen Thompson's

investigation report, that Emma Boyeson made inappropriate use of the respondent's instant messaging system by writing the word *"bitch"* in a message sent to colleagues. (This was said about another colleague who, it appears, was perceived by Emma Boyeson to be flirting with one of the interns).

87. Helen Thompson's investigation concluded that Emma Boyeson had taken part in the incident by joining in with her three colleagues in the verbal confrontation with Emma Nicholson. Helen Thompson found that Emma Boyeson had failed to follow the instructions provided to her by Tracey Barker on 4 September 2020.

88. It is plain from the evidence given by each of them in cross-examination that both Dr Dobson and Dr Ali were concerned that the claimant displayed a lack of insight. In the Tribunal's judgment, this is at odds with the claimant's approach both at disciplinary and appeal stages. The claimant said that she would offer an apology to Emma Nicholson if Emma Nicholson had felt affronted by the claimant's behaviour. The claimant recognised that she had used an inappropriate expletive. She recognised that she ought to have sought out Emma Nicholson to have a private meeting with her about her concerns around the interns rather than doing this in the heated atmosphere of the care navigators' room on the morning of 8 October. She recognised that more diplomatic language could have been used in her dealings with Tracey Barker about the September incident. It is difficult to see, upon this basis, how Dr Ali and Dr Dobson could each have concluded that the claimant lacked insight into her behaviour. She plainly did so.

89. It is also the case, in our judgment, that Dr Dobson in particular was exercised by the claimant raising issues to Dr Moult on 5 October 2020. This plainly influenced Dr Dobson's views about the claimant's propensity for raising issues. That in turn fed into Dr Ali's opinion that the claimant had a propensity for questioning management instruction.

90. Earlier in these reasons, we set out (in paragraphs 8 to 34) our findings upon the September 2020 incident and our conclusion that the claimant had done little (if anything) wrong. Upon this basis, the adverse findings against the claimant upon it made by Dr Dobson and Dr Ali are not properly or rationally based. The contention that in September 2020 she was seeking to countermand a reasonable management instruction is simply unsustainable in circumstances where what she was doing was following the respondent's procedure of moving difficult cases from herself as a care navigator to one of the senor care navigators. In those circumstances, Tracey Barker's instruction for the claimant to telephone the patient (in the face of her objections) in order to ask him to reduce the complaint to writing was not a reasonable management instruction and was contrary to the respondent's own procedures as eloquently described by Emma Nicholson.

***The relevant law***

91. We now turn to a consideration of the relevant law. We shall start by looking at the complaint brought under the 2010 Act. This is a complaint of unfavourable treatment for something arising in consequence of disability. Such discrimination is made unlawful in the workplace pursuant to the provisions to be found in Part 5 of the 2010 Act. In particular, the claimant says that she was discriminated against contrary to section 39(2)(c) by being dismissed. (The concept of "*dismissal"* extends to the rejection of an appeal. If there was to be any doubt about that, then the rejection of an appeal may be considered a detriment and therefore unlawful pursuant to section 39(2)(d)).

92. The employer may have a defence to a complaint of unfavourable treatment for something arising in consequence of disability where it can be shown that there is a legitimate aim and the treatment of the complainant is a proportionate means of achieving the legitimate aim.

93. The first issue that arises upon a section 15 claim is that the disabled employee must have been treated unfavourably. This term is not defined in the 2010 Act. The Equality and Human Rights Commission's Code of Practice on Employment states that it means that the disabled person *"must have been put at a disadvantage".*

94. For a claim under section 15 to succeed, the unfavourable treatment must be shown by the claimant to be because of something arising in consequence of disability. The disadvantage must arise in consequence of the claimant's own disability and not a disability of someone else. It needs to be shown that there was something that led to the unfavourable treatment and this *"something"* had a connection to the claimant's disability.

95. Thus, there are two separate causative stages in order for a claim under section 15 to be made out. The first is to decide what it was that led to the unfavourable treatment. This is the *'something.'* The Tribunal has to determine what caused the treatment, focusing on the reason in the mind of the alleged discriminator. Did the 'something' in question materially contribute to the unfavourable treatment. At the second stage the Tribunal then has to determine whether the '*something'* causing or leading to the unfavourable treatment arises in consequence of the claimant's disability.

96. Whereas the first stage of the causation test depends upon the thought process (conscious or sub-conscious) of the alleged discriminator, the second stage involves an objective question of causation and does not depend upon that thought process. It is not necessary to show that the putative discriminator knew that the something which caused the unfavourable treatment arose from the disability.

97. It is for the claimant to show facts from which an Employment Tribunal could decide that an unlawful act of discrimination has taken place. Therefore, in order to shift the burden, the claimant has to show that: she is disabled; has been subjected to unfavourable treatment for something; that the employer had actual or constructive knowledge of the disability; and a link between the disability and the "something" that is said to be ground for the unfavourable treatment. (There is no issue in this case upon disability or the respondent's knowledge of disability).

