Case Number: 1406112/2020
1401586/2021

EMPLOYMENT TRIBUNALS

Claimant: Mrs C White

Respondent: Vibrant Energy Matters Ltd

Heard at: Bristol Employment Tribunal

On: 16th – 21st April 2023

Before: Employment Judge Lambert
Mrs V Blake
Mrs E Smillie

Representation:

Claimant: Mrs J Duane, counsel

Respondent: Mr J Wallace, counsel

JUDGMENT

1. The complaints of:

    1.1 detriment(s) of the grounds of having made protected disclosures;
    1.2 discrimination arising from disability;
    1.3 failure to make reasonable adjustments; and
    1.4 arrears of pay,

    fail and are dismissed.

2. The complaint of victimisation succeeds solely on the ground of detriment 5 as pleaded. The remaining 4 detriments were found not to amount to victimisation.

3. This matter will be listed for a Remedies Hearing on a date to be notified to the parties.

REASONS

4. All page references in this judgment are references to pages contained within the trial bundle, discussed below. The headings are included to assist the reader but do not form part of the judgment. Any wording in [square brackets] has been inserted by the Tribunal to assist with the understanding of any quote.

Claim History

5. The Claimant, Mrs White, presented two Claim Forms. The first was presented on 19th November 2020 (which was recorded under case number 1406112/2020) ("the **First Claim**") and related to matters that were alleged to have taken place between June 2020 and 22nd November 2022. It ran to some 41 pages in addition to the standard ET1 form.

6. A further Claim Form was presented on 23rd April 2021 (recorded under case number 1401586/2021) ("the **Second Claim**") which related to matters said to have occurred between 25th January 2021 and 25th March 2021. Both claims named Ms Dee Corp (the First Respondent's former Head of Operations) as a Second Respondent. The Second Claim also included Ms Claire Harris (the First Respondent's former HR and General Assistant) as a Third Respondent. The Second Claim ran to 17 pages in addition to the standard ET1 form.

7. The First and Second Claims (collectively "**the Claims**") contained complaints of:-

    7.1 disability discrimination in the form of:

        7.1.1 a failure to make reasonable adjustments (Sections 20/21 Equality Act 2010 ("**EqA**");

        7.1.2 discrimination arising from disability (Section 15 of EqA);

        7.1.3 indirect disability discrimination (Section 19 of EqA);

        7.1.4 victimisation (Section 27 of EqA).

    7.2 detriment(s) on the grounds of having made protected disclosures (Section 47B of Employment Rights Act 1996 ("the **ERA**");

    7.3 detriment(s) on the grounds of Health and Safety concerns (S. 44 of the ERA); and

    7.4 arrears of pay.

8. Solicitors acting for all three of the Respondents requested further time to file a Response to the First Claim and, in reference to the style and length of the First Claim, referred to the comments made by Tucker HHJ in C v D (UKEAT/0132/19/RN) cautioning against the use of "*narrative*" style pleadings, especially by legal representatives, who are encouraged to adopt a "*more succinct and clear drafting style*". This extension was granted. The Respondents filed Response Forms to both

Claims resisting all of the Claimant's complaints. The Respondent criticised the length of the Claimant's Claim Form and the fact that it lacked specificity in certain areas, meaning that it was not possible to discern fully the nature of some of the Claimant's complaints. These criticisms were not unjustified.

9. By order of 8th November 2021, the claims were combined and heard together.

10. A Preliminary Hearing (Case Management) took place on 24th May 2022 before EJ Roper. At this hearing the claims against the Second and Third Respondents were dismissed, leaving Vibrant Energy Matters Limited as the sole Respondent to the Claims.

11. EJ Roper noted that the claims raised by the Claimant seemed disproportionate to the issues in question, namely that due to the Claimant's concerns around Covid, she could not safely return to work because of the consequences of her illness.

12. This was a view echoed by EJ Livesey when the matter came before him at a further Preliminary Hearing on 15th March 2023. He noted that although the issues had been refined with the withdrawals of some elements:

> *"…the issues still appeared to be somewhat convoluted. The Claimant relied upon 7 disclosures, asserted 7 detriments under S.47B, relied upon 8 PCPs in support of the s.20 reasonable adjustment complaints, claimed 8 s.15 detriments, relied upon 9 protected acts under s.27 and asserted a further 7 detriments. That placed a heavy duty upon the Tribunal and there was a risk, in cases of this sort, that the real issues might get lost amongst makeweights and/or unnecessary additions.*
>
> *[The Claimant's representative] was asked to review the issues within the Case Summary to assess whether some rationalisation might be undertaken. She accepted, for example, that the multiple PCPs relied upon under s.20 really boiled down to one thing; the requirement for the Claimant to return to her role as a Field Assessor. Nevertheless, as they stood, the Tribunal's job was considerably more complex.*
>
> *The Judge was concerned that a similarly convoluted approach has been adopted in other areas."*

13. The claims for indirect discrimination and detriments due to Health and Safety were dismissed on withdrawal on 14th June 2022. At the hearing itself, the Claimant's representative confirmed that the arrears of pay claim was no longer live and no evidence was advanced. This claim therefore fails and is dismissed.

14. This left the following claims to be determined:-

    14.1 disability discrimination in the form of:

        14.1.1 a failure to make reasonable adjustments (Sections 20/21 of EqA);

14.1.2 discrimination arising from disability (Section 15 of EqA);

14.1.3 victimisation (Section 27 of EqA);

14.2 detriment(s) on the grounds of having made protected disclosures (Section 47B of the ERA.)

The Hearing

Trial Bundle

15. The hearing took place remotely and was heard over 5 days. It was agreed that this hearing was to determine liability only with a separate remedy hearing to be listed if required.

16. As the case unfolded, day 1 was affected by technical difficulties and was used as a reading day. The representatives were requested to agree a final list of issues by Day 2. This issue arose out of the Claimant's representative attempting to reformulate certain elements of the allegations which was resisted by the Respondent.

17. The other noteworthy point was the amount of documentation within the trial bundle. The Case Management Order directed that the bundle was to be limited to 500 pages. The trial bundle for use at the hearing was 658 pages accompanied by an additional pleadings bundle of some 220 pages. The evidence was completed within the 5 days but there was insufficient time for oral closing submissions. The representatives agreed to supply written submissions by 9am on Monday 24th April 2023. In keeping with the verbose theme running throughout this case, the Claimant's submissions ran to 41 pages and the Respondent's submissions, some 57 pages.

Witnesses

18. The Claimant gave evidence herself and called 1 additional witness, her neighbour, Mr Roger Daniels. He is a retired Company Secretary who attended various meetings with the Claimant as her companion. Both supplied witness statements.

19. The Respondent called 4 witnesses: Ms Dee Corp, the Respondent's former Head of Operations Manager; Ms Claire Harris, the Respondent's former HR and General Assistant; Mr Daniel Kittow, Managing Director of the Respondent; and Mr Gregory Elliott, the Respondent's Business Development Director. All supplied statements. In addition, the Respondent supplied audio recordings of four conversations that took place between the Claimant and the Respondent. The Tribunal was requested to listen to these recordings. The Claimant had been supplied with copies and raised no objection.

20. The panel read the statements, the documents referred to within those statements, the documents it was directed to within cross examination and listened to the audio recordings.

The Agreed List of Issues

22. The parties' representatives worked to refine the original list of issues identified by EJ Roper on 24th May 2022, no doubt in the light of EJ Livesey's comments on 15th March 2023, and, with some intervention from the Tribunal panel, the following were identified as the list of issues this Tribunal had to determine.

23. Protected Public Interest Disclosures ('Whistle Blowing')

23.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the ERA? The Claimant relies on these disclosures ("**PID**"):

First Claim:

PID 1: on 12 June 2020 the Claimant's letter to the Respondent;

PID 2: on 16 June 2020 the Claimant's letter to the Respondent;

PID 3: on 17 June 2020 the Claimant's letter to the Respondent;

PID 4: on 16 July 2020 the Claimant's formal grievance;

PID 5: on 28 July 2020 the Claimant's representations at her grievance hearing from her formal grievance that tenants would not be happy for her to use their toilets, there was no guarantee that any toilets were cleaned to a suitable standard, no personal assessment had been conducted of how existing health and safety measures may protect her, and the Respondent had failed to seek/obtain medical advice prior to 18 June 2020 on tailored health and safety issues for the Claimant or reasonable adjustments;

PID 6: on 11 August 2020 the Claimant's formal appeal against the grievance outcome.

23.2 The Respondent conceded that there were disclosures of information in each of the six PIDs relied upon by the Claimant.

23.3 Did the Claimant believe the disclosure of information was made in the public interest?

23.4 Was that belief reasonable?

23.5 Did the Claimant believe it tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation? The Claimant relies on the following legal obligations:

23.5.1 failure to provide C with a safe system of work; and

23.5.2 breach of the Claimant's contract of employment, cl 21.1.

23.6 Was that belief reasonable?

23.7 If the Claimant made a qualifying disclosure, was it a protected disclosure because it was made to the Claimant's employer pursuant to section 43C(1)(a) of the ERA?

23.8 Whilst denying the disclosures were qualifying disclosures, the Respondent accepted that they were made to it. Therefore if the Tribunal considers that any of the PIDs were qualifying disclosures, will also be protected disclosures.

23.9 Was the disclosure made in good faith?

24. Unlawful Detriment (ss 47B of the ERA)

24.1 Did the Respondent do the following things (all raised in the First Claim):

Detriment 1: the Claimant's grievance was not investigated properly, (which relies upon PIDs 4 and 5);

Detriment 2: on 5 August 2020 Ms Kate Archer failed to uphold the Claimant's grievance (relying on PIDs 4 and 5);

Detriment 3: on 27 October 2020 Mr Dan Kittow failed to uphold the Claimant's appeal against the grievance outcome or conduct a proper investigation into the appeal (relying upon PID 6);

Detriment 4: on 27 October 2020 Mr Kittow dismissed the Claimant's Disclosure of 11 August 2020 which stated that the Respondent's health and safety measures were not being followed with no reviews or amendments to health and safety, (relying upon PID 6);

Detriment 5: managing the Claimant sickness absence in or around June 2020 to November 2020 which caused exacerbation of the symptoms of stress and depression, (relying upon PIDs 1-3); and

Detriment 6: on 18 June 2020 Ms Dee Corp forced the Claimant and/or left the Claimant with no alternative other than to take sickness absence, (relying upon PIDs 1-3).

24.2 By doing so, did it subject the Claimant to a detriment?

24.3 If so, was it done on the ground that the Claimant had made the protected disclosure(s) set out above?

25. Knowledge of Disability

25.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? If so, from what date?

25.1.1 The Claimant's toileting requirements i.e. the need to go to the toilet more frequently; and/or

25.1.2 The Claimant's condition of hypertension placing C at a potentially higher risk of death in the event she contracted COVID-19?

25.2 The Respondent accepted that the combination of the Claimant's hypertension with the side effects of her medication, which is a diuretic, caused her to use the toilet more frequently. It conceded this was a disability although it was contested when it became aware of this disability. It did not accept that the Claimant's hypertension placed her at a potentially higher risk of death in the event she contracted COVID-19.

26. Discrimination Arising From Disability (s15 EqA)

26.1 Did the following arise as a consequence of the Claimant's disability?

26.2 Did the Respondent treat the Claimant unfavourably by:

First Claim

26.2.1 On 15 and 17 June 2020 and/or 27 October 2020, the Respondent required the Claimant to return to her role as Field Assessor, including the appeal outcome;

26.2.2 On 5 August 2020 and 27 October 2020, Ms Archer and Mr Kittow concluded in both the grievance and grievance appeal outcome letters (respectively) that the Claimant continue to use available public toilets;

26.2.3 From June to August 2020, the Respondent failed to carry out a tailored risk assessment and/or review of existing health and safety measures for the Claimant's proposed return to work as a Field Assessor; and

26.2.4 On 27 October 2020, Mr Kittow failed to follow the recommendations of the first and second medical report, namely that the Claimant's duties should be varied to permit homeworking;

26.2.5 On 10 June 2020 and subsequently the Respondent failed to make a reasonable adjustment by failing to offer the Claimant continuing participation in the furlough scheme and/or failing to change the Claimant's role or offer the Claimant an alternate role to enable homeworking.

Second Claim

26.2.6 On 29 January 2021, the Respondent required/pressurised the Claimant to consider a return to her role as Field Assessor for a trial period.

26.3 Was the unfavourable treatment because of any of the things which are said to have arisen from the Claimant's disability?

26.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

First Claim

26.4.1 The Respondent required field-based staff to return to work to service clients and remain in business;

26.4.2 Using resources (including employees and company funds) in an efficient and proportionate way;

26.4.3 Using government funding proportionately;

26.4.4 Maintaining the viability of the business;

26.4.5 Maintaining employment where possible;

26.4.6 Limiting the cost of absence to specific categories of employees because a line must be drawn at some point;

Second Claim

26.4.7 Facilitating a return to work for the Claimant;

26.4.8 Ensuring that the Respondent's business could remain viable; and

26.4.9 Maintaining employment where possible, and addressing ongoing absences, and mitigating against the impact of long-term absences on other employees?

26.5 The Tribunal will decide in particular:

26.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims?

26.5.2 Could something less discriminatory have been done instead? and

26.5.3 How should the needs of the Claimant and Respondent be balanced?

27. Reasonable Adjustments (ss 20 and 21 EqA)

27.1 Did the Respondent have the following PCPs:

First Claim PCPs:

PCP 1: the requirement for the Claimant to return to her role as a Field Assessor from 10 June 2020.

PCP 2: from 10 June 2020 increasing the geographical size of an employee's coverage for field work, i.e., to include postcodes in Torquay and Exeter;

PCP 3: requiring an employee to continue to use public toilets.

