EMPLOYMENT TRIBUNALS

Claimant: **Mr J Killen**

Respondent: **Parrhesia Inc.**

Heard at: **Leeds** **On:** **7,8,9,12,13 and 14 June 2023**
Deliberations in Chambers: 30 June 2023

Before: **Employment Judge Shepherd**

Members: **Mr. G Corbett**
Mr. R Webb

Appearances
For the Claimant: **Mr. Mitchell KC**
For the Respondent: **Mr. Pacey, counsel**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claims of discrimination arising from disability are not well-founded and are dismissed.
2. The claims of detriment for making a protected disclosure are not well-founded and are dismissed.
3. The claims that the claimant was victimised because he had done a protected act are not well-founded and are dismissed.
4. The claims of harassment related to disability are not well founded and are dismissed.
5. The claims of outstanding holiday pay and failure to provide a written statement of terms and conditions succeed. The parties' representatives indicated that they would seek to reach agreement with regard to the amounts to be paid.

REASONS

1. The claimant was represented Mr. Mitchell KC and the respondent was represented by Mr. Pacey, counsel. The Tribunal heard evidence from:

James Killen, the claimant;

David Dickson, Trustee;

Holly Bowden, Former Trustee (by CVP video link);

Ian Foxley, Chief Executive Officer;

David McDowell, Chair of the Board of Trustees.

5. The Tribunal had sight of a bundle of documents which consisted of a main bundle which, together with documents added during the course of the hearing, was numbered up to page 585 and a supplementary bundle numbered up to page 38. The Tribunal was also provided with a bundle of inter partes correspondence numbered up to page 46. The Tribunal considered those documents to which it was referred by parties.

6. The Issues

1. Status: was the claimant a worker or employee

It was conceded by the respondent that the claimant was an employee.

2. Discrimination arising from disability (Equality Act 2010 section 15)

2.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability from 1 to 5 July 2021?

This was conceded by the respondent.

2.2 Did the Respondent treat the Claimant unfavourably by:

2.2.1 On 1 July 2021, Mr Foxley used the Claimant's criminal record to instigate an ad hoc HR process (paragraph 8 of the Claimant's particulars of claim)

2.2.2 On 2 July 2021 the Respondent used the Claimant's criminal record to pressure the Claimant into submitting his resignation and accepting a minor role. (paragraph 10 of the Claimant's particulars of claim)

2.2.3 On 1 July 2021, Mr Foxley created a fictitious complaint from a fictitious person to bolster their apparent/purported concerns

about the Claimant (paragraph 8 of the Claimant's particulars of claim)

2.2.4 On 5 July 2021, My Foxley subjected the Claimant to unnecessary restrictions (as set out in paragraph 11 of the Claimant's particulars of claim)

1.3.Did the following arise in consequence of the Claimant's disability (PTSD):

1.3.1. The Claimant's criminal conviction?

1.4. Was the unfavourable treatment because of any of those things?

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

1.5.1. ensuring it acted in accordance with regulatory requirements of the charity commission;

1.5.2. managing its reputation and relationship with the charity commission, funders, trustees, members, future employees, partners, the public at large and women in particular; and

1.5.3. ensuring its workforce and those having fiduciary responsibilities maintained high standards of conduct including honesty and integrity.

1.6. The Tribunal will decide in particular:

1.6.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;

1.6.2. could something less discriminatory have been done instead;

1.6.3. how should the needs of the Claimant and the Respondent be balanced?

3. Harassment related to disability (Equality Act 2010 section 26)

3.1 Did the Respondent do the following things:

3.1.1 Mr Foxley subjected the Claimant to verbal abuse on 5 July 2021 including by saying "you're a coward", "you're damaged goods", "you need to prove your loyalty to the board".

3.2 If so, was that unwanted conduct?

3.3 Did it relate to disability?

3.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Victimisation (Equality Act 2010 section 27)

4.1 Did the Claimant do a protected act as follows:

4.1.1 On 5 July 2021, the Claimant disclosed to Mr McDowall the alleged harassment (referred to above) by Mr Foxley?

4.2 Did the Respondent do the following things:

4.2.1 From 12 July 2021 onwards, Mr Foxley created an increasingly hostile working environment as set out in paragraph 14 of the Claimant's particulars of claim – by sending emails directing the Claimant to complete tasks with tight deadlines and requiring that he report only to Mr Foxley and despite being told that Mr Foxley had been told not to contact the Claimant.

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

4.4 If so, was it because the Claimant did a protected act?

4.5 Was it because the Respondent believed the Claimant had done, or might do, a protected act?

5. Protected Disclosure Detriment

5.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

5.1.1 What did the claimant say to David McDowall in a telephone call in May of 2021? The claimant says he told Mr McDowall that Mr Foxley was using the charity for personal causes (his witness statement will confirm and the call took place following an email, to be provided in disclosure, asking for time to discuss)

5.1.2 Did he disclose information?

5.1.3 Did he believe the disclosure of information was made in the public interest?

5.1.4 Was that belief reasonable?

5.1.5 Did he believe it tended to show that:

5.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation (namely the constitution of the charity and charity regulation generally);

5.1.6 Was that belief reasonable?

5.2 If the claimant made a qualifying disclosure, was it made to his employer or another permitted person within *ERA sections 43C, 43D, 43E, 43F, 43G, or 43H*

If so, it was a protected disclosure.

6. Detriment (Employment Rights Act 1996 section 48)

6.1 Did the respondent (Mr McDowell, Mr Foxley, Mr Dixon) subject the claimant to an ad hoc, invasive arbitrary and disproportionate HR process with no mechanism to appeal or for discussion on 2 July 2021?

