EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Cefyn Jones	AND	Hemp Trades Association Limited Trading as Cannabis Trades Association

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 10 and 11 October 2022
And in chambers on 12 October 2022

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms R Hewitt-Gray
Mr I Ley

Representation

For the Claimant: **In person**
For the Respondent: **Mrs M Graham-Woods, Director**

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are all dismissed.

REASONS

1. In this case the claimant Mr Cefyn Jones, who was dismissed by reason of redundancy, claims that he has been unfairly dismissed, both automatically for having made protected public interest disclosures, and generally. He brings a further claim of detriment on the grounds of having made protected public interest disclosures. He also claims that he was discriminated against because of a protected characteristic, namely disability. The claim is for direct discrimination; because of the respondent's failure to make reasonable adjustments; and for harassment and victimisation. The respondent denies the claims. It contends that the reason for the dismissal was redundancy, that the dismissal was fair, that there was no discrimination, and that in any event the discrimination claims were presented out of time.

2. The procedural history of this claim
3. There have been four preliminary hearings in this case before this full main hearing, dealing with the claimant's disability status which the respondent continued to dispute, and various case management issues which the parties remained unable to agree. At a preliminary hearing on 7 March 2022 Employment Judge Oliver determined that the claimant was a disabled person by reason of dyslexia and dyspraxia at all material times. Employment Judge Oliver also agreed with the parties, and set out in detail, the List of Issues which were to be determined by this Tribunal at this full main hearing. These various claims are all set out and determined in this judgment.
4. It is fair to say that the evidence adduced by the parties at this hearing did not address all of the issues which they had earlier agreed were to be determined. In particular, the respondent is under new management, and did not adduce any evidence to support its blanket denial of allegations against the previous management regime, other than to allege that they were presented out of time. On the other hand the claimant did not address the out of time issues.
5. We have heard evidence from the claimant. We also accepted a statement of evidence from his wife Mrs KM Jones whose evidence the respondent did not seek to challenge. In addition, we accepted a statement from Mr A Dumbiotis on behalf of the claimant, but he was not present to be questioned and we can only attach limited weight to this evidence.
6. For the respondent we have heard from Mrs S Phillips, Mrs D Clayton, and Mrs M Graham-Woods. Both Mrs Phillips and Mrs Clayton gave their evidence remotely by video with the consent of all parties.
7. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
8. The Facts
9. The respondent company trades as the Cannabis Trades Association. It describes itself as the largest trade body in both Europe and the British Isles representing the interests of the cannabis and hemp industry. It invites membership from traders in the industry, and it provides support and information, and a business forum for its members.
10. The claimant Mr Cefyn Jones suffers from dyslexia and dyspraxia. He commenced working with the respondent as a volunteer in June 2018 and commenced employment with the respondent shortly thereafter on 20 August 2018. His main role was as point of contact for the respondent's members as a Member Services Administrator. He was well informed as the law around the cannabis industry and during the claimant's employment the respondent's members doubled from about 220 to about 450.
11. In February 2020 the claimant attended the Hemp & CBD Expo, a trade exhibition. The respondent's managing director was Mr Mike Harlington and the claimant overheard his wife say to him "stop embezzling members' money!". The claimant was concerned about this and he asserts that he reported the conversation to Mrs Sian Phillips, from whom we have heard, who was then the Communications and PR Director, and Ms Nicola Dowling who was then Compliance Assistant. Both Mrs Phillips and Ms Dowling have subsequently denied that the claimant told them this at that time, and as the weight of evidence is against the claimant on this point we prefer their evidence to that effect.
12. In any event the claimant asserts that the atmosphere at work began to change. He was assigned a new direct line manager Mr Nico Will who was a close personal friend of the Harlingtons. It was at this stage that the claimant says that he began to be treated poorly by Mr Will and Mrs Harlington.
13. On 3 March 2020 Mr Will was apparently concerned about holiday cover and asked the claimant to prepare a graph setting out the work cover arrangements for employees between 3 and 13 March 2020. The claimant seemed reluctant to do this, but he was

then told by Mr Will to complete the task as instructed. That seems to us to have been an ordinary and reasonable work instruction.

14. On 3 March 2020 Mr Will also asked the claimant to fill in a new database on top of the one which he was using at the time. The claimant complained about his workload and reminded Mr Will of his dyslexia and dyspraxia. The claimant asked for a second screen and for training on the new database. Mr Will refused and told him: “No, just do it”
15. On 13 March 2020 Mrs Harlington telephoned the claimant and criticised him for not completing the new database. Mr Will subsequently arranged a Teams meeting with the claimant and criticised him for the same issue. The claimant again reminded him of his disabilities and again Mr Will just told him to get on with it. The same pattern was repeated on 18 June 2020 and on 31 July 2020. There was another incident on 31 July 2020 when Mr Will accused the claimant and making up his disabilities and using them as an excuse. During this time, on 18 June 2020, Mr Will refused another request from the claimant for a second screen. This was eventually provided by Mrs Phillips on 31 July 2020.
16. By July 2020 Mr Mike Harlington the former managing director had been voted off the respondent’s Board. It felt that his actions and comments damaged the respondent’s business. The respondent was in a difficult financial position. The national lockdown during the Covid pandemic was having its effect, and a number of smaller businesses sought to reduce their costs by leaving membership of the respondent. That had previously represented 450 paying members, but this number had been reduced to about 200.
17. Mrs Marika Graham-Woods, from whom we have heard, joined the respondent’s Board as an unpaid non-executive director in July 2020. In addition, Mrs Sian Phillips was appointed as the respondent’s new Acting Managing Director on 10 June 2020. She decided to conduct a full review of the respondent’s business, processes and staff. She informed the staff of her intentions at a meeting on 12 June 2020. Mrs Phillips described the respondent’s circumstances at that stage as “perilous” because of the respondent’s significant costs and salary bill which were too high to be met by its falling membership numbers.
18. On 4 August 2020 Mrs Phillips made contact with the claimant in connection with a work issue. She did not know that the claimant was absent on holiday and the matter was dealt with on his return. The claimant complains that Mrs Phillips did not subsequently apologise for having made contact with him on holiday.
19. During July and August 2020 Mrs Phillips reviewed all aspects of the respondent’s business including its staff and structure and HR operations; its membership and management systems including its website; its legal and financial provision; its marketing and PR; its IT and technology; and its strategy policy and lobbying. It became clear to her that there was inadequate staff and HR support and she appointed Mrs Debbie Clayton, an independent HR adviser, from whom we have heard, to undertake a staff review.
20. Mrs Clayton reviewed matters from early September 2020, by which stage the respondent’s membership had declined by 40%. Streamlining and reducing costs became Mrs Phillips’ priority as the new managing director. Mrs Phillips decided to outsource as many of the processes as possible in order to reduce their costs. This included human resources, IT services, the company website, online call booking, and graphic typesetting.
21. Mrs Clayton discussed her review of the employees and staff processes with Mrs Phillips, and in early September Mrs Phillips decided to implement redundancies in order to save costs. However, they wished to ensure that the least harm was occasioned to the running of the membership services and they wished to make membership processes more efficient. Mrs Phillips presented proposals for restructuring to the Board of Directors of the respondent at the beginning of November 2020.