98. If the *prima facie* case is established and the burden then shifts, the employer can defeat the claim by proving either that the reason for the unfavourable treatment was not in fact the *"something*" that is relied upon as arising in consequence of the claimant's disability or that the treatment was justified as a proportionate means of achieving a legitimate aim.

99. There is no question in this case that the respondent had a legitimate aim of maintaining appropriate standards of conduct in the workplace and safeguarding employees against abuse and insubordination. (That is the pleaded aim to which the Tribunal may add as an aim the provision of efficient health care to the respondent's patients).

100. As the EHRC Employment Code puts it (in paragraph 4.30 of the Code*), "Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate*

*involves a balancing exercise."* (This remark is actually made in the context of indirect discrimination complaints, but the principles are the same upon a section 15 claim). Essentially, the Tribunal needs to conduct an evaluation of the discriminatory effect of the employer's conduct on the one hand against the employer's reasons for taking it upon the other. The needs of the employer must therefore be weighed against the impact of the discrimination upon the employee.

101. The employer's act in discriminating against the employee needs to correspond to a real need and be appropriate to the employer's objectives. The employer's actions must therefore be reasonably necessary in order to achieve the aim in question.

102. Section 103A of the 1996 Act renders the dismissal of an employee automatically unfair where the reason (or, if more than one reason, the principal reason) for their dismissal is that they made a protected disclosure. Where, as here, the employee lacks sufficient qualifying service to claim unfair dismissal, then the onus of proof is upon the employee to show that they were dismissed for an automatically unfair reason such as the making of a public interest disclosure. The Tribunal must consider the employer's conscious and unconscious reasons for acting as they did.

103. It is, therefore, for the claimant to prove all elements of her public interest disclosure complaint. She must show that she made a qualifying disclosure. That is to say, she must show that she has disclosed information which in her reasonable belief was made in the public interest and tends to show that one or more of the six relevant failures set out in section 43B(1) of the 1996 Act has occurred, is occurring or is likely to occur.

104. The disclosure in question must convey facts. This is to be distinguished from allegations or speculation. In **Cavendish Munro Professional Risks Management Limited v Geduld** [2010] ICR 325 EAT, in order to demonstrate the practical distinction between giving information and making an allegation, the EAT posited the following example:

*"Communicating 'information' would be: "the wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that: "you are not complying with health and safety requirements." In our view this would be an allegation not information."* The conveying of facts may be undertaken in writing or verbally. It must be made to one or more of the categories of recipients set out in section 43C to 43G. This includes the employer of the whistleblower. There is no dispute in this case that the only relevant category of recipient is the employer.

105. As has been said, a qualifying disclosure is defined in section 43B as "*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 six relevant failures."* The relevant failure in question in this case is that the health or safety of any individual has been endangered, is being or is likely to be endangered. (The Act protects disclosures conveying facts concerning past, present and future events).

106. The focus is on what the worker in question believed rather than what anyone else might or might not have believed in the same circumstances. What needs to be shown is that the worker in question had a reasonable belief (as opposed to just a genuine belief). The fact that the worker making the disclosure must have a

reasonable belief does not mean that the worker's belief must necessarily be true and accurate. Therefore, there can be a qualifying disclosure even if the worker making it is wrong but reasonably mistaken in their belief.

107. In order for the disclosure to qualify for protection, the person making it must also have a reasonable belief that the disclosure is made in the public interest. This may be somewhat easier for an employee or worker who works for a public sector employer or which delivers public services than in other employments where the matter may be said simply to be a private employment dispute between contracting parties.

108. Problems may arise where the employer claims that the dismissal was not imposed by reason of the protected disclosure but because of the manner in which the disclosure was made. Misconduct in the course of making a protected disclosure may therefore afford an employer a defence. An example of this may be found in the case of **Bolton School v Evans** [2007] ICR 641, CA in which the Court of Appeal upheld the employer's argument that the employee was disciplined for his actions in hacking into the system and not for informing the school that its computer system was insecure.

109. As has been said, the claimant bears the burden of showing, on the balance of probabilities, that the reason for the dismissal was for an automatically unfair reason. Often, there will be a dearth of direct evidence as to an employer's motives in deciding to dismiss the employee. It may be appropriate for a Tribunal in these circumstances to draw inferences as to the real reason for the employer's actions on the basis of its findings of fact. The Tribunal is not obliged to draw such inferences in a complaint of automatically unfair dismissal under the 1996 Act. It is for the Tribunal to determine the real reason for the dismissal.

110. The claimant also pursues a complaint of automatic unfair dismissal under section 100(1)(c) of the 1996 Act. This provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee brought to his employer's attention, by reasonable means, circumstances connected with their work which they reasonably believe were harmful or potentially harmful to health or safety. Such a claim may be defeated if the employee brings matters to the employer's attention directly in circumstances where there was a representative or safety committee through which such concerns could have been raised and it was reasonably practicable for matters to have been raised by those means. In this case, there was no health or safety committee *in situ.*

111. In a similar way to public interest disclosures, there is no mandate for there being too onerous a duty of enquiry to be placed upon the employee. The purpose of the legislation is to protect employees who raise matters of health and safety. The fact that concerns might be allayed by further enquiry does not mean that the employee's concerns are unreasonable.

