EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
GUY MATTHEWS	**v**	**CGI IT UK LIMITED**

Heard at: London Central (by video)

On: 20 - 29 September 2022
16 and 17 November 2022 (in Chambers)

Before: Employment Judge P Klimov
Tribunal Member Ms S Plummer
Tribunal Member Dr B Von Maydell-Koch

Representation:

For the Claimant: Mr T. Gillie (of Counsel)

For the Respondent: Ms J Coyne (of Counsel)

Reserved Judgment

All Claimant's claims fail and are dismissed.

Reasons

Background, preliminary issues and evidence

1. By a claim form dated 18 June 2021, following an early conciliation between 15 February 2021 and 29 March 2021, the Claimant presented complaints of:

a. Victimisation contrary to s.27 of the Equality Act 2010 ("**EqA**");
b. Automatic unfair dismissal for making a protected disclosure under s103A of the Employment Rights Act 1996 ("**ERA**");
c. Whistleblowing detriment under s.47B(1) of the ERA;
d. Unfair dismissal contrary to s.98 of the ERA;
e. Failure to make reasonable adjustments under s.20-21 EqA;
f. Breach of contract; and
g. Failure to provide an itemised pay statement under s.8(1) ERA.

2. On 30 June 2022, there was a preliminary hearing to determine the issue of disability. EJ Burns decided that the Claimant was disabled from 27 August 2020 by reason of long Covid. The Respondent accepts that the Claimant was disabled at the material times by reason of diabetes. The Respondent's knowledge of the Claimant's disability was in dispute.

3. At the start of the hearing, the Claimant withdrew his complaints of breach of contract and of failure to provide an itemised pay statement under s.8(1) ERA. These were dismissed upon withdrawal by a separate judgment.

4. There was an agreed list of issues, reproduced as Appendix to this Judgment ("**the List of Issues**"), cast list and chronology.

5. Mr Gillie appeared for the Claimant and Ms Coyne for the Respondent. The Tribunal is grateful to both Counsel for their submissions and assistance to the Tribunal.

6. The Tribunal heard from three witnesses called by the Claimant: the Claimant, Ms C Ayo ("**CA**") and Ms D Tudor ("**DT**"), and from six witnesses called by the Respondent: Mr S Evans ("**SE**"), Ms S Chappell ("**SC**"), Ms A Vale ("**AV**"), Mr C Ravenhill ("**CR**"), Mr F McKay ("**FM**") and Ms T McGeehan ("**TM**"). All witnesses gave sworn evidence and were cross-examined, except for DT who Ms Coyne chose not to cross examine. The Tribunal is grateful to all the witnesses for attending the hearing and giving their evidence.

7. The Tribunal was referred to various documents in the bundle of documents of 2960 pages and two supplemental bundles of 22 and 73 pages the parties introduced in evidence. The Tribunal read only the documents which it was asked to read in advance of the hearing and those to which it was referred during the hearing.

8. Both Counsel prepared opening and closing submissions. The Tribunal was referred to various authorities in the authorities bundle prepared by Mr Gillie and four further authorities sent by Ms Coyne and Mr Gillie during and shortly after their closing submissions.

9. At the start of the closing submissions, Mr Gillie confirmed for the Claimant that the Claimant was not pursuing the alleged protected disclosures 8(a) and 8(b) on the List of Issues and PCP 1 (issue 18(a) on the List of Issues). He also accepted that the detriments claimed in addition to the dismissal in practical, evidential terms rise and fall with the dismissal. Finally, he accepted that the Claimant's claim for failure

to make reasonable adjustments was out of time but argued that the Tribunal should exercise its discretion and extend time because it would be just and equitable to do so. In his reply to Ms Coyne's final submissions, Mr Gillie also confirmed that the Claimant was not pursuing detriments 12(a) and 12(b) on the List of Issues. Accordingly, all these allegations and complaints are dismissed upon withdrawal.

10. This was a liability hearing only, however, the parties asked the Tribunal to deal in its judgment with the issues of Polkey and contributory fault (issues 29 b) and c) on the List of Issues), if relevant.

11. The hearing finished after 5pm on the final day of the hearing. There was no time left for the Tribunal to deliberate. The Tribunal deliberated in chambers on 16 and 17 November 2022 and has arrived at this decision unanimously.

Findings of Fact

12. Based on the documentary and oral evidence presented by the parties, the Tribunal makes the following findings of fact relevant to the issues the Tribunal was asked to decide.

13. The Claimant was employed by the Respondent from 29 May 2017 until his dismissal on 10 February 2021. From June 2018 he worked as a Director/ Consulting Expert in the newly created Emerging Technology Practice ("**ETP**"), reporting into SE, who was the head of ETP. The Claimant's role within ETP had a particular focus on 5G technology.

14. Until the beginning of 2020, his working relationship with SE was good. There were no issues with the Claimant's performance or conduct.

15. In December 2019, the Claimant took an extended holiday break. Upon his return to work in January 2020 the Claimant became concerned that he was receiving less emails, updates and meeting invites than before going on holiday. He raised his concerns about that in an email to SE on 13 February 2020 and shortly after that in a one-to-one meeting.

16. In early March 2020, the Claimant developed Covid-like symptoms. He continued working from home. His symptoms continued through April and May. By the end of May the Claimant's health worsened, and he was signed off work. He was again signed off work in June until late July, which was then extended to the end of August.

Claimant's redundancy

17. In or around May/June 2020 the Respondent took a business decision to discontinue pursuit of 5G opportunities. Before making that decision, the Respondent asked the Claimant as "*[the Respondent's] 5G lead*" to give his view on the Respondent's commercial opportunities with respect to 5G and whether the

Respondent should stay or exit the 5G market. The Claimant's view about the prospects of securing 5G business in the near future was largely negative.

18. Shortly after the decision to discontinue 5G had been taken, SE had a meeting with SC at which SE stated his concerns that with the discontinuation of 5G there would not be enough work for the Claimant and CA in his team. SC said that it looked like a potential redundancy situation and advised SE on the process to follow.

19. On 10 June 2020, SE met with the Claimant. SE told the Claimant that business plans were being worked out for the next financial year and there was no significant demand for 5G. The Claimant asked about his job security. SE replied that he did not know and was waiting for TM to confirm the position based on the business planning.

20. On 17 June, SE notified the Claimant that he was at risk of redundancy and invited to attend the first redundancy consultation meeting on 23 June. Due to the Claimant being signed off sick on 23 June, the meeting was re-arranged for 30 June. The Claimant did not attend the re-arranged meeting because he remained unwell.

21. SE re-arranged the meeting to 2 July. On 30 June, the Claimant wrote to SE saying that he would not be attending the re-arranged meeting because he was signed off sick for 3 weeks and was undergoing medical tests. SE responded asking the Claimant to try and attend the meeting.

22. On 2 July, SE and SC attended the meeting (by video). The Claimant did not join the meeting.

23. On 3 July, SG sent to the Claimant a letter informing him that his role was at risk of redundancy and outlining the consultation process. The letter stated that if no suitable alternative employment could be found the Claimant employment would be terminated on 5 August 2020.

24. On 7 July, SG sent a follow up letter as the Claimant had not replied to the 3 July letter.

25. On 16 July, SE invited the Claimant to a consultation meeting on 21 July. The Claimant declined on the same day. In his email the Claimant explained that he did not respond earlier because he was unwell and was following medical advice not to work. He said that because of his medical conditions he could not engage in the process. He said that he would attend a consultation meeting when he was fit to return to work, but that would not be on 21 July.

26. On 23 July, CA was made redundant. She later filed a tribunal claim against the Respondent. The claim was settled.

27. On 27 July, the Respondent changed the consultation manager from SE to FM and wrote to the Claimant inviting him for a consultation meeting on 3 August.

28. On 30 July, the Claimant submitted his grievance against SE.

29. On 4 August, the Respondent suspended the redundancy process pending the outcome of the investigation into the Claimant's grievance.

30. On 6 October, following the decision on the Claimant's grievance, FM wrote to the Claimant re-starting the consultation process and asking the Claimant to attend a consultation meeting on 8 October.

31. The Claimant did not attend the meeting. Later the same day he wrote to FM stating that the reason for that was him still being on sick leave and not being able to prepare for the meeting due to having only intermitted access to his work email. FM replied proposing to re-arrange the meeting for 19 October.

32. On 13 October, the Claimant appealed the grievance decision.

33. On 18 October, FM wrote to the Claimant stating that the redundancy process was paused and there would be no meeting on 19 October.

34. As a result of the outcome of the grievance appeal the redundancy process was abandoned.

Claimant's Grievance

35. The Claimant's grievance against SE, submitted on 30 July 2020, was investigated by AV. It was a lengthy grievance but primarily contained three complaints: (i) that the Claimant's role had been undermined by SE; (ii) that SE was seeking to scapegoat the Claimant for the failure of the 5G business, and (iii) that SE had attempted to narrow down the Claimant's role to 5G in order to fabricate a reason for redundancy.

36. AV conducted a comprehensive investigation into the grievance by considering relevant documents and interviewing relevant people, including SE and the Claimant.

37. On 2 October 2020, AV finalised her report. She found that there was insufficient evidence to support the Claimant's complaints and therefore did not uphold his grievance.

38. On 13 October 2020, the Claimant appealed his grievance. In his appeal he challenged the grievance investigation process, and the findings and conclusions made by AV.

39. CR was appointed to consider the appeal. He separately met with SC, SE and the Claimant as part of his investigation.

40. Following the meeting with the Claimant on 26 October, there were further exchanges between CR and the Claimant with respect to the appeal process. The Claimant was dissatisfied with the process and stated his intention to submit further grievances against CR and SC.

