EMPLOYMENT TRIBUNALS

Claimant: Mrs K Hunter

Respondent: Tameside College

Heard at: Manchester Employment Tribunal

On: 10, 11, 12, 13, 14 and 17 October 2022

Before: Employment Judge Mark Butler
Ms A Jackson
Mr BJ McCaughey

Representation
Claimant: In person, assisted by Mr A Christie-Hunter
Respondent: Mr J Boyd (of Counsel)

JUDGMENT

It is the unanimous decision of the tribunal that:

1. The 3 emails on which the claimant brings her public interest disclosure complaints are not public interest disclosures, either individually or collectively. The claims of detriments and automatic unfair dismissal caused by having made public interest disclosures therefore fail and are dismissed.

2. The claimant has not satisfied the tribunal that she had an impairment that met the legal definition of disability at s.6 of the Equality Act. Her claims for disability discrimination therefore cannot succeed and are dismissed.

3. The claimant has been found not to have been unfairly dismissed.

4. For the avoidance of doubt, none of the claims brought by Mrs Hunter in this case are well-founded and have all been dismissed.

5. The claimant requested written reasons at the conclusion of the hearing. These are those written reasons.

REASONS

INTRODUCTION

6. The claimant presented her claim form on 19 October 2020. In short, she brought complaints of being subject to a detriment on the grounds of having made protected disclosures, automatic unfair dismissal pursuant to s.103A of the Employment Rights Act 1996, ordinary unfair dismissal and a failure by the respondent in its duty to make reasonable adjustments.

7. The particulars of the complaint brought by the claimant was considered by Employment Judge Horne at a Preliminary Hearing on 12 April 2021. At that hearing, EJ Horne recorded the issues in this case. These can be found at pages 33-38 of the bundle provided for use at this hearing. These were confirmed as the issues in this case at the outset of the hearing.

8. We were provided with a bundle that had 308 electronic pages. Within this bundle of documents was the claimant's witness impact statement that EJ Horne directed to be produced for the purposes of determining the disability issue. The witness impact statement can be found at p.53 of the bundle. This identified that the claimant brought her disability discrimination complaints on the mental impairment of anxiety with depression.

9. The claimant was represented at this hearing by her husband, Mr Christie-Hunter. However, the tribunal was flexible in allowing the claimant to ask some questions too where she considered that that was necessary. The tribunal considered this to be an appropriate approach given that neither the claimant nor Mr Christie-Hunter were legally qualified. And it was important that the claimant had the opportunity to fully challenge the respondent's evidence.

10. The claimant gave evidence on her own behalf and called Ms Evans-Jarvis to also give evidence.

11. The respondent called Ms Pearson, Ms Arnold, Mrs Hayhoe, Dr Farran, Mr Blackwell and Ms Moores.

12. The tribunal tried to assist the claimant in framing questions where that was needed, and asked questions that had been overlooked by the claimant, where appropriate. The claimant tried to be generous with time too, to give the claimant and Mr Christie-Hunter thinking time, especially when it was indicated to the tribunal that they had completed cross-examination of a witness. This was also the case when it came to closing submissions.

13. There were various occasions where there was a need to take a break, to help the claimant. This was when the claimant became upset or when it appeared that she was struggling in some way. Such breaks were afforded when necessary, in addition to the planned breaks during the hearing.

14. During the proceedings, the tribunal had to determine whether the document at page 182 of the bundle was subject to without prejudice protection. Having heard from both parties, and having considered this matter, the tribunal determined that it was not subject to such protection. In short, this document was not created whilst there was a dispute in contemplation, nor was it with a view toward settling any such dispute. This document was therefore admitted into evidence.

15. The tribunal was grateful for the way that both parties presented their case throughout the hearing. It enabled the tribunal to hear the evidence that it needed

in order to reach a decision on this dispute.

LIST OF ISSUES

16. The list of issues was recorded by EJ Horne at the Preliminary Hearing that took place on 12 April 2022.

17. These were considered at the beginning of this hearing and confirmed as the list of issues in this case.

18. I attach a copy of the last of issues as recorded by EJ Horne to the back of this document.

LAW

Detriment on the grounds of a Protected Disclosure

19. It is at s.43B of the Employment Rights Act 1996 where it is set out what is meant by a qualifying disclosure (relevant to the claimant's detriment claim and automatic unfair dismissal complaint):

> **43B Disclosures qualifying for protection.**
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [F2 is made in the public interest and] tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

Disability

20. Section 6 of the Equality Act (2010) ("EqA (2010)") states:

> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse

effect on P's ability to carry out normal day-to-day activities.

A failure in the duty to make reasonable adjustments

21. The relevant statutory provisions of EqA, in respect of a failure to make reasonable adjustments complaint are as follows:

> **20. Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. ...
>
> **21. Failure to comply with duty**
>
> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Burden of Proof under the Equality Act 2010

22. We reminded ourselves of the burden of proof in discrimination cases, with reference to section 136 of the Equality Act 2010:

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (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.

Unfair Dismissal

23. The test of unfair dismissal is set out in section 98 of the Employment Rights Act 1996:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b)that it is either [capability] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. ...

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

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

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

24. The essential question in cases of long-term medical absence is whether the employer can be expected to wait longer for the employee to return: *Spencer v Paragon Wallpapers Ltd* 1977 ICR 301, EAT. In that context, the size and resources of the employer is very relevant. Phillips J noted that relevant circumstances to be considered include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'. And these are factors that have applied time and time again in such dismissals.

CLOSING SUBMISSIONS

25. The tribunal benefitted from written closing submissions submitted on behalf of the respondent. The tribunal was grateful to Mr Boyd for having set out in simple terms an explanation as to the legal principles that the tribunal was considering in these proceedings. This was for the benefit of the claimant and her representative, given that neither are legally qualified.