27.2 Did any of the PCPs put the Claimant personally at a substantial disadvantage compared to someone without the Claimant's disability in that:

First Claim – Substantial Disadvantage:

27.2.1 From 2020 it was difficult for the Claimant to meet her toileting needs (15 to 25 times a day with a sudden an immediate effect) where many public and accessible toilets were closed and/or unavailable;

27.2.2 From March 2020 the Claimant was at an increased risk of contracting Covid-19;

27.2.3 On 27 October 2020 the Claimant was given the alternative of working at Head Office, which was over a three hour commute (one way) and unlikely to be safe due to a Covid-19 outbreak;

Second Claim – Substantial Disadvantage:

27.2.4 It was more difficult for the Claimant to comply with the alleged PCP 5 because her hypertension medication causes her to urinate between 15- 25 times per day and there was no guaranteed access to toilets as many public and accessible toilets were closed and/or unavailable during the trial period;

27.2.5 The Claimant was at an increased risk of contracting Covid-19 for the trial period.

27.3 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

27.4 What steps (the 'adjustments') could have been taken to avoid the disadvantage (all the First Claim).

Adjustment 1: seeking a medical report for the Claimant between 12 June 2020 and 22 July 2020;

Adjustment 2: seeking a personalised health and safety assessment of the Claimant's hypertension prior to November 2020;

Adjustment 3: keeping the Claimant on the furlough scheme from 18 June 2020 onwards;

Adjustment 4: delaying instruction to return to work until the determination of whether a safe return to work could be facilitated;

Adjustment 5: seeking a medical report on the Claimant's condition prior to the grievance outcome on 5 August 2020;

Adjustment 6: accepting the conclusions of the first medical report, that a reasonable adjustment of office working and homeworking should be made, rather than commissioning a second medical report;

Adjustment 7: accepting the conclusions of the second medical report that if accessible and Covid-19 safe toilet facilities could not be provided, homeworking should be considered;

Adjustment 8: making additional enquiries of the authors of the first and second medical reports or of the Claimant's GP about particular health and safety measures which could minimise the risk of a return to work for the Claimant;

Adjustment 9: making practical adjustments that addressed the risk of ongoing toilet closures and that failed to mitigate against the risks of the Claimant contracting Covid-19; and

Adjustment 10: being placed on remote video assessment duties and/or call centre homeworking.

27.5 Was it reasonable for the Respondent to have to take those steps and when?

27.6 Did the Respondent fail to take those steps?

28 Victimisation (s 27 EqA)

28.1 The Respondent concedes the Claimant carried out the following protected acts ("**PA**"):

First Claim

PA 1: on 12 June 2020 in her letter to the Respondent;

PA 2: on 16 June 2020 in her letter to the Respondent;

PA 3: on 17 June 2020 in her letter to the Respondent;

PA 4: on 16 July 2020 in her formal grievance.

Second Claim

PA 1-4: repeated;

PA 5: on 19 November 2020 in her First Claim;

PA 6: on 29 January 2021 when discussing reasonable adjustments with Claire Harris; and

PA 7: on 15th March 2021 the Claimant raising a further grievance of disability discrimination.

28.2 Does the Claimant's appeal of her grievance outcome on 11 August 2020 constitute a protected act? The Respondent concedes that it was.

28.3 Did the Respondent do the following things:

First Claim

28.3.1 On 5 August 2020 Ms Archer did not uphold the Claimant's grievance PA 1 to 4;

28.3.2 On 27 October 2020 Mr Kittow did not uphold the Claimant's appeal against the grievance outcome PA 4;

28.3.3 On 27 October 2020 Mr Kittow, without managing the risks caused by the Claimant's disability, instructed the Claimant to prepare to return to work as a Field Assessor; and otherwise took no meaningful action based on the second medical report, PA 4;

Second Claim

28.3.4 On 29 January 2021 Ms Harris required/pressurised the Claimant to consider a return to her role as Field Assessor for a trial period;

28.3.5 The Respondent failed to deal with the Claimant's further grievance in accordance with the ACAS Code of Practice. In this respect the Claimant asserts that there was no formal meeting, she was not offered the right to be accompanied; and no appropriate action was taken by the Respondent.

28.4 By doing so did the Respondent subject the Claimant to a detriment?

28.5 If so, was it because the Claimant had done the protected acts?

Findings of Fact

29 We make the following findings of fact based on the balance of probabilities.

30 The Claimant commenced employment with the Respondent on 27th August 2013, initially as a Field Agent. This job title was then changed to an Energy and Property Partner although the role remained the same. Throughout the hearing the role was referred to as a Field Assessor, which we will adopt. The Claimant remains employed by the Respondent as a Field Assessor.

31 The Claimant's main duties involved attending premises of the Respondent's clients, whether occupied or not, to carry out various tasks, including energy performance assessments, legionella risk assessments, inspections of vacant properties and condition reports. She would produce reports based on the information she had collated from her visits. Writing up of the reports could be completed on site or later at the Claimant's home, although the Claimant used to upload information, such as inventories, at home due to the time it could take.

32 The Claimant worked without any particular issues until 23rd March 2020, when the impact of the emergence of Covid-19 led to the first national lockdown ("the **First Lockdown**"). Up until this point, it was common ground that the Claimant managed her workload effectively and did not require any adjustments, or, more accurately, any adjustments she required she could manage herself. There was no evidence put before the Tribunal that the Respondent was aware that the Claimant required any adjustments at all when carrying out her duties prior to June 2020.

33 On 30th March 2020, the Claimant was placed on furlough with the Respondent utilising the Coronavirus Job Retention Scheme ("the **Scheme**").

34 On 24th April 2020, (p.85 – 86) the Respondent's Managing Director, Mr Kittow, issued an email to all employees entitled "Business Update". Within this email, it acknowledged that the furlough scheme had been extended until the end of June 2020 and the Respondent anticipated that colleagues currently on furlough would remain so for the foreseeable future. A graph was provided showing the level of instructions the Respondent had received immediately before and after the First Lockdown. Whilst variable, the level of instruction at the time of the email was approximately 44% of normal levels. It also mentioned "New Services" that the Respondent had launched as part of an adjustment to meet the challenges presented by the pandemic. This included carrying out virtual viewings, mid-term inspections over FaceTime and Key drop off services. We will return to this email when considering reasonable adjustments below.

35 Mr Kittow issued an email on 13th May 2020 (p.87) providing a further update to employees. The contents of this email were geared towards plans to re-open after the First Lockdown. It records that:

> *"The vast majority of employed field assessors will remain furloughed as long as the scheme remains available and business volumes remain low…*
>
> *All employed staff members should be ready to return to work within a 24 hour period – we will unfurlough staff as and when business volumes increase."*

36 This message was repeated in a further email from Mr Kittow on 28th May 2020 (p.101) where he stated:

> *"The vast majority of [field assessors] will remain on furlough whilst volumes remain at these levels; however…given that volumes are starting to rise sharply please be ready to return to work within a 24-48 hour notice period.*
>
> *It is likely that you will return in a drip rather than flood – we will keep in touch."*

37 On 9th June 2020, emails passed between Ms Corp, then the Respondent's Head of Operations, and Mr Kittow discussing the unfurloughing, or return to work, of a number of Field Assessors. Mr Kittow at 17:07 on 9th June 2020, suggested requesting the return of the Claimant because *"…we are struggling in Plymouth and Torquay a bit."*

38 Pausing there: the Tribunal accepted the evidence from Mr Kittow that the Respondent company, like many other companies at this time, had significant concerns due to the uncertainty caused by the pandemic and the First Lockdown, over its continuing financial viability. Ms Harris also provided evidence that some of the Respondent's Field Assessors were advised by the NHS to shield. This was a reference to letters issued by the Department of Health & Social Care to individuals who had been identified as having an underlying disease or health condition that meant they satisfied the definition of being *"clinically extremely vulnerable"*. Individuals who were identified as clinically extremely vulnerable were directed to shield and to remain at home.

39 The Respondent was therefore balancing its requirement for Field Assessors to return to work where inspection work was available, against the Field Assessors who were unavailable due to shielding. The Tribunal found that the Respondent had the various legitimate aims related to requiring its employees to return to work to ensure the financial viability of the company going forward, in particular the aims listed at 26.4.1; 26.4.2; 26.4.4; 26.4.5; 26.4.7 and 26.4.8.

40 On 10th June 2020, Ms Harris spoke with the Claimant and informed her that she would be required to return to work. We accept that this was not welcome news to the Claimant as she did not want to return to work. During this call, Ms Harris informed the Claimant that she would be required to cover a slightly larger area, or "patch". This was to enable the Respondent to use the Claimant to provide cover to a wider area as not all Field Assessors were being asked to return to work at this point.

41 Following this call, the Claimant contacted her GP surgery to request a letter confirming that she should shield. The Claimant's medical records confirm this discussion on 10th June 2020 (p.24) and it appears that she was informed on 12th June 2020 (p.23) that hypertension or chronic diseases such as diabetes are not conditions that would automatically meet the criteria for an individual to be clinically extremely

vulnerable. The note records that the Claimant was informed that GPs have been advised not to issue patients with such letters and the Claimant's options were to self-certify via the NHS111 website, or to write to her employer setting out her concerns. The Claimant chose the latter.

PID 1

42 The Claimant sent a letter by email dated 12th June 2020 (p.118-119) raising her concerns about the Respondent's request that she return to work due to the pandemic. The Claimant says this letter was a protected disclosure (referenced as PID 1 above). Relevant sections of this email state:

> *"I am concerned for my health and safety if I am to return to work for the following reasons:*
>
> - *My job role is public facing and therefore I do not believe I will be able to socially distance from customers in line with the government guidance.*
> - *I am concerned that I would not be provided with appropriate personal protective equipment and sanitising products due to the nature of my work which requires entering multiple premises on a daily basis.*
> - *I don't believe that you are proposing wide-spread testing of employees for COVID-19, so there is a high likelihood that I could be in an infectious state when visiting multiple individual premises on a daily basis whilst carrying out my various duties which would deny my philosophical beliefs of beneficence and non-maleficence.*
> - *I do not believe there would be adequate hand washing facilities that would be available as per government guidelines when entering a property that does not offer this facility i.e. vacant and repossessed properties.*
> - *I do not believe that the company can control cleanliness of, or fully confirm that the appropriate cleaning requirements as per Government guidelines have been carried out by any third party.*
> - *I have a condition which according to the NHS website which places me in a High Risk category. While this does not place me on the Government's list of individuals who should be shielding it does place me at a higher risk factor of contracting COVID-19 and therefore places me in a position of increased risk of illness as a result of this pre-existing condition.*
>
> *Section 44 of the Employment Rights Act 1996 gives employees the right to not return to work while they believe there are circumstances of serious and imminent danger. If I was made to return to work, I believe the current circumstances mean I would be in serious and imminent danger of contracting COVID-19 as announced by the Government.*
>
> *As I am not able to work from home to do my job, I respectfully request that you keep me on furlough leave for the time being. I understand that the Government has recently extended the Job Retention scheme has been extended until the end of October.*
>
> *I would welcome a virtual meeting to discuss the options further, including what reasonable adjustments can be made in the circumstances to address this risk but best allow me to continue working including the possibility of a different role that would allow me to work from home until such time it can be agreed it would be safe for me to return to my normal duties.*

I believe that, for the reasons set out above, not coming into work is an appropriate step to counter the serious and imminent danger I believe I would be in if I return to work at this time…"

43 Of note in the above excerpt is the final bullet point, where the Claimant refers to the NHS website placing her in a "high risk" category, meaning that she was a higher risk of *contracting* Covid-19. As the evidence unfolded during the hearing, it became apparent that the Claimant was relying upon information on the British Heart Foundation's ("**BHF**") website (p.488), not of the NHS, and also her recollection of a discussion with her GP at or around this time where he allegedly expressed this view. The Claimant accepted in evidence that there was no mention of this within her medical notes made at the time of the conversation. In actual fact those notes (p.23) suggest that she was not high risk.

44 The excerpt from the BHF website states that it was updated in November 2021. It was not clear from the evidence whether this information was available in June 2020. The information on that website stated "*We know that a diagnosis of high blood pressure (Hypertension) is linked to a higher risk of serious illness from Covid-19, and therefore you are considered at high risk."* It also provided 3 categories of higher risk: high risk; particularly high risk and at most risk.

45 However, none of the medical evidence that the Tribunal was referred to confirmed that the Claimant was at a higher risk of *contracting* Covid-19 as she asserted in documentary evidence. The evidence contained in the Third OH Report discussed below suggested that the Claimant's risk should she contract Covid-19 was moderate. It was not clear from this report whether this assessment was based on her disability or her age. Whilst the Claimant may have considered herself at higher risk of contracting Covid-19 and that if she contracted it, she was a higher risk of death than others, this was not supported by any medical evidence. The Tribunal rejects the Claimant's assertions on this point.

46 The Claimant accepted that she had instructed solicitors at this point in time and this and subsequent documents were drafted with their assistance. The Claimant contends this is a protected disclosure, referred to as PID 1; and is also relied upon as a protected act for her victimisation claim. The Respondent accepts this letter discloses information but denies it is a protected disclosure on other grounds which will be considered later. It accepts it is a protected act for the victimisation claim.

47 The Respondent replied by letter dated 15th June 2020 (p.120-121) setting out its position that it did not believe it would be appropriate to continue to furlough the Claimant. It felt that the purpose of the Scheme was to protect the employment of employees who might otherwise be made redundant and it was not an appropriate use of the Scheme to furlough employees when there was no risk of redundancy. The Respondent asserted various legitimate aims not to misuse the Scheme in this way. The Tribunal accepted that the Scheme could be used in the way contended for by the Claimant and this was not a valid legitimate aim. However, this was a moot point because the Tribunal accepted the other legitimate aims asserted by the Respondent,

including requiring employees to return to work in order protect the Company's and the employees' financial interests. In the Claimant's case, she was required to return to work because, as it stated in that letter, the Respondent needed to get its employees back to work to ensure the business had a viable future.

48 It considered that it had put in place measures which allowed its Field Assessors to return to work safely in accordance with Government guidelines. It confirmed that the Claimant would:

48.1 not usually be in close proximity to anyone else and the properties would be vacant or tenants would be required to wait outside or stay in another room;

48.2 receive appropriate Personal Protective Equipment ("**PPE**"), training on minimising infection risk; and would be required to carry out a dynamic risk assessment before each inspection and must decline to enter into any property if she considered it was not safe to do so;

48.3 have opportunities to wash and sanitise her hands regularly.

