EMPLOYMENT TRIBUNALS

Claimant: **L Cooke**

Respondent: **Manchester University NHS Foundation Trust**

HEARD AT: Manchester **On:** 19-23 + 26-30 June 2023

BEFORE: Employment Judge Batten
A Jackson
Dr B Tirohl

REPRESENTATION:
For the Claimant: In person
For the Respondent: G Holden, Counsel

JUDGMENT having been sent to the parties on 7 July 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant presented 2 claims to the Employment Tribunal. The first claim was presented on 14 April 2021 (case number 2402886/2021). The response to that claim was received on 19 May 2021. On 15 July 2021, a case management preliminary hearing took place before Employment Judge Feeney. The claimant's second claim was issued on 4 October 2021 (case number 2411429/2021) and the response was filed on 30 October 2021. There were then 4 further preliminary hearings for case management. During the second of those further case management preliminary hearings, on 26 September 2022, a list of issues was finalised by Employment Judge Dunlop.

2. At the fifth preliminary hearing, Employment Judge Allen refused the respondent's strike out application but made deposit orders. The claimant failed to pay the deposits required and so, on 22 May 2023, her complaints of harassment related to age and detriments 1-3 of the protected disclosure detriment claim were struck out for non-payment of the deposit orders.

3. As a result, only the claimant's complaints of disability discrimination, being a failure to make reasonable adjustments, and protected disclosure detriment fell to be determined at this hearing. The disability which the claimant relies upon is her epilepsy.

Evidence

4. The Tribunal was provided with an agreed bundle of documents in the form of three lever arch files and in excess of 1,300 pages together with what was called the "B" bundle, which comprised further documents supplied by the claimant.

5. The claimant gave evidence from a written witness statement. The respondent called 5 witnesses to give oral evidence, each of whom provided a witness statement. The respondent's witnesses were: Kay Monks, an administration team leader and the claimant's line manager; Oksana Nagnybida, the Clinic Coordinator; Amy Wright, the respondent's Operational Manager; Joanne Jeffrey, an administration team leader; and Chris Chapman, the respondent's Divisional Director of Medicine at North Manchester General Hospital. All witnesses were subject to cross-examination.

6. The parties tendered an agreed cast list and a chronology which was disputed. The respondent also produced an opening note at the beginning of the hearing.

The Issues

7. At the case management preliminary hearing on 26 September 2022, a list of issues was drawn up, discussed and finalised. At the start of the final hearing, the Tribunal nevertheless reviewed and discussed the list of issues with the parties who each confirmed that the list was agreed. Those matters below which have a line through them are the matters for which the claimant failed to pay the deposits as ordered. The issues which the Tribunal had to determine were therefore as follows.

1. <u>Protected disclosures</u>

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

1.1.1. What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:

1.1.1.1. PD1 – On 30 July 2020 the claimant told her manager, Kay Monks, verbally in response to an instruction to go Stockport clinic the day before (29 July 2020), that the respondent has not complied with health and safety regulations and has put her, her vehicle and members of the public in danger. She said that as her employer, the respondent, is responsible for her health and safety whilst she is at work and that she should have been covered by business insurance before driving to another site, which should have been checked before her travel being authorised. She also said that if she had been in a road traffic accident she would not have been covered nor would her vehicle or any other person involved in the accident, and she showed her confirmation on her phone of this.

1.1.1.2. PD2 – On an unknown date the claimant told operations manager, Amy Wright, that the respondent has not complied with health and safety regulations and has put her, her vehicle and members of the public in danger. She said that as her employer, the respondent is responsible for her health and safety whilst she is at work and that she should have been covered by business insurance before driving to another site, which should have been checked before her travel being authorised. She also said that if she had been in a road traffic accident, she would not have been covered nor would her vehicle or any other person involved in the accident.

1.1.1.3. PD3 - On a date prior to the mediation on 8 September 2020 the Claimant verbally told Kay Monks and Amy Wright that she had not got business insurance cover as it was too expensive and that she was still making enquires with other insurance companies, and that Wythenshawe was difficult to get to on public transport. She also said that the Respondent has not complied with health and safety regulations and has put her, her vehicle and members of the public in danger. She said that as her employer, the Respondent is responsible for her health and safety whilst she is at work and that she should have been covered by business insurance before driving to another site, which should have been checked before her travel being authorised. She also said that if she had been in a road traffic accident she would not have been covered nor would her vehicle or any other person involved in the accident.

1.1.1.4. ~~PD4 – On 4 January 2021, the Claimant verbally told Kay Monks, Amy Wright and Oksana Nagynbidi that the~~

~~**Respondent has not complied with health and safety regulations and has put her, her vehicle and members of the public in danger. She said that as her employer, the Respondent is responsible for her health and safety whilst she is at work and that she should have been covered by business insurance before driving to another site, which should have been checked before her travel being authorised. She also said that if she had been in a road traffic accident she would not have been covered nor would her vehicle or any other person involved in the accident.**~~

1.1.2. Did she disclose information?

1.1.3. Did she believe the disclosure of information was made in the public interest?

1.1.4. Was that belief reasonable?

1.1.5. Did she believe it tended to show that:

1.1.5.1. A person has failed, was failing or was likely to fail to comply with any legal obligation;

1.1.5.2. The health or safety of any individual had been, was being or was likely to be endangered;

1.1.5.3. Information tending to show any of these things had been, was being or was likely to be deliberately concealed?

1.1.6. Was that belief reasonable?

1.2. **If the claimant made qualifying disclosures, they are protected disclosures if they were made to the claimant's employer.**

2. <u>Detriments</u>

2.1. **What are the facts in relation to the following alleged acts or deliberate failures to act by the respondent?**

~~**2.1.1. D1 – On 9 September 2020 the claimant was required to travel by bus to Wythenshawe for a mediation meeting, by Kay Monks and Amy Wright.**~~

~~**2.1.2. D2 – On 9 September 2020 the claimant was sent to a mediation meeting that was not genuine, by Kay Monks and Amy Wright.**~~

~~**2.1.3. D3 – On 9 September 2020 the claimant's telephone number was copied into a message to Nusrat Jabeen, by Kay Monks and the claimant received two malicious calls that evening from an anonymous male calling the claimant a "bitch".**~~

2.1.4. D4 – On 9 September 2020 the claimant was refused permission to change her day off, by Kay Monks.

2.1.5. D5 – On 11 September 2020 the claimant was accused by email of not printing off a clinic list when she had, by Kay Monks.