22. Meanwhile in late September 2020, probably on or about 28 September 2020, the claimant reported to Mrs Phillips his concerns that Mr Harlington had been embezzling members' money. He reported to Mrs Phillips that he had overheard Mrs Harlington accusing Mr Harlington of embezzling members' money at the end of February 2020 at the trade exhibition, and that he believed that this money had still not been accounted for. Mrs Phillips agreed to investigate the matter.
23. On Friday 30 October 2020 the respondent received a complaint from one of its members that the claimant had not dealt with membership money appropriately. He was suspended with immediate effect pending investigation. That investigation took place without delay and was found to have been without substance. The claimant was immediately reinstated on Monday, 2 November 2020.
24. During the review of staff processes it became clear to the respondent that it had limited information with regard to the claimant's disability. The claimant had mentioned his disability on his application form, but this had not been brought up to date and there been no recent discussion about any necessary adjustments. Mrs Phillips asked the claimant if he could provide confirmation of his disability and what this might entail by way of letter from his GP. The claimant agreed to do so. He did not however produce the letter, had to be reminded of the request. Instead, he then produced a letter from 2013 confirming that he had received support from mental health issues as a student. Mrs Phillips felt this to be inadequate and renewed her request for a doctor's letter, with the last such request being on 23 November 2020. The claimant appears to have taken this to mean that the respondent doubted that he was disabled at all.
25. There was also an incident on 19 November 2020 as explained in the claimant's statement when he says that Mrs Phillips "demanded answers on how I knew AF and Orange County were the reason for my suspension on 28 October 2020. I asked if the investigation that had been closed by MD had been reopened. SP chose not to reply."
26. On 16 November 2020 Mrs Phillips emailed all members of staff to say the company review been completed and that a formal consultation period would commence with probable changes to staff structure and job roles. The first round of consultation meetings then took place on 19 and 20 November 2020. Two employees were informed that the roles were at risk of redundancy and one of these was the claimant. The respondent had hoped to retain all staff members and invited consultation on any suggestions within 10 days before a second consultation meeting.
27. During this consultation process on 20 November 2020 the respondent held a consultation meeting with a junior employee Steph Powell immediately before the consultation meeting with the claimant. She was told at that stage that she was unlikely to be made redundant. The claimant became aware of this and assumed as a result that his redundancy was a foregone conclusion.
28. The claimant's first consultation meeting then took place, and he reacted aggressively. He said that he wished to pursue grievances against Mrs Harlington and Mr Will during the consultation meeting. Mrs Clayton advised that the respondent should hear this grievance separately, and she subsequently commenced that process and wrote to Mrs Harlington and Mr Will to that effect.
29. The claimant did not respond as invited following the consultation meeting but did react in other ways. First, he raised a Subject Access Request against the respondent on 20 November 2020 (to which the respondent did not reply until after the end of the claimant's employment). Secondly, he then wrote an email to all directors on 23 November 2020 which ran to four pages and raised a number of complaints of previous discrimination against him and the fact that his dismissal for redundancy was already a foregone conclusion. The respondent decided to deal with the claimant's grievance and complaints as compared to his redundancy consultation as to discrete issues. The respondent did not ignore that email, but it did commence an investigation into the complaints following completion of the consultation process. Thirdly, on 4 December 2020 he appeared to have set himself up in competition with the respondent by registering a new business under the name of The Hemp Hound. This subsequently resulted in the respondent instructing solicitors to write to the claimant on 26 January

2021 seeking undertakings from him not to breach his contractual confidentiality provisions in order to avoid proceedings. In any event the claimant did not engage constructively in the consultation process as invited.

