EMPLOYMENT TRIBUNALS

Claimant: Miss F Ahmad

Respondent: Human Relief Foundation

Heard at: Manchester **On:** 29 January-2 February and 5-7 February 2024

Before: Employment Judge Phil Allen
Ms S Howarth
Dr H Vahramian

REPRESENTATION:

Claimant: Ms T Ahari, counsel
Respondent: Ms Y Barlay, consultant

JUDGMENT having been sent to the parties on 16 February 2024 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 was employed by the respondent as a fundraising officer from 24 September 2018 until 6 November 2020.The claimant was dismissed, the respondent contended as being by reason of redundancy. The claimant claimed that she made a protected disclosure and that she was treated detrimentally and/or dismissed as a result. The claimant also claimed direct disability discrimination, direct discrimination because of religion or belief, indirect disability discrimination, breach of the duty to make reasonable adjustments, harassment related to disability and ordinary unfair dismissal. The disability was asthma. The claimant relied upon being a liberal Muslim as the reason why she alleged she was treated less favourably because of religion or belief. The claimant also claimed that there was breach of contract as a result of the reduced payments made to her during her employment.

Claims and Issues

2. Preliminary hearings were previously conducted on 25 November 2021, 24 March 2022, and 23 September 2022. Appended to the case management order

made following the last of those hearings was a proposed list of issues. That list required the addition of some content from the parties. Included in our bundle was a document to which that required content appeared to have been added (246). At the start of the hearing that list was raised with the parties, and they confirmed that it was the list of the issues which we needed to determine.

3. At the start of the hearing, the claimant confirmed that the claim for direct disability discrimination was not being pursued and therefore issue eight in the list could be crossed out and did not need to be determined. The time limit/jurisdiction issues were also addressed, and the respondent's representative agreed that there was no argument that the claim had not been brought in time for the unfair dismissal claim, and therefore issue 1.3 could be crossed out and not determined.

4. It was also agreed at the start of the hearing, that the Tribunal would, initially, determine the liability issues only. The remedy issues were left to be determined later, only if the claimant succeeded in her claim. However, it was proposed by the Tribunal that issues 3.3.3 and 3.3.4 would be addressed and determined at the same time as the liability issues, even though they were in fact strictly speaking remedy issues. When it came to submissions, and in the light of the fact that no loss following dismissal was claimed in the schedule of loss, it was agreed that those issues did not need to be determined as they made no difference to the remedy in this case. During submissions, a part of the claimant's claim for breach of contract was questioned by the Tribunal. After taking instructions, the claimant's representative confirmed that the part which had been questioned was not being pursued.

5. The list of the issues as identified is appended to this Judgment (including only those issues which the Tribunal needed to determine and not including the remedy issues).

Procedure

6. The claimant was represented by Ms Ahari, counsel. Ms Barlay, consultant, represented the respondent.

7. The hearing was listed to take place in-person in the Manchester Employment Tribunal, and, for the majority of the hearing, it was conducted entirely in-person. In the week prior to the hearing, the respondent's representative applied for the hearing to be converted to be a hybrid hearing so that she could attend remotely for personal reasons. That application was refused by Employment Judge Butler in writing, but he did confirm that she could attend remotely on the first day of hearing and the Tribunal conducting the final hearing would consider the conduct of the hearing at that time. The parties had previously been informed that the first day of hearing would be a reading day and they did not need to attend. Not unsurprisingly, the Tribunal's correspondence caused some confusion. The respondent's representative attended the first day of the hearing in-person and (initially) the claimant's representative did not attend at all. After being contacted, the claimant's representative attended remotely. Unfortunately, the CVP equipment did not work effectively on that first day and the representatives could not see each other but could hear what was said. As a result, the matters addressed on the first day were kept to a minimum. The list of issues was agreed, and some timetabling was

discussed. The respondent's representative did not pursue a further application for a hybrid hearing after taking instructions and following a brief adjournment. The remainder of the first day was taken as a reading day, without the parties needing to attend further.

8. From the start of the second day, the hearing was conducted in-person with both parties and almost all the witnesses attending in-person at Manchester Employment Tribunal. On the third day, the respondent made an application for one of its witnesses, Mr Tokan, to be allowed to give his evidence remotely by CVP. Mr Tokan had recently had a medical issue and was unable to travel to the Tribunal to give evidence (but it was the representative's instructions that he was well enough to give evidence). Medical evidence was provided to the Tribunal and the claimant's representative overnight between the third and fourth days, and it was also established whether facilities were available for the hearing to be conducted as a hybrid for Mr Tokan's evidence. On the fourth day, after Mr Al Ramadhani's evidence had been completed, the claimant confirmed that she had no objection to Mr Tokan giving evidence remotely and, as the Tribunal was able to relocate to a different room with video facilities for his evidence, it was agreed that Mr Tokan could give evidence remotely by CVP. For the duration of his evidence only and with only him attending remotely, Mr Tokan's evidence was heard by CVP with both parties, their representatives, and the panel, present in the Tribunal building.

9. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 732 pages. After the initial discussion on the first day, the Tribunal read the witness statements and the pages in the bundle referred to in those witness statements. Where a number is referred to in brackets in this Judgment, that is reference to the page number in the bundle.

10. During the discussion on the first day of hearing, the claimant asked the Tribunal to listen to the recording of a conversation which she had with Ms Iram Khan on 27 September 2020. A transcript of the conversation was included in the bundle (715), but the claimant believed that the Tribunal also needed to listen to the recording. The respondent did not object to the Tribunal listening to the recording. It was provided during the first day and the Tribunal listened to the recording during the reading day. At the end of the fourth day of hearing, when there was only one witness whose evidence was left to be heard and long after the claimant's evidence had concluded, it was proposed that the Tribunal watched a video provided by the claimant. The respondent objected and, as it was far too late in proceedings for a document of any kind to be submitted (where the claimant's evidence had concluded), the Tribunal refused to do so. The Tribunal was also aware that the respondent's representative had sent an email to the Tribunal during the hearing with some documents attached, but as the respondent's representative did not make any application for the attachments to be admitted and/or viewed/considered by the Tribunal, the Tribunal did not look at what had been attached to the email.

11. The claimant provided witness statements from herself and Mr Saif Chaudhry.

12. The respondent provided witness statements from the following witnesses:

    a. Mr Mohammed Rahman, the respondent's head of international programmes;

b. Ms Shareen Nawaz, previously the respondent's northwest manager and the manager of the Manchester office until her resignation in September 2020;

c. Ms Sairah Zafar, previously the respondent's operations manager until her resignation in September 2020;

d. Ms Raisah Chowdhury previously a marketing and fundraising assistant for the respondent until her resignation in September 2020;

e. Dr Nabeel Al Ramadhani, the president and CEO of the respondent;

f. Ms Ammaarah Ahmed, previously volunteer co-ordinator for the respondent;

g. Mr Kasim Tokan, the respondent's deputy CEO;

h. Mr Wajahat Hussain, fundraising assistant and volunteer coordinator for the respondent;

i. Ms Zarah Anwar, a volunteer;

j. Ms Nayab Rana, a vounteer;

k. Mr Naseem Ahmed, a volunteer; and

l. Ms Nasira Majid, also a volunteer.

13. The last four of the witnesses called by the respondent listed above did not attend the hearing to give evidence, as the claimant's representative said that she had no questions for them in cross-examination and therefore their evidence was accepted as read without them being required to attend the hearing (the claimant's position being that the evidence they gave was not relevant).

14. The Tribunal was asked to hear the evidence of Mr Chaudhry first because he had limited availability. The respondent did not object, so his evidence was heard at the start of the second day. He was cross-examined by the respondent's representative. The Tribunal then heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal. Each of the respondent's witnesses then gave evidence in the order listed above, save for the final four witnesses whose evidence did not need to be heard. Each of the witnesses who attended were cross examined by the claimant and (where felt necessary) were asked questions by the Tribunal. On occasion, a witness was re-examined. The evidence concluded on the morning of the fifth day.

15. After the evidence was heard, each of the parties was given the opportunity to make submissions. It was agreed that written submissions would be provided and exchanged by 1pm on the fifth day (and a document was provided by each of the representatives) and oral submissions were heard at 2pm on the fifth day.

16. The Tribunal took the sixth and seventh days of the hearing as time (in chambers) to reach a decision. The oral Judgment was provided on the eighth day.

17. The Tribunal then heard evidence from the claimant and submissions from both parties regarding remedy. The remedy Judgment was delivered later on the eighth day. These reasons address both liability and remedy, a single written Judgment having been sent including both liability and remedy.

Facts

18. The claimant worked for the respondent from 24 September 2018. She had previously volunteered for the respondent and had undertaken a deployment to Jordan in March 2018 to distribute emergency aid. The Tribunal was provided with a copy of her offer letter and statement of main terms of employment (255). The offer letter stated that her position was fundraising officer. She was entitled to a salary of £22,000 per annum payable monthly. Her normal hours of work were forty hours per week, 9.30 am to 5.30 pm Monday to Friday (with a thirty-minute paid break).

19. In the bundle, we were provided with the respondent's handbook (268). Neither party made any reference to the contents of the handbook either during cross-examination or in submissions. The handbook included a capability procedure, a disciplinary procedure, a capability/disciplinary appeal procedure, a grievance procedure, a personal harassment policy and procedure, and an equal opportunities procedure. We were not shown a redundancy procedure.

20. The respondent is a charity which seeks to provide humanitarian assistance around the world. The respondent's witnesses emphasised that it did so without discrimination. It was put to the respondent's witnesses that the charity branded itself in a way which would elicit support from Muslims. Dr Al Ramadhani and others emphasised that many charities seek donations from Muslims, particularly during Ramadan.

21. The claimant worked in the respondent's Manchester office. It was common ground that for much of the claimant's employment she had good working relationships with others including Ms Nawaz and Ms Zafar, there were cordial relations in the office, and we were told that the respondent's Manchester staff worked long hours and were committed to the charitable organisation. It was common ground between the parties that in or around June 2019 there had been an issue with flooding in the Manchester office. The respondent's employees had briefly remained away from the office. Thereafter there was an ongoing issue with water in, and damage to, the office. The parties disputed how serious the issues were. In summary, the respondent's case was that the ongoing issues were restricted to a storeroom at the rear of the office and that was closed, and the employees did not need to go into it. The claimant's evidence was that the water was a more serious issue and that the office smelt of damp.

22. The claimant, a qualified barrister, wrote a letter to the respondent's landlord on the respondent's behalf about the issues with the premises (404). The claimant was authorised to do so by the respondent.

23. On 5 November 2019 the claimant emailed Ms Nawaz after a response had been received from the landlord. In her email, the claimant said (409) that she was asthmatic and had been struggling to breathe in the office for months.

24. It was the claimant's evidence that those who worked with her were aware that she was asthmatic, particularly because she kept her inhaler on her desk, used it in the office, and was wheezy. We heard evidence from a number of witnesses called by the respondent who denied that they knew that the claimant was asthmatic. Ms Nawaz (the office manager) accepted that she knew that the claimant was asthmatic after she received the claimant's email in November 2019.

25. There was no dispute that the damp issue was at least in part resolved in December 2019 and the floor fixed. It was Ms Chowdhury's evidence that her heel had gone through the floor. We were provided with photographs of the floor being fixed (411). Those were dated 11 December 2019.