112. As has been said several times, the claimant does not have sufficient continuity of employment to pursue what is commonly referred to as an ordinary complaint of unfair dismissal. Her complaints under section 103A and section 100(1)(c) are of automatic unfair dismissal.

113. Were she to have had two years of service, and complained of ordinary unfair dismissal, the question which would have arisen is whether the dismissal of her in the circumstances was a decision which fell within the range of reasonable

management responses. This test is of relevance even though the claimant does not pursue an ordinary unfair dismissal claim because the claimant has brought a claim under section 15 of the 2010 Act and the respondent seeks to establish a justification defence.

114. This arises because in **O'Brien v Bolton St Catherine's Academy** [2017] ICR 737, CA, Underhill LJ considered the test of proportionality under the 2010 Act (applicable in this case upon the claimant's 2010 Act complaint) alongside the reasonableness test for ordinary unfair dismissals in section 98(4) of the 1996 Act. He explained:

*"I accept that the language in which the two tests is expressed is different and that in the public law context a "reasonableness review" may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately, I see no reason why that should be so. On the one hand, it is well established that in an appropriate context, a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the Tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat – what is sometimes insufficiently appreciated – that the need to recognise that there may sometimes be circumstances where both dismissal and "non-dismissal" are reasonable responses does not reduce the task of the Tribunal under section 98(4) to one of "quasi Wednesbury" review… thus in this context I very much doubt whether the two tests should lead to different results."* (The reference to "*quasi Wednesbury review"* is to the test that applies in a public law context to judicial review of administrative decisions, which in effect permits the courts to intervene only if there is shown to be a clear error of law or the decision is perverse – ie one to which no reasonable decision maker could have come).

115. **O'Brien** concerned a case of dismissal for long term sickness absence. It is therefore factually very different to the instant case. Underhill LJ was clearly concerned by the prospect of a section 15 complaint in a long-term sickness case succeeding on the one hand (by application of the objective proportionality test) but an unfair dismissal claim upon the same facts failing (by application of what is generally perceived to be a less stringent (from the employer's point of view) range of reasonable responses test that applies in an unfair dismissal case. Underhill LJ was concerned that it would be counter-intuitive in those circumstances for the section 15 claim to succeed but for the unfair dismissal claim to fail.

116. Although factually very different, the Tribunal takes the view that it is instructive when testing the proportionality of the respondent's conduct of the matters with which we are concerned to consider whether it was within the range of reasonable responses for the employer to have dismissed the claimant. If the answer to that question is *'no'* (even taking into account reasonable managerial prerogative) it is difficult to see how it may be said to be proportionate to dismiss her when applying the section 15 justification test.

***Discussion and conclusions***

117. Having made our findings of fact and having set out the relevant law we now turn to our conclusions. We shall start with the section 15 complaint.

118. The claimant was unfavourably treated. The unfavourable treatment consisted of her dismissal and the dismissal of the appeal. On any view, these were decisions which put the claimant at a disadvantage. Paragraph 5.7 of the EHRC Code indicates that unfavourable treatment should be construed synonymously with *"disadvantage".* It states: "*Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat the person unfavourably."* From this, it is plain that the claimant was subjected to unfavourable treatment.

119. The unfavourable treatment must be as a result of something arising in consequence of the claimant's disability. We must ask at the first stage what the reason was for the unfavourable treatment. This gives us the 'something.' Then at the second stage we must ask if that 'something' arose in consequence of the claimant's disability.

120. As has been said, the only behaviour which the claimant sought to link to her disability was the use of the expletive: that the respondent "*does not give a fuck"* about its employees. The claimant says that her utterance of the expletive arose in consequence of her disability. In particular, the previous day she had undergone a medical consultation at which the prospect of a recurrence of the cancer was raised. She had the anguish of awaiting the outcome of tests. The claimant eloquently described the invasive nature of the radiotherapy and chemotherapy that she had undergone in 2016. This involved 35 sessions over a seven weeks' period for 20 minutes at a time. She produced *'real evidence'* in the form of the mask that she had to wear during the course of the radiotherapy. This was a full face covering extending to the clavicle which the claimant said was fastened so tightly as to leave impressions upon the skin at the end of each session. Naturally, the claimant was very concerned about the prospect of having to again go through such invasive treatment as she had undergone in 2016 again.

121. Both Dr Ali and Dr Dobson fairly credited the claimant with a heightened sense of anxiety given the circumstances when she attended for work upon the morning of 8 October 2020. Both accepted that there was no prior history of the claimant being prone to outbursts, uttering expletives or behaving in the way that she did that morning. The Tribunal specifically asked Dr Dobson and Dr Ali for their professional medical opinions upon the issue. To their credit, they did not shy away from an acceptance that the claimant's behaviour on the morning of 8 October 2020 had a medical cause being heightened anxiety consequent upon the previous day's consultation.