49 The Tribunal considered that these were all reasonable steps for the Respondent to take at the time and took particular note of the fact that the Claimant had authority to decide whether to commence an inspection if she decided that it was not safe to do so.

50 Towards the end of that letter, it stated:

> *"You are expected to return to work from Thursday, 18 June. If you are unable to do so, because you are unwell, then you may be entitled to statutory sick pay. If you were well enough to attend work, but chose not to do so, we would not be able to pay you and might have to invoke other administrative procedures."*

51 Ms Harris sent a further email the same day (recorded at 12:57pm) (p.123-124) to the Claimant providing her with an invite to training on new products and Covid-19 health and safety training. This would be conducted remotely and take place on 16th June 2020. The Claimant accepted that she attended that training and it covered health and safety measures in connection with Covid-19.

52 In addition, the email advised the Claimant to purchase her own PPE and included a link to a supplier where disposable gloves, hand sanitiser and disposable masks were available. Within the email, Ms Harris confirmed that she had contacted the supplier and they had the items in stock available for next day delivery if they were ordered before 3pm. She also provided a link to another supplier where the Claimant could source disposable overshoes.

53 In response to a question from the Respondent's counsel, the Claimant answered that she had tried to order some PPE but was told that none was available. Her evidence was initially that she had not received Ms Harris's email until 6pm and when she subsequently contacted the supplier, it did not have any available. When taken to the email, it became apparent that the Claimant was mistaken. Her response was timed at 6:02pm, but she had received it at 12:57pm. It is noteworthy that within the Claimant's

email responding to Ms Harris, there is no mention of the Claimant attempting to order PPE and it being unavailable. The Tribunal considered this was a surprising omission if the Claimant's evidence was correct on this point.

54 The Claimant accepted in response to a further question from counsel that nowhere in her evidence had she ever mentioned that she had attempted to obtain PPE. It was put to her that she was misremembering events or lying. The Claimant denied this but her evidence on this point was not satisfactory. This evidence, when taken with the Claimant's evidence about being High Risk and her reference to the NHS website led the Tribunal to conclude that whilst the Claimant was not deliberately misleading it, she was misremembering key issues and presenting a picture that was overall favourable to her case, rather than what may have occurred. The Tribunal concluded that where there was a conflict on evidence on any point with another witness, it preferred the evidence of others.

55 During her evidence at this part, the Claimant was asked why it took her so long (approximately 5 hours) to respond to this email. The Claimant explained that she lives on a 10 acre farm and has mixed livestock, including sheep, cattle, pigs and horses. There were no workers on the farm and she managed it all herself, with some assistance from her partner. She would have been working outside for 3 hours and confirmed that she would have "wild toileted". This meant that the Claimant would urinate outside. The Claimant confirmed that she would do this on her property and, whilst not comfortable doing so, would wild toilet on other land when she was out walking. The Tribunal will return to this "wild toileting" point later in this judgment.

PID 2

56 The Claimant responded to this letter by sending a letter to Ms Harris dated 16th June 2020 (p.161). She reiterated her concerns that she:

> *"…still ha[s] significant concerns about the risk of exposure to Covid-19 Infection on my return to work, as well as the risk of me potentially infecting others.*
>
> *I suffer from hypertension (abnormally high blood pressure) and have done since my diagnosis in 2000. This has an impact on my day to day activities as I have to take medication to manage this. This condition (because of this medication) also has a negative impact on my kidneys. Whilst not a person who is recommended to completely self-isolate, if I contracted Covid-19 I would be at higher risk of death than others who do not suffer from this condition. I therefore believe I meet the legal definition of disability as set out in the Equality Act 2020.*
>
> *Whilst I appreciate the company response about the changes they have made to try and preserve health and safety on property visits, I believe that these measures are still not sufficient, for either my safety or that of my colleagues…*
>
> *For example:*
>
> - *I am informed that employees are responsible for ordering their own PPE and claim the costs back on expenses. The company cannot guarantee the receipt of PPE by 18th June 2020.*
> - *The company cannot guarantee that customers in occupied properties will comply with social distancing.*

- *The company cannot guarantee that occupied properties have been cleaned to a sufficient standard.*
- *There is no detail in the letter of 15th June 2020 about what PPE will be provided, and how 'opportunities to wash and sanitize hands' will be provided.*

I therefore have a reasonable belief that a return to work will be harmful or potentially harmful to my health and safety, and that of others, including colleagues, customers, and the wider public. I believe that these correspondences constitute protected disclosures about health and safety issues."

[underlining is the Tribunal's emphasis]

57 The Tribunal noted that the first and fourth bullet points specifically refer to PPE. There is no mention by the Claimant of her failed attempts to secure PPE. We consider that if the Claimant had done so it would have been mentioned here. This reinforces the Tribunal point about the credibility of the Claimant's evidence.

58 The Claimant contends this is a protected disclosure, referred to as PID 2, and is a protected act for the victimisation claim. The Respondent accepts this letter discloses information but denies it is a protected disclosure on other grounds which will be considered later. It accepts it is a protected act for the victimisation claim.

PID 3

59 The Claimant followed up with a further letter sent by email dated 17th June 2020 (p.163). This letter states:

"I write further to my email last night, I would like to add that due to my hypertension medication I often need the toilet, sometimes hourly. This means I am more likely to need to use toilet facilities when visiting customers and vacant properties. Again I believe that this places me at additional risk of Covid-19 infection, as again the company cannot guarantee the cleanliness of such facilities. Equally there are unlikely to be public toilet facilities open either.

Further information about this issue would be readily available from my GP, if you were minded to agree to my proposal to seek a medical report."

60 The Claimant contends this is a protected disclosure, referred to as PID 3; and is a protected act for her victimisation claim. The Respondent accepts this letter disclosures information but denies it is a protected disclosure on other grounds which will be considered later. It accepts it is a protected act for the victimisation claim.

61 Ms Harris sent a letter by email to the Claimant dated 17th June 2020 responding to the Claimant's letter of 16th June 2020 (PID 2) which records:

"We have given your comments careful consideration, but I must confirm that the decision to end your furlough leave, with effect from 17th of June, still applies. You will not be furloughed after this date.

I have double checked with our suppliers and can confirm that all necessary PPE is in stock and available for "next day "dispatch, provided an order is placed by 3 pm. If you contact Flu Supplies, as instructed, www.flusupplies.com you will be able to receive that the necessary PPE. To be absolutely clear, as you would not be expected to work without

it, on this occasion, Claire Harris will order in the PPE supplies for you, which will be delivered tomorrow but thereafter you will need to replenish your PPE and claim back the cost on your expenses in the normal way.

As your period of furlough has now ended, you will be required to work as normal. We have a backlog of work in your area and, at present, we are having to ask staff from Bristol to support it.

We would not usually regard hypertension as amounting to a disability and have no reason to believe you cannot work safely at this time. We also note you say you are a whistle blower and can assure you we will not treat you in a different way for raising your concerns.

As you are no longer furloughed, if you are unable to attend for work, for example because you are sick, then you would be paid in accordance with our normal sick pay procedures. If you do not attend for work, in other circumstances, then we would not be in a position to pay you.

Ultimately, we cannot continue to furlough staff when there is work to do. While we understand that everyone will have some anxiety about returning to work, we do need to get back to it as soon as possible, to ensure the viability of the business."

62 The Respondent also responded to the Claimant's letter of 17th June 2020 (PID 3) by letter dated 17th June 2020 (p.168) confirming that it would not expect any employee to use unsanitary facilities; explaining that under normal circumstances, Field Assessors would not be permitted to use toilets in a client's property and, the Respondent has no reason to believe using public facilities presents additional risks when following social distance measures and hand washing. It also confirms that the Respondent is happy to receive correspondence from the Claimant's GP and that if the Claimant is unable to work because she is ill, then she would be eligible for sick pay.

63 Pausing there: the Tribunal considered that the Respondent had put in place steps to create a safe system of work, in accordance with the applicable Government guidelines.

64 The Respondent maintained its position that the Claimant could not remain on furlough and confirmed that it would end on 17th June 2020. The Claimant contends that this decision was a detriment (Detriment 6) on grounds of her protected disclosures (PIDs 1 – 3), as it forced the Claimant and/or left the Claimant with no alternative other than to take sickness absence.

65 On 18th June 2020, the Claimant commenced sickness absence due to work related stress with highly elevated blood pressure. The Claimant remained on sickness absence until 5th November 2020, when she returned to furlough (p.275).

66 Within cross examination, the Claimant accepted that she was raising concerns about her returning to work. She was not suggesting that no other Field Assessors should return to work. This admission seemed at odds with her assertion that the information she was disclosing was within the public interest.

<u>PID 4: Formal Grievance Letter</u>

67 On 16th July 2020, the Claimant sent a letter by email dated 16th July 2020 (p.180 – 183) raising a formal grievance. This letter described how the Claimant would, prior to the First Lockdown, plan her working day around frequent toilet breaks. This would include the use of facilities at local estate agents, public toilets, service stations and shops. Due to the closure of public toilets and estate agents, this made the Claimant's task of finding facilities she could use more difficult.

68 She also reiterated her concerns about PPE; how the company could guarantee that customers would comply with social distancing requirements; whether vacant and occupied properties had been cleaned to a sufficient standard; the increased risk of infection from using facilities; and the risk of the Claimant infecting others.

69 The relevant excerpts are set out below, as highlighted by the Claimant, which were identified in closing submission as sections she relied upon to establish that the information disclosed was in the public interest.

> *"I was and continue to be concerned both about my health, together with the risk that I could pass infection on to other members of the public, colleagues, friends and family.*
>
> *…the risk of myself infecting others.*
>
> *Whether customers in occupied properties would comply with social distancing…*
>
> *The increased risk of infection when using toilet facilities at occupied and vacant properties.*
>
> *These disclosures show that it was likely that dangers would arise to the health and safety of myself, my colleagues, and other third parties."*

70 The Claimant contends that this letter is a protected disclosure, referred to as PID 4; and is a protected act for the victimisation claim. The Respondent accepts this disclosures information but denies it is a protected disclosure on other grounds which will be considered later but accepts it is a protected act for the victimisation claim.

71 Attached to the grievance letter was a letter from the Claimant's GP dated 29th June 2020 (p.186). This letter confirms that the Claimant is being treated with spironolactone which is a diuretic and one of the side effects is that she needs to urinate more frequently.

72 The Respondent acknowledged the Claimant's grievance and arranged for a hearing to take place on 28th July 2020 by telephone. The Claimant was informed that Ms Kate Archer, the Respondent's Financial Controller, would chair the meeting and Ms Harris would be present to take notes.

PID 5

73 The grievance hearing took place on 28th July 2020. As part of its business, the Respondent operates a contact centre from its Head Office in Blackwood. Most calls into and out of the Head Office are recorded. This hearing was recorded and a transcript, which was accepted by both parties as accurate, appeared in the bundle

(p.190 – 194). The Claimant contends that oral representations made by the Claimant at this meeting amount to a protected disclosure, referred to as PID 5. The Claimant did not rely upon these representations as a protected act for the victimisation claim. The Respondent accepts this disclosures information but denies it is a protected disclosure on other grounds which will be considered later.

74 On 5th August 2020, Ms Archer for the Respondent sent a letter by email rejecting the Claimant's grievance complaints (p.196 – 202). The letter contains detailed responses to each of the points raised by the Claimant. In essence, the points raised by the Respondent in response to PID 1 were reiterated in more detail. The recommended PPE was available, this would minimise the risk of infection and if the Claimant was not satisfied that it was safe to commence an inspection after arrival, she could refuse to do so. In relation to the toilet issue, Ms Archer noted that the Claimant had not returned to work and had not suffered any impact, but she would recommend that the Respondent would provide her with a list of accessible toilets to assist her in accessing facilities whilst completing her Field Assessor duties.

PID 6

75 The Claimant appealed against that decision by letter dated 11th August 2020 (p.205 – 210). Her appeal was based on several grounds including:-

75.1 that the Respondent failed to make reasonable adjustments by failing to (i) adjust her working area (her patch); (ii) consider alternative roles; and (iii) allow her to continue on furlough;

75.2 a failure to deal with her health and safety concerns;

75.3 a failure to obtain medical advice before her return to work and before reaching an outcome on her grievance and that overall, as a consequence of all of these actions she has suffered with increased hypertension.

76 On 12th August 2020, Ms Harris emailed the Claimant attaching a list of the public toilets that were open in the Cornwall area and managed by Cornwall Council. It included a link to a website called lockdownloo which provided details of locations and opening hours for public accessible toilets. Shortly after sending this email, Ms Harris acknowledged the Claimant's grievance appeal.

77 The Claimant contends that the contents of this letter amount to a protected disclosure, referred to as PID 6. The Claimant did not rely upon these representations as a protected act for the victimisation claim. The Respondent accepts this disclosures information but denies it is a protected disclosure on other grounds which will be considered later.

First Occupational Health Report

78 The Respondent received an occupational health report, on or around 1st September 2020 (p.215 – 219), from Dr Ahmed assessing the Claimant ("the **First OH Report**")

via a telephone consultation on 26th August 2020. The relevant sections of this report states:

> *"…[The Claimant] is fit for work with temporary adjustments…*
>
> *She would require to use toilet frequently [sic] during her working hours due to side effects of her medication. This is beyond her control. Considering the ongoing restrictions on public toilets during the pandemic, reasonable adjustment would be to consider working in an altered role from office or from home temporarily for 3 months and then to review this.*
>
> ***Does the Equality Act 2010 apply – if so why***
>
> *Criteria for disability under the Equality Act 2010 requires that, if in a hypothetical situation, she stops all her treatments, would her symptoms mount to the level to affect her function on daily basis for at least 12 months. In my opinion, she meets this criteria as her blood pressure control has remained poor despite being on evidence based treatments…"*

79 The First OH Report confirmed that, in the opinion of Dr Ahmed, the Claimant was a disabled person.

80 The Respondent was not satisfied with the First OH Report. It felt that the report contained typographical errors and drew a conclusion based on an inaccurate application of the definition of disability under the EqA.