26. At the time of the national lockdown for Covid-19, the claimant, and a number of other employees of the respondent, were placed on furlough. Not all employees were placed on furlough. We were, for example, told that neither Ms Nawaz (the Manchester office manager) nor Ms Zafar (the operations manager) were placed on furlough because they were held out to be key workers. We were provided with a letter sent to the claimant on 27 March 2020 (416) in which she was notified that she was to be placed on furlough leave with effect from 1 April 2020 which was said to apply until further instruction. The letter also stated that, during the period of leave, the claimant would receive 80% of her salary package, with wording which linked it to the government scheme. An email was also sent to the claimant by Ms Khan (the respondent's HR officer) on 27 March 2020 (417) and the claimant emailed to accept her understanding of the furlough scheme on 16 April (418).

27. There was no dispute that throughout the period from going on furlough until the end of her employment, the claimant received only 80% of her salary and not her full salary.

28. There was a dispute about both what the claimant was told about work and whether she did work during the period when she was recorded as being on furlough. It was the respondent's evidence that the claimant undertook volunteering for the respondent during the period, but she did not work. The claimant's evidence was that she did work. One project operated by the respondent in response to the pandemic was operated in conjunction with the Manchester Pharmacy. The claimant emailed the MEN about this with a press release on 25 March 2020 (420). There was a difference of view between the parties as to whether this project was as a result of the claimant's own idea, or not.

29. It was the claimant's evidence that she visited the respondent's Manchester office during lockdown approximately once every two weeks. The claimant referred in her statement to a significant number of documents which she said evidenced the work she did during the period, albeit many of the documents pre-dated the start of the period of furlough. Some emails of 17 June (424) showed the claimant in email correspondence with others about a press release being sent out. In her witness statement, the claimant described the work she undertook during the purported furlough period. The respondent's witnesses emphasised that the claimant was not required to work but it was acknowledged that she did work, but she was described as doing so as a volunteer. It was the claimant's evidence that she was told that fundraisers were effectively being tested during the period and needed to work, the respondent denied that the conversation took place.

30. On 12 May it was the claimant's evidence that she told Ms Zafar that she weas struggling to breathe because colleagues were smoking in the office. It was the claimant's evidence that she did so in a lengthy telephone call.

31. We were shown a document dated July 2020 which was presented as being a business case for redundancies (496). It appeared to be the case that the document had been prepared by Ms Khan. We did not hear any evidence from Ms Khan. Had we done so, she would have been an important witness, as it was clear from both Dr Al Ramadhani and Mr Tokan that she was not only the main architect of the redundancy process, but also the person most involved in how the process was operated. We were provided no reason, nor any evidence about, her non-attendance at the hearing. There was no evidence about the reason for the delay in employees being informed about potential redundancies for the period between the business case in July 2020 and the consultation meetings in mid-September. The document stated that none of the employees were part of trade union.

32. There was no dispute in this case that there was a requirement for redundancies following the pandemic, and as a result of the reduction in funds being received. The business case set out in detail that requirement. It also said that the respondent would like to reduce the fundraising team by half. At the very end of the document, it was recorded that the decision was to eliminate a certain amount of fundraisers from each office (500).

33. On 31 August the claimant visited the Manchester office. It was her evidence that she did so to collect some items. It was her evidence that there was cigarette ash in a mug. She found sheesha equipment (the respondent did not dispute that a part of the equipment was in the office). She said the office smelt of smoke, both cigarette and shisha.

34. The respondent has its headquarters in Bradford. Dr Al Ramadhani and Mr Tokan are both based in Bradford. It was clear from their evidence that on occasion they would visit the Manchester office during usual circumstances, but during the early stages of the pandemic their visits would have been very limited, if they visited at all. On Saturday 5 September, Dr Al Ramadhani endeavoured to meet with some trustees in the Manchester office. It appeared that none of the employees from whom we heard evidence knew he would be visiting Manchester. He was unable to gain access. He could not recall who he contacted to try to assist in gaining access, but it was clear that he endeavoured to contact at least Mr Hussain and Ms Nawaz. He could not gain access or succeed in contacting anyone. He emphasised to us that the time with the trustees was important and was his priority. They went ahead with their meeting elsewhere.

35. It was not entirely clear why Dr Al Ramadhani could not access the Manchester office, as the explanations were not entirely consistent. Ms Zafar's car was stolen in August 2020 with the keys to the office in the vehicle and with the respondent identified with the keys. The lock was changed. It appeared to be the case that Ms Zafar had not provided head office with the new keys. That may have been why Dr Al Ramadhani could not access the office.

36. The Tribunal was provided with a full WhatsApp group chat which arose from Dr Al Ramadhani's attempts to visit the office. The parties agreed that the chat as

provided to the Tribunal was accurate (519). The group was an office chat. In the relevant period those involved were Ms Nawaz, Mr Hussain and Ms Chowdhury. The claimant and Ms Zafar were both members of the chat, but did not contribute to it at the relevant time.

37. There was no doubt that the tone of the chat was informal and light-hearted. The start of the chat was a genuine exchange between those on it regarding Dr Al Ramadhani's visit. Thereafter, as Ms Nawaz confirmed in evidence, the chat became a prank by Ms Nawaz and Mr Hussain (and possibly Ms Zafar although she was not involved in the chat itself), in which they led Ms Chowdhury to believe that Dr Al Ramadhani had entered the office and, as a result, they were all to be the subject of a disciplinary investigation.

38. We do not need to provide the full details of the content of the chat in this Judgment. Mr Hussain referred to there being a "*bong*" in the toilet. It was clear that had Dr Al Ramadhani accessed the office, what he would have found would have caused considerable concern. There were references to the need for Ms Chowdhury to resign. There was reference to sheesha and to a sign.

39. In her evidence to the Tribunal, Ms Chowdhury denied that she had fallen for the prank for the vast majority of the period covered by the WhatsApp chat. It was her evidence that she knew it was a prank, but towards the very end of it she had become concerned that it might be genuine.

40. An important element of the chat was an exchange at 16.38. Mr Hussain stated that he was "*live*" (a word described to us as meaning ok) because "*I've got a beard, I don't smoke*". He later said to the others on the chat, that "*It's all your haramis*". Mr Hussain described that word in various ways, but ultimately accepted (as had Ms Nawaz) that the word described those who were considered less observant of some aspects of Muslim beliefs or practices. Whether or not the chat was intended entirely as a joke or banter, as those involved in it wished to emphasise, we found that this particular exchange made clear that those involved perceived that there might be a distinction drawn by the respondent and the respondent's trustees between those perceived to be more observant Muslims and those (like the claimant and Ms Nawaz) who might be perceived as being more liberal Muslims.

41. On Monday 7 September a spot check was undertaken at the Manchester office by Ms Khan.

42. The claimant's evidence was that she spoke to Ms Nawaz on 8 September. This call was recounted in the document which the claimant sent to Dr Al Ramadhani (517). The telephone call appeared to be an enquiry about keys, the claimant informed Ms Nawaz that she had given the keys to Ms Khan because she had sorted out all her reference "*stuff*" with Ms Khan and had told her that she was resigning that week (but had not yet resigned). Ms Nawaz responded by saying it was strange because the claimant had not resigned.

43. When the claimant saw the WhatsApp chat to which we have referred and its content, she said that she was devastated by how they had behaved and was concerned about being exposed to criminal activity (524).

44. At 6.16 am on 11 September the claimant sent an email to Dr Al Ramadhani (the president), which she copied to: Ms Khan (the head of HR); Mr Rahman; Mr Iqbal; and Mr Chaudhry (510).

45. The claimant also provided a lengthy and detailed letter detailing the issues which the claimant wished to raise (512). In that letter she made a number of very specific allegations. We have not reproduced in this Judgment all that she said, but what she said included "*As you have already been made aware there is a strong likelihood that the following laws have been breached: the Misuse of Drugs Act 1971, multiple breaches of the Health Act 2006, breaches of the Coronavirus Act 2020 and subsequent government guidance and multiple breaches of the Health and Safety at Work Act 1974"*. In the document the claimant reproduced the WhatsApp chat from 5 September and she concluded with her recommendations.

46. Later, on the same day, the claimant also raised a formal grievance (530). That letter addressed the issues previously raised and the events which occurred on the evening on 11 September (detailed below).

47. The decision was taken to close the Manchester office by Ms Khan. She emailed all employees at 13.18 on 11 September (538) and what she said in that email was "*The Manchester office will be closed until further notice. Can those who have the office keys please provide them to Saira today. All HRF property needs to be returned today or asap and if you have any belongings please collect them today if you can"*.

48. Ms Nawaz removed the claimant from the Manchester staff WhatsApp group at 13.36 on 11 September 2020. She said she did so because she understood the claimant had resigned. The claimant had not resigned.

49. At 18.05 on 11 September the claimant emailed Ms Khan following a telephone conversation, and confirmed she would visit the Manchester office to collect the final bits she had left behind and her personal poems from the computer. Ms Khan responded at 18.12 to say that she was at the office and the claimant could extract her poems (538). It was the claimant's evidence, as recorded in her witness statement, that she was reassured by Ms Khan that the colleagues she had named in her whistleblowing letter would not be there.

50. The claimant visited the office with Mr Chaudhry and her sister. Ms Zafar was in the office. There was a dispute about what occurred. The Tribunal heard evidence from the claimant, Mr Chaudhry, and Ms Zafar, about what happened. A statement provided to the respondent from the claimant's sister, was included in the bundle. In summary, Ms Zafar was present in the office when the claimant attended. The claimant alleged that she felt uncomfortable speaking to her. Ms Zafar stepped out of the office with the claimant whilst speaking to her. Mr Chaudhry became concerned and told the claimant to get into the car. Ms Chowdhury and Ms Islam then appeared, stood on the pavement, and stared at the claimant. In her witness statement, the claimant explained how she felt as a result and why she was uncomfortable, as did Mr Chaudhry in his.

51. At 21.59 on 13 September Dr Al Ramadhani responded to the claimant's grievance by email (539).

52. On 14 September the claimant was logged out of the Manchester office staff Instagram account. On 16 September Mr Hussain removed the claimant from the HRF Manchester Core Vol WhatsApp group at 10.39 am and the HRF Socials Broadcast group at 10.41. In his witness statement, Mr Hussain did not provide a reason for doing so (and in any event during his cross-examination Mr Hussain said that his witness statement was inaccurate and was an earlier draft version, but declined to identify all of the ways in which it was incorrect). In answers to questions asked, Mr Hussain stated he removed the claimant because she had removed him from a group. No evidence of Mr Hussain being removed from a group by the claimant was provided.

53. On or around 21 September Ms Zafar, Ms Nawaz and Ms Chowdhury all resigned from their employment with the respondent. They did so with immediate effect. All of them gave evidence that they resigned without knowing about the reason why the office had been closed or what was being investigated, and did so because they were unhappy with the office being closed and the investigation being undertaken.

54. On 21 September Mr Chaudhry received an anonymous Instagram message (625). It was highly offensive, and we do not need to reproduce what was said in this Judgment. The claimant was referred to in it. Neither Mr Chaudhry nor the claimant knew who sent the message. The claimant messaged Mr Gerraty (556), sent him a copy of the Instagram message, and said she was scared and wished she had never opened her mouth. The claimant believed Mr Gerraty was the head of marketing. The respondent disputed that he was. On 22 September, the claimant messaged Mr Gerraty to say she was on her way to the headquarters (in Bradford) and Mr Gerraty responded by saying that he would see her soon.