41. On 12 November 2020, CR issued his report. He did not uphold the Claimant's appeal against the grievance outcome on the first (SE undermining the Claimant) and second (SE scapegoating the Claimant for 5G failure) issues. However, on the third issue (narrowing down the Claimant's role) CR found that undue weight had been placed on the Claimant's 5G experience in forming the view that his role was at risk of redundancy, and that his other skills and overall experience and delivery had not been adequately considered. CR recommended in his report that a meeting was held to discuss with the Claimant a way forward and that there was a review of the process between the business and HR for the establishment of the case for redundancy.

42. On 13 November 2020, the Claimant responded to CR's outcome letter in a confrontational manner, accusing CR of incompetence, making things up and making false and misleading statements. He repeated his intention to initiate two further grievances against CR and SC. He also indicated that he was planning to take the matter to an employment tribunal and the Respondent's internal ethics team.

Claimant's return to work

43. On 9 November 2020, the Claimant commenced phased return to work following a period of his prolonged sickness. FM, who was asked to work with the Claimant to find him a role, spoke with the Claimant on that day. The Claimant told FM that he was going to bring a grievance against CR because of the lies in the grievance appeal process.

44. Prior to speaking with the Claimant, FM had a conversation with SE about the Claimant's return. SE confirmed that there was insufficient work for the Claimant in ETP and they discussed other options, including the Claimant joining Ian Dunbar's ("**ID**"), Vice President Communications and Media, team. Subsequent to that conversation, FM spoke with ID who told FM that although there was no vacancy in his team, there was a possibility to create a role for the Claimant, if required.

45. On 16 November, FM had a call with the Claimant. The Claimant repeated his allegations about SE and SC and about mishandling his grievance and stated that his role at ETP was not redundant and he would continue to do his job.

46. On 20 November, FM emailed the Claimant three options regarding his return to work to be discussed at the next call. These were: (1) remain in the ETP role reporting to SE; (2) try to find an equivalent role elsewhere in the business; (3) a without prejudice option [*privileged was not waived by the Respondent*].

47. Later that day, FM and the Claimant discussed these options on a call. The Claimant set various conditions with respect to option 1, which were not acceptable to the Respondent, in particular with respect to interactions between the Claimant and SE. FM suggested "coaching" as a means of repairing the relationship between the Claimant and SE.

48. The Claimant accepted option 2 in principle, but only if the new role was very similar to his role at ETP. The Claimant repeated that he was planning to bring two further grievances.

49. On 24 November, FM emailed the Claimant summarising their conversation. The Claimant replied disagreeing with the summary. He questioned how the coaching could resolve the issues. He said that the new role would need to be broadly similar or of sufficient interest and value. He restated his intention to bring at least two further grievances.

50. On 25 November, FM told the Claimant that they would focus on option 1 and try to mutually agree a set of responsibilities for the Claimant. That included the Claimant having a billable target of 100%. Although the Claimant's role in ETP was recorded as being 100% billable, in reality the Claimant did not do any billable work, i.e. work for which the Respondent could bill its customers.

51. On 26 November, the Claimant responded to FM's proposal. The Claimant disagreed with the billable target and with defining responsibilities and stated that the proposal was a "*long way from anything that is even remotely acceptable*". FM responded to the Claimant's points suggesting that the Respondent would be willing to accommodate some of them.

52. On 27 November, FM and the Claimant spoke on the phone. The Claimant said that he would accept 50% billable target, provided he had written assurances that he would not be held accountable against the target. He also agreed to list elements of his role without time spent on them, provided he would not be held accountable against the list. The Claimant raised the issue that no action had been taken against SE. FM sent to the Claimant a summary of the call.

53. On 30 November, the Claimant responded to FM. The Claimant did not provide a list of his activities because he considered that to be "*micro-management*". The Claimant said that he was preparing a number of new grievances. The Claimant raised an issue of annual leave carryover, suggesting that if it was not resolved in his favour, he would submit another grievance, a complaint to the ethics team in Canada and add it as a complaint to any legal action. The Claimant said that his trust in the Respondent was "*hitting very low levels*".

54. There were further emails and calls between FM and the Claimant in early December with respect to the Claimant's annual performance review. The Claimant continued to reiterate his position that his role at ETP was not redundant, querying why no actions had been taken against SE, and threatening to bring further grievances. In particular, the Claimant said that he would only stay in ETP if something was done with SE. He also said that although he preferred to stay in ETP, absent any action against SE, his position was untenable, and the Respondent needed to find him an alternative role.

55. On 9 December, FM spoke with ID to discuss a role for the Claimant. FM persuaded ID to create a role for the Claimant and prepare a role remit.

56. On 11 December, FM spoke with the Claimant. The Claimant again said that he wanted a disciplinary action to be taken against SE for placing the Claimant at redundancy. The Claimant said that he would be sending information to the ethics team to make it visible. The Claimant also said that he believed that he was used by SE as a cover to dismiss CA and that CA's dismissal was discriminatory.

57. On 17 December, FM emailed the Claimant summarising their previous discissions and giving the Claimant two options: (1) continue in ETP reporting to SE with detailed objectives for the role, or (2) move to ID's team to do a new role based on the role remit prepared by ID, which he had sent to FM the day before. FM asked the Claimant to consider the two options and make his decision by 11 January 2021.

58. On 18 December, the Claimant emailed FM alleging that he was being harassed by SC and SE whilst on sick leave, stating that CA's dismissal was discriminatory, and his planned dismissal was a cover-up. He also said that he was planning to submit four further grievances in January. In his email the Claimant stated that: *"trust has not been repaired to date, it has in fact been further undermined (perhaps significantly), so I will in due course be left with little option".*

59. On 15 January 2021, having not received the Claimant's response, FM called the Claimant. The Claimant said that both options were untenable. On the call the Claimant again raised the issues of discrimination against CA and him being harassed whilst on sick leave. The Claimant sent to FM an email summarising their conversation.

60. On 21 January, FM responded to the Claimant. FM said that his view was that the relationship between the Claimant and SE had broken down and he did not see a way how the Claimant could continue to be part of ETP and not reporting to any manager. FM said that the Respondent could not wait indefinitely for the Claimant to decide on the two options, and therefore if by 29 January the Claimant did not make his choice, he would recommend that the Claimant be moved to ID's team. FM also recommended that if the Claimant was prepared to abandon his grievances, a one-off ex-gratia payment of £5,000 be made to the Claimant.

61. On 29 January, the Claimant replied to FM's email. The Claimant said that FM's email was an "*ultimatum*" which made his position untenable. He repeated his earlier allegations of harassment, and that the redundancy was a nonsense. The Claimant also raised the issue of FM threatening to restart the redundancy when the Claimant was on a graduated return to work.

62. On this last issue the Tribunal finds as a fact that FM did not threaten to restart the redundancy process. The Tribunal accepts FM's evidence that during one of the conversations with the Claimant, in response to the Claimant telling him that the Claimant's lawyers had told the Claimant that companies never pause redundancy processes, FM said that it sounded as if the Claimant thought that the Respondent should not have paused his redundancy and that if the Claimant wished it could be restarted. The Tribunal accepts FM's evidence that it was his light-hearted way of

stopping the Claimant from keep going over old grounds, which FM found frustrating.

63. On 3 February, FM replied to the Claimant stating that given the issues he raised in this email, option 2 was more likely to deliver a successful outcome and accordingly the Claimant would be move to the new role from 8 February. FM also confirmed that the Claimant's performance review would be conducted on 28 February.

64. The Claimant responded on 3 February stating that he did not agree with the option imposed and was acting under duress. He said that he considered the new role as "*a clear demotion*" and that it seemed to him "*a blatant case of constructive dismissal as can be*". He said that he would immediately be taking legal advice and was expecting that the matter would inevitably lead to legal redress. He concluded his email by stating that he had given the Respondent "*ample opportunity to deal with the clear misconduct and unethical behaviour*", which the Respondent had failed to do, and therefore he had "*no option but to take the matter ……..outside of [the Respondent] through legal redress*".

65. On 4 February, the Claimant emailed FM stating that he had taken legal advice and would be taking medical advice, and that he would reply with a suggested way forward the following week.

66. On 8 February, the Claimant emailed FM stating that he had not progressed with the "*imposition of forcing the new role reporting to [ID] on [the Claimant], against [the Claimant's] will*" due to being off sick and would deal with that upon return.

Claimant's dismissal

67. On 1 February there was a call between TM, FM, Alistair Dewar ("**AD**"), HR Director and Stuart Goldberg ("**SG**"), VP, UK General Counsel to discuss the situation with the Claimant. FM briefed TM on his latest discussions with the Claimant. The Claimant's email dated 29 January was considered. Based on that review TM formed the view that the Claimant could not return to work for SE and therefore option 2 was the only viable option. FM's email to the Claimant of 3 February was the outcome of that discussion.

68. The Claimant's response of 3 February was forwarded to TM and she consulted with SG on the legal risks for the Respondent.

69. On 5 February, having considered the relevant facts and legal advice she received from SG, TM decided that the relationship between the Claimant and the Respondent had irretrievably broken down and the only remaining option was to terminate the Claimant's employment. The decision was discussed on a call with FM, SG and AD. They supported the decision. In making that decision TM was not aware that the Claimant had made allegations about CA and him being subjected to discriminatory conduct and harassment, except for what was stated in the Claimant's email of 29 January (the Fourth Disclosure (5(b)(iv) on the List of Issues).

70. On 10 February, FM called the Claimant to inform him of the decision to dismiss him. The dismissal was confirmed by a letter on the same day signed by FM. The letter stated that the reason for the dismissal was "*that the relationship between you and CGI has irretrievably broken down such that there is no longer any relationship of trust and confidence between you and CGI*".