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

6.3 If so, was it done on the ground that the claimant made a protected disclosure?

7. Remedy for discrimination or victimisation or protected disclosure detriment

7.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend? (Equality Act claims only)

7.2 What financial losses has the discrimination caused the Claimant?

7.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.4 If not, for what period of loss should the Claimant be compensated?

7.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

7.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

7.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.9 Did the Respondent or the Claimant unreasonably fail to comply with it?

7.10 If so, is it just and equitable to increase or decrease any award payable to the Claimant?

7.11 By what proportion, up to 25%?

7.12 Should interest be awarded? How much?

8. Holiday Pay (Working Time Regulations 1998)

8.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

8.2 What was the claimant's leave year?

8.3 How much of the leave year had passed when the claimant's employment ended?

8.4 How much leave had accrued for the year by that date?

8.5 How much paid leave had the claimant taken in the year?

8.6 Were any days carried over from previous holiday years?

8.7 How many days remain unpaid?

8.8 What is the relevant daily rate of pay?

8.9 Is the claimant entitled as he asserts to aggregate his entire annual leave pro-rata from 26 October 2020 until 31 July 2021 and claim for all accrued leave at the remuneration rate only payable from May 2021?

9. Employment Act 2002 – failure to provide a written statement of terms of employment

[Schedule 5 Employment Act 2002 cases]

9.1 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

9.2 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

9.3 Would it be just and equitable to award four weeks' pay?

Background/ facts

7. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions. The numbers in brackets are references to the page numbers of the documents within the bundle of documents.

8. Where the Tribunal heard evidence on matters for which it makes no finding, or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Some of the Tribunal's findings are also set out in its conclusions, to avoid unnecessary repetition. The Tribunal has anonymised the identity of those mentioned who were not parties, did not appear before the Tribunal or provide a witness statement. The numbers included in brackets are the relevant page numbers of the agreed bundle of documents provided for the hearing.

9. The respondent was registered as a charity in February 2021. It was set up following discussions between the claimant and Ian Foxley. They both had an academic interest in whistleblowing. The charity was set up as a research charity. The claimant became the Chief Operations Officer and Ian Foxley the Chief Executive Officer.

10. Both the claimant and Ian Foxley had military backgrounds. The claimant had been an Army officer seconded to a civil contractor as a Nursing Officer. He had served in Afghanistan in 2014 and witnessed horrific injuries.

11.The claimant had made Ian Foxley aware that he had a criminal conviction. Ian Foxley said that the claimant had told him that he had "been involved in a low-level altercation with his girlfriend that got out of hand when he had checked her phone and discovered that she had been an escort in her previous life". He said that the claimant told him that he had merely thrown some water at her and that he only ever slapped her.

12. David Dickson became one of the respondent's trustees in or around March 2021. He received a LinkedIn request from the claimant and saw that he had served in the army in Germany. David Dickson's sister, Linda Harris, had also worked in the same part of Germany that the claimant had served in. David Dickson asked Linda Harris if she knew the name. She recognised the claimant from the Linkedin photograph and Linda Harris sent an email to David Dickson on 22 June 2021 enclosing the notes of a Nursing and Midwifery Council (NMC) hearing in which the claimant (in his previous name) had been struck off the Nursing and Midwifery Register.

13. David Dickson was concerned about the information provided and that it could cause significant reputational damage to the respondent.

14. The NMC report (173) included information about the claimant's criminal conviction on 27 May 2017 and the description by the Crown Court Judge about the events that had occurred when claimant had attended a wedding with his girlfriend (Miss A). At the end of the evening Miss A fell asleep in a bedroom which she was sharing with the claimant. He:

"… took the opportunity to read messages that were on Miss A's phone. The Judge in the Crown Court described what happened as follows:

> "On that phone you found material you did not like about what (Miss A) had been doing or what you thought she had been doing or who she had been seeing. You were upset by that. You were incensed by it. It is the sort of situation where people have arguments, but what you did was pick up a jug or kettle of water, pour it over her head as you (sic) slept and started to shout abuse, and saying that you wished you had boiled the kettle. You punched her in the face, you… "busted her nose" is the phrase used. I am not sure it was actually broken, and you hit her with such force that you knocked the teeth braces out of her mouth. You pulled her around by her hair, so that clumps of that hair came out, and are only starting to grow back. You pushed her on the floor, and in a degrading gesture, spat in her face."
>
> Following these events, the registrant (claimant) refused to let Miss A have her phone back or her keys and prevented her from leaving the room. Moreover, the registrant 'strangled and throttled' Miss A and called her names like 'dirty whore' and 'slag'. The registrant also beat Miss A around the head 'so hard that her ears were ringing'.
>
> The Judge described how the registrant allowed Miss A to leave the room at 05:00. But he kept her phone 'and because (he) knew about the images on that phone, some of which (he) had asked her to make, and which she was frightened of going further, that was itself a factor about abuse of power, that I regard as an aggravating factor'.
>
> Following the events of 25 September 2016, Miss A tried to take her own life later that day. She took an overdose and was treated in hospital for one week thereafter.
>
> After the incident the registrant continued to contact Miss A. He claimed that he had acted in self-defence and sought to victim blame citing the content he had founded on her phone. The registrant also sent Miss A threatening phone messages which included one that said "you'd better lock your door. I'll smash your face in, you fucking cunt". The Judge noted that this was a 'serious aggravating factor given that you had smashed her face in already, so it was not an empty threat.