122. The "*something"* that caused the unfavourable treatment of the claimant included the use by her of an expletive on the morning of 8 October 2020. This had a significant (that is to say, a more than minor or trivial) influence upon the unfavourable treatment. It was one of the three reasons for the dismissal of the claimant by Dr Dobson. Dr Ali refused the claimant's appeal and held that Dr Dobson's decision stands (including that upon the use by the claimant of the expletive). The *"something"* (being the use of the expletive) was therefore an

effective reason for or cause of the unfavourable treatment (being the dismissal and the refusal of the claimant's appeal against dismissal). The use of the expletive plainly influenced the thought processes of Dr Dobson and Dr Ali.

123. The Tribunal must then determine whether the cause of the unfavourable treatment arose from something that was in consequence of disability. Plainly, upon the evidence of Dr Dobson and Dr Ali, it was. There is a causal link between the claimant's behaviour on the one hand (that being the something which led to the unfavourable treatment) and the disability on the other (the behaviour which caused the unfavourable treatment being behaviour linked to or arising from the disability). In conclusion therefore the Tribunal's judgment is that the claimant was unfavourably treated for something arising in consequence of her disability.

124. No issue arises upon the respondent's knowledge of disability. The knowledge required is of the disability only and does not extent to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of disability. At all events, given the respondent's concession, the Tribunal is not concerned with making findings of fact upon the issue of the respondent's knowledge of disability.

125. The Tribunal therefore turns to the justification defence. As already indicated, no issue arises that the respondent has established a legitimate aim. The issue that arises is whether the dismissal of the claimant and the refusal of her appeal (which the Tribunal has held to be discriminatory) corresponds to a real need of the respondent and that the unfavourable treatment was reasonably necessary in order to achieve the aim. The respondent prayed in aid **O'Brien** in support of the proposition that a substantial degree of respect for the decision-makers as to their reasonable needs should be afforded.

126. As we have said, it is instructive, we think, to view matters through the prism of the range of reasonable responses test in ordinary unfair dismissal complaint. Could a dismissal of the claimant in these circumstances be considered to be one that fell within the range of reasonable managerial prerogative?

127. In our judgment, the answer to that question is 'no.' The claimant was dismissed for three reasons. The first was the use of the expletive which we have found to be unfavourable treatment for something arising in consequence of disability. It is difficult to see how a discriminatory reason for dismissal can fall within the band of reasonable responses.

128. The second reason was her (admitted) remark that she did not care if the respondent was unhappy about her wishing to complain about the introduction of the interns as she herself was unhappy. The third reason arose out of the incident in early September 2020.

129. Upon the second reason for dismissal, the experience of the non-legal members is that the remark made by the claimant was innocuous in industrial relations terms. Indeed, it was precipitated by Emma Nicholson attempting to shut down the claimant by informing her that communication of her concerns to management may be badly received. It was the role of Emma Nicholson to manage the care navigators and push-back from them about the respondent's likely reaction to the employees' concerns may have been readily anticipated. The claimant's remark was thus nothing untoward.

130. There is a duty upon employers to provide a procedure for dealing with employee's grievances. However, given the circumstances which presented on 8 October

2020, there was simply insufficient time for the claimant to reduce her grievance to writing. Unbeknown to her until it was announced by Emma Nicholson that morning, the interns were in the building. The claimant could reasonably apprehend that they were going to be introduced into the care navigators' room the same day. In reality, the only forum by which the employees could make known their concerns was verbally to Emma Nicholson during that meeting. Emma Nicholson's apprehension that the respondent's management would be intolerant of any dissent cannot be a good reason to seek to prevail upon the claimant that she should not raise concerns or to discourage her from doing so. In the Tribunal's judgment, it is difficult to see how the claimant's remark was anything other than one made in acutely stressful circumstances (particularly given the medical consultation the previous day and the claimant's anxiety about Covid generally) and given the immediacy of the introduction of newcomers into what the claimant and the other three care navigators perceived to be a secure workplace bubble. The claimant making a forceful protest in those circumstances cannot, in our judgment, be properly categorised as any kind of misconduct let alone serious misconduct such as to justify the claimant's dismissal.

131. The third issue concerns the events of early September 2020. For the reasons already given in paragraphs 8 to 34 above we hold it to be outside the range of reasonable responses for the respondent to ascribe any kind of misconduct to the claimant arising out of this matter. Indeed, we would go so far as to say that the respondent reached a perverse conclusion upon it. The fundamental flaw in the respondent's position arose from a lack of understanding of their complaints procedure.

132. Discounting the September 2000 incident therefore leaves the respondent only able to rely upon the two issues arising from 8 October 2020 incident. One of those (about the expletive) constituted discriminatory treatment (that is to say, unfavourable treatment for something arising in consequence of disability). The other (about the respondent's management), as we have said, was an innocuous remark.

