Case Number: 2401206/2020
2420257/2020
2420674/2020
2400338/2021
2407546/2021

EMPLOYMENT TRIBUNALS

Claimant: Miss M Waterworth

Respondent Manchester University Hospitals NHS Foundation Trust

HELD AT: Manchester **ON:** 1- 5, 8-12, 15-19 August 2022 (and in chambers 31 October-2 November 2022)

BEFORE: Employment Judge Batten
A Gilchrist
N Williams

REPRESENTATION:

For the Claimant: In person
For the Respondent: L Amartey, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. the complaint of whistle-blowing detriment fails and is dismissed; and

2. the complaint of disability discrimination succeeds only in respect of one allegation, which was admitted by the respondent, namely the comment by Mr Crier about the claimant (allegation 46 in Schedule 3 of the list of issues) for which the Tribunal awards the sum of **£900.00** for injury to feelings. All other complaints of discrimination fail and are dismissed.

REASONS

Background

1. The 5 claims which are the subject of this hearing, have a lengthy case management history.

2. By a claim form dated 14 February 2020, the claimant presented complaints of disability discrimination, detriment for whistle-blowing and unpaid wages. On 18 March 2020 the respondent entered its response to the claim. The claimant subsequently amended her claim on 24 March 2020 and the respondent submitted an amended response on 31 March 2020. In May 2020, the claimant wrote to the Tribunal about making an application to amend her claim further. That application was submitted to the Tribunal and sent to the respondent on 7 August 2020 and further amended particulars were sent to the Tribunal in September 2020.

3. On 9 November 2020, there was a case management preliminary hearing before Employment Judge Whittaker at which efforts were made to understand the particular complaints of disability discrimination and whistleblowing, having regard to the applicable statutory provisions. Orders were made for the claimant to clarify her complaints by way of further particulars.

4. At the end of 2020, the claimant served 2 further claims covering further matters which had occurred since the first claim was issued (case numbers: 2420257/2020 and 2420674/2020). These were joined with the original claim.

5. On 14 January 2021, there was a second case management preliminary hearing before Employment Judge Whittaker at which further efforts were made to understand the claimant's complaints of disability discrimination and whistleblowing, having regard to the expanded particulars of claim which the claimant had presented to the Tribunal. Employment Judge Whittaker undertook to prepare a schedule of claims and issues for further consideration by the parties. As the issue of disability remained in dispute, Orders were made to progress the issue of disability.

6. Following the second case management preliminary hearing, the claimant served a fourth claim (case number: 2400338/2021) which was joined into these proceedings. The fourth claim covered further matters which had occurred since the previous 3 claim forms were issued.

7. Immediately prior to the third case management preliminary hearing, the claimant issued a fifth claim (case number: 2407546/2021) which was also joined into these proceedings. It covered further matters which had occurred since the previous 3 claim forms were issued.

8. The third case management preliminary hearing took place on 21 and 22 June 2021 before Employment Judge Leach. The issue of disability (dyslexia) was by then admitted by the respondent. All 5 claims were discussed and renewed efforts were made to identify and clarify all the claimant's complaints and issues across the various claim forms, the several amendment requests and other documents that the claimant had tendered in the course of the proceedings up to that date. Orders were made to prepare the 5 claims for final hearing which was listed for 15 days, in August 2022. Following the third case management preliminary hearing, the Employment Judge produced a 19-page list of issues to which the parties agreed.

9. Since the third preliminary hearing, the claimant has issued a sixth claim (case number: 2401633/2022). It has been agreed that this sixth claim shall not be considered at the final hearing listed in August 2022. The parties have agreed that this final hearing shall only deal with events and matters comprised in the first to fifth claim forms, that is events and matters up to 21 May 2021.

10. A fourth preliminary hearing was listed on 8 July 2022, before Employment Judge Batten, to consider what reasonable adjustments would be required for the claimant to participate in the final hearing effectively. Whilst the claimant wrote to the Tribunal to set out adjustments which she considered necessary, no medical or expert evidence was provided, despite the Tribunal's order for such to assist the Tribunal in considering the appropriateness or otherwise of the requested reasonable adjustments. In the course of the preliminary hearing, the claimant forwarded a 2008 report prepared by Salford University, on her study support requirements. A list of 9 reasonable adjustments was drawn up and the respondent asked for time to respond to those, necessitating further discussion at the start of the final hearing – see paragraphs 20 - 29 below.

11. In addition, the claimant has informed the Tribunal that, in June 2022, she sent a letter before action to the respondent, with the intention of pursuing a claim in the county court about her subject access request, which itself had been the subject of a complaint to the Information Commissioner's Office. That matter does not fall within the Tribunal's jurisdiction.

Evidence

12. The Tribunal was provided with 4 lever-arch files of documents, amounting to in excess of 2700 pages together with a file of the claimant's medical disclosure and also a file of documents on remedy. Further documents were added to the hearing files, in the course of the hearing. References to page numbers in these Reasons are references to the page numbers in the main 4 files.

13. The claimant gave evidence herself and called Matthew Harris of the RCN, to give evidence in support.

14. The respondent tendered 15 witness statements. Following its strike-out application (see paragraphs 30 - 65 below), the respondent called 7 witnesses to give oral evidence, being: Dr Heidi Mason – Consultant clinical psychologist; Gill Whelan – claimant's manager from August 2019 to October 2020; Maria Slater – Director of the CAHMHS service until August 2021; David Crier – Contract Service manager; Kimberley Turner – Assistant HR business partner; Lois Critchley – Informatics Head of governance and risk control; and Shelley Bunting – the claimant's manager from September 2018 to August 2019.

15. The respondent's other witnesses, for whom the respondent served written witness statements but who did not give oral testimony, were: Liam Connolly – the claimant's manager until September 2016; Vicky Gillibrand – the claimant's manager from September 2016 to October 2018; Stephen Dickson – the respondent's chief executive; Stephen O'Rourke – IT Desktop Support team manager; David Cain – 'Freedom to Speak Up' guardian from August 2018 to March 2021; Tom Widdall – HR business partner; Helene Bilton – Director of HR; and Al Ford – Director of the clinicals service unit and the claimant's line manager from October 2020. The respondent decided not to call these witnesses following the determination of its strike-out application – see paragraphs 30 to 65 below

16. All of the witnesses who gave oral evidence did so by reference to their written witness statement and were subject to cross-examination, except for Mr Harris from the RCN, who attended on a witness order without a written statement.

17. The respondent also provided the Tribunal with a factual chronology and a cast list. The claimant took no issue with these documents.

18. Upon conclusion of the oral evidence, the Tribunal received written submissions from each party in turn and heard oral submissions from both

parties - the claimant having the benefit of advanced sight of the respondent's written submissions. As the oral submissions were only completed at the end of the fifteenth hearing day, the Tribunal reserved its judgment.

19. On 27 October 2022, following the hearing, and prior to the Tribunal's deliberations, the claimant sent the Tribunal a medical report on her from a consultant neurologist, dated 8 October 2022. On 1 November 2022, the respondent emailed the Tribunal to set out its view that the symptoms and impact of a number of conditions suffered by the claimant had been the subject of lengthy discussion at the start of, and during the final hearing and that the report merely confirmed the conditions discussed. On 1 November 2022, the claimant emailed the Tribunal to say that the report was on her condition of chronic migraines which had recently been diagnosed and that she considered the report should be viewed as "background information". The Tribunal accepted the claimant's suggestion, that the report be viewed as background information.

Reasonable adjustments

20. At the start of the final hearing, the Tribunal revisited the issue of reasonable adjustments for the claimant which had previously been discussed at the fourth preliminary hearing on 8 July 2022 – see paragraph 10 above.

21. The Tribunal heard extensively from the claimant, from her trade union officer, Mr Harris, and from Counsel for the respondent on this matter, noting that reasonable adjustments had originally been considered in 2021, at the case management preliminary hearing before Employment Leach, and subsequently at the case management preliminary hearing on 8 July 2020, and reserved to the start of this hearing as a matter to be considered further in the absence of medical evidence.

22. The claimant had been invited to provide more evidence. Further evidence had been found and the Tribunal took time to consider it all. The Tribunal heard from the claimant at length and discussed all matters fully with her. It also heard from the claimant's union officer, Mr Harris, who has assisted the claimant with internal proceedings for a number of years, and who clearly knows the claimant very well.

23. The Tribunal considered the disadvantages under which the claimant labours and carefully reviewed the documentation and the reports provided, including the medical documents file and an 'Access to Work' report which appears in the main hearing files at page 82, which was prepared for the

Jobcentre Plus and DWP in 2017. As a result, the Tribunal first identified the following list of disadvantages which list was agreed with the claimant:

- Dyslexia;
- Issues with working memory and short-term memory and taking notes;
- Reading slowly and needing to re-read for understanding;
- The question of the hours of the day which may be best for the claimant to be effective in her work;
- Needing additional time;
- Needing a quiet environment in which to function;
- The claimant's migraines;
- The claimant's stress and anxiety;
- The claimant's depression;
- Tiredness;
- Issues with understanding legal terminology in the case.

24. Following extensive discussion with the claimant, the Tribunal considered that the reasonable adjustments required to assist the claimant with each of the above disadvantages at the hearing, which were put into effect, are as follows:

24.1. The Tribunal noted that the claimant's dyslexia manifests itself in a number of the identified disadvantages including working memory and short-term memory. It was therefore decided that questions to the claimant, or themes for questioning, would be, and were provided to the claimant by Counsel for the respondent in advance, with discussion where appropriate on how far in advance that would to be practical to do, as the cross-examination of the claimant proceeded;

24.2. Whilst under oath and giving evidence, the claimant was permitted to use a highlighted and annotated/colour-coded bundle which she had prepared for her reference with notes endorsed on it and also a copy of her witness statement prepared in a similar fashion with notes endorsed on it. Counsel for the respondent inspected these items before the claimant gave her evidence and raised no issue with the format or notes thereon;

24.3. The claimant was allowed to take her own notes when she was under cross-examination, in order to jot down any thoughts or concerns,

and to reflect on matters arising in her evidence, at the end of each session. The claimant was then able to, and did, feedback her further thoughts on her answers to cross-examination, at the start of the next day. The claimant also gave the Tribunal a copy of her notes and further thoughts, for reference. These notes were added to the claimant's witness statement;

24.4. As the claimant reads slowly and needs to re-read for understanding, the claimant was afforded additional time and/or breaks as required. This gave her time to read documents and statements referred to in the course of the hearing. The Tribunal took a number of breaks during the hearing to facilitate this and other adjustments in this list;

24.5. Documents referred to in evidence were read out to the claimant, and re-read where necessary, to enable clarity of understanding. Similarly, questions were repeated to ensure the claimant understood what was being asked of her;

24.6. On most days, the hearing finished early in the afternoon, either at the claimant's request or when it became apparent that the claimant was experiencing tiredness and/or memory overload;

24.7. The respondent provided the claimant with a copy of its notes of the evidence and matters arising in the hearing, each day. This meant that the claimant had a thorough note of the hearing/evidence, and afforded her the ability to follow the evidence without trying to make her own notes at the same time. In addition, each day the claimant was able to reflect on the day's events, in her own time and space. The Tribunal is grateful to the respondent for supplying its notes to the claimant. The Tribunal considered that having thorough and detailed notes was an important aspect of support for the claimant when she reviewed the evidence and each day's events;

24.8. In respect of the hours of the day, the medical documents suggest that adjusting the claimant's working day, starting early and finishing early, might be helpful although there was little information on the reasons for such nor how this might best work. In the circumstances, the Tribunal proposed that the first days of the hearing, where administrative matters were dealt with, would start at 10:00am and the claimant was asked to tell the Tribunal if this was creating difficulties for her, so that the times could be reviewed for example when the Tribunal came to hearing evidence. The claimant reported no issues. In any event the claimant, and also 2 members of the

Tribunal, were travelling a significant distance each day such that getting to the Tribunal for say 9.00am, or earlier, was going to be problematic for the claimant. In any event, the Tribunal sat from 10:00am each day without complaint being raised;

24.9. Having regard to the need for a quiet environment, the Tribunal ensured that the air conditioning was switched off as necessary. It was agreed that if the hearing room became hot, it would be possible, but not ideal, to move to another Tribunal room. In the event, this was not necessary;

24.10. The Tribunal decided that, when people wish to communicate between themselves within the hearing room, they should avoid making a noise, and instead confer by passing notes rather than say whispering. Where conversations needed to be had, or instructions taken, the Tribunal was alerted and took an appropriate break;

24.11. In terms of the claimant's migraines, the trigger for those migraines was unclear from the medical documents. The Tribunal therefore kept an eye on how much material and information the claimant was having to process each day and the resulting fatigue, and adjourned for breaks or an early finish in consultation with the claimant each day. This was also done in an effort to reduce the stress and anxiety which the claimant was likely to suffer during the course of the hearing. The Tribunal were conscious that bringing and conducting Tribunal proceedings is, by its very nature, stressful and demanding. The reasonable adjustments discussed and agreed with the claimant were designed with such in mind;

24.12. The claimant told the Tribunal she suffers from depression and low mood. There was no medical evidence on how/when this condition manifested itself in the claimant’s case. In those circumstances and after discussion with the claimant, the Tribunal considered that the reasonable adjustments put in place would help to alleviate things as much as possible but that the claimant must tell the Tribunal if she felt low at any time over the course of the 15-day hearing so that adjustments could be reviewed;

24.13. In respect of legal terminology, The Tribunal considered that it had a duty to avoid such and/or explain any unusual terms, phraseology or language in plain English so that everyone participating in the hearing can understand what is being said or discussed. Counsel for the respondent also indicated she was mindful of the fact that lawyers

do sometimes slip into legal terminology and confirmed that she would endeavour not to do so. In any event, it was made clear to the claimant that she could, and must, ask whatever she wishes to know, at any time, if she does not understand what is being said.

25. The Tribunal then considered revising the timetable for the hearing, because the original timetable had slipped due to initial administrative matters taking up almost the whole of the first 2 hearing days. The Tribunal needed time to read the statements and documents before hearing evidence. The Tribunal also considered that it would be useful to "take stock" at the end of each day and at the end of each week, as to how the case/evidence was progressing, how the claimant was feeling and her need for any additional time to prepare for each day and the next witness, in light of the evidence so far.

26. In June 2021, Employment Judge Leach had raised the possibility of appointing an intermediary to assist the claimant and this matter had been reviewed at the fourth case management preliminary hearing in July 2022. The claimant had been asked to research the use of intermediaries in legal proceedings, and to bring evidence of what help she might benefit from in terms of an intermediary, if she wished to pursue such. The claimant was, however, unable to identify anything that an intermediary might do to assist her beyond the reasonable adjustments which the Tribunal had identified, discussed and agreed with her above, save that she thought it would be good to have somebody to sit with her and "be on [her] side". The Tribunal did not consider this to be the role or function of an intermediary and the claimant was asked instead to consider whether any family or friends might accompany her to the hearing for support. Indeed, on some but not all hearing days, the claimant brought a friend with her to the hearing for support.

27. It was not apparent to the Tribunal that an intermediary might assist the claimant, or indeed the Tribunal, in any other or better way. Nevertheless, at the end of the first hearing day, the claimant was afforded further time, overnight, to consider the issue of an intermediary and raise the matter again if she wished to pursue such. The claimant did not raise the matter again.

28. In light of all the above, the Tribunal considered that it had identified the relevant and numerous disadvantages with the claimant. By agreement with the parties, the Tribunal put in place the agreed reasonable adjustments so as to effectively discharge the Tribunal's duty to assist the claimant in terms of access to justice and to enable her to participate fully and effectively in

the hearing. The Tribunal noted that it had engaged in discussions with the claimant on reasonable adjustments for over a year prior to the final hearing and that many of the reasonable adjustments which the Tribunal had identified for the final hearing had been the subject of lengthy discussion and deliberation.

29. The claimant also alluded to the possibility of adjourning the final hearing in order to give her more time to prepare for it. The Tribunal rejected this suggestion. The final hearing had been listed for 15 days, by consent of the parties, over a year ago. The Tribunal considered that there had been ample time to prepare for the hearing, given that the first claim had been presented in early 2020. The Tribunal's preliminary view was that 15 days might be insufficient due to the amount of evidence before it, the number of witnesses and the list of Issues which ran to 19 pages. However, the Tribunal did not think that a postponement and relist of the final hearing, likely to be in 2024 given the pressure on the lists in the North West region of the Employment Tribunals, would be in the interests of justice or in accordance with the overriding objective having regard to both parties' positions which might be prejudiced by further significant delay. Rather, the Tribunal considered that the interests of justice required the hearing to get going, with the reasonable adjustments identified in place, and with the opportunity to review such matters from time to time as the hearing progressed.

The issues to be determined and the respondent's application to strike out parts of the claim

30. A list of issues had been agreed by the parties after the third case management preliminary hearing on 21 – 22 June 2021. The list of issues appears as an annex to this Judgment but see also paragraph 65 below.