In sentencing the Crown Court Judge also stated:

> I regard this as a particularly nasty and serious offence of its kind. I regard you as particularly culpable because you were in a position of power and control over your victim, and because as a senior officer in the army and a psychiatric nurse, you should have known better. But you abused those positions. That breach of trust and abuse of power, make you particularly to blame… The physical assaults which took place in the context of that controlling and bullying behaviour were nasty assaults. You are bigger than her and older, and you had taken away the victim's means of escape

> from you, her keys and her phone. And this was a sustained assault over a long period of time, as a result of which she lost her hair and suffered bruising and other injuries.
>
> A medical report that was available to the Crown Court also showed, following the offence, that Miss A suffered from:
>
> - An adjustment disorder
> - flashbacks, nightmares including nightmares about you throttling her
> - a depressive illness with significant anxiety and post-traumatic stress disorder
>
> The Judge also recorded that Miss A is having to reconsider her position as a nurse in the army because of the PTSD, and she finds it hard to make friendships, and is frightened to be alone with men, because of the way you have made her feel about herself and about a man that she trusted. Miss A is now re-registered as a nurse."

15. In the psychiatric report by Dr Bott dated 27 February 2023(539) following a consultation on 1 March 2022 by video it is stated:

> "During his service at Tidworth Mr Killen formed a relationship with a nurse who was serving in the Army. He described how when they were both guests at a wedding during which he became aware that she had been involved in relationships with other men and an altercation resulted. From his account to me, he was attacked by the young woman, he retaliated in self-defence and also, on one occasion, he slapped her. In my opinion, his behaviour at the time of this incident was materially and substantially influenced by his Post-Traumatic Stress Disorder which impaired his ability to distance himself emotionally from the situation and to exercise effective control over his behaviour. This is a well-recognised feature of sufferers from PTSD particularly among veterans of Army service. It is important to emphasise that, from his account to me, Mr Killen had refrained from drinking alcohol on the evening in question, therefore alcohol did not contribute to emotional dysregulation.
>
> In my opinion Mr Killen's legal advisers actively prevented his psychological state at the time of the incident being properly considered by the Court. From his account to me, Mr Killen was told to reply 'no comment' when he was interviewed by the police, something which denied him the opportunity to present his version of events which would have been grossly at variance with that of his accuser, together with recognition of his mental state at the time of the offence which would have potentially provided him with mitigation and the possibility, therefore, of avoiding a custodial sentence.
>
> In due course Mr Killen appeared in the magistrates court charged with causing actual bodily harm, coercion and intimidating a witness and he was remanded on bail. When he appeared at the Crown Court he described how the CPS offered to drop the charges of coercion and intimidating a witness if he pleaded guilty to causing actual bodily harm. He followed this course pleading guilty, even though

> he did not feel that in reality he was guilty of the offence with which he was charged. He received a custodial sentence and resigned his commission on the day of his sentence."

16. Dr Bott gave his opinion that the claimant's PTSD was a material and substantial factor in his criminal offence which resulted in his conviction and custodial sentence. He also stated that, in his opinion, the claimant's legal advisers actively prevented his mental state at the time of his offence being properly considered when he appeared in court.

17. When provided with agreed written questions by counsel during this hearing, he replied indicating that the Crown Court Judge's observations were a biased account based solely on the victim's description of events and that the claimant had received inappropriate advice from his legal advisers.

18. It is clear that the claimant was seeking to minimise his offence when providing his narrative to the psychiatrist. The criticisms by Dr Bott of the Crown Court Judge and the claimant's legal advisers in respect of the criminal case which were based on a one-hour video consultation appear to be, perhaps, unfortunately partisan.

19. David Dickson raised his concern about the details of the claimant's criminal conviction with Ian Foxley and sent the NMC decision to him on 23 June 2023.

20. It was agreed that David McDowall, David Dickson and Ian Foxley would meet with the claimant.

21. The claimant provided Ian Foxley with a draft of his application for the Armed Forces Compensation Scheme (AFCS) claim on 30 June 2021. On 1 July 2021 Ian Foxley asked the claimant if he could share the draft AFCS claim with David McDowall and David Dickson.

22. On 1 July 2021 Ian Foxley sent an email to David McDowall and David Dickson (222) in which enclosed a copy of the claimant's draft of this claim for an army pension by virtue of PTSD incurred from his active service in Afghanistan. It was stated:

> "It came to me for proofreading (hence the odd red ink) this morning BEFORE he was aware of the current issues raised and your meeting tomorrow. Having read it I believe it is essential that you read it before your meeting since I doubt you could collectively cover the ground in such depth tomorrow. I believe it sheds light on a wide number of aspects and will help you to view the range of issues that confronts both him and us. I have just spoken to him and he has agreed that I can share it with you both.
>
> Please note that following my discussion with him this morning, he has drafted a letter of resignation which he will present to you tomorrow as a matter of honour. Whether you accept it on the spot is for you to decide but I believe it would be a pre-emptive, unfortunate, and unnecessary action that would be disservice to him and the wider ethos of Parrhesia. He will meet you both at the Mont Royale, the Mount, York at 11:30 hrs tomorrow."

23. On 2 July 2021 the claimant sent an email to a chaplain from HMP Hewell in which he stated that (223):

> "Some Army nursing Col who is the sister/sister-in-law of one of the trustees for the charity I've just set up has told him about my conviction.
>
> The retired general who is the chair of the board is coming up on the train from London tomorrow to talk to this guy, and then with me.
>
> I think I'm going to have to resign."