2.1.6. D6 – On 9 October 2020 the claimant's shift was changed at short notice, by Oksana Nagynbida.

2.1.7. D7 – On 9 October 2020 the claimant was accused of not prioritising patients, by Kay Monks.

2.1.8. D8 – On 12 October 2020 the claimant was questioned in front of patients by Oksana Nagnybida as to why the claimant had booked a patient in with reference 'as per Oksana' as Oksana was not in that day.

2.1.9. D9 – On 13 October 2020 the claimant was accused of booking a 15-year-old into an incorrect clinic, by Oksana Nagynbidi.

2.1.10. D10 – On 22 October 2020 the claimant was excluded from a team meeting, by Oksana Nagnybida and Kay Monks.

2.1.11. D11 –The claimant was subjected to unfair rotas. Nusrat Jabeen was given every Friday off and most Mondays for 6 weeks by Oksana Nagnybida and Kay Monks. On 28 October 2020, 30 October 2020, 16 November 2020, 18 November 2020, 19 November 2020, 23 November 2020, 24 November 2020 and 1 December 2020 the Claimant highlighted this and requested updates.

2.1.12. D12 – On 26 October 2020, 6 November 2020 and 16 November 2020 the claimant sent emails to her manager, Kay Monks requesting further details regarding the complaint which had been made against her but these requests were ignored.

2.1.13. D13 – On 3 November 2020 the claimant was accused of leaving a clinic list out overnight, by Kay Monks. The Clinic Manager, Annece Walker and Oksana Nagnybida were also copied into this email which is not usually required.

2.1.14. D14 – On 11 November 2020 Oksana Nagnybida sent an email asking if anyone wanted to request annual leave. Oksana refused to authorise the claimant's leave without Kay's permission and said she would have to wait for Kay to authorise it, yet she had authorized other leave the claimant had requested for 2021.

2.1.15. D15 – On 18 November 2020 the claimant's request for annual leave over Christmas was refused, by Kay Monks.

2.1.16. D16 – On 18 November 2020 the claimant was refused time off to access EAP, by Kay Monks.

2.1.17. D17 – The claimant raised a grievance in writing on 18 November 2020. This was acknowledged by Kay Monks on 19 November 2020 and Amy Wright on 30 November 2020. The claimant sent emails on 3 December 2020, 14 December 2020 and 23 December 2020 to Kay Monks and Amy Wright to highlight it had been two, four and five weeks since raising a grievance and still no meetings had been arranged.

2.1.18. D18 – On 1 December 2020 during a return-to-work meeting Kay Monks agreed to refer the claimant to occupational health, however this did not take place.

2.1.19. D19 – On 4 January 2021 the claimant was informed by Kay Monks and Amy Wright that she would have to work at the Manchester location, meaning that she would have to catch 4 buses.

2.1.20. D20 - On 4 January 2021 Amy Wright sent an email to the claimant confirming that she had managed to find the claimant's terms and conditions, and boldly underlined everything relating to travelling to other sites.

2.2. **Did the claimant reasonably see that act(s) or deliberate failure(s) to act as subjecting her to a detriment?**

2.3. **If so, was it done on the ground that she made one or more protected disclosures?**

~~**3. Age discrimination (harassment)**~~

~~3.1. **The claimant's age group is 59 plus. She compares herself with people in the age group, below 59.**~~

~~3.2. **Did the respondent do the following alleged acts?**~~

~~**3.2.1. On 8 September 2020 Nusrat Jabeen said to the claimant 'because of your age you are slow and everybody thinks so' and that she never liked her from the day she started work at The Orange Rooms because she was 'posh and snobby'. This is said by the claimant to have been witnessed by mediators, Sue and Judy.**~~

~~**3.2.2. On an unknown date Oksana Nagynbidi said to the claimant after she requested instructions on how to print the clinic list 'if I asked Nusrat to do that she would be able to do it immediately as she is younger than you and they taught it in schools then'.**~~

~~**3.2.3. On an unknown date the claimant was in the back office and overheard somebody commenting that it was cold in reception and Oksana Nagynbidi saying 'that's because women of a certain age'. The claimant says she always had the aircon on.**~~

~~3.3. **If so, was that unwanted conduct?**~~

~~3.4. **Was it related to age?**~~

~~3.5. **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?**~~

~~3.6. **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. Disability

4.1. **The impairment the claimant relies on is epilepsy. The respondent concedes that the claimant was a disabled person by reason of epilepsy at all material times, namely from 4 January 2021 onwards.**

5. Reasonable adjustments

5.1. **The respondent concedes that it knew, from 12 March 2020, that the claimant had the disability.**

5.2. **The respondent accepts that it operated the following PCPs (Provision, criterion or practice):**

5.2.1. A requirement (for the claimant) to work 30 hours per week;

5.2.2. A requirement to travel to other sites (Manchester) from 4 January 2021 [*albeit that the respondent does not accept that this PCP was applied to the claimant*].

5.3. **Did the PCPs put the claimant at substantial disadvantage compared to someone without the claimant's disability in that?**

5.3.1. She was worried about having seizures because of stress at work.

5.3.2. She was exposed as a vulnerable person to covid and was at increased risk of catching covid.

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

5.5. **Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:**

5.5.1. Reducing the claimant's hours to 22.5 hours per week and giving her shorter shifts;

5.5.2. Allowing the claimant to stay at her original place at work.

5.6. **By what date should the respondent reasonably have taken those steps?**

6. Time limits

6.1. **In respect of her claims of discrimination:**

6.1.1. Did some or all of the allegations of discrimination take place outside of the time limits provided by s123 EqA for bringing claims?

6.1.2. Do the alleged acts of discrimination amount to conduct extending over a period in accordance with EqA s123(3)(a)?

6.1.3. Did the claimant issue the claims within such other period as is just and equitable in accordance with EqA s123(1)?

6.2. **In respect of her claims of whistleblowing detriment:**

6.2.1. Did some or all of the allegations of whistleblowing detriment take place outside of the time limits provided by s48, s111 ERA 1996?

6.2.2. Do the alleged acts of detriment form part of a series of similar acts?

6.2.3. Was it not reasonably practicable for the claimant to bring the claims in time and did she bring them in such further reasonable period?

7. Remedy

7.1. **If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.**

Findings of Fact

8. The Tribunal has made findings of fact on the basis of the evidence before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. Where there was a conflict of evidence, this was resolved on a balance of probabilities. The findings of fact relevant to the issues to be determined are as follows.

9. The claimant was employed by the respondent from 13 August 2018, as a Receptionist/Clerical Officer, latterly working 30 hours per week in shifts lasting 7.5 hours or 10.5 hours over a 6-day working week, including

occasional Saturday mornings on a shift of 3.5 hours. This working pattern resulted in the claimant having 1 or 2 non-working days per week. Her working days were not fixed and in fact changed from week to week, or month to month, subject to a rota which was produced monthly in advance.