31. At the commencement of the final hearing, the Tribunal discussed the list of issues with the parties and proceeded to hear the claimant's evidence and cross-examination of her on the basis of that list of issues.

32. The claimant's evidence was completed on the tenth hearing day. On the morning of day 11 of the hearing, the respondent made an application for the Tribunal to strike out those parts of the claimant's case which were out of time. The respondent contended that there were no grounds, on a just and equitable basis, to extend time for any discrimination complaint that was out of time and that no course of conduct had been established by the evidence. Further, it was contended that it had been reasonably practicable for the claimant to bring the relevant whistle-blowing detriment complaints in time. In addition, the respondent contended that the Tribunal should strike

out all the allegations brought by the claimant that were in time, or in the alternative certain other allegations brought by the claimant, which the respondent contended had no reasonable prospects of success in light of the claimant's evidence or lack thereof.

33. The respondent made its application in writing, sent to the Tribunal and to the claimant early that morning, before the hearing itself. At the start of the hearing that day, the Tribunal first explained to the claimant what the respondent was seeking to do. The Tribunal then heard submissions on the application from Counsel for the respondent. The Tribunal then explained to the claimant the legal tests to be applied in respect of strike-out and those aspects of her case which the respondent sought to remove by its application to strike-out, including an explanation of time points, extensions of time, and also the concept of reasonable prospects of success. The claimant was then afforded just over a further 2 hours to prepare her response to the application as made. The claimant's submissions were heard after lunch, such that the strikeout application effectively took up the eleventh hearing day.

34. Having heard from both parties, the judgment of the Tribunal on the respondent's application was that:

    34.1. All those matters which occurred before 20 September 2019 (having regard to the commencement of early conciliation on 19 December 2019) are out of time and shall not be considered further, it not being just and equitable to extend time for the discrimination complaints, and it having been reasonably practicable for the claimant to bring the relevant detriment complaints in time;

    34.2. The allegations in Schedule 2, numbered 2, 5, 21, 22 and 26 have no reasonable prospects of success and shall be struck out on that basis;

    34.3. In Schedule 3, allegation 43 has no reasonable prospect of success, such that it shall be struck out on that basis; and

    34.4. The remainder of the allegations shall continue to be heard.

35. The Tribunal's reasons for its decision on the respondent's application are as follows.

Relevant Legal Principles – Striking Out

36. The power to strike out arises under what is now rule 37 of the Employment Tribunals Rules of Procedure 2013. Rule 37 so far as material provides as follows:

"*At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –*

(a) that it is scandalous or vexatious or has no reasonable prospect of success…"

37. As far as "no reasonable prospect of success" is concerned, a helpful summary of the proper legal approach to an application to strike-out is found in paragraph 30 of *Tayside Public Transport Co Ltd v Reilly [2012] CSIH 46*, a decision of the Inner House of the Court of Session:

"Counsel are agreed that the power conferred by Rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (Balls v Downham Market High School and College [2011] IRLR 217, at para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (ED & F Mann Liquid Products Ltd v Patel [2003] CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (ED & F Mann Liquid Products Ltd v Patel, supra; Ezsias v North Glamorgan NHS Trust [[2007] ICR 1126]). But in the normal case where there is a "crucial core of disputed facts," it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out (Ezsias v North Glamorgan NHS Trust, supra, Maurice Kay LJ, at para 29)."

38. There is no blanket ban against there being a strike-out, for instance in particular classes of cases such as discrimination, although in *Lockey v East North East Homes Leeds UKEAT/0511/10/DM*, a decision of 14 June 2011 before HHJ Richardson sitting alone, the EAT said at paragraph 19:

"…In cases of discrimination and whistleblowing there is a particular public interest in examining claims on their merits which should cause a Tribunal to consider with special care whether a claim is truly one where there are no reasonable prospects of success: see Ezsias at paragraph 32, applying Anyanwu v South Bank Student's Union [2001] IRLR 305. …..The Tribunal

is in no position to conduct a mini-trial; issues which depend on disputed facts will not be capable of resolution unless it is clear that there is no real substance in factual assertions made, as it may be if they are contradicted by contemporaneous documents."

39. In *Ahir v British Airways plc [2017] EWCA Civ 1392*, Underhill LJ put it as follows (paragraph 16):

"*Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'*."

Applicable law - time limits – discrimination complaints

40. The time limit for complaints of unlawful discrimination is found in section 123 of the Equality Act 2010 ("EqA"), which provides that such complaints may not be brought after the end of: -

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

(b) such other period as the Employment Tribunal thinks just and equitable.

41. Conduct extending over a period of time is to be treated as done at the end of that period and a failure to do something is to be treated as occurring when the person in question decided on it*, or does an act inconsistent with doing it,* or on the expiry of the period in which that person might reasonably have been expected to do it. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question.

42. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) [2003] IRLR 434* the Court of Appeal considered the application of the "just and equitable" extension and the extent of the discretion and concluded that the Employment Tribunal has a "wide ambit".

Time limits – whistle-blowing detriment complaints

43. The time limit for complaints of whistleblowing detriment is found in section 48(3) of the Employment Rights Act 1996 ("ERA") which provides that such complaints shall be presented to the Tribunal:

> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
>
> *(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*

44. Two issues may therefore arise: whether it was not reasonably practicable for the claimant to present the complaint within time; and, if not, whether it was presented within such further period as is reasonable.

45. Something is "reasonably practicable" if it is "reasonably feasible" (see *Palmer v Southend-on-Sea Borough Council [1984] ICR 372, Court of Appeal)*.

46. In *University Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12* the EAT upheld a Tribunal decision that a late claim was "in time" even though the medical evidence "did not entirely support the Judge's findings about the Claimant's mental health" (EAT judgment paragraph 12) and even though the claimant had been able to move home and find a new school for her child during the period when the Tribunal found it had not been reasonably practicable to have presented a claim.

47. In *Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293* the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 of its Judgment that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal

Conclusions on time limits

48. The Tribunal considered that everything the claimant complained about that occurred before 20 September 2019 was out of time having regard to the statutory time limits for bringing her complaints, in section 123 EqA and section 48(3) ERA as applicable.

49. Early conciliation for the first claim (case number 2401206/2020) was commenced on 19 December 2019. 3 months prior to that date is 20 September 2019 such that anything arising prior to that date is out of time. This affected a number of complaints brought under EqA, namely the factual allegations in Schedule 3, numbers 28-41 of the list of issues. It also affected a single complaint of detriment, being number 1 in Schedule 2 of the list of issues, which relates to the protected disclosure detriment claim. The Tribunal in any event considered that the latter was an individual allegation which had no reasonable prospects of success because it was clear from the documentary evidence that there was no such refusal by Ms Bunting either as alleged or at all.

50. In respect of the discrimination allegations in Schedule 3, items 28-40, which are out of time, the Tribunal found no evidence of a continuing act or course of conduct nor anything to connect any of those matters complained of. The Tribunal also considered that items 28-41 did not have reasonable prospects of success because there was a complete lack of evidence of any causal link to the claimant's disability. In addition, certain of these allegations formed the basis for the complaint of a failure to make reasonable adjustments. In light of the provisions of section 123(3)(b) on time limits in respect of a failure to do something, the Tribunal considered that all the allegations of a failure to make reasonable adjustments were long out of time and the reasonable adjustments complaint was dismissed on that basis.

51. The claimant asked the Tribunal to extend time for up to 4½ years to bring all her complaints in time by extension, despite there being no evidence of a continuing act, and no evidence of any link whatsoever between the acts complained of or the personnel said to be involved. The Tribunal took account of the fact that the claimant had the benefit of advice and representation by her trade union over many years, and that the trade union engaged in-house solicitors. She therefore had the benefit of legal advice from qualified and experienced lawyers in addition to experienced trade union representation. The Tribunal considered on a balance of probabilities that the claimant would therefore have been made aware of the necessary time limits for bringing her complaints in time. In those circumstances, the

Tribunal considered that it would not be just and equitable to extend time in respect of those discrimination complaints brought out of time and that it was reasonably practicable for the detriment complaint concerned to have been brought in time.

52. In reaching its decisions, the Tribunal took account of the fact that, immediately prior to making her claim, after the issue of her early conciliation certificate, the claimant had talked to the respondent about her complaints, describing them as covering "the last 14 months". In the file of documents at page 2493 of the bundle, there is a transcript of a conversation between the claimant and David Cain of the respondent on 20 January 2020. When asked about taking her complaints to Tribunal, the claimant told the respondent the following:

"Cain: On what grounds would you take it to the Tribunal, Mary?

Claimant: I'm claiming that for the last 14 months I've been working at a Band 6 level but I've only been paid at a Band 5 level.

Cain: That's a payment or a pay claim.

Claimant: Yes, and it's also the bullying."

53. In January 2020, therefore, the claimant had in mind an allegation or allegations of bullying over at best 14 months only, which would encompass matters going back to mid-2018, having commenced early conciliation on 19 December 2019. Nevertheless, the claim appeared to have grown in substance since then, going back to 2015. It was apparent that matters were expanded further when the claimant submitted a 'subject access request' to the respondent. This produced numerous documents from which the claimant decided that there were more things that she should complain of even though she had been unaware of much at the material time. Her allegations also grew despite that the documents to which the Tribunal was referred do not support many of the complaints since raised. The Tribunal did not consider it appropriate to extend time because of what had amounted to a fishing expedition.

54. The Tribunal took account of the fact that the claimant did not pursue any of her complaints at the material time, save that she had raised a grievance against Mr Connolly in 2016, when he was about to leave the respondent's employment. However, that grievance had not then been pursued and it was not appealed, and the claimant has been unable to provide any explanation this or for the delay in pursuing that matter since 2015. The Tribunal was satisfied from the claimant's evidence that she was at all times

aware of her right to bring a grievance and that she had the ability to do so if she had wished at the material time.

55. The Tribunal also took account of the decision in *South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168*. The Tribunal found there to be lengthy periods within the time frame of this claim where there were no matters complained of by the claimant and nothing untoward was said to have happened. It is for the claimant to prove that events are linked but, from the evidence presented, the Tribunal did not find any link between the events complained of, nor anything to support a contention of a continuing act. The claimant was cross-examined over 6 days and the best the claimant could tell the Tribunal about a causal link was that she believed "the managers were sticking together" without being able to point to any evidence to substantiate this view. In addition, the Tribunal took account of the fact that the claimant was not complaining about one or two managers who had been friends or connected; rather, her complaints spanned every single line manager she had had, from 2015 when the claimant was managed by Mr Connolly, up to and including Mr Ford (who was a new employee of the respondent), who had never met nor could have met the first manager complained about, namely Mr Connolly.

56. The Tribunal considered there was no reasonable prospect of the claimant succeeding with an argument that any pre-2018 acts could be brought in time when there were no complaints brought during a number of significant periods or gaps in time, as highlighted by Counsel for the respondent in submissions. That fact of itself tended to suggest the absence of a continuing and/or sustained course of conduct or pattern of behaviour against the claimant.

57. For all those reasons, the Tribunal concluded that there were no grounds on a just and equitable basis to extend time to bring the out of time discrimination complaints into time and that it had been reasonably practicable for the whistle-blowing detriment complaint to have been brought in time.

Conclusions on no reasonable prospects of success

58. The second thrust of the respondent's application concerned whether, having heard the claimant's evidence, certain of her allegations could be said to have no reasonable prospects of success. The Tribunal was mindful of the fact that for example discrimination complaints are fact-sensitive and that the Tribunal had not yet heard from the respondent's witnesses. The burden of proof in discrimination complaints lies first with the claimant to

show facts from which the Tribunal could conclude that unlawful discrimination had occurred and involves a 'shifting' burden of proof save in circumstance where the Tribunal is able to make a firm finding as to the reason why a decision or action was taken. The Tribunal therefore considered this matter with care but concluded that certain allegations, even though in time, had no reasonable prospects of success, and should be struck out.

59. In respect of the individual discrimination complaints, in Schedule 3 of the list of issues, the Tribunal decided that allegation number 43 in Schedule 3 shall be struck out for having no reasonable prospects of success. The substance of the allegation was that, on 1 October 2019, the claimant had been asked to see a patient who had turned up in the clinic at 3pm. The claimant's evidence under cross-examination was that patients of the CAMHS service occasionally turned up asking to see a clinician and that sometimes admin staff were asked to see patients, not on a clinical basis, but just because somebody was in the waiting room and somebody needed to go and speak to them. The claimant did not see the patient and she was not required to do so. It was 3 pm. The claimant had her coat on, and was going out of the door when the matter was raised but she continued to leave work unhindered. She suffered no consequences from being unable to see the patient concerned who was not on the claimant's patient list. The claimant was unable to explain how this request was unfavourable treatment for the purposes of her section 15 discrimination arising from disability complaint.

60. Allegation 43 also featured as part of the claimant's complaint of harassment. However, the Tribunal concluded, from the claimant's evidence that it was a one-off event, and that it did not happen as the claimant had alleged. In those circumstance, the Tribunal found that the allegation had no basis in fact and therefore no reasonable prospects of succeeding as harassment or at all.

61. The Tribunal also considered that a number of the factual allegations of whistle-blowing detriment which appear in the list of issues, Schedule 2, had no reasonable prospects of success and should be struck out, as follows:

    61.1. Allegation 2: There was simply no evidence that the claimant's computer was being monitored. Her computer was old and the evidence showed that the claimant had not and would not cooperate with the respondent to upgrade it. The claimant's computer was therefore still running on Windows 7 (not Windows 10) and she was using an external memory stick, so there were a number of

reasonable and plausible explanations for why the claimant's computer may have been encountering difficulties. What there was not, was any evidence of a deliberate intention by the respondent to either interfere with the claimant's computer or to monitor it in any way.

61.2. Allegation 5: This related to an email, in the file at page 440, about missing patient notes having been found "in Mary's pigeonhole". The email was sent by Belinda Hughes, an administrator at the respondent. The claimant did not suggest that Ms Hughes was an antagonist or was in any way linked to or in cahoots with the managers complained of. In the circumstances, the Tribunal considered that the email was likely sent following the panic surrounding the loss of important documents and with relief that the lost documents had been found, without thinking that the pigeon hole was shared by 2 people and that, to be accurate, 2 names should have been used. The claimant's case was that it was her managers who were against her (which cannot by status include Ms Hughes, an administrator), and there was no evidence to suggest that Ms Hughes had somehow been put up to sending the email or put up to describing the pigeon hole in terms of the claimant alone. Later that day, Ms Bunting sent an email to many staff, not just the claimant, about needing to take care of documents or there would need to be a 'Datix' incident form, and that staff might suffer consequences – see file page 410. The claimant did not in any event suffer any consequences for the fact that the lost document was found in her pigeon hole. She was not even spoken to about the fact that the documents were found in her pigeon hole. In those circumstances, there was no evidence of any detriment arising such that the Tribunal concluded that this allegation has no reasonable prospects of success.

61.3. Allegation 21: this was an allegation that the respondent had refused to supply a transcript of the claimant's disciplinary investigation interview of 13 March 2020. The evidence showed that there was no such transcript in existence and so the Tribunal considered that the respondent could not be accused of refusing to give the claimant something which did not exist – such would be nonsensical and the allegation therefore has no reasonable prospects of success. In fact, there was a suggestion that the claimant had a recording of the meeting. If so, she could have produced a transcript herself but she had not done so.

61.4. Allegation 22: Here the claimant alleged that Mr Widdall had refused to be impartial in his dealings with her. The claimant pointed to emails in the hearing files, at pages 1206-1210 in support of this allegation. Having considered those emails, the Tribunal found no evidence of any sort of partiality or animus to the claimant on the part of Mr Widdall nor of any links to the claimant's protected disclosures. Rather, the emails show Mr Widdall acting at all times professionally in his dealing with the claimant and as a senior HR person, doing his job.

61.5. Allegation 26: At page 960 in the hearing file is an email sent by Dr Mason to the claimant and 2 of her colleagues about the claimant's change of supervision. The email was not sent to all colleagues. Changes in working arrangements have to be notified; they are occasionally talked about. The Tribunal could discern no detriment in this administrative communication to those colleagues who would need to know such and the claimant was unable to explain her the email in question could be said to be detrimental to her or at all.

62. The Tribunal decided to strike out the above complaints/allegations because, having heard the claimant's evidence, the Tribunal considered that those allegations had no reasonable prospects of success chiefly due to a complete lack of evidence, including where the claimant had accepted in cross-examination that things were not in fact as she had alleged, or where the contents of documents were irrefutable. The Tribunal considered the power of strike-out to be a draconian power, to be exercised with caution because it could mean the end of the claimant's claim in its totality. In light of all the above conclusions on the respondent's application, and on particular allegations, the Tribunal decided not to strike out the whole claim. However, the Tribunal's decision brought to an end a very substantial part of the claimant's claim. The Tribunal did not strike out the whole of the claimant's case, as the respondent invited it so to do, for the following reasons.