24. On 2 July 2021 the claimant attended a meeting with David McDowall and David Dickson. Ian Foxley was unable to attend the meeting due to having been admitted to hospital. The claimant provided a letter addressed to Major General McDowall (226) in which he stated:

> "Ian has updated me on what has happened. I want to thank you for taking the time to travel to York to speak to me in person.
>
> I started Parrhesia with Ian because I believe in what we have set out to achieve. What we will do will improve how we live and improve the lives of people who have tried to do the right thing. Although Parrhesia has moved rapidly, I recognise that we are still at a nascent stage of development. Not only do we need to maintain the interest and batting we have had so far, but we need to attract more. Our reputation is key to the success of this.
>
> The people I have come to know in Parrhesia are good people. I know there are other good people around too. I trust Ian fully and I am grateful for his, and your, support. However, the fact remains I am a liability to the reputation of the organisation. I am not selfish enough to throw away what we have achieved so far, therefore beyond anything to do is resign.
>
> To me, rehabilitation is having a place as of right based on merit. Not because of the flavour or someone deigned to allow one to be a part. On this principle, I feel unable to continue at Parrhesia following any discussion at the Board of Trustees about the rename. I understand and appreciate why you would see this as necessary, but I hope you can see my point of view. I would not want to stay anywhere on this basis.
>
> I resign my position from the Board of Trustees and offer you my resignation as Chief Operations Ofc. I sincerely wish Parrhesia every success."

25. At the meeting on 2 July 2021 The claimant was urged to consider whether he really wanted to resign. It was indicated to him that they wished to retain his services. The full circumstances of the claimant's conviction was a concern for the charity and a reputational risk.

The claimant sent an email to David McDowall (89). He stated that

> " what I took from today's meeting was:

- There is anxiety about the reputation of the organisation

- A recognition that my role is key to future development, that it would be very difficult to find a replacement so there is an appetite for to continue to do the same work

- A desire to support me at this stage in my life

- The proposed solution is to change my mode of employment to that of a contractor on a self-employed basis, to discuss this plan at the board, but essentially to do so as a fait accompli, and then return to "normal jogging"

26. The claimant went on to refer to the Rehabilitation of Offenders Act 1974 and concerns about the respondent's reputation and he stated:

> "I hope you have seen this letter as a reflection of my dedication, not just to the issues I've mentioned here but to Parrhesia. It is not meant as a soapbox. I know everyone is replaceable, but I recognise the difficulty it would cause the organisation if I left at this stage. By going to the length of writing this, I am attempting to be able to explain the position I approach this from, in the hope of coming to a solution that helps and supports everyone.
>
> If it is clear to you immediately, that there is no hope of concluding things incorporating what I have said here, then I would be grateful if I could resign based on health reasons and the commitment of my soon to restart PhD.
>
> In any event, I look forward to speaking to you next week, I would like to thank you again for today's meeting and the manner in which you have dealt with this issue, and with me."

27. Also on 2 July 2021 the claimant sent an email to David McDowall (225) stating:

> "Thank you for today. I wanted to update you on where I am. My position is that I don't want my private life to be brought in and discussed at the board in any way at all. From what was said today, the only way I see to achieve that is to walk away from Parrhesia entirely.
>
> This wouldn't be ideal, for lots of reasons, but having been through this process several times before I know what it entails and I am not prepared to do it again. For me there was also a matter of principle at stake.
>
> I appreciate that we only spoke this morning, and I have had only the briefest chats with Ian, so would be happy to chat more if you thought it could be helpful. Next week my diary has lots of spaces and there are things I could move.
>
> Otherwise I'd like to resign stating my health and the upcoming academic commitments I will have with my soon to restart PhD."

28. The claimant said that this meeting was an ad hoc HR process. The Tribunal is not satisfied that it was. Matters were discussed but nothing was agreed and it was made clear that any proposal would have to go before the Board. There were discussions and the respondent's witnesses were clear that wanted to keep the claimant. David McDowall said that they were trying to work out a way the claimant could continue to work for the charity and maintain his financial position until his conviction would be spent the following year.

29. The evidence and surrounding correspondence does not support the allegation that the claimant was pressured into submitting his resignation and accepting a minor role. There was a concern about potential danger to the respondent's reputation. Nothing had been decided and any proposal would have to go to the Board.

30. Holly Bowden sent an email on 2 July 2021 to Ian Foxley and David McDowall (243) although they said this was not received until 7 July 2021 when she sent a further copy. She stated:

> "On an employment law note, we are aware that James suffers PTSD and that his mental health played into the crime for which was convicted. From my perspective, James' criminal record is a private matter which does not relate to the objects of Parrhesia and as such I do not think it poses a reputational risk to Parrhesia as an organisation.
>
> James is under treatment as I understand which means he is doing what he can to manage his condition. As an employer it is incumbent on us to make reasonable adjustments for employees with mental and/or physical health conditions which may fall within the definition of a disability for the purposes of the Equalities Act. PTSD will almost certainly fall within the definition. Reasonable adjustments might include time off for medical appointments, flexible working hours etc. James should be asked to advise what he needs to make sure he stays well enough to perform and thrive in the role."

31. Holly Bowden's evidence was that she was surprised to hear that the claimant had offered his resignation on 2 July 2021. Also, she was not aware of the details of his conviction and the Crown Court Judge's sentencing remarks.

32. On or around 5 July 2021 the claimant had a telephone conversation with Ian Foxley. He said that he felt he was being forced to leave and Ian Foxley replied saying, "listen, you're damaged goods" and that "you'd be a coward if you leave", and "you need to prove your loyalty to the board".

33. Ian Foxley said that he had advanced the view that, if he left the charity now, the claimant might be seen by third parties as having "run away from the issue and viewed as a coward for having done so". Ian Foxley said that he stated that they believed that the claimant's continued engagement with the charity offered him the possibility of protective work in a supportive environment until his conviction was spent. He also said to the claimant that they were all whistleblowers, including Ian Foxley, David McDowall and the claimant. They were all damaged goods by the very nature of enduring the whistleblowing experience.