55. On 22 September 2020 Dr Al Ramadhani met with the claimant. The meeting was also attended by Ms Khan and Mr Chaudhry. We were provided with a transcript of the meeting (634), albeit Dr Al Ramadhani emphasised that he had not known that the meeting was being recorded and, if he had done so, he wouldn't necessarily have said what he said. He also said that the meeting was not a formal grievance meeting, it was a meeting he had offered because he knew that the claimant wished to meet him, and he saw it as a support for an employee. Two particular parts of what was said in the meeting were alleged to have been detriments to which the claimant was subjected. Our findings on those parts of the meeting and what was said are detailed in our findings below.

56. On 24 September Ms Khan removed the WhatsApp group chat. She emailed the employees and explained her decision (563).

57. On Friday 25 September Ms Khan sent an invitation to a business update meeting to the claimant and others (566). It was for a Zoom meeting at 2pm on Monday 28 September. At 13.55 on the Monday 28th the claimant emailed Ms Khan and said she was really uncomfortable sitting in a Zoom call with colleagues from the Manchester office because she said they had "*all been complicit in behaviour, some of which has escalated beyond the workplace*". She said she would not attend the Zoom call. Ms Khan responded to say that she completely understood and would conduct a Zoom call with the claimant once she had spoken to other staff (564). Ms Khan did later speak to the claimant. She explained the redundancy process which

was being undertaken. We were provided with a note of what was said (568). In that meeting there was no genuine explanation of how selection would be undertaken.

58. On 27 September the claimant spoke to Ms Khan by telephone. We were provided with a transcript of what was said (715) and we also listened to the recording. In that conversation, Ms Khan informed the claimant that Dr Al Ramadhani was not allowing her to do her job or to conduct the investigation which she felt was required. We also noted that it was stated by Ms Khan in the conversation that she had put her concerns in an email to keep as a record, but no such email was provided to us by the respondent (even though it appeared that such an email must have existed).

59. Included in the bundle of documents was a document headed "*Grievance outcome – Raised against Manchester staff*" (569). There appeared to be no dispute that it was prepared by Ms Khan. we were not provided with any other materials collated in the course of the grievance investigation. The grievance outcome itself appeared internally inconsistent in describing who was spoken to and when. The grievance was not dated or signed and there were no appendices or attachments. The note stated that Mr Hussain and Ms Islam (the claimant's comparators in the Tribunal claim) had been given informal warnings. Mr Hussain confirmed when asked in the Tribunal, that he had been given a warning. Within the grievance outcome (569), Ms Khan recorded that she had asked questions of Ms Nawaz and Ms Chowdhury and she recounted what they had said. It was accordingly clear that there had been some discussion about the allegations with them, contrary to the evidence which the two of them gave (which we did not accept). In the light of what Ms Khan said in her conversation with the claimant of 27 September, and in the absence of both the email she referred to in that call and any materials collected or recording the grievance investigation undertaken, we only gave the grievance outcome limited weight.

60. A consultation meeting took place with the claimant on 2 October 2020. It was attended by Mr Tokan, Ms Khan and the claimant. A note was included in the bundle (571). The note recorded that the meeting started at 10 am lasted for half an hour.

61. The claimant had prepared a document setting out her proposal for 2 October meeting (579) which was for a new role.

62. Following the meeting, a letter was sent to the claimant (575) which stated that it was sent further to the meetings held on 28 September and 1 October (albeit that date appears to have been incorrect). The letter said that it enclosed the claimant's scores and went on to say that, with regret, the claimant was informed that she had scored lower than most other employees in the pool and had been unsuccessful in securing the post of a fundraising officer. In the light of the scores provided to us, the statement made in that letter was inaccurate.

63. The scoring table for the claimant, dated 5 October (576), recorded that the assessor was Ms Khan and the verification assessor was Mr Tokan. When he was asked about the scores, Mr Tokan clearly had very little understanding of the scoring and referred to it as having been Ms Khan's responsibility. The claimant in that document was scored: three points for length of service (out of five); five points (out of five) for disciplinary record; five points (out of five) for sickness/attendance; three

points (out of five) for lateness/timekeeping; and three points (out of five) for skills. In a table headed "*subjective criteria*" the claimants was scored under four sub-categories (each scored between one and three points) as follows: two points for versatility/flexibility; three points for co-operation and self-motivation; one point for quality of work; and three points for initiative. Comments were included in relation to the scores. The total given was twenty-eight points.

64. In the bundle of documents was a sheet which set out the justification for the scores given (590). After some questions were asked about the document in cross-examination of the respondent's witnesses, the respondent's representative explained that it had been identified that the document had been drafted during the proceedings. As it was not a contemporaneous document, the respondent's representative agreed that it should be ignored.

65. We were provided with a detailed table which showed the scores given to each of those at the respondent who were scored for redundancy (593). The table listed: eight employees in London of whom two were stated as voluntary redundant; nine employees in Birmingham, one of whom was stated as having resigned and two of whom we know were voluntarily redundant from the letters provided to us; one employee in Sheffield; five employees in Manchester/Liverpool (including the claimant and both her named comparators); and two in Wales, one of whom we know was a voluntary redundancy from the letters provided.

66. Each person's score was listed against the categories of: length of service; disciplinary record; absence record; lateness record; skills/cap ability; performance; and total score. There was also an "*other considerations*" column. The table did not break down the performance score. The claimant was shown as having a total score of 29. Ms Islam had a score of 28. One of the other Manchester employees had a score of 28. Mr Hussain had a score of 33. Ten people in total on the sheet scored lower than the claimant, only two of whom were those made voluntary redundant.

67. Ms Islam and Mr Hussain were both recorded as having scored five for disciplinary record (in common with everybody else on the table) even though we know that they had received a warning. It was Mr Tokan's evidence, that for that warning they each should have received a score of three for disciplinary.

68. It was the evidence of both Dr Al Ramadhani and Mr Tokan that only the claimant and possibly one other person had been made compulsorily redundant. It was also Dr Al Ramadhani's evidence that the selection for the fundraisers made redundant was undertaken nationally, it was not undertaken based upon office location. Mr Tokan in his evidence appeared to have no understanding about pools for selection, but broadly his evidence appeared to also be that a distinction was not made based upon the office location of each fundraiser. Mr Tokan thought the other person made compulsorily redundant was in Swansea. Dr Al Ramadhani did not know. The bundle we were given included letters which showed who was made redundant after volunteering. There was no evidence provided of any other individual being made compulsorily redundant. In the absence of any such evidence, we found that the claimant was the only person made compulsorily redundant. There was no explanation provided by any of the witnesses as to why it was that eight people who scored less than the claimant were not made redundant (or at least one of the eight),

when the claimant was. The witnesses confirmed that there was no identified number of fundraisers who needed to be made redundant.

69. A further consultation meeting took place on Zoom between the claimant, Mr Tokan and Ms Khan on 7 October 2010. We were provided with notes (603). We were also provided with a full transcript (696). Mr Tokan at the time was sat in a café in Turkey when he attended the meeting and part-way through ordered a drink. Mr Tokan confirmed to us that he was in Turkey for a pre-arranged appointment, and he had offered the claimant the option of an alternative date.

70. An email was sent to the claimant on 8 October from Ms Khan which informed the claimant of the outcome to the redundancy process (606). What was said regarding the scoring sheet, was that the score sheet had been adjusted for cooperative and self-motivation and initiative. We were not provided with a revised score sheet. The claimant was not informed of the revised score nor was she told what score would have resulted in her not being made redundant.

71. A more formal letter was also sent to the claimant by Ms Khan (607) which advised the claimant that the redundancy consultation had concluded, and the claimant's employment would terminate by reason of redundancy. The notice was stated as being for one month, which commenced on 12 October and ended on 6 November, with it being stated that the claimant would remain on furlough during her notice period.

72. We were provided with various letters which confirmed the voluntary redundancies of other employees (573) (574) (584) (585) (586) (610). We were provided with no letters which informed anyone (other than the claimant) that they were being dismissed by reason of redundancy without it being voluntary.

73. The claimant emailed Mr Rahman on 14 October to appeal against her redundancy (611). An appeal hearing was held on 22 October which was attended by Mr Rahman (as the appeal manager), Ms Khan, the claimant, and Mr Geraghty, as her accompanier. We were provided with a transcript of the meeting (669). Following the appeal hearing, a letter was sent to the claimant explaining that her appeal had not been upheld (612). The claimant appealed on two grounds, which in summary were: the alternative role which she had proposed which had been rejected; and that the scores had not been amended in the light of information she had provided. The decision letter addressed the first in some detail. It addressed the second only briefly and in very generic terms. Mr Rahman did not appear to have given any consideration to the detail of the claimant's scoring, or why it was she had been selected as the person to be made redundant from the large pool of people.

74. When the claimant gave evidence in the remedy part of the hearing, she explained the impact upon her which the detrimental treatment had. She described herself as having been left feeling hopeless and dejected. A report dated 26 May 2022 was provided from Zuber Adams, a coach with degrees in psychology, which described the claimant as having, at the relevant time, sought medical help for extreme distress and feeling suicidal. The claimant's GP records from the 29 September 2020 (83) recorded the claimant at the time as not sleeping, feeling nauseous at the time, and dry retching. The report recorded the claimant's mental health as having dramatically worsened over the previous few weeks.

The Law

75. Direct discrimination claims are brought under section 13 of the Equality Act 2010 which provides that:

> *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

76. Section 39(2) of the Equality Act 2010 sets out various ways in which discrimination can occur and these include any other detriment and dismissal. The characteristics protected by these provisions include religion or belief.

77. In this case, the respondent will have subjected the relevant claimant to direct discrimination if, because of her religious belief, it treated her less favourably than he treated or would have treated others. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different. It is not a requirement that the situations have to be precisely the same.

78. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case. That applies to all of the discrimination and harassment claims. It 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 sub-section (2) does not apply if A shows that A did not contravene the provision".*

79. In short, a two-stage approach is envisaged. At the first stage, we must consider whether the claimant has proved facts on the balance of probabilities from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that she has been treated less favourably than her comparator(s) and that there is a difference of religious belief between them; there must be something more. The second stage is reached where the claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that we must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

80. In **Shamoon v Chief Constable of the RUC** [2003] IRLR 285 the House of Lords said there may be cases where:

> *"The act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy enquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the enquiry is the ground of, or the reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in James v Eastleigh, a benign motive is irrelevant…the ultimate question is – necessarily what was the ground of the treatment complained of (or - if you prefer - the reason why it occurred)."*

81. In **Hewage v Grampian Health Board** [2012] ICR 1054 the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong** [2005] ICR 931, as refined in **Madarassy v Nomura International PLC** [2007] ICR 867. In order for the burden of proof to shift in a case of direct discrimination, it is not enough for a claimant to show that there is a difference in the protected characteristic, and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation. In **Madarassy v Nomura International PLC** [2007] ICR 867 Mummery LJ said:

> *"The court in **Igen v Wong** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate 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.*
>
> *'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it…The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

82. In its decision in **London Borough of Islington v Ladele** [2009] IRLR 154 the Employment Appeal Tribunal set out a detailed commentary on direct discrimination claims and the approach which should be taken, which we took into account.

83. In **Barton v Investec Henderson Crosthwaite Securities Limited** [2003] IRLR 332 the Court of Appeal provided guidance on how the burden of proof should operate. We considered what was said in that Judgment (but will not re-produce it here).