133. We have determined that the respondent is unable to justify the treatment of the claimant. We shall come to our reasons for this conclusion shorty. Thus, this leaves the respondent relying solely upon the non-disability related comment about the claimant not being concerned about management unhappiness as she herself was unhappy. Even if the Tribunal were to accept the respondent's case that the claimant expressed herself in over-forceful and undiplomatic terms, on any view it falls outside the range of reasonable responses to dismiss her for it given the strong mitigations available to her (namely the stress arising from the medical consultation the day before and the imminent and unheralded change of circumstance within the workplace in the midst of a pandemic). This is all the more the case when set alongside the claimant's hitherto unblemished work record and lack of history of similar behaviour.

134. There is also a consistency issue. The lack of consistency in treatment between Emma Boyeson on the one hand and the claimant on the other strikes at the requirement of equity and fairness. Dr Dobson sought to distinguish between Emma Boyeson's case on the one hand and that of the claimant on the other by reference to Emma Boyeson showing insight. It is difficult to see why the claimant was also not credited with insight. As we have said, she accepted the inappropriateness of her use of the expletive and apologised for it. She said that on reflection she ought to have sought a private consultation with Emma Nicholson

that morning. She accepted that the tone of the email to Tracey Barker was undiplomatic. It is difficult, frankly, to see what more the claimant could have done to express insight into how she had behaved. She recognised how she would deal with the situation were similar circumstances to occur in the future.

135. For the reasons already given, we do not accept Emma Nicholson's account that the claimant was the worst behaved of the four care navigators. Therefore, there was in reality no real distinction between the conduct of Emma Boyeson on the one hand and the claimant's conduct on the other (other than the claimant uttering the expletive which was disability related in any case).

136. In any case, Emma Boyeson also used an expletive when she wrote the word *"bitch"* on the respondent's internal messaging system. If anything, in the Tribunal's judgment, this is worse behaviour than that committed by the claimant. Firstly, the claimant's use of foul language was disability related which is powerful mitigation. Secondly, Emma Boyeson's conduct was a misuse of the internal messaging system and required a degree of forethought by engaging with a written means of communication which was not present in the claimant's heat-of-the-moment exclamation. Further, Emma Boyeson was also implicated in the incident of early September 2020 to a greater degree than was the claimant. Emma Nicholson identified her and not the claimant as guilty of insubordination. It is difficult to see why the claimant was dismissed and Emma Boyeson was not. No real attempt was made by the respondent to distinguish the cases aside from Dr Dobson's unconvincing explanation.

137. A further issue is that the claimant justifiably considered that she had done nothing wrong by raising workplace concerns with Emma Nicholson. During cross-examination, it was put to Mrs Nicholson by the claimant that she had raised concerns about an individual seen loitering in the workplace car park and difficulties with locking a gate. As far as the claimant was concerned therefore, it was open to her to raise matters of concern with her line manager and by doing so on the morning of 8 October 2020 was simply doing so and adopting a usual and condoned practice. Mrs Nicholson accepted that she had raised these issues.

138. An additional feature is the availability of alternative work. One of the respondent's concerns, as articulated by Dr Dobson and Dr Ali, was the claimant's propensity for raising complaints should she harbour concerns about her health following any changes within the workplace. Such concerns would of course be obviated by the claimant being able to work from home. The possibility of home working was not something which appears to have been considered by the respondent at the time of the claimant's dismissal or at appeal stage. The opportunity of working from home was not something suggested to the claimant. The respondent appears to have taken the view that the claimant would not have been interested in home working because she wished to come into work. She was prepared to go into work knowing of the risks.

139. There is some merit in the respondent's view about the claimant's attitude to work. However, where there is a choice between homeworking on the one hand and being dismissed on the other, the claimant's wish to physically go into work may not then be her paramount consideration. The claimant was deprived of this choice.

140. Given all of these circumstances, in the Tribunal's judgment, it fell outside the range of reasonable managerial prerogative (even allowing for the degree of respect which is to be vested in the decision makers) to dismiss the claimant.

141. Having tested maters in this way, it follows in our judgment that it was disproportionate to dismiss the claimant. The dismissal of her did not correspond to a real need upon the part of the respondent in order to achieve the aims. Having the claimant work from home would achieve the pleaded aim of safeguarding employees against abuse and insubordination. (The Tribunal does not find the claimant to have been guilty of abuse or insubordination in any case). There was no need to dismiss the claimant to achieve the stated aim of maintaining appropriate standards of conduct in the workplace given that objectively, the claimant's conduct did not fall below those standards. Crediting the respondent (without making a finding of fact of such) that the claimant acted too forcefully by saying that she did not care about management views could have been proportionately dealt with by the giving of words of advice. Dismissing the claimant for it did not correspond with a real need in order to achieve that aim when balanced against the impact upon the claimant of the loss of her job.

142. The legitimate aim of the respondent identified by the Tribunal of the efficient provision of medical services to the public (particularly at a time of pandemic) again could have been met by allowing the claimant the opportunity of working from home undertaking the e-consultation work. This was work that needed to be done. Dr Dobson said that the claimant's hours could have been filled by undertaking that kind of work. The claimant's care navigator role within the surgery could have been filled by somebody else. Dismissing the claimant went nowhere towards the achievement of the aim as it led to the respondent having two vacancies to fill.