30. The second round of consultation meetings was held on 10 December 2020. Mrs Phillips felt uneasy about dealing with the matter given the claimant's reaction to her earlier involvement, and after which the claimant had begun to make a number of personal allegations against her. Mrs Clayton asked Mrs Graham-Woods, a director of the respondent from whom we have heard, to take that meeting. The claimant attended and was accompanied by Mr Dumbiotis. There appears to have been something of a dispute about his status: he confirmed that he was acting as the claimant's friend, but he was a retired police officer and legal executive, and the respondent felt it was inappropriate that the claimant should be accompanied by a legal representative.
31. The claimant again tried to introduce numerous examples of bullying and harassment within the workplace rather than address the issues of the potential redundancy which was the purpose of the consultation meeting. At the end of that meeting Mrs Graham-Woods confirmed to the claimant that the respondent was going to introduce its new structure as of 1 January 2021, and that the claimant would be made redundant with effect from 31 December 2020. The reason given was that the respondent was automating the member enquiries procedures which would involve removing the direct line in, with all enquiries being directed through a contact system and put telephone calls. There would therefore be a significant reduction in the work for which the claimant was employed.
32. Within the structure the respondent was also creating a new position of Compliance Assistant (but not employing a new employee from outside of the organisation to fill it). The claimant wanted to do this job and was told that he was entitled to apply for it, but that the respondent doubted that he had the necessary qualifications. In the event the claimant did not apply. There were no other vacancies or opportunities for alternative employment within the respondent small organisation.
33. By email dated 11 December 2020 the claimant appealed against the decision to dismiss him. He alleged that he had been selected for redundancy because of the grievances which he had raised and that there was no true or fair consultation process. He complained he was qualified to do the new Compliance Assistant role and that no steps have been taken to find him alternative employment.
34. Mrs Clayton dealt with the claimant's appeal by way of a review rather than a rehearing of any evidence. Having reviewed the process, she rejected the claimant's appeal by letter dated 18 December 2020. She stated in that letter that the claimant had not raised anything which would change the outcome of the redundancy, and that the claimant did not have the relevant experience or qualifications to meet the job description of the new Compliance Assistant position.
35. The claimant asserts that his redundancy was a sham as a result of his previous whistleblowing and discrimination complaints. He also asserts that a colleague namely Steph Powell ended up assuming most of his previous duties. The respondent agrees that a number of existing duties were spread around other members of staff following the restructure, but equally a number of duties were no longer undertaken by employees because they were contracted out to other suppliers. As a result of the restructuring and redundancy process the number of employees working for the respondent was reduced from about eight to six, with the claimant and Mr N Will both having been made redundant.
36. Meanwhile the claimant had already commenced the Early Conciliation process with ACAS. He consulted ACAS on 11 December 2020, and ACAS issued the Early Conciliation Certificate on the same day, 11 December 2020. Following the expiry of his notice period, the effective date of termination of the claimant's employment was 31 December 2020. The claimant then presented these proceedings on 1 February 2021
37. Having established the above facts, we now apply the law.
38. <u>The Law</u>

39. The law relating to each of the claimant's claims is as follows:
40. Protected Public Interest Disclosures – Whistleblowing Claims
41. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
42. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
43. Under section 103A of the Act, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
44. Under section 47B of the Act, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
45. Under section 48(2) of the Act, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
46. We have considered the cases of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT; Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; Fecitt and Ors v NHS Manchester [2012] ICR 372 CA; Kuzel v Roche Products Ltd [2008] ICR 799 CA; Blackbay Ventures Limited t/a Chemistree v Gahir UK/EAT/0449/12/JOJ; Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] EWCA Civ IDS 1077 p9; Underwood v Wincanton Plc EAT 0163/15 IDS 1034 p8 Parsons v Airplus International Limited EAT IDS Brief 1087 Feb 2018 Ibrahim v HCA International Ltd [2019] EWCA Civ.
47. The statutory framework and case law concerning protected disclosures was summarised by HHJ Tayler in Martin v London Borough of Southwark (1) and the Governing Body of Evelina School UKEAT/0239/20/JOJ. He referred to the dicta of HHJ Auerbach in Williams v Michelle Brown AM UKEAT/0044/19/00 at para 9: "it is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."
48. The claimant relies on four protected public interest disclosures. The first and second of these relate to the allegation that Mr Harlington was not accounting properly for funds raised from members of the respondent. The claimant asserts that on 29 February 2020 he disclosed verbally to the respondent that he had overheard Mrs Harlington say to her husband Mr Harlington "stop embezzling members' money". The claimant asserts that the disclosure was made to both Mrs Phillips and Nicola Jones (formerly Dowling). However, they both deny that the claimant made his verbal disclosure to them and both signed short statements to that effect in the course of a

subsequent investigation. On balance we find that the claimant has not discharged the burden of proof that he made this first (verbal) disclosure on 29 February 2020.

49. However, the second disclosure is conceded by the respondent. This is that on 7 October 2020 the claimant reported to Mrs Phillips that a member had paid between £30,000 and £40,000 to the respondent but there was no record of any payment into the respondent's bank account. This was in the context of Mr Harlington having failed appropriately to account for that money. Mrs Phillips concedes that this disclosure was made to her, but it was more probably made on 28 September 2020 rather than early October 2020.
50. We find that this was a protected public interest disclosure, which was made on or about 28 September 2020. It was a disclosure of information to the effect that either a criminal offence had been committed, or a legal obligation had been breached. The claimant genuinely believed that this was the case. In addition, the disclosure was in the public interest bearing in mind that the number of the respondent's members varied between approximately 200 and 400, and it is clearly in their interest to ensure that any membership fees were accounted for properly. The disclosure was made to the claimant's employer. The disclosure therefore complies with ss 43B(1)(a) and (c) and 43C(1)(a) of the Act.
51. The third disclosure relied upon is an email on 17 November 2020 under which the claimant asserts that he complained to the respondent's directors that some of his personal information had been withheld. We have seen the exchange of emails between the claimant and Ms Dowling and Mrs Phillips at that time, and subsequently to the other directors. We do not accept that the claimant made a disclosure of information relating to his personal information which satisfied any of the conditions of section 43B(1). There is repetition of the claimant's concerns about the financial matter which we have already found to have been a protected public interest disclosure as above. However, we are not satisfied, and do not accept, that there was any further protected public interest disclosure relating to the claimant's personal information at the time alleged.
52. The fourth disclosure relied upon is that on 23 November 2020 the claimant disclosed that the respondent was withholding his personal information, and Mr Harlington's actions, from the respondent's membership. We have seen the exchange of emails on 23 November 2020. Mrs Phillips wrote to the claimant in the course of the respondent's redundancy consultation process seeking further suggestions before any final decision was made. The claimant replied with a detailed email running to nearly five pages complaining about the treatment which he perceived he had received from the respondent. The claimant repeated his disclosure concerning the money which he felt Mr Harlington had embezzled from the respondent. However, we do not accept that there was any specific disclosure relating to the withholding of personal information of the claimants, or in connection with holding Mr Harlington's actions from the membership. There is no information about the breach of any legal obligation in either respect, or what that legal obligation would be. There is repetition of the claimant's concerns about the financial matter which we have already been found to be a protected public interest disclosure as above. However, we are not satisfied, and do not accept, that there was a further protected public interest disclosure at the time alleged.
53. In conclusion therefore we find that the claimant made one protected public interest disclosure which he alleged was on 7 October 2020, but which was conceded by the respondent to have been on or about 28 September 2020, and we so find.
54. <u>Detriment:</u>
55. The definition of Detriment is to be interpreted widely: see <u>Warburton v the Chief Constable of Northamptonshire Police</u> [2022] EAT - it is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the ET itself. The ET might be of one view, and be

perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.

56. We have considered the guidance in Fecitt and Ors v NHS Manchester and we have considered whether the disclosure materially influenced the respondent's treatment of the claimant in the sense that that influence might have been more than trivial.
57. The claimant has brought 15 separate alleged detriment claims which are said to have arisen from his alleged protected public interest disclosures. However, those numbered 5.1.1, 5.1.2, 5.1.4, 5.1.5, 5.1.6, 5.1.7, 5.1.8, and 5.1.12 in the agreed list of issues in the case management order dated 8 March 2022 all predate 28 September 2020. They cannot therefore be detriments which had been caused by the one protected public interest disclosure which we have found to have taken place on 28 September 2020. For this reason, they are all dismissed. We now deal with the remaining detriment claims in order as follows.
58. Claim numbered 5.1.3 is that Mrs Phillips demanded on at least three occasions, the last being 23 November 2020, that the claimant provide proof of his disabilities even though he had provided a letter from a special-needs coordinator. We agree with the respondent's assertion that it was entitled to ask for proof of the claimant's diagnosis of disability in the form of a doctor's letter. We do not accept that the claimant suffered a detriment in this respect, but even if that does fit the definition of a detriment, we cannot find that it was caused by or materially influenced by the claimant's disclosure.
59. The next claim numbered 5.1.9 is that the claimant was suspended on 30 October 2020 after allegations were made by a new member when others were not suspended when the claimant made his complaints. We accept that it is a detriment to be suspended, but in this case the claimant's suspension followed serious allegations which a member had raised against the claimant. There was an immediate investigation into the allegations raised, which were found to be untrue, and the claimant was immediately reinstated. We do not accept that the decision to suspend the claimant was caused by or materially influenced by the claimant's disclosure.
60. The next claim numbered 5.1.10 relates to Mrs Clayton and Mrs Phillips telling another employee that her job was safe on 20 November 2020. We deal with this in connection with the redundancy dismissal below. This was in the course of the consultation process involving all of the employees of the respondent. We do not accept that it was a detriment at that stage to the claimant (who had not yet commenced his consultation) to learn that another employee was unlikely to be made redundant. We find that the respondent was entitled to take this course of action and this was not a detriment which was caused by or materially influenced by the claimant's earlier disclosure.
61. The next claim numbered 5.1.11 was not allowing the claimant to ask questions on his final redundancy meeting on 10 December 2020. We find that the respondent was entitled to limit the claimant's questioning to matters relating to redundancy consultation at that time, and not to allow further discussion as to the claimant's historical complaints, and we do not find that the claimant suffered a detriment in this respect nor that any such detriment was caused by or materially influenced by the claimant's disclosure.
62. The next claim numbered 5.1.13 is not offering the claimant retraining as part of the redundancy process. We do not accept that it is a normal or necessary part of redundancy consultation process to offer training to one or more employees, and in this instance, it was not the case that others were offered training to their benefit when the claimant was not. We do not accept the claimant suffered detriment in this respect, nor that any such detriment was caused by or materially influenced by the claimant's disclosure.
63. The next claim numbered 5.1.14 is requiring the claimant to go through a redundancy process with people "conflicted by unresolved previous complaints" and finishing the process with a different chairperson. In the first place, the respondent is a small employer with a limited number of managers, who had taken independent advice on

the redundancy consultation process. The allegation that there was a different chairperson at the end would appear to contradict the claimant's complaint that previous managers should have been replaced. In any event we find that the respondent was entitled to conduct the process in the way that it did, which focused on the redundancy consultation process and not the earlier complaint. We do not accept that the claimant suffered a detriment in this respect, and in any event there was no such detriment which was caused or materially influenced by the claimant's disclosure.