63. The Tribunal took account of the cautionary principles set out in ***Wiggan v R N Wooler & Co Limited UKEAT/0542/06*** and the reference in that decision to ***Clark v Watford Borough Council UKEAY/0043/99,*** in particular Judge Clarke's comments that it would be a complete waste of time to call upon the other party to give evidence in a hopeless case. The Tribunal did not consider that the claimant's was a totally hopeless case but considered nevertheless that certain allegations were hopeless for the reasons set out above, hence they were struck out. In reaching its decision on this aspect, the Tribunal noted the guidance in ***Wiggan,*** to the effect that, where the

burden of proof is on the claimant, it can be legitimate for the claimant to expect to be able to extract some useful evidence from the defendant's witnesses, and the importance of the claimant feeling the Tribunal has heard the entirety of her story before reaching a conclusion. It is only in exceptionally frivolous complaints where it is right to proceed to strike out in the course of a hearing. However, in this case, having heard from the claimant and having heard her frank admissions either that she had no evidence to substantiate a number of historic complaints and/or where contemporaneous documents contradicted her contentions, the Tribunal considered that strike out of such complaints was appropriate and necessary. The Tribunal was mindful of the overriding objective and the requirement for there to be a fair hearing for both parties, including the respondent, which should not be put to defending unsubstantiated and hopeless allegations where the evidence contradicts the complaints brought.

64. The claimant had addressed the Tribunal on her points for cross-examination of certain of the respondent's witnesses. Having heard from the claimant on that aspect, the Tribunal considered it just to allow the claimant the opportunity to cross examine those witnesses on the points raised as appropriate. The Tribunal asked itself whether, in the instant case, it was sufficiently exceptional to justify striking out everything as having no reasonable prospects of success, but the Tribunal decided that it was not appropriate to do so, concluding that it could not safely be said that nothing useful or relevant to the claimant's case might be extracted from the respondent's witnesses. Given the nature of certain in time allegations against the respondent, the Tribunal considered it important for the claimant to have the chance to cross-examine on such and for the Tribunal to proceed to hear oral evidence on those more recent allegations which survive the respondent's strike out application.

The remaining issues to be determined

65. After judgment on the strike out application, it was agreed that the complaints and issues remaining to be determined by the Tribunal were as set out in the annex to this Judgment, save that <u>those allegations struck out are indicated in the annex by a horizontal line through them</u>.

Findings of fact

66. The Tribunal made its findings of fact on the remaining issues on the basis of the material before it, taking into account contemporaneous documents

where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

67. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making further findings of fact. The Tribunal has not simply considered each particular allegation, but has also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

68. The findings of fact relevant to the issues which have been determined are as follows.

69. The claimant was employed by the respondent from 9 July 2010 as a Child and Adolescent Mental Health (CAMHS) Staff Nurse, band 5, based at Salford Pendleton Gateway, working 30 hours per week. She remains so employed. The respondent's job description for a CAMHS Practitioner, dated January 2014, appear in the hearing file at pages 268-270.

70. The claimant considers herself to be disabled by reason of dyslexia. She has never been formally diagnosed as such, however, in 2008, whilst studying at Salford University, the claimant was identified by the student support services as dyslexic and a document, outlining the support which she would need to complete her university studies, was drawn up. The respondent has conceded that the claimant is a disabled person for the purposes of her complaints brought under the EqA.

71. In early 2012, the claimant made a complaint about another staff nurse. Her complaint included incidents going back to the first day of her employment. Informal action to resolve the claimant's complaint failed because the claimant refused to mediate. Mr Connolly, the claimant's then line manager, had investigated and found no basis for disciplinary action against the individual about whom the claimant had complained.

72. The claimant subsequently complained about the conduct of Mr Connolly's investigation. The claimant was signed off work, sick, during the investigation of her complaint about Mr Connolly. Ms Slater, A Director of the CAMHS service, reviewed Mr Connolly's investigation and found nothing wrong. On 2 February 2012, Ms Slater wrote to the claimant to confirm her review and recommendations.

73. On 19 August 2016, the claimant contacted the respondent's HR to raise a grievance regarding support which she contended was not being provided to her by Liam Connolly as her line manager, which the claimant said had hindered her career progression. The grievance appears in the file at pages 277-279 and arose from the fact that an application to Access to Work had apparently not been progressed on the claimant's behalf. The claimant was by then aware that Mr Connolly was about to leave the respondent. There was no evidence that the claimant had ever chased up Mr Connolly about the issues raised in her grievance nor had she sought to progress the application to Access to Work herself in any way.

74. On 23 August 2016, the claimant went off work, sick. In the meantime, on 30 August 2016, Mr Connolly emailed Ms Slater regarding the allegations raised by the Claimant and recounting his involvement in a referral to occupational health and pointing out that it was for the employee to contact Access to Work (bundle page 283). On 2 September 2016, Mr Connolly left the respondent for a job elsewhere. He was replaced, as the claimant's line manager, by Ms Gillibrand.

75. On 17 October 2016, the claimant met with Maria Slater, the respondent's a Director of the CAMHS service and a colleague, Leila Mousa, to discuss the claimant's concerns regarding Liam Connolly, her return to work, an application to Access to Work and the prospect of the claimant making a Flexible Working application.

76. On 15 December 2016, a meeting took place to review the claimant's sickness absence, conducted by Ms Gillibrand. The claimant had, on the same day, made a request for flexible working which was also discussed. The claimant requested a change in her work pattern, to work Monday to Thursday from 7am to 3pm instead of working those days from 8am to 4pm. The claimant said that, due to her dyslexia she worked better with admin tasks earlier in the mornings rather than afternoon. On 19 December 2016, Ms Gillibrand rejected the claimant's flexible working request, on the basis that the working hours sought by the claimant could not be accommodated within the team.

77. On 30 December 2016, the claimant submitted a challenge to the refusal of her request for flexible working and, upon her return to work on 3 January 2017, the claimant contacted Ms Slater about it. On 25 January 2017, the claimant's request was granted on appeal and she was afforded a 3 months' trial, working amended hours from 7am to 3pm Mondays to Thursdays, with

her first working hour, from 7am to 8am being ringfenced for the completion of administrative tasks.

78. On 23 February 2017, the claimant returned to work after a lengthy sickness absence. Her flexible working trial was successful, and her amended hours were confirmed as permanent.

79. In April 2017, Dr Heidi Mason took over clinical supervision of the claimant.

80. On 12 July 2017, the claimant met with Ms Gillibrand and Dr Mason about the Access to Work assessment – the claimant's notes of this meeting and list of agreed actions are in the bundle at pages 331-332. The claimant raised no concerns as a result of the discussions.

81. In September 2018, Ms Gillibrand moved roles in the respondent and Ms Bunting became the claimant's line manager. Around this time, the respondent advertised a Band 6 role vacancy. The claimant decided to apply. However, after a review of the claimant's work by Ms Bunting, it was suggested that the claimant consider applying for re-banding to Band 6 through the 'Agenda for Change' regrading process. At some point, the claimant therefore withdrew her application for promotion to Band 6 on the basis of going through the Agenda for Change process instead- see bundle page 333.

82. On 11 December 2018, the claimant was told by the Agenda for Change HR Project Manager that she did not meet the essential criteria, under Agenda for Change, for a Band 6 regarding due to her lack of additional qualifications. Having reflected on her application in light of this information, the claimant emailed Ms Bunting and Dr Mason on 7 January 2019, to withdraw her re-banding application. In her email, the claimant said that she felt she was working above her banding, she was happy with her current role and responsibilities – see bundle page 348.

83. On 31 January 2019, in a meeting, the claimant told Dr Mason that she was concerned about a colleague, AB, undertaking independent school observations. The claimant contends that this allegation was a protected disclosure – see the list of issues, schedule 1, item 1(a). In light of the evidence, the Tribunal did not find this to be a protected disclosure. The Tribunal found that the claimant commented on AB's ability to carry out observations, expressing her opinion as to AB's competence and there was no evidence that the claimant's concerns were linked to patient safety. Rather, the Tribunal considered that the claimant identified a training need for AB, amounting to a further day of training being required to remedy

matters. There was no emphasis on seriousness and/or patient safety being compromised. The claimant did not identify anything that AB was doing that would or might harm patients. Her opinion was that AB's assessment results were below par and so follow-up action may be incorrect.

84. The claimant also contended that, at the same meeting on 31 January 2019, she expressed concerns to Dr Mason about instructions from Shelley Bunting which the claimant believed to be that all new Band 3 clerical staff would be expected to do half clerical work and half clinical work. The claimant did not agree with such a policy. The matter was put to the respondent's witnesses who also expressed concerns if that were to be the case. The claimant contends that this allegation was a protected disclosure – see the list of issues, schedule 1, item 1(b). However, the Tribunal did not find this to be a protected disclosure. The Tribunal found that the claimant was merely expressing her opinion. In any event, the evidence showed that this was not the respondent's policy and the claimant had misunderstood the situation.

85. On 14 March 2019, the claimant was off work, sick, until her return to work on 28 March 2019. She had a return-to-work meeting on 2 April 2019 with Ms Bunting. The meeting resulted in a return-to-work form (bundle pages 362-363) being completed and signed twice by Ms Bunting, in error.

86. On 4 June 2019, the claimant was off work, sick, until 17 June 2019. A return-to-work meeting took place on 18 June 2019. Issues have been raised about when this meeting happened as the claimant's notes were not produced until September 2020.

87. On 28 June 2019, there was a meeting between the claimant, Ms Bunting, Ms Slater and a representative from Remploy at which it was agreed, as a reasonable adjustment, that the claimant's job plan would include seeing 10 patients per week. The claimant also asked that her patient numbers should not be shared with the rest of the team.

88. On 22 July 2019, the claimant met with Ms Slater. In the course of the meeting, the claimant made allegations about Ms Bunting's behaviour towards her. The claimant contends that her allegations were a protected disclosure – see the list of issues, schedule 1, item 7. The allegations about Ms Bunting's conduct are recorded at point 5 in the claimant's follow-up email sent after the meeting – see also paragraph 89 below. The Tribunal considered that the claimant's allegations about Ms Bunting amounted to a personal complaint about her manager's conduct. In any event, the Tribunal noted that the claimant did not wish to make a formal complaint. In her email,

the claimant states, at the end of point 5, that she would manage the matter herself with Ms Bunting and, "if the situation starts escalating again [the claimant] will ask for the conversation to end and inform [Ms Bunting] that [the claimant] will contact [Ms Slater] to hopefully mediate and try to resolve this issue without it again becoming personal." In those circumstances, the Tribunal considered that nothing in the allegation or email record amounted to a protected disclosure and the claimant did not intend that it should be viewed and/or acted upon as such.

89. On 23 July 2019, the claimant sent Ms Slater an email containing her notes of their meeting – see bundle pages 388-389. In this email, the claimant added concerns about a reduction in her admin time and changes to her job role that she said she was not consulted upon, together with concerns about a new Band 5 job description and the role of case managers, none of which had been raised at the meeting. The claimant contends that her allegations in this email were protected disclosures about patient safety – see the list of issues, schedule 1, item 8. In particular, the claimant said that she had alleged that the respondent was not adhering to safe implementation of its policies and guidance. However, this point is not, in fact, set out in the claimant's email to Ms Slater at bundle page 388 and nowhere in the email does the claimant identify which policies/procedures she alleged were not being safely implemented. At best, in point 4 of her email, the claimant suggests that there are no policies/procedures or national guidance to support the changes being made to the Band 3 role. In addition, the claimant raised concerns about her belief that new Band 3 clerical staff were being expected to do administrative work and also clinical work. In this regard, the Tribunal considered that the claimant is again expressing her dissatisfaction with changes to Band 3 roles and had misunderstood what was proposed. Ms Whelan's evidence on these matters, which the Tribunal accepted, was that the CAMHS service was going through a number of organisational changes at the time. The claimant was finding the change process difficult.

90. On 14 August 2019, the claimant again emailed Ms Slater following a supervision meeting with Ms Bunting, to report that it did not go well. She raised concerns about Ms Bunting having (in the claimant's view) implied that there was a problem with her mental health. The claimant also said that Ms Bunting was unprofessional. The claimant said that she did not wish to appear to be causing trouble but that "I cannot allow this latest incident to pass unmentioned." As the claimant did not wish to make formal complaint, Ms Slater did not treat this as a grievance but it led to changes in the line management of the claimant, who was thereafter line managed by Ms Whelan, from August 2019.

91. In September 2019, the claimant applied to be a 'Freedom to Speak Up champion' at the respondent. She was interviewed by Mr Cain but was not successful as she did not meet the criteria for the role.

92. On 12 September 2019, Ms Whelan conducted her first supervision meeting with the claimant. The meeting notes were sent to the claimant in July 2020. The claimant then added her comments and suggested amendments – Ms Whelan disputed the accuracy of the claimant's comments and amendments – see bundle pages 1056-1057 and 1546.

93. On 22 October 2019, the claimant presented a grievance which appears in the bundle at pages 563-565. The grievance was about Ms Bunting. It was sent to Mr Dickson, the respondent's Chief Executive. Mr Dickson forwarded the grievance to the respondent's HR team to handle. Unfortunately, nobody acknowledged receipt nor communicated with the claimant about what was happening.

94. On Sunday 27 October 2019, the claimant called Ms Whelan in distress, and told her she was upset about having been asked by Ms Bunting to see a patient at 3pm. The claimant contended that this request was made of her on 1 October 2019 at 3pm, when the claimant was leaving work and is relied upon by the claimant as an allegation of detrimental treatment for her complaints under EqA, sections 15 and 26. There was no explanation as to why the claimant had delayed so long, almost 4 weeks, before reporting it nor why the matter was not included in her grievance about Ms Bunting which the claimant had only recently submitted, when it would have been fresh in the claimant's mind.

95. On 20 November 2019, Ms Slater emailed the claimant to arrange an informal meeting about her grievance – see bundle page 424. Ms Slater did not copy the claimant's trade union into the email and so the claimant refused to comply with the request for a meeting. Despite this refusal, on 21 November 2019, the claimant and also her trade union representative began chasing the respondent's Chief Executive, Mr Dickson about the progress of the grievance – see bundle paged 413 and 432.

96. The claimant wanted an independent person to handle her grievance and she alleged that Mr Dickson refused such. The alleged refusal is relied upon by the claimant as an allegation of detrimental treatment for her whistle-blowing complaints. The Tribunal found that Mr Dickson had not in fact refused as the claimant alleged. An independent manager was appointed but the meaning of "independent" in this context was not understood by the claimant. She thought that the individual appointed should be entirely

independent from and outside of the respondent whilst the respondent considered it to mean a senior person who was independent in terms of having no involvement with the claimant's workplace and from elsewhere within the respondent's wider organisation. The Tribunal considered that such an appointment was not unreasonable in an organisation of the significant size of the respondent health trust which incorporates a number of healthcare organisations.

97. Between 19 and 26 November 2019, emails circulated within the CAMHS team about missing set of patient notes. Eventually, when the notes were located, an email was sent to the team, from an administrator, to let everyone know the notes had been found. The email says, "Found in Mary W pigeonhole". In fact, this was a pigeon hole which the claimant shared with another employee. There were a number of reasons why or how the notes came to be there and subsequent emails made no mention of the claimant – see bundle page 439.

98. On 26 November 2019, Dr Mason informed Ms Whelan that there had been an incident with the claimant, during the previous day, when the claimant was reported to have become extremely challenging about her job plan in the belief that management were seeking to alter it, to the claimant's detriment. On 28 November 2019, the claimant requested weekly management supervision meetings, to which Ms Whelan agreed for a short-term period.

99. On 4 December 2019, Dr Mason raised concerns with Ms Whelan about the claimant's negative comments and behaviour, and its impact on team morale.

100. That day, during a supervision meeting with Ms Whelan, the claimant raised a concern that cases had been assigned to her workload, without her knowledge, including what the claimant described as "risky" patients. The claimant contends that this concern was put into an email to Ms Whelan and was a protected disclosure – see the list of issues, schedule 1, item 13. However, the Tribunal found no evidence of any such email sent by the claimant on 4 December 2019. There is, in the bundle at page 470, an email of 9 December 2019, from the claimant to Ms Whelan about being named case manager for a particular patient. The claimant was effectively complaining that she was not told about this patient being allocated before it was put into effect and the claimant expressed her view that it was not safe practice to do this. However, in evidence to the Tribunal, the claimant accepted that she had to check for allocations via the respondent's CISTA system (which records who is responsible for each case) if she had not

attended the team meeting(s). The thrust of the claimant's complaint was that she did not consider herself to be a "case manager", which should be at a higher Band than Band 5 and that she should therefore only be assisting a more senior practitioner. The Tribunal considered, from the evidence, that the respondent was trying to introduce a degree of accountability for work with patients, by putting the name of the person who was due to do the next piece of work with a particular patient, onto the system against each patient. This also meant that, when the records were consulted, it was apparent which practitioner had had most recent contact to a particular patient. The claimant was resistant to this change and accountability. The claimant considered that the claimant's complaint amounted to an example of the claimant using "patient safety" to give weight to her complaints about changes to her working practices.