71. The Claimant's employment was terminated on 10 February 2021. The Claimant was paid in lieu of notice. No right of appeal was offered to the Claimant.

Protected Disclosures/Protected Acts

72. The Respondent accepts that the Claimant carried out the acts listed on the List of Issues at paragraphs:
    a. 5(a),
    b. 5(b)(i) (except that the Claimant told FM that SE "*had a problem with female staff*"),
    c. 5(b)(ii) (the Claimant accepted that there was only the email and not a phone call) (the content of the email is different to how it is reproduced in the List of Issues),
    d. 5b(iii) (except that no reference was made to disability discrimination), and
    e. 5(b)(iv) (the content of the email is different to how it is reproduced in the List of Issues).

73. The Respondent disputes that what the Claimant communicated to FM and the Respondent on 18 December 2020, 29 January 2021 and 8 February 2021 founder a belief on the Respondent's part that the Claimant may bring proceedings for disability discrimination under EqA (issue 5(c)).

74. On the balance of probabilities, we find that the Claimant did not say to FM that SE had a problem with female staff. We accept FM's evidence on this, which correspond with his contemporaneous notes of the call. At the end, it is not material and nothing turns on this fact.

75. With respect to other communications (issues 5(b)(ii) – (iv) we accept that these did take place, however as recorded in the relevant emails and not as reproduced in the List of Issues.

76. Whether these amounted to protected acts and/or protected disclosures and whether these caused the Respondent to form a belief that the Claimant may bring a claim for disability discrimination will be addressed in the Conclusions section of the Judgment, to the extent relevant.

The Law

Time limit – Discrimination claims

77. Discrimination claims must also be presented not after the end of "*(a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable*" (**section 123(1) EqA**).

Just and equitable extension

78. In ***Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA***, the Court of Appeal held that when employment tribunals consider exercising the discretion under S.123(1)(b) EqA: "*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 the discretion is the exception rather than the rule*." The onus is therefore on the Claimant to convince the tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable — ***Pathan v South London Islamic Centre EAT 0312/13***.

79. The relevant principles and authorities were summarised in ***Thompson v Ark Schools [2019] I.C.R. 292, EAT***, at [13] to [21], and in particular:
    a. Time limits are exercised strictly;
    b. The onus is on the Claimant to persuade the tribunal to extend time;
    c. The decision to extend time is case- and fact-sensitive;
    d. The tribunal's discretion is wide;
    e. Prejudice to the respondent is always relevant;
    f. The factors under s33(3) Limitation Act 1980 (such as the length of and reasons for the delay and the extent to which the Claimant acted promptly once he realised he may have a claim) may be helpful but are not a straitjacket for the tribunal.

Unfair Dismissal

80. The law relating to unfair dismissal is set out in S.98 ERA.

    "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

    (a) The reason (or, if more than one, the principal reason) for the dismissal; and

    (b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

81. If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1), the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Automatically unfair dismissal

82. Section 103A ERA states: "*An employee who is dismissed shall be regarded for the purposes of this Part 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*".

83. It is for the employer to show the reason (or if more than one, the principal reason) for the dismissal (see section 98(1) ERA). For a dismissal to be automatically unfair under section 103A, the protected disclosure must be the reason or, if more than one, the principal reason for the dismissal.

Reason for Dismissal

84. A reason for dismissal "*is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.*" (***Abernethy v Mott, Hay & Anderson [1974] ICR 323*)**.

85. This requires the tribunal to identify the person who made the decision to dismiss and consider his or her mental process. The tribunal must consider "*only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss"* (***Orr v Milton Keynes Council 2011 ICR 704, CA*).**

86. However, in **Royal Mail Group Ltd v Jhuti** [2019] UKSC 55 the Supreme Court held at [60] and [62] that,

"*60 […] If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker." […]*

"62 […] if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it

behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason."

87. If the decision is made for more than one reason the tribunal must identify the principal reason "*As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it*" (**Kuzel v Roche Products Ltd 2008** ICR 799, CA).

88. As stated above, the burden of showing, on the balance of probabilities, a potentially fair reason is on the employer, and it fails to do show that, the dismissal will be unfair.

Fairness of dismissal

89. If the employer establishes that the reason for the dismissal was one of the potentially fair reasons, the Tribunal must then determine whether the employer's decision was within the range of reasonable responses which a reasonable employer could come to in the circumstances. It means that the Tribunal must review the employer's decision to determine whether it falls within the range of reasonable responses, rather than to decide what decision it would have come to in the circumstances of the case. (***Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563***).

90. If the dismissal falls within the range - the dismissal is fair. If the dismissal falls outside the range - it is unfair. Further, in looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the range of reasonable responses that an employer could reasonably come to in the circumstances.

91. Fairness or otherwise of the procedure adopted by the employer in dismissing the employee plays important part in the Tribunal's assessment of the fairness of the dismissal. Only in rare cases a dismissal would be fair in the circumstances where the employer dispensed with any procedure because it considered to be futile (see ***Polkey v AE Dayton Services Ltd 1988 ICR 142, HL, and Gallacher v Abellio Scotrail Limited UKEATS/0027/19/SS***). However, the focus is on the reasonableness of the employer's conduct and not on fairness or unfairness to the employee (***Garside and Laycock Ltd v Booth 2011 IRLR 735, EAT***).

92. Giving the employee an opportunity to provide explanations before the decision to dismiss is taken and affording the employee the right to appeal dismissal are important features in assessing the fairness of the adopted procedure (see **McLaren v National Coal Board [1988] IRLR 215, [1988] ICR 380, CA and Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT**)

Breakdown in working relationship

93. When the cited reason for the dismissal is the breakdown in the working relationship and loss of trust and confidence, the Tribunal must look behind the label and examine why the employer considered it impossible to continue to employ the employee (see ***Leach v Office of Communications 2012 ICR 1269, CA***).

94. Where the breakdown in the working relationship is a consequence of the employer's conduct, that is likely to be a highly relevant factor in determining the reasonableness of the dismissal under S.98(4) ERA (see ***Tubbenden Primary School v Sylvester UKEAT/0527/11***).

95. It is for the employer to show that the relationship had broken down, and broken down irretrievably, and not for the employee to prove that the relationship had not irretrievably broken down (see ***Phoenix House Ltd v Stockman 2017 ICR 84, EAT***).

96. The nature of the breakdown in the relationship, the prospects for repairing the relationship and the existence of alternatives to dismissal are important factors the employer must consider in deciding on procedural steps to follow when contemplating dismissing an employee because of the breakdown in the relationship (see ***Jefferson (Commercial) LLP v Westgate EAT 0128/12, Express Medicals Ltd v O'Donnell EAT 0263/15, and Turner v Vestric Ltd [1980] I.C.R. 528, EAT***).

Protected Disclosure

97. Section 43A of the ERA states,

> *"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H*."

98. Section 43B of the ERA states,

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *……..*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*

99. In ***Williams v Brown UKEAT/0044/19/OO, EAT*****,** HHJ Auerbach in the Employment Appeal Tribunal explained at [9] that,

> *"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 sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."*

Reasonable belief that the disclosure was in the public interest

100. In ***Chesterton Global Ltd v Nurmohamed [2017] IRLR 837***, the Court of

Appeal provided guidance on the public interest test at [27]-[31], [34] and [37] (***emphasis added***),

> *"27 First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula's case [2007] ICR 1026 (see para 8 above).* ***The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable****.*
>
> *28 Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to the "Wednesbury approach" (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful.* ***All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking - that is indeed often difficult to avoid - but only that that view is not as such determinative****.*
>
> *29* ***Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it****.* ***Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable****.*
>
> *30 Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para 17 above, the new sections 49(6A) and 103(6A) would have no role.* ***I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in***

the public interest it would be odd if that did not form at least some part of their motivation in making it*.*

31 Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, ***I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression.*** *Although Mr Reade in his skeleton argument referred to authority on the Reynolds defence (Reynolds v Times Newspapers Ltd [2001] 2 AC 127) in defamation and to the Charity Commission's guidance on the meaning of the term "public benefits" in the Charities Act 2011, the contexts there are completely different. The relevant context here is the legislative history explained at paras 10—13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest. This seems to have been essentially the approach taken by the tribunal at para 147 of its reasons."*

….
34. Mr Laddie, for the Claimant, took a position between those two extremes. He accepted that the mere fact that the disclosure was in the interest of other workers besides the worker making it was not in itself enough to bring it within section 43B (1) ; but he did not accept that numbers were irrelevant, nor that the disclosure need always be in the interests of persons "outside the workplace" in Mr Reade's sense. He contended that a disclosure of pay irregularities affecting the entirety of the NHS workforce (over a million employees) would plainly be in the public interest; or, if that case were sought to be distinguished on the basis that the NHS is a public authority, that the same would be the case for Royal Mail (a plc) or indeed the John Lewis Partnership (a private company). The disclosure in such a case would be in the public interest simply because of the number of employees affected. ***He said that in any case the tribunal in deciding whether a disclosure was in the public interest would have to consider all the circumstances, but he suggested that the following factors would normally be relevant (I have paraphrased them slightly)****:*

(a) ***the numbers in the group whose interests the disclosure served – see above;***
(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
(d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far*.***

Adopting that approach, he submitted, the Tribunal's conclusion was plainly open to it. It had not based its decision entirely on the numbers of employees affected by Chestertons' alleged manipulation of the accounts. It had also taken into account the fact that the alleged manipulation was deliberate and that it involved the mis-statement of the accounts by between £2m-£3m. Disclosure of such wrongdoing, by a well-known national estate agent, was plainly capable of being regarded as in the public interest.

…..