64. The final allegation number 5.1.15 was the respondent's instructing its solicitors to send "cease and desist" orders on the claimant on 26 January through contractual breaches, and to prevent the claimant from explaining why he had been made redundant. We accept that the respondent sent a letter before action through its solicitors, but this was on the basis that it considered, and presumably had received advice, to the effect that the claimant was in breach of his contract of employment. The letter sought undertakings that the claimant would protect the respondent's confidential information as he had earlier promised to do in his contract. Even if such a letter were to be a detriment, we do not accept that it was caused by or materially influenced by the claimant's earlier disclosure.
65. For the above reasons we do not find that the claimant suffered any detriment as a result of or which was caused by or materially influenced by his previous disclosure and accordingly we dismiss his claim for detriments arising from protected public interest disclosure.
66. Automatically Unfair Dismissal section 103A of the Act
67. The next question which arises is whether the claimant's whistleblowing on or about 28 September 2020 was the principal reason for his dismissal. We have to consider whether the claimant has produced sufficient evidence to raise the question as to whether the principal reason for the dismissal was the protected disclosure. We also have to consider whether the respondent has proven its reason for the dismissal, namely redundancy.
68. We have considered the guidance in Fecitt and Ors v NHS Manchester and we have considered whether the disclosure materially influenced the respondent's treatment of the claimant in the sense that that influence might have been more than trivial.
69. For the reasons set out in our analysis of the redundancy dismissal which now follow below we find that there was a general redundancy situation, and that the claimant's dismissal was attributable to that redundancy. We cannot find that the respondent's decision to dismiss the claimant by reason of redundancy was materially influenced by the claimant's previous disclosure, and we do not find that the reason for the claimant's dismissal, or if more than one the principal reason, was that he had made the protected disclosure.
70. We therefore dismiss the claimant's claim for automatically unfair dismissal under section 103A of the Act.
71. Redundancy Dismissal
72. The reason relied upon by the respondent for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("the Act").
73. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish"
74. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted

reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case". The reason for the dismissal was capability which is a potentially fair reason for dismissal under section 98(2)(a) of the Employment Rights Act 1996 ("the Act").

75. We have considered the cases of Williams & Ors v Compair Maxam Ltd [1982] IRLR 83; Safeway Stores v Burrell [1997] IRLR 200 EAT; Langston v Cranfield University EAT [1998] IRLR 172; Osinuga v BPP University Legal Team [2022] EAT 53; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. I take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
76. Unless the parties have explicitly agreed to the contrary, the Tribunal must consider whether the respondent has reasonably consulted with the employee, adopted a fair selection process, and made reasonable efforts to find reasonable alternative employment within its organisation (see Langston). This was reaffirmed in Osinuga, which also held that the Tribunal should consider Polkey and related matters.
77. There are a number of important background matters which arose prior to the claimant's dismissal for redundancy. It appears that the respondent was badly organised and badly managed. It was losing members and it was in financial difficulties. New members of management took over and conducted a review of all aspects of the respondent's business, which included advice from an independent external consultant. This review included the number and roles of the various employees and whether it was necessary to make redundancies. It is hardly surprising against this background that redundancies became necessary, particularly as the respondent implemented recommendations to outsource and/or to automate some of its processes.
78. The Claimant asserts that his redundancy was a sham, and that his duties remained to be done, and were delegated to other employees. The claimant also conceded at this hearing that his duties diminished by approximately 40%. That in itself would ordinarily suggest redundancy. In fact, that is not quite the point. The statutory definition in section 139 of the Act provides that the definition of redundancy is satisfied if the respondent's requirements for employees to carry out work of a particular kind have ceased or diminished. It does not necessarily matter how work might be allocated.
79. We are satisfied that the respondent's requirements for employees to carry out work of a particular kind did diminish. There was a genuine redundancy situation. The claimant's dismissal was attributable to that redundancy. We next have to consider the extent to which the process adopted by the respondent was a fair one.
80. The claimant has raised four specific allegations of unfairness. The first relates to the consultation process. The claimant complains that "the process was predetermined, involved individuals who were conflicted, there was no continuity, and he was refused the right to ask questions during his final redundancy meeting." We do not accept that the process was predetermined (although we understand that employees who eventually become dismissed during a process can think that that was the case). The respondent was a small employer with a limited number of managers at senior level who were available to consider the process, and they had access to independent advice. At the final consultation meeting we accept that the claimant was not allowed to use that meeting as a forum for proceeding with his various complaints, and that questions in this respect were not allowed, but the claimant was permitted to express his views to the extent they related to the redundancy process. For that reason it was genuine consultation.
81. The second allegation of unfairness is that: "another employee at a lower level but similar salary was told their job was safe approximately two hours before his redundancy meeting." This refers to Steph Powell, who was a junior employee who was also involved in the consultation process. She had a consultation meeting immediately before the claimant and was told at that stage that she was unlikely to be made redundant. It is not unusual for employers in the consultation process to reassure employees who are unlikely to be dismissed. At that stage the claimant was still able

to make his views clear at his forthcoming consultation meeting, the respondent had not yet made a decision as to the claimant's employment.

82. The third allegation of unfairness is that the claimant says that he was denied retraining and refused the right to apply for the position of Compliance Assistant. In the first place there is no hard and fast rule that any employer needs to offer retraining to one or more employees during a redundancy process. That may or may not be appropriate or reasonable, and obviously depends on the circumstances. In this case the claimant was told that he could apply for the position of Compliance Assistant although the respondent doubted that he had the appropriate qualifications. In the event the claimant did not apply for that position. It is not the case that the respondent appointed a new external candidate to that position in circumstances where limited retraining could have resulted in the claimant being retained in that position.
83. The fourth allegation of unfairness is that the claimant was refused an appeal meeting. In fact, the respondent did process the claimant's appeal. It was not a full rehearing, but rather it was a review. Having reviewed the surrounding circumstances Mrs Clayton decided to reject the claimant's appeal. There is no hard and fast rule that an employee in these circumstances is entitled to a full rehearing of all matters, and in this case the respondent did consider the matters raised by the claimant on appeal.
84. In this case we find that there was a genuine redundancy situation, and that the claimant's dismissal was attributable to that redundancy. We find that the respondent reasonably consulted with the employee, adopted a fair selection process, and made reasonable efforts to find reasonable alternative employment within its organisation.
85. It is not for this Tribunal to substitute its view for that of the respondent. There is a band of reasonable responses open to an employer when faced with these facts. We find that the respondent's decision to dismiss the claimant was within the band of responses reasonably open to it in these circumstances. Bearing in mind the size and administrative resources of the respondent we find that the claimant's dismissal for redundancy was fair and reasonable in all the circumstances of the case. We therefore dismiss the claimant's unfair dismissal claim.
86. <u>Disability Discrimination</u>
87. This is also a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct disability discrimination, failure by the respondent to comply with its duty to make adjustments, harassment, and victimisation.
88. As for the claim for direct disability discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
89. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
90. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or

creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

91. The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The following are all examples of a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
92. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
93. We have considered the cases of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Nagarajan v London Regional Transport [2000] 1 AC 501; Cordell v Foreign and Commonwealth Office [2012] ICR 280; Environment Agency v Rowan [2008] IRLR 20 EAT; Ishola v Transport for London [2020] ICR 1024 CA; Nottinghamshire City Transport Ltd v Harvey [2013] EqLR 4 EAT General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 EAT.
94. Direct Discrimination s13 EqA
95. The claimant has presented four claims of direct discrimination. The first claim relates to the events of 13 March 2020, 18 June 2020 and 31 July 2020 when Mrs Harlington intimidated the claimant on the telephone, which was followed by an intimidating call on Teams by Mr Will. The less favourable treatment was being shouted at and intimidated. This was in the context of discussions about the claimant's disability, which he specifically raised.
96. The second claim relates to Mr Will stating to the claimant on 31 July 2020 that the claimant's disabilities were not real and that he used them as an excuse. The less favourable treatment was being accused of dishonesty in making up the existence of his disabilities and deliberately deceiving the respondent as to their effect.
97. In respect of each of these first two claims we have heard no evidence from the respondent in rebuttal to the claims presented by the claimant, in respect of which he gave his own evidence, and was not then cross-examined.
98. With regard to a claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his disability than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been treated in the same less favourable manner.
99. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.

100. Direct discrimination is based on comparative treatment. It must be established that the claimant was treated "less favourably" than someone else, who will be either an actual person or a hypothetical person. Either way, a comparator must be in materially the same circumstances (see section 23(1) EqA which provides: "on a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case"). Even if the claimant is treated less favourably than an appropriate comparator, it must have been "because" of disability. This requires the Tribunal to determine the reason why the claimant was treated less favourably. (This is not to say that the comparator issue is a threshold to be crossed before "the reason why" is addressed: the focus must always be on why the respondent treated the claimant as it did: <u>Shamoon v Chief Constable of the Royal Ulster Constabulary</u>). Discrimination is only made out if disability had a "significant influence on the outcome": <u>Nagarajan v London Regional Transport</u>. Disability itself must be the reason for the treatment, not something related to a disability: <u>Cordell v Foreign and Commonwealth Office.</u>

101. With regard to these first two claims, we find that the claimant suffered less favourable treatment because of his disabilities in circumstances where his actual non-disabled colleagues, and/or a hypothetical non-disabled colleague, were not, or would not have been, treated in the same manner. In the absence of any adequate explanation from the respondent we find that the claimant would ordinarily have succeeded in his first two claims of direct discrimination. However, these claims were presented out of time, for which see further below.

102. We reject the remaining two claims of direct discrimination. The third claim relates to Mrs Phillips requesting the claimant provide a Doctor's letter setting out confirmation of his diagnosis of disability. Mrs Phillips' evidence (which was not challenged) was that during the staff review it became clear that the information provided by the claimant as to his disability on his application form was sparse. She discussed this with the claimant and asked him to provide a letter from a doctor explaining the exact nature of the disability and whether the respondent needed to do anything to accommodate him. The claimant agreed to provide that letter. He had to be reminded to do so. As it happened the claimant then only provided a letter from a student adviser in 2013 which Mrs Phillips did not consider sufficient for the purposes. She requested the claimant to provide the doctor's letter as agreed. The date of the last request was about 19 or 20 November 2020.

103. We find that it is not the case that Mrs Phillips treated the claimant less favourably because of his disability as compared to a non-disabled comparator in the same circumstances. She was following up the claimant's agreement to provide a doctor's letter. She would have done the same for a hypothetical non-disabled comparator, who had agreed to provide a doctor's letter but had not done so.

104. The fourth claim relates to Mr Will's requirements for the claimant to prepare a graph to explain work cover arrangements between 3 and 13 March 2020. We agree with the respondent's assertion that Mr Wills was merely managing the claimant, and there is no evidence that the claimant was treated less favourably because of his disability than a non-disabled comparator was or would have been.

105. With regard to the third and fourth claims of direct discrimination, the claimant has not proven any facts upon which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that an act of discrimination has occurred. In these circumstances these third and fourth claims fail, and they are dismissed.

106. The claimant does however potentially succeed in his first and second claims for direct discrimination, subject to the time point below.

107. <u>Reasonable Adjustments</u>

108. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in <u>Environment Agency v Rowan</u>. Before considering whether any proposed adjustment is reasonable, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of the employer;

(ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant.

109. Environment Agency v Rowan has been specifically approved by the Court of Appeal in Newham Sixth Form College v Sanders - the authorities make it clear that to find a breach of the duty to make reasonable adjustments, an employment tribunal had first to be satisfied that there was a PCP which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The tribunal had then to consider the nature and extent of the disadvantage which the PCP created by comparison with those who were not disabled, the employer's knowledge of the disadvantage, and the reasonableness of proposed adjustments.