84. During the hearing, we raised a recent decision of the Employment Appeal Tribunal as it was one which had recently been argued before the Employment Judge and appeared to potentially have relevance to the claim, which was **Virgin Active Limited v Hughes** [2023] EAT 130. It is a case which addressed the shifting of the burden of proof in cases involving an actual comparator. The parties both referred to it in their submissions. We have considered what was said in that case and noted, in particular, what was said in the following passages:

> "*In other cases, the claimant compares his treatment with that of one or more other people. There are two ways in which such a comparison may be relevant. If there are no material differences between the circumstances of the claimant and the person with whom the comparison is made (the person is usually referred to as an actual comparator), this provides significant evidence that there could have been discrimination. However, because there must be no material difference in circumstances between a claimant and a comparator for the purpose of section 23 EQA it is rare that a claimant can point to an actual comparator. The second situation in which a comparison with the treatment of another person may provide evidence of discrimination is where the circumstances are similar, but not sufficiently alike for the person to be an actual comparator. The treatment of such a person may provide evidence that supports the drawing of an inference of discrimination, sometimes by helping to consider how a hypothetical person whose circumstances did not materially differ to those of the claimant would have been treated (generally referred to as a hypothetical comparator). Evidence of the treatment of a person whose circumstances materially differ to those of the claimant is inherently less persuasive than that of a person whose circumstances do not materially differ to those of the claimant. That distinction is not always sufficiently considered when applying the burden of proof provisions …*
>
> *It is worth noting that in* ***Madarassy*** *the Employment Tribunal did not analyse the treatment of the claimant in comparison to actual comparators. Ms Madarassy's claim was not analysed on the basis that there were men who were actual comparators, but that the scoring of men in a redundancy exercise could help establish how a hypothetical comparator would have been treated. Where there is an actual comparator, it might be said that there is more than the bare fact of a difference of status and a difference of treatment…*
>
> *If anything more is required to shift the burden of proof when there is an actual comparator it will be less than would be the case if a claimant compares his treatment with a person whose circumstances are similar, but materially different, so that there is not an actual comparator.*
>
> *For example, if two people who differ in a protected characteristic attend a job interview and one is appointed but the other is not, that, of itself, would not be enough to shift the burden of proof, but if they scored the same marks in the*

> *assessment, so there is an actual comparator, the difference of treatment would seem to call out for an explanation…*
>
> *Accordingly, where a claimant compares his treatment with that of another person, it is important to consider whether that other person is an actual comparator or not. To do this the Employment Tribunal must consider whether there are material differences between the claimant and the person with whom the claimant compares his treatment. The greater the differences between their situations the less likely it is that the difference of treatment suggests discrimination."*

85. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council** [1998] IRLR 36. An employer's failure to follow policies and procedures can support an inference of discrimination.

86. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or significant influence for the treatment.

87. If the burden of proof shifts, the employer is required only to show a non-discriminatory reason for the treatment in question, it does not have to show that it acted reasonably or fairly in relying on it.

88. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. Section 123(4) says that, in the absence of evidence to the contrary, a person is to be taken to decide on a failure to something when he does an act inconsistent with doing it, or if he does no inconsistent act, on the expiry of the period when that person might reasonably have been expected to do it.

89. The key date is when the act of discrimination occurred. We need to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. The respondent's representative highlighted that whether the respondent is responsible for an ongoing situation or state of affairs, was the test set out in **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96. She also highlighted that there is a distinction to be drawn between a one-off act with ongoing consequences and conduct extending over a period (**Sougrin v Haringey Health Authority** [1992] IRLR 41). For a claim for breach of the duty to make reasonable adjustments, the respondent's representative submitted that the discriminatory conduct occurred by way of an omission as opposed to a continuing act and relied upon **Kerr v Fife Council** UKEATS/022/20, a case in which it was found that what occurred was an omission extending over a period and, for which, there was a need to consider and determine when that period ended.

90. If out of time, we need to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*

91. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble** [1997] IRLR 336. Those factors are: the length of, and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the relevant respondent has cooperated with any request for information; the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action. Subsequent case law has said that those are factors which illuminate the task of reaching a decision, but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. We should assess all the factors in the particular case which we consider relevant to whether it is just and equitable to extend time and factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent. That was emphasised in **Adedeji v University Hospitals Birmingham NHS Trust** [2021] EWCA Civ 23, a case which the respondent's representative cited as saying that, as a general rule, it was in the public interest that time limits are enforced and strictly so. **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 confirms the breadth of the discretion available to us, but also says that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases.

92. S19 Equality Act 2010 provides:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

93. When considering a claim of indirect discrimination, it is necessary to consider the statutory test in stages:

a. The first stage is to establish whether there is a provision, criterion or practice (known as a PCP);

b. If we aresatisfied that the PCP contended for has been or would be applied, the next step is the analysis of whether there is a particular disadvantage for those with the relevant protected characteristic when compared to those that do not share the protected characteristic. The comparative exercise must be in accordance with section 23(1) of the Equality Act 2010. In relation to disability, it is therefore necessary to consider those with the individual's particular disability. The Code gives the example of someone with an equivalent level of visual impairment.

c. If the group disadvantage is established, then it must be shown that it did or would put the individual at that disadvantage.

94. The burden of proving those elements is on the claimant.

95. Section 20 of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20(3) provides that the duty comprises the requirement that where a provision, criterion or practice of the employer's puts a person with a disability at a substantial disadvantage in relation to a relevant matter in comparison with people who do not have a disability, to take such steps as it is reasonable to have to take to avoid the disadvantage. That requires not only the existence of a disability, but also: identification of a PCP; and knowledge (actual or constructive) on the part of the employer. The claimant also relied upon the provisions of section 20 which apply to physical features.

96. Section 21 of the Equality Act 2010 provides that a failure to comply with the requirement set out in section 20 is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

97. **Environment Agency v Rowan** [2008] IRLR 20 is authority that the matters we must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of an employer;

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage suffered by the claimant.

98. The requirement can involve treating disabled people more favourably than those who are not disabled. Whether something is a provision, criterion or practice should not be approached too restrictively or technically, it is intended that phrase

should be construed widely. A one-off act can be a PCP, but it is not necessarily the case that it is.

99. In terms of knowledge of disability and reasonable adjustments, the duty only applies if the respondent: knew or could reasonably be expected to know that the claimant had the disability; and knew or could reasonably be expected to know that the claimant was likely to be placed at a substantial disadvantage compared with persons who are not disabled (that is aware of the disadvantage caused by the application of the PCP or the physical feature). The question of whether the respondent could reasonably be expected to know of the disability and/or the substantial disadvantage is a question of fact for us to decide.

100. When considering reasonable adjustments, we took into account the EHRC Code of Practice on Employment. This included: paragraphs 4.5 and 6.10 on provision criterion or practice; and 6.11 about physical features.

101. Section 26 of the Equality Act 2010 says:

> **"***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."*
>
> *"In deciding whether conduct has the purpose or 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.***"**

102. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for her; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

103. A respondent can be liable for effects, even if they were not its purpose (and vice versa). In each case, even if the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires us to consider the effect of the conduct from the claimant's point of view; the subjective element. We must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

104. Section 43A of the Employment Rights Act says:

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

105. Section 43B says:

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

106. Section 43C provides that a disclosure to a worker's employer is a qualifying disclosure.

107. The word "*likely*" in section 43B requires more than a possibility or a risk that a person might fail to comply with a legal obligation or that health and safety is endangered, the information had to show that it was probable or more probable than not, that there would be a breach.

108. The necessary components of a qualifying disclosure are:

a. First, there must be a disclosure of information.

b. Secondly, the worker must believe that the disclosure is made in the public interest.

c. Thirdly, if the worker does hold such a belief, it must be reasonably held.

d. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f) of section 43B.

e. Fifthly, if the worker does hold such a belief, it must be reasonably held.

109. Unless all five conditions are satisfied there will not be a qualifying disclosure. Those steps are clear from the statute, but were very clearly and helpfully summarised by HHJ Auerbach in **Williams v Michelle Brown AM** EAT/0044/19.

110. The first stage involves a consideration of whether there has been a disclosure of information (as set out in the decision of the Court of Appeal in **Kilraine v London Borough of Wandsworth** [2018] ICR 1850).

111. It is necessary to consider whether the employee holds the belief that the disclosure tends to show one of the relevant forms of wrongdoing and whether that belief is reasonable. That involves subjective and objective elements. The test of what the claimant believed is a subjective one. Whether or not the employee's belief was reasonably held is an objective test and a matter for us to determine.

112. In **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731 Underhill LJ held that the same approach, involving both the objective and subjective elements, applies to the requirement that in the reasonable belief of the worker making the disclosure, it is made in the public interest. What is "in the public interest" does not lend itself to absolute rules.

113. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done on the ground that the worker has made a protected disclosure. Under section 48(2) it is for the employer to show the ground on which any act, or deliberate failure to act, was done (where it is asserted that it was on the ground of having made a public interest disclosure). The employer must prove on the balance of probabilities that the act, or deliberate failure, was not on the grounds that the employee had done the protected act.

114. In determining whether a claimant has suffered a detriment as a result of having made a public interest disclosure, we must focus on whether the disclosure had a material influence, that is more than a trivial influence, on the treatment - **NHS Manchester v Fecitt** [2012] IRLR 64.

115. In her submissions, the respondent's representative placed reliance upon the decisions in **Parsons v Airplus International Ltd** UKEAT/0111/17, **Babula v Waltham Forest College** [2007] EWCA Civ 174, **Harrow London Borough v Knight** [2003] IRLR 140 and **Jesudason v Alder Hey Children's NHS Foundation Trust** [2020] EWCA Civ 73. In relation to the last of these cases, she emphasised that we must consider the employer's motivation for taking a particular course of action, as an employer who is motivated to act for reasons unconnected to the protected disclosure will not have subjected the employee to an unlawful detriment.

116. The law in relation to the burden of proof as explained for discrimination and harassment allegations, does not apply to claims for detriment or dismissal as a result of having made a protected disclosure. The respondent's representative relied upon **Yewdall v Secretary of State for Work and Pensions** UKEAT/0071/05 in this respect. The initial burden is on the claimant to show in the first instance that a ground or reason (that is more than trivial) for detrimental treatment is a protected disclosure. She submitted that the burden of proof only passes to the employer after the employee has established what she described as a prima facie or arguable case of unfavourable treatment which requires to be explained. If that has occurred, then by virtue of 48(2) Employment Rights Act 1996 the respondent must be prepared to show why the detrimental treatment was done and if they do not do so adverse inferences may be drawn against them.

117. Determining whether a detriment is on the ground that the worker has made a protected disclosure, requires an analysis of the mental processes (conscious or unconscious) of the employer acting as it did. It is, of course, not sufficient to demonstrate that 'but for' the disclosure, the employer's act or omission would not have taken place. The protected disclosure must have materially influenced the employer's treatment of the worker.

118. A worker is subject to a detriment if she is put at a disadvantage. The concept of detriment is very broad and must be judged from the viewpoint of the worker. There is a detriment if a reasonable worker might consider the relevant treatment to constitute a detriment.

119. It is also important to highlight that, in deciding whether or not a protected disclosure was made, or a worker was subjected to a detriment as a result, we do not need to decide whether the worker was correct when making the disclosure. It is not part of our role to determine whether or not the matter about which the worker blew the whistle was made out and (in this case) whether a criminal offence had been committed etc, or whether the health and safety of an individual had in fact been endangered.

120. The respondent emphasised that it was a defence if the reason for the detrimental treatment was not the doing of the protected act in question but was the unacceptable way in which it was made (**Panayiotou v Kernaghan** [2014] IRLR 500).