37. Against that background, in my view the correct approach is as follows. ***In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character 5), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker****. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest.* ***The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool****. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph.*

Detriment

101. Section 47B of the ERA states,

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

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
(a) by another worker of W's employer in the course of that other worker's employment, or

Meaning of "detriment"

102. In ***Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73*** the Court of Appeal said at [27]-[28] (***emphasis added***):

"*27 In order to bring a claim under s 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker.* ***There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases****. In Derbyshire v St Helens MBC [2007] UKHL 16, [2007] ICR 841, [2007] IRLR 540, paras [67]-[68], Lord Neuberger described the position thus:*

'[67] … In that connection, Brightman LJ said in Ministry of Defence v Jeremiah [1980] ICR 13 at 31A that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".

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

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

Causation: meaning of "on the ground that"

103. In ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA***, Elias J said at [45],

"45 In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."

Victimisation

104. Section 27 EqA states:

(1) A person (A) victimises another person (B) if A subjects BSto a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) 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.

105. The relevant legal principles can be summarised as follows:

a. The Claimant is protected when he or she complains about discrimination even if he or she is wrong and there has been no discrimination, unless the complaint was made in bad faith, e.g. a false allegation without the employee believing he/she or someone else was discriminated against.

b. The protection is against victimisation for raising a complaint of discrimination. The Claimant is not protected against victimisation for simply complaining about unfairness. It is important to identify precisely what the Claimant said which amounts to a "protected act" (see ***Beneviste v Kingston University EAT 0393/05***). The protected act must have taken place before the detrimental treatment which is complained of.

c. The meaning of a "detriment" for the purposes of s.27 EqA is broadly the same as the meaning of a "detriment" for the purposes of s.47B ERA. It involves examining the situation from the Claimant's point of view and also considering whether a reasonable worker would or might take the view that the treatment in question was in all the circumstances to his or her disadvantage (subjective/objective test) – (see ***Warburton v Chief Constable of Northamptonshire Police 2022 EAT 42***), An unjustified sense of grievance could not amount to a detriment. However, whether or not the Claimant has been disadvantaged is to be viewed subjectively (see ***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL***).

d. Detriment cannot be because of a protected act in circumstances where the person who allegedly inflicted the detriment did not know about the protected act (see ***Scott v London Borough of Hillingdon 2001 EWCA Civ 2005, CA***).

e. Unlike in cases of dismissal (see **Jhuti** above), if the person who subjects the Claimant to the detriment does not do so because of the protected act (and may not even know of the protected act) but has been influenced or manipulated to carry out the detriment by a different person who is aware of it, the detrimental treatment is the manipulation or tainted information (see ***CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439; [2015] IRLR 562, CA***.)

f. Decisions are frequently reached for more than one reason. Provided the protected act, had a significant influence on the outcome, discrimination is made out. (***Nagarajan v London Regional Transport [1999] IRLR 572, HL***, applied in the context of a victimisation claim in ***Villalba v Merrill Lynch and Co Inc and ors 2007 ICR 469, EAT***). As with direct discrimination, the discriminator may have been unconsciously motivated by the protected act (***Nagarajan v London Regional Transport 1999 ICR 877, HL***)**.**

106. The Tribunal also considered all the authorities provided by the parties during and shortly after the hearing.

Submissions and Conclusions

Is it just and equitable to extend time?

107. The Claimant accepts that his claim for failure to make reasonable adjustments is out of time. Mr Gillie argued that it would be just and equitable to extend time because, he argued, there would be no prejudice to the Respondent because the claim was based on the same facts as the Claimant's other claims, which were in time and which the Respondent had to meet. When questioned by the Tribunal as to the reason for the delay, Mr Gillie said that he did not have instructions on that. After the break, in reply to the Respondent's final submissions, Mr Gillie referred the Tribunal to paragraphs 41, 45, 63, 70 and 76 of the Claimant's disability impact statement as evidence why the claim could not be submitted in time. Mr Gillie also argued that it was not necessary for the Claimant to adduce evidence on the time point and the Tribunal must still apply the relevant test and exercise its discretion in favour of the Claimant. In support of his arguments, he referred the Tribunal to paragraphs 18-25 of the Court of Appeal case of ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640*** and the EAT decision in ***Bahous v Pizza Express Restaurants Limited UKEAT/0029/11/DA***.

108. Ms Coyne argued that it would not be just and equitable to extend time because: the Claimant had been legally advised throughout the material period; he was clear and repeated his intention to take his complaint to the Tribunal; he came back to work in November 2020 and was able to prosecute his claim then; had he done so at the time, it would have given the Respondent the opportunity to ameliorate the matters; in any event his complaints for reasonable adjustments are incoherent in substance and the legal requirements for the complaints are not satisfied.

109. Having considered the parties submissions and the available evidence and having applied the legal principles set out in the Law section above and in the authorities the parties referred the Tribunal to, the Tribunal finds that it will not be just and equitable to extend the time limit for the presentation of the Claimant's claim for failure to make reasonable adjustments. We find that for the following reasons.

110. Whilst the Tribunal accept on the **Abertawe** authority that the absence of an explanation for the delay does not prevent it from exercising its discretion and extending the time limit and the Tribunal is not obliged to infer that there was no acceptable reason for the delay (see para 25 in **Abertawe**), nevertheless the reason or the absence of it for the delay is a relevant factor (see para 19 in **Abertawe** and the authorities quoted above).

111. Despite producing two lengthy witness statements, the Claimant does not explain why he could not present his complaint for reasonable adjustments in time. The paragraphs in his witness statement, to which Mr Gillie referred the Tribunal, do not deal with the issue. They contain the Claimant's evidence about the events in June 2020 – January 2021, where the delay was between the Claimant's

obtaining the EC certificate on 29 March 2021 and presenting his claim on 18 June 2021. No explanation was provided for that delay. Had he presented his complaint by 29 April 2021, the complaint would have been in time.

112. The Claimant indicated his intention to take the matter to an employment tribunal whilst still employed by the Respondent. He told the Tribunal that he was legally advised throughout the process. He knew that Ms Ayo had initiated a claim against the Respondent and was planning to give evidence in support of her claim. Therefore, he would not have been ignorant of the time limit. If he were ignorant of the time limit (for which he presented no evidence), no evidence was presented as to what steps he had taken to ascertain the position. In any event, he had solicitors acting for him throughout.

113. We do not accept Mr Gillie's submission that there is no or very little prejudice to the Respondent in allowing the complaint to proceed. The fact that there are overlapping factual matters in relation to this complaint and the complaint of unfair dismissal does not mean there is no or little prejudice to the Respondent for having to meet the reasonable adjustments complaint. These are two very different complaints, with different legal tests, which call upon different types of enquiries and evidence.

114. The Claimant's claim for reasonable adjustments appears to be a product of his lawyer's "creative thinking". It is based on PCPs formulated in a way that requires the Respondent to prove the negative, i.e. that it did not operate those PCPs. Whilst not unusual as such, it clearly creates an additional evidential burden on the Respondent.

115. The claim was so "creative" that the Claimant himself was confused about the nature of his claim. He said in his evidence that what was alleged to be PCP2 was in fact on 3 February 2021 imposing option 2 on the Claimant, and that was the only time that the Claimant knew the alleged PCP was applied to anyone. At the end of the hearing, the Claimant abandoned PCP1 without any explanations provided.

116. On the other hand, there is little prejudice to the Claimant in not allowing his reasonable adjustments claim to proceed. The Claimant primary complaint, as was confirmed by Mr Gillie in his closing submission, is about the dismissal, which he claims was unfair. That claim remains intact and is not materially affected by not allowing his reasonable adjustments complaint to proceed.

117. Therefore, we find that the Tribunal does not have the jurisdiction to consider the Claimant's complaint for failure to make reasonable adjustments (ss. 20, 21 EqA), and this complaint stands to be dismissed for lack of jurisdiction.

What was the principal reason for the dismissal?

118. Next, we shall deal with the reason (or, if more than one, the principal reason) for the Claimant's dismissal.

119. The burden is on the Respondent to establish that the dismissal was for a potentially fair reason. The Respondent states that the Claimant was dismissed for some other substantial reason, namely irretrievable breakdown of trust and confidence in the working relationship. The Respondent submits that the decision to dismiss the Claimant was taken by TM, and she took that decision because she genuinely and reasonably considered that there had been a breakdown of trust and confidence in the employment relationship.

120. The Respondent primarily relies on the evidence of TM, FM and contemporaneous documents, containing various statements suggesting that the Claimant had lost trust and confidence in the Respondent.

121. Mr Gillie argued for the Claimant that it was not the real reason for the dismissal, because: the loss of trust was not terminal, and that assertion by the Respondent was not supported by the evidence; the reasons the Respondent relied upon to conclude that there was the loss of trust (as recorded in the dismissal letter) were insufficient or inaccurate; TM and FM knew of the Claimant's "protected acts"/"protected disclosures" and the fact that the Claimant was intending to give evidence in support of CA's tribunal claim, and that had a material influence over TM's mind when she concluded that the relationship of trust and confidence was irretrievably broken.

122. Having considered all the evidence and the submissions by the parties, the Tribunal is satisfied that the real and the sole reason for the Claimant's dismissal was the Respondent concluding that the relationship of trust and confidence between the Claimant and the Respondent had broken down irretrievably. We accept TM's evidence that it was her decision and that she took it because she genuinely believed that the relationship had broken down irretrievably. We also find that based on the evidence in front of TM at the time, it was reasonable for her to form that belief.

123. We reject the Claimant's submission that the Respondent's witnesses lacked credibility and their answers were evasive. We found all the Respondent's witnesses credible and giving full and honest answers to the Tribunal. In particular, we do not accept Mr Gillie's submission that TM's evidence on who took the decision to dismiss the Claimant was inconsistent. In his closing written submissions (at para 67) Mr Gillie incorrectly records TM's answer, when it was put to her that SE said that his approval of the dismissal was "*just a rubber stamp*", as "*For him potentially it may have been a rubber stamp, Forbes took the decision*". The Tribunal records show that the answer TM actually gave was: "*For Steve it was, because he was not involved in the decision, Forbes briefed me, and I took the decision*".