10. The claimant was based at 'The Orange Rooms' which is a busy sexual health and wellbeing clinic in Ashton-under-Lyne. A copy of the claimant's contract of employment appears in the bundle at pages 231-241. There is a flexibility clause in that contract (page 247 of the bundle) which says that, although primarily based in one designated service location, Ashton-under-Lyne, the claimant would be required to work flexibly across the integrated sexual health service as service needs determined. In practice, this was a requirement to travel to work at other clinics which did not arise with any regularity and was not exercised at all in the first couple of years of the claimant's employment save that, at the start of her employment, the claimant attended induction training at the respondent's central Manchester site, and she drove there each day.

11. Disability is conceded. The claimant relies only upon epilepsy as her disability although, in the course of the hearing, she referred to a number of other impairments which are not pleaded as disabilities and not relied upon.

12. On 31 October 2018 the claimant requested to reduce her working hours from what was, at the time, 35 hours per week to 22.5 hours per week. Her application appears in the bundle at pages 251-258. The claimant's reason for a reduction in working hours was because a reduction in working hours would mean that she would not pay tax on her salary and her national insurance would be in what she described as a lower bracket. There is no mention of disability nor of the claimant's epilepsy in the application.

13. In November 2018, the claimant had a period of sickness due to workplace anxiety following a conflict with the Reception team.

14. On 11 December 2018, the claimant's request to reduce her hours was declined by Amy Wright on the basis of service need. The claimant did not appeal the decision.

15. In May, June and July 2019, the claimant was off work with work related stress due to difficulties in her working relationship with a colleague.

16. In early 2020, the news, worldwide, began to be about the outbreak and spread of COVID-19 and of measures taken in a number of countries to prevent and/or treat such. On 12 March 2020, the respondent asked all of its staff about their medical conditions. The respondent as part of the NHS was enquiring about the vulnerability of its employees. The claimant notified the Clinic Manager of her epilepsy (see page 296 of the bundle).

17. On 23 March 2020, the claimant decided to self-isolate and wrote to the respondent to say she would not be coming to work because of her concerns

about Covid. Later, that evening,) the UK-wide COVID lockdown was announced by the Government. Thereafter, the claimant remained off work until the end of April 2020, effectively self-isolating due to the COVID pandemic.

18. On 7 July 2020, there was an administration team meeting with Joanne Jeffrey, which led to a referral of the receptionists for mediation.

19. Also in July 2020, Ms Monks, the administration team leader, returned to work after 5 months' absence due to stress. Ms Monks was asked to undertake assertiveness training, for her personal development, and she was also told to confirm all instructions to staff by email in order to ensure a paper trail in the event of future disagreement.

20. In evidence, the claimant suggested that there were no relationship problems at work prior to July 2020. The Tribunal wholly rejected that suggestion. There clearly were a number of issues. Contemporaneous documentary evidence highlighted that there were a number of documented issues between the members of the Reception team, including the claimant.

21. On 27 July 2020, the claimant and her co-worker, Nusrat Jabeen, received an email from Ms Monks asking for somebody to go to the respondent's clinic in Stockport, on 29 July 2020, to cover the reception there from 1.00pm to 4.00pm. Ms Jabeen said she could not do so because she needed to pick up her children from school that afternoon. Therefore, it fell to the claimant to cover the Stockport reception. However, the claimant also had a personal commitment to help a neighbour at 4.00pm on 29 July 2020. Managers therefore arranged for the claimant to cover the Stockport reception until 3.00pm, so that she could still honour her personal commitment, and the claimant agreed.

22. The next working day, 28 July 2020, was the claimant's non-working day. On 29 July 2020, the claimant worked at the clinic in Ashton-under-Lyne in the morning and then she drove to the Stockport clinic to cover the reception as instructed. The claimant was given handwritten instructions on how to get to the Stockport clinic.

23. On 30 July 2020, the claimant returned to work at the clinic in Ashton-under-Lyne. She told the managers that she did not feel she was needed at Stockport because they already had one receptionist. The claimant made enquiries as to how she could claim her mileage/expenses for going to Stockport. On 31 July 2020, the claimant was informed by Vernon Hempsall, of the respondent's financial administration team, that "*you need to make sure you have business insurance when you claim mileage*". The claimant's line manager, Ms Monks, had not been aware that business insurance cover was required when using a car for work because she did not drive herself. The respondent had not therefore alerted the claimant to this requirement.

24. The claimant had not been happy about having to travel to and/or cover reception at the respondent's Stockport clinic. She seized on the requirement for business insurance as a reason to argue that she should not have been sent to work at the Stockport clinic and also to argue that she should not be sent to work anywhere else in future. There were several conversations between the claimant and her managers on 31 July 2020, during which the claimant told her manager that she considered she had travelled to Stockport "illegally" on 29 July 2020 and that she was very concerned about this. The claimant said that her insurance did not cover her for work purposes, the implication being that she could not therefore go to work at the respondent's other sites or be asked to do cover elsewhere again.

25. When it was pointed out to the claimant that she could travel by bus, the claimant then introduced her (undiagnosed) IBS, she complained that it would take more than one bus and about the time it would take her to get to any other site by public transport. The claimant complained about the distances involved, which she sought to exaggerate; for example, the claimant claimed that one journey was 11 miles whilst the respondent contended that, in fact, it was 6½ miles, the respondent's contention going unchallenged. There was no evidence to support such complaints but these matters were nevertheless used by the claimant in her efforts to resist being deployed to work at other sites.

26. In contrast, the Tribunal noted that the claimant was, in fact, prepared to go to work at Hattersley which was closer to her home but to not sites further away from Ashton-under-Lyne and not into the central Manchester conurbation. The Tribunal concluded that the claimant was seeking to pick and choose where she worked despite the provision for flexibility to work across the respondent's sites within her contract of employment. When the claimant's contract of employment was pointed out to her under cross-examination, she said that she had never signed the document and did not agree with it. This was despite having worked under her contract for over 2 years.

27. The claimant also relied upon her epilepsy, about which she told the respondent. The claimant said that the respondent should have done a risk assessment for her epilepsy and that this had not been actioned. None of these issues were raised by the claimant before she agreed to and did go to cover the Stockport clinic reception. In the circumstances, the Tribunal considered such to be excuses which were thought up and/or raised after the event, in an effort to ensure the claimant did not get sent to work elsewhere again.