121. For dismissal and section 103A of the Employment Rights Act 1996, the question is whether the principal reason for the dismissal is that the claimant made a public interest disclosure.

122. For the claim for ordinary unfair dismissal, as in all such claims, the starting point is section 98 of the Employment Rights Act 1996.

> *"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) The reason (or if more than one, the principal reason) for the dismissal."*
>
> *"A reason falls within this subsection if it…is that the employee was redundant."*
>
> *"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.*"

123. The respondent's representative highlighted that the words quoted above of section 98(4) should always be the starting point (**Iceland Frozen Foods v Jones** [1982] IRLR 439) and that, in judging the reasonableness of the employer's conduct, we must not substitute our decision of what was the right course to have adopted, for that of the employer.

124. In **Williams v Compair Maxam Ltd** [1982] IRLR 83, the EAT set out the standards which should guide the Tribunal in determining whether a dismissal for redundancy is fair under section 98(4). Browne-Wilkinson J, expressed the position as follows (including only the factors relevant to this case):

> *"… there is a generally accepted view in industrial relations that… reasonable employers will seek to act in accordance with the following principles:*

> *(1) The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
>
> *(2) ….*
>
> *(3) … the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*
>
> *(4) The employer will seek to ensure that the selection is made fairly in accordance with these criteria ….*
>
> *(5) The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*
>
> *… The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim."*

125. The respondent's representative relied upon the **Williams** Judgment in emphasising that the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted (not whether we decide whether we would have thought it fairer to act in some other way).

126. On consultation, the Employment Appeal Tribunal in **Mugford v Midland Bank** [1997] IRLR 208, summarised the state of the law as follows:

> *"It will be a question of fact and degree for the [employment] tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."*

127. The respondent's representative submitted that there is no need for an employer to make exhaustive efforts regarding alternative employment, just reasonable ones (relying upon **Quinton Hazel 30 Limited v Earl** [1976] ICR 296). She also submitted that if the selection method was reasonably fair, then the dismissal would be fair (relying upon **British Aerospace v Green** [1995] EWCA Civ 26).

128. We considered the entire written and verbal submissions of both parties, whether or not they are expressly addressed in this Judgment. The claimant's representative in her liability submissions focussed almost entirely upon the facts and not the applicable law.

129. Based upon the date when the claim form was entered at the Tribunal, the **Vento** bands which applied to the claimant's claims were: £900-£9,000 lower band; £9,000-£27,000 middle band; and £27,000-£45,000 upper band. Whilst **Vento** was a discrimination case, the awards for injury to feelings applying that case (as amended) also apply to findings of detriment on the grounds of having made a public interest disclosure (but not the automatic dismissal found). Compensation is awarded on the basis that, as best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct. When making an injury to feelings award, we must keep in mind that the intention is to compensate, not punish. We should not allow an award reflect outrage or indignation. Awards should not be set too low as that would diminish respect for the policy of the legislation. The focus is on the injury suffered by the claimant. The top **Vento** band is for the most serious of cases, such as where there has been a lengthy campaign. The middle band is for serious cases which do not merit an award in the highest band. The lower band is for less serious cases, such as where there is an isolated or one-off occurrence.

Conclusions – applying the Law to the Facts

130. Before explaining the decisions which we made when applying the law to the facts, we did think it was important to highlight that we believed that there were significant gaps in our knowledge about the facts and what occurred, particularly in the absence of Ms Khan as a witness. We could not understand why the respondent did not call her as a witness. We were told that she had remained in employment for some time after the relevant events and we noted that the respondent called other ex-employees to give evidence. We have already addressed the conversation of 27 September and the lack of documents to demonstrate the grievance investigation undertaken. We also found that there was a paucity of evidence available about elements of the redundancy process undertaken and what account was taken at which stage of matters such as the scores given for each person at risk.

131. We believed that it was appropriate to consider at the outset of our conclusions the view that we took of the evidence of the four witnesses from whom we heard, who were directly involved in the WhatsApp chat of the 5 September or (in the case of Ms Zafar) were closely related to it. We did not find that the evidence which they gave about the WhatsApp conversation was credible when read alongside the chat itself. We found that to have been clear from each of their cross-examination and the implausible answers given during cross-examination. In particular, and as submitted by the claimant's representative, we considered that it was simply implausible that Ms Nawaz, Ms Zafar, and Ms Chowdhury, all resigned with immediate effect during the first year of the Pandemic purely because they were dissatisfied with the office being closed and an investigation being undertaken about which they had not been provided any information. We found that they obviously resigned because of what had been found in the office and what was said in the WhatsApp chat, not because of an investigation into a matter about which they knew nothing. We did not accept that they resigned for the reasons they gave.

132. We did not consider the issues in the order in which they were listed in the attached list. We decided that it was logical to start by determining whether there had been a protected disclosure (issue four), before considering the detriments (issue five). We then considered the claim for unfair dismissal claim (including whether the principal reason for the dismissal was any protected disclosure found) (issue two), followed by the claim for direct discrimination on grounds of religion or belief (which also arose from the dismissal) (issue seven). After that we considered the indirect disability discrimination and duty to make reasonable adjustments claims (issues nine and ten) and the claim for harassment related to disability (issue eleven). The last issue we considered was the issue in the breach of contract claim (issue thirteen).

The disclosure

133. The one disclosure upon which the claimant relied as being (or containing within it) a protected disclosure, was the disclosure which she made at 6.15 am on 11 September 2020 by email to Dr Al Ramadhani, Ms Khan, Mr Rahman, and Mr Iqbal. This consisted of a covering email (510) and a document addressed to D Al Ramadhani (512-529). As the alleged disclosure was stated in the list of issues to have been the email of 6.15 am, what was relied upon did not include the formal grievance document sent by the claimant to Ms Khan later, on the same day (530).

134. In the list of issues, it was stated at issue 4.1.2 that the claimant disclosed drug taking on work premises, smoking indoors, and health and safety breaches. The document which the claimant wrote did disclose allegations that those matters had occurred. As we have already explained, it is not necessary for us to determine whether or not those things had occurred, or whether or not the claimant's allegations were correct.

135. Issue 4.1.3 asked whether the claimant believed that the disclosures of information were made in the public interest? The respondent submitted that the claimant did not believe that the disclosure of information was made in the public interest and, further, that the claimant had failed to show that what was disclosed was in the public interest as it was not raised at the time.

136. On 31 August 2020 the claimant had visited the respondent's office and seen cigarette ash and her evidence was that the smell in the office was of cigarette smoke and sheesha. She also saw sheesha smoking devices (there was no dispute that at least a part of such a device was present in the office), birthday decorations, and other things potentially evidencing that a party or gathering had recently taken place. We accepted her evidence about what she had seen and smelt. She had also seen the content of the WhatsApp conversation of the 5 September 2020 (either on that day or shortly afterwards) which appeared to support her beliefs (as she had read it literally and not as a prank). She wrote her letter to Dr Al Ramadhani and sent it by email early on 11 September. We did not find that the timing of the disclosure supported the respondent's argument that the claimant had not believed that the disclosures were made in the public interest because they had not been raised at the time. What she raised was based upon what she had recently observed, and a WhatsApp conversation seen by her less than a week before the disclosure was made.

137. We accepted that the claimant did believe that the disclosure she made was made in the public interest. By the very nature of what was alleged in the letter, we found that showed that the claimant believed it to be in the public interest. It was also clear from the content of what was said and the context of it. The claimant cited the legislation which she believed had been breached, referred to it as illegal and criminal activity, and (in her summary) referred to the risk that anybody who had entered the office space could have been at risk of contracting Covid. We had no doubt that the claimant believed that what she disclosed was in the public interest. For similar reasons, we also found that belief to have been reasonable (issue 4.1.4). By the very nature of what was alleged (misuse of drugs, smoking indoors in a workplace, using the premises for a social gathering during the pandemic in breach of restrictions in place at the time, and the office being unfit for use), it was reasonable for the claimant to have believed that what she was disclosing was in the public interest.

138. In the list of issues, 4.1.5 set out the various things which the claimant said that she believed her disclosure tended to show with reference to the subsections of section 43B of the Employment Rights Act 1996. She relied upon subsections (a), (b) and/or (d). It did not ultimately matter whether the claimant could prove that she believed that it tended to show all three matters, as it would have been a protected disclosure if it tended to show any one of the things set out in those subsections.

139. The claimant alleged that the information she disclosed evidenced misuse of drugs on the premises, smoking indoors in a workplace, and breaches of the Covid restrictions in place at the time as the space had been used for a social gathering. As we have said, we did not need to determine whether a criminal offence had in fact been committed. For issue (4.1.5.1) we only needed to decide whether the claimant believed that a criminal offence had been committed, was being committed, or was likely to be committed. We found that she clearly did, based upon what was alleged and the reason why she made the allegations. We also found that belief to be reasonable (issue 4.1.6).

140. In her letter to Dr Al Ramadhani, the claimant identified what she believed to have been evidence of: smoking in the workplace; breaches of the Covid obligations; and breaches of the Health and Safety at Work Act 1974. As with the criminal offences, we did not need to decide whether there had been breaches of the law or legal obligations which applied to those matters. What we had to determine (4.1.5.2) was whether the claimant believed that the information she was disclosing showed that the respondent had failed, was failing, or was likely to fail to comply, with the legal obligations to which it was subject. We found that the claimant did, based upon what she said in the letter. We also found that belief to be reasonable (issue 4.1.6).

141. In her letter, the claimant identified health and safety risks arising from what she believed had been smoking in the office, breaches of Covid restrictions, and other failures to comply with health and safety obligations. Section 43B(1)(d) of the Employment Rights Act 1996, which was what was relied upon for allegation 4.1.5.3, required the claimant to believe that her disclosure tended to show that the health and safety of any individual had been, was being, or was likely to be, endangered. We accepted that the claimant did believe that at the time. That was the whole point of the letter which she wrote. Any breaches of the rules prohibiting smoking in the workplace or the Covid restrictions in place at the time, would clearly carry the risk of

health and safety being endangered, as that was the reason for the relevant rules/restrictions. We found that any such belief was reasonable (issue 4.1.6).

142. The disclosure was made to the claimant's employer. As stated at issue 4.2, any qualifying disclosure found was a protected disclosure as it was made to the claimant's employer. As a result of what we found and have explained, we found that the contents of the claimant's email of 6.15 am on 11 September 2020 to Dr Al Ramadhani (and others) was (or contained) a qualifying disclosure and therefore it was (or contained) a protected disclosure.

The alleged detriments

143. We then proceeded to consider in turn each of the detriments alleged and whether those detriments had been on the grounds that the claimant had made the protected disclosure found. We considered each of detriments D1 to D15 set out at issue 5.1 (having correctly renumbered the latter detriments) and for each detriment also considered issues 5.2 and 5.3 as they applied to that detriment. The parties' representatives had helpfully set out each parties' submissions on each detriment, following through each of the alleged detriments. We read and considered each of those submissions at the same time as we considered and determined the issues (whether or not such submissions are expressly referred in this Judgment).

144. Alleged detriment D1 was that Ms Nawaz had removed the claimant from the Manchester staff WhatsApp group at 13.36 on 11 September 2020. The WhatsApp group was not a formal method of communication operated by the respondent, but it appeared to be a communication forum in general use and Ms Zafar in evidence explained that it was used as an informal channel of communication (for those based in the Manchester office). There appeared to be no dispute that what was alleged had in fact occurred, the dispute was about the reason why. When we considered issue 5.2 (whether the claimant did reasonably see the act as subjecting her to a detriment) we had no hesitation in finding that she did, in the context of a small office which used the WhatsApp group to communicate and where the claimant was singled out as being the person removed from the group.