143. The dismissal of the claimant was, in our judgment, disproportionate. The impact upon the claimant was profound. She lost her job. For the reasons given, the dismissal of her did not correspond to a real need upon the part of the respondent in order to achieve its legitimate aims. The aims could have been achieved by the taking of proportionate measures short of dismissing the claimant.

144. Dr Ali was asked by the Employment Judge whether the claimant would have been dismissed were it not for the September 2020 incident. Dr Ali said that she would not have been dismissed were it not for what happened in the early part of September. Given our findings that the claimant did nothing wrong in the early part of September 2020 leads inexorably to the Tribunal reaching the only conclusion sensibly available to it. Even on Dr Ali's evidence, dismissal of the claimant arising from what happened on the morning of 8 October 2020 was disproportionate.

145. In conclusion, therefore, upon the section 15 complaint, the claimant has made out her claim. The respondent's justification defence fails. Although the instant case and the **O'Brien** case are factually distinct, we were encouraged by the respondent's counsel to assess proportionality by reference to the benchmark of the range of reasonable responses test applicable to ordinary unfair dismissal complaints. By reference to that benchmark, dismissal of the claimant fell outside the range of reasonable managerial prerogative. It must follow therefore that the dismissal of her was disproportionate.

146. We now turn to the complaints brought under the 1996 Act. We shall start with the claimant's complaint brought under section 103A of the 1996 Act (that she was unfairly dismissed for making a protected disclosure).

147. Section 103A of the 1996 Act protects those who are colloquially known as "*whistle blowers."* It is worth reminding ourselves of the background that led to the Public Interest Disclosure Act 1998 (which was incorporated into the 1996 Act). The

introduction to the IDS Employment Law Handbook *"Whistleblowing at Work"* says (at paragraph 1.2) that, "*Prior to the enactment of the Public Interest Disclosure Act, a worker who blew the whistle could expect to feel the full force of an organisation's disapproval – ostracism, criticism, poor appraisals, victimisation, blacklisting and even dismissal for breaching confidentiality. Faced with these disincentives, it was small wonder that few employees felt able to disclose what they knew or strongly suspected concerning malpractice or wrongdoing".* It goes on to say in paragraph 1.4 that the core purpose of the 1998 Act was to encourage disclosures to be made internally. That is to say, the 1998 Act encouraged employees to whistleblow to their own employer. As is said in the IDS Handbook, *"This is achieved by making the protection readily available so long as the worker raises his or her concern with the employer (or designated person). The intention is not only to reassure workers that it is safe and acceptable for them to make disclosures internally but also to make it more likely that employers will be forewarned of any malpractice or wrong doing and given the opportunity to take steps to deal with the problem".* In short, therefore, the mischief against which the 1996 Act is directed is the discouragement of employees and workers from raising issues for fear of retribution of some kind.

148. The Tribunal finds that the claimant raised disclosures which qualify for protection upon two occasions. The first of these was on 5 October 2020. The second disclosure was on 8 October 2020.

149. Our findings of fact upon the 5 October 2020 are at paragraphs 35 to 41. We have found that on 5 October 2020 the claimant said to Dr Moult and Emma Nicholson words to the effect that a patient who has been in contact with an individual who has tested positive for Covid should not come into the surgery. The claimant was conveying facts. She was providing information to the effect that the patient had arrived at the surgery and presented a Covid risk because of Covd contact. She therefore, in our judgment, had a reasonable belief that the health and safety of individuals was being endangered by the patient's presence within the surgery. In our judgment, the claimant reasonably believed that her own health and that of others (being other members of staff and patients) was being endangered by the presence of the patient.

150. Given that this took place during the Covid-19 pandemic and at a time of public messaging exhorting the dangers of breaching social distance guidelines, it is our judgment that the claimant had a reasonable belief that the presence of the patient was an endangerment to health and safety. The claimant was not simply raising an allegation that the presence of the patient was in breach of legislation or Covid guidance. She conveyed facts to Emma Nicholson and Dr Moult. We can see little difference between the example posited by the EAT in the **Geduld** case (to the effect that *"the wards have not been cleaned for the past two weeks. Yesterday sharps were left lying around")* on the one hand with the claimant saying *"This patient is present in the surgery but need not be in the surgery just to present her urine sample where she has been in contact with somebody who has tested positive for Covid"* on the other. Both of those statements convey information. It matters not of course that Dr Moult and Emma Nicholson were already aware of the patient's history.

151. We also find that the claimant had a reasonable belief that the provision by her of this information was in the public interest. In reality, there can be little argument with the proposition that it was (and for that matter remains) in the public interest to keep down the spread of Covid infection.

152. For very similar reasons, we find that the claimant made a protected disclosure on 8 October 2020 when she said words to the effect that the interns should not be entering the care navigators' room because they would not be able to adhere to social distancing requirements. Unlike with the 5 October 2020 incident (where the claimant made the disclosure during the course of the event) the disclosure on the morning of 8 October 2020 was about a future event: the imminent arrival of the interns into the room. In our judgment, the claimant conveyed information to Emma Nicholson to the effect that the introduction of third parties into the care navigators' room would breach social distancing guidelines. That concerns a future event and conveys information about it.