124. Equally, we find no inconsistency in the fact that SE approved the dismissal under the Respondent's OMF policy despite not being involved in the decision. In the Respondent's management system SE was still the direct line manager of the Claimant (FM did not assume that role formally). The policy required dual approval, direct manager and the direct manager's manager. SE "rubber stamp" the decision taken by TM.

125. We also find nothing of significance in the fact that FM signed the dismissal letter drafted by the Respondent's lawyers, or the fact that the Respondent's Grounds of Resistance in the CA case stated that the Respondent remained at risk of redundancy.

126. Finally, the fact that there were no notes of the discussions TM had with FM, AD, SG when they were considering what to do with the Claimant had been disclosed in the proceedings, is not sufficient to conclude that the Respondent was hiding the real reason "*behind the cloak of legal privilege*", as was submitted by Mr Gillie. It is nothing unusual for senior executives to consult their legal advisers and HR when deciding whether to dismiss a senior employee, particular in a complicated case as this. There is nothing untoward in the Respondent's decision not to waive legal privileged on such discussions and documentation.

127. More importantly, contemporaneous documents clearly support the Respondent's case. The Claimant's communications with the Respondent contain statements, which demonstrates that the Claimant had lost trust in the Respondent and had no confidence in the Respondent's processes and the management he was dealing with:

a. On 7 August 2020, the Claimant wrote that he had "*pretty much zero faith in HR*".

b. On 28 September, he stated his opinion that the Respondent was "*going to attempt to downplay or brush under the carpet what has happened*" and that he was "*close to the point of taking the issue outside of CGI, both in terms of pursuant of legal redress for myself and also as a key witness in support of Carmen Ayo at Employment Tribunal*".

c. On 20 October, the Claimant said that the Respondent was not dealing with his complaint ethically and "*making things worse for themselves*" and that he expected the Respondent to behave in the same way with respect to his grievance appeal. He also stated that he was "*committed to taking [the complaint] to an Employment Tribunal*".

d. On 29 October, the Claimant alleged that the Respondent was being dishonest and covering up the flaw in the process and said that he was building up evidence for legal redress and that the Respondent was "*digging an ever deeper hole for themselves*".

e. On 9 November, he accused CR of being biased.

f. On 13 November, he accused CR of being incompetent and making false and misleading statements, and again made accusations against SC.

g. On 18 November, he accused the Respondent of "*desperate attempts to remove intent*", attacked SE and SC for their "*appalling*" conduct and

alluded to the fact that he was planning to take the matter to an Employment Tribunal.

h. On 30 November, the Claimant said that his trust in the Respondent was "*hitting very low levels*".

i. On 21 December 2020, he stated that he had "*any great faith in the veracity of findings that come out of CGI's internal process*", accused HR of "*dishonesty*", and again referred to future "*legal redress*".

j. On 18 December, the Claimant stated that: *"trust has not been repaired to date, it has in fact been further undermined (perhaps significantly), so I will in due course be left with little option."*

k. On 29 January 2021, he again accused SE and HR of "*outright dishonesty*" and having "*no credibility*" and of being harassed while on sick leave. He said that the proposed alterative role was a demotion and indicated that he was not prepared to meet with SE. While he said that he was "*prepared to try and find a way for the relationship to function*", that will require the management and SE to "*meaningfully acknowledge the wrongdoing*", apologise and provide assurances as to future conduct.

l. On 3 February, the Claimant stated that the Respondent's conduct was "*a blatant case of constructive dismissal as can be*". He said that he would immediately be taking legal advice and was expecting that the matter would inevitably lead to legal redress. He said that he had given the Respondent "*ample opportunity to deal with the clear misconduct and unethical behaviour*", which the Respondent had failed to do, and therefore he had "*no option but to take the matter ……..outside of [the Respondent] through legal redress*"

128. All attempts by the Respondent since the Claimant's gradual return to work in November to find a resolution led nowhere. The initial three options, turned to two, then to one, and all of them were rejected by the Claimant or made subject to various conditions and caveats, which were not acceptable to the Respondent. As FM said in his evidence the Claimant wanted to do a role as he defined and that was not what the Respondent needed him to do.

129. When the Respondent decided that the only viable option was to transfer the Claimant to ID's team and communicated that to the Claimant, the Claimant's response was that it was "*a blatant case of constructive dismissal*" and that he was acting "*under duress*" and "*in effect being bullied by the company*", which he communicated to ID, to whom he was meant to report. He clearly stated that he did not agree "*with anything [FM] imposed upon [the Claimant]*"

130. We do not accept the Claimant's evidence and submissions that because it was only SE, CS and CR he had issues with, there was no loss of trust and confidence with the Respondent as his employer, because he had good relationship with other employees, and the Respondent employs over 6,000 staff.

131. The Claimant had to operate within the management structures and the processes established by the Respondent. The Claimant clearly stated that he had no trust in the Respondent's processes, was not prepared even to meet SE, who was his direct line manager, accused HR of dishonesty, accused CR of incompetence and dishonesty, and considered himself being "under duress" (i.e. being forced to act against his will) when instructed to report to ID. The fact that the Claimant might have had good relationship with the Respondent's employees outside his reporting line is irrelevant.

132. The Claimant was a senior employee in the organisation and had a client-facing role. The Tribunal accepts TM's evidence that she was genuinely concerned that the Claimant was operating outside the recognised management structure while continuing to make serious accusations against the Respondent, indicating that he had little or no trust in the Respondent's processes and his direct line management.

133. The Claimant's apparent willingness to work for ID was made by the Claimant subject to various conditions and caveats, including that he would not be held accountable for his targets and activities, which was not acceptable to the Respondent. The Claimant was also demanding a detailed description of the role despite knowing that the role was new and specifically created for him. As TM put it in her oral evidence, it was the Claimant, as a senior employee, who was expected to "make the role". The Claimant was not showing any willingness to engage in that process. On the one hand he demanded a detailed description of the new role, but on the other – refused to provide to FM a list of his activities because he considered that to be "*micro-management*". When the Respondent decided to transfer him to work under ID, the Claimant told ID that he was acting "*under duress*".

134. The Tribunal accepts that more efforts could have been put by the Respondent into exploring mediation between the Claimant and SE. The Tribunal also accepts that "coaching" that FM offered to the Claimant, which the Claimant rejected, is not the same as mediation. However, "coaching" was offered as a means of resolving the issue the Claimant had with SE. We accept that FM used a wrong terminology, however, the intent was to find a way of resolving the apparent animosity the Claimant had towards SE. The Claimant's view on that was (as recorded in his 3 February email): "*As an aside you did not offer "mediation", you offered "coaching" just for me. The opinion of my legal firm on this was "what, coaching on how to accept being bullied?"*".

135. This shows that the Claimant was not prepared to explore that option, but was looking for some sort of retribution against SE. In his 29 January email the Claimant says that he is open to explore workplace mediation, however, that was said in the context of his demands that the management and SE "*meaningfully acknowledge the wrongdoing*", apologise and give future assurances. In the preceding paragraph of that email the Claimant writes: "*As a result of his [SE's] conduct, the lack of anything even remotely resembling an apology from Steve Evans, the Company's insistence on overlooking his conduct and the lack of*

steps taken to assure the risk of repeat behaviour is reduced has seriously damaged my trust and confidence in him and the organisation".

136. In light of the Claimant's repeated statements of lack of trust in the Respondent's processes, HR and the organisation as a whole, his clear position that SE must be penalised in some way for the Claimant to be satisfied and move on, and the deadlock the parties had reached in trying to find an alternative solution after three months of trying, in our judgment, it was reasonable for the Respondent to concluded that the relationship of trust and confidence had broken down irretrievably.

137. The Tribunal does not accept that the breakdown in the relationship was solely the Respondent's fault. Although the Respondent's conduct of the redundancy process was far from being faultless, we find that it was a genuine redundancy situation. We accept SE, SC, AV and CR evidence on that point. The fact of the matter was that the Respondent's 5G business was discontinued, and the Claimant was a lead on 5G at ETP and actively involved in those activities. That was not disputed by the Claimant. Therefore, the Respondent's requirements for employees to carry out work of a particular kind, namely 5G business, ceased or at any rate diminished.

138. It appears the Claimant misunderstood the outcome of his appeal, wrongly concluding that the redundancy was a sham and then developed a theory that he was used as a cover for SE to dismiss CA. That appears to become *casus belli* for the Claimant in his pursuit against SE, SC and CR. That then evolved into a pursuit for "justice" against the Respondent with the Claimant making his position more and more entrenched.

139. The Tribunal also finds that the Respondent was genuine it its attempt to rebuild trust and keep the Claimant employed. We find that FM put significant and genuine efforts in that direction. The fact that option 3 was offered to the Claimant at the start of the process and that FM spoke with SC about costs associated with termination of the Claimant's employment, and also spoke with AD about "constructive dismissal", in our judgment, in light of other evidence is not sufficient to conclude that he was not genuine in his attempts to keep the Claimant employed and find a mutually acceptable solution. Option 3 was quickly abandoned, and the focus was on options 1 and 2. FM investigated the possibility of the Claimant returning into ETP. It was FM, who persuaded ID to create a new role for the Claimant. Unfortunately, after three months of trying his efforts came to nothing.

140. In the circumstances, it was not unreasonable for TM to conclude that the relationship of trust and confidence had irretrievably broken down.