101. On 18 December 2019, the claimant went off work, sick, until 1 January 2020. The period of sickness was followed by pre-booked holiday.

102. On 19 December 2019, the claimant contacted ACAS in order to commence early conciliation.

103. On either 13 or 14 January 2020, Ms Slater emailed the claimant in a further effort to arrange a meeting to discuss the claimant' grievance – see bundle pages 511-513. The claimant replied saying that she wanted to meet only with Mr David Cain who was contracted to the respondent as a management consultant and who was the respondent's 'Freedom to Speak Up Guardian'. The claimant declared that she intended that 3 items would be resolved as a starter, namely: the claimant wanted to be given the name of the manager who had allocated patients to her without prior notice and a copy of the procedures for the allocation of patients; confirmation of her job role at Band 5; and a more realistic admin to clerical ratio. The email reads as a series of demands rather than points for discussion and there is no mention of reasonable adjustments nor mention of the claimant's disability being a factor for any decisions.

104. The following day, 15 January 2020, the claimant sent an email to Mr Cain, to inform him of her intention to meet with him about her grievance. In reply, Mr Cain told the claimant that his remit did not include oversight of grievances. Mr Cain's evidence was that he believed the claimant wanted him to influence the grievance process which was not within his power and he told the claimant that it was for the respondent to progress matters.

105. Also on 15 January 2020, the claimant attended a 3-way meeting, with Ms Whelan and Dr Mason, the purpose of which had been to discuss the

claimant's job description. However, at the start of the meeting, the claimant said that she wanted to discuss 'bullying' and proceeded to make a number of allegations about Ms Bunting, some of which were historic. The claimant also alleged that Dr Mason had allowed the bullying to go on and had joined in. Dr Mason was shocked by the allegations and, as a result, decided that it was not appropriate for her to continue to provide clinical supervision to the claimant.

106. The next day, 16 January 2020, Ms Slater emailed the claimant again about arranging a meeting to discuss her grievance but the claimant again declined to meet.

107. On 17 January 2020, the claimant met with Mr Cain about her workload. The claimant chose to record the meeting but has not disclosed the recording or a transcript to the respondent.

108. On 19 January 2020, early conciliation via ACAS ended with the issue of an early conciliation certificate.

109. On 20 January 2020, the claimant met with Mr Cain again to explore informal resolution of her grievance. The claimant told Mr Cain that she was reluctant to meet with Ms Slater about her grievance and repeated her allegation that she felt bullied by Ms Bunting. Following their meeting, Mr Cain emailed the claimant, inadvertently using the claimant's personal email address and copying in HR personnel. The claimant reacted by emailing Mr Cain and Mr Widdall of the respondent's HR team, to say that all correspondence between herself and the respondent should go through ACAS – see bundle page 570. However, on 21 January 2020, ACAS responded to say that this was not appropriate, pointing out that an early conciliation certificate had been issued as ACAS considered there was no scope to resolve matters between the parties at that point – see bundle page 613.

110. On 24 January 2020, Dr Mason raised a 'Dignity and Respect at Work' complaint against the claimant. It appears in the bundle at pages 606-607. Dr Mason expressed her anxiety as a result of what she considered to be generalised allegations of bullying made by the claimant, and pointed out that she had supervised the claimant for over 2 years without any issues being raised and that the claimant's conduct over recent months had given cause for concern.

111. On or just before 29 January 2020, the claimant found a confidential supervision record for a colleague, MP, in the CAMHS team's filing room.

In the notes, there is a reference to MP having expressed a view that the claimant is “paranoid”. The claimant said that she had a habit of going into the filing room on a Tuesday and this was known to others. The claimant said that she believed the record had been left out for her to find. The claimant took MP’s supervision record out of the building and to her home. The claimant said this was in order to keep it safe and she then raised the record at her supervision meeting the next day and told Ms Whelan about it and that it was at her home.

112. On 30 January 2020, Ms Slater wrote to the claimant is response to her grievance, pointing out that a number of attempts had been made to arrange to meet with the claimant to explore her concerns but that all meetings had been postponed at the claimant’s request. The response letter appears in the bundle at pages 626-632. Ms Slater sought to answer the claimant’s complaints and stated that she considered the over-arching theme of the claimant’s grievance was about communication and understanding the redesign of working practices across the respondent’s CAMHS clinical service unit. Ms Slater also pointed out that the development of Band 3 roles to include clinical and clerical work was part of a national priority within CAMHS, that the respondent had been identified as an early implementor of the transformation project and that the Band 3 clinical roles had been approved under the ‘Agenda for Change’ process.

113. On 6 February 2020, Ms Whelan took HR advice and then emailed the claimant about progressing her allegations against Dr Mason and Ms Bunting. In her email, Ms Whelan warned the claimant that a continued refusal to meet to progress the complaints would be considered as a refusal of a reasonable management instruction and would be progressed as an issue of misconduct in accordance with the respondent’s disciplinary policy – see bundle page 692.

114. Later, on 6 February 2020, after a telephone conversation with Ms Whelan, the claimant emailed Ms Whelan about the allocation of another patient without her knowledge – see bundle page 689. The claimant contended that the telephone call and email to Ms Whelan were each protected disclosures – see the list of issues, schedule 1, items 15 and 16. The Tribunal considered that the claimant was here repeating her previous complaint about patient allocation which did not amount to a protected disclosure – see paragraph 100 above.

115. The email in the bundle at page 689, essentially repeats the claimant’s concerns about patient allocations being done without notice and the claimant finding them on the system under her name. The claimant alleged

this was “deliberately undermining [the claimant] as a competent worker” and she goes on to remind the respondent about her reasonable adjustments. The Tribunal read the email with care but considered that nothing in the content amounted to a protected disclosure. Rather it constitutes a continuation of the claimant’s complaint about the system by which patients had been allocated to her. Importantly, in the bundle at page 691, is an email conversation between Ms Whelan and Ms Bunting which took place approximately an hour before the claimant’s email and in which they resolve to remove the claimant’s cases from CISTA and reallocate them. At the time of the claimant’s email to Ms Whelan, that decision had not yet been communicated to the claimant but it addressed what the claimant was seeking in any event.

116. On 12 February 2020, Ms Slater wrote to the claimant to inform her of 2 allegations, namely: (1) her refusal to attend meetings with Ms Whelan to explore the claimant’s allegations of bullying against Dr Mason; and (2) a breach of confidentiality by opening and reading documentation in a personal supervision record. The claimant was told that the allegations would be investigated by Mr Crier, the respondent’s CAMHS service manager and that she could seek support from her line manager, Ms Whelan. The letter appears in the bundle at pages 706-707. In addition, the claimant was told that if she did not attend the investigation meeting or give reasonable notice that she could not attend, it would proceed without her co-operation and that her non-attendance would be regarded as potential misconduct for refusing a reasonable management request.

117. On 13 February 2020, Mr Cain submitted an incident report regarding the claimant’s allegations of bullying, as part of the quarterly reporting of Freedom To Speak Up matters at the respondent.

118. On 14 February 2020, the claimant presented her first claim to the Employment Tribunal, which was given case number 2401206/2020.

119. On 20 February 2020, Dr Mason sent a letter to the claimant which appears in the bundle at pages 700-701. The letter was written following the 3-way meeting on 15 January 2020, at which the claimant made her allegations of bullying by Ms Bunting and also by Dr Mason – see paragraph 105 above. In her letter, Dr Mason asked for clarification of the allegations made by the claimant and also asked to know the name of the other employee whom the claimant had alleged had also been bullied by Dr Mason. Dr Mason asked for a response in 7 days. The claimant replied in a short email saying that she would not have time to reply due to work commitments prior to her holiday and would look at the letter upon her return.

120. On 13 March 2020, an investigatory meeting took place with the claimant who was accompanied by her trade union representative. The meeting was a fact-finding exercise, conducted by Mr Crier with Ms Turner from HR.

121. On 18 March 2020, the claimant replied to Dr Mason's letter of 20 February 2020 in generalise terms. Dr Mason was not satisfied with the claimant's response and so, on 20 March 2020, Dr Mason invoked the respondent's formal Dignity at Work policy against the claimant about her behaviour.

122. In the meantime, on 19 March 2020, the claimant emailed Mr Crier, asking for Ms Turner of HR to identify the relevant policies that related to the disciplinary investigation process. The claimant was told that the purpose of the investigatory meeting was to fact-find and to establish her understanding of certain policies and responsibilities at the time of the events under investigation. On 23 March 2020, the claimant sent Mr Crier, and Ms Turner, her statement of events.

123. On the evening of 23 March 2020, the UK Government announced the first COVID-19 lockdown.

124. On 25 March 2020, Ms Turner asked Ms Whelan to commission a formal investigation into the allegation that the claimant had accessed a confidential document. However, shortly afterwards, all disciplinary and grievance procedures at the respondent were put on hold for at least 4 weeks. This was due to the respondent's urgent need to address the pressures created by working in the NHS in the COVID lockdown and the consequent redeployment of staff.

125. On 15 April 2020, the claimant volunteered to be redeployed, commenting that she was "happy to do whatever would help". On 22 April 2020, Ms Bunting reported that the ongoing situation with the claimant was impacting her health and that of the team and was also having an impact on service delivery. Ultimately, in May 2020, it was proposed that the claimant should move to work at Galaxy House.

126. On 13 May 2020, the claimant called Mr Cain about her computer freezing. The claimant believed that it was being interfered with and that the times when it froze could not be coincidental. Mr Cain suggested that interference was unlikely given the infrastructure of the respondent. At this suggestion, the claimant became irate and threatened to report Mr Cain to the National FTSU Guardian's office.

127. The next day, 14 May 2020, the claimant rang the respondent's IT support team about her computer freezing. IT staff pointed out that the claimant's computer was still running on Windows 7 and needed an upgrade to Windows 10 which the claimant had resisted. On 16 May 2020, the claimant emailed the IT team to allege that her emails were being monitored and/or interfered with and that this had happened on at least 11 occasions. Mr O'Rourke, an IT support team manager, investigated but found nothing to suggest that the claimant's allegations of being monitored had any foundation. He told the claimant that the IT team would not be able to access or interfere with the claimant's computer either as she alleged, or at all. Importantly, arrangements were then made for the claimant to be given a new Windows 10 computer but she did not respond to emails about the set-up of this computer.

128. On 20 May 2020, Ms Bunting emailed Ms Whelan about the delay in the respondent's investigation into the claimant's bullying allegations and the fact that the claimant had not yet substantiated her allegations. In response, Mr Widdall of HR suggested that the claimant should be moved to another working area due to a breakdown in working relationships rather that because of the bullying allegations, although it was understood that the claimant had requested to move teams and had previously volunteered to be redeployed.

129. On 2 June 2020, Ms Whelan emailed Mr Widdall to say that she had no concerns about the claimant's patient care but that she was concerned about the effect of her presence on team wellbeing. Ms Whelan reported that there was 'an atmosphere' in the building because staff were aware that something was going on and because the claimant had recently said she would be making a complaint about the Freedom To Speak Up champion.

130. On 4 June 2020, Ms Slater raised an issue about what she described as "a drift in managing [the claimant]" and set out the timeline, from the claimant's grievance about Ms Bunting, to the disciplinary investigation not progressing, and the claimant's allegations against Dr Mason having triggered a Dignity at Work claim against the claimant. Ms Slater reported that the whole Salford team were feeling over-stressed and a senior clinician was sick due to uncomfortableness over contact with the claimant and so had started looking for alternative employment, as had the team manager. Ms Slater sought a timescale for the Dignity at Work claim to be progressed. Mr Widdall replied that the respondent was looking to move the claimant temporarily whilst all the investigations were concluded, so that staff would feel able to speak freely, and he sought suggestions for locations. The

respondent considered that it was no longer tenable for the claimant to remain working in the Salford CAMHS team due to the reports of stress from the team which was said to be because of the claimant's conduct. In reaching this conclusion, the respondent took account of its duty of care to all its staff, including the claimant.

131. On 9 June 2020, a further investigation was commenced into the claimant's conduct due to the Dignity at Work complaint made by Dr Mason. Ms Slater met with the claimant about the matter and proposed that the claimant should move to work at the respondent's in-patient unit at Galaxy House whilst the investigation was undertaken and in order to support and safeguard the claimant. Ms Slater subsequently wrote to the claimant, setting out this proposal. The letter is in the bundle at pages 951-952. It was proposed that the claimant would start working at Galaxy House on 15 June 2020.

132. On 12 June 2020, the claimant emailed Ms Slater to say that she did not feel able to attend work at Galaxy House because of the impact she felt everything was having on her health. The claimant also said that her union had advised her to tell Ms Slater that she felt she was being victimised by the move to Galaxy House and that it was inappropriate. The claimant said that she would be going to speak to her GP about her well-being. The respondent offered the claimant support from its employee health and well-being service.

133. On 15 June 2020, the claimant was due to start at Galaxy House. However, the claimant did not attend work as proposed and instead went off work, sick, with work-related stress which she said was triggered by the proposed move to Galaxy House, away from the CAMHS team. The claimant's trade union representative became involved in negotiations which resulted in the claimant being offered a role in the Salford School Team as an alternative. This would have meant that she did not have to move her work base but this offer was rejected by the claimant.

134. On 26 June 2020, the claimant sent a Subject Access Request to the respondent, seeking copies of all emails between team members and managers in which her name appeared, over several years. The SAR was emailed by the claimant to Ms Turner, in HR. However, by this time, Ms Turner had been redeployed and so the request was passed to Mr Widdall to deal with. He reported to the claimant that her request would take a considerable time and work to fulfil.

135. On 16 July 2020, the claimant emailed Mr Widdall about a previous SAR she had sent to Ms Turner in March 2020 about the respondent's policies. The claimant said it had not been responded to. Mr Widdall looked into the earlier email and identified that the claimant had in fact mis-spelt Ms Turner's name in the email address in March 2020, so Ms Turner had never received that SAR. The claimant maintained that the respondent had placed her at a disadvantage in the disciplinary process by not highlighting the relevant policies invoked, even though she had not raised or chased the matter of the first SAR in over 4 months.

136. On 13 July 2020, the claimant sent an email to Ms Slater about wanting to see emails about her from within the team. She asked to come into Salford CAMHS to access her work account and print off emails.

137. On 17 July 2020, Ms Slater told the claimant she could not to come into work for her emails because she was off sick. At this, the claimant said she was only off sick because she alleged that Ms Slater had "threatened" her with suspension if she did not move to Galaxy House.

138. By the end of August 2020, Mr Crier was finalising his investigation report which was issued in October 2020. The report appears in the bundle at pages 1380-1392. In respect of the first allegation, whether the claimant's repeated refusal to attend a meeting about her allegations of bullying was a refusal of a reasonable management request, Mr Crier found that the claimant's responses and refusal were not reasonable, particularly as the claimant knew it was a formal process which had been initiated by the claimant herself, she had made her allegations back in January 2020, she had been told that the allegations were serious and needed to be resolved quickly and she had been told of concerns about the impact on everybody's well-being and consequent effect on service delivery. Mr Crier also concluded that the claimant's insistence on an "independent" investigation was premature. This allegation was therefore upheld against the claimant.

139. In respect of the second allegation, as to whether the claimant opening and reading a confidential supervision document was a breach of confidentiality/information governance, Mr Crier determined that this needed further investigation. There was an issue about whether the claimant had 'opened' the document because she said it was left on a writing shelf, in the CAMHS filing area. It was the claimant's opinion that the document had been left out deliberately for her to find so that a breach of confidentiality could be held against her, and that she did not give it to her manager because she feared that it was "a potential entrapment situation". The claimant had also told Mr Crier that she believed she had been told to

keep the document safe and not return it, and this was why she took it home, claiming that she was unsure whether the prohibition on taking personal files or documents was applicable in the circumstances.

140. In September 2020, the respondent's managers became concerned that the claimant was emailing team members, seeking a number of documents about meetings in 2019 and 2020 and that staff had become unsettled by this.

141. On 1 October 2020, Ms Whelan retired and Ms Slater briefly took over line management of the claimant. In mid-October 2020, line management of the claimant was transferred to Mr Ford, at the claimant's request due to her grievance against Ms Slater.

142. On 20 December 2020, the claimant presented her second claim to the Employment Tribunal, which was given case number 2420257/2020.

143. On 22 December 2020, the claimant presented her third claim to the Employment Tribunal, which was given case number 2420374/2020.

144. On 29 December 2020, Ms Slater met with Mr Ford and Ms Pender, a CAMHS service manager in Trafford, who had been appointed as the investigator of the Dignity at Work complaint. Ultimately, it was decided not to proceed with any disciplinary action against the claimant albeit that the investigation outcome recommended that the claimant be given training on communication that upholds the respondent's vision, values and behaviour, and also that the parties be offered mediation, together with a facilitated discussion for the claimant about the respondent's new service processes and the role of a case manager and job planning.