81 An email from Mr Davies, General Manager of the Occupational Health Provider, dated 10th September 2020 (p.224) refers to a letter from Ms Harris dated 4th September 2020 raising concerns over the First OH Report. The letter of 4th September 2020 was not referred to in evidence. Mr Davies correctly states that the decision of whether an individual is a disabled person under the EqA is a legal decision, not a medical one, but Dr Ahmed clearly feels that the Claimant may be a disabled person. Ms Harris responded in a further email of the same date that she would like a further report to be carried out that uses the correct test for disability.

82 Ms Harris emailed a letter to the Claimant on 21st September 2020 (p.229 – 230) to invite her to attend a grievance appeal hearing before Mr Kittow to take place on 24th September 2020. Within this letter, Ms Harris raises concerns over the quality of the First OH Report and requests the Claimant to attend a further occupational health assessment. This letter also states:

> *"We are happy to proceed to deal with your grievance appeal on the basis that we will assume that your condition amounts to a disability under S.6 of the Equality Act 2010;…"*

83 The Claimant agreed for a further assessment to be carried out.

84 In the meantime, on 28th September 2020, the Claimant attended a grievance appeal hearing, heard remotely, with Mr Daniels attending as her companion. Mr Kittow chaired the appeal hearing with Ms Harris attending. A transcript was provided within the bundle (p.239 – 248).

Grievance appeal outcome

85 The outcome of the grievance appeal was provided in a letter emailed to the Claimant on 27th October 2020 (p.260 – 272). None of the Claimant's grievances were upheld.

Working area/patch

86 In response to the Claimant's issues around her working area, Mr Kittow responded that the Claimant's contract required her to work and/or travel to such places as the Company may reasonably require from time to time. As part of his investigation, he noted that whilst the Claimant alleged it was more difficult for her to travel to places like Torquay and Cornwall due to her condition, she had in fact travelled to various places prior to the First Lockdown, whilst she was prescribed medication but without alerting the Respondent to any issue.

87 The uncontested evidence was that in 2018, 28% of her appointments were outside her patch, 41% in 2019 and 24% during 2020. The Claimant accepted that her patch was variable dependent on the type of job and number of other available Field Assessors available, but her ordinary patch prior to the pandemic was Plymouth, Bodmin and St Austell. She accepted that she travelled outside this patch to St Columb Major, Truro, Exeter and occasionally to Torquay.

88 The Tribunal concluded that the Claimant did not have an exact settled patch. This is as we would have expected for a role of this type, where the Claimant was required to travel to different locations to complete appointments in a relatively wide ranging area.

89 To respond to the Claimant's assertion that there were less public facilities available for her to use whilst travelling, Mr Kittow suggested that the Respondent's HR team would contact her to assess what areas the Claimant could travel to, in order that appointments could be planned accordingly.

90 In evidence, Mr Kittow confirmed that during the appeal hearing it was established that the Claimant had an issue with any travel, not just travel out of her usual area. This was consistent with the agreed transcript and the Tribunal finds that this was the Claimant's position.

91 Despite assertions to the contrary, the evidence clearly demonstrated that the Claimant's position was that there was nothing in reality the Respondent could do that would allow her to return to work in the Field Assessor role. Whilst, initially, the Claimant's issue appeared to be with access to toilet facilities when travelling, the Claimant also raised issues over the standard of cleaning that was carried out in such facilities. Clearly the Respondent had no control over the quality of the cleaning regime carried out at third party toilets or other premises. The Tribunal formed the view that there was nothing the Respondent could do to satisfy the Claimant that it was safe to return to work. That is not to criticise the Claimant for her fear of exposure to Covid-19, but we consider that she was attempting to hold the Respondent to a far

higher standard than could reasonably be expected of a company in the Respondent's position.

92 Within the list of issues (para 26.2.1 above), the Claimant alleges that within this letter Mr Kittow required the Claimant to return to her role as a Field Assessor. The Tribunal does not accept that this is accurate. In order to "require" something to be done, the Tribunal considered that there must be an instruction or direction to that effect. Mr Kittow responded to the Claimant's grievance complaints and made recommendations for further discussions and actions to be completed, including the Claimant giving thought to taking up a different role at the Respondent's call centre. The Tribunal finds that this claim must fail because the premise it relies upon is not accurate.

93 The Claimant also alleges (para 26.2.2) that Mr Kittow concluded that the Claimant continue to use available public toilets. The Tribunal does not accept that this is accurate. Within the recommendations section of his letter Mr Kittow recommends that:

> *"A meeting is scheduled between you and HR to discuss and work out availability of all toilet facilities in i) your usual field-based area of work; and ii) the wider area that you would ordinarily be expected to cover as part of your normal duties. The meeting will focus on assessing the availability of facilities and establishing whether or not your needs will be met."*

94 It is clear that Mr Kittow is recommending a meeting to discuss the issue and assess whether or not the Claimant's needs will be met. This is not concluding that the Claimant continues to use available public toilets, but arranging a meeting where this can be considered. Notwithstanding this, the Claimant accepted in evidence that she may need to use the toilet between 4-5 times in a working day. The Tribunal considered this and took judicial notice that this did not appear to be significantly out of step with other individuals who did not have a disability. This being the case, the Claimant would not be able to demonstrate substantial disadvantage in using public toilets over another Field Assessor who was not disabled and used toilets during their working day.

Alternative roles

95 In relation to the alternative working duties, Mr Kittow accepted that the Claimant's role as Field Assessor could not easily be adjusted to allow the Claimant to work from home. The Claimant initially agreed with this point as confirmed in her email of 12th June 2020 (PID 1) where she confirms that she *"…was not able to work from home to do [her] job".* However, this position later changed once the Claimant became aware of the new products that the Respondent had developed, mentioned in in Mr Kittow's email of 24th April 2020 above.

Call Centre Work

96 Mr Kittow explained that he did not consider it feasible for the call centre work to be completed at home due to the nature of the role. The letter, and his oral evidence on

this point, confirmed that the call centre received around 600 – 700 calls a day and the content of those calls varied. Training required an initial 2 – 3 days on site and then an ongoing programme of training support which included sitting alongside experienced employees, listening to calls, receiving feedback and operating in small groups. It also included having to take difficult or challenging calls when support could be offered on site. Mr Kittow confirmed that the Respondent would not usually allow home working for these roles. It did permit two employees to work from home during some periods of the pandemic but both employees were pregnant and held Regional Quality Manager roles, meaning they were very experienced in the roles. The Respondent was concerned that allowing home working for the Claimant, who was not trained and experienced in this role, could impact upon providing an acceptable service, meeting client demand and expectations.

97 In addition to these points, the evidence demonstrated that on 7th September 2020, Mr Kittow sent an email to affected staff confirming that a local lockdown had been announced in the area where its Head Office was based. Within this email, Mr Kittow states that people can still travel to work where their work cannot be done from home. He confirms that its Head Office would remain open and operational as normal. The relevance of this email was to provide evidence that the Respondent could not accommodate home working for employees who worked in its contact centre. This was not an isolated decision restricted to the Claimant.

98 A similar email was sent out by Mr Kittow on 19th October 2020 dealing with a further local lockdown affecting the Head Office. This states:

> *"All Call Centre roles (i.e. inbound, outbound, associated call centre admin, call centre managers) cannot reasonably be done at home. Call Centre staff will be expected to work from Blackwood as normal…*
>
> *All other roles based from Blackwood will be assessed on an individual basis. Your line manager will work with you to establish whether you can reasonably carry out your duties from home for this short period of time…"*

99 Mr Kittow confirmed in oral evidence, that in preparation for the return to work after the First Lockdown and to ensure that the social distancing guidelines could be complied with, the Respondent took a temporary lease of neighbouring premises from its Head Office. At a time of financial pressures, the Respondent would not have done so if it could have accommodated home working for its call centre staff. Further, both Mr Kittow and Ms Harris gave evidence that there was a Field Assessor who was receiving cancer treatment but had been recalled to work as usual and had done so.

100 Having considered this evidence, the Tribunal finds that the Call Centre Work could not be completed at home and, in the light of the Claimant's lack of experience and training in that role, it was not a reasonable adjustment to permit the Claimant to carry out such work from home.

101 The Claimant also complained that she should have been offered the opportunity to carry out virtual viewings and mid-term assessments, described as the "New Services" in Mr Kittow's email of 24th April 2020 mentioned above. The evidence suggested that

there had been 479 Face Time instructions nationwide completed by the Respondent. The Claimant asserted that her role could have been adjusted to complete this work.

102 The Tribunal accepted the Respondent's evidence on this point that whilst it had to look at during the First and Second Lockdowns, it was not the preferred method of conducting assessments because it relied upon tenants to show the Field Assessors the property. Some tenants would not show areas within the property that may give rise to charges for them and this affected the accuracy of the data collated. It also explained that these were national instructions and it did not take into account when these took place. Arranging dates nationally across the country with the tenant or other occupier could be problematic and, in any event, it estimated that this would not amount to a full time role for the Claimant. The Tribunal did not consider this to be a reasonable adjustment.

103 The Claimant raises several complaints connected with the grievance appeal which are considered below.

The Second Occupational Health Report

104 The Respondent subsequently received an occupational health report from Dr Norman dated 9th October 2020 ("the **Second OH Report**") (p.250 – 259). This report states, when considering whether the Claimant's condition of hypertension is a disability, that:

> *"…Although hypertension in itself is unlikely to be classed as a disability, because it necessitates her taking medication that does cause symptoms that impact substantially on her day-to-day activities, and that have been long lasting, I believe it would be considered as a disability. I appreciate that this is ultimately a legal rather than a medical condition…"*

The Third Occupational Health Report

105 On 21st October 2020, the Claimant attended an occupational health assessment which she had commissioned with a Dr Cannon ("the **Third OH Report**"). Dr Cannon was provided with the First and Second OH Reports. The Claimant received the Third OH Report on 5th November 2020 (p.438 – 440). The Respondent was not made aware of the existence of the Third OH Report until the Claimant provided it 16th August 2021 (p.443). For this reason, the Third OH Report has no relevance to the state of the Respondent's knowledge of the Claimant's disability for the purposes of the Claims. However, this was the report which confirmed that the Claimant was at moderate risk from Covid-19.

106 On 5th November 2020, a further national lockdown was announced ("the **Second Lockdown**"). The Respondent offered to furlough the Claimant, which she accepted.

107 On 19th November 2020, (p.281 – 282) the Claimant responded to the Respondent's list of available toilets, having carried out her own research. The First Claim was also issued on this date.

108 On 21st December 2020, Ms Harris emailed the Claimant to confirm that she had compiled a list of toilets that were open and within the Claimant's patch. It was arranged for a telephone discussion to take place on 5th January 2021 about this issue.

109 On 4th January 2021, a further national lockdown was announced ("the **Third Lockdown**"). On 5th January 2021, Ms Harris and the Claimant had a telephone discussion about the toilet facilities. Immediately prior to the conversation, Ms Harris had updated a spreadsheet listing the various toilets, where they were located, contact details and their opening hours and emailed this to the Claimant. During the call, the Claimant confirmed that she had not read the email because she was not at home.

110 In cross examination, the Claimant confirmed that she conducted this conversation with Ms Harris whilst attending a local hospital because her partner had become seriously ill. This appeared at odds with the Claimant's evidence that she remained on her property from the First Lockdown, only venturing out to visit her GP. In evidence, Mr Daniels conceded that the Claimant had met with him socially from the First Lockdown.

111 The Claimant suggested that Mr Daniels was mistaken on this point, although for the reasons stated above, we preferred Mr Daniels's evidence. The Respondent relied upon this evidence to suggest that despite her position that she remained on her property throughout, the Claimant was in fact regularly leaving her property and socialising or otherwise coming into contact with other people. This was in contradiction to her stated position of being fearful of contracting Covid-19. In short, the position she was presenting to the Respondent was not accurate.

112 The Tribunal considered that the evidence did not fully support the Respondent's position. At best, the evidence was that she socialised on occasion with Mr Daniels but in a socially distanced way. However, it was clear that she was leaving her property during this period and her professed fear of contracting Covid-19 did not appear to act as a barrier for her.

113 The Claimant accepted that she did not make Ms Harris aware during the call that she was attending hospital with her partner, whom she described as seriously ill. The Claimant accepted that she did not request to postpone the call and took the call either in the hospital or in the car park. She denied being with friends and her explanation for taking the call was simply that she was expecting it. It is fair to say that this exchange added to the Tribunal's view that at points there was a certain opaqueness about the Claimant's evidence.

114 The Claimant sent an email to Ms Harris dated 12th January 2021 setting out further concerns about the toilets. This included certain facilities may not be available due to issues over keys, or that they are a distance from the car park and as her condition could lead to a sudden and immediate requirement to use the toilet, these were not appropriate.

115 In evidence, the Claimant accepted that there was nothing the Respondent could do to satisfy the Claimant that the toilet facilities would be available or cleaned to a

satisfactory standard for the Claimant. The Tribunal accepted that this was the Claimant's true position that, in reality, there was no adjustment the Respondent could make that would facilitate the Claimant's return to her work which involved leaving her property for work purposes.

116 By letter dated 25th January 2021 (p.313 – 316) Ms Harris set out in detail her observations about the Claimant's responses in relation to the toilet facilities in the area and invited the Claimant to have a telecon on 29th January 2021. The letter sets the purpose of the discussion in the following terms:

> *"In light of your comments [about accessible toilet facilities] it is important for [the Respondent] to establish whether, even if there are sufficient lavatory facilities for your use in your field-based area, you still are unable to return to work.*
>
> *If that is the case, and given that we cannot control the infection risk, or the frequency with which you need to access lavatory facilities, it seems that there is a bigger issue at play here, which is that on the grounds of ill-health capability, you may not be capable of carrying out the role for which you are employed.*
>
> *I believe it is important to discuss whether that is the position we have reached, because it involves a different Company process. Furthermore, it indicates that there are no reasonable adjustments that can be made to your role to enable you to return to it, and that instead, our efforts should be focussed on redeployment opportunities within the business.*
> *…*
> *Given the concern that I have outlined above, I am keen to have an informal discussion with you to discuss further."*

Second Grievance Complaint

117 The telephone conversation took place on 29th January 2021. On 15th March 2021, the Claimant raised a grievance (p.354 – 356) ("the **Second Grievance**"). On 25th March 2021 (p.369 – 372) the Respondent emailed a letter to the Claimant, providing a response to the Second Grievance.