34. Ian Foxley said he made the comments as part of his discussion with the claimant in trying to retain his services within the respondent and that he meant absolutely no derogatory harm to the claimant.

35. A further meeting took place on 16 July 2021 between the claimant, Ian Foxley and David McDowall. It was put to the claimant that he could continue to work with the respondent charity and be paid his normal monthly amount but he would have to step down as Trustee and Chief Operating Officer.

36. On 22 July 2021 the claimant wrote to David McDowall (286) with a request to initiate without prejudice discussions under section 111A of the Employment Rights Act 1996. He referred to the meeting on 2 July 2021 in which he stated he had been taken through an ad hoc HR process where proposals were made to arbitrarily change his job title (i.e. a demotion) and that he should resign as a trustee because of his criminal record. He also referred to the trustee (David Dickson) with an undeclared conflict of interest.

37. He referred to the telephone call which was stated to have been on 6 July 2021 with Ian Foxley and the claimant stated that it had been said:

> "… That I would be a "coward" and "running away" if I decided to resign, that I was "damaged goods", and that I'd got to prove (myself) to the board".

38. The claimant also referred to the meeting on 16 July 2021 and that it had been agreed that the trustee with a conflict of interest would need to resign. He said he left that meeting feeling much better. However, on 19 July 2021 the claimant attended a meeting with the Department of Business Energy and Industrial Strategy together with Ian Foxley. The claimant said this demonstrated that the CEO lacked the ability to be objective and appreciate longer term strategy. He also indicated that it had been suggested a meeting between the trustee in question and the claimant would be appropriate. The claimant referred to that as a prioritisation of a trustee who had shown poor judgment and who had been duplicitous in his disclosure of conflict, over the co-founder who had driven the establishment of the organisation.

39. The claimant also referred to being called a coward, damaged goods and being told that he needed to prove himself to the Board of Trustees as the highest insult.

40. The claimant proposed terms of settlement which included his employment with the respondent coming to an end.

41. On 30 July 2021 David McDowall wrote to the claimant accepting his letter of resignation dated 2 July 2021.

42. The claimant's employment terminated on 31 August 2021 and, following the ACAS early conciliation process, the claimant presented a claim to the Employment Tribunal. The claimant brought claims of disability discrimination – discrimination arising from disability, harassment related to disability, victimisation and outstanding holiday pay. The claimant was later allowed to amend his claim to include a claim of protected disclosure detriment under section 47B of the Employment Rights Act 1996 following a Preliminary Hearing before Employment Judge Miller on 7 April 2022.

The Law

43.. **Discrimination arising from Disability**

44. Section 15 of the Equality Act 2010 states:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arises in consequences of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Sub-Section (1) does not apply if A shows that A did not now, and could not reasonably have been expected to know, that B had the disability.

45. Under section 15 there is no requirement for a Claimant to identify a comparator. The question is whether there has been unfavourable treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in **Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams UKEAT/0415/14** at paragraph 28. As the EAT continued in that case (see paragraph 29 of the Judgment), the determination of what is unfavourable will generally be a matter for the Employment Tribunal.

46. The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the Claimant's disability; see **IPC Media Ltd v Millar [2013] IRLR 707**: was it because of such a consequence?

47. With regard to justification, The EAT in **Hensman v Ministry of Defence UKEAT/0067/14/DM, [2014] EQLR 670** applied the justification test as described in **Hardy and Hansons Plc v Lax [2005] ICR 1565**, CA to a claim of discrimination under section 15 Equality Act 2010. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. In effect the Tribunal needs to balance the discriminatory effect of the stated treatment against the legitimate aims of the employer on an objective basis in considering whether any unfavourable treatment was justified.

48. The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.

49. In the case of **Pnaiser v NHS England [2016] IRLR 170** it was provided as follows:

"In the course of submissions I was referred by counsel to a number of authorities including **IPC Media Ltd v Millar [2013] IRLR 707, Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN** and **Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893**, as indicating the proper approach to determining section 15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:

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

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

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: **see Nagarajan v London Regional Transport [1999] IRLR 572**. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in **Land Registry v Houghton UKEAT/0149/14** a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of **Weerasinghe** as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in **Weerasinghe**, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

50. In the case of **A Ltd v Z [2019] IRLR 952** it was stated by Eady J*:*

> "(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see ***City of* York Council v Grosset [2018*]* EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492 CA** at para 39**.**
>
> (2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see **Donelien v Liberata UK *Ltd (2014)* UKEAT/0297/14, [2014] All ER (D) 253** at para 5, per Langstaff P, and also see ***Pnaiser v NHS***

England *(2016)* UKEAT/0137/15/LA, [2016] IRLR 170 EAT at para 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see **[2018] EWCA Civ 129, [2018] IRLR 535 CA** at para [27]; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see **Herry v Dudley Metropolitan Council *(2016)* UKEAT/0100/16, [2017] ICR 610**, per His Honour Judge Richardson, citing **J v DLA Piper UK LP *(*2010) UKEAT/0263/09, [2010] IRLR 936, [2010] ICR 1052)*,** and (ii) because, without knowing the likely cause of a given impairment, *'it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]'*, per Langstaff P in **Donelien** EAT at para 31.

(5) The approach adopted to answering the question thus posed by s 15(2) is to be informed by the Code, which (relevantly) provides as follows:

> '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 be 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 personal information is dealt with confidentially.'

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so *(***Ridout v TC Group *(*1998) EAT/137/97, [1998] IRLR 628*; Alam v Secretary of State for the Department for Work and Pensions *(2009) UKEAT/0242/09, [2010] IRLR 283, [2010] ICR 665).***

(7) Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such

> enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."