145. In January 2021, the claimant presented her fourth claim to the Employment Tribunal, which was given case number 2400338/2021.

146. In June 2021, the claimant presented her fifth claim to the Employment Tribunal, which was given case number 2407546/2021.

147. On 21 June 2021, Ms Slater was interviewed by Mr Jackson, the investigator of the claimant's grievances.

The applicable law

148. A concise statement of the applicable law is as follows.

Disability discrimination

149. The complaint of disability discrimination was brought under the Equality Act 2010 ("EqA"). Disability is a relevant protected characteristic as set out in section 6 and schedule 1 EqA.

150. Section 39(2) EqA prohibits discrimination by an employer against an employee by subjecting her to a detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

151. The EqA provides for a shifting burden of proof. Section 136(2) and (3) so far as is material provides as follows:

> *(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

152. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

153. In *Hewage v Grampian Health Board [2012] IRLR 870* the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong [2005] ICR 931* and was supplemented in *Madarassy v Nomura International plc [2007] ICR 867*. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct discrimination

154. Section 13 EqA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The relevant protected characteristics include race.

155. Section 23 EqA provides that on a comparison for the purposes of establishing less favourable treatment between B and others in a direct discrimination claim, there must be no material difference between the circumstances of B and of the comparator(s).

156. The effect of section 23 EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person not of the claimant's race. In analysing whether an act or decision is tainted by discrimination, an Employment Tribunal may avoid disputes about the appropriate comparator by concentrating primarily on why the claimant was treated as she was, known as the "reason why" approach, in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*. Addressing the "reason why" involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, race) had any material influence on the decision, the treatment is "because of" that characteristic.

157. Very little direct discrimination is overt or even deliberate. In *Anya v University of Oxford [2001] IRLR 377 CA* guidance was given that Tribunals shall look for indicators from a time before or after the particular act which may demonstrate that an ostensibly fair-minded decision was or was not tainted by bias, in *Anya* racial bias. Discriminatory factors will, in general, emerge not from the act in question but from the surrounding circumstances and the previous history.

Harassment

158. Section 26 EqA provides:

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to the relevant protected characteristic, and

(b) the conduct has the purpose or effect of -
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

(2) A also harasses B if-

(a) A engages in unwanted behaviour of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1) (b).

(4) In deciding whether conduct has the effect referred to in subsection (1) (b), each of the following must be taken into account-

(a) the perception of B

(b) the other circumstances of the case

(c) whether it is reasonable for the conduct to have that effect.

159. The concept of harassment under the previous equality legislation was the subject of judicial interpretation and guidance by Mr. Justice Underhill in *Richmond Pharmacology and Dhaliwal [2009] IRLR 336*. The Tribunal has applied that guidance, namely:

"*There are three elements of liability (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's [protected characteristic].*"

Discrimination arising from disability

160. The prohibition of discrimination arising from disability is found in section 15 EqA. Section 15(1) provides:

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

(a) A treats B unfavourably because of something arising in consequence of B's disability and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

161. The proper approach to causation under section 15 was explained by the Employment Appeal Tribunal in paragraph 31 of Pnaiser v NHS England and Coventry City Council EAT /0137/15 as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant …...

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links …[and] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) ….. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) …..

(h) Moreover, the statutory language of section 15(2) makes clear …. that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so.

162. In City of York Council v Grosset [2018] WLR(D) 296 the Court of Appeal confirmed the point made in paragraph (h) in the above extract from Pnaiser: there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the "something" arises in consequence of the disability. That is an objective test.

Reasonable adjustments

163. The duty to make reasonable adjustments, in section 20 EqA, arises where:

(a) the employer applies a provision criterion or practice which places a disabled employee at a substantial disadvantage in comparison with persons who are not disabled; and

(b) the employer knows or could reasonably be expected to know of the disabled person's disability and that it has the effect in question.

164. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Equality and Human Rights Commission Code of Practice in Employment ("the EHRC Code") paragraph 6.10 says the phrase is not defined by EqA but "*should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one-off decisions and actions*".

165. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) EqA defines substantial as being "*more than minor or trivial*". In the case of Griffiths v DWP [2015] EWCA Civ 1265 it was held that if a PCP bites harder on the disabled employee than it does on the

able-bodied employee, then the substantial disadvantage test is met for the purposes of a reasonable adjustments claim.

166. The duty is to take such steps as it is reasonable, in all the circumstances, to take to avoid the provision criterion or practice having that effect. The duty is considered in the EHRC Code. A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case. An adjustment cannot be a reasonable adjustment unless it alleviates the substantial disadvantage resulting from the PCP – there must be the prospect of the adjustment making a difference.

167. Under section 136 EqA, it is for an employer to show that it was not reasonable for them to implement a potential reasonable adjustment.

Victimisation

168. Section 27 EqA provides that a person (A) victimises another person (B) if A subjects B to a detriment because

a. *B does a protected act or*

b. *A believes B has done or may do a protected act*

169. A protected act includes making an allegation (whether or not express) that A or another person has contravened the Act.

170. In *Martin v Devonshires Solicitors UKEAT/0086/10* Mr. Justice Underhill analysed the previous similar provisions as follows:

"The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: If it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint."

171. A claim of victimisation does not require any comparison. Answering the question of the 'reason why' involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator to see whether the protected act had any material influence on the detrimental treatment; see for example *Amnesty International v Ahmed [2009] IRLR 884*.

Whistle-blowing detriment

172. Section 47B ERA provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure.

173. Section 47(1A) to (1E) ERA provides that an employer can be vicariously liable for the detrimental acts of its workers unless the employer has taken all reasonable steps to prevent the detriment. It is immaterial whether the act of detriment or deliberate failure to act was done with the knowledge or approval of the employer.

174. A "protected disclosure" means a disclosure of information, but not mere allegations, to the employer or to a prescribed person which, in the reasonable belief of the worker is in the public interest and tends to show one or more matters including a failure to comply with a legal obligation, that the health or safety of any individual has been endangered, or that a criminal act has been committed.

175. The Tribunal has jurisdiction to consider complaints of public interest disclosure detriments by section 48(1A) ERA. Section 48(2) stipulates that on such a complaint it is for the employer to show the ground on which any act, or any deliberate failure to act, was done.

176. A 'detriment' arises in the context of employment where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see for example, *Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL*.

177. In *Fecitt v NHS Manchester [2012] IRLR 64* the Court of Appeal held that for the purposes of a detriment claim, a claimant is entitled to succeed if the Tribunal finds that the protected disclosure materially influenced the employer's action. The test is the same as that in discrimination law and separates detriment claims from complaints of unfair dismissal under section 103A ERA, where the question is whether the making of the

protected disclosure is the reason, or at least the principal reason, for dismissal.

178. In the course of submissions, the Tribunal was referred to a number of cases by the parties, as follows:

Aspinall v MSI Mech Forge Ltd UKEAT/891/01
Bahl v The Law Society [2003] IRLR 640 EAT and [2004] IRLR 766 CA
Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06
Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38
Smith v London Metropolitan University [2011] IRKR 884
Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4
Chandhok v Tirkey [2015] IRLR195
Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979
International Petroleum Ltd and others v Osipov and others UKEAT/0058/17
Kilraine v London Borough of Wandsworth [2018] ICR 1850
Royal Mail Group v Efobi [2021] UKSC 33
Dobbie v Felton t/as Feltons Solicitors [2021] IRLR 679

The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Submissions

179. The claimant made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that:- she had brought her case to the Tribunal because after raising issues of patient safety, staff well-being and discrimination she did not feel that the harassment and victimisation she was experiencing was going to stop; that she had considered resigning but decided to continue; she had a responsibility to raise patient safety issues and had been victimised for doing so; that as a nurse of 11 years, she felt qualified to recommend that AB receive further training; she had concerns about seeing risky patients and without notice or consultation; she thought if she escalated her grievances to the chief executive, they would be dealt with; the respondent's 'refusal' to clarify its policies for the disciplinary investigation put her at a disadvantage due to her disability and she had told the respondent this; the document she found had her initials on the second page, and her eyes were drawn to her initials and it made her feel anxious; that in a Band 5 role, she was being expected to take on Band 6

duties and responsibilities so that more risk was put onto her; she was being bullied into a new job plan whereby she was expected to see more complex patients; that Ms Bunting had said she was 'crass' and 'rigid' and that Ms Bunting was encouraged by Ms Slater so things got worse; that Ms Whelan had devised a plan to remove her and wanted her to go; and that there should have been a proper mediation between herself and Ms Bunting at the outset and, if so, the Tribunal could have been avoided.

180. Counsel for the respondent also made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that: - the disclosures relied upon by the claimant were not in fact disclosures of information; rather they were matters of the claimant's personal opinion; the claimant had failed to address the issue of a reasonable belief in the disclosures relied upon which is a subjective test; many of the issues said to be about 'patient safety' had no basis, for example the issue of Band 3s allegedly doing duties on-call or the claimant not being given a copy of the Band 3 job description when she had not asked for it; the actual detriments contended for were unclear and the claimant failed to adduce evidence or cross-examine the respondents' witnesses about such, so their unchallenged evidence should be accepted; the evidence did not show detriment but related to ordinary operational matters; the burden of proof is on the claimant to show facts and she had failed to do so - the EqA complaints amounted to nothing more than an assertion of discrimination without any basis for concluding that the acts complained of were because of disability; that many of the acts alleged to be discrimination mirrored the detriment claims and lacked supporting evidence; the claimant failed to cross-examine the respondent's witnesses about the reason(s) why she was subjected to the treatment complained of; the claimant's evidence on a number of issues grew in the course of the hearing, for example, the allegation about being allocated risky patients; the claimant's requests for reasonable adjustments lacked any detail; there was no evidence of a PCP requiring employees to relocate during an investigation and in any event the claimant was not moved for such reason but because relations in the team had become strained due to the claimant's behaviour and the claimant had previously indicated a willingness to be redeployed; and that much of the claimant's case was confused and inconsistent and lacked any evidence to support it and so should be dismissed.

Conclusions (including where appropriate any additional findings of fact)

181. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Protected disclosures

182. The Tribunal concluded that none of the protected disclosures set out in Schedule 1 of the list of issues were made out. Each disclosure contended for was considered in turn, and the Tribunal's conclusions on these are as follows.

183. 1. *On 31 January 2019: (a) The claimant told Dr Mason that AB was not capable of carrying out three school observations on her own on children whose families were making complaints. The claimant expressed concerns for the safety of patients*. The Tribunal accepted that the claimant commented on AB's competence or ability to carry out observations but considered this to be an allegation or opinion of the claimant as to AB's competence. There was no evidence that any concerns were linked to patient safety and this aspect was not explained. Rather, the Tribunal considered that the claimant had identified a training need for AB, amounting to a further day of training being required to remedy matters, with no emphasis on any seriousness. There was no identification of anything AB was doing that would harm patients. The Tribunal understood that observation results could be below par and so resultant action may be impaired but there was no evidence nor explanation of how this would compromise safety.

184. *On 31 January 2019: (b) Again, during this discussion with Heidi Mason on 31 January 2019 the claimant expressed concerns about instructions from Shelley Bunting that all new Band 3 clerical staff would be expected to do half clerical work and half clinical work.* The evidence showed that the claimant just did not agree with the respondent's policy to change working practices and that she had misunderstood this aspect. A number of the respondent's wits also expressed concerns if new Band 3 clerical staff were to do clinical work, but the respondent's evidence was clear that this was not the policy – as with a number of matters, the claimant had misunderstood what was to happen. There was no evidence that Ms Bunting had actually instructed Band 3 clerical staff to do half clerical and half clinical work. The Band 3 role had been redesigned and individuals were recruited specifically for the new Band 3 role. The claimant was expressing her opinion about what she believed to be happening and her mistaken belief was not reasonable. In any event, the claimant was unable to explain how the new Band 3 role might endanger patient safety or impact on anybody.

185. *3. On 11 February 2019 the claimant expressed her concerns about the effect a reduction of admin time from 30% to 12.5% could have on the quality of care that the claimant could deliver, and the considerable amount of stress that this was putting staff under.* The claimant clarified that she expressed her concerns to and how in the following ways: *(a) Informed Heidi Mason 11/02/19 Face to Face; and (c) Informed Maria Slater via email on 23/07/19*. The Tribunal heard evidence that the claimant believed there would be a reduction in administration time as a result of the changes to the operation of the CAMHS service. The claimant therefore expressing her opinion on what she thought might happen. In fact, as part of the service redesign, there was to be a general reduction in the amount of administration which the team would be required to do due to a number of new appointments, including the creation of a separate and dedicated duty team to manage clinical risk. The Tribunal considered that the claimant focussed on what she believed would be the effect on herself, and not on the wider team, and bolstered her view by suggesting that less administration "could have" an effect on the quality of care provided. However, the Tribunal noted that the claimant had an hour's protected administration time each morning and there was never any suggestion that this was going to change. Nevertheless, the claimant continued to complain about administration time. Again, the claimant had misunderstood what was intended, and assumed that administration time would be cut when, in fact, the position was to be that there would be less administration to do and so the change was positive in terms of reducing workloads and pressure. However, the claimant was unable to see that there might be a positive side to this or other changes. It was another change that she did not like. In particular, the Tribunal noted that, in evidence, Dr Mason did not recollect the claimant challenging the proposal for a reduction in administration time across the team when it was discussed in team meetings.

186. *4. On 13 February 2019 the claimant spoke to Heidi Mason. She complained about comments which had been made about the claimant and other staff members by Shelley Bunting in a team meeting on 12 February 2019*. This related to Ms Bunting having made a comment in a team meeting about people who were not in work and who were off sick at the time of the meeting. The claimant agreed in evidence that this was not a comment about people who were at the meeting - the claimant was at the meeting and not off sick and she agreed that Ms Bunting's comment was not and could not be about her. The Tribunal considered this to be an attempt by the claimant to complain about Ms Bunting's conduct in terms of herself.

The claimant said that she thought the comment somehow implied a criticism of people who went off sick. The Tribunal rejected this suggestion and considered that the claimant was expressing dissatisfaction with Ms Bunting's conduct and not relaying any information which might qualify as a protected disclosure.

187. *5. On 25 March 2019 the claimant told Heidi Mason of her concern for the safety of patients, stating the following issues*:*(a) The claimant said that she was not aware of any policy or guidelines that had been signed by clinical governance relating to the duties of Band 3 staff;* The Tribunal did not consider this to be in any sense a protected disclosure. The claimant is not saying that no policy exists, just that she has not seen it. The Tribunal accepted the evidence from several of the respondent's witnesses, that such does exist and is available on the internet.

188. (*b) The claimant had not seen a description for a Band 3 role to clearly define that role;* The Tribunal did not consider this to be in any sense a protected disclosure. The claimant is not saying that no job description exists, just that she has not seen it. The Tribunal accepted the evidence from several of the respondent's witnesses, that such does exist and is available on the internet.

189. *(c) The claimant had not seen a copy of the documentation regarding the competencies that needed to be signed off by supervisors in relation to a Band 3 role to say that these clinicians are competent to assess children's needs in ADHD, ASD or learning difficulties*; The Tribunal did not consider this to be in any sense a protected disclosure. The claimant is not saying that no documentation exists, just that she has not seen it. The Tribunal accepted the evidence from several of the respondent's witnesses, that such does exist and is available on the internet.

190. *(d) The claimant had not seen the competencies that needed to be signed off to say that Band 3 staff can identify when there are possible child protection issues and the procedures that are required to be followed to escalate any concerns*. The Tribunal did not consider this to be in any sense a protected disclosure. The claimant is not saying that no competencies existed, just that she has not seen them. The Tribunal accepted the evidence from several of the respondent's witnesses, that competencies do exist and are available on the internet. The Tribunal also noted that the NHS has safeguarding competencies in place, which operate throughout the

respondent at all levels and that training schemes are run to ensure competencies are met. The claimant was not involved in the specific training she complained about nor was she the overall supervisor of the Band 3s although she was involved in some of the Band 3 training. Further, the Tribunal noted Dr Mason's evidence to the effect that it would be inappropriate for C to be involved in such training or to need copies of the documentation concerned.

191. *6. On 9 May 2019 Heidi Mason stated in an APDG meeting that Shelley Bunting had informed her that Band 3 clerical staff will be expected to perform On-Call Duties. The Claimant then spoke with Heidi Mason privately to expressed concerns that Shelley Bunting was expecting Band 3 admin workers to complete clinical duties well above their capabilities without the correct safety measures or competencies being put in place*. The Tribunal accepted the respondent's witness' evidence that Band 3s were not going to be asked to do on-call duties. There was no evidence of any such proposal and the Tribunal was told it would be highly inappropriate. In addition, the Tribunal was informed that an APDG meeting is a post-diagnostic parenting workshop and such matters would not be discussed at such a meeting. The Tribunal found that there was no expectation of Band 5s doing on-call duties either and concluded that the claimant had misunderstood or misheard what was proposed with regard to on-call working.