118 The relevant sections provide:

> *"I have now had the opportunity to review the recording of the meeting, and attach a full transcript. Near the close of the meeting, you clearly ask me 'is there any way that you would be able to return to work on a trial basis?' (highlighted). This was a reference to a return to work as an Assessor, working remotely in my usual patch on or around Plymouth and the surrounding postcodes. No time frame was given for this suggested return...*
>
> *This question was asked after a detailed discussion about how during the current lockdown, very few toilet facilities were open to me. Indeed, we discussed that ones that were open may still not mitigate the need for me to access toilet facilities 10-15 times a day. I clearly explained that if I was required to park and walk to facilities, the need to urinate can often by sudden and immediate and I would be at risk of having an accident. I clearly explained that the company suggestions of additional time to toilet and payment for parking would not mitigate the risk of having an accident.*
>
> *In the light of these prior representations, to simply side-step these concerns and press me on if I would be prepared to return to work in the current climate illustrates that the*

Company have no regard to their health and safety obligations to provide me with a safe system of work. It indicates that they are still not prepared to follow the medical advice they have received, to seek more up to date advice, or to explore the alternative job roles I have suggested.

It has also come to my attention that scientists believe that Covid-19 can also be contracted through exposure to airborne faecal matter. Therefore even if I could access a public toilet in a timely way, the infection risk to me is increased. Having to use a toilet at the daily frequency of 10-15 times, also places me in an enclosed space, (with potentially limited ventilation) and in contact with other members of the public using the toilet.

This question about returning to work as an Assessor on a trial period was therefore extremely distressing, as It appears that the Company are pressurising me to return to work when it remains unsafe for me to do so. Equally, they seem unprepared and unconcerned to address the risks to my health of carrying out that instruction, or making reasonable adjustments again to mitigate that risk. Additional time to travel to toilets and payment for parking will not be reasonable adjustments if they do not In fact mitigate the risk of a toileting accident, or the risk of Covid-19 Infection from using public facilities, or otherwise."

119 The Claimant raises two complaints arising from this telephone discussion. The first is that Ms Harris required/pressurised her to consider a return on a trial period as a Field Assessor and this was an act of victimisation. The second complaint arose out of how the Respondent treated the Second Grievance.

120 Dealing with the contents of the telephone conversation. The Claimant's position at the hearing was that Ms Harris asked her six times during this conversation about returning to work on a trial basis. This was accepted by Ms Harris although it was not accepted that she was requiring or pressurising the Claimant to consider a return to work on a trial period. She was looking for clarity of the Claimant's position.

121 An agreed transcript of the conversation was available (p.357 – 367). The Tribunal reviewed this transcript and also listened to the recording of the actual conversation. The Tribunal noted there was no aggression in the voices of either party during the conversation. There was not obvious distress discernible from the Claimant. It also noted that after the question was first asked, there was an issue over being heard and the question was repeated. The question was also repeated by way of confirming that there was nothing else the Claimant wished to add.

122 The context of this discussion was to consider what else the Respondent could do to assist the Claimant in returning to work; whether the Claimant was not medically capable to complete that role and to look at redeployment opportunities. By this time, the Claimant had raised two grievances and issued the First Claim. Listening to the recording, the Tribunal felt that the tone of both parties was one of caution, possibly with the realisation that some difficult decisions lay ahead. In this context, the Tribunal did not consider that Ms Harris either required the Claimant to return to work on a trial period, nor could it be said that Ms Harris pressurised the Claimant into doing so. Ms Harris sought absolute clarity of the Claimant's position and repeated the question several times to ensure she had this.

123 The Claimant's second complaint is about how the Respondent dealt with the Second Grievance. She says that it did not deal with it as a grievance in accordance with the ACAS Code of Practice on disciplinary and grievance procedures because it failed to hold a formal meeting; she was not offered the right to be accompanied; and no appropriate action was taken by the Respondent.

124 The Respondent's letter of 25th March 2021 confirmed its position that:

> *"Having considered this very carefully, I am not of the view that your purported grievance is capable of being sensibly responded to, under our grievance policy/procedure…"*

125 The letter also states:

> *"… I am satisfied, having listened to the recording and reviewed the transcript, that [Ms Harris] has not acted in any untoward way towards you; and has merely been exploring adjustments with you, in order to establish what stage has been reached*
>
> *…. I am firmly of the view that your dissatisfaction with that discussion is not one that is capable of receiving a sensible response under our grievance procedure."*

126 The Tribunal finds as fact that the Respondent failed to hold a formal meeting with the Claimant and did not offer her the right to be accompanied. The Respondent did investigate matters and concluded, in effect, that there was no case to answer. The Tribunal considered it did take action.

127 The Claimant lodged the Second Claim on 23rd April 2021. Whilst the bundle contained a lot of documentation relating to events after 25th March 2021, for the purposes of the liability hearing these were not relevant to the issues identified within the List of Issues.

Protected Disclosures

The Law

128 Section 47B(1) of the ERA provides:

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

129 Section 43A of the ERA provides:

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

130 Section 43B of the ERA provides:

> *"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following –*
>
> *…*

> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, …*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered."*

131 Section 43C of the ERA is satisfied if the worker makes a qualifying disclosure to their employer.

132 In their respective submissions, both parties referred to **Williams v Michelle Brown AM UKEAT/0044/19/OO** and also **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979**.

133 In **Williams** Auerbach HHJ considered the questions that arise in determining whether a qualifying disclosure has been made:

> *...It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."*

134 In this case, the Respondent has accepted that all of the PIDs relied upon by the Claimant amount to disclosures of information, thus, the first limb of the test set out in **Williams** above is met. The Respondent also accepted that the disclosures were made to the Claimant's employer, satisfying Section 43C of the ERA. Therefore, if the Claimant can establish that any of the PIDs she relies upon satisfy all four remaining limbs of the test in **Williams**, they will be "qualifying disclosures" and will have become protected disclosures by reason of the disclosure to the Respondent.

135 The Respondent's written submissions focussed upon the third and fifth limb of the **Williams** test; whether the Claimant possessed a reasonable belief that any or all of the PIDs she relies upon were in the public interest and whether the PIDs tended to show a failure under Section 43B(1) (breach of a legal obligation) and a reasonable belief.

136 The public interest test was considered in **Chesterton**, where Underhill LJ at para 27 set out the issues for a tribunal to consider:

> *"…The Tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.*
>
> *Second, … element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest;. … All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view*

is not as such determinative.

Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.

Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it... I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression."

[underlining is the Tribunal's emphasis]

137 The Respondent referred to the decision of **Dobbie v Felton (t/a Felton Solicitors) [2021] IRLR 679** where Tayler HHJ sets down a summary of the law in relation to the public interest component within protected disclosure cases. This includes the following points:

137.1 The essential distinction between private and public interest is between disclosures which serve the private or personal interest of the worker, or wider interests (per **Chesterton** at para 31 and **Dobbie** at para [27](7));

137.2 The intention behind the public interest requirement is that disclosures making disclosures in the context of a private workplace dispute should not attract the enhanced statutory protection (per **Chesterton** at paras 10 - 13 and **Dobbie** [27](8));

137.3 The test is broad and one to be answered by the tribunal in consideration of all the circumstances, taking into account the factors identified in **Chesterton** at para 34 and ***Dobbie*** [27](9)):

"(a) the numbers in the group whose interests the disclosure served…

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed…

(c) the nature of the wrongdoing disclosed…

(d) the identity of the alleged wrongdoer..."

137.4 In **Chesterton** it was noted that a self-interested motive will not preclude the public interest requirement from being met, but a self-interested motivation may be relevant, particularly where the disclosure was made with no wish to serve the public: ***Dobbie*** [28](8).

137.5 **Chesterton** also makes clear that even where a disclosure relates to a breach of the worker's own contract or some other matter where the interest in question is personal in character, there may nevertheless be features of the case that make it reasonable to regard the disclosure as being in the public interest as well as in the personal interests of the worker.

138 In (**Babula v Waltham Forest College [2007] IRLR 346 (CA)**) it was held that a worker does not have to prove that the facts or allegations disclosed are true, or that they are capable in law of amounting to one of the categories of wrongdoing listed in the legislation. As long as the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is, in the tribunal's view, objectively reasonable, it does not matter that the belief subsequently turns out to be wrong, or that the facts alleged would not amount in law to the relevant failure.

Analysis of PIDs 1 - 3

139 The main sections of PIDs 1 – 3 are set out above. Whilst the Claimant relies upon the whole of those documents, in closing submissions, it was focussed toward the sections underlined in those excerpts.

140 In essence, the Claimant's case is that she was concerned about the health and safety of herself and others in relation to her return to work. She felt that the steps put in place by the Respondent would not be sufficient to mitigate the risk of Covid-19 transmission for herself and others and she was making the Respondent aware of these concerns as she was concerned about the harm of passing on the virus to others.

141 The Claimant also stated that the risk of her carrying Covid-19 and then infecting others would deny her philosophical beliefs of beneficence and non-maleficence.

142 This is what she was conveying in PIDs 1 - 3. She says that it is self-evident that there is a direct correlation between the concerns she was raising with the Respondent as they related to her and the wider public.

143 The Respondent's case was that PIDs 1 – 3 were not genuinely or reasonably made in the public interest, as understood from **Chesterton** and **Dobbie**. The focus of these PIDs were aimed directly at the Claimant's objective of not returning to work due to her concerns about the risk Covid-19 represented to her. It says that a review of the

contents of the PIDs reveal that the focus is upon her, not others. The *"few throw-away lines"* that the Claimant relies upon to evidence the public interest do not withstand proper scrutiny.

144 The Tribunal reviewed carefully the contents of PIDs 1 – 3 and formed the impression that the Claimant was clearly wishing to avoid returning to work due to her concerns about Covid-19 and the potential impact that could have upon her. This was consistent with the Claimant's oral evidence where she accepted that she was not saying that none of the Respondent's employees should return to work. The Claimant accepted in cross examination that she had taken legal advice prior to sending these PIDs to the Respondent.

Public Interest

145 In PID 1, the Tribunal noted that there were very few words dealing with what could be considered a public interest element. The contents are directed towards the Claimant's concerns of a "serious and imminent danger" of her contracting Covid -19 if she is required to return to work. The wording within PID 1 is heavily focussed towards engaging Section 44 of the ERA, which deals with health and safety of her position, not towards the protected disclosure provisions within Section 43B of the ERA. It also raises potential issues around philosophical beliefs in relation to beneficence and non-maleficence, although they did not feature in any part of the claim advanced by the Claimant.

146 **Chesterton** reminds Tribunals that a disclosure which appears personal in character may nevertheless have features that make it reasonable to regard disclosure as being in the public interest as well as in the worker's personal interest. In such circumstances, Tribunals should consider all the relevant circumstances, including the fourfold classification set out above.

147 The Tribunal was firmly of the view that the Claimant was raising these issues with the Respondent in response to its instruction for her to return to work. She accepted that the letters were written with the input from her lawyers and the Tribunal formed the view that the Claimant was raising as many potential legal issues as she could to meet her objective.

148 We considered that in the light of the above factors and the Claimant's own concession in cross examination, that she was not saying that the Respondent should stop all Field Assessors from returning to work, it is difficult to accept the Claimant's case that these disclosures were in the public interest.

149 Whilst this is not determinative, the Tribunal is required to review the evidence and answer the question whether the Claimant held a belief that her disclosure was in the public interest and that such belief was reasonably held. Looking at all of the circumstances, the Tribunal considers that did not hold the belief that her disclosures within PIDs 1-3 were in the public interest. We consider she believed it was in her own interests to advance these concerns in response to the Respondent's instruction for her to return to work. If we are wrong about this, we do not consider that such beliefs

were reasonably held due to the steps taken by the Respondent to minimise the risks, as they were known at that time, of exposure to Covid-19.

Breach of legal obligation

150 The Respondent was following the relevant Government advice at that time, it provided the Claimant with access to PPE; training; instructed tenants on what steps to take in advance of any visit; and, importantly, authority for the Claimant to refuse to attend premises if she felt that it was unsafe. The Tribunal considered that the Respondent had taken all reasonable steps it could to create a safe system of work for the reasons set out earlier. It is noteworthy that the uncontested evidence from the Respondent was that only the Claimant raised issues with it over health and safety. All other Field Assessors who were requested to return to work did so. The Tribunal considers that whilst the Claimant believed that the information she was disclosing tended to show a breach of the Respondent's legal obligations, in the light of the steps the Respondent took, and the Claimant being aware of those steps, this belief was not reasonably held.

151 PID 1 is not a protected disclosure.

PID 2

152 The same issues that arise in the consideration of PID 1 are of relevance to PID 2. The Claimant had taken legal advice and, we consider, her focus was to avoid the Respondent's instruction to return to work. However, for the factors above, including the Claimant's admission that she was not suggesting that the Respondent should stop all Field Assessors returning to work, then it follows that we do not consider that the Claimant had a belief that her disclosures in PID 2 were in the public interest; lesser still, in the light of the Respondent's actions in meeting the Claimant's challenges, that this belief was reasonably held. For the same reasons we also concluded that the Claimant's belief that the information tended to show a breach of a legal obligation was not reasonably held.

153 PID 2 is not a protected disclosure.

PID 3

154 The Claimant accepted in closing submissions that taken in isolation this document does not appear to meet all of the criteria in Section 43B of the ERA. However, this document was evidently an extension of PIDs 1 and 2 and it should be considered collectively alongside those earlier documents.

155 The Tribunal would go further and state that nothing within PID 3 could be considered as being raised in the public interest. Taking a step back and considering PIDs 1 – 3 collectively, we consider that PID 3 adds nothing to the analysis set out above.

156 PID 3 is not a protected disclosure.

PID 4

157 Relevant excerpts from PID 4 are set out above. The Claimant's case reiterates her points above but also that the contemporaneous evidence plainly shows that she believed she was raising these concerns in the public interest.