51. In the case of **City of York Council v Grosset [2018] IRLR 746** the Court of Appeal held that section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) 'something'? (ii) and did that 'something' arise in consequence of B's disability?

52 **Burden of Proof**

Section 136 of the Equality Act 2010 states:

> "(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 sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.
>
> (5) This Section does not apply to proceedings for an offence under this Act.
>
> (6) A reference to the court includes a reference to –
>
> (a) An Employment Tribunal."

53 Guidance has been given to Tribunals in a number of cases. In **Igen v Wong [2005] IRLR 258** (a sex discrimination case decided under the old law but which will apply to the Equality Act) and approved again in **Madarassy v Normura International plc [2007] EWCA 33.**

54 To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from

which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

55 In **Project Management Institute v Latif (2007) IRLR 579** The EAT gave guidance as to how Tribunal's should approach the burden of proof in failure to make reasonable adjustments claims. The burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, in the absence of an explanation, that it has been breached. It was noted that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given its own particular circumstances. Therefore the burden is reversed only once potential reasonable adjustment has been identified. It will not be in every case that the claimant would have to provide the detailed adjustment that would have to be made before the burden shifted, but "it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not". The proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, not even until the Tribunal hearing.

Harassment

56. Section 26 of the Equality Act provides

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

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

(b) the conduct has the purpose or effect of--

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

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

(a) the perception of B;

(b) the other circumstances of the case;

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

Victimisation

57. Section 27 of the Equality Act provides as follows:-

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) Bringing proceedings under this Act;

(b) Giving evidence or information in connection with proceedings under this Act;

(c) Doing any other thing for the purposes of or in connection with this Act;

(d) Making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Protected Disclosure Claim

58. Section 43B(1) of the Employment Rights Act 1996

"(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 –

(a) that a criminal offence has been committed, is being committed or is likely to be committed;

(b) obligation to which he is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health or safety of an individual has been, is being or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged; or

(f) that information tending to show any matter falling within any one the preceding paragraphs has been or is likely to be deliberately concealed".

59. Section 47B (1)

"A worker has the right not to be subjected to any detriment by an act, or

> any deliberate failure to act, by his employer done on the ground that the workers made a protected disclosure."

60. Mummery LJ in in the well-known Court of Appeal case of **NHS Manchester v Fecitt & Others [2011] EWCA Civ1190** made it clear that liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detriment.

> "In my judgment, the better view is that Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower. If Parliament had wanted the test for the standard of proof in section 47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so…
>
> > Where the whistle-blower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical eye – to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation

61. The Tribunal had the benefit of a bundle of agreed authorities together with oral submissions provided by the representatives. These were helpful. They are not set out in detail in these reasons but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

62. The claimant's evidence was difficult. He was clearly distressed and, at times, confused. He had downplayed the extent of his assault and conviction to numerous people.

63. In an application to the University of York dated 18 July 2017 (134) the claimant had stated that he had received a number of painful blows to the head and that he retaliated by slapping his girlfriend back to prevent her from assaulting him further.

64. In the report provided by Dr Bott (555) it is stated that, from the claimant's account to Dr Bott he said was attacked by the young woman and retaliated and, on one occasion, he slapped her.

65. In a letter from Dr Matt Kemsley, clinical psychologist (572) it is stated that the claimant reported he had been imprisoned after hitting his then partner and this was self-defence in response to her repeatedly hitting him.

66. The Crown Court Judge said that the claimant said he was acting in self-defence and that was seeking to "victim blame" Miss A.

67. Holly Bowden was shocked when she was informed of details of the extent of the assault.

68. The claimant misled Ian Foxley about the extent and nature of his conviction. Ian Foxley said that the claimant had led him to believe that the conviction was for common

assault the claimant said that that he had been involved in a low-level altercation and that he had thrown some water at his girlfriend and only ever slapped her.

69. The claimant changed his name by deed poll on 17 October 2018(141). The claimant did not specifically say that this was done to avoid being identified with the conviction but the Tribunal is satisfied that this must have been at least partly to avoid being connected with his conviction He was very concerned about his reputation. He acknowledged that he was a risk to the reputation of the respondent in his letter of resignation. The respondent did not know the extent of the assault before it received the NMC report.

1. Status: was the claimant a worker or employee

70. It was accepted by the respondent that the claimant was an employee within the meaning of section 230 of the Employment Rights Act 1996.

2. Discrimination arising from disability (Equality Act 2010 section 15)

2.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability from 1 to 5 July 2021? If

71. It was accepted by the respondent that the claimant was a disabled person and that the respondent had knowledge that disability at the material time.
.

2.2 Did the Respondent treat the Claimant unfavourably by:

2.2.1 On 1 July 2021, Mr Foxley used the Claimant's criminal record to instigate an ad hoc HR process (paragraph 8 of the Claimant's particulars of claim)

72. The Tribunal is not satisfied that this was an ad hoc HR process. There was a genuine concern on the part of the respondent and there was no credible evidence of a fictitious complaint. There was information provided to David Dickson by his sister and this raised an issue with regard to potential reputational damage to the respondent. Conversations took place with the claimant and the Tribunal is satisfied that the respondent wished to retain the claimant within the charitable organisation.