28. The claimant's case is that what she told the respondent on 30 July 2020 constituted a protected disclosure. The Tribunal did not find this to be the case, not least because the matters relied upon by the claimant could not have been raised until the following day, 31 July 2020, when the claimant first became aware that business insurance might be an issue. What the claimant then told the respondent was that she herself had not complied with a legal

obligation in respect of business insurance cover for travel with work. The Tribunal did not consider that any failure to obtain business insurance cover would put people's health and safety at risk; rather, it meant that in the event of an accident, any resulting injury or damage may not be covered and that compensation may not be claimable. Further, the Tribunal considered this matter to have been raised by the claimant as one of a number of self-serving excuses, pursued in her own interest, in order to push back on the requirement to travel to work at the respondent's other sites, should that arise in future.

29. The claimant's case is that she made a second protected disclosure, verbally to Ms Amy Wright. Under cross-examination, the claimant was unable to identify a date nor circumstances for this. Ms Wright did not remember anything at all. There were no contemporaneous emails to suggest that anything had been raised by the claimant with Ms Wright in any such terms, at a time when there were numerous emails sent about other matters. The Tribunal considered, on a balance of probabilities, that it would have expected to find some reference to what amounted to a serious matter and therefore rejected the claimant's contention that the conversation had taken place.

30. On 8 September 2020, the claimant agreed to attend a team mediation which was arranged to address abusive behaviour between 2 of the administration team members. The mediation took place at the respondent's Wythenshawe site because that was where there was a suitable venue available.

31. The claimant contended that she made a third protected disclosure to Ms Monks, verbally, before the mediation took place. The Tribunal did not find that there was any such protected disclosure made. From the evidence, the Tribunal considered that what took place amounted to, at best, a discussion. The context was that the claimant did not want to travel to Wythenshawe where it was proposed the mediation be held; rather, she wanted the mediation to take place at the Orange Rooms, in Ashton-under Lyne, and she raised her lack of business insurance as a reason why she could not go to Wythenshawe and therefore a reason why the mediation should take place where the claimant wanted, at the Orange Rooms. Ms Wright sought advice on the need for business insurance. However, the claimant adopted a position of insisting that she was not prepared to travel by car to Wythenshawe, in any event. In those circumstances, the Tribunal considered that the claimant was using her motor insurance as a reason why she could not attend Wythenshawe for the mediation. When it was pointed out that the claimant could travel by public transport, the claimant claimed that "it's 4 buses and I can't do that either".

32. Under cross-examination, the claimant said she felt forced to go to Wythenshawe for the mediation because she believed that one of the other receptionists had been told that, if they did not go, they would be redeployed. Again, the Tribunal found no evidence to support the claimant's suggestion of

such a threat. In any event, the Tribunal heard that, ultimately, the claimant attended the mediation at Wythenshawe.

33. On 9 September 2020, the claimant alleged that she was refused permission to change her day off by Ms Monks. The Tribunal found is that the change of day off was requested at short notice (5 days) and it simply could not be accommodated within the rota which had been set weeks beforehand. At the time, the claimant accepted this was the case, as evidenced by her email, in the bundle at page 432, in which the claimant replied, "No worries kay (sic), thanks anyway" followed by a smiley emoji.

34. On the morning of 11 September 2020, the clinic list could not be found. It had been the claimant's job to print the list at the end of the previous day's late shift, in readiness for the clinic to take place the next morning. The Tribunal found that, following this event, the claimant was sent an email reminder about the importance of printing off the list. The Tribunal reviewed the email and rejected the claimant's allegation that she had been "accused" of something - the email sent to the claimant was not accusatory in either its content or tone. When asked about her objection to the email, the claimant sought to suggest that Ms Monks had not written the email herself and that it had been written for her. There was no evidence to suggest that Ms Monks had not in fact written the email. However, the matter of who had written the email made no difference to the substance of the allegation and the Tribunal rejected the claimant's assertion that she was being accused of anything – the email simply does not read as such.

35. On the morning of 9 October 2020, the claimant was given in excess of 2 weeks' notice of a proposal to change her shift on a particular date. The claimant was asked if she was content with the proposed change. The claimant said to Ms Nagnibida that she wanted to check her diary. By lunchtime, Ms Nagnibida confirmed the change and put it into effect. The claimant took the view that she had been given insufficient time to consider the proposed change and, in evidence at the hearing, the claimant said that she had had to move a doctor's appointment but also said that she did not actually mind changing her shifts. There was no evidence of the claimant's doctor's appointment having been raised at the time of the proposal and that matter is not mentioned in the claimant's witness statement. It appeared to have been raised for the first time at the final hearing.

36. On 9 October 2020, Ms Monks sent an email, which appears in the bundle at page 446, to all the receptionist staff. The email states "Can I just remind you that patients attending clinic are to be prioritised and arrived (sic) before dealing with the telephone so patients are then seen by the clinician on time …" Ms Monks' email makes no reference to a particular shift or incident nor is there any suggestion that it was the claimant who might not have been prioritising patients.

37. The respondent's booking procedure involves making a note of which clinician has approved each booking and the approval date. A booking appeared with Ms Nagnibida's name against it as having approved the booking. Ms Nagnibida is not a clinician, and the date was a day when Ms Nagnibida was working from home. An issue therefore arose about the approval of the booking in question. Ms Nagnibida wanted to know who had made the note and reference to her as she believed it was a mistake. On 12 October 2020, Ms Nagnibida spoke to the claimant in reception about the booking. No patients were around, nor did anybody overhear he conversation. The claimant did not report it nor make a complaint about it at the time. In evidence, the claimant sought to increase the accusation by suggesting that Ms Nagnibida had shouted at her, but the Tribunal found no evidence to support what the claimant contended.

38. The respondent had a limited number of appointment slots for emergency contraception. On 13 October 2020, an issue arose that the claimant may have booked a 15-year-old into the wrong clinic. Ms Nagnibida asked the claimant about the booking and, in the course of their conversation, it became apparent that instructions from the clinic manager and those of a Consultant had differed. The confusion was quickly resolved without any criticism of the claimant who had been caught in the middle of conflicting instructions.

39. On 21 October 2020, a nurse raised concerns about the claimant's conduct towards Ms Monks and Ms Nagnibida (see page 462 in the bundle). The respondent's position was that this was not a formal complaint but it was passed to the claimant, and she was asked for comment. Nobody told the claimant that the matter was being treated informally.

40. On 22 October 2020, a team meeting took place from which the claimant contended she had been excluded. The Tribunal found that the claimant was not, in fact, excluded. She had been invited like everybody else. Team meetings involved up to 25 people, from Consultants to the most junior staff. The meetings took place each month, and not everyone was expected to attend due to the nature of shift patterns and rota commitments. In fact, it would have been surprising if everyone was able to attend at the same time. The tribunal noted that this was the only example, during the claimant's employment that she could point when challenged, where a team meeting had been scheduled on one of her non-working days. The claimant had initially declined the invite but later asked for the rota to be changed. That was not possible, but the issue was in any event resolved so that the claimant could and did attend the meeting after being given the equivalent time off in lieu.