192. *7. On 23 July 2019, following on from the discussions on 9 May 2019 with Heidi Mason, the claimant escalated her concerns to Maria Slater. The claimant had increasing concerns about Shelley Bunting's behaviour.* This relates to the claimant's email to Ms Slater of 23 July 2019, which appears in the bundle at pages 388-389. In that email, the claimant records a number of points discussed with Ms Slater previously and about which the claimant seeks clarification. Points 1-4 are about the claimant's misapprehension of a reduction in admin time and alleged changes to her Band 5 job role on which she said she had not been consulted. Point 5 is a personal complaint about her manager's conduct and not in any sense a protected disclosure. At the end of the email, the claimant writes that she and Ms Slater had agreed that the claimant would manage matters herself and if the situation starts to escalate again, she would will let Ms Slater know. Nothing in the email amounted to a protected disclosure for all the reasons above in paragraphs 184 – 191.

193. *8. On 23 July 2019, in an email which the claimant sent to Maria Slater, the claimant made protected disclosures about patient safety including*: (a) *MUFT not adhering to safe implementation of policies and guidance*. This matter is not set out in the claimant's email to Ms Slater and at no point does the claimant identify which policies and/or procedures she considers are not being safely implemented, save for in point 4 of the email, wherein the claimant suggests that there are in fact no policies/procedures or national guidance to support the changes being made to the Band 3 role. In the circumstances, the Tribunal considered that, once again, the claimant as expressing her dissatisfaction with what she misunderstood to be the changes to Band 3 roles.

194. *9. On 18 September 2019 the claimant spoke to David Cain (freedom to speak up guardian) and informed him of the email sent to Maria Slater on 23 July 2019 and informed him of the contents.* The Tribunal has dealt with the email sent by the claimant to Ms Slater on 23 July 2019 at paragraphs 192 and 193 above. The claimant's comments were said to have been made during her interview for the post of Freedom to speak up champion. Mr Cain's evidence was that the claimant may have raised an issue concerning admin time but that he did not recall the July email being mentioned. In any event, the Tribunal considered that the fact that the claimant may have repeated matters that did not amount to protected disclosures did not make them into protected disclosures.

195. *10. On or about 31 January 2019 the claimant told Heidi Mason that Anna Beck was not capable of carrying out school observations of children on her own even though Shelley Bunting had authorised her to do so by email*. The Tribunal did not consider this to amount to a protected disclosure for the reasons set out in paragraph 183 above.

196. *11. On or about the end of January 2019 the claimant told Shelley Bunting of her concerns for the safety of patients as a result of her instructions that all new Band 3 clerical staff should do 50% clerical work and 50% clinical work without the appropriate training package in place*. The Tribunal did not consider this to amount to a protected disclosure for the reasons set out in paragraph 184 above.

197. *13. On 04 December 2019 the claimant emailed Gill Whelan to raise the issue of the claimant being allocated "risky" patients as a case manager without her knowledge or consent*. There was no such email in the bundle

dated 4 December 2019. However, at page 470 of the bundle, there is an email dated 9 December 2019, sent by the claimant to Ms Whelan, complaining about being named 'case manager' for a particular patient. The claimant effectively complained that she was not told about the allocation of the patient before it was put into effect and the claimant expressed her view that it was not safe practice to do this. However, in evidence, the claimant accepted that the responsibility was on her to check for patient allocations via the respondent's CISTA system (which records who is responsible for each case) if she had not attended the team meeting(s) where allocations were discussed. The thrust of the claimant's complaint was that a 'case manager' should be at a higher Band than her Band 5 and that she should only be assisting the 'case manager', who should be a more senior practitioner. The Tribunal heard evidence that the respondent was trying to introduce a degree of accountability for work with patients by recording on its system the name of the practitioner who was due to undertake the next piece of work with each patient. The Tribunal considered that the claimant was resistant to this change and resistant to the idea of accountability. The Tribunal noted that the claimant "patient safety" in order to give weight to her complaints and to resist what were not unreasonable changes to her working practices.

198. *15. On or about 5 February 2020 the claimant telephoned Gill Whelan to complain about patients being allocated to her as a case manager and without the claimant being told of the allocation of those patients*. The Tribunal did not consider this to amount to a protected disclosure for the reasons set out in paragraph 197 above

199. *16. On 6 February 2020, following that telephone call with Mrs Whelan, the claimant sent an email to Mrs Whelan as a follow-up. The claimant relies upon the content of that email dated 6 February 2020*. The email concerned appears in the bundle at page 689 and was sent by the claimant to Ms Whelan at 12:54, about allocations being done without notice and about the claimant finding them on the CISTA system. The claimant says this is "deliberately undermining [the claimant] as a competent worker" and then reminds the respondent about her reasonable adjustments. The Tribunal considered the contents of the email carefully but found nothing in it which amounted to a protected disclosure. Rather it reads as a continuation of the claimant's complaint about the manner in which patients were being allocated to her. Interestingly, in the bundle at page 691, there is an email conversation between Ms Whelan and Ms Bunting, which took place

approximately an hour before the claimant's email and in which Ms Whelan and Ms Bunting resolve to remove the claimant's cases from CISTA and reallocate them. This decision had not yet been communicated to the claimant but the Tribunal found that it addressed what the claimant was complaining about and seeking for in any event – see also paragraph 115 above.

200. *17. On 19 October 2019 the claimant put an incident form into MFT regarding her being frozen out of her computer all day when she needed to complete an online referral to Social Services regarding an urgent safeguarding issue*. The Tribunal considered that the claimant presented the matter of her computer freezing as a deliberate act to make her life difficult. However, the claimant was unable to identify who she believed was responsible for such. The incident form relied upon was not in the bundle and the contents were unknown. In those circumstances, the Tribunal was unable to determine that anything stated in the incident form amounted to a protected disclosure.

201. *18. On 19 December 2019 the claimant informed Ged Webster (IT Support) face to face about her suspicions that some-one had authorized her computer to be monitored and interfered with as it would freeze her out when she was attempting to email about issues relating to grievances. Ged Webster suggested the claimant to started to keep a record of dates and times*. The Tribunal considered that the claimant's suspicions could not amount to a protected disclosure. The witness statement of Mr O'Rourke confirmed that no such authorisation had taken place nor could the claimant's computer be accessed and/or interfered with by the respondent's IT team, or anybody else, either in the way the claimant suggested or at all. Mr O'Rourke's statement contains an number of alternative explanations for why the claimant's computer might have been freezing, including the fact that it was an old machine which the claimant had not submitted for an upgrade from Windows 7, despite being asked to do so. The upgrade was long overdue, and on a balance of probabilities the Tribunal considered the lack of an upgrade would likely have affected functionality.

202. *19. On 06 May 2020 after sending Gill Whelan an email the claimant was frozen out of her computer and was unable to access it again all that day. On this day the claimant needed to complete an online referral to Social Services regarding 2 urgent safeguarding issues but was unable to access her computer to do so*. The claimant's case was that being frozen out of her

computer could potentially put patients at risk due to her being unable to make urgent online referrals. The Tribunal considered that this matter did not constitute a disclosure to anybody and so could not be a protected disclosure.

203. For all the above reasons, the Tribunal found that the claimant had not made any protected disclosures within the definition in sections 43A-H ERA.

Detriments

204. Accordingly, in the absence of any protected disclosures, the Tribunal was bound to conclude that the claimant had suffered no detrimental treatment because of a protected disclosure. Nevertheless, the Tribunal noted that several matters which were contended for as detrimental treatment for being a whistle-blower, were matters which the Tribunal considered the respondent had reasonable and proper cause to pursue against the claimant. For example, the disciplinary action arose because of the claimant's repeated failure/refusal to attend a meeting with a manager in order to progress her grievances when serious allegations hung over employees and the claimant's admitted handling of and removal of a confidential document in breach of the respondent's procedures for the safe-keeping of confidential information and records. The Tribunal considered that it was reasonable for the R to investigate and pursue these matters in any event. The Tribunal considered that the respondent's handling of the claimant's SAR is not a matter for the Employment Tribunal in the absence of any protected disclosure and/or causal link, noting also that the handling of the SAR is the subject of an ongoing process with the Information Commissioner's office.

Disability

205. The respondent conceded disability so this was not an issue for the Tribunal to determine. However, the Tribunal found that a number of issues in the claim proved problematic, largely due to lack of evidence of the nature of the claimant's impairment of dyslexia. The claimant produced no diagnosis, formal or otherwise, nor anything to explain how her dyslexia manifests itself or affects her ability to carry out day to day activities nor how it might impact her work. The only document disclosed by the claimant pertaining to her disability was from Salford University, being an assessment of the type of assistance the claimant might need in order to complete her degree course studies and to write her dissertation. The Tribunal found that the

circumstances addressed in the Salford University assessment were very different to those encountered by the claimant in her work with the respondent. In the course of the hearing, the claimant made a number of unsubstantiated and at times confused suggestions about her disability. Such assertions were repeated by the claimant from time to time in evidence. The Tribunal considered such to be used in an effort by the claimant to justify her objections to the respondent's management of her and efforts to implement change in the CAMHS organisation.

Complaints under EqA - Harassment

206. The Tribunal has determined that allegations of conduct numbered 32, 40 and 41, relied upon for this complaint should be and are struck out for being out of time – see paragraphs 34.1 and 49-57 above. The Tribunal has determined that allegation numbered 43, relied upon for this complaint should be and is struck out for having no reasonable prospects of success – see paragraphs 34.3 and 59-60 above.

207. As to allegation 42, the Tribunal considered that the presentation of job plan(s) to the claimant, and to other employees in the CAMHS team at the same time did not amount to unwanted conduct that might support a claim of unlawful harassment. The Tribunal appreciated that the claimant did not wish for her job to be changed in any way and that she was resistant to the changes to the CAMHS service, which were part of a national project designed to improve efficiency and accountability. There was no evidence to suggest that there was any link between the respondent's actions in presenting a new job plan and the claimant's disability.

208. In light of the above, the complaint of harassment must fail.

Complaints under EqA - Direct discrimination because of disability

209. The Tribunal has determined that allegations of conduct numbered 30 and 31, relied upon for this complaint should be and are struck out for being out of time – see paragraphs 34.1 and 49-57 above.

210. The conduct relied upon in paragraph 46 of schedule 3 of the list of issues concerns a comment by Mr Crier, in the course of the investigation and not directly to the claimant but to a colleague, to the effect "*She can read, I presume*" when he was aware of the claimant's disability. At the time the

offending comment was made, the Tribunal noted that the claimant had no knowledge of it and so made no complaint about it. It was only after her SAR and disclosure in these proceedings that the claimant discovered it and has since pursued it. Mr Crier accepted in evidence to the Tribunal that it was wrong. He apologised in his witness statement and to the claimant directly, at the hearing, whilst putting it into context, explaining that he had a lot of personal issues to deal with during the COVID pandemic as a result of his health and that his conduct had slipped. The Tribunal noted that, ultimately, the outcome of the investigation, as determined by Mr Crier, was not to discipline the claimant, finding effectively in her favour on the issue of the document not being safely stored. The Tribunal concluded that, in light of the evidence, this comment was one-off but hurtful comment and, when she discovered it, the claimant was hurt. However, it was not put to Mr Crier that he made the comment because of the claimant's disability or because of something arising from disability. However, the Tribunal considered it to be a flippant and clumsy expression of frustration at the claimant's demands for him to do something which he believed she was capable of and for which the claimant had trade union support.

211. In light of the respondent's stated position, that the comment was discriminatory less favourable treatment, the Tribunal considered that an award for injury to feelings, for this particular comment, in its context, fell at the very bottom of the low band of Vento. The Tribunal has therefore decided to award the claimant the sum of **£900.00** for injury to feelings in this regard.

Complaints under EqA - Discrimination arising from disability

212. The Tribunal has determined that allegations of conduct numbered 29, 30, 31, and 34 relied upon for this complaint should be and are struck out for being out of time – see paragraphs 34.1 and 49-57 above. The Tribunal has determined that allegation numbered 43, relied upon for this complaint should be and is struck out for having no reasonable prospects of success – see paragraphs 34.3 and 59-60 above.

213. This complaint therefore only relates to allegation 46 in schedule 3 of the list of issues. The Tribunal considered there was no evidence of any refusal by the respondent to clarify the policies as alleged and so no unfavourable treatment in that regard. The evidence showed that the respondent was in fact willing to assist the claimant. Ms Turner emailed the claimant on 25

March 2020 (bundle page 790) to say that she was away from the office but would "go through the policies and highlight the relevant sections when [she was] able." In fact, the respondent was then not required to do so as no disciplinary action resulted from the investigation.

214. Accordingly, the complaint of discrimination arising from disability must fail.

Complaints under EqA - Failure to make reasonable adjustments

215. The Tribunal has determined that allegations numbered 28, 33, 35, 36 and 37 relied upon for this complaint should be and are struck out for being out of time – see paragraphs 34.1 and 49-57 above.

216. As to allegation 42 in schedule 3 of the list of issues, the claimant has failed to identify a PCP in relation to this allegation, which the Tribunal understood to be that the claimant objected to the job plan given to her on 25 September 2019 because it did not take account of her reasonable adjustments and also because a second job plan was given to her in front of colleagues. The claimant's case for allegation 42 was stated to be of a "failure to comply with reasonable adjustments". The evidence showed that the first job plan was given to all staff at the team meeting in September, including the claimant, so as not to draw attention to anybody's disability or reasonable adjustments. The second job plan was a revised job plan which was designed taking account of the claimant's reasonable adjustments. The respondent's witnesses were not cross-examined by the claimant on this aspect. In any event the Tribunal found no basis for allegation 42 and considered that this allegation was another example of the claimant's resistance to the changes ongoing at the respondent.

217. Allegation 47 of Schedule 3 of the list of issues concerns the proposed move of the claimant to work at Galaxy House. The claimant has identified a PCP which she says was applied by the respondent, of requiring employees under investigation for allegations of misconduct, to move to another part of the respondent's organisation pending the outcome of the investigation. The claimant contends that this put her at a substantial disadvantage in comparison with persons who do not have her disability because her ability to work productively is greatly assisted by her being familiar with work colleagues, workplace and surroundings.

218. The Tribunal found no evidence of the PCP contended for. The respondent did not have a practice of requiring employees under investigation for misconduct to move workplace pending the investigation outcome, other than suspension but the claimant was not suspended. Ms Slater's letter to the claimant of 9 June 2020, points out that the claimant had identified, in her letter to Dr Mason, that she felt bullied in the team at Salford over the past 15 months and that it was very stressful for her personal and working life. Ms Slater makes clear that the move to Galaxy House was proposed taking account of the fact that it was the claimant herself who indicated difficulties in working at Salford CAMHS and that the proposal was to help safeguard the claimant. The Tribunal noted that the claimant never mentioned her disability or requested reasonable adjustments at the time. She simply refused to move and said that her union had advised her to tell the respondent that she felt she was being victimised by the proposal. The Tribunal found that the claimant's disability and reasonable adjustments were raised later, in the course of these proceedings, and the Tribunal considered that the claimant was attempting to make the proposed move to Galaxy House (a situation that she was not happy with) fit the legal framework in order to pursue a complaint about it. Nowhere in the evidence is there mention of the claimant's ability to work productively being greatly assisted by being familiar with work colleagues, workplace and surroundings. Likewise, the Tribunal found no evidence that such was a feature of the claimant's disability nor a matter requiring reasonable adjustments.

219. In addition, in June 2020, the claimant was offered a move to the Salford School team precisely so that she would not have to move work base but she refused that offer too. However, the evidence showed that there had been communications between the respondent and the claimant's trade union around the proposed move. The trade union had suggested that a "deal" might be possible in terms of the respondent dropping its investigations and the claimant would agree to a move. Again, within this correspondence there is no mention of the claimant's disability nor any reasonable adjustments or issues arising.

220. The Tribunal was also mindful of the fact that, back in April 2020, the claimant had offered to be deployed to work "wherever required". The discussions at the time had included the possibility of such a move being in Galaxy House. There was no evidence of the claimant objecting to working at Galaxy House at that time nor any mention of her disability and/or

limitations/adjustments which she has sought to introduce to this aspect within the course of these proceedings. In those circumstances, the Tribunal considered that the claimant's evidence on this aspect was inconsistent and in complete contradiction of her position in June 2020. Nevertheless, having issued her claim, the claimant sought to contend that moving her would somehow be a failure to make reasonable adjustments albeit that such adjustments were unclear. The fact was that the claimant's colleagues did not want to work with her and had become increasingly concerned about her behaviour in the team. Further, the Tribunal considered that the claimant's approach to the issue of where she worked changed when she found out that Ms Bunting had a base in Galaxy House and that the claimant's primary motivation was a wish to avoid Ms Bunting.