145. In her submissions, the respondent's representative relied upon Ms Nawaz's evidence that this had been due to her understanding of the claimant resigning. In her submissions, the claimant's representative submitted that what had been said by Ms Nawaz was incorrect as the claimant had not resigned. The claimant's representative relied upon the claimant's own account of her conversation with Ms Nawaz on 8 September 2020 as related in her 11 September complaint (517) when Ms Nawaz had been told by the claimant about her conversations with Ms Khan and Ms Nawaz had mentioned that the claimant had not handed in her resignation.

146. We did not believe the explanation which Ms Nawaz provided for removing the claimant from the WhatsApp group. We have already explained why we did not find Ms Nawaz (together with others) to have been truthful in their evidence generally. On this issue, we found it not to be credible that Ms Nawaz removed the claimant because she believed that the claimant had resigned, when she was aware that she had not done so, and where the claimant had not formally resigned. Even had the claimant resigned, we would have expected her to have been removed from the group only at the time when her notice expired.

147. In her submissions, for all of the detriments relied upon, the claimant's representative contended that as the detriments were imposed on the claimant shortly after she made her protected disclosures, the Tribunal was asked to draw the inference that the detriments were all done on the grounds that the claimant had made the protected disclosure. We noted, in particular, that the claimant was removed from the group eighteen minutes after Ms Khan had emailed the Manchester office staff to tell them that the Manchester office would be closed (13.18 on 11 September (538)). We have considered carefully what we have said about the steps we must undertake as set out in the section on the law above. The initial burden is on the claimant to show in the first instance that a ground or reason (that is more than trivial) for the detrimental treatment was a protected disclosure. This is the requirement on the claimant to demonstrate what the respondent's representative described as an arguable case of unfavourable treatment which requires to be explained. In the circumstances we have described, and in particular based upon the proximity of the claimant's removal from the group to the timing of the closure of the office, we found that the claimant had demonstrated the arguable case that the reason for the detrimental treatment was the protected disclosure. We did so based upon the inference we were invited to draw. That having occurred, by virtue of section 48(2) of the Employment Rights Act 1996, the respondent must show why the detrimental treatment was done and if they do not do so adverse inferences may be drawn against them. There was an absence of a credible explanation from Ms Nawaz for having done so, us having found the explanation she gave to have been untruthful. We were mindful of the fact that there was no express clear evidence that Ms Nawaz was informed of the disclosure made, but in circumstances where the respondent's witnesses made clear that there were office discussions about what had occurred and where we did not have any genuine evidence of what Ms Khan told Ms Nawaz (save for Ms Nawaz's account which we did not believe, and a limited reference in the grievance document which confirmed that a discussion had taken place), we did find that the claimant was treated detrimentally as alleged and the reason for it was because the claimant had made the protected disclosure.

148. We then considered alleged detriments D3 and D4 as they also arose from the claimant being removed from other groups and they were therefore related to alleged detriment D1. It was the claimant's evidence that on 14 September she was logged out of the Manchester office staff Instagram account. It was also her evidence that at around 10.30 am on 16 September she was removed from the Manchester core volunteers WhatsApp group and from the HRF socials broadcast WhatsApp group. In her witness statement, she explained why she believed that being removed from those groups (when still an employee) was a detriment for her. Based upon that evidence and for the same reasons which we have already given for the Manchester office WhatsApp group, we found the claimant being removed from those groups to be a detriment for her (issue 5.2).

149. In her submissions, the respondent's representative stated that D3 was an action of Ms Nawaz and contended it was due to her understanding that the claimant was resigning. For D4, it was Mr Hussain's evidence that he removed the claimant from the relevant groups. The respondent submitted that it was because the claimant had removed Mr Hussain from a group that had 80% of his volunteers. In his witness statement Mr Hussain did not provide that as the reason why he had done so. The reason relied upon in submissions, was not one which was evidenced by any other documents, such as a document showing the claimant having removed Mr Hussain

from a group. In the absence of any supporting evidence and as an explanation which was not included in his statement, we did not find Mr Hussain's oral evidence to have been truthful on this issue. We found that there was no genuine reason why the claimant was removed from the groups alleged where she had not actually resigned. We found that the reason the claimant was removed from the groups was with the intention of isolating her. Based upon the absence of any credible reason and for the same reasons as given in addressing allegation D1 (and having applied the law as we have set out for allegation D1), we also found that the claimant was treated detrimentally as alleged in allegations D3 and D4 and the reason for that was because the claimant had made the protected disclosure.

150. Alleged detriment D9 was also in relation to a similar issue. That alleged detriment was the nationwide WhatsApp group being closed down. The reason why that group was closed down was set out in Ms Khan's email of 24 September to a large number of employees (563). That was said to be because there had been a lot of commotion and comments about the recently departed employees. It was said that the group chat would be removed as any group chat created for work purposes had to be authorised by the senior management team and a responsible person would monitor each group chat. Unlike the situation for the claimant's removal from other WhatsApp groups or Instagram, this was not specific to the claimant it was applied generally.

151. We found that the step taken by Ms Khan and set out in the email of 24 September was a sensible thing to do and an entirely legitimate approach to a WhatsApp group. It was not directed at the claimant, it applied to all members of the group. We did not find that it was a detriment for the claimant (or something which she could reasonably see as being a detriment) for a WhatsApp group to be closed down in its entirety for all staff within it. We also did not find that the reason why Ms Khan shut down the group was because the claimant had made the protected disclosure relied upon, where the decision was to close the group in its entirety.

152. Alleged detriment D2 was that on 11 September 2020 the claimant was placed in an uncomfortable situation with other colleagues at the office. The list of issues stated this occurred at 5pm, but from the evidence we heard it occurred at shortly after 6pm. In her submissions, the respondent's representative submitted that this was denied, and she said that as it was outside and not on the premises, the respondent was not vicariously liable for the actions of those at the time.

153. We found that the context in which the claimant attended the office was important. At approximately 6am that morning, the claimant had made her protected disclosure. At 1.20 pm Ms Khan had informed those who worked in the Manchester office that it would be closed until further notice and that anybody who needed to return to the office to collect belongings should do so that day. The claimant spoke to Ms Khan and then, in an email at 6.05 pm, said she would come into the Manchester office to collect her things. Ms Khan confirmed at 6.12 pm that she could, and that Ms Khan was there. It was the claimant's evidence, as recorded in her witness statement, that she was reassured by Ms Khan that the colleagues she had named in her whistleblowing letter would not be there. As we did not hear any evidence from Ms Khan and therefore there was no evidence which contradicted what the claimant said, we accepted that the claimant was given that reassurance.

154. When the claimant attended the office, she was accompanied by Mr Chaudhry and her sister. We heard evidence from both the claimant and Mr Chaudhry about what occurred. We accepted the evidence they gave and found their evidence to have been genuine and credible. In the bundle was an account provided by the claimant's sister to the respondent, but as the claimant's sister did not give evidence to us under oath as she could have done, we gave that account little weight. Ms Zafar was present in the office when the claimant attended. Ms Zafar stepped out of the office with the claimant whilst speaking to her. Mr Chaudhry became concerned and told the claimant to get into the car. Ms Chowdhury and Ms Islam then appeared, stood on the pavement, and stared at the claimant. In her witness statement, the claimant explained how she felt as a result and why she was uncomfortable, as did Mr Chaudhry in his. Notably, Ms Chowdhury did not give any evidence about the incident whatsoever, nor did she explain in her statement why she was there, despite this being one of the alleged detriments (and, indeed, being the only alleged detriment which directly involved Ms Chowdhury). Ms Zafar's witness statement also did not address the incident, but in her oral evidence she said that Ms Chowdhury and Ms Islam were nearby, saw what had occurred, and were concerned for Ms Zafar. We did not accept her evidence as a realistic explanation of why the other two employees happened to be outside the building at the time and noted that, in any event, Ms Chowdhury did not herself evidence that she attended for that reason.

155. The alleged detriment was that the claimant was placed in an uncomfortable situation. We found that she clearly was, in the circumstances she evidenced and where she had been reassured that those whom she had raised in her protected disclosure would not be present. We accept her evidence, as corroborated by Mr Chaudhry, that she was made to feel uncomfortable by the actions of Ms Chowdhury, Ms Islam and, to an extent, Ms Zafar. We did not accept the respondent's argument that they were not vicariously liable for the actions of the employees. Where the claimant attended the office to collect her belongings with the agreement of Ms Khan and where the event occurred on the pavement immediately outside the office, we found that what occurred was clearly in the course of employment and the respondent was vicariously liable for the actions of its employees even though they were not in the premises at the time, but immediately outside. We found that what occurred was to the claimant's detriment. Applying the steps set out in the section of this Judgment explaining the law above and taking account of the proximity of the events to the claimant's protected disclosure and that they occurred whilst the office was being closed following the disclosure, we found that the claimant showed in the first instance that a ground or reason (that is more than trivial) for the detrimental treatment was the protected disclosure. Applying section 48(2) of the Employment Rights Act 1996, the respondent was then required to show why the detrimental treatment was done. In her submissions the respondent's representative denied it occurred but provided no explanation. In the absence of any positive evidence from Ms Chowdhury about why she acted as she did and as we have not found Ms Zafar's evidence to be credible, we drew the adverse inference that the conduct was because of the protected disclosure made that morning.

156. Detriment D5 was the anonymous Instagram message sent to Mr Chaudhry on 21 September 2020 which referred to the claimant. We found that the message (625) was received by Mr Chaudhry. Clearly that would have been very upsetting for

both him and the claimant. It was a detriment for her. However, as it was an anonymous message, neither Mr Chaudhry nor the claimant knew who sent it. By the time the message was received, the three who resigned from their employment with the respondent had resigned, so the respondent could not be vicariously liable for their actions (even if one of them sent it). On the evidence available to us, we did not find that the claimant had proved on the balance of probabilities that the message sent to Mr Chaudhry had been sent by someone for whom the respondent was vicariously liable. As the claimant has not proved that she was subjected to the alleged detriment by the respondent, this complaint did not succeed.

157. Alleged detriment D6 was an allegation that Matthew Gerraty did not take action when the claimant messaged him and spoke to him on the phone about how she was feeling on 21 September 2020. We did not hear evidence from Mr Gerraty. There was some dispute about his precise job title; the claimant believed he was the Head of Marketing, but the respondent's witnesses suggested he was not. We did note that Mr Gerraty was the claimant's workplace colleague who supported the claimant at the redundancy appeal meeting on 22 October 2020 (669), that is one month after this alleged detriment. It was the claimant's evidence that she spoke to Mr Gerraty on 21 September (after Mr Chaudhry had received the upsetting Instagram message) and followed the telephone call with text messages. We read those messages (556). Those messages show that the claimant was informing her colleague that she was scared and now wished she had not opened her mouth. On the following day, the claimant informed Mr Gerraty that she was on the way to the Bradford headquarters, and he responded that he would see her soon. She was confiding in a colleague about her concerns. We did not find that the absence of any action from that colleague was the claimant being subjected to a detriment. No genuine detriment was identified in the claimant's representative's submissions. In any event, even had we found the absence of action from Mr Gerraty in response to have been a detriment, we did not find that there was any evidence that the way in which he responded to the claimant's concerns was because the claimant had made a protected disclosure.