141. We reject the Claimant's submission that the Claimant's protected acts and protected disclosures had any influence whatsoever on the decision to dismiss him. We accept TM's evidence that, except what was written in the 29 January email, she was not aware of any other disclosures and was not aware of the fact that the Claimant was planning on giving evidence for CA at an employment tribunal. Her evidence was clear and consistent on this point, and we find no

proper basis to draw inferences that discriminatory reason or the Claimant's alleged protected disclosures operated on her mind when she decided to dismiss the Claimant.

142. We make positive findings on this issue, and therefore it is unnecessary to apply the burden of proof provisions (see ***Hewage v Grampian Health Board [2012] IRLR 870, SC***).

143. The facts upon which the Claimant relies in inviting the Tribunal to draw inferences of discriminatory reason appear to be an odd juxtaposition of various events separated in time and by actors. They fall far short of convincing the Tribunal that they are sufficient to displace the clear and consistent evidence by TM on this issue.

144. For example, the Claimant theory that Michelle Pontes, the Respondent's Marketing manager, called CA on 8 February 2021 for the first time in a few months and during the conversation asked CA whether she continued with her claim against the Respondent, and CA confirmed that and said that the Claimant was supporting her as a witness. Then, it is alleged, Ms Pontes conveyed all that information to TM, who in turn, two days later, decided to dismiss the Claimant because she concluded there was risk to the business in the Claimant's remaining in employment in this context, and the Respondent did not wish to fight the allegation of discriminatory conduct "*on two fronts – internally and in the Tribunal*".

145. This theory does not withstand scrutiny. Firstly, it is the Claimant's case that on 29 January 2021 he told the Respondent's legal department that he was going to testify in the CA's tribunal claim. Therefore, it does not appear to be any reason why Ms Pontes needed to obtain that information from CA. Secondly, it is not clear, and the Claimant did not explain that, how dismissing him would have helped the Respondent's position in the CA's litigation. Finally, the decision to dismiss the Claimant was taken on 5 February, three days before the call made by Ms Pontes to CA. In any event, the Tribunal accepts TM's evidence that she did not instruct Ms Pontes to call CA to find out about the Claimant's intention and did not speak to Ms Pontes about that call.

146. The other theories advanced by Mr Gillie in his closing submissions, in the attempt to make the Tribunal to infer discriminatory reason for the dismissal or that the protected disclosures influenced the decision, are equally unpersuasive. Given our acceptance of TM's evidence as to the real and the sole reason for the dismissal, we find that there is no proper basis to draw inferences that other impermissible reasons operated on her mind. Therefore, we do not consider it is necessary to deal with each of these theories in detail. Suffices to say that we reject them.

147. It follows that the Claimant's claim for automatically unfair dismissal (s.103A ERA) fails and is dismissed.

148. It also means that the Claimant's claim that his dismissal was an act of victimisation (issue 6(a) on the List of Issues) fails and is dismissed.

Other detriments

149. Mr Gillie accepted for the Claimant that his claim for other detriments rise and fall with the dismissal. Given our conclusion on the reason for the dismissal, we find that other alleged detriments (issues 6(b) – 6(e) and 12(c) – 12(d)) were not because of the protected acts or on the ground of the protected disclosures.

150. We remind ourselves that a different legal test must be applied, namely whether protected acts/protected disclosures materially influenced the Respondent's decision, and not whether they were the reason or the principal reason for the decision. However, are factual findings with respect to the decision to dismiss are equally relevant to our conclusions on the detriment claims.

151. We find that removing the Claimant's access to the Respondent's IT Systems (6(a), - the Claimant in closing abandoned 12(b), but for some reason not 6(a) detriment), and the termination of the Claimant's and his wife's private health care insurance (6(c) and 12(c)) were normal and inevitable consequences of his dismissal.

152. We accept SC's evidence why the Claimant was not sent P45 in time. It was an administrative error by the Respondent's payroll provider. The Claimant was not entitled to receive P60 as he was not employed by the Respondent at the end of the tax year. The Claimant was not provided with a breakdown of payments on termination. However, it was provided to him on 7 July 2020. The delay was due to an administration error by the payroll provider and had nothing to do with the Claimant's protected act or protected disclosures.

153. Given our conclusions on the causation issue, we do not need to decide whether the alleged detriments, protected acts and protected disclosure meet the relevant legal tests. However, for the sake of completeness, we say that we do not accept that the Claimant's belief that the four disclosures he made were in the public interest was reasonable.

154. We say that because these complaints were about the alleged discriminatory treatment of CA and the Claimant only. There was nothing in those complaints that stands out in a way to make them of a particular significance or importance. The fact that the Respondent, as part of its business, serves public sector customers, in our view, is not sufficient to turn every complaint of discriminatory treatment against the Respondent into a matter of the public interest.

155. We recognise that the test is not whether the Tribunal thinks the disclosure was in the public interest, but whether the Claimant reasonably believed that the disclosure was in the public interest.

156. However, even accepting the Claimant's "zero tolerance" stance on discrimination of any kind, which can only be applauded, his view that every complaint of discrimination irrespective of its nature, how many people are

affected and against whom the complaint is made, is a matter of the public interest, in our judgment, is not reasonable. Such interpretation would mean that any complaint of discrimination will automatically qualify as a "protected disclosure" under s.43A ERA, which is not supported by the legal authorities and is unlikely to have been the legislative intent behind the "whistleblowing" legislation.

157. It follows that the rest of the Claimant's claim for victimisation (s.27 EqA) and his claim for "whistleblowing" detriment (s.47B ERA) fail and are dismissed.

Was the dismissal fair?

158. Mr Gillie submitted that the decision to dismiss the Claimant was unfair because the Respondent had failed to give the Claimant any warning, which is a fundamental feature of a fair process. He also argued that the fact that the Claimant was not afforded the right to appeal his dismissal was another reason to find that the dismissal was unfair. He also submitted that when the decision to dismiss was taken the Respondent had not exhausted all alternative steps short of dismissal, in particular mediation, and did not pause to consider the Claimant's proposal on a way forward, which the Claimant had said he was going to present upon his return from sick leave. Finally, Mr Gillie argued that the Respondent adopted a closed mind to improving the relationship between SE and the Claimant and had put the burden on the Claimant to prove that the relationship could be fixed and had not broken down irretrievably, and that was unfair.

159. Mr Gillie argued that following some sort of procedure before dismissing the Claimant would not have been futile because it would have given the Claimant an opportunity to understand why the Respondent was considering dismissing him or imposing option 2. Given the importance to the Claimant of the private health care insurance provided by the Respondent, the prospect of being dismissed, thus losing the private medical cover, might have persuaded the Claimant to accept option 2. It would have given an opportunity to the parties to further explore mediation. It would have given the Respondent an opportunity to consider the Claimant's proposal on a way forward, which the Claimant said would be a three-month trial period working for ID. It would have given the Respondent an opportunity to consider whether the Claimant's ill health was accentuating his anxiety and feeling of insecurity and whether that was the driving force behind his sense of grievance.

160. In support of these arguments, Mr Gillie referred the Tribunal to various authorities he submitted with his closing arguments. In reaching its decision the Tribunal considers these authorities. Mr Gillie also referred the Tribunal to an employment tribunal decision in ***Marshall v Parkway Entertainment Company Ltd* ET Case No.2600168/17** in support of his contention that the Respondent did not act reasonably in treating the breakdown in the relationship as a sufficient reason to dismiss the Claimant. We have considered that case, but do not find it "on all four" with the case in front of us. Each case turns on its own facts, and it would be wrong to mechanically apply conclusions reached by one tribunal on specific facts of that case to another case.

161. Ms Coyne in her submissions argued that it was an exceptional case where, given the history, there was nothing more that could be meaningfully done by the Respondent short of dismissal, and that in the circumstances it was reasonable for the Respondent to dismiss the Claimant without any formal procedure. She relied on the EAT case ***Gallacher v Abellio Scotrail Limited UKEATS/0027/19/SS*** in support of that position.

162. In reaching our decision we reminded ourselves of the test under s.98(4) ERA. We also reminded ourselves that we must not fall into the error of substitution, and it matters not how this Tribunal, or another hypothetical reasonable employer would have acted in the circumstances, but whether in the circumstances the Respondent's decision to dismiss the Claimant was reasonable or unreasonable.

163. We also considered that although the Respondent's action must be judged by the so-called "range of reasonable responses" test, the range is not infinite, and it is open for the Tribunal to conclude that the Respondent's decision to dismiss the Claimant in those circumstances fell outside the range.

164. We took into account that the rules of natural justice and equity require that an employee is warned in advance of the possibility of him being dismissed and given a reasonable opportunity to state his case before the final decision is taken by his employer, and that the possibility of appealing the dismissal is an important feature of a fair process. We recognise that in vast majority of unfair dismissal cases the lack of a prior warning would lead to a finding of unfairness. It is only in rare cases an employer will be found to have acted reasonably in dismissing an employee without a warning or following any procedure. However, each case must be judged on its facts, and the Tribunal must take into account all the relevant circumstances.

165. Stepping back and looking at the whole picture we find that it is one of such rare cases where the decision to dismiss without a prior warning and without affording the Claimant the opportunity to appeal was within the range of reasonable responses. We say that for the following reasons.

166. The decision to dismiss came after a prolonged process, during which the Respondent genuinely and persistently tried to find a reasonable solution that would enable the Claimant to continue in his employment. The Claimant essentially turned down both options on the table, which left the Respondent in the position where there was no other viable alternative to the dismissal. We do not accept Mr Gillie's argument that considering the size of the Respondent, it should have sought other alternative employment opportunities for the Claimant. The Claimant was a senior employee with particular technical skills. There were no immediate alternative roles available at the Respondent. FM persuaded ID to create a role specifically for the Claimant despite there being no existing vacancy.