41. The claimant complained about "unfair rotas" in the months of October and November 2020. The claimant's working days/shifts were not fixed. At the time, she worked 30 hours per week and sought to compare herself to Ms Jabeen who worked 22.5 hours per week. The Tribunal was told that Mondays are the respondent's clinic's busiest day. On Tuesdays and Thursdays, the clinics ran over long hours, hence the respondent reasonably

required 2 receptionists to work on those days. In the period from October to December 2020, the reception team was short-staffed, down to 2 receptionists from an original team of 4. As a result, the rotas for the clinic reception were pressured, with managers sometimes covering the reception desk, to help out.

42. The claimant's complaint was that she had been asked to work more Fridays than her colleague, during the period in question. The claimant told the Tribunal that she was not getting long weekends off, as her colleague was. The Tribunal considered that the rota in this period was a function of the limited number of receptionists available, the requirement for 2 receptionists on the busiest days (Tuesdays and Thursdays), and the fact that the claimant worked more hours than Ms Jabeen. In those circumstances, the Tribunal found that it was likely that the claimant would have to work more Fridays than her colleague. In any event, the Tribunal found that rotas were amended in November 2020, on a temporary basis to accommodate the claimant's request for more Fridays off work. An email from the claimant, dated 3 November 2020, in the bundle at page 473, shows the claimant to be happy with the amended rotas at the time, the claimant declaring "These appear to be fair rotas which will give both myself and Nusrat the opportunity of time off on a rotational basis."

43. On 26 October 2020, the claimant met with Ms Monks about the nurse having raised concerns about her behaviour – see paragraph 40 above. The claimant asked for details of the nurse's complaint and contended that her emails had been ignored. Upon examination of the evidence, there were a number of documents which entirely contradicted the suggestion that the claimant's emails had been ignored. Under cross-examination, the claimant accepted that this was the case and detriment 12 was withdrawn by the claimant in the course of the hearing– see list of issues, point 2.1.12 above.

44. On 3 November 2020, the claimant left a clinic list out on view, overnight, by mistake. The respondent addressed the matter by sending all the receptionists an email to remind them of the procedure for clinic lists and the need for confidentiality. The email was clearly sent to both receptionists and not targeted at the claimant. When challenged, the claimant gave a convoluted excuse for what might have happened and alleged that others had made the same error in previous days. The Tribunal considered that '2 wrongs do not make a right' and found there was no detriment to the claimant to be reminded of procedures.

45. The respondent has a procedure for arranging leave over the Christmas/New Year period. In or around September/October each year, all staff are invited to book Christmas leave at the same time, so that the Christmas rotas can be drawn up in the knowledge of everybody's requirements/wishes, out of fairness to all. This means that the rotas for the Christmas/New Year period are set by the end of October. The claimant had applied to have 24 December 2020 as leave, which had been granted.

46. In November 2020, a general request was issued to staff, to book leave. This request does not specify whether such bookings included the Christmas period or not. On 11 November 2020, the claimant therefore asked for time off between Christmas and New Year. Because the Christmas rota had already been set, Ms Nagnibida referred the claimant's request to Ms Monks because only Ms Monks had authority to grant leave where there was an issue with the rotas. The Tribunal found Ms Nagnibida would have referred any late request for holiday to Ms Monks, once the rotas had been set.

47. On 18 November 2020, the claimant's request for leave between Christmas and New Year was refused by Ms Monks because the rota had by then been set. The Tribunal was told that the claimant had been given the previous 2 years' Christmas holidays as leave, as requested prior to the rotas being drawn up. In addition, the claimant's original request, for leave only on 24 December 2020, had been granted. In those circumstances and in the context of the respondent's efforts and procedures for arranging leave and drawing up the rota for a number of people over the festive season, it was unreasonable for the claimant to expect the respondent to rework the rotas later on.

48. On 18 November 2020, the claimant's request to access the respondent's Employee Assistance Programme ("EAP"), in worktime, was refused. The refusal became an issue because the claimant, and other employees, had previously done so. The respondent's managers took advice from HR which confirmed the view that access to the EAP in work's time was not appropriate. The claimant contended that the EAP was available 24/7 and the Tribunal found that this was so that NHS employees could access it at any time of the day or night. However, the Tribunal understood that the 24/7 availability of the EAP was provided so that NHS employees could access it around their shift and rota patterns which ran 24/7, but not regardless of what work they were doing at the time. In those circumstances, the Tribunal considered it to be reasonable for the respondent to tell the claimant that work's time could not be used on a personal matter, and there was no detriment to the claimant in her being told to access the EAP in her own time.

49. On 18 November 2020, the claimant had raised a grievance against the nurse who had complained about her conduct. The grievance appears in the bundle at page 502. The claimant alleged that the nurse had used offensive language to her and that the nurse's complaint was deliberate and malicious and without any evidence or foundation. The claimant's grievance email was brief. It gave no details of her allegations, no examples of offensive language nor any explanation of why the claimant believed the complaint against her was malicious. The Tribunal was told that it related to an incident over a year beforehand, in 2019 when, the claimant alleged, the nurse had sworn at her albeit that the claimant did not complain about such behaviour at the time.

50. The claimant complained about the respondent's handling of the grievance process and the fact that no meetings had been arranged. The claimant contended that managers had failed to progress her grievance. The Tribunal

found that Ms Monks had acknowledged the claimant's grievance on 19 November 2020, and Ms Wright also acknowledged the claimant's grievance on 30 November 2020. From then on, the respondent's managers sought and waited for information from the nurse who was the subject of the grievance but she did not wish to engage and/or provide any information. In fact, the nurse left the respondent's employment on 21 January 2021. The respondent's witness evidence on this matter was confused. Managers variously told the Tribunal that the claimant's grievance was a "counter-grievance" to that submitted by the nurse about the claimant but also told the Tribunal that they had not considered it to be a grievance at all. Managers were confused about what the claimant had presented and how to deal with it. Ultimately, the respondent sought to treat the claimant's grievance as an informal complaint which was not what the claimant wanted, and the claimant felt aggrieved at the respondent's lack of a robust approach. The Tribunal found evidence that the respondent had progressed the claimant's grievance so far as it was able but, in the absence of information from the nurse, it was unable to progress an investigation, particularly when the claimant was demanding further details first be obtained from the nurse. The Tribunal considered that the respondent did not always keep the claimant updated on progress (or the lack of it) which may have appeased the claimant in the interim.