110. As per HHJ Richardson at para 37 of General Dynamics Information Technology Ltd v Carranza UKEAT/0107/14 KN: “The general approach to the duty to make adjustments under section 20(3) is now very well-known. The Employment Tribunal should identify (1) the employer's PCP at issue; (2) the identity of the persons who are not disabled with whom comparison is made; and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the Employment Tribunal is in no position to find what, if any, step it is reasonable for the employer to have to take to avoid the disadvantage. It is then important to identify the "step". Without identifying the step it is impossible to assess whether it is one which it is reasonable for the employer to have to take”.

111. In addition, it is clear from Ishola v Transport for London, that although a PCP will not be narrowly construed, nonetheless the concept does not apply to every act of unfair treatment of a particular employee. It must be capable of being applied to others, and it suggests a state of affairs which indicates how similar cases are generally treated or how a similar case will be treated if it occurred again. This is consistent with Nottinghamshire City Transport Ltd v Harvey which states “practice connotes something which occurs more than on a one-off occasion and which has an element of repetition about it”.

112. The claimant presents two claims asserting that there was an alleged failure by the respondent to make adjustments. The first relies on a PCP to the effect that the respondent required employees to work using a single screen, and the substantial disadvantage suffered was said to have been caused by the nature of the claimant’s work which required multiple tabs to be open on one screen which overloaded the claimant because of his disabilities. The claimant asserts this gave rise to the statutory duty to provide an auxiliary aid by way of adjustment, namely a second screen.

113. The claimant has explained that on 3 March 2020 he asked Mr Will for a second screen for his computer because of the extent of his workload and that Mr Will refused. He repeated the request on 13 March 2020 but again Mr Wills refused. The request was repeated on 18 June 2020 Mr Wills again refused. The claimant then complained to Mrs Phillips, who agreed to provide a second screen, which eventually arrived on 31 July 2020.

114. The respondent argues that the claimant requested a second screen so that he could work more efficiently without having to shift tabs to search for information during calls and it was not a request for auxiliary equipment or a reasonable adjustment arising from any disadvantage caused by the claimant’s disability. We agree with that analysis, and we are not satisfied that the claimant has in the first place proven the PCP relied upon, nor that any such PCP caused substantial disadvantage to someone with the claimant’s disability as compared with non-disabled people. In any event this claim would appear to be out of time, for the reasons explained in our comments on time below, and as at the time the claimant issued these proceedings the auxiliary equipment by way of adjustment had already been in place for some months.

115. The second claim relies upon a PCP that employees are given “additional work without providing training or help” and that this caused a substantial disadvantage in that the claimant struggled with additional work without having training or help. Again, we do not accept that the claimant has proven that there was a PCP in place to the effect that the respondent gave employees additional work without any training or

assistance. In any event we are not satisfied that the claimant has established that this caused any substantial disadvantage as compared to someone without his disability.

116. For these reasons we dismiss the claim for reasonable adjustments.

117. Harassment s26 EqA:

118. Turning now to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).

119. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: "In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.

120. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment." Similarly, Langstaff P emphasised in Betsi at para 12: "The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc ..."

121. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: "one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."

122. The claimant brings four claims of harassment related to disability. First, the claimant complains that on each of 13 March 18 June and 31 July 2020 Sarah Harlington intimidated the claimant on the phone which was then followed by a call on Teams from Mr Will. The second claim is that on 3 March 2020 and 30 September 2020 Mrs Harlington and Mr Will placed the claimant under pressure by adding to his workload while there were active and unresolved grievances against Ms Harlington. These allegations are set out in the claimant's witness statement, and they are set out

in our findings of fact above. We unanimously find that this behaviour by Mrs Harlington and Mr Will amounted to conduct which created and had the effect of an intimidating, hostile and offensive environment for the claimant, and that this was related to the claimant's disability. The claimant therefore potentially succeeds in these two claims of harassment, subject to the time point below.

123. The third claim is that Mrs Phillips made contact with the claimant on 4 August 2020 whilst he was on annual leave concerning a work issue and did not subsequently apologise. We consider that this is a normal work issue, and we do not agree that this had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, and in any event, it cannot be said to be related to the claimant's disability. We reject this claim of harassment.

124. Fourthly and finally, the claimant complains that Mrs Phillips made contact with him on 18 November 2020 to demand information regarding an investigation that had been closed. More accurately this refers to an incident on 19 November 2020 as explained in the claimant's statement when Mrs Phillips "demanded answers on how I knew AF and Orange County were the reason for my suspension on 28 October 2020. I asked if the investigation that had been closed by MD had been reopened. SP chose not to reply." We consider that this is a normal work issue, and we do not agree that this had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, and in any event, it cannot be said to be related to the claimant's disability. We reject this claim of harassment.

125. The claimant therefore potentially succeeds in his first two claims of harassment related to his disability.

126. Victimisation s27 EqA:

127. The claimant relies on two protected acts for the purposes of his victimisation claim. The first is his email to Mrs Phillips on 31 July 2020 during which he states: "I have to PROVE I'm dyspraxic and again I cannot stand being shouted at especially when I'm bombarded with the words of others but I'm not allowed to defend my actions, because my words don't count …" We find that this effectively amounts to a complaint of harassment under the EqA and is therefore a protected act.

128. Secondly the claimant relies on his "update" to Mrs Phillips on 8 or 9 August 2020. In fact, this relates to the claimant's letter dated 7 August 2020. The complaint runs to 6 pages, but starts: "I would like to make an official complaint against Nicolas (Nico) Wills and Sarah Harlington on the grounds of treatment in employment and discrimination of learning difficulties …" We find that this also amounts to a protected act because it alleges discrimination which is unlawful under the EqA.