158 Whilst it can certainly be helpful if an individual making a protected disclosure identifies the relevant factors that are required to be taken into account when determining whether a disclosure is protected or not, a statement saying something is in the public interest is not determinative of the issue of whether the Claimant reasonably believed the disclosure was. If this was the case, then it would obviate the need for the careful analysis required of Tribunals.

159 For the same reasons as set out above, we do not consider that this disclosure was made in the public interest. It was made with the Claimant's personal interests at the forefront of her mind.

160 PID 4 is not a protected disclosure.

PID 5

161 The Claimant's case is that, in addition to the documents PIDs 1 – 4, she made oral representations at the grievance hearing which amounted to qualifying disclosures. An agreed transcript was provided within the trial bundle (p.190 – 194). The Claimant confirmed in closing that the particular sections she relied upon were as follows:

Excerpt 1:

"Equally, estate agents, clients, even though they are open those facilities I will not be able to use and you know, there is no guarantee that any of these facilities will be cleaned to a suitable standard to reduce the transmission of COVID-19.

Excerpt 2:

Are the cleaning, is it being carried out to the standard? Are tenant, clients being instructed to social distance during these visits?

Excerpt 3:
I am concerned that the Company has not been complying with their legal duty to provide me with a safe system of work, circumstances connected with my work that I believe are harmful or potentially harmful to health and safety. These disclosures show that it is likely that dangers would arise to the health and safety not only to myself but to my colleagues and other third parties.

Excerpt 4:

you have obviously got a copy of the grievance letter and all previous documentation where you know I have been highlighting my concerns."

[Underlining is the Tribunal's emphasis].

162 The Claimant says that these are qualifying disclosures because she reasonably believed she was raising them in the public interest.

163 The Respondent denies that the disclosures contained in PID 5 were made in the public interest, nor that they tended to show that some legal obligation had been breached. This was on the basis that the Respondent could not control the actions of third parties, such as the local authorities responsible for cleaning the toilets, or, the tenants requested to carry out steps to minimise the risk of transmission when the Claimant was in attendance.

164 The Tribunal read the transcript carefully and noted the Claimant's case that PID 5 should be read in conjunction with the earlier PIDs. In relation to the first excerpt put forward by the Claimant, the Tribunal re-read the full section, which states:

> *"[The Claimant]: It is basically a diuretic which means I need to plan my day around fluid intake and toilet facilities. Once again, you know this has never previously affected my work. So that is the main bullet points of my hypertension. Because of this, it means it is difficult for me to travel further to places like Torquay and Exeter meaning increased travel time in the car. You know prior to Covid-19, I was able to use service stations, public facilities. Covid-19 has not only caused the widespread of the closure of toilet facilities, there is no guarantee that they are safe to use as they are open to the general public. Equally, estate agents, clients, even though they are open those facilities I will not be able to use and you know, there is no guarantee that any of these facilities will be cleaned to a suitable standard to reduce the transmission of Covid-19.*
>
> *[Respondent]: Yeah.*
>
> *[Claimant]: You know, the company's requirement asking me to travel further is you know putting me in an intolerable position where I may have to urinate in public or in the car if [indistinct] facilities are not open and available for me and that is essentially an affront to my basic human dignity. Its also to get me into trouble with the police, penalty notices can be issued for this and I think that the company has not taken the time to properly review the instruction to return to work with this greater requirement to travel and I raised this as an issue before 18th June this year."*

165 The highlighted section above is the section relied upon by the Claimant to demonstrate that this element of the disclosure is in the public interest. However, when looking at the information in context, it can be seen that the Claimant's focus is upon her own personal situation and her position that public facilities may not be open or even *"that they are safe to use as they are open to the general public".* This phraseology indicates to the Tribunal that the Claimant is not making this disclosure in the public interest, but rather is saying that the facilities are not safe *for her* because they are being used by the general public.

166 The second and fourth excerpts set out above and relied upon by the Claimant are also directed to her position that facilities and premises may not be cleaned to a suitable standard *for her*. We determined that these disclosures were not made in the public interest, but to advance the Claimant's own personal situation. We acknowledged that public interest and advancing a personal circumstance may not be mutually exclusive, but this information was directed at assisting the Claimant's sole situation and not that of others.

167 The third excerpt, containing the Tribunal's highlighting, is the only section that arguably engages the public interest. However, taking all the circumstances into account and the earlier analysis of PIDs 1-4, the Tribunal considers that all of this information is driving at the Claimant's personal situation and she did not believe she was raising this in the public interest. For the same reasons as above, the Tribunal does not consider the Claimant reasonably believed the information she disclosed tended to show a breach of a legal obligation.

168 PID 5 is not a protected disclosure.

PID 6

169 The Claimant relies upon statements she included within her letter of 11th August 2020 (p.205 – 210) appealing against the grievance outcome.

> *"I am not convinced that these safety measures are in fact happening in practice. I enclose a screenshot of a recent online discussion between Assessors which confirms they have attended a number of properties where tenants were not aware of new safety measures and had not adequately prepared for employee visits."* ***[P208]****.*
>
> *I note that the Company has not required customers to complete any preparatory cleaning nor are there any measures to clean vacant properties prior to our attendance at properties*." (*Emphasis added)* **[P208]**.*"*

170 Again, the Claimant says that looking at all of the circumstances, including the unprecedented situation of a global pandemic, the various health and safety restrictions and requirements implemented during this time, it evidently demonstrates that the disclosures were made in the public interest.

171 The Respondent denies this is the case for the reasons set out previously.

172 The Tribunal considers that this disclosure was a continuation of the Claimant's position that she did not consider that the safety measures that the Respondent had put in place were sufficient, or were in fact happening. For the reasons set out above, this is not a view the Tribunal agrees with. The Respondent took reasonable steps to protect its employees with responsibility resting with the Claimant as to whether, after attending premises, she considered it was appropriate to commence an inspection. We consider that the disclosures were not made in the public interest.

173 Further that the Claimant did not reasonably believe that there was a breach of her contract of employment or other legal obligation because it is difficult to envisage what else the Respondent could have done to comply with its health and safety obligations.

174 For these reasons, the Tribunal does not accept any of the disclosures relied upon by the Claimant were made in the public interest, and, additionally for the disclosures specifically identified above, that the Claimant reasonably believed there was a breach of her contract of employment or that the health and safety of any individual would be endangered.

175 It follows that all of the Claimant's complaints that rely upon protected disclosures fail. However, for completeness, the Tribunal carried out its assessment of the respective detriments as these also cross over with other claims the Claimant raised.

Detriments 1 and 2

176 As set out in the list of issues, in detriment 1, the Claimant complains that her grievance was not investigated properly. Detriment 2 is the Claimant's complaint that Ms Archer failed to uphold her grievance complaint and that both of these detriments were done on the grounds that the Claimant had raised PIDs 4 and 5.

177 The Claimant's witness statement dealt with the grievance from paragraphs 52 – 58 and her reasons for appealing that decision at paragraphs 59 – 63. It is noteworthy that there is very little detail contained within these sections setting out the Claimant's case why she considered her grievance was not investigated properly. The totality of her evidence was that she considered it was premature for the Respondent to conclude within the grievance outcome, that there was insufficient evidence about her disability, before obtaining occupational health evidence.

178 The Claimant's grievance appeared at pages 180 – 183, with the grievance outcome appearing at pages 196 – 202. At page 201 under point 11, the Respondent acknowledges that the Claimant attached with her grievance letter, a letter from her GP, confirming that she was taking medication to control her hypertension; that this was a diuretic and the Claimant needs to urinate more frequently. The Respondent noted that the Claimant believed that hypertension was a disability and indicated that it was not in a position to make an informed assessment based on the information it had, and therefore it recommended that an occupational health assessment was arranged to provide it with more information.

179 The grievance outcome breaks down the Claimant's grievances into 11 separate points and, in the Tribunal's view, provides a considered and detailed response to the Claimant's concerns. The letter confirms the adjustments that it has put in place for all its Field Assessors to allow them to return to work and suggestions for the Claimant, including identifying public lavatories that she may be able to use when working. Just looking at this document alone, it is possible to conclude that the Respondent conducted a reasonable investigation and drew appropriate conclusions. However, the Tribunal is aided by the fact that the Claimant accepted in cross examination that the grievance process was thorough and there was nothing untoward or improper in that process.

180 In the light of these facts, the Tribunal does not accept that the Respondent failed to investigate the Claimant's grievance properly and the detriment 1 claim fails.

181 Detriment 2 was the Claimant's complaint that the Respondent failed to uphold her grievance. This was factually accurate and conceded by the Respondent.

182 However, it is difficult to see how this complaint, in and of itself, can amount to a detriment, otherwise any failure by a Respondent to uphold a grievance would be

actionable. In **Jesudason v Alder Hey Children's NHS Foundation Hospital [2020] IRLR 374** at para 27, Sir Patrick Elias stated:

> *"It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases."*

183 The Tribunal has no hesitation in concluding that a reasonable employee would not consider a failure to uphold a grievance, without more, to be a detriment. On this basis, the claim as formulated fails.

184 However the Tribunal also assessed the claim as if it was phrased that the Respondent had "*unreasonably"* failed to uphold her grievance. Looking at the considered and detailed nature of the responses provided to the Claimant by the Respondent in its grievance outcome, the Tribunal concluded that this claim would also fail.

Detriment 3

185 The Claimant alleges similar detriments about the grievance appeal as those she raised in Detriments 1 and 2 above about the grievance.

186 The grievance appeal appeared at pages 205 – 210. The agreed transcript at pages 239 – 248 and the appeal outcome letter at pages 260 – 272. Again, in cross examination, the Claimant accepted that the process and outcome of the grievance appeal was thorough and there was nothing inappropriate or improper. On her own oral evidence the Claimant has failed to establish her case for these detriments. For completeness, the Tribunal considered the grievance appeal to have been conducted thoroughly with fair and reasonable outcomes.

Detriment 4

187 This complaint arose out of the Claimant's allegation that she provided WhatsApp screenshots (p.211) involving a discussion from other Field Assessors that suggested that some of the Respondent's health and safety measures were not being followed. This related to the Respondent's procedure requiring its call operatives to contact tenants and explain what steps they should take when a Field Assessor attended their property, such as standing outside or remaining in one room.

188 This was discussed in the appeal hearing (p.244) and Mr Kittow explained that the Respondent listened to a percentage of the calls made to ensure compliance with the procedure, but the safeguard rests with the Field Assessor who attends. If they decide that the premises are not safe, then they can refuse to carry out the assessment. The Claimant did not offer any further evidence to suggest that the monitoring of calls was not taking place, nor that its call operatives were not complying. To the Tribunal's mind, the Respondent considered the Claimant's point, explained the process and the checks it was carrying out and that, ultimately, the decision as to whether it was safe for a Field Assessor to attend premises rested with the Field Assessor when attending.

It is difficult to see what else the Respondent could do. This Tribunal does not consider that a reasonable employee would consider this to be a detriment.

Detriments 5 and Detriment 6

189 The Claimant complains about the Respondent *"managing the Claimant sickness absence in or around June 2020 to November 2020 which caused exacerbation of the symptoms of stress and depression."*

190 During cross examination of the Respondent's witnesses and within closing submissions, the Claimant asserted that she was complaining about the Respondent's *"failure to support or manage"* including the provision of counselling or welfare support. The Respondent objected to what it described as *"moving the goalposts"* as the detriment claimed was clear from the list of issues and there was no reference to counselling or a failure to welfare support.

191 Dealing with the detriment as it appears, the Tribunal found that the Respondent managed the Claimant's sickness by requiring her to complete fit for work certificates. She complied with this requirement and was paid in accordance with her statutory entitlement. The Claimant supplied further information, via a GP letter about her medication on 16th July 2020, which the Respondent considered through the grievance process and an occupational health referral. It is difficult to see what the detriment the Claimant is complaining of, lesser still to assess that a reasonable employee would consider it a detriment. Detriment 5 fails.

192 Within the closing submissions, the Claimant asserted that due to the Respondent's failure to acknowledge her condition as a disability and its failure to address her concerns relating to health and safety in with workplace, this forced the Claimant to take sick leave. If the Respondent had taken her concerns seriously then these detriments would have been avoided.

193 The Tribunal considered this to be a conflation of Detriment 5 with Detriment 6. It looked to the Tribunal that the Claimant was really complaining about the Respondent's failure to place her on furlough when it became apparent to the Respondent that the Claimant would not be complying with its instruction to return to work in June 2020. However, that is not how the case was pleaded under this head of claim. It was pleaded in this way as part of the Claimant's discrimination arising from disability but not as a protected disclosure.

194 Detriment 6 is specific that on 18th June 2020, Ms Corp forced the Claimant and/or left the Claimant with no alternative other than to take sickness absence. This was the date when Ms Corp's decision to end the Claimant's furlough took effect. The Respondent took this action because it required the Claimant to return to work and it considered that it had taken reasonable steps to ensure all of the Field Assessors health and safety. The Claimant did not accept that. Instead she commenced a period of sickness absence and was paid in accordance with her contract, namely statutory sick pay.

195 The Tribunal did not consider this to be Ms Corp "forcing" the Claimant to take sickness absence, or to leave her with no other alternative. The Claimant could have returned to work. She did not consider it safe to do so and took the decision not to return. It may be that the Claimant was left with a dilemma, but she clearly had options. Ultimately, if the Claimant was too ill to return to work and she was paid statutory sick pay as a consequence, it cannot be said that a reasonable employee would consider this to be a detriment. It follows that this claim fails.

Disabled Person

196 The Respondent accepted that the Claimant is a disabled person, within the meaning of Section 6 of the EqA, due to the combination of the Claimant's hypertension with the side effects of her medication, which is a diuretic, caused her to use the toilet more frequently.

197 The Tribunal was not required to determine this disability but it was required to consider the issue of whether the Claimant's hypertension meant that she suffered a higher risk of death if she contracted COVID-19. The Tribunal did not accept that the Claimant was a disabled person on the basis of this alleged disability for the reasons set out above.

Knowledge of Disability

198 There was a dispute between the parties about when the Respondent had actual or constructive knowledge of the Claimant's disability.