51. On 1 December 2020, the claimant attended a return-to-work meeting at which it was agreed to refer the claimant to Occupational Health. The Occupational Health referral form was completed with the claimant, and it was sent to Employee Health and Wellbeing on 3 December 2020. However, on 4 December 2020, Employee Health and Wellbeing replied to say that the respondent needed to do a stress risk assessment first in order to see if the issues raised were related. The claimant was not told about this, as she should have been. There was then a delay in progressing matters because Ms Monks was off work for part of December 2020. In cross examination, the claimant accepted that the referral was in fact made to Occupational Health. The Tribunal here found the issue arose from a lack of communication or updating of the claimant. The referral process was then stalled by the Christmas period when a number of people were off and staffing was at a minimum, and also by the fact that the claimant went off on long-term sick, from 6 January 2021.

52. On 4 January 2021, the claimant was called into a meeting with Ms Wright, Ms Monks and Ms Nagnibida, to be told that she would be needed to cover/work at the respondent's clinic in central Manchester. The Tribunal did not understand why such a meeting required 3 managers to be present and the claimant found it oppressive although her complaint was not about such. Ms Wright announced that, because the respondent had recruited an additional receptionist, the claimant would be required to travel to the respondent's site in central Manchester to provide cover and also to work on sexual health kits, for other sites. The claimant raised a number of concerns, including her epilepsy, her inability to travel in lockdown against Government guidance, and the possibility of cross-clinic contamination. It was pointed out

that, if the claimant had business insurance, she could go by car, albeit that the claimant did not have business insurance because she would not pay for it and/or would not arrange such. The claimant was told that cove for other sites was not just a requirement for her but for all receptionists.

53. Later, on 4 January 2021, Ms Wright sent the claimant an email with her terms and conditions of employment underlined, in response to the discussion that morning about travel/cover being part of her contractual obligations. Unfortunately, Ms Wright sent was a contract of employment and a job description for the claimant's role albeit not necessarily the ones the claimant had been issued with when she started. Nevertheless, the Tribunal found that the documents sent were applicable to the claimant. The documents referred to the need to work flexibly. The Tribunal considered that pointing out the claimant's contractual requirements, in an effort to clarify matters, was not a detriment, but was an effort to underline what the respondent was asking of the claimant and its entitlement to do so.

54. The following day, 5 January 2021, Ms Wright issued an email to all staff about cross-site working. The email appears in the bundle at page 558 and it makes employees aware that business cover insurance is needed including that they should send evidence of such to their line manager, by the end of January 2021.

55. The following day, 6 January 2021, Ms Wright realised that, because a further national lockdown had just been announced, her instructions on cross-site cover was inappropriate. However, rather than tell all staff directly of her change of mind, Ms Wright emailed 4 managers only and told them to explain this to staff, to underline the fact that travelling across sites remained an expectation. It was entirely unclear whether Ms Wright's instructions to the 4 managers were ever actioned by any of those managers, there being no evidence of such before the Tribunal.

56. In any event, on 6 January 2021, the claimant was signed off work, sick, and was not told for some months about Ms Wright's change of mind. The claimant produced fit notes from 1 January 2021 to 28 August 2021, due in part to stress and anxiety. Ultimately, the claimant remained off sick and did not return to work until she resigned in January 2022.

57. On 3 April 2021, whilst off sick, the claimant applied for flexible working with a view to reducing her hours to 22.5 per week, from 30 hours per week. The claimant proposed to work shifts of 4.5 hours duration (see for example page 625 in the bundle, the document being duplicated elsewhere in the bundle). The claimant's flexible working application is light on detail. However, the claimant stated that her application was about "reasonable adjustments due to work-related ill health and disability under the Equality Act 2010." Ms Monks, who received the application, did not notice this line in the form and, at the time, she did not appreciate the significance of the claimant's reference to disability or to the Equality Act 2010.

58. The respondent's policy on flexible working appears in the bundle at page 1047 onwards. In fact, the Tribunal was presented with more than one such policy. What is clear from the policies, is that where a flexible working request relates to a disability or makes a request for reasonable adjustments, managers should seek guidance from Occupational Health and/or HR (see point 5.1.2 on bundle page 1047). As Ms Monks did not notice or appreciate matters, a referral to Occupational health and/or HR advice was not considered. The claimant's reference to disability and the Equality Act 2010 was simply overlooked. Instead, the respondent's managers made efforts to arrange a meeting with the claimant, but the claimant was not keen to meet, and she did not reply to a number of the initial approaches and, later, the claimant said she would need to check her trade union representative's availability before she could agree to a meeting.

59. In the interim, the claimant commenced early conciliation via ACAS and, on 14 April 2021, she presented her first claim to the Employment Tribunal, under case number 2402886/2021.

60. On 5 July 2021, a stage one health review meeting took place due to the length of time the claimant had been off sick, by then 6 months. The minutes appearing at pages 699-702 of the bundle. These show that the respondent's decision on the claimant's flexible working request was announced during the meeting. The Tribunal considered that the discussion about the claimant's health situation and potential for returning to work turned to her flexible working request when the claimant's trade union representative raised it. The hours which the claimant wished to work, upon her return, naturally formed part of a discussion about the mechanics of any return to work and it was therefore appropriate for the claimant's trade union representative to enquire about the progress of the claimant's application for flexible working. It then became apparent that the respondent had already made a decision on the flexible working request, some time before the meeting. The claimant described this as an "ambush", but the Tribunal rejected that analysis. It is fair to say that the announcement of the respondent's decision, on the claimant's flexible working application, was unanticipated, but the claimant had raised the matter in terms of the necessity of an Occupational Health referral, despite the fact that the claimant had, in recent months, made significant efforts to resist a referral to Occupational Health.

61. On 9 July 2021, a stage one health review outcome letter was sent to the claimant, and the flexible working request outcome was also produced in writing.

62. On 19 July 2021, the claimant sent an email to Mr Chapman to appeal the decision not to grant her flexible working request.

63. On 21 July 2021, despite being offered a role working 21 hours, at Withington Hospital, the claimant declined to pursue it. In the course of the next few

months, a number of other part-time roles were mentioned to the claimant but she did not pursue any of them for a variety of reasons.