129. The claimant relies upon five acts of detriment which he asserts were suffered because he had done the protected acts. The correct legal test to the causation or "reason why" question (as to whether or not a detriment was suffered because of the protected act) is whether the protected act had a significant influence on the outcome - see Warburton v Chief Constable of Northamptonshire Police [2022] EAT, applying Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947 HL; Nagarajan v London Regional Transport [2000] 1 AC 501; Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425 and Page v Lord Chancellor [2021] ICR 912 CA. We deal with each of the five alleged detriments in turn.

130. First, the claimant asserts that he was refused the opportunity to ask appropriate questions during the redundancy process and that he was only allowed to pursue his grievance claims after he had left the respondent. In the first place we have rejected the assertion that he was not able to ask such questions as were relevant to the redundancy process as he wished. In addition, the claimant has not established any causative link between respondent's decision to pursue the grievance separately after the redundancy consultation and either of the two protected acts. We reject this claim of victimisation.

131. Secondly, the claimant complains that he was dismissed for redundancy "despite being presided over by conflicted people who had been named in unresolved complaints". We have dealt with this allegation above and we find that it was

reasonable for the respondent which is a small employer to involve the managers which they did particularly as they had engaged independent HR advice. We do not agree that the claimant suffered detriment in this respect and in any event, there is no causative link established between the respondent's decision and the earlier protected acts. We reject this claim of victimisation.

132. Thirdly, the claimant accuses the respondent of "ignoring an email sent by the claimant to the directors of the respondent on 23 November 2020 complaining about ongoing victimisation." Although there does not appear to have been an immediate response to this email, this was in the context of the ongoing redundancy consultation and in response to the first consultation meeting on that day. The respondent decided to separate the claimant's complaint, and the consultation process, into two discrete processes, and dealt with the complaint subsequently. To that extent the claimant's email was not ignored, and in any event there is no causative link established between the respondent delaying its response to the email and the claimant's earlier protected acts. We reject this claim of victimisation.

133. Fourthly, the claimant complains that the respondent failed to respond to his Subject Access Request before he was made redundant. This is factually correct, but again no evidence has been established that the respondent decided to delay its response because the claimant had made either of the two protected acts above. We reject this claim of victimisation.

134. Fifthly and finally, the claimant complains of the refusal to allow a redundancy appeal meeting. The respondent dealt with the claimant's appeal by way of review and then rejected it. The respondent was entitled to do so, and the claimant did not suffer detriment in this respect. In any event no causative link has been established between the decision to hold the appeal by way of a review rather than a rehearing and either of the two protected acts relied upon. We also reject this claim of victimisation.

135. The claimant's claims of victimisation under section 27 EqA are therefore all dismissed.

136. <u>Time Issues</u>

137. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

138. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.

139. Section 140B EqA provides: (1) This section applies where a time limit is set by section 123(1)(a) or section 129(3) or (4). (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when the time limit set by section 123(1)(a) or section 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by section 123(1)(a) or section 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exerciseable in relation to that time limit is extended by this section.

140. In summary, the relevant law relating to Early Conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunal to hear relevant

discrimination proceedings is as follows. Section 18 of the Employment Tribunals Act 1996 defines “relevant proceedings” for these purposes. This includes in subsection 18(1) the discrimination at work provisions under section 20 of the EqA. Section 140B EqA sets out how the EC process is taken into account. Where the EC process applies, the limitation date should always be extended first by section 140B(3) or its equivalent. However, where this date as extended by section 140B(3) or its equivalent is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate, time to present the claim is further extended under section 140B(4) for a period of one month (applying Luton Borough Council v Haque [2018] ICR 1388 EAT). In other words, it is necessary first to calculate the primary limitation period, and then add the EC period. Having reached that date, it is necessary to ask whether it is before or after one month after Day B (the date of issue of the EC certificate). If it is before then the limitation date is extended to one month after Day B. Otherwise, if it is after one month after Day B, then limitation will be extended to that later date.

141. In this case the claimant’s effective date of termination of employment was 31 December 2020. The claimant first approached ACAS under the Early Conciliation provisions on 11 December 2020 (Day A). The Early Conciliation Certificate was issued on the same day 11 December 2020 (Day B). The claimant presented these proceedings on 1 February 2021. The claims relating to the claimant’s dismissal have clearly been brought within time because they have been brought within three months of the effective date of termination in any event and do not have to rely on an extension of time under the EC provisions.

142. However, the claims in respect of which the claimant has potentially been successful are the first two claims of direct disability discrimination, which took place on 13 March, 18 June and 31 July 2020; and the first two claims of harassment which arose first on 13 March 2020, 18 June 2020, 31 July 2020, and secondly on 3 March 2020 and 30 September 2020. The latest of these claims arose on 30 September 2020.

143. The normal limitation period of three months from the last successful allegation on 30 September 2020 therefore expired on 29 December 2020. Time is an extended for a period of one month from the date the claimant received the EC certificate (Day B). This was on 11 December 2020. The next stage is to ask whether the primary limitation date (29 December 2020) is before or after one month after Day B (11 January 2021). As this primary limitation date was before one month after Day B, the limitation period is extended to one month after Day B and remains at 11 January 2021.

144. The claimant’s otherwise successful discrimination claims between 13 March 2020 and 30 September 2020 were presented on 1 February 2021 which is therefore some three weeks out of time.

145. We have considered the cases of Robertson v Bexley Community Service [2003] IRLR 434 CA; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

146. In this case, despite the issue of time having been identified in the agreed list of issues, and the respondent’s repeated assertions that the discrimination claims were presented out of time, the claimant has not made an application to extend time nor presented any evidence or arguments as to why it would be just and equitable to extend time.

147. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

148. Accordingly, the limited claims of direct discrimination and harassment in respect of which the claimant would otherwise have succeeded are also dismissed because they were presented out of time.

Employment Judge N J Roper
Date: 13 October 2022

Judgment sent to the Parties: 19 October 2022

FOR THE TRIBUNAL OFFICE