26. The tribunal also heard oral closing submissions from both Mr Boyd on behalf of the respondent and Mr Christy-Hunter on behalf of the claimant. To assist Mr Christy-Hunter and the claimant, the tribunal had a brief adjournment at the conclusion of Mr Boyd's closing submissions to allow them time to consider what they wanted to present in their closing submissions. The closing submissions of both parties have been considered in reaching this decision.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Below we consider each claim in turn. We make relevant findings of fact, based on the balance of probability from the evidence we have read, seen, and heard, before turning to explain our analysis and conclusions. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that no other evidence has been considered. Our findings were based on all the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

Protected Disclosures: findings

27. The claimant sent an email to Angela Pearson on 21 May 2019 at 11.20. In this email, the claimant explains:

Dear Angela,

> X stormed off this morning when Jason came to my session and had a massive go at him for attending my extra support session. I made no comments and carried on as Jason did request me yesterday for extra help in chemistry.
>
> Then later on he had a go at me for this reason. Then he had a negative comment about Jason on pro-monitor when he knew that he was working in chemistry this morning.
>
> I feel very uncomfortable with this situation.
>
> Kind regards,
> Khay

28. The claimant emailed Ms Pearson on 05 June 2019 with the following:

> Dear Angela,
>
> I need to make you aware of the following.
>
> This afternoon at around 13.30pm I was making my way down the corridor towards my lab. I walked past Sam Olssen with a group of students and Sam said in a loud voice" I am going to have a meeting with you and Angela later on today. The students clearly heard this and all looked.
>
> I consider this to be unprofessional in front of students.
>
> Khay

29. The claimant sent a further email to Angela Pearson on 16 August 2019. In this email she wrote:

> Dear Angela,
>
> I went to college today for my session for chemistry revision as timetabled. I had arranged specially for Thursday so it wouldn't clash with maths or physics sessions. To my disappointment two of my students who would benefit with extra help went to Maths session again on my schedule time. They eventually arrived at 13.00 pm for the last two hours and were already exhausted from the maths session. Therefore they were not able to focus in chemistry. This has happened quite a few times lately and feel frustrated and concerned for the performance of students in the chemistry exams. I was told by one the students that the maths teacher would be very annoyed if they did not attend his session.
>
> I am very concerned about how this my affect their exam performance.
>
> Many thanks,
> Khay

Protected Disclosures: discussion and conclusions

30. The three emails copied above in their entirety are the emails in which the claimant says she has made a protected disclosure, for which she brings her

claim of detrimental treatment and automatic unfair dismissal

31. There are several matters that the tribunal must assess when considering whether the claimant has made a protected qualifying disclosure in this case. The first of which is whether the claimant has disclosed sufficient factual information that is capable of showing one of the matters listed in s.43B(1) of the Employment Rights Act 1996.

32. The claimant's case is that these three emails are disclosures of information that is capable of showing that the health and safety of any individual has been, is being or is likely to be endangered.

33. The tribunal must focus on the specific wording of the alleged disclosure when determining whether a protected disclosure has been made.

34. The tribunal on assessing these three emails is not satisfied that these contain a disclosure of sufficient information relating to the endangerment of the health and safety of individuals to be considered a protected disclosure. This is when looked at individually or collectively. There is simply nothing in those emails that reaches that level. The claimant may have interpreted these as being such an endangerment to the health and safety of individuals after the event, but this is not enough.

35. The claimant has not satisfied the tribunal that she has made a protected disclosure in this case.

36. The claims of being subject to a detriment on the grounds of having made a protected disclosure, and automatic unfair dismissal for having been dismissed for the principal reason of having made a protected disclosure are therefore dismissed.

Disability: findings

37. The claimant was diagnosed with anxiety with depression by her doctor on 20 June 2016.

38. Throughout the material period, the claimant was prescribed and took Fluoxetine. This was prescribed to her from at least 20 June 2016, at 40mg daily.

39. On 31 December 2018, at the claimant's medication review (see p.83 of bundle) there was discussion between the claimant and her doctor about reducing the Fluoxetine dosage or her coming off it in its entirety'. However, it is also recorded by the doctor that the claimant feels like 'she can't give up the fluoxetine'. At this stage the claimant was medicating with 20mg fluoxetine daily.

40. On 13 May 2019, the claimant attended a medication review with her doctor. It is recorded that at this point the claimant was keen to continue with fluoxetine although at that moment in time, she had run out. It is recorded that the claimant was advised not to stop her medication abruptly (see p.83 of bundle).

41. On 13 March 2019, when attending a doctor's appointment, it is recorded that the claimant did not sleep the night before due to feeling tearful, nauseous and anxious about returning to work (see bottom p.82. top of p.83 of bundle). There is no other reference to impacts on sleep in the medical records.

42. The claimant continued to take fluoxetine until at least 29 March 2021.

Disability: discussion and conclusions

43. Determining disability caused the tribunal some difficulty in this case. In the background, the claimant had an early diagnosis of anxiety with depression from her doctor, going back as early as June 2016, according to her medical records. And there is evidence in the tribunal bundle that certain individuals were aware that Mrs Hunter may or may not have, at least at some point, been impacted upon by such impairments. And this is coupled with her continued use of Fluoxetine throughout the material period.

44. However, the tribunal is applying a legal test when considering the issue of disability. Having a diagnosis is not conclusive.

45. The test for disability is contained at s.6 of EqA (see above).

46. The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (the Guidance) does not itself impose legal obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12 EqA).

47. The Guidance at paragraph B1 deals with the meaning of 'substantial adverse effect' and provides:

> 'The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.'