64. The respondent spent significant time seeking guidance on the claimant's return to work and arranged for a telephone referral to an Occupational Health physician who also had problems arranging a meeting with the claimant. This was only achieved in August 2021. This led to a report on the claimant from Occupational Health, on 17 August 2021, which appears in the bundle starting at page 732. The Tribunal considered the report carefully, noting that it makes no mention of stress relating to epilepsy nor of the claimant having reported that her situation had impacting her epilepsy nor any fear of a seizure. Rather, the claimant told Occupational Health that her stress had been triggered by several incidents in the workplace, building up since July 2020, and exacerbated when the claimant was asked to relocate in January 2021.

65. On 27 August 2021, the respondent held a flexible working appeal meeting conducted by Mr Chapman. On 3 September 2021, Mr Chapman issued his written appeal outcome: the claimant's request for flexible working in terms of reduced hours was unsuccessful.

66. On 4 October 2021, the claimant presented her second Tribunal claim, under case number 2411429/2021.

67. On 27 October 2021, the respondent held a stage two health review meeting because the claimant remained off work sick. At this meeting, when asked about working hours, the claimant said, "*it stands to reason that doing fewer hours would cause less stress and that 22.5 hours would be better for me*". The claimant, then and at the final hearing, produced no medical evidence to support her claims about her circumstances; neither did she mention her epilepsy. The record of this meeting appears in the bundle, at page 781. It shows that there was a discussion of working hours in which the claimant says that her issues were about having to travel into Manchester or to other places in terms of having to travel on the bus or having to park 20 minutes' walk away from the respondent's Manchester clinic in order to avoid parking charges. The Tribunal considered that the claimant's position was that she did not want to travel far and/or work in the inner-city area. The claimant said nothing about her epilepsy nor any potential adverse effects arising from it. In evidence, the claimant suggested that she might have considered working at other locations but that she could not say for definite. The Tribunal concluded, from the records of the meeting, that the claimant was seeking to pick and choose where and when she worked.

68. The claimant remained off sick due to work related stress. On 18 November 2021, the respondent produced the written outcome of the claimant's stage two health outcome review meeting.

69. In January 2022, the respondent started to seek an agreed format for the claimant to return to work, at which point the claimant resigned.

The applicable law

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

Detriment for whistleblowing

71. Section 47B of the Employment Rights Act 1996 ("ERA") provides that a worker has the right not to be subject to any detriment by any act or deliberate failure to act by his or her employer on the ground that the worker has made a protected disclosure.

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

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

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

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

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

Disability discrimination

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

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

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

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

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

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

Reasonable adjustments

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

> (a) the employer applies a provision criterion or practice which places a disabled employee at a substantial disadvantage in comparison with persons who are not disabled; and
>
> (b) the employer knows or could reasonably be expected to know of the disabled person's disability and that it has the effect in question.

83. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Equality and Human Rights Commission Code of Practice in Employment ("the EHRC Code") paragraph 6.10 says the phrase is not defined by EqA but

"*should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one-off decisions and actions*".

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

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

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

Time limits – whistle-blowing detriment

87. The time limit provisions for complaints of detriment for whistleblowing are found in section 48(3) ERA which provides that such a complaint must be brought:

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

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

89. Something is "reasonably practicable" if it is "reasonably feasible" (see *Palmer v Southend-on-Sea Borough Council [1984] ICR 372 Court of Appeal*). Health issues can make it not reasonably practicable to present a claim (see *Schultz v Esso Petroleum Co Ltd [1999] ICR 1202 Court of Appeal*). In *University Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12* the EAT

upheld a Tribunal decision that a late claim was within section 111(2) even though the medical evidence "did not entirely support the Judge's findings about the Claimant's mental health" (EAT judgment paragraph 12) and even though the claimant had been able to move home and find a new school for her child during the period when the Tribunal found it had not been reasonably practicable to have presented a claim.

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

Time limits – discrimination complaints

91. The time limit provisions for discrimination claims appears in section 123 EqA as follows: -

> *(1) subject to Section 140A proceedings on a complaint within Section 120 may not be brought after the end of –*
>
> *(a) the period of three months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the Employment Tribunal thinks just and equitable.*

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

93. The case law on the application of the "just and equitable" extension includes *British Coal Corporation –v- Keeble [1997] IRLR 336*, in which the EAT confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in *Keeble*: -

> *"that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –*
>
> *(a) the length of and reasons for the delay;*

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any request for information;

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

94. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) [2003] IRLR 434* the Court of Appeal recognised that the Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said: -

"it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

95. Subsequently in *Chief Constable of Lincolnshire –v- Caston [2010] IRLR 327* the Court of Appeal, in confirming the *Robertson* approach, confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

96. In the course of submissions, the Tribunal was referred to a number of cases by Counsel for the respondent, as follows:

Project Management Institute v Latif [2007] IRLR 579
Environment Agency v Rowan [2008] ICR 218
Kuzel v Roche Products Limited [2008] ICR 799 CA
Rider v Leeds City Council UKEAT/0243/11
Burke v The College of Law and another [2012] EWCA Civ 87
Ibekwe v Sussex Partnership NHS Foundation Trust UKEAT/0072/14
Brangwyn v South Warwickshire NHS Foundation Trust [2018] EWCA Civ 2235

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

Conclusions (including where applicable any further findings of fact)

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

Protected Disclosures

99. The first protected disclosure was said to have been made to Ms Monks, the claimant's line manager, on 30 July 2020. However, the Tribunal found no evidence that what was said by the claimant on 30 July 2020 amounted to a protected disclosure – see paragraph 28 above. The matters of business insurance and health and safety were not in fact raised by the claimant until the following day, 31 July 2020, when she learned of the business insurance requirement but, even then, the Tribunal considered that what was said by the claimant in the conversations which took place did not constitute a qualifying disclosure, having regard to the definition in ERA section 43B. The Tribunal concluded from the evidence that the claimant was at all times acting in her own personal interests, rather than the public interest as required by ERA section 43B(1).

100. The Tribunal rejected the second protected disclosure contended for – see paragraph 29 above. Under cross-examination, the claimant was unable to state with any precision when it might have happened nor give details of what was said. Ms Wright, whom the Tribunal found to be a credible witness, did not remember it at all. In addition, there was a complete absence of contemporaneous evidence to support the claimant's case on this point.

101. The third protected disclosure was said to have taken place prior to the mediation on 8 September 2020. The Tribunal considered that the conversation between the claimant and Ms Monks simply did not amount to a protected disclosure on the facts – see paragraph 31 above.

102. The Tribunal considered that, in respect of all 3 protected disclosures contended for, the claimant had not disclosed 'information'; alternatively, what she said had not disclosed anything in the public interest; rather the matters raised were in the claimant's personal interest and self-serving. The Tribunal considered that it was not reasonable for the claimant to believe that anything she raised was in the public interest. The issue of motor insurance cover for business purposes was used by the claimant only after she had been sent to Stockport to cover reception there, and only when told of the requirement for such, it thereafter being used by the claimant as a reason why she would in future be unable to travel to other sites for work. On that aspect, the Tribunal considered that the legal obligation to have business insurance was an obligation primarily on a driver, in this case the claimant, rather than the respondent, albeit that the respondent ought to have checked that its employees were compliant.