221. In light of the above the complaint of reasonable adjustments fails.

Complaints under EqA - Victimisation

222. The Tribunal first considered whether the claimant had done a protected act as identified in paragraphs 38, 39, 44, 45, 47 and 48 of Schedule 3. To the extent that the protected act contended for was the claimant's request(s) for the respondent to make reasonable adjustments in accordance with its obligations under EqA, the Tribunal accepted that such would be a protected act for the purposes of the victimisation complaint.

223. The Tribunal has determined that allegations of conduct numbered 38 and 39, relied upon for this complaint should be and are struck out for being out of time – see paragraphs 34.1 and 49-57 above. In addition, the Tribunal has made findings on the matter comprising allegation 38, to the effect that the claimant suffered no detriment – see paragraph 186 above – the comment made was not about the claimant nor could it be so.

224. In respect of allegations 44 and 45, the Tribunal found no evidence that the claimant had in fact raised or sought reasonable adjustments at the material time, being the protected act contended for. In any event, the Tribunal did not consider that the detriments contended for in these allegations could stand as such. The claimant appeared to be arguing that she should not have been subject to disciplinary action over the confidential document and that she should not have been allocated higher risk patients. The Tribunal considered these to be unreasonable positions to take – the respondent was entitled to investigate a potential breach of confidentiality and patient

allocation was the respondent's prerogative. Accordingly, the Tribunal did not consider that these matters, 44 and 45, amounted to detriments.

225. The issue of working with higher risk patients was raised by the claimant in December 2019. Contemporaneous emails do not at any point suggest that the issue was raised in relation to the claimant's disability or her dyslexia specifically. Rather, the thrust of the claimant's complaint was about her caseload, the lack of notice of new patients and the type of patient that her name is being put to. In addition, when amending the supervision notes, 12 months later, the claimant did not include any mention of her disability, or discrimination or EqA. In contrast, the amended supervision notes suggest that the claimant would have been happy to take on more responsibility such as higher risk patients if that was reflect in an increase in her pay – see bundle page 1548. The claimant was challenged on this matter in cross-examination by the respondent's Counsel and the claimant accepted that there was no evidence here to support her contentions either that she was allocated the risky patients because of her protected disclosures or because of her disability. The Tribunal also noted that the allocation of patients to her, as case manager, without notice, in the claimant's view made her "look incompetent and unprofessional" – see bundle page 689. Hence, the Tribunal considered that there was no evidence that this matter was about the claimant requesting reasonable adjustments albeit that the claimant's reasonable adjustments had been granted in any event when her case were removed from the CISTA allocation system – see paragraph 115 above and bundle page 691. What happened was that the claimant had risky patients allocated to her and then asked to not have them allocated to her as a reasonable adjustment, which was put into effect and then she complained. Nevertheless, the evidence showed that only 1 'risky patient' was allocated to the claimant and that her complaint at the time was that Band 5s should not get allocated risky patients; it was nothing to do with disability or reasonable adjustments.

226. In addition, the Tribunal accepted the respondent's evidence, from Ms Bunting, to the effect that as a Band 5 nurse, the claimant would not knowingly be allocated risky patients but that the level of risk is not always apparent when patients are first allocated. Patients can be allocated and then risk becomes apparent at a later stage. In those circumstances, the respondent has put in place clear escalation route and reallocation processes such that a nurse at the claimant's level would certainly not be expected to manage a risky patient.

227. Allegation 47 concerns the claimant's allegation about the proposal to move her workplace in June 2020. She made no request for reasonable

adjustments at the material time nor anything that might constitute a protected act – see paragraphs 217-220 above.

228. Allegation 48 was that the claimant was told that she would not be returning to Salford CAMHs in any event. The Tribunal found no evidence of this and the claimant was unable to explain the matter or point to any evidence of when or how she was informed of such, beyond the fact that it was her belief that she would never be allowed to return. All the evidence showed that the claimant had clearly been informed that the move was temporary, whilst the disciplinary investigation process was completed.

229. In light of all the above matters, the Tribunal considered that the victimisation complaint was not made out and fails.

Remedy

230. The Tribunal has determined that the claimant shall be awarded **£900.00** for injury to her feelings arising from the admitted discriminatory comment of Mr Crier – see paragraph 211 above.

_____

Employment Judge Batten
3 March 2023

JUDGMENT SENT TO THE PARTIES ON
27 March 2023

FOR THE TRIBUNAL OFFICE

APPENDIX – LIST OF ISSUES

List of Complaints and Issues

A. Time Limits/Limitation Issues

1. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) and (b) of the Equality Act 2010 ("EQA") and section 48(3)(a) and (b) of the employment Rights Act 1996 ("ERA")?

2. Dealing with this issue may involve consideration of subsidiary issues including: where there was an act and full slash or conduct extending over a period, and/ or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a just and equitable basis; when the treatment complained about occurred.

B. Detrimental treatment on the grounds that claimant made Protected Disclosures (section 47B ERA)

3. Did the claimant make one or more protected disclosures (ERA section 43B and 43C) as set out in **Schedule 1** attached?

4. The claimant alleges that the respondent subjected the claimant to the detriments contrary to section 47B ERA as set out in **Schedule 2** attached.

5. In relation to each alleged detriment:-

5.1 What are the facts?

5.2 Did the claimant reasonably see that act or deliberate failure to act as subjecting her to a detriment?

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

Complaints Under the Equality Act 2010 (EQA)

C. Harassment related to disability (EQA section 26)

This section refers to Schedule 3 which is a list of all complaints made under the Equality Act 2010 and numbered as complaints 28-48) .

6. Did the respondent engage in conduct as stated in paragraphs 32,40,41,42 and 43 of Schedule 3?

7. If so, was that conduct unwanted?

8. If so, did it relate to the protected characteristic of disability?

9. Did the conduct have the purpose or (taking in to account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

D. Direct discrimination because of disability (s13 EQA)

This section refers to Schedule 3 which is a list of all complaints made under the Equality Act 2010 and numbered as complaints 28-48) .

10. What are the facts in relation to the complaints as stated in paragraphs 30, 31 and 46 of Schedule 3?

11. Did the claimant reasonably see the treatment as a detriment?

12. If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances without a disability was or would have been treated? The claimant relies on a hypothetical comparison.

13. If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of disability?

14. If so, has the respondent shown that there was no less favourable treatment because of disability?

E. Discrimination arising from Disability (section 15 EqA)

This section refers to Schedule 3 which is a list of all complaints made under the Equality Act 2010 and numbered as complaints 28-48)

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

16. If so, did the respondent treat the claimant unfavourably as stated in paragraphs 29, 30, 31, 34, 43, 46 of Schedule 3? :

17. Did things arise in consequence of the claimant's disability as stated in those paragraphs? :

18. Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

19. If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

20. If not, was the treatment a proportionate means of achieving a legitimate aim?

F. Failure to make Reasonable Adjustments. (sections 20/21 EqA)

This section refers to Schedule 3 which is a list of all complaints made under the Equality Act 2010 and numbered as complaints 28-48)

21. A “PCP” is a provision, criterion or practice. Did the respondent have the PCPs as identified in paragraphs 28, 33, 35, 36, 37, 42, 47 of Schedule 3?

22. Did those PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability?

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

24. Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage?

G. Victimisation (section 27 EqA)

This section refers to Schedule 3 which is a list of all complaints made under the Equality Act 2010 and numbered as complaints 28-48)

25. Did the claimant do a protected act as identified in paragraphs 38, 39, 44, 45, 47, 48 of Schedule 3?

26. Did the respondent do those things alleged in those same paragraphs?

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

28. If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

29. If so, has the respondent shown that there was no contravention of section 27 EqA?

SCHEDULE ONE

Protected Disclosures the Claimant alleges she has made.

1. On ***31 January 2019*** –

(a) The claimant told Heidi Mason that Anna Beck was not capable of carrying out three school observations on her own on children whose families were making complaints. The claimant expressed concerns for the safety of patients.

(b) Again, during this discussion with Heidi Mason on 31 January 2019 the claimant expressed concerns about instructions from Shelley Bunting that all new Band 3 clerical staff would be expected to do half clerical work and half clinical work.

3. On ***11 February 2019*** the claimant expressed her concerns about the effect a reduction of admin time from 30% to 12.5% could have on the quality of care that the claimant could deliver, and the considerable amount of stress that this was putting staff under. The claimant has not identified who she expressed her concerns to or how she expressed those concerns, either face to face, or by telephone or in writing.

(a) Informed Heidi Mason 11/02/19 Face to Face

~~(b) Informed David Cain on 18 September 2019 face to face and again 19/01/20 face to face.~~

(c) Informed Maria Slater via email on 23/07/19.

~~(d) Informed Gill Whelan face to face 12/09/19~~

4. On 13 February 2019 the claimant spoke to Heidi Mason. She complained about comments which had been made about the claimant and other staff members by Shelley Bunting in a team meeting on 12 February 2019.

5. On ***25 March 2019*** the claimant told Heidi Mason of her concern for the safety of patients, stating the following issues:

(a) The claimant said that she was not aware of any policy or guidelines that had been signed by clinical governance relating to the duties of Band 3 staff;

(b) The claimant had not seen a description for a Band 3 role to clearly define that role;

(c) The claimant had not seen a copy of the documentation regarding the competencies that needed to be signed off buy supervisors in relation to a Band 3 role to say that these clinicians are competent to assess children's needs in ADHD, ASD or learning difficulties; and

(d) The claimant had not seen the competencies that needed to be signed off to say that Band 3 staff can identify when there are possible child protection issues and the procedures that are required to be followed to escalate any concerns.

6. On ***9 May 2019*** Heidi Mason stated in an APDG meeting that Shelley Bunting had informed her that Band 3 clerical staff will be expected to perform On-Call Duties. Claimant then spoke with Heidi Mason privately to expressed concerns that Shelley Bunting was expecting Band 3 admin workers to complete clinical duties well above their capabilities without the correct safety measures or competencies being put in place.

7. On ***23 July 2019***, following on from the discussions on 9 May 2019 with Heidi Mason, the claimant escalated her concerns to Maria Slater. The claimant had increasing concerns about Shelley Bunting's behaviour ~~and equally had concerns that Heidi Mason was informing Shelley Bunting of discussions which the claimant had had with Heidi Mason and that Heidi Mason and Shelley Bunting were colluding behind the back of the claimant.~~

8. On ***23 July 2019***, in an email which the claimant sent to Maria Slater, the claimant made protected disclosures about patient safety including:

(a) MUFT not adhering to safe implementation of policies and guidance; and

~~(b) Getting Band 3 untrained staff to perform duties outside of their remit and without appropriate training.~~

~~(c) The significant reduction of Admin time from 30% to 12.5%~~ and also the stress this was putting on the team.

9. On ***18 September 2019*** the claimant spoke to David Cain (freedom to speak up guardian) and informed him of the email sent to Maria Slater on 23 July 2019 and informed him of the contents.

10. On or about ***31 January 2019*** the claimant told Heidi Mason that Anna Beck was not capable of carrying out school observations of children on her own even though Shelley Bunting had authorised her to do so by email.

11. On or about the ***end of January 2019*** the claimant told Shelley Bunting of her concerns for the safety of patients as a result of her instructions that all new Band 3 clerical staff should do 50% clerical work and 50% clinical work without the appropriate training package in place.

13. On ***04 December 2019*** the claimant emailed Gill Whelan to raise the issue of the claimant being allocated "risky" patients as a case manager without her knowledge or consent.

~~14. On ***19 January 2020*** the claimant once again met with David Cain following their meeting on 18 September 2019. (It is not clear whether the claimant is relying on this meeting with David Cain as a protected/qualifying disclosure). The claimant is relying on this meeting with David Cain as a protected/qualifying disclosure.~~

15. On or about ***5 February 2020*** the claimant telephoned Gill Whelan to complain about patients being allocated to her as a case manager and without the claimant being told of the allocation of those patients.

16. On ***6 February 2020***, following that telephone call with Mrs Whelan, the claimant sent an email to Mrs Whelan as a follow-up. The claimant relies upon the content of that email dated 6 February 2020.

17. On ***19 October 2019*** the claimant put an incident form into MFT regarding her being frozen out of her computer all day when she needed to complete an online referral to Social Services regarding an urgent safeguarding issue.

18. On ***19 December 2019*** the claimant informed Ged Webster (IT Support) face to face about her suspicions that some-one had authorized her computer to be monitored and interfered with as it would freeze her out when she was attempting to email about issues relating to grievances. Ged Webster suggested the claimant to started to keep a record of dates and times.

19. On ***06 May 2020*** after sending Gill Whelan an email the claimant was frozen out of her computer and was unable to access it again all that day. On this

day the claimant needed to complete an online referral to Social Services regarding 2 urgent safeguarding issues but was unable to access her computer to do so.

~~20. On ***13 & 14 May 2020*** the claimant telephoned David Cain to complain that she believed that some-one at MFT had authorized for her computer to be monitored and interfered with on 11 separate occasions with two of these occasions putting 3 families at risk.~~

~~21. On ***18 May 2020*** the claimant followed this complaint up with an email to David Cain and her Union Representative Matthew Harris. Subsequently the claimant states that after she had sent this email, she was then no longer frozen out of her computer again when she attempted to email people regarding her grievances.~~

~~22. On 28 April 2021, the Claimant informed Helene Bilton, the Respondent's Interim HR Director, that additional administrative support had been requested by Shelley Bunting that 3 other CAMHS managers join her for a full morning around the week commencing 13th December 2019 to ensure that patient files would meet the standards for a CQC inspection. Such additional administrative support would give a false and misleading indication of the correct ratios of clinical and administrative time required by CAMHS clinicians to meet the required record keeping standards.~~

SCHEDULE 2

Alleged Detriments contrary to s43B ERA

1. ~~**4 April 2019.** Shelley Bunting (SB) refused to allow the claimant time off from work to attend medical appointments even though the appointment had to be arranged at short notice and the claimant had been unable to make an appointment outside of her working hours. The respondent's own policy allows up to 2 hours of working time to attend an appointment in the event that an employee is unable to arrange an appointment outside of working time. However, the claimant was denied this allowance.~~

2. ~~Between **14 October 2019 and 6 May 2020** - the claimant alleges that her emails were being monitored between these dates.~~

3. **21 November 2019** – Stephen Dickson replied to correspondence from the claimant which was by then a month old (claimant had written on 22 October 2020) and in his reply he refused to provide for an independent person to investigate formal complaints raised by the claimant, instead requiring the investigation be undertaken by MS who the claimant does not regard as independent.

4. **21 November 2019** – MS wrote to the claimant to arrange a meeting but did not copy in claimant's union representative.

5. ~~**27 November 2019.** The claimant found a set of patient notes in a pigeon-hole that the claimant shared with a colleague. The patient notes should not have been in the pigeon-hole. An email went out to the team but naming the claimant only and not the colleague with whom she shared the pigeon-hole. Further, the team was told that an incident report form should be completed in relation to the misplacing of the patient notes. The claimant considers she was singled out.~~

6. **27 November 2019** - the claimant requested a three-way meeting between herself, Heidi Mason (HM) and Gillian Whelan (GW) which was declined. The claimant asked for this meeting on two further occasions.

7. **4 December 2019** - HM sent an email to GW stating a colleague had shared information and concerns about the claimant. The claimant alleges

that HM was encouraging other members of staff to escalate complaints about the claimant to senior staff.

8. **19 December 2019 to 19 January 2020** - the respondent's refused to engage in correspondence through ACAS even though the claimant specifically asked the respondent to do this.

9. **21 January 2020** – Tom Widdall (TW) emailed the claimant. In this email he informed the claimant that he had attached a letter to an email they day before when the claimant had asked him to send correspondence via ACAS.

10. **22 January 2020** – Ms sent a confidential email to HM and SB. The email told the recipients to "get rid of " the email once they had read it. The email concerned the claimant and, the claimant believes, concerned the setting up of a discussion about how to remove the claimant from her post.

11. **23 January 2020** - GW withheld information from Maria Slater (MS) and SB that the claimant was being bullied by HM.

12. **23 January 2020** – HM did not inform recipients of her email for the reasons why the claimant had emailed HM about operational issues.

13. **28 January 2020** – Whilst the claimant had been informed that SB had **reflected** on her behaviour towards the claimant and would attend training to improve her behaviour in the future, claimant found a sensitive document written by SM concerning the claimant which had been left out in a communal area.

14. **29 January 2020** - HM emailed GW stating that she had said hello to the claimant, who looked "feisty" as she walked past and ignored her.

15. **End January 2020** - the decision to subject the claimant to a disciplinary **investigation** process from the end of January 2020. The disciplinary investigation related to:

    15.1 A document being left out in a general office (see 4.3 above);

    15.2 The claimant's non-attendance at a meeting with a manager.

16. **13 March 2020** – disciplinary investigation meeting carried out by David Crier (DC) and Kimberley Walsh (KW). In the course of this investigation meeting these two individuals:

16.1.1 continued to inform the claimant that it was her fault for finding a document, the subject matter of the investigation;

16.1.2 continued to inform the claimant that she should not have read the document;

16.1.3 blamed the claimant for the document having been left out in an office;

16.1.4 questioned the claimant about the Tribunal claim that she had by then brought, even though it had nothing to do with the subject matter of their investigations.