48. Paragraph B1 should be read in conjunction with Section D of the Guidance which considers what is meant by 'normal day-to-day activities'.

49. Paragraph D2 states that it is not possible to provide an exhaustive list of day-to-day activities.

50. Paragraph D3 Provides that:

> 'In general, day-to-day activities are things that people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.'

51. Paragraph D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.

52. The burden of proof is on a claimant to show that she satisfies the statutory definition of disability.

53. In **Goodwin v Patent Office** [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:

    a. Does the person have a physical or mental impairment?

    b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?

c. Is that effect substantial?

d. Is that effect long-term?

54. In directing the claimant to adduce the evidence required to assist the tribunal in determining the issue of disability, Employment Judge Horne at the Preliminary Hearing that took place on 12 April 2021 directed the following:

> The disability issue
>
> 6. By 4pm on 7 June 2021 , the claimant must deliver to the respondent:
>
> > 6.1. a signed statement setting out the effects of her impairment on her ability to carry out normal day to day activities during the relevant period and during the preceding 12 months, any medication she took for her impairment and theeffects of her impairment at any time when she did not take that medication;
> >
> > 6.2. copies of any documents on which the claimant relies in relation to the disability issue; and
> >
> > 6.3. copies of her general practitioner records starting 12 months prior to the relevant period, so far as they are relevant to the disability issue, whether they support or undermine the claimant's case. The claimant may redact the records to obscure any entry that is wholly irrelevant to the disability issue.
>
> (Note the definitions of "the relevant period" and "the disability issue" in the case management summary above)

55. The claimant presented the respondent with a witness impact statement, and this was contained at p.53 of the bundle. This contains very little relevant evidence, at least in terms of the affects on the claimant's normal day to day activities. At its height it refers to:

    a. Being on medication, and that without it she 'cannot cope mentally with any type of stress'. And that she can lose 'focus on my thoughts and thus cannot process information'. However, she does not explain how this then affects normal day to day activities.
    b. The claimant references coughing and incontinence but provides little explanation around these. And how they affected her daily activities. Her medical records only reference incontinence in September 2013, and do not support these as symptoms of any impairment, nor with respect the affects on her daily life these symptoms were having on her.

56. In support of her case on this issue, the claimant sent a copy of her medical records. These are found at pages 79-88 of the bundle.

57. The respondent responded on the disability issue on 10 June 2021. The claimant's impairment of anxiety with depression was not conceded by the respondent as satisfying the legal definition of disability, and a detailed explanation was provided (see pages 54 and 55 of the bundle). Part of the reasoning (which became the tribunal's focus), amongst others, was that the claimant had not given sufficient evidence on the affect any such impairment had on her normal day to day activities should she not take the prescribed Fluoxetine. And this tribunal agrees with that analysis. The claimant, in her witness impact statement refers to coughing and incontinence. That she was on occasion tearful, and there is reference to avoiding people. The difficulty is that the statement is

written quite generally and does not explain when and how often those effects occurred, nor how they had an impact on her ability to undertake normal day to day activities.

58. To the claimant's credit, she to did try to supplement this evidence by including a paragraph on the first page of her witness statement to address the shortcomings of her witness impact statement. However, this again does not explain the effect she says the impairment had on her normal day to day activities.

59. Under cross examination, Mr Boyd rightly gave Mrs Hunter the opportunity on at least three occasions to emphasise the affects the impairment was having on her normal day to day activities, but the claimant provided no additional detail. And nor was that detail provided when the tribunal gave a further opportunity through its questioning.

60. The tribunal must apply the legal test when determining the issue of disability. The burden of proof rests on the claimant, and she has not satisfied the tribunal with sufficient evidence on the affects she says her anxiety with depression was having on her normal day to day activities across the material period to support a finding of a disability in this case. And this conclusion is reached having considered the claimant's witness impact statement, the medical evidence supplied in support, the claimant's witness statement for this hearing, her answers under cross examination as well as other documentary evidence before this tribunal.

61. The tribunal was careful to assess all the evidence before it in reaching this conclusion. And having done this we reached the difficult decision that there simply was insufficient evidence to support that there was an impairment having a substantial effect on the claimant's normal day to day activities across the material period.

62. Given this finding, the claimant was found not to have a disability and the disability discrimination complaints all must fail.

63. The tribunal did consider its alternative position, should it be wrong on the issue of disability. And ultimately, the decision of the tribunal was that even had the claimant been able to satisfy the definition of disability within EqA, the claim that the respondent had failed in its duty to make reasonable adjustments would still not have succeeded.

64. Without giving any significant consideration to the Provision, Criterion or Practices (PCPs) themselves, or knowledge of the disability, the tribunal did turn to consider whether the claimant had adduced sufficient evidence to establish that for reasons connected to her disability she had been put at a substantial disadvantage by any of the PCPs pleaded. The initial burden of proof in this respect rested on the claimant (s.136 EqA). The claimant failed to discharge this burden. There was simply no evidence produced to establish this connection.

65. In reaching this conclusion, again the tribunal carefully considered the evidence before it. The tribunal was not satisfied that the evidence supported:

    a. that the claimant for reasons connected to her anxiety with depression found it harder to cope with the resulting stressful atmosphere.
    b. that the claimant for reasons connected to her anxiety with depression the claimant found it harder to tolerate Mr Olsen entering her classroom during revision classes.
    c. that the claimant for reasons connected to her anxiety with depression found it harder to tolerate circumstances where her students did not have enough revision time.

d. that the claimant for reasons connected to her anxiety with depression was put at a substantial disadvantage in relation to absence review meetings, as she was too ill to attend. This is especially in light of the Occupational Health reports, none of which recorded the claimant as being too ill to attend those meetings.

66. It may well be the case that the claimant's anxiety with depression did put her at these substantial disadvantages, but put simply, the evidence before this tribunal did not support such findings.