103. In any event, the Tribunal considered that none of the detriments contended for were actually detrimental to the claimant – see paragraphs 33 – 53 above. Detriment 17 is about the fact that no meetings were arranged in respect of the claimant's grievance, during a 5-week period. The Tribunal was concerned

about certain aspects of the respondent's handling of the grievance (see paragraph 50 above) but these did not form part of the substance of the claimant's allegation of detriment in the list of issues at 2.1.17 above. During the course of the grievance process, the Tribunal considered that the respondent's communications, or lack of them, became an issue; for example, not keeping the claimant updated, which led to a number of unfortunate misunderstandings, such as in respect of the Occupational Health referral in December 2020, which has in turn led to one of the claimant's allegations of detriment before the Tribunal, an allegation which could so easily have been prevented.

104. Even if any of the detriments contended for were in fact detriments, the Tribunal was unable to conclude that they arose or happened because of any of the matters which the claimant contends were protected disclosures (the Tribunal having rejected such) or in any way related to the matter of the claimant having raised concerns about her lack of business insurance for work travel. The claimant was asked to explain how the detriments were related to her protected disclosures, or to point to some causal link. The claimant, however, brought no evidence to support her contention of a link; the best she could say, under cross examination, was "I believe these things were connected", In those circumstances, and in the absence of any evidence in support, the claimant has failed to discharge the burden of proof.

Reasonable Adjustments

105. The respondent has conceded that the claimant is a disabled person by reason of her epilepsy and has accepted that the PCPs contended for were in fact PCPs, namely the requirement for the claimant to work 30 hours per week and the requirement to travel to other sites in Manchester from 4 January 2021. Both of these requirements were express terms of the claimant's contract of employment.

106. In respect of the substantial disadvantages contended for, the Tribunal considered that the claimant had not made these out and found there was, in fact, no substantial disadvantage to the claimant for the following reasons.

107. The claimant said that she was worried about having seizures because of stress at work. However, she produced no evidence that stress at work would lead to seizures. Whilst the Tribunal accepted that stress may be likely to exacerbate conditions such as epilepsy, in reality, throughout the period that the claimant was employed by the respondent, she had never experienced a seizure. The Tribunal took account of the fact that the claimant had been signed off work, sick, with stress, on several occasions during the course of her employment. There was an Occupational Health report in August 2021 which talked about stress but which made no link between that stress and the claimant's epilepsy. In this regard, the Tribunal considered that the claimant had seen that report, before it was sent to the respondent and, if she thought that such a link was important at the time, she was within her rights to put a

statement into the report about such, pursuant to the Access to Medical Reports Act 1988, but she did not do so.

108. The claimant also claimed that she suffered a disadvantage because she was exposed, as a vulnerable person, to Covid and was at increased risk of catching Covid. The Tribunal accepted in principle that the claimant would be a vulnerable person because of her disability. However, this allegation of disadvantage was couched in general terms and without medical evidence to support it. In fact, the claimant did catch Covid, on 2 occasions. At no time during her 2 bouts of Covid did the claimant experience a seizure, which the Tribunal considered went against the claimant's contention as to the likelihood of seizures, simply because she did catch Covid but never experienced a seizure at any time, nor had she for many years.

109. In light of the above, the Tribunal considered that the PCPs did not put the claimant at the substantial disadvantages contended for. The claimant's worries were unfounded.

110. Lastly, the Tribunal considered the adjustments contended for and the question of whether such: (a) were reasonable; and (b) whether they may have alleviated the disadvantages pleaded.

111. The Tribunal considered that the adjustments may have been reasonable in terms of the respondent being able to put them into effect, if required. However, the claimant produced no evidence to suggest that working 30 hours per week put her at a substantial disadvantage, or indeed any disadvantage, whether as a disabled person or at all. In fact, the Tribunal heard that the claimant had always worked 30 hours per week and, from the start of her employment, she had made repeated efforts/applications to reduce her working hours for a variety of reasons. Notably, in the beginning, the claimant's epilepsy was not a matter that featured in her applications. It was introduced during the Covid the pandemic. In those circumstances, the Tribunal considered that the claimant sought to use her epilepsy as a (further) excuse to try to achieve what she wanted, which was reduced working hours and not to have to travel to certain of the respondent's sites. Further, the Tribunal concluded that, in the circumstances of the case, reducing the claimant's hours to 22.5 per week, giving her shorter working shifts or allowing her to work only at her original place of work, the Orange Rooms, would not have alleviated any disadvantage contended for even if such disadvantage had been established.

Time limits

112. The claimant commenced ACAS early conciliation on 15 February 2021. Hence, absent a continuing course of conduct, any act occurring prior to 16 November 2020 is, on the face of it, out of time, notwithstanding the conclusions reached by the Tribunal as set out above.

113. In relation to the whistleblowing detriment claim, the detriment allegations 4-14 relate to events prior to 16 November 2020. Each detriment has been pleaded and pursued as a stand-alone act, the majority arising from management decisions by a number of individuals. The claimant did not seek to argue that they had been operating together or in concert. In those circumstances, detriments 4-14 are out of time and the claimant has provided no reason why it was not reasonably practicable to present such complaints in time.

114. As to the reasonable adjustments claim, the EqA section 123(3)(b) provides that a failure to do something is to be treated as occurring when the person in question decided on it or does an act inconsistent with doing it. The claimant's case on reasonable adjustments was that the respondent should have allowed her to work less hours and not work elsewhere than the Orange Rooms. Having regard to its findings of fact, the Tribunal considered that the claimant's flexible working request to reduce her hours was refused on a date in June or July 2021 and so is brought in time, in terms of any failure to make reasonable adjustments at that point. However, the claimant had complained back in July 2021 about being asked to travel to the respondent's other clinics and so any claim about a failure to make reasonable adjustments in response to such complaint would be long out of time and, in the circumstances of this case, the Tribunal did not consider it would be just and equitable to extend time for that complaint.

115. Putting to one side the Tribunal's findings on the time points above, in light of the Tribunal's findings of fact and the conclusions of the Tribunal on the substantive issues, the claimant's claims must fail and are dismissed.

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Employment Judge Batten
Date: 16 November 2023

REASONS SENT TO THE PARTIES ON:
Date: 20 November 2023

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FOR THE TRIBUNAL OFFICE

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