167. For the reasons explained above we accept that the Respondent came to a genuine and reasonable view that the relationship with the Claimant had broken down irretrievably. Essentially, the parties reached stalemate, and in our

judgment, it was within the range of reasonable responses, for the Respondent to decide that it was terminal and not remediable.

168. Given the Claimant's stance on the matter, we find that it was not unreasonable for the Respondent not to wait for the Claimant's proposal on a way forward. There was no indication that the Claimant would be making a constructive proposal. In fact, the first time the Claimant said that he was going to suggest a three months' trial period was in his oral evidence to the Tribunal. It was not communicated to the Respondent at the time, which would have been very easy for the Claimant to do. It is not even in his witness statement, which is surprising, given how much reliance is being placed on the fact that the Claimant was prepared to accept option 2 on a three-months' trial basis.

169. The Claimant had more than ample opportunity to make a constrictive proposal in the three months that FM was discussing with him a way forward. Instead, he chose a rather confrontational approach dismissing the Respondent's suggestions as being a "*long way from anything that is even remotely acceptable".* In the circumstances it was not unreasonable for the Respondent to expect that the Claimant's way forward would be further unacceptable demands, thus simply prolonging the impasse.

170. We find that in the circumstances issuing a prior dismissal warning to the Claimant would have most likely generated a further escalation on the part of the Claimant and would not have helped to repair the relationship. The Claimant held a strong view that he was treated badly by the Respondent and the Respondent had to accommodate his demands before he would be able to move on. Therefore, a warning that the Respondent was considering dismissing the Claimant most likely would have only cemented the Claimant's lack of trust in the Respondent's processes and the management. We do not accept Mr Gillie's submission, which was not supported by the evidence, that a warning would have made the Claimant to change his stance on the matter because of the importance of the private health insurance for him and his wife.

171. Although mediation might have helped, especially at an early stage of the return to work process, the Claimant's position was consistent throughout that SE had to be penalised in some way and the Claimant must be given assurances that he would not be subjected to unfavourable treatment. That is despite that there were no findings from the Claimant's grievance that SE undermined the Claimant, or sought to scapegoat him for 5G failure, or fabricated the Claimant's redundancy. The Claimant previously rejected coaching as a means of resolving the conflict with SE. His suggestion on 29 January 2021 that he would be open to mediation was made in the context of the demand that the Respondent accepts "wrongdoing" on the part of SE and the management. Faced with this stance by the Claimant, we find that it was not outside the range of reasonable responses for the Respondent not to further explore mediation as an alternative to dismissal.

172. We also find that the fact that the Claimant was not afforded the right of appeal did not take the decision outside the range. The decision to dismiss was taken by TM, the most senior manager in the Claimant's line of management. It

was her reasonable conclusion that the relationship of trust and confidence had broken down irretrievably. Therefore, it is very unlikely that the appeal would have helped to restore the relationship.

173. Finally, we do not accept the Claimant's argument that the Respondent adopted a closed mind and put the burden on the Claimant to prove that the relationship could be fixed. We find that the Respondent took genuine and reasonable steps in trying to restore the relationship. We have already dealt with this issue in some detail earlier in the judgment. In contrast, the Claimant did not appear to be willing to compromise and leave behind ill feelings he had towards SE and other Respondent's managers and HR. The Respondent did not ask the Claimant to prove that the relationship could be fixed. TM assessed the situation as she found it and took the decision that the relationship had broken down irretrievably, which in the circumstances was open to her to take.

174. Therefore, we find that in the circumstances the decision to dismiss the Claimant was within the range of reasonable responses, and accordingly the Respondent acted reasonably in treating the irretrievable breakdown in the relationship and the consequent loss of trust and confidence as a sufficient reason to dismiss the Claimant in the way it did.

175. It follows that the Claimant's claim for unfair dismissal fails and is dismissed.

Employment Judge Klimov

17 November 2022

Sent to the parties on:

18/11/2022

For the Tribunals Office

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Appendix 1 – Agreed List of Issues

The Claimant's claims are as follows:

I. Victimisation contrary to s.27 of the Equality Act 2010 ("EqA 2010")

II. Automatic unfair dismissal for making a protected disclosure under s103A of the Employment Rights Act 1996 ("ERA 1996")

III. Whistleblowing detriment under s.47B(1) of the ERA 1996;

IV. Unfair dismissal contrary to s.98 of the ERA 1996;

V. Failure to make reasonable adjustments under s.20-21 EqA 2010;

VI. Breach of contract; and

VII. Failure to provide an itemised pay statement under s.8(1) ERA 1996.

Jurisdiction

1. The Claimant contacted ACAS on Early Conciliation on 15 February 2021, received the Early Conciliation certificate on 29 March 2021 then submitted the claim against the Respondent on 18 June 2021.

2. Are any of the Claimant's claims out of time? If so, do any such claims form part of a continuing act such that they are in time?

3. If the claims under the EqA 2010 relating to acts or omissions complained of which are prior to 8 February 2021 are out of time, is it just and equitable to extend the time limit for presentation of those claims such that the Tribunal has jurisdiction to hear them?

4. If the claims under the ERA 1996 relating to acts or omissions complained of which are prior to 8 February 2021 are out of time, was it reasonably practicable for the Claimant to have presented the claim to the Tribunal within that time limit under s48(3)(b) ERA 1996, and/or s207B? If not, has the Claimant presented his claims within a further period that the Tribunal considers reasonable?

Victimisation (s.27 EqA 2010)

5. Did the Claimant carry out the following protected acts:

   a) On 29 January 2021, the Claimant told the Respondent's legal department that he intended to give evidence or information in connection with employment tribunal proceedings for discrimination brought by Carmen Ayo.

   b) Did the Claimant make, or did the Respondent believe the Claimant had made, allegations of discrimination as follows:

      i. In telephone calls with Mr McKay on 7 and 11 December 2020, informing Mr McKay that Mr Evans had a problem with female staff and used the Claimant as cover to remove Ms Ayo from her role (the "**First Disclosure**").

      ii. On 18 December 2020 by telephone and/or email with Mr McKay, informing him that:

a. he had been harassed by Mr Evans and Mr Chappel during his sick leave, that he had not been given enough time on sick leave to prepare for each stage of the redundancy process and grievance process and that this was contrary to the Equality Act 2010; and

b. Ms Ayo's dismissal was an act of discrimination: his own planned dismissal had been arranged by Mr Evans so that Mr Evans could dismiss him for discriminatory reasons. The Claimant was collateral damage to hide the real reason for Ms Ayo's dismissal,

together, the "**Second Disclosure**".

iii. In a telephone call with Mr McKay on 15 January 2021 and by email that day, informing Mr McKay that Mr Evans discriminated against Ms Ayo and that Mr Evans had subjected the Claimant to disability discrimination by pursuing and harassing the Claimant while he was ill by sending letters to the Claimant's house complaining that he had not replied to emails and insisting that the Claimant attend meetings while on sick leave (the "**Third Disclosure**").

iv. On 29 January 2021 the Claimant emailed Mr McKay and said that he had been harassed by Mr Evans while the Claimant was on sick leave: Mr Evans sent letters to his home stating he had not replied to emails, insisted that he attend meetings and would open the meetings online waiting for the Claimant to join them, listed job vacancies to the Claimant and threatened the Claimant with a loss of sick pay. After that, while he was on sick leave and barely able to speak, the Claimant had to engage with the grievance process meetings and review documents and he was not given enough time to prepare for each stage of the grievance process given his illness. The Claimant said that the redundancy was a nonsense, that Mr McKay had threatened to restart it while the Claimant was on a graduated return to work, Mr McKay was treating the Claimant like he was delaying deciding on the way forward for no reason other than because he was ill and on a phased return to work. The Claimant was still suffering from the symptoms of Covid-19 and under medical treatment. This was a lack of a duty of care by the Respondent that amounted to discrimination (the "**Fourth Disclosure**").

c) On 18 December 2020, 29 January 2021 and 8 February 2021, what the Claimant told Mr McKay and the Respondent orally and/or by email founded a belief that the Claimant may bring proceedings for disability discrimination under the Equality Act 2010.

6. The acts of victimisation alleged by the Claimant are as follows:

a) Dismissing him on 10 February 2021.

b) On 10 February 2021, removing his access to all IT systems immediately after the dismissal had been communicated.

c) Terminating or procuring the termination of the Claimant's wife's private health insurance immediately on 10 February 2021 and terminating or procuring the termination of his own health insurance at the end of February 2021. The Respondent asserts that the Claimant and his wife's private health insurance terminated on 24 March 202.

d) On or after 10 February 2021, not sending the Claimant his payslip, P45 and P60 forms. The Respondent asserts that the February payslip was provided on 7 July 2021, the P45 was sent by the Respondent's payroll provider by post and as a replacement P45 cannot be sent, a statement of earnings has been provided on 7 July 2021 and the Claimant was not entitled to a P60.

e) On or after 10 February 2021, not providing a breakdown of payments made on termination.

7. In respect of each alleged act of victimisation in paragraph 6a)– e):

a) Did the act occur and did it amount to a detriment for the purposes of s.27 EqA 2010?

b) If so, did the Respondent subject the Claimant to that detriment because he had done the protected acts at paragraph 5?