67. This all led the tribunal to the conclusion that even had the claimant established that she had a disability in this case, her claim was bound to fail in any event.

68. We do not take this decision any further, however, make this observation. This particular claim would also have had difficulties in respect of knowledge of substantial disadvantage (as the claimant's clear evidence was that she considered her anxiety with depression to be a private matter and did not let anybody know how it was affecting her) and in respect of adjustments that could have been made and would have been reasonable in the circumstances. However, we as a tribunal do not consider it necessary to take those any further given our conclusions on the issue of disability and in terms of substantial disadvantage above.

Unfair dismissal: findings

69. The claimant during her employment with the respondent had not been subject to any disciplinary action.

70. Each member of the teaching staff is subject to two learning walks per year. Staff were not made aware as to which class would be subject to the learning walk but would be informed that one would be taking place within the next couple of weeks.

71. During September 2019, one of the claimant's classes was subject to a Learning Walk. This was conducted by Ms Arnold and Ms Person. A feedback report was prepared. The feedback in this report was discussed with the claimant on 02 October 2019. Parts of the report were critical of some of the approaches adopted by the claimant.

72. In light of the report, Ms Pearson put in place a support package. This included a meeting between herself and the claimant on 09 October 2019. There was no question of performance management, nor was the claimant being subjected to any disciplinary action. This was not a tool used to begin a process of dismissing the claimant.

73. There had been other members of staff treated similarly to that of the claimant, following the conclusions of a learning walk observation. This included Sam Walters, who following the support package remained employed by the respondent.

74. The respondent advertised a role of Deputy Head of the Science and Maths Department. This role was part teaching (10 hours of the 32 hours per week) with the remainder of the role being a management/strategic role. There was a need for additional staff at the respondent at this time due to increasing student numbers. This was a different job to that held by the claimant.

75. The claimant applied for the role of Deputy Head of the department but was unsuccessful. Ms Wood was successful at interview and was appointed to this

role. This was not as a replacement of the claimant,

76. The claimant started a period of sickness absence on 10 October 2019. She did not return to work before her dismissal.

77. On 06 January 2020, Ms Berry and Ms Pearson met with the claimant at her home. This was a welfare meeting in line with the respondent's absence management policy. At this meeting, the claimant with support from Mr Christy-Hunter, informed Ms Berry and Ms Pearson that she was seeking to leave the employ of the respondent and was looking for an 'exit strategy'. This was confirmed by the email sent on behalf of the claimant on that same day (see p.182), where it states:

> Dear Sally,
>
> my husband is writing this email on my behalf, as I am not well enough to do it. It is written with my full consent and is in line with previous request.
>
> I am very disappointed that the meeting today was not about an exit strategy, nor was it a management meeting as stated in your letter. As you did not put exit on the table and said that this was not a management meeting we will have to amend the written statement that was read to you today to reflect this.
>
> Our reasonable request for exit is 6 months pay in lieu of notice, tax free and accrued holiday pay to the end of this time period. Thank you for saying that you would pass this on to the Principal Jackie Moores.
>
> As the said subject of the meeting was not kept too, clarification of my situation was provided in the read statement. This is why you were not provided with the statement prior to the meeting.
>
> Would you please sent the grievance procedure and paperwork, as we wish to proceed with this route unless we hear otherwise. We will provide the amended statement to you once you have sent the appropriate paperwork.
>
> Yours sincerely,
>
> Khay Hunter

78. As at this date, from the claimant's point of view, trust and confidence had broken down between the claimant and the respondent and she was not going to return to work. This was the claimant's clear evidence under cross examination. From this point forward, the claimant was seeking to bring the relationship to an end and was unlikely to return to the workplace. Support for this finding is the email above, which is further supported by the entry in the medical records at p.82, where it is recorded in the entry on 11 Oct 2019 that the claimant 'plans to look for another job when feels emotionally ready', and the entry on 31 January 2020 (see p,81) where it is recorded that the claimant has 'requested a settlement'. There is further support for this finding in the note created by Ms Pearson around the date of the meeting (see p.229). The tribunal accepted the accuracy of this note, especially given the corroborating evidence referred to in this paragraph.

79. Ms Berry emailed the claimant on 07 January 2020 (see p.181) to inform her that she had forwarded the claimant's proposal for an exit strategy to Ms Moores, to provide the claimant with the necessary grievance documentation, and to arrange

an Occupational Health appointment, as discussed at the meeting on 06 January 2020.

80. The claimant attended the Occupational Health appointment on 09 January 2020. It was the opinion of the Occupational Health practitioner that the claimant was 'capable of attending a management meeting'. And that she was 'temporarily unfit to return to work in the short to medium term'.

81. The claimant raised a grievance with the respondent on 21 January 2020. The content of the grievance is at pages 186-189 of the bundle. The grievance related to:

> This grievance relates to:
>
> 1. Lack of support.
> 2. Bullying and harassment from management.
> 3. Lack of support in getting back my health and wellbeing.
> 4. Targeted destruction of my teaching career.
> 5. Lack of support/dismissal In relation to allegations brought.
> 6. Unprofessional HR behavior.

82. Ms Hayhoe was appointed to investigate and determine the grievance raised by the claimant. The claimant attended a grievance investigation meeting on 02 March 2020 (notes at pages 191-194). Ms Hayhoe also met with Mr Olsson on 03 March 2020 (notes at pages 200-201), Ms Arnold on 03 March 2020 (notes at pages 202-203), Ms Pearson on 03 March 2020 (notes at pages 204-206), Ms Wood on 03 March 2020 (notes on page 207), Ms Shaw on 03 March 2020 (notes on page 208), and Ms Berry on 03 March 2020 (notes on pages 209-210).