158. Allegations D7 and D8 arose from the meeting which Dr Al Ramadhani held with the claimant on 22 September 2020. The meeting took place on the day after Mr Chaudhry had received the Instagram message. In her statement, the claimant described it as being a grievance meeting. Dr Al Ramadhani in his evidence was very keen to emphasise that it was not a grievance meeting, as he would not involve himself in such processes. He explained that it was a meeting which he agreed to as a support to the claimant. We were provided with the lengthy transcript of the claimant's recording of the meeting (634) which helpfully meant that we had a record of exactly what was said. Dr Al Ramadhani's evidence was that he did not know it was being recorded at the time. The meeting was also attended by Mr Chaudhry and Ms Khan.

159. Alleged detriment D7 was that Dr Al Ramadhani told the claimant to seek alternative employment. The relevant part of the meeting (661) involved Dr Al Ramadhani raising that he knew that the claimant had planned to find another job or had done so, and he asked whether she might leave? The genesis of that part of the conversation was that the claimant had informed Ms Khan and others that she would be resigning. In that context and in a meeting with the claimant, we found that to be an entirely understandable conversation.

160. The statement which formed the heart of this complaint was what Dr Al Ramadhani said after the claimant had confirmed that she had been in the process of doing resigning. What is recorded (662) is that he said, "*I don't want to tell you yes or no, but carry on with that"*. It was the claimant's evidence that she was shocked and disappointed by the comment and took it as a clear indication that Dr Al Ramadhani wanted her to leave. In her verbal evidence, she also referred to Dr Al Ramadhani having gestured towards the door at the same time as saying the end of the words quoted. Mr Chaudhry also believed that the comment made had suggested that the claimant look for another job. It was Dr Al Ramadhani's evidence that he never mentioned to the claimant to seek alternative employment. However, whatever he intended by what he said, we accepted that the transcript recorded him as telling the claimant to carry on with that, when referring to her resigning. It was the claimant's representative's submission that, even if Dr Al Ramadhani had good intentions, his comment was still to advise the claimant to leave the business. We agreed with that submission and found the comment to have been a detriment to the claimant. In the context of a meeting arranged because the claimant had made a protected disclosure to Dr Al Ramadhani, and where he told her to leave whilst discussing what she should do as a result, we found that what was said was done on the ground that the claimant had made a protected disclosure. Dr Al Ramadhani emphasised that the respondent's reputation was at the forefront of his considerations. He wanted to close the issues down (as clearly evidenced by what Ms Khan said in her telephone conversation with the claimant on 27 September 2020 (715)). What he said in the meeting about the claimant leaving, was a part of him expressing his wish for the issues to go away.

161. Allegation D8 was that the claimant was allegedly blamed by Dr Al Ramadhani for leaking the whistleblowing statement at the same meeting. In submissions, the claimant's representative placed reliance upon two passages from the transcript of the meeting: one in which Dr Al Ramadhani referred to it being the claimant's decision to have sent her letter to four people (636); and a second point at which he referred to the claimant sending it to four (638). In her submission, the respondent's representative emphasised that, in his evidence, Dr Al Ramadhani had confirmed that the claimant had not been blamed. We found no evidence that Dr Al Ramadhani blamed the claimant for leaking the statement as relied upon in the allegation. He was unhappy that the claimant had sent the grievance letter to four people as opposed to having sent it to him only. In evidence he made clear that he had no issue with the claimant having also sent it to the HR officer, but he questioned why she had chosen to send it to others. We did not find the questions asked in the meeting about why the claimant had chosen to send the letter to four people did amount to the claimant being subjected to a detriment in the context of the meeting which took place. We did not find that, from the viewpoint of the worker, a reasonable worker might consider the relevant comments recorded on the transcript to have constituted a detriment. In any event, we found that Dr Al Ramadhani's comments were questions about to whom the protected disclosure was disclosed, they were not because of the fact that the claimant had made the disclosure (and the disclosure itself did not have a material influence on what was said).

162. Alleged detriment D10 was that information given to Ms Khan that the claimant was feeling suicidal was not actioned. The basis for this allegation was recorded in an exchange of text messages between the claimant and Ms Khan on 24

September 2020 (559). In those messages, Ms Khan asked if the claimant was free to talk. The claimant responded (and for this allegation we considered the full text of what she said to be important): "*I've got a therapy session at 3pm Irram I'm feeling suicidal I'll ring you after I finish*". Ms Khan responded immediately by saying "*ok*", then "*oh gosh*" and finally "*ring me when your free*". In her witness statement, the claimant informed us that Ms Khan did not ring the claimant, after the claimant did not ring Ms Khan. We found that Ms Khan's responses to the message she received were entirely appropriate. The full message sent by the claimant made clear that the claimant was receiving professional help. Ms Khan asked the claimant to contact her but did not chase a response. We did not find that what was alleged was subjecting the claimant to a detriment (a reasonable worker viewed from the claimant's viewpoint would not consider the responses and absence of further action to have constituted a detriment). There was also no evidence whatsoever that Ms Khan's response or lack of further action was, in any way, because of the protected disclosure which the claimant had made.

163. On 25 September 2020 the claimant was invited to a business update meeting to be held on 28 September and conducted by Zoom. We were provided with a copy of the invite (566). The claimant alleged (D11) that her being invited to that meeting as well as colleagues who she said were bullying and intimidating her, was a detriment. The three who had chosen to resign were not invitees to the meeting as they had left employment. The invitees were the remaining Manchester based staff. Prior to the meeting taking place, the claimant emailed Ms Khan and said that she was really uncomfortable sitting in a Zoom call with colleagues from the Manchester office and would not be attending the call. Ms Khan responded to say she completely understood and would speak to the claimant after she had spoken to everyone else. A one-to-one meeting (by Zoom) was then conducted with the claimant. We did not find it to have been subjecting the claimant to a detriment to have simply invited the claimant to such a Zoom meeting, in circumstances where an alternative one-to-one meeting was arranged as soon as the claimant objected to attending. A reasonable worker would not have considered the invite, in and of itself, to have constituted a detriment. In any event, the reason why the claimant was invited to the Zoom meeting alongside all of the other Manchester based employees, was because the respondent intended to announce the redundancy consultation process. It was not because the claimant had made the protected disclosure.

164. Alleged detriment D12 was that the claimant was notified that the redundancy process may begin by Ms Khan on 28 September 2020 (that is in the separate one-to-one meeting Ms Khan arranged as addressed for alleged detriment D11). The respondent's representative, in her submissions, highlighted that the redundancy process applied to all employees and not just the claimant. There was no dispute in this case that a potential redundancy situation existed. This allegation was that the claimant was notified of this. It was entirely appropriate for the claimant to be notified that a redundancy process was beginning. Whilst it may be a detriment for any employee to be told of the start of a redundancy process, the reason the claimant was notified was not because she had made a protected disclosure, it was because she was one of the fundraising staff who might be affected by the redundancy process.

165. Alleged detriment D13 (originally numbered in the list of issues as the second D11) was the inaccurate scoring for the redundancy and the absence of proper

consultation with the claimant about the redundancy process. In both of their submissions, the parties addressed this issue more broadly. We considered the redundancy scoring, selection and consultation process undertaken as a whole. The redundancy selection, scoring and consultation process undertaken by the respondent was utterly inadequate. The claimant was given a score. The score was stated as having been adjusted, albeit it was not clear in the evidence before us whether it was and what those adjustments meant. The score which the claimant achieved then appeared to be completely ignored when she was selected as the only person made compulsorily redundant even though (593) eight other fundraisers nationally (who did not take voluntary redundancy or resigned) scored lower than the claimant (including two others in the Manchester office).

166. Mr Tokan, as the deputy CEO, was the person who was partly responsible for the redundancy process. From his evidence, it was clear that he had absolutely no idea what was meant by pools for selection, how scoring was undertaken, or what the recorded scores meant when selecting for redundancy. In his answers, he appeared to attribute the claimant's redundancy selection solely to her inability to justify the role she had proposed as a way of avoiding being made redundant. The scoring chart provided by the respondent showed numerous people who scored lower than the claimant; Mr Tokan provided no explanation for why those people were not made compulsorily redundant. It was the evidence of both Dr Al Ramadhani and Mr Tokan that the selection of those to be made redundant was undertaken nationally. The scoring sheet for those employed nationally showed others who scored as low as 22 or 24 (in contrast to the claimant's score of 29), but there was no evidence why those individuals were not made redundant. We were informed by Mr Hussain that he was required to give a presentation, but we were provided with no evidence about, or records of, any other presentations and/or of why those presentations resulted in others not being made redundant (when the claimant was).

167. The evidence about the scoring undertaken also showed that the scores given to others were incorrect. Both Mr Hussain and Ms Islam were given informal warnings (Mr Hussain accepted in evidence that had been the case). It was Mr Tokan's evidence that such a warning should have resulted in a score of three rather than five for disciplinary record. Both were recorded as having scored five.

168. The scoring of the claimant herself was not consistent or clear. In a score sheet dated 5 October 2020 for the subjective criteria (578) she was recorded as having scored two out of three for versatility/flexibility, three out of three for co-operation and self-motivation and three out of three for motivation. Her total subjective criteria score was nine. Her total score was recorded as 28 (which should not have resulted in the claimant being the one person selected for compulsory redundancy in any event). In the table provided by the respondent, the claimant was recorded as scoring eight for performance (which appeared to equate to subjective criteria) and with a total of 29. In the email of 8 October 2020 (606) Ms Khan informed the claimant that the points raised in the claimant's final meeting had been taken into account and the scores for cooperative and self-motivation and initiative had been adjusted as she had provided justification for those. There was no explanation of what that meant for the claimant's final score as a total and they appeared to be adjustments to elements which had already been scored the maximum amount in a document dated 5 October. There was an issue about the fundraising for which the claimant was responsible and, in particular, whether the

claimant should have been allocated the funds raised via a particular donor she introduced to the organisation. However, it was not clear from the criteria applied how that had any relevance to the scores allocated or what score should/would have been adjusted had the respondent accepted the increased fundraising from the claimant. None of the respondent's witnesses did (or appeared able to) explain the scoring process, the consultation undertaken, or how it applied to the claimant.

169. In terms of consultation, there were meetings held with the claimant and she was allowed to appeal, and had an appeal considered. However, the information provided about the redundancy process and the genuine consultation about how that process might or had led to the claimant being selected from the pool for redundancy, was woeful. The appeal hearing focussed almost entirely upon the claimant's proposal for an alternative role and appeared to involve no genuine consideration of why it was the claimant who had been identified as at risk of redundancy in preference to others (who scored less). In the appeal outcome, the claimant's appeal against selection was only dealt with cursorily and in broad-terms and no genuine explanation was provided. In practice, there was no genuine consultation about how it was the claimant was selected for redundancy. Even at the end of the hearing before us we didn't know how it was that the claimant was the one person identified as compulsorily redundant, so it was clear that the consultation undertaken with the claimant failed to explain and consult upon the basis for selection which would be used and the outcome of that selection.