2.2.2 On 2 July 2021 the Respondent used the Claimant's criminal record to pressure the Claimant into submitting his resignation and accepting a minor role. (paragraph 10 of the Claimant's particulars of claim)

73. The claimant's letter of resignation was in clear terms. There was no mention of any pressure. He acknowledged that he was a liability to the reputation of the respondent. The claimant prepared and handed in his resignation. It was clear from the email from Ian Foxley (222) that he viewed it as a "pre-emptive, unfortunate, and

unnecessary action." He said that it was a matter for David McDowell and David Dickson as to whether they accepted the claimant's resignation. The claimant's resignation was not accepted at this stage. The respondent made efforts to retain the claimant within the respondent charity.

2.2.3 On 1 July 2021, Mr Foxley created a fictitious complaint from a fictitious person to bolster their apparent/purported concerns about the Claimant (paragraph 8 of the Claimant's particulars of claim)

74. There was no credible evidence of a fictitious complaint. It was information provided to David Dickson by his sister.

2.2.4 On 5 July 2021, My Foxley subjected the Claimant to unnecessary restrictions (as set out in paragraph 11 of the Claimant's particulars of claim)

75. The claimant referred to a request by Mr Foxley to return his debit card for the charity business bank account. The claimant had resigned as the Chief Operations Officer. There was a new Chief Financial Officer due to start. This action was for operational reasons. The relationship had changed and the claimant would no longer be the Chief Operations Officer.
.

2.3.Did the following arise in consequence of the Claimant's disability (PTSD):

2.3.1. The Claimant's criminal conviction?

76. Dr Bott's evidence was that, in his opinion, the claimant's Post Traumatic Stress Disorder was a material and substantial factor in his criminal offence. Mr Pacey submitted that the Tribunal should be slow to accept that criminality arises from disability. In this case it was not the fact of the conviction it was the serious nature of the offence and the potential reputational damage to the respondent that was the concern. The "something" arising from the claimant's disability was the knowledge of the claimant's conviction under his previous name and how serious the assault had been by the revelation of the NMC report by David Dickson's sister'

77, The Tribunal accepts that the claimant's PTSD had a material influence on the assault by the claimant leading to his conviction.

2.4. Was the unfavourable treatment because of any of those things?

78. The Tribunal is not satisfied that the claimant was subjected to unfavourable treatment.

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

2.5.1. ensuring it acted in accordance with regulatory requirements of the charity commission;

79. There were no specific regulatory requirements relied on by the respondent other than the general and fiduciary requirements*.*

> 2.5.2. managing its reputation and relationship with the charity commission, funders, trustees, members, future employees, partners, the public at large and women in particular; and
>
> 2.5.3. ensuring its workforce and those having fiduciary responsibilities maintained high standards of conduct including honesty and integrity'

80. The respondent did not wish to dismiss the claimant. That was made clear to the claimant and there were discussions as to how he could continue and that matters would have to be discussed at the main Board of Trustees. The claimant was very concerned that he did not want this to be discussed at the full Board of Trustees.

81. The Tribunal is satisfied that the respondent's treatment of the claimant was supportive and a proportionate means of achieving the legitimate aims of managing its reputation and relationships and ensuring its workforce and those having fiduciary responsibilities maintained high standards of conduct.

> 2.6 The Tribunal will decide in particular:
>
> 2.6.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;
>
> 2.6.2. could something less discriminatory have been done instead;
>
> 2.6.3. how should the needs of the Claimant and the Respondent be balanced?

82. This was a serious situation which had arisen. The respondent tried to discuss matters with the claimant and to consider the appropriate options. The Tribunal accepts David McDowall's clear and credible evidence that he wanted the claimant's input to continue and he did not want him to suffer financially. There was no discriminatory treatment of the claimant and the respondent's actions were appropriate and reasonably necessary to achieve those aims.

3. Harassment related to disability (Equality Act 2010 section 26)

> 3.1. Did the Respondent do the following things:
>
> 3.1.1 Mr Foxley subjected the Claimant to verbal abuse on 5 July 2021 including by saying "you're a coward", "you're damaged goods", "you need to prove your loyalty to the board".

83. The claimant says that such language is particularly insulting and degrading for those with a military background.

84. Ian Foxley said that it was in the context of making proposals for retaining the claimant's services in the charity and retaining him until such time as his conviction was spent in order to reduce the reputational risk to the charity. He said that he stated that if the claimant left the charity he might be seen as having run away and be viewed as a coward for having done so.

85. The claimant's pleaded case was that he was subject to verbal abuse and informed "you're a coward", "you're damaged goods", "you need to prove your loyalty to the board.

86. In his witness statement the claimant referred to being told "listen, you're damaged goods" and that "you'd be a coward if you leave" and "you need to prove your loyalty to the board.

87. The Tribunal accepts the respondent's evidence that the remarks made by Ian Foxley were made in an effort to persuade the claimant not to resign. Ian Foxley gave clear evidence that he made the comments as part of his discussion with the claimant in trying to retain his services with the respondent.

88. Also Ian Foxley said that he referred to himself, the chairman, David McDowall and the claimant as all being damaged goods as a result of each of them going through a whistleblowing procedure.

89. The remark that the claimant needed to show loyalty to the board is not an act of harassment**.** The claimant had exposed the respondent to reputational risk. He had misled the respondent about his conviction. It was an appropriate remark in the circumstances. It did not have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

3.2. If so, was that unwanted conduct?

90. The remarks may have been unwanted, but the Tribunal is satisfied that they were made in the context of attempting to retain the claimant's services.

3.3. Did it relate to disability?

91. The Tribunal is not satisfied that such remarks related to the claimant's disability. They were remarks made in discussions with the claimant about the potential reputational damage following the discovery of the serious nature of the assault. If it was related to the claimant's disability, then the remarks were in a supportive context

3.4. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

92.The conduct did not have the purpose of violating the claimant's dignity etc. or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. If it was related to the claimant's disability, then the remarks were in a supportive context. Its purpose was to support the claimant and retain his involvement with the respondent charity.