199 The Claimant asserted that the Respondent was aware or should have been aware of her disability at some point during 2016. She relies upon her absence record, which confirms that she was absent due to high blood pressure on 22nd January 2016 (p.1); documents sent to Ms Harris, then the Respondent's HR and General Assistant, in March 2016 (p.3-7) requesting time off. One of these documents is a letter to the Claimant from Royal Cornwall Hospitals NHS Trust confirming the date for a medical appointment.

200 At the bottom of this letter (p.6), under the heading "SPECIAL INSTRUCTIONS" it states:

> *"* DEFER ANTI HYPERTENSIVE/HIGH BLOOD PRESSURE MEDICATION ON THE DAY OF YOUR ADMISSION FOR YOUR RENIN: ALDOSTERONE BLOOD TEST."*

201 A further appointment letter sent to the Claimant (p.7), refers to the "NEPHROLOGY" clinic.

202 The Claimant also relied upon a letter from Ms Darby, at the time the Respondent's Area Manager (P.21). The Claimant argued that this letter specifically referred to the Claimant's absence due to hypertension and acknowledged that a return to work meeting was held to discuss the Claimant's absences. It also refers to a discussion relating to the Claimant having surgery for her kidneys and that her absence due to

this surgery will not be taken into consideration. It was accepted in evidence by Ms Harris that she was aware of this correspondence at the time in 2016.

203 The Claimant says that from this information, the fact that Ms Harris was an experienced HR professional and had read this information, she should have been aware that the Claimant had a disability in 2016. Therefore the Respondent had actual knowledge from this point.

204 Within her witness statement, the Claimant stated that she had a conversation with Ms Harris in November 2018, during which she confirmed that a medical operation had to be postponed because of her high blood pressure and this necessitated the postponement of that operation. Ms Harris could not recall the conversation although accepted it may have occurred. Again, the Claimant says that from this date the Respondent had actual knowledge.

205 The Claimant advanced an alternative case that the Respondent was aware no later than 12th June 2020 when she disclosed in an email to Ms Harris (p.117) that she had a condition which placed her in a higher risk category. The Tribunal noted that this email makes no reference to being placed in a higher risk category. However, the Claimant's later email of the same day (p.118) and as quoted in paragraph 43 above, under the heading PID 1, in the fifth bullet point, there is reference to the Claimant's higher risk category.

206 The Claimant also relies upon her email to the Respondent of 17th June 2020 (p.163) where she notifies the Respondent of her requirement to use the toilet more frequently than others. This is set out in paragraph 49 above under the heading PID 3.

207 The Claimant drew the Tribunal's attention to paragraph 6.19 of the Equality and Human Rights Commission: Code of Practice on Employment (2011) ("the **EHRC Code**"). This requires employers to *"…do all they can reasonably be expected to do to find out…"* whether an individual has a disability.

208 The Respondent's position is that hypertension in and of itself is unlikely to be a disability. The Claimant had various intermittent absences prior to the First Lockdown, as listed in her absence records (p.1-2). These were approximately 35 days absence in 2014; 30 days in 2015; 13.5 days in 2016; 5 days in 2017; 5 days in 2018; 178 days in 2019 and 10 days in 2020, prior to the First Lockdown. None of these absences were linked to her hypertension, apart from the one day's absence due to high blood pressure on 22nd January 2016 (p.21).

209 In context, the documents relied upon by the Claimant which were read by Ms Harris were not capable of putting Ms Harris on notice of a disability because the references to high blood pressure were vague and they were not being relied upon by the Claimant to disclose a disability, but to justify time off for medical appointments.

210 Further, it is not the duty of the Respondent to actively review each and every document placed before it to look for information which may support a finding that an employee may have a disability.

211 The Respondent asserts that at no point did it actually come to the conclusion that the Claimant was a disabled person and therefore the Tribunal must make a determination about constructive knowledge.

212 It says that nothing within the material before the Respondent up until receipt of the Second OH Report could reasonably lead it to conclude that the Claimant was a disabled person. It is entitled to a period of time to consider the points in the Second OH Report, after its receipt on or around 9th October 2020, therefore the correct date is around November 2020.

213 The Respondent also made reference to the EHRC Code, particularly paragraphs 5.14 and 5.15, which states:

> *"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person".*
>
> *5.15 An employer must do all they can reasonably expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that the personal information is dealt with confidentially."*

Consideration

214 The Claimant complains of events contained within the Claims between June 2020 and 25th March 2021.

215 For the disability discrimination claims advanced by the Claimant, the Respondent cannot be held liable for discrimination at a point in time when it had no knowledge (referred to as actual knowledge), or it could not reasonably be expected to be aware (constructive knowledge), of the Claimant's disability. This is the effect of S.15(2) of the EqA for discrimination arising from disability and para 20 of Part 3 of Schedule 8 of EqA for a failure to make reasonable adjustments.

216 The Claimant's impairment of hypertension/high blood pressure, in and of itself, may not always satisfy the definition of disabled person within the EqA because it must be shown that the impairment has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities ("the **Adverse Effects**"). In the Claimant's case it appears that the hypertension itself did not cause any Adverse Effects. However, she was prescribed with Spironolactone to assist in controlling her hypertension.

217 It was accepted that one of the side effects of Spironolactone medication, which is a diuretic, is that it causes the Claimant to use the toilet frequently, she says up to 15 –

25 times a day. It is this side effect of the medication that the Claimant takes to control her hypertension that causes the Adverse Effects. The Respondent accepts on this basis that the Claimant is a disabled person for the purposes of the EqA. It was common ground that this did not represent any issue for the Claimant in carrying out her duties, prior the First Lockdown.

218 We have referred to the relevant paragraphs of the EHRC Code as set out by the parties. Whilst noting that the Claimant referred to paragraph 6.19, which deals with knowledge in relation to reasonable adjustments, and the Respondent refers to paragraphs 5.14 and 5.15, which deals with knowledge in relation to something arising in consequence of disability, we consider the guidance is very similar. It requires us to assess, objectively, when we consider the Respondent had knowledge, or should reasonably be considered to have knowledge, whilst being obliged to do all it could reasonably be expected to do to find out.

219 The Tribunal considered the evidence available to the Respondent prior to the First Lockdown. This included the Claimant's medical notes and the letter from Mr Darby referring to the Claimant's absences, one of which on 22nd January 2016 was because of *"high blood pressure"*. The Claimant says that this information, in addition to the knowledge of Ms Harris that she was due to have a medical operation and it was postponed due to high blood pressure, provided the Respondent with actual or constructive knowledge of her condition. We disagree. At this point in time, there was little to no evidence dealing with the Adverse Effects, simply that the Claimant has had one sickness day and the postponement of a medical operation attributable to hypertension. Set in context of the considerable absences of the Claimant prior to the First Lockdown and bearing in mind what we have said about hypertension amounting to a disability, the evidence put before us is not sufficient for us to conclude that prior the First Lockdown the Respondent had actual or constructive knowledge of the Claimant's disability.

220 The Claimant contends that if the date of knowledge was not prior to the First Lockdown, then it should be 12th June 2020 (PID 1) when she wrote to the Respondent and set out details of her condition. The relevant text of PID 1 is set out above. However, this simply states that the Claimant has a condition which places her in a High Risk category. It does not set out what the condition, lesser still that she considers this to be disability.

221 Whilst it is not necessary for the Claimant to spell this out to the Respondent, unless the disability is an obvious one, she runs the risk of it being difficult to establish that the Respondent has failed in its obligation to make reasonable enquiries of whether she is a disabled person.

222 Again, the Tribunal did not consider that the information available to the Respondent at 12th June 2020 was sufficient for it to have constructive knowledge of the Claimant's disability. Taking the Claimant's case at its highest, the Respondent may have been aware that the Claimant had hypertension and that she has a condition which places her in a High Risk category. However, there is still no knowledge of Adverse Effects.

223 The next relevant date is 17th June 2020, when the Claimant specifically informs the Respondent, via PID 3 (paragraph 49 above) that as a consequence of her hypertension, she takes medication which causes her to use the toilet more frequently. Within this correspondence, the Claimant invites the Respondent to seek a medical opinion. Set in the context of a refusal by the Claimant to return to work; the unusual nature of the alleged disability in that it is the medication that is being used to treat the impairment that is said to give rise to the Adverse Effects; and this being the first time that the Claimant sets out details of a condition and the potential Adverse Effects; we consider that the Respondent was entitled to wait until it received further evidence before it could be considered to have constructive knowledge.

224 The next possible date is 16th July 2020, when the Claimant provided the Respondent with a report from her GP, attached to her grievance letter (PID 4). This confirmed that the Claimant was prescribed with Spironolactone, which is a diuretic. This is the first point when the Respondent is aware from a third party that the Claimant has hypertension and is being treated with medication which may have Adverse Effects.

225 The Tribunal felt that the Respondent was, at this point in time, aware of the potential for the Claimant to be a disabled person but the matter was not free from doubt. It was entitled to seek a medical opinion, as suggested by the Claimant, which is, in fact, what it did. Upon receipt of the First OH Report, on 1st September 2020, the Respondent was aware that the Claimant was likely to be a disabled person.

226 Whilst we note the Respondent's criticisms of the First OH Report, we consider that the information contained within it was sufficient to provide the Respondent with constructive knowledge about the Claimant's disability. The First OH Report links the Claimant's requirement to use the toilet frequently as a side effect of the medication she is taking to control her hypertension. We are of the view that upon an objective assessment of the information available to the Respondent it should reasonably be aware from this date that the Claimant was a disabled person.

227 Pausing there: if the Respondent was not aware, and could not reasonably be considered to be aware, that the Claimant was a disabled person until 1st September 2020, then all of her complaints that arose before this date fail.

Discrimination Arising From Disability

228 Due to the Tribunal's finding of when the Respondent had constructive knowledge of the Claimant's disability, the following claims under this head must fail:

228.1 On 15 and 17 June 2020, the Respondent required the Claimant to return to her role as Field Assessor;

228.2 On 5 August 2020 Ms Archer concluded in the grievance outcome letter that the Claimant continue to use available public toilets;

228.3 From June to August 2020 the Respondent failed to carry out a tailored risk assessment and/or review of existing health and safety measures for the Claimant's proposed return to work as a Field Assessor; and

228.4 On 10 June 2020 and subsequently the Respondent failed to make a reasonable adjustment by failing to offer the Claimant continuing participation in the furlough scheme and/or failing to change the Claimant's role or offer the Claimant an alternate role to enable homeworking.

229 The claims remaining are set out below. The Tribunal has amended some of the allegations to remove references to dates prior to the date of knowledge:

229.1 On 27 October 2020, the Respondent required the Claimant to return to her role as Field Assessor, including the appeal outcome;

229.2 On 27 October 2020, Mr Kittow concluded in the grievance appeal outcome letter that the Claimant continue to use available public toilets;

229.3 On 27 October 2020, Mr Kittow failed to follow the recommendations of the first and second medical report, namely that the Claimant's duties should be varied to permit homeworking; and

229.4 On 10 June 2020 and subsequently the Respondent failed to make a reasonable adjustment by failing to offer the Claimant continuing participation in the furlough scheme and/or failing to change the Claimant's role or offer the Claimant an alternate role to enable homeworking; and

229.5 On 29 January 2021, the Respondent required/pressurised the Claimant to consider a return to her role as Field Assessor for a trial period.

The Law

230 Section 15 EqA states that:

> *(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.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

231 The Tribunal reminds itself that this section is somewhat unique within discrimination law in that it requires someone to be treated *"unfavourably".* The only other strand that is cast in this way is pregnancy discrimination. It is significantly different to the more commonly encountered *"less favourable treatment"* of other discrimination strands which require comparison with a hypothetical or actual comparator.

232 In **Pnaiser v NHS England and another [2016] IRLR 170** the EAT summarised the proper approach to claims for discrimination arising from disability as follows:

> *a) The tribunal must identify whether the claimant was treated unfavourably and by whom.*
> *b) It then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the motive of the alleged discriminator in acting as he or she did is irrelevant.*
> *c) The tribunal must then determine whether the reason was "something arising in consequence of [the claimant's] disability", which could describe a range of causal links. That stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*
> *d) The knowledge required is of the disability; not knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.*

233 In **Williams v Trustees of Swansea University Pension and Assurance Scheme 2019] 2 All ER 1031** the Supreme Court considered what the term *"unfavourably"* meant. It agreed with the earlier explanations provided by the Langstaff J in the Employment Appeal Tribunal that unfavourable treatment did not require a hypothetical or actual comparator but measured against an *"objective sense of that which is adverse and that which is beneficial"* and unfavourable treatment means *"placing a hurdle in front of or creating a particular difficulty for, or disadvantaging a person".*

234 Section 136 of the EqA sets out how the Tribunal must consider the burden of proof. This provides that:

> *(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.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

235 Guidance on the reversal of the burden of proof was given in **Igen v Wong [2005] IRLR 258**. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc [2007] ICR 867** and **Efobi v Royal Mail Group Ltd [2021] UKSC 33.** The guidance may be summarised in two stages: (a) the Claimant must establish on the totality of the evidence, on the balance of probabilities, facts from which the Tribunal *"could conclude in the absence of an adequate explanation"* that the Respondent had discriminated against her. This means that there must be a *"prima facie case"* of discrimination and facts from which the Tribunal could infer that the treatment complained of was because of the protected characteristic; (b) if this is established, the Respondent must prove that the treatment was in no sense whatsoever because of the protected characteristic.

236 In accordance with guidance from Langstaff J in **Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14**, there are two distinct steps to establish causation:

a. did the Claimant's disability cause, have the consequence of, or result in "something"?

b. did the Respondent treat the Claimant unfavourably because of that "something"?

237 Turning to the allegations complained of:

On 27 October 2020, the Respondent required the Claimant to return to her role as Field Assessor, including the appeal outcome.

238 The Tribunal has found as fact that the Respondent did not require the Claimant to return to her role as a Field Assessor on 27th October 2020. This claim fails.

On 27 October 2020, Mr Kittow concluded in the grievance appeal outcome letter that the Claimant continue to use available public toilets.

239 The Tribunal has found as fact that Mr Kittow did not conclude that the Claimant continue to use available public toilets. In addition, the Tribunal considered that the Claimant could not demonstrate substantial disadvantage based on her own evidence of the amount of times she would need to use a toilet in working hours. This claim fails.