Alleged protected disclosures

8. The Claimant relies on the following as alleged protected disclosures individually and cumulatively:

~~a) In a grievance submitted on 30 July 2020, the Claimant made the following disclosures:~~

~~i. "*Basically, Steve Evans had used my period of extended annual leave, which he himself had authorised, to exclude me from a variety of areas, including the WM5G programme which I had been engaged on for nearly two years as the CGI SME, engaged with government, quango, LA and technology partners. When I questioned the validity and ethics of this approach Steve Evans became angry and shut the conversation down*" (page 14).~~

~~ii. "*Given the pressure on resources, the limited expertise in Smart City concepts across CGI UK and my background in the area over more than two years, it seems a clearly deliberate decision to exclude me from new opportunities from January 2020, to the extent that by July 2020 I was left with significant involvement in only Salford and then only because of pressure from the client. This appears a clear pre-meditated act by Steve Evans, with Manoj Arora and Cate Elder aware, in line with all the other examples of deliberate exclusion to undermine my position*" (page 38).~~

~~iii. "*By this point it had become clear that a similar pattern was developing of exclusion and marginalisation for several people. Michelle Pontes who had made the same complaint of exclusion against Steve Evans and had been moved roles, whilst also warning Carmen Ayo that Steve Evans was "coming for you and Guy next". Carmen Ayo was also facing the same process and she has also submitted a grievance for a process of deliberate exclusion by Steve Evans to undermine her role and has now been forced out of CGI through "redundancy""*" (page 45 – paragraph 1.9.13).~~

~~iv. "*We were also now of the belief that Steve Evans knew that both Carmen and I were aware of his method of undermining people, that we were discussing what we were facing and supporting each other in ETP meetings and 1:1s. I believe this just resolved Steve Evans to proceed against both of us, as he had against Michelle Pontes, who again he was aware we were in contact with.*" (page 45, paragraph 1.9.14).~~

~~v. "*Around the same time I believe Carmen Ayo was approached by Steve Evans to provide details on the WM5G transport competition, who was likely to be bidding for it and insight on consortia etc. Carmen had also been excluded since late 2019 and said as much making clear she had not been involved so could not provide any answers.*" (page 49, paragraph 2.10)~~

vi. "*There is no basis for redundancy of my role because, in Steve Evans' words "demand across the UK SBU for centralised support on 5G has fallen away". The element of 5G I am responsible for, that of applications and use cases, is but a part of my role, the minority of a much wider and deeper remit across multiple emerging technologies. Steve Evans has consistently lied, with this charge just another incidence of dissembling in his premeditated and deliberate strategy to remove me from my role*." (Page 72).

vii. "*Steve Evans sought to exploit a period of extended annual leave, that he himself authorised, to begin to exclude me from a range of initiatives and opportunities. The range and number of areas in which this occurred, in the same period and with the weight of evidence for each (Grievance Section 1) indicates that this cannot be waved away with simple excuses or seen as mere co-incidence. It was premeditated and deliberate, whilst also following a pattern of behaviour other staff in ETP have suffered themselves in 2020*." (page 73).

viii. "*Both Michelle Pontes early in 2020 and Carmen Ayo over the same period as myself, have suffered the same undermining of roles and harassment by Steve Evans. Michelle Pontes complained over Steve Evans appalling behaviour and was moved to a new role, whilst Carmen Ayo is also unfairly being pushed out of CGI. I would hope that both Michelle Pontes and Carmen Ayo will act as witnesses with full and frank evidence provided as required*." (page 73).

ix. "*Michelle Pontes suffered appalling treatment at the hands of Steve Evans, culminating in her moving roles out of ETP in early 2020. Carmen Ayo faced similar exclusion and undermining in her role as I have done. I would hope that three instances of the same premeditated strategy of undermining staff and harassment in 2020 to date would bring Steve Evans behaviour to light. I would hope that this would in turn force CGI to recognise this abuse and then to act in line with their much promoted commitment to ethical behaviour. I hope this, even if only at the least to spare anyone else from suffering the same abuse as we have had these last few months*" (page 74).

x. "*My experience through 2020 has been one of consistent lies and deceit on Steve Evans part. I have experienced a level of abuse and harassment, as Steve Evans has sought to undermine and remove me from my role for his own personal interests, that I have never seen in my business career before. I believe this highlights a complete failure of any duty of care and an alarming lack of ethics, if not sociopathic behaviour, from a CGI UK senior leader, a member of UK Cabinet no less*" (page 75).

b) In a grievance appeal submitted on 13 October 2020, the Claimant made the following disclosure: "*I stated that Steve Evans failed in a duty of care by clearly working to undermine and exclude me, as noticed by a number of other CGI members, thus resulting in my staying at work even when increasing unwell as the suspected Covid-19 infection developed*." (page 9).

c) Providing information that the EqA 2010 had been breached as set out in paragraph 5b)(i), (ii), (iii) and (iv) above.

d) The First to Fourth Disclosures at paragraphs 5b)i) to iv) above.

9. Were the alleged disclosures in paragraph 8 qualifying disclosures i.e. were they a disclosure of information which, in the reasonable belief of the Claimant, was made in the public interest and tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation for the purposes of section 43B(1)(b), ERA 1996:

10. If so, are the disclosures protected within the meaning of s.43A ERA 1996 i.e. were they made by the Claimant to the Respondent in accordance with s.43C ERA 1996?

Automatic unfair dismissal for making a protected disclosure (s.103A ERA 1996)

11. Was the reason (or, if more than one, the principal reason) for the Claimant's dismissal on 10 February 2021 that he made one or more of the protected disclosures at paragraph 8?

Whistleblowing detriment (s.47B(1) of the ERA 1996)

12. Did the Respondent subject the Claimant to a detriment pursuant to s.47B ERA? The Claimant relies on the following detriments:

    ~~a) On 3 February 2021, Mr McKay threatening to subject the Claimant to a performance review of his work from August 2019 to January 2021.~~

    ~~b) On 10 February 2021, removing his access to all IT systems immediately after dismissal had been communicated. As stated at 8(b) above, this is admitted.~~

    c) Terminating or procuring the termination of the Claimant's wife's private health insurance immediately on 10 February 2021 and terminating or procuring the termination of his own health insurance at the end of February 2021.

    d) Not sending the Claimant his P60 and P45 forms.

13. If so, was that on the ground that the Claimant made one or more of the protected disclosures at paragraph 8 above? The Claimant contends that all of the detriments were done on grounds that he had made one or more of the protected disclosures.

Ordinary unfair dismissal (s.98 of the ERA 1996)

14. What was the reason or principal reason for the Respondent dismissing the Claimant? The Respondent relies upon 'some other substantial reason' due to the breakdown of trust and confidence in the working relationship. The Claimant contends that he was not dismissed for a fair reason but in any event SOSR did not justify his dismissal.

15. If the Respondent dismissed the Claimant for a potentially fair reason, did the Respondent act reasonably in the circumstances (including the size and administrative resources of the Respondent's undertaking) in treating it as a sufficient reason for dismissing the Claimant and was the dismissal fair in accordance with the equity and the substantial merits of the case, pursuant to s.98(4) ERA?

Failure to make reasonable adjustments (s.20-21 EqA 2010)

16. Was the Claimant disabled within the meaning of s.6 of the EqA 2010 at the relevant time? The Claimant relies upon Long-Covid and diabetes, type 2.

17. If the Claimant was disabled, did the Respondent(s) know or could the Respondent(s) reasonably have been expected to know about the Claimant's disability? If so, at what date did the Respondent(s) have that knowledge?

18. Did the Respondent(s) apply provisions, criteria or practices ("PCP") as follows:

    a) ~~**PCP 1:** Requiring employees to co-operate with redundancy procedures~~.

    b) **PCP 2:** Requiring employees to agree to unilateral changes to their roles

c) **PCP 3:** Requiring employees to accept grievance outcomes.

19. If so, did the PCPs put the Claimant at a substantial disadvantage as follows:

a) **PCP 1**: the Claimant was unable to co-operate with the redundancy procedure because he was on sick leave due to an illness related to his disability;

b) **PCP 2 and 3**: the Claimant was unable to accept the grievance outcome or to accept unilateral changes to his role without experiencing anxiety which exacerbated his illness;

c) **PCP 1, 2 and 3**: the Claimant was subject to a greater risk of experiencing a breakdown in the working relationship which put him at a greater risk of dismissal.

20. If so, did the Respondent(s) know or ought they have known that the Claimant was likely to be at a substantial disadvantage compared with persons who were not disabled?

21. If so, did the Respondent(s) fail to make reasonable adjustments needed to avoid such substantial disadvantage pursuant to s.20 EqA by:

a) Not holding a meeting with the Claimant before dismissal

b) Not arranging workplace mediation.

c) Requiring the Claimant to co-operate with redundancy procedures.

d) Unilaterally changing the Claimant's role. It is denied that the Respondent(s) unilaterally changed the Claimant's role.

e) Dismissing the Claimant.

22. The Claimant contends that the Respondent's failure to meet its duty to take reasonable steps to avoid such substantial disadvantages occurred from 17 June 2020 to 10 February 2021.

~~**Breach of contract**~~

~~23. Did the Respondent fail to pay approximately £4,600 in reasonable expenses to the Claimant?~~

~~24. If so, was this a breach of the Claimant's contract?~~

~~**Failure to provide an itemised pay statement (s.8(1) of the ERA 1996)**~~

~~25. Was the Claimant not provided with an itemised pay statement for February 2021? It is admitted that the Claimant was not sent his February 2021 payslip at the time of termination. However, a payslip has since been sent.~~

~~26. Was this a breach of s.8(1) of the ERA 1996?~~

Remedy

27. If any of the Claimant's claims are well founded, what compensation should he be awarded in respect of:

a) a basic award;

b) a compensatory award for unfair dismissal;

c) financial loss arising from any discrimination;

d) injury to feelings.

28. What steps has the Claimant taken to mitigate his loss?

29. Should any adjustments be made to any award of compensation to take into account:

a) an unreasonable failure by the Respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures;

b) The principle set out in Polkey v AE Dayton Services Ltd [1987] UKHL 8;

c) The Claimant's contributory fault;

d) A lack of good faith in the making of any disclosures?