153. Again, it matters not that Mrs Nicholson may have been aware of this already nor that in the event the interns were only introduced one at a time and the claimant was not required to sit with one. At the time when the claimant made the disclosure, she had reasonable belief (because the respondent told her) that the interns were going to be introduced into the room. She conveyed information to Emma Nicholson to the effect that the health and safety of individuals (her and the other care navigators) was, by that move, likely to be endangered because the *'one meter plus'* rule would be difficult to adhere to. For the same reasons as with the 5 October 2020 incident, we find that the claimant entertained a reasonable belief that her disclosure was in the public interest.

154. The Tribunal finds that the principal reason for the claimant's dismissal was because she had made the protected disclosures. It is plain from the notes of the disciplinary hearing of 5 November 2020 that Dr Dobson took umbrage at the claimant questioning Dr Moult's clinical judgement on 5 October 2020. Dr Dobson took a dim view of what she perceived to be the claimant's challenge to line management authority and the questioning of a doctor's judgement. Dr Dobson specifically mentioned the incident of September 2020 as vindicating this view. (For the reasons already given, in the Tribunal's judgment, this was misplaced). Dr Dobson was concerned that the claimant would *"choose to do what [she] wanted".* She was concerned that, "*in the same situation she would do the same thing*."

155. Dr Ali was concerned that the claimant had refused to call the patient back in September 2020 and had disagreed with the introduction of the interns on 8 October 2020. She was looking for the claimant to offer a complete and unreserved apology.

156. In summary, the respondent perceived that the raising by the claimant of genuine and reasonably founded concerns on 5 and 8 October 2020 equated to dissent. Dr Ali went so far as to say that, "*I haven't got time to draw out of them [the staff] what makes them uncomfortable"*. This was a reference to employees raising issues of concern to them. The respondent was seeking a compliant workforce and looked askance at those raising issues that concerned the staff.

157. An adverse inference may also be drawn against the respondent upon its conclusions around the September 2020 incident. As has been said, the conclusion that the claimant had committed an act of insubordination around it was so flawed as to amount to a perverse decision. Further, the claimant had been led to believe by Emma Nicholson that the matter was concluded when they spoke on 7 September 2020. However, the respondent then chose to resurrect the matter in an attempt to demonstrate the claimant's insubordination. Mr Ryan was correct to suggest that delay in the pursuit of the matter after 7 September 2020 in and of

itself may not constitute unreasonableness or unfairness. However, it may do so in circumstances where the employee has been led to believe that a matter has been concluded and is then (as was the case here) unjustifiably resurrected by the employer.

158. There is, we think, much in the claimant's point that it is no coincidence that of the four care navigators she was the only one to be dismissed in circumstances where the other three had unfair dismissal protection by virtue of their length of service. We remind ourselves that the whole purpose of the 1998 Act is to safeguard whistleblowers. The real reason for the claimant's dismissal was her having raised the concerns on 5 October and 8 October 2020 and the apprehension by the respondent that she would do so were similar circumstances to present themselves again. The dismissal of somebody who has made a disclosure which qualify for protection because they may do so again falls four-square within the mischief which the 1998 Act is aimed at addressing. The three reasons given by the respondent for the claimant's dismissal were so weak for the reasons that we have outlined that an adverse inference is drawn as to the real motivation for the dismissal of the claimant.

159. The Tribunal rejects the respondent's argument that the reason or principal reason for the claimant's dismissal was the manner in which she raised her concerns. The respondent did not advance any argument that the claimant had behaved inappropriately on 5 October 2020 (other than by raising the issue with Dr Moult). The two concerns raised about the 8 October incident were the use by the claimant of the expletive and her expression of unhappiness. The first was disability related in any case. It was a one-off act and without precedent during the currency of the claimant's employment. The second, as has been said, was in reality innocuous in industrial relations terms. The manner in which the claimant went about making the disclosures of 8 October 2020 falls way short of, for example, the criminal offence committed by the complainant in the **Bolton Scho**ol case.

160. We now turn to the claimant's complaint under section 100(1)(c). There was no health and safety or safety representative committee *in situ*. Even if there had been, it would not have been practicable in any case for the claimant to have raised the concerns which arose on 5 October and 8 October 2020. There was simply insufficient time for her to do so given the circumstances which prevailed upon each day.

161. She therefore had no option but to raise her concerns there and then. The suggestion by Dr Dobson that she ought to have used the internal messaging system to communicate with Emma Nicholson on 8 October 2020 is unrealistic. Firstly, Emma Nicholson was standing with the care navigators in the care navigator's room. She was not at her own computer ready to receive messages from the claimant. Secondly, Emma Nicholson encouraged the claimant to voice her concerns there and then. Thirdly, the situation was urgent. As far as the care navigators were concerned, the interns were going to be introduced into the room in short order. They were already in the building. There was simply insufficient time to engage in back and forth through computer messaging.