The claimant's position is that she informed DC and KW of the protected disclosures made by her.

17. **13 March 2020** – a refusal by DC to clarify the policies relevant to allegations being made about the claimant's conduct. The claimant had been referred, in **general** terms, to six policies in operation at the respondent. Whilst the relevance of three of those policies was clear, it was unclear to the claimant what relevance the other three policies had in relation to allegations made against her. The claimant requested clarification and for the respondent to identify which parts of these policies were relevant. DC effectively refused to assist the claimant, simply stating, by email, *"she can read, can't she?"*.

18. **In or about May 2020** the claimant enquired about a move to a different part of the CAMHS team (to work within the i-Reach team) but was then told by i-Reach team manager that it would not fulfil the claimant's purpose behind the move as SB would continue to make decisions **relevant** to the i-Reach team. The detrimental act was that SB informed HM of the claimant's request to move to the i-Reach team and, further, the 2 then engaged in email gossip and speculation concerning the claimant. HM replied to SB's email stating that the claimant was trying to line herself up to do Tourette's therapy at school and how she had more words to say on the claimant's enquiry about a move, but not for the email.

19. **9 June 2020** – MS provided the claimant with a second disciplinary **investigation** letter. This letter informed the claimant that the respondent was undertaking a second disciplinary investigation and also that she was required to relocate from her place of work at Salford CAMHS to the Harrington Centre building.

20. **26 June 2020** – the claimant made a subject access request pursuant to data protection legislation ("SAR"). The respondent failed to deal with this to any adequate extent. This is the subject matter of an ongoing process with the Information Commissioners Office. However, separately, the claimant alleges that the respondent refused to deal with the claimant's subject access request, in compliance with its obligations under data protection legislation, on the ground that she had raised the protected disclosures

21. ~~**On or about 7 July 2020** - when responding to a SAR made by the claimant, the respondent refused to provide a copy of the **transcript** of the disciplinary investigation interview held with the claimant on 13 March 2020.~~

22. ~~**In the second half of 2020**. In this period TW had been appointed as the HR Manager with responsibility for managing various processes in relation to the claimant's employment with the respondent. The claimant asked that TW maintain an impartial position, however he refused to do so and took steps (particularly identifying issues that the claimant's work colleagues may have had) which were negative to the claimant. These steps were instrumental in having the claimant removed from the Salford CAMHS Service where she had worked for some ten years.~~

23. **12 October 2020** – TW recommended that the respondent should not investigate grievances the claimant had submitted against Ms Whelan and Ms Slater.

24. **In the second half of 2020** - GW deliberately delayed continuation and completion of the second disciplinary investigation.

25. **26 November 2020** The claimant (including through her union, RCN) requested an extension to the claimant's period of paid sickness absence which was refused.

~~26. **09 June 2020** Mary Fenner ("MF") informed SB that another manager called Michaela Kelly was going to be the claimant's Clinical Supervisor. In turn, SB informed HM. The detriment claimed by the claimant was HM then informing all of the claimant's colleagues in the department of this expected change.~~

27. **13 April 2021** – Claimant asked for an extension to her sick pay until conclusion of investigation. By that stage the claimant was being paid at 50% of her salary and this was due to reduce to zero pay. On **21 May 2021**, the claimant was informed that the extension would not be provided for.

SCHEDULE 3

Complaints made under EqA 2010

28. **June 2015.** The claimant says that the respondent applied a Provision Criterion or Practice ("PCP"), being a requirement to provide mental health services to at least 14 patients per week. Some of these were outpatient services at the hospital and others involved home and school visits. The claimant says that this PCP put her at a disadvantage by comparison to her colleagues who were not disabled because the claimant needs longer to read information, write reports and complete administration in relation to each patient than her non-disabled colleagues need. The disadvantage to the claimant was that she could not do 14 patients per week and she says it was unreasonable to expect her to do that. The claimant raised this with her previous manager, Liam Connolly in June 2015 and then following this to:-

a. The respondent's disability adviser, Akhtar Zaman in June 2015.

b. The respondent's occupational health advisers subsequently.

(Complaints under s19 and s20/21)

The claimant states that it would have been a reasonable adjustment to reduce the number of patients that she had to see at their home because that would have reduced time taken travelling to and from their homes. The target of 14 patients should also have been reduced in order to give the claimant an increase in administration time to complete the work associated with each of the patients that she was seeing.

The claimant notes that her clinical supervisor, Jonathan Thursfield suggested that she cut down on the time taken to travel to schools and patients' homes. This was an unreasonable requirement as it was impossible to lawfully comply with and did nothing to overcome the disadvantage to the claimant caused by the application of the PCP noted in 1 above. However, this is not in itself a separate complaint.

29. **August 2016.** The claimant alleges that her then manager, Liam Connolly, had stated that he had referred the claimant in order that she may receive support in the workplace for her dyslexia. However, LC knowingly misled the claimant in to believing this referral had been made when it had not. LC did not inform the claimant that he had received an instruction from the respondent's Occupational Health provider (OH) that the claimant should refer herself to the Access to work programme and request assistance.

- ***Complaints under s15 EqA***. The claimant was treated unfavourably because of something arising in consequence of her disability. The something arising is the referral to occupational health and the delay caused by LC including by him misleading the claimant as alleged.

30. **12 August 2015.** The claimant says that she suffered a disadvantage and was treated less favourably by being told that in person by Mr Connelly she was not to attend ROM training and that someone who had attended the training could provide the claimant with relevant information. The claimant was the only member of the team who was not permitted to attend this ROM training. ***Complaints under s13 and 15 EqA.***

- ***Section 13***: claimant claims she was not allowed to attend because of her disability;

- ***Section 15***: the "something arising" is the claimant's difficulty in absorbing information and the additional time it takes the claimant to do so. Accordingly, the decision that the claimant should not attend the training (instead being "passed on" information by an attendee at the training) put the claimant at a disadvantage and was unfavourable to her.

31. **August 2015** Following the ROM course, the respondent failed to **require** any of her colleagues who had attended the course to provide training to the claimant in any event. The claimant says that she had never received any of the training at all from any of her colleagues who had attended at the course. This put her at a disadvantage by comparison to her colleagues who had attended. The claimant says that attendance at that course was part of the specification for meeting the requirements of a Band 6 role and so by not making this training available the claimant was hindered in being

able to apply for promotion to Band 6 from Band 5. ***Complaints under s13 and 15 EqA***

Section 13 – claimant claims she was not allowed to attend the course because of her disability and, further, the respondent's failure to require a colleague to provide the information also amounted to direct discrimination

Section 15 – claimant claims that the something arising from her disability is her difficulty in absorbing information and the additional time it takes the claimant to do so. Accordingly, the decision not to provide the claimant with any assistance at all in being trained on ROM put her at a further disadvantage and so was unfavourable to her.

32. **2016**. In a grievance meeting on **17 October 2016** ***following the 19 August 2016, which was the date the claimant submitted her grievance)*** Maria Slater and Leila Mousa accused the claimant of delaying the submission of her grievance deliberately in order to prevent Mr Connelly defending himself. The claimant says this is contrary to ***section 26 of the EqA*** in that the accusation was related to the claimant's disability and the purpose or effect of the accusation was violating her dignity or creating an intimidating, hostile degrading humiliating or offensive environment for her.

33. **17 October 2016** The respondent (Maria Slater) agreed that the claimant could amend her working hours so that she started and finished earlier (the hours which it was agreed the claimant could work were 7am until 3pm). The **claimant** claims that the PCP of working a standard working day until 5pm put her at a particular disadvantage as, because of her disability, she was less able to concentrate, later in the working day. The Claimant subsequently made a formal application for these changes to her working hours and her then line manager, Vicky Gillibrand ("VG") refused the application. Whilst the change in hours was later agreed by the respondent, there was a period of unnecessary delay. ***Complaints under s20/21 EqA.***

34. **01 August 2017 and again on 12/07/2019**. The respondent agreed to provide training to the claimant's work colleagues on how to best manage staff with Dyslexia but failed to do so. ***Complaints under s15 EqA.***

~~The "*something arising"* for the purposes of the claim under s15 is the need for the colleagues to be trained in order to work with and understand the impact of the claimant's disability on her. The unfavourable treatment is the respondent's failure to provide that training.~~

35. ~~**9/10/2018.** Shelley Bunting (SB) instructed the claimant to complete three patient file reviews for other clinicians. SB did so even though the claimant had been informed that a reasonable adjustment that would apply to her was that she should not be allocated administrative tasks from other staff members. Further, the claimant understands that SB was aware of this adjustment at the time, as she had specifically informed SB of them at a meeting with her on 24 September 2018 .~~

~~***Complaint under section 20/21 EqA*** – the PCP is to undertake administrative duties on behalf of other staff members as and when required. This put the claimant at a particular disadvantage as it takes her longer to read information, write reports and patients' notes and complete other administration tasks compared to those who do not have the claimant's disability.~~

36. ~~**29/10/2018**. At a management supervision meeting SB claimed (in a note of that meeting) that a job plan and capacity requiring the claimant to see 14 patients was **discussed** and agreed with her. The claimant denies that she agreed to the job plan and stated requirements. However, and in any event:-~~

~~a. The requirement to see 14 patients was a PCP which put the claimant at a substantial disadvantage in comparison with persons who are not disabled. This was particularly the case where, within the patients allocated there was a number of children with additional and multiple complexities;~~

~~b. The respondent had a duty to make reasonable adjustments to overcome this disadvantage and failed to do so (even though the respondent had previously acknowledged that a reasonable adjustment for the claimant was a reduction in her workload).~~

~~***Complaint under s20/21 EqA.***~~

37. **14/03/2019**. The claimant met with SB and HM and discussed with them the work that she had carried out during the previous four weeks. At this meeting SB maintained that the claimant needed to see more patients and have less administration time.

The requirement to see more patients and have less administration time was a requirement that was also being applied to the claimant's colleagues at the time, yet it put the claimant at a substantial disadvantage as she requires longer to read information, write reports and complete administration in relation to each patient than her non-disabled colleagues need.

SB, by her comments appeared not to accept that the claimant had a disability and required the adjustments. For example, at the meeting on 14 March 2019 SB noted that the claimant was using up too much administration time that could be delegated to other members of staff.

Complaint under sections 20/21 EqA.

38. **12/02/2019.** A team meeting took place on this date. Prior to that team meeting the claimant had told one of her managers (HM) she had made a number of **requests** for reasonable adjustments, and the respondent's failure to make those adjustments was starting to make the claimant feel ill. At the team meeting itself another of the respondent's managers (SB) made the following comment:

"The staff not at this meeting and off sick are your colleagues who are letting you down as a team."

Claim under section 27 EqA (victimisation) – the protected act for the purposes of this section 27 claim was the claimant raising her requirements for reasonable adjustments.

39. **19/03/2019**. The claimant asked SB if she could make arrangements for Access to Work to facilitate a meeting between the claimant and SB in order to resolve differences about the reasonable adjustments the claimant required. SB's response was to tell the claimant, *"I find you crass, rigid and inflexible and I know you don't like me either"*.

~~***Claim under section 27 EqA (victimisation)*** – the protected act was the claimant's continuing request for reasonable adjustments pursuant to sections 20/21 EqA.~~

40. ~~**18 /06/19**. The claimant returned to work following a period of absence and attended a return-to-work meeting having only been in the workplace for approximately one hour. The claimant was engaged in time consuming tasks required of her on a return to work including reviewing and actioning emails and contacting patients. SB and HM were the managers attending the return-to-work meeting. both SB and HM proceeded to provide the claimant with a large number of additional tasks. This was upsetting to the claimant. These unfair burdens were placed on the claimant by SB and HM (acting together and meeting the claimant together even though they were aware that the claimant would be unaccompanied, which the claimant considered to be intimidating) even though they were aware of the claimant's disability and the need for reasonable adjustments in relation to her workload.~~

~~***Complaint under s26 EqA (Harassment***).~~

41. ~~**29/07/19.** SB informed the claimant that she should be allowed to publish to the team as a whole, the number of patients the claimant had seen and comparing those numbers with the numbers of patients seen by the claimant's colleagues in the same team. Whilst these numbers were not published, the claimant claims that, by informing her that it should be done and engaging in this discussion with the claimant was harassment.~~

~~***Complaint under s26 EqA (Harassment)***~~

42. **25/09/19 and 22/10/19**. On 25/09/19 an ASC team meeting took place on this day. At that meeting the claimant was presented with a new job plan. This job plan was different to and more demanding than the plan that had been agreed with the claimant at a meeting on 28 June 2019 tasking account of reasonable adjustments required by the claimant. On noting that the job plan agreed on 28 June 29019 also matched the claimant's grading of Band 5, one of the other attendees (Claire Goodwin) announced to the claimant that if she (the claimant) wanted to progress to a band 6, she would have to leave the respondent trust

On 22/10/19 a further job plan was presented to the claimant which was different to (and more demanding than) the job plan which had been agreed on 28 June 2019. This new job plan was also presented to the claimant in front of colleagues.

On both occasions the job plan was presented by HM who was aware of the claimant's disability and of the job plan designed to ensure compliance with reasonable adjustments and agreed on 28 June 2019. Further, provided the claimant with new job plans in front of colleagues even though she could have discussed this with the claimant directly and without colleagues being present (some of whom were not aware of the claimant's disability).

Complaint under s20/21 EqA (failure to comply with reasonable adjustments already discussed and agreed).

Complaint under s26 EqA(Harassment).

43. **01/10/19.** SB required the claimant to see a patient who had been assigned to another clinician. The claimant was expected to see this patient at 3pm (the time when the claimant's working day ends) and at short notice, thus denying the claimant the time she needs to consider a patient's records and understand the information contained in there.

Complaint under s19 EqA – indirect discrimination The PCP was the requirement to see a patient at very short notice, due to scheduling difficulties

Complaint under s15 EqA (the something arising is the claimant's difficulty in absorbing information and the additional time it takes the claimant to do so.)

Complaint under s26 EqA (harassment)

44. **28/01/20 and following.** After the claimant reported finding a confidential document that the Claimant believes was written about her, the claimant was subjected to a disciplinary investigation.

Complaint under s27 EqA (Victimisation). The Protected Act was the claimant's requests for the respondent to make reasonable adjustments in accordance with its obligations under s20/21 EqA.

45. **17/01/19-06/02/20**. During these dates the respondent allocated to the claimant a number of higher risk patients even though, as a band 5 practitioner, she should not have been allocated those patients (they should only have been allocated to band 6 or above) .

Complaint under s27 EqA (Victimisation). The Protected Act was the claimant's requests for the respondent to make reasonable adjustments in accordance with its obligations under s20/21 EqA.

46. **13/03/20** – a refusal by David Crier to clarify the policies relevant to allegations being made about the claimant's conduct. The claimant had been referred, in general terms, to six policies in operation at the respondent. Whilst the relevance of three of those policies was clear, it was unclear to the claimant what relevance the other three policies had in relation to allegations made against her. The claimant requested clarification and for the respondent to identify which parts of these policies were relevant. David Crier effectively refused to assist the claimant, simply stating, by email, *"she can read, I presume?"*. David Crier was aware of the claimant's disability.

Complaint under s13 EqA – Direct discrimination

Complaint under s15 EqA The "something arising" is the claimant's requirement for assistance with explanations about written material that she is unfamiliar with.

47. **09/06/20.** The Claimant was instructed to move her place of work pending the outcome of a disciplinary investigation regarding a meeting that had taken place on 15/01/20. The Claimant has identified a PCP applied by the respondent of requiring employees under investigation for allegations of misconduct, to move to another part of the respondent's organisation pending the outcome of the investigation. This put the claimant at a substantial disadvantage in comparison with persons who do not have the

claimant's disability. The claimant's ability to work productively is greatly assisted by her being familiar with work colleagues, workplace and surroundings.

Complaint under s20/21 EQA – failure to make reasonable adjustments.

Complaint under s27 (Victimisation) - the Protected Acts were the claimant's requests for the respondent to make reasonable adjustments in accordance with its obligations under s20/21 EqA and the claims made to the Tribunal.

48. **17/11/20 and 18/12/20** The claimant was informed that she would not be returning to the Salford CAMHS workplace even following completion of the outstanding disciplinary investigation. The claimant has been informed that this is due to a breakdown in relations. The respondent will not engage in workplace mediation to attempt to resolve this breakdown.

Complaint under s27 (Victimisation) - the Protected Acts were the claimant's requests for the respondent to make reasonable adjustments in accordance with its obligations under s20/21 EqA and the claims made to the Tribunal.

Case Number: 2401206/2020
2420257/2020
2420674/2020
2400338/2021
2407546/2021

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2401206/2020**

Name of case: **Miss M Waterworth** v **Manchester University NHS Hospitals Foundation Trust**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 27 March 2023

the calculation day in this case is: 28 March 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:
   www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.