3.5. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

93. Taking into account the claimant's perception and all the circumstances of the case, the Tribunal is not satisfied that it had the proscribed effect of violating the claimant's dignity etc. The remarks were intended to persuade the claimant not to resign from the respondent and were, essentially supportive. The relationship deteriorated following the revelation of the seriousness of the claimant's assault on his former girlfriend and the realisation that there was a potential reputational risk to the charity and that it would need to be discussed by the Board of Trustees.

4. Victimisation (Equality Act 2010 section 27)

4.1. Did the Claimant do a protected act as follows:

4.1.1 On 5 July 2021(or 12July 2021), the Claimant disclosed to Mr McDowall the alleged harassment (referred to above) by Mr Foxley?

94. The claimant's evidence as to whether he disclosed to Mr McDowall the alleged harassment by Mr Foxley and when he had done so was unclear. David McDowall denied such a conversation had taken place. The Tribunal is not satisfied that there was a protected act.

4.2. Did the Respondent do the following things:

4.2.1.From 12 July 2021 onwards, Mr Foxley created an increasingly hostile working environment as set out in paragraph 14 of the Claimant's particulars of claim – by sending emails directing the Claimant to complete tasks with tight deadlines and requiring that he report only to Mr Foxley and despite being told that Mr Foxley had been told not to contact the Claimant.

95. There was a change of tone in the emails from around 12 July 2021. The claimant had resigned from his position as Chief Operating Officer. The relationship had changed and the Tribunal is not satisfied that there was an increasingly hostile working environment or that any treatment occurred because of a protected act of any disclosure by the claimant to Mr McDowall.

4.3. By doing so, did it subject the Claimant to detriment?

4.4. If so, was it because the Claimant did a protected act?

4.5. Was it because the Respondent believed the Claimant had done, or might do, a protected act?

96. The Tribunal is not satisfied that the claimant was subject to a detriment because he had done a protected act or that the respondent believed the claimant had done, or might do a protected act.

5. Protected Disclosure Detriment

5.1. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

5.1.1. What did the claimant say to David McDowall in a telephone call in May of 2021? The claimant says he told Mr McDowall that Mr Foxley was using the charity for personal causes (his witness statement will confirm and the call took place following an email, to be provided in disclosure, asking for time to discuss)

5.1.2. Did he disclose information?

5.1.3.Did he believe the disclosure of information was made in the public interest?

5.1.4. Was that belief reasonable?

5.1.5. Did he believe it tended to show that:

5.1.5.1.a person had failed, was failing or was likely to fail to comply with any legal obligation (namely the constitution of the charity and charity regulation generally);

5.1.6. Was that belief reasonable?

5.2. If the claimant made a qualifying disclosure, was it made to his employer or another permitted person within *ERA sections 43C, 43D, 43E, 43F, 43G, or 43H*

97. The claimant made no reference to a protected disclosure in his letter of resignation, his correspondence with the respondent, his request for a negotiated settlement and his claim to the Tribunal. It was allowed to be included as an amendment following a Preliminary Hearing on 7 April 2022.

98. It is not credible that the claimant would wait almost a year before raising such a claim if it was true. If it had played any part in in the alleged treatment of the claimant, he would have raised it with the respondent before this time.

99. The claimant has an academic interest in whistleblowing and, if it had been an issue, the Tribunal finds that he would have raised it before then. The alleged disclosure was in May 2021 and the Tribunal is not satisfied that it played any part in the respondent's treatment of the claimant. David McDowall gave firm evidence that no such disclosure had been made. The Tribunal prefers David McDowall's evidence to that of the claimant.

6. Detriment (Employment Rights Act 1996 section 48)

6.1. Did the respondent (Mr McDowell, Mr Foxley, Mr Dickson) subject the claimant to an ad hoc, invasive arbitrary and disproportionate HR process with no mechanism to appeal or for discussion on 2 July 2021?

100. The Tribunal has found that the claimant was not subject to an ad hoc HR process. There was no detriment established.

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

6.3. If so, was it done on the ground that the claimant made a protected disclosure?

101. The Tribunal finds that there was no such detriment. The claimant has not satisfied the Tribunal that he made a disclosure and he has not established that there was any detriment on the grounds of making such a disclosure. The detriment was alleged to be in July 2021. There was no credible evidence that any treatment could be related to a protected disclosure.

102. The Tribunal is satisfied that claimant did not want the details of his conviction to be discussed at the full Board of Trustees. He was unhappy about David Dickson revealing the NMC report and he wanted him removed from the board of Trustees.

103. There was a concern about potential reputational damage to the respondent charity. This was a serious issue for the respondent. It was a newly formed charity. The Tribunal is satisfied that the respondent was trying to support the claimant and had tried to ensure that he stayed with the charity. Ian Foxley and David McDowall gave clear and credible evidence of this. It was suggested in discussions with the claimant that he could step down from the COO role until his conviction was spent.

104. David McDowall indicated that they would see whether the respondent could ensure that the claimant stayed in that role. He also said they would protect the claimant's financial status. It was made clear that no decision could be made without it being placed before the Board of Trustees.

105. In all the circumstances the Tribunal finds that the claims of discrimination arising from disability, detriment for making a protected disclosure, victimisation and harassment are not well-founded and are dismissed

106. The claims of outstanding holiday pay and failure to provide a written statement of terms and conditions succeed. The parties' representatives indicated that they would seek to reach agreement with regard to the amounts to be paid.

Employment Judge Shepherd

Date: 20 July 2023
Sent to the parties on:

Date: 25th July 2023
For the Tribunal Office:

……..……..