83. Ms Hayhoe produced an investigation report dated 24 April 2020 (see pages 212-222). This recorded the investigation that was undertaken, and evidence collected (see pages 212-213. The claimant's grievance in its entirety was not upheld. Ms Hayhoe did record the following:

> Recommendation:
>
> Grievance 1
>
> Whilst I recognise that SO behaviour and manner can sometimes be unprofessional and inappropriate I do not believe he was bullying KH. There was a complete breakdown in the relationship which made it impossible for the two parties to have any form of working relationship. There was clear fault on both sides.
>
> Grievance 2
>
> There is a clear trail of support by management and HR to try and support KH and reconcile the differences between KH and SO before it escalated. KH was also referred to occupational health and CBT. My opinion is that KH saw the introduction of a new teacher as someone who would replace KH but it was actually to support and enhance the department. HR followed HR policy however it is noted that the grievance policy does not appear to have been sent when KH requested it but sent at a later date and there are minutes missing from meetings between HR, KH and SO. I do not believe HR tried to persuade KH to resign.

84. The claimant appealed the grievance decision on 21 May 2020 (see pages 247-252).

85. Ms Moores was the appeal officer for the grievance appeal. A grievance appeal hearing took place on 16 June 2020 (see pages 255-258). The claimant was afforded the opportunity to send Ms Moores a statement following the appeal hearing, and before any decision was made. The claimant did so on either 16 or 17 June 2020 (this is found at p.260).

86. The outcome of the appeal was communicated to the claimant on 22 June 2020. The appeal outcome letter is dated 18 June 2020 (pages 261-263). The outcome was to reject the appeal.

87. As part of the email (see p.264) that attached the appeal outcome letter on 22 June 2020, Ms Sammut also informed the claimant that:

> Now that your grievance has been investigated and the outcome has been reached, the college will now proceed to manage your continued sickness absence in line with our absence Management procedure. A Sickness absence panel will be arranged. We will contact you with the date.

88. The claimant was sent a letter on 09 July 2020, informing her of the following:

> Dear Khay
>
> I am writing to inform you that we are convening a Panel under the terms of our Sickness Absence Procedure, a copy of which I enclose, to consider your long term sickness absence.
>
> The Panel will consist of three College Managers and will meet on Thursday 16 July 2020 at 1pm.
>
> You have the right to be accompanied at this meeting by a work colleague or Trade Union Representative.
>
> In accordance with the procedure, the Panel will give due consideration to the facts surrounding the absences and deem whether a sanction under the College's Disciplinary Procedure should be given, which could be a written warning, a final written warning or, if deemed serious enough, recommendation for dismissal on the grounds of capability due to unsatisfactory level of attendance.
>
> Please confirm your attendance at this Hearing by email to me by Monday 13 July 2020.

89. The panel that was considering the absence of the claimant was: Ms Farran (chair) and Mr Sutton and Ms Jones. The panel was provided Human Resource support by Mr Blackwell.

90. Ms Arnold put together the Management case to be presented at the meeting on 16 July 2020. This is contained at pages 270-273. This recorded the following points:

    a. The claimant had been absent from work since 10 October 2019.
    b. The claimant was still unfit for work, and had informed the respondent that she does not want to return to her role.
    c. The claimant's absence was having an impact in terms of increasing h workload for other staff in the department, was impacting upon the learning experience of students; is having a financial cost through the respondent having to make use of agency staff.
    d. That the total cost for absence to date was £32,058.52. This being made

up of occupational sick pay, costs of occupational health appointments, and agency staff/additional hours for existing staff costs.

91. The claimant under cross examination accepted that her absences would have led to an increased workload for others in her department. And that the other impacts were likely to have been borne out because of her absence.

92. The claimant on the morning of 16 July 2020, emailed Mr Blackwell and informed him that she would not be attending the meeting that day. The claimant did not explain why she was not attending, just of the fact that she would not be.

93. The Sickness Absence Panel meeting took place on 16 July 2020 in the claimant's absence, notes of which are at p.276. At this meeting, Ms Arnold presented the management case. A decision was made at meeting that it would be adjourned to allow for an updated Occupational Health report to be produced, given that the current one was obtained some months prior to this meeting. Confirmation of this was sent to the claimant on 17 July 2020 (see p.277).

94. The claimant attended an Occupational Health appointment by telephone on 24 July 2020. The report produced following that appointment is at pages 278 to 280. At this assessment the claimant explained to the assessing practitioner that she had no confidence in management at that time. The claimant also identified what she would require the respondent to implement prior to discussing a return to her role. These were that:

    - Mrs Hunter would like copies of all documentation relating to her grievance including witness statements.
    - Mrs Hunter would like the grievance to be reheard as she perceives that certain aspects of her grievance have not been fully investigated.
    - Mrs Hunter would like the person she perceives has bullied her to be dismissed and she would like the other managers she perceives have discriminated against her to be dealt with in a manner than enables her to return to work with no direct contact with them in future.
    - Mrs Hunter states that a case number has been provided to her via ACAS and that she plans to take her perceived issues further.

95. The claimant was not going to return to work unless all these matters were addressed. This was clearly recorded in the Occupational Health report, and by the claimant in her email of 08 September 2020 (see pages 283-284).

96. The respondent considered these requests to be unreasonable requests. This is particularly given that the grievance process had been carried out and a conclusion had been reached (and this included having considered the claimant's appeal). In particular, this is noted in the reconvened meeting notes at p.285.

97. The Occupational Health practitioner recorded that the claimant was medically fit to attend the reconvened meeting, although there were psychological barriers that may result in her not attending.