162. For these reasons, we find that the claimant raised her concerns upon both days by reasonable means. We accept that were the claimant not to be a disabled person then the use of the expletive on the morning of 8 October may have constituted an unreasonable way of bringing the matter to an employer's attention. However, no such concern arises out of the 5 October incident. Further, the use

of the expletive was disability related in circumstances where the respondent discriminated against the claimant for it. In our judgment therefore the claimant raised her concerns by reasonable means and had a reasonable belief that health and safety issues were presenting themselves which were harmful or potentially harmful to health and safety.

163. The same reasoning applies upon the issue of causation as for the public interest disclosure case. The claimant has therefore made out her case that she was automatically unfairly dismissed for having raised a health and safety concern by reasonable means.

164. There is something of an oddity in the 1996 legislation in that in order to succeed with a complaint of automatic unfair dismissal the complainant must show that the reason or if more than one the principal reason was the reason which gives rise to automatic unfair dismissal. Here, the claimant has succeeded upon both of her heads of claim. Therefore, how can it be said that either of them is the sole reason or the principal reason? In our judgment, however, this is simply a matter of labelling. In reality, the concerns raised by the claimant on 5 and 8 October 2020 concern health and safety issues for which she was dismissed. Whether labelled as a health and safety dismissal or a public interest disclosure dismissal that was the principal reason for dismissal. The claimant ought not to lose protection simply because she can bring her claim under more than one statutory provision. Such would be a perverse conclusion.

165. We now turn to remedy issues. As was said at the outset, remedy issues shall be determined at a subsequent remedy hearing save for that of any issue arising out of the claimant's conduct.

166. Under the 2010 Act, the case of **Way and another v Crouch** [2005] ICR 1362, EAT is authority for the proposition that the Law Reform (Contributory Negligence) Act 1945 applies to discrimination law and Employment Tribunals can make a reduction from compensation to reflect contributory conduct. Discrimination under the 2010 Act is a statutory tort, hence the applicability of the 1945 Act.

167. The correct way for the Tribunal to consider the issue of contributory negligence is to assess the parties' causative contributions to the discrimination in question and in the light of that assessment decide what would be a just and equitable apportionment. The Tribunal is required to reduce damages to such extent that is just and equitable. This test involves a consideration of the relative blameworthiness or causative potency of the claimant and the respondent and their causative effect. The Tribunal will consider whether the act or omission of the claimant caused or contributed to the statutory tort imposed upon her by the respondent.

168. In our judgment, the respondent bears all of the causative potency. The three issues upon which basis the claimant was dismissed do not make it, in our judgment, just and equitable to reduce the claimant's compensation. Firstly, she did nothing wrong in early September 2020. Secondly, the expletive was disability related. Thirdly, the comment about management was innocuous, uttered in stressful circumstances and ought to be something which was capable of being managed by Emma Nicholson.

169. We now turn to the issue of conduct as it relates to the complaints brought under the 1996 Act. By section 123(6) of the 1996 Act: *"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce … the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

170. In **Nelson v BBC (No 2)** [1980] ICR 110 CA, the Court of Appeal said that three factors must be satisfied if the Tribunal is to find contributory conduct:

- The relevant action must be culpable or blameworthy.
- It must have actually caused or contributed to the dismissal.
- It must be just and equitable to reduce the award by the proportion specified.

171. There may be a reduction for conduct upon complaints of automatic unfair dismissal. Therefore, there is scope for the Tribunal to make such a reduction int his case.

172. There is little doubt that the claimant's actions caused her dismissal. Indeed, the respondent dismissed the claimant because of what she did in early September 2020 and the first week of October 2020. The causal link is therefore established.

173. However, the Tribunal finds that the relevant action was not culpable or blameworthy for the same reasons as upon our findings around the 1945 Act and its applicability to the claimant's discrimination claim under the 2010 Act. In **Nelson**, the Court of Appeal explained that the concept of culpable or blameworthy conduct extends to that which may be considered to be "*perverse or foolish", "bloody minded"* or merely *"unreasonable in all the circumstances."* We find that none of these epitaphs fit what the claimant did. She was innocent of any wrong-doing in the early September 2020 incident. The disability related outburst cannot be viewed in these terms. Her comment about management's reluctance to hear the claimant's complaint was something that was reasonable in all the circumstances and was simply part of the back and forth of industrial relations.

174. For the same reasons, the Tribunal considers it to be just and equitable not to make any reduction to the claimant's compensation under section 123(6) of the 1996 Act. In particular, the Tribunal sets store by the acute stress faced by the claimant given the previous day's medical consultation coupled with the imminent introduction of third parties into the workplace bubble in the midst of the most serious healthcare pandemic for around a century.

175. In the circumstances, the claimant's complaints succeed. The matter shall now be re-listed for a remedy hearing. Should the parties consider that it would be helpful to have a case management hearing before the Employment Judge for the good conduct of the remedy hearing then the parties shall write within 21 days of the date of promulgation of this Judgment.

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**Employment Judge Brain**

Date: 10 September 2021

Date: 13 September 2021