On 27 October 2020, Mr Kittow failed to follow the recommendations of the first and second medical report, namely that the Claimant's duties should be varied to permit homeworking.

240 The Tribunal has considered the issue of homeworking and found, as fact, that the Claimant accepted that Field Assessor role could not be carried out as it was prior the First Lockdown. The Tribunal also found that the Claimant's duties could not reasonably be varied because there was insufficient work for her to complete in terms of the new products developed. It was not possible for the Claimant to carry out the call centre role on a homeworking basis. Therefore, this claim fails.

On 10 June 2020 and subsequently the Respondent failed to make a reasonable adjustment by failing to offer the Claimant continuing participation in the furlough scheme and/or failing to change the Claimant's role or offer the Claimant an alternate role to enable homeworking.

241 The first limb of this complaint arises from a decision that was made on 10th June 2020, which was before 1st September 2020, the date the Tribunal found that the Respondent had constructive knowledge of the Claimant's disability. This second limb is effectively a restatement of the Claimant's earlier claim about a failure to enable homeworking which has been considered above. This claim fails.

On 29 January 2021, the Respondent required/pressurised the Claimant to consider a return to her role as Field Assessor for a trial period.

242 The Tribunal has found as fact that the Respondent did not "require" or "pressurise" the Claimant to consider a return to her role as a Field Assessor for a trial period. This claim fails.

Reasonable Adjustments

243 The Claimant raised a number of claims asserting failures on the Respondent's part to make reasonable adjustments.

The Law

244 Section 20 of the EqA provides:

> *"(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…*
>
> *(3) …, where a provision, criterion or practice ["**PCP**"] of [the Respondent'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….*

245 Section 21 of the EqA effectively provides that a failure to make reasonable adjustments amounts to discrimination.

246 Paraphrasing paragraph 20 of Schedule 8 of the EqA, the Respondent cannot be held liable for a failure to make reasonable adjustments if it did not know, and could not reasonably be expected to know that the individual is likely to be placed at a disadvantage. This is in addition to the Respondent's knowledge of the Claimant's disability, which, the Tribunal found it was constructively aware of on 1st September 2020.

247 The proper approach to a reasonable adjustments claim remains that suggested in **Environment Agency v Rowan [2008] IRLR 20**. A tribunal should have regard to the PCP applied by or on behalf of the employer; and the nature and extent of the substantial disadvantage suffered by the Claimant.

248 Whether adjustments are reasonable is a fact-sensitive question. The test of reasonableness is objective and to be determined by the tribunal: **Smith v Churchill's Stairlifts plc [2006] IRLR 41**. No objective justification defence is available under this head of claim. Therefore, the proposed adjustments are either reasonable or they are not.

249 The EHRC Code states at paragraph 6.29 that *"ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case".*

250 The identification of a PCP should be liberal and not overly technical: **Carranza v General Dynamics Information Technology [2015] IRLR 43** although it must be something that can be described as a PCP. The Tribunal can only consider the claim that has been made to it: **Prospere v Secretary of State for Justice [2014] EqLR 633.**

251 It is well established in case law that a failure by an employer to consult, assess or otherwise consider whether and what reasonable adjustments to make cannot itself be failure to make an adjustment: **Tarbuck v Sainsbury's Supermarket Ltd [2006] IRLR 664; HM Prison Service v Johnson [2007] IRLR 951** and **Scottish & Southern Energy plc v Mackay UKEATS/0075/06/MT.**

252 It is for the Claimant to identify the PCPs applied by the Respondent. The Claimant identified the following as PCPs:

PCP 1: the requirement for the Claimant to return to her role as a Field Assessor from 10 June 2020.

PCP 2: from 10 June 2020 increasing the geographical size of an employee's coverage for field work, i.e., to include postcodes in Torquay and Exeter;

PCP 3: requiring an employee to continue to use public toilets.

Conclusions:

253 The Tribunal identified a number of problematic areas with the Claimant's case under this head of claim and considered it proportionate to provide conclusions on those first.

PCP1:

254 The Respondent always had a requirement for the Claimant to attend work and carry out her duties as a Field Assessor, which she did without issue prior to the First Lockdown. That was the nature of her employment with the Respondent. It is difficult to see what the date adds to this PCP. The Tribunal thought, that in reality, the Claimant was really complaining about the failure of the Respondent to allow her to continue to be furloughed under the Scheme from 10th June 2020. However, that was not how the case was pleaded.

255 As a matter of fact, the Claimant was placed on furlough on 5th November 2020. Therefore, on the Claimant's case, this PCP as pleaded, only existed between 10th June 2020 and 5th November 2020. The Respondent was deemed to have constructive knowledge from 1st September 2020 and therefore the timescale for the application of this PCP can only have been between 1st September 2020 and 5th November 2020.

256 Setting aside the Tribunal's concerns about the formulation of the PCP, it determined that the requirement for the Claimant to return to work (PCP) was a decision that was

made on 10th June 2020. This was a one off decision in time. The Claimant may complain about the effects of that decision, but, at the time the Respondent made that decision, it did not have knowledge of the Claimant's disability. Therefore this claim fails. For completeness, if the PCP claimed was a failure to place the Claimant on furlough under the Scheme, this was a decision the Respondent made on 17th June 2020 and, again, it is the effects of that decision that the Claimant complains of because that decision was also made at a time when the Respondent did not have constructive knowledge of her disability.

Substantial Disadvantage:

257 The Claimant raised two separate allegations of substantial disadvantage: that from March 2020 she was at an increased risk of *contracting* Covid-19; and that she was at an increased risk of *contracting* Covid-19 for the trial period. The Tribunal has found as fact that the Claimant was not at risk of *contracting* Covid-19 as there was no credible evidence to support this claim. Therefore, these disadvantages also fail.

258 The Claimant also claimed that she was given the alternative of working at Head Office, which was over a three hour commute (one way) and unlikely to be safe due to a Covid-19 outbreak. This was pleaded as a substantial disadvantage. The Tribunal considered that this was a proposal but forward by the Respondent as a reasonable adjustment to assist the Claimant returning to work.

Adjustments:

259 As a consequence of the Tribunal's finding on the date of the Respondent's constructive knowledge of the Claimant's disability, the following adjustments are said to have occurred before that date. Therefore, those elements must fail. From the list of issues, these are Adjustments 1, 3 are 5.

260 A number of the other adjustments asserted by the Claimant as ones the Respondent should have made do not stand scrutiny in the light of the **Tarbuck** line of authorities referred to above. They are clearly adjustments requiring the Respondent to seek further information or make assessment on what reasonable adjustments it could make. These authorities make it clear that an adjustment is either reasonable or it is not. The steps before that cannot in itself be a failure to make an adjustment.

261 Adjustments 2, 6, 7, 8 and 9 fall on this ground. Further, the Tribunal noted that Adjustment 9 is itself tautologous in that it is contended that the failed to make a reasonable adjustment by failing to make practical adjustments.

262 Adjustment 4 fails because the Tribunal has found as fact that the Respondent had taken reasonable steps to provide a safe working environment for the Claimant. The Respondent had made a determination that the Claimant could return to work safely, so there were no grounds for delaying the instruction. This proposed adjustment was not reasonable. In any event, the instruction was issued on 10th June 2020, prior to the Respondent having constructive knowledge of the Claimant's disability.

263 Adjustment 10 fails as a consequence of the finding of facts made by the Tribunal that it was not reasonable for the Respondent to provide the Claimant with video assessment duties because there was not sufficient work for her to complete. This also applies to the proposed adjustment of call centre homeworking. The Tribunal did not accept that this could reasonably be accommodated by the Respondent.

264 The Claimant accepted in evidence that there were no adjustments that the Respondent could make that would permit her to return to work. Looking at this the other way, the Claimant asserts that the Respondent.

Victimisation

The Law

265 Section 27 of the EqA defines victimisation as:

> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> *a. B does a protected act, or*
> *b. …"*

266 In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285**, it was held that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work.

267 In respect of causation, the Tribunal was directed to the well-known case of **Nagarajan v London Regional Transport and others [1999] IRLR 572** which holds that a Tribunal is not required to determine whether an alleged perpetrator was consciously motivated or influenced that a claimant had done a protected act. This is also authority that the protected act may not have been the sole cause, but that it should have had a significant influence, or been the principal or an important cause.

268 In **Chief Constable of West Yorkshire v Khan [2001] UKHL 48** the relevant question to ask *"…why did the alleged discriminator act as he did? What consciously or unconsciously, was his reason"* as reiterated in **Greater Manchester Police v Bailey [2017] EWCA Civ 425**.

269 The Claimant relied upon 7 protected acts. The first 4 were documents labelled as PIDs 1 – 4. The 5th was the First Claim. The 6th was a conversation concerning reasonable adjustments that the Claimant held with Ms Harris on 29th January 2021. The 7th was the Claimant's Second Grievance dated 15th March 2021.

270 Quite properly, the Respondent accepted that all 7 of the acts relied upon by the Claimant were protected acts for the purposes of Section 27 of the EqA. This left the Tribunal to determine whether:

270.1 the complaints raised by the Claimant were occurred;

270.2 whether those complaints amount to detriments and, if so,

270.3 did the Respondent subject the Claimant to those detriments because the Claimant did a protected act, what consciously or unconsciously was the reason?

271 The Claimant relied upon 5 detriments, two of which have already been considered above.

Detriment 1

272 The Claimant asserted that on 5th August 2020, Ms Archer did not uphold the Claimant's grievance. For the reasons set out above, the Tribunal did not consider this to be a detriment. It follows that this claim fails.

Detriment 2

273 On 27th October 2020, Mr Kittow did not uphold the Claimant's appeal against the grievance outcome. For the reasons set out above, the Tribunal did not consider this to be a detriment. This claim fails.

Detriment 3

274 On 27th October 2020, Mr Kittow, without managing the risks caused by the Claimant's disability, instructed the Claimant to prepare to return to work as a Field Assessor; and otherwise took no meaningful action based on the second medical report.

275 This allegation was considered above and the Tribunal found as fact that Mr Kittow did not instruct the Claimant to prepare to return to work. This claim fails.

Detriment 4

276 On 29th January 2021, Ms Harris required/pressurised the Claimant to consider a return to her role as Field Assessor for a trial period.

277 This allegation was considered above and the Tribunal found as fact that Ms Harris did not require or pressurise the Claimant to consider returning to her role as Field Assessor for a trial period. This claim fails.

Detriment 5

278 The Respondent failed to deal with the Second Grievance in accordance with the ACAS Code of Practice. In this respect the Claimant asserts that there was no formal meeting, she was not offered the right to be accompanied; and no appropriate action was taken by the Respondent.

279 The Tribunal found as fact that the first allegation was correct, the Respondent failed to hold a formal meeting with the Claimant. It did not find that the Respondent had

failed to offer the Claimant the right to be accompanied because this is not a requirement of the ACAS Code. Similarly, the Respondent did not fail to take appropriate action because it explained why it was refusing to deal with the complaint.

280 Having found that one of the complaints occurred, the Tribunal concluded that in accordance with **Shamoon,** a reasonable worker would or might form the view that a failure to hold a formal meeting in accordance with the ACAS Code was a disadvantage.

281 The Claimant contended in her closing submissions that reason was because Ms Corp was aware that she had been listed as a co-respondent by the Claimant in the First Claim. Ms Corp was aggrieved at this and perceived the Claimant to be a nuisance. Ms Corp accepted that she had conducted a number of grievances and that rather than inviting the Claimant to attend a meeting, possibly to resolve matters through mediation or an apology, the Claimant's concerns were dismissed outright. The Claimant contends that Ms Corp was influenced because of the protected acts.

282 The Respondent accepts that it failed to hold a formal meeting and there is no express provision in its grievance policy for this. It says that the totality of the Claimant's complaint within the Second Grievance is what was said to her by Ms Harris in the telephone conversation of 29th January 2021. The audio recording provided objective evidence and it was reasonable for Ms Corp to listen to the recording and form a view without the need for any further investigations. The holding a formal meeting would not have changed the outcome. It says that where the Respondent has investigated, considered a complaint to be without foundation, it cannot be reasonable to have to undertake the usual formalised process. To do so, would mean it could not summarily deal with false, malicious or entirely misguided grievances. Otherwise, it says that this was an honest mistake and it was not a deliberate decision to caused by the Claimant's protected acts.

283 The Tribunal that the question to be asked is: what was the reason for the treatment? If it concludes that there was more than one reason, was the fact that the Claimant had done a protected act a significant influence, or principal cause?

284 The letter responding to the Second Grievance includes the following:

> *"… I am not of the view that your purported grievance is capable of being sensibly responded to, under out grievance policy/procedure.*
>
> *…I am satisfied that [Ms Harris] was seeking to establish, during your meeting, whether the newly suggested adjustments could proffer support to enable to you return, even if just on a trial basis, or not.*
>
> *…I cannot accept that [Ms Harris] is not permitted to ask this question of you.*
>
> *It sets a very dangerous precedent if HR cannot have candid conversations with employees about whether or not adjustments will enable a return to work, without the risk of having a grievance raised against them…*
>
> *…I am firmly of the view that your dissatisfaction with that discussion is not one that is capable of receiving a sensible response under out grievance procedure."*

285 The Tribunal identified two reasons why Ms Corp took this action. The first because she felt the complaint was not one that is capable of being sensibly responded to under the Respondent's grievance policy. The second arose out of concerns that it could set a very dangerous precedent if HR cannot have candid conversations with employees about reasonable adjustments.

286 The Tribunal concluded that the second reason listed above is intrinsically connected with the telephone conversation, which itself is agreed to be a protected act (PA 6). One of the reasons why Ms Corp does not hold a formal meeting is because she does not want to set what she considers would be a very dangerous precedent if HR cannot have candid conversations about adjustment. In the Tribunal's view, this reasoning is because of the contents of the telephone discussion, which is a protected act. The Tribunal considers this to be a significant influence in Ms Corp's reasoning and the Claimant's complaint of victimisation succeeds.

Employment Judge Lambert
Date: 9 June 2023

Judgment sent to the Parties: 26 June 2023

FOR THE TRIBUNAL OFFICE