98. The panel meeting was reconvened to take place on 10 September 2020. The claimant received an invite to that meeting by letter dated 27 August 2020. The hearing was to be remote. This was to try to alleviate some of the stress caused to the claimant by the meeting.

99. The claimant emailed Mr Blackwell on 10 September 2020 (again the day of the meeting rather than in advance) informing him again that she would not attend the meeting. This followed correspondence between the claimant and Mr

Blackwell from 08 September 2020 (see pages 282-285).

100. The reconvened sickness absence panel took place on 10 September 2020, with the claimant not in attendance (the notes of that meeting are at pages 285-286). At that meeting the following was noted:

> Panel consideration
>
> TF said she was aware that the managers concerned had been exonerated at the grievance appeal of any wrongdoing. The College was therefore not in a position to take any action against them.
> GS said that it did not seem possible to make the adjustments that KH was seeking to enable a return to work, and therefore a return was highly unlikely.
>
> RJ agreed that it seemed nothing could be done to facilitate KH's return.
>
> The Panel noted the impact of KH's absence on the Department described in the Panel meeting held on 16th July, and the cost of providing Agency cover.
>
> Decision
>
> The Panel concluded that:
>
> - there was no prospect of KH returning to work in her current role in the foreseeable future,
>
> - there were no suitable redeployment opportunities, and
>
> - given that she had no underlying health conditions or disability, she would not qualify for ill-health retirement
>
> - in view of the stated impact and cost, her absence could no longer be sustained by the College.
>
> Therefore, the Panel decided that KH should be given notice of the termination of her contract of employment on the grounds that she was, and was likely to remain, incapable of performing work for the College.

101. The decision to dismiss the claimant was confirmed to her by letter dated 22 September 2020 (see ages 287-288). As part of this letter the claimant was informed of her right of appeal. The claimant did not appeal the decision.

Unfair dismissal: discussion and conclusions

102. The burden of proof in ordinary unfair dismissal claims rests with the respondent to establish the reason behind the dismissal. Having determined the reason behind the dismissal, the tribunal then turns to consider:

a. whether the decision to dismiss for that reason was substantively fair. The tribunal in answering this question applies the Band of Reasonable Responses test. It asks itself whether the decision to dismiss the employee for that reason fell within the Band of Reasonable Responses? The tribunal must be careful not to substitute its own decision and ask whether it would have dismissed in those circumstances.

b. Whether the dismissal was procedurally fair?

103. The tribunal was satisfied that the reason behind the decision to dismiss the clamant was capability, and this concerned a long-term absence. The evidence before this tribunal supports this conclusion. The claimant was absent for some 8 months with illness before the Sickness Absence Procedure was commenced. The claimant accepted under cross examination that applying this procedure was inevitable in the circumstances. The respondent satisfied the burden of establishing that the reason behind the decision to dismiss was the potentially fair reason of capability.

104. The respondent during this period of illness undertook the investigations necessary to identify whether and when the claimant was likely to return to the workplace, and what it could do to support such a thing.

105. The claimant in her own evidence made it clear that trust and confidence had broken down with the respondent at the latest from 06 January 2020, when Ms Pearson and Ms Berry attended at the claimant's house. It is clear that from this point forward, the claimant was seeking to bring the relationship to an end and that she was unlikely to return to the workplace. And this was communicated to the respondent.

106. The respondent undertook investigation through arranging meetings with the claimant, to try to understand what more it could do to assist the claimant, but also to help it reach a conclusion on this matter. It took the eminently sensible decision to adjourn the initial absence management panel meeting on 16 July 2020 when the claimant was not in attendance, and commissioned a further occupational health appointment, before making any decisions with respect the claimant's absence. This was to ensure that it understood, as best it could, the health position of the claimant and whether she would be able to return to work.

107. The claimant did not attend the reconvened meeting on 10 September 2020, some 11 months after she first went off with sickness absence. The claimant did not present any statement to be considered at this panel meeting to explain what her position was, save to require the respondent to take particular actions before she would consider returning to the workplace. This included re-hearing her grievance (as she disagreed with the outcome, despite the process having been followed through to completion) and dismissing Mr Olsson, who had been found not to have bullied/discriminated against the claimant. These requests were simply unreasonable in the circumstances.

108. This tribunal considers that the respondent undertook a fair process in dismissing the claimant. It is not entirely clear what the claimant was submitting in this respect; however, the tribunal found the process to be fair in any event. Further, this tribunal concludes that the respondent undertook all reasonable investigations in these circumstances, it made sensible decisions to ensure it had all the necessary information in front of it, and the decision to dismiss in these circumstances, that being an 11-month absence with no prospects of the claimant returning to work, fell within the so-called band of reasonable responses.

109. For the avoidance of any doubt, the panel comprising of Ms Farran (as chair) and Mr Sutton and Ms Jones, made the decision to dismiss the claimant based on capability grounds. Ms Moores played no role in the absence procedure, nor did she assert any influence over the panel. The grievance and grievance appeal process had no bearing on this decision.

110. The decision to dismiss the claimant, for the reasons outlined above, was a fair one. The claim for unfair dismissal is dismissed.

CONCLUSIONS

111. All claims brought in this case for the reasons outlined above are dismissed.

112. The tribunal does echo the comments made by Mr Boyd in his closing submissions. This is a sad case, where many of the issues in this case appears to have stemmed from a disagreement between two staff members, both of whom believed they were wanting the best for their students. There was an obvious respect between the claimant and the witnesses of the respondent, which the tribunal viewed firsthand. This suggests that the claimant had built some good relationships during her employ there, and this is not often viewed between parties when you get to final hearing stage.

_____

Employment Judge **Mark Butler**

Date_13 January 2023____

JUDGMENT SENT TO THE PARTIES ON

13 January 2023

.....
FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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

Complaints and Issues

18. By a claim form presented on 19 October 2020, the claimant raised the following complaints:

> 18.1. Unfair dismissal, contrary to section 94 of the Employment Rights Act 1996 (“ERA”) and alleged to be unfair both within the meaning of section 98 of ERA and also section 103A of ERA;
> 18.2. Detriment on the ground of protected disclosures, contrary to section 47B of ERA; and
> 18.3. Failure to make adjustments, as defined by sections 20 and 21 of the Equality Act 2010 (“EqA") and in contravention of section 39 of EqA.

19. The claim form also raised a complaint of race discrimination, but that complaint was withdrawn today. In the claim form the claimant also ticked a box to say “I am owed...other payments" and complained about the respondent "withholding salary". When I sought clarification of this part of the claim, Mr Christie-Hunter confirmed that this was not a separate complaint of a breach of any free-standing legal obligation to pay wages. Rather, he said, this was another way of saying that the alleged discrimination and detriments had caused the claimant to be and to remain on sick leave, which in turn caused her to lose earnings.

20. We discussed the issues to be determined by the Tribunal. They are summarised below. The parties should consider this list carefully to make sure that it accurately records such matters. If not, the Tribunal and the other party must be notified promptly.
Protected disclosures

21. The claimant’s case is that she made three protected disclosures. Each of them was by e-mail to Ms Pearson. They all concerned Mr Olsen’s alleged behaviour towards students and colleagues. The claimant was not able to provide details of all the e-mails today, but she agreed to disclose the e-mail themselves at an early stage. According to the claimant, she believed that the information in each e-mail tended to show that the health and safety of staff and/or students was being put in danger.

22. The disclosures were:

> 22.1. PID1 - An e-mail on 21 May 2019 complaining that Mr Olsen was bullying students (in particular a student referred to by the parties as JH) and had shouted at the claimant.
> 22.2. PID2 - An e-mail on 30 May 2019 complaining that Mr Olsen had pulled two students out of her class and into his classroom in an "aggressive manner".
> 22.3. PID3 - A similar e-mail on a date to be confirmed.

23. In one of the e-mails (the claimant will clarify which one) the claimant highlighted that Mr Olsen had made a misleading entry onto the respondent's “Pro-Monitor" attendance recording system. According to Mr Olsen’s entry, JH had not been in a session, but in fact JH had been in the claimant's revision session. The claimant believed that this was a “safeguarding” issue which tended to show that JH’s health or safety was in danger.

24. The claimant told me that she had also reported concerns of a similar nature "verbally" to Ms Pearson. These conversations may well form part of the background evidence. The claimant is not asking the tribunal to make a finding

about whether or not she made protected disclosures in these conversations. The three e-mails are enough, confirmed Mr Christie-Hunter, to give the tribunal the full picture of what disclosures the claimant made and which motivated the respondent to subject her to detriments.

25. The issues for determination, in respect of each of PID1 to PID3 are:

> 25.1. Did the claimant send the e-mail? (If so, it would be a disclosure to the claimant's employer within the meaning of section 43C(1) of ERA.)
> 25.2. Did the e-mail contain a disclosure of information?
> 25.3. Did the claimant believe that the information tended to show that the health and safety of a member of staff or a student was being put in danger?
> 25.4. Was that belief reasonable?
> 25.5. Did the claimant believe that she made the disclosure in the public interest?
> 25.6. Was that belief reasonable?

Detriment complaint

Alleged detriments

26. Here is a complete list of the detrimental acts and failures that are said to have been done on the ground that the claimant made protected disclosures:

> 26.1. Ms Pearson not replying to the claimant's e-mails of 21 May 2019 and 30 May 2019;
> 26.2. Ms Pearson failing to ensure that Mr Olsen used a separate staff room from the claimant; (The claimant agreed that she would have a think about this particular detriment: as things stand, her case appears to be that the respondent failed to put this measure in place despite the fact that she had raised a protected disclosure; she struggled to explain how the respondent's failure was because she had made a protected disclosure)
> 26.3. Ms Pearson and Ms Jennie Arnold, in the "learning walk", making petty and unjustified "nit-picking" criticisms of the claimant's grammar, her visit to the toilet, and drinking a glass of water; other staff members were not criticised in this way; and
> 26.4. Ms Teresa Farran dismissing the claimant.

Jurisdiction issues

27. With the exception of the dismissal, all of these alleged detrimental acts and failures appear to have been done before 25 March 2020. The significance of that date is that it is three months before the claimant first notified ACAS of her prospective claim. For acts and failures before that date, the tribunal must consider the statutory time limit.

(The respondent may seek to argue that 25 March 2020 is not the correct cut-off date and that anything done prior to 1 June 2020 is out of time. The argument, as I understand it, is that a period of early conciliation is ineffective to trigger the "stop the clock" provisions in section 207A of ERA unless the certificate number for that particular conciliation period is contained in the claim form. I did not determine that point today. If the respondent wishes to argue it, it must submit a full skeleton argument in support.)

28. The issues for the tribunal, in respect of each detrimental act or failure done prior to 25 March 2020, will be:

28.1. Was the act or failure part of a series of similar acts which included the dismissal?
28.2. Was the act of failure part of an act extending over a period which ended on or after 25 March 2020?
28.3. If the answer to both questions is no: (a) can the claimant show that it was not reasonably practicable to present the claim within the statutory time limit and (b) if so, was the claim presented within such further period as the tribunal considers reasonable?

Substantive issues

29. For those alleged detriments which the tribunal has jurisdiction to consider, the following questions will establish whether or not the complaint is well-founded:

29.1. Did the alleged act or failure occur?
29.2. Could it reasonably have been understood by the claimant to be detrimental to her?
29.3. Did the claimant make one or more of the alleged protected disclosures (see above)?
29.4. If so, was the act or failure motivated to any significa nt extent by the fact that the claimant had made a protected disclosure?

Unfair dismissal

30. It is common ground that the claimant had statutory protection against unfair dismissal and that she was dismissed.

31 . The issues for the tribunal to determine are as follows:

31.1. Can the respondent prove that the sole or principal reason for the dismissal was the claimant's sickness absence?
31.2. If the answer to the first question is yes, that reason was one which related to the claimant's capability, and the'tribunal must go on to ask: Did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason to dismiss the claimant?
31.3. If the answer to the first question is no, the dismissal was unfair under section 98, but the tribunal will nevertheless consider whether or not it was also unfair under section 103A of ERA. This involves asking:
31.3.1. Did the claimant make one or more of the alleged protected disclosures (see above)?
31.3.2. Can the claimant put forward sufficient evidence to raise a reasonably arguable case that the sole or principal reason for dismissal was that she had made a protected disclosure?
31.3.3. If so, can the respondent prove that this was not the sole or principal reason?

Disability

32. In order for the claimant to succeed in her complaint of failure to make adjustments, she will need to establish that she had a disability within the meaning of section 6 of EqA.

33. The claimant's case is that she is disabled by the effects of the mental impairment of anxiety and depression.

34. The will need to show that she that that disability during the relevant period of time. In this case, "the relevant period" started in March 2019 and ended with the termination of the claimant's employment. (In fact, the claimant's case is

that she was already disabled by the time her employment started.)

35. At present, there is a potential dispute about whether or not the claimant had that disability for the whole of the relevant period. The tribunal refers to this potential dispute as “the disability issue”.

Duty to make adjustments

The steps

36. The claimant says that the respondent should have taken seven different steps by way of reasonable adjustments. These steps are:

Step 1 - Requiring Mr Olsen not to go near the claimant
Step 2 - Requiring Mr Olsen to use a different staff room from the one that the claimant used
Step 3 - Requiring Mr Olsen not to enter the claimant’s classroom when she was teaching
Step 4 - Changing the claimant's line manager
Step 5 - Following an unsuccessful mediation, arranging a further mediation with a different mediator, using separate rooms
Step 6 - Making it compulsory for students to attend revision sessions and
Step 7 - Permitting a representative to participate in attendance review meetings instead of the claimant.

37. We discussed how the legal duty to take these steps arose. The claimant contends the steps should have been taken in order to avoid the disadvantageous effect of four provision, criterion or practice (PCPs). They are listed below, together with the steps that should have been taken in response.
PCP1

38. PCP1 was the requirement for a teacher to work in the same place as a person about whom the teacher had made an unresolved allegation of bullying.

39. The claimant says that PCP1 put her at a substantial disadvantage, in that the resulting stressful atmosphere was harder for her to cope with than for a person who was not disabled with depression and anxiety.

40. As an adjustment, the respondent should have taken Steps 1-5.
PCP2

41. It is also alleged that Mr Olsen had a practice (PCP2) of treating any student who was not in a compulsory lesson as being available if Mr Olsen wanted to speak to them.

42. Her case is that PCP2 put her at a substantial disadvantage in that it led to Mr Olsen entering her classroom during revision sessions, which the claimant found harder to tolerate than a non-disabled person would find.

43. By way of adjustment, the respondent should have taken Step 6 (compulsory revision).
PCP3

44. The claimant says that PCP3 was the respondent’s practice of assessing teachers based on their students’ results.

45. PCP3 added to the claimant’s anxiety that the students did not have enough revision time, which was harder for her to bear than it would be for a non-

disabled person.

46. The adjustment required here was also Step 6 (compulsory revision).
PCP4

47. The respondent's practice (PCP4) of holding absence review meetings put the claimant at a substantial disadvantage on the occasion of the last two meetings, as she was too ill to attend.

48. The claimant contends that, as an adjustment, the respondent should have taken Step 7 (permitting a representative to attend in her place).

Jurisdiction issues

In respect of each alleged failure to make adjustments, the tribunal will need to resolve the following issues in relation to the statutory time limit.

50. Two points are worth noting here. First, as with whistleblowing detriment, the respondent may raise the technical argument over the early conciliation certificate. Second, the claimant's case is that the respondent should have taken Steps 1-6 even whilst she was on sick leave, as they might have enabled her to return to work.

51 . Subject to those two points, the issues are:

> 51.1. When should the failure to make adjustments be treated as having been "done" for time limit purposes? Was it on or after 25 March 2020? (If so, the statutory time limit does not affect the tribunal's jurisdiction.)
> 51 .2. If not, was the failure, part of an ongoing state of affairs which included a later failure which was done on or after 25 March 2020?
> 51.3. If not, would it be just and equitable for the time limit to be extended?

Substantive issues

52. For those alleged failures which the tribunal has jurisdiction to consider, the tribunal will need to decide:

> 52.1. The disability issue
> 52.2. Can the respondent prove that it did not know that the claimant was disabled?
> 52.3. Can the respondent prove that it could not reasonably have been expected to know that the claimant was disabled?
> 52.4. Did each alleged PCP exist?
> 52.5. Did the PCP put the claimant to the alleged disadvantage?
> 52.6. Was the disadvantage more than minor or trivial?
> 52.7. Can the respondent prove that it did not know of the disadvantage?
> 52.8. Can the respondent prove that it could not reasonably have been expected to know of the disadvantage?
> 52.9. Was it reasonable for the respondent to have to take the steps for which the claimant contends in relation to that PCP?

Remedy

53. The claimant has provided a schedule of loss, which includes a headline figure for lost earnings. The respondent asked for the claimant to provide a breakdown of her calculation. The claimant agreed to provide it.