170. For the reasons given, we found that the scoring of the claimant and identification of her as being the sole fundraiser placed in a position where they were considered for compulsory redundancy from the pool of all national fundraisers, was inaccurate (and, in practice, unexplained), and there was an absence of any proper (that is genuine and meaningful) consultation about why the claimant had been selected and why. That was obviously a detriment for the claimant and would reasonably be seen as such a detriment by anyone. In the absence of any genuine process and in circumstances where the claimant was the sole person made compulsorily redundant when eight others in the national pool scored lower than she did, we also found that the reason for the detriment was the fact that the claimant had made a protected disclosure. We accepted the claimant's representative's submission and drew an inference from the fact that such a (shambolic) redundancy process was started seventeen days after the claimant had made the protected disclosure relied upon. On that basis and applying the process set out in the section on the law above, we found that the detriment was because the claimant had made a protected disclosure.

171. Detriment D14 (originally the second D12 in the list of issues) was that the claimant's email comments sent to Ms Khan at 15.54 on 7 October 2020 regarding data to be considered within the redundancy consultation were ignored. For this allegation, the claimant's submissions referred only to a paragraph in the claimant's witness statement. That paragraph referred to a number of pages in the bundle, but none of those pages had the time and date set out in the list of issues. Accordingly, we did not find that the claimant had proved the allegation made as we were not referred to any such email which it was alleged had been ignored. In any event, it would appear that this allegation related to the redundancy consultation process, which we have in practice addressed when considering alleged detriment D13.

172. The final alleged detriment relied upon (D15 – originally the third D12) was that the claimant was spoken over in her final appeal hearing by Ms Khan. In her submissions, the claimant's representative contended that the claimant was not able to put her final points to the respondent. The respondent's representative contended that the meeting was a two-way discussion, and the claimant was not spoken over. We had a transcript which recorded what was said in the redundancy appeal meeting on 22 October 2020 (attended by the claimant, Mr Gerraty, Mr Rahman and Ms Khan). That transcript clearly showed the claimant being given the opportunity to put her case. There was nothing in it which appeared to record Ms Khan speaking over the claimant and there was no evidence that she did so. We did not find that anything recorded showed that the conduct of the meeting was detrimental or showed what a reasonable worker might consider to have constituted a detriment. In any event, there was no evidence that the manner in which Ms Khan conducted herself at the appeal meeting was in any way materially affected by the claimant's protected disclosure.

Unfair dismissal

173. We next turned to consider the claim for unfair dismissal (issue two). We first considered issue 2.3, which was to decide whether the principal reason for the dismissal was that the claimant had made a protected disclosure? We have already found that the disclosure at 6.15 am on 11 September was a protected disclosure and we have explained our view of the redundancy process undertaken by the respondent when addressing detriment D11. The test for dismissal is different from the test for detriment, as we were required to consider for the dismissal whether the protected disclosure was the principal reason for the dismissal?

174. It was not in dispute that there were legitimate reasons to undertake a redundancy process and redundancies were required. What is in dispute is the reason why the claimant was selected for redundancy. We note that whilst there were voluntary redundancies, there were no other compulsory redundancies from the fundraisers. Based upon the chart provided by the respondent, out of a pool of twenty-five fundraisers nationally, the claimant was unique in being made compulsorily redundant (albeit that five or six volunteered and one resigned). The redundancy process commenced seventeen days after the claimant made a protected disclosure. Despite there being eight other people in the pool who scored lower that the claimant, the claimant was the only one made redundant. We have already addressed the shortcomings in both the process undertaken by the respondent and in the evidence about what occurred.

175. We found that the claimant demonstrated that, based upon an inference drawn from the timing of the redundancy and the fact that she was uniquely made compulsorily redundant when others who scored lower in her pool were not, that the principal reason for her dismissal was that she had made a protected disclosure. The respondent completely failed to explain or evidence why it was that the claimant was uniquely selected for compulsory redundancy from the pool. We found that the principal reason for the claimant's dismissal, was because she had made the protected disclosure.

176. Having found that the claimant was automatically unfairly dismissed applying section 103A of the Employment Rights Act 1996, we did not necessarily need to go

on and decide whether the claimant would otherwise have been found to have been unfairly dismissed. It followed from our finding that the principal reason for the dismissal was because the claimant had made a protected disclosure, that we did not find that the principal reason for the claimant's dismissal was redundancy (a potentially fair reason) (issues 2.1 and 2.2). Had we needed to have done so, we would also not have found that the respondent acted reasonably in all the circumstances in dismissing the claimant applying section 98(4) of the Employment Rights Act 1996, even if redundancy had been the principal reason for dismissal. We have explained at some length the significant shortcomings in the process followed by the respondent and will not reproduce them in this part of the Judgment. The respondent did not adopt a reasonable selection decision as a result of its approach to selection pools and scoring the claimant (issue 2.4.2). Following the guidance set out in **Compair Maxam** we did not find that the respondent sought to establish criteria for selection which so far as possible did not depend solely upon the opinion of the person making the selection but could be objectively checked, and it did not seek to ensure that the selection was made fairly in accordance with those criteria. As already explained, the selection was not made in accordance with the criteria followed. We also noted that there appeared to have been no prior decision made about the number of redundancies required from the pool, the selection of only one compulsory redundancy appeared to have been entirely arbitrary. There was no genuine consultation about how redundancy selection was actually going to occur. In reaching this decision we did not also needed to consider whether the criteria supposedly applied were themselves fair but would also observe that using what were labelled as subjective criteria, suggested that the process was not fair applying the **Compair Maxam** test. One thing which we did find to be procedurally fair, was that reasonable steps were taken to look at and consider alternative employment in the light of the discussions held as part of the redundancy consultation.

Religion or belief discrimination

177. The next issue which we considered was issue seven, direct discrimination on the grounds of religion or belief. The list of issues stated that the claimant identified herself as a liberal Muslim. There was some debate and evidence heard in the hearing about what that meant. It appeared clear to us that as well as the claimant, Ms Nawaz was also what could be described as a liberal Muslim. It was not necessary for us to genuinely further define that protected characteristic, as in practice the WhatsApp chat of 5 September provided the reference point for what it meant. In that chat, Mr Hussain distinguished himself from others (including Ms Nawaz and Ms Chowdhury) with reference to certain things which might identify him as an orthodox Muslim and not a liberal Muslim. He referenced that he had a beard and did not smoke. He also referred to the others as haramis, which appeared to be a reference to their practices. It was not in dispute that, in the case of women, the practice of wearing head coverings may also be indicative. We do not of course make any value judgment about anybody's practices and Mr Hussain emphasised in his evidence that what someone does may be a more important reflection of their adherence to the principles of Islam rather than their attire, but it was clear from what was said in the WhatsApp conversation that the three employees of the respondent (at the time) involved in the chat perceived that the respondent as an organisation was more likely to be lenient to someone who was not thought of as a liberal Muslim, than somebody who was.

178. The alleged unfavourable treatment was being made redundant. Issue 7.2.1 set out what the claimant alleged in more detail and said that the claimant alleged that she was made redundant despite not having any warnings or disciplinaries and was chosen for redundancy over those who did have issues on their record. Clearly being made redundant was a detriment and was potentially less favourable treatment. The claimant relied upon Ms Islam and Mr Hussain as being actual comparators. In her submissions, the respondent's representative stated that the claimant was not treated worse than Ms Islam and Mr Hussain. That submission was entirely incorrect. The claimant was treated less favourably than them both, because she was made redundant when they were not. In particular, when the comparison was made to Ms Islam, she scored 28 points and was not made redundant when the claimant who scored 29 was (and indeed that was on the basis that Ms Islam scored five points for disciplinary, which was incorrect as she had been given an informal warning and should have scored less). For Mr Hussain he scored more than the claimant. It appeared to be accepted and was certainly the claimant's case, that Ms Islam and Mr Hussain were not liberal Muslims, in contrast to the claimant herself.

179. We did highlight to the parties the recent decision of the Employment Appeal Tribunal in **Virgin Active**. The example given in that case of two job applicants who scored the same, had some parallels with the facts of this case. On the face of it, where Ms Islam was in the same pool as the claimant and scored less but was not made redundant, it would at first sight have appeared that the lesser matters required to shift the burden of proof set out would apply to those circumstances. However, it was important for us to consider whether Ms Islam was in materially the same circumstances as the claimant. In practice, in the light of the fact that we have found that the principal reason for the claimant's dismissal was that she had made a protected disclosure, for the purposes of the religious discrimination claim, Ms Islam was not in materially the same circumstances as the claimant as she had not also blown the whistle. We therefore needed to consider a hypothetical comparator to the claimant in materially the same circumstances (not Ms Islam or Mr Hussain because their circumstances differed because they had not made a public interest disclosure).

180. Had we considered that Ms Islam was an actual comparator in the same circumstances (but with a lower score) and had we applied the lesser test required in the light of the **Virgin Active** decision to shift the burden of proof, it is likely that we would have found that the claimant had proven facts from which we could conclude that she was treated less favourably than someone in materially the same circumstances considered to be an orthodox Muslim would have been treated (issue 7.4). The things which in our view might have been sufficient to provide the something more to shift the burden of proof was what three other employees of the respondent set out in their WhatsApp chat of the 5 September 2020 that they perceived there would be differences of treatment by the respondent of a perceived orthodox Muslim in comparison to a perceived liberal Muslim. However, where we were considering a hypothetical comparator, we considered the position to be different. We did not find that potential "something more" was sufficient to shift the burden of proof to show that someone who was an orthodox Muslim who had also made a protected disclosure would not have been selected for redundancy (where we have found already that the principal reason for the claimant's dismissal was because she had made the protected disclosure). We, of course, noted that the protected characteristic did not have to be the only reason for the conduct, provided that it was an effective cause or significant influence for the treatment. Whilst the

claimant was treated unfairly, unfair treatment in and of itself does not prove discrimination. As we have already addressed, we were comparing the treatment of the claimant with the treatment of a hypothetical comparator who was perceived to be an orthodox Muslim, but who had also made a public interest disclosure. It was our finding that such a comparator would also have been dismissed by the respondent purportedly by reason of redundancy.

Indirect disability discrimination and the duty to make reasonable adjustments

181. We considered issues nine and ten together, because the claims for indirect disability discrimination and breach of the duty to make reasonable adjustments were very closely linked. However, we considered the two PCPs relied upon separately as they raised very different factual matters (a PCP is a provision, criterion or practice but we will refer to it as a PCP in this Judgment).

182. The first PCP relied upon (9.1.2 and 10.1.2) was that the respondent was contended to have had a practice of not maintaining the claimant's place of work which resulted in the property becoming damp. The office did have an issue with damp, albeit there was a dispute between the parties about the extent of the issue. The issues were raised with the landlord, including by the claimant in a letter which she wrote with authorisation. Remedial action was (ultimately) taken by the landlord which addressed the leaks (at least to some extent). It was the claimant's evidence that the issues were not entirely resolved.

183. We considered very carefully what is said in the EHRC code of practice on employment about what is meant by PCP (4.5). We noted that we must construe the phrase widely. Examples are given in the code of practice of any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. The place of work belonged to the landlord and not the respondent. The respondent did take some action to require the landlord to remedy the defects. We did not find that the respondent in fact had a practice of not maintaining the claimant's place of work, even if it were the case that the damp issues could or should have been remedied more quickly or more effectively. We also did not find that what occurred was genuinely a PCP operated by the respondent (in the light of what was said in the code of practice and applying the phrase widely).

184. Issue 10.1.5 raised the issue of the damp in the office in a different way for the claim for breach of the duty to make reasonable adjustments. That contended that the water and structural damage to the office was a physical feature which placed the claimant at a substantial disadvantage. We also considered what the EHRC code of practice said for this issue, at 6.11 about physical features. We noted that the code provides that features are covered whether temporary or permanent and include any other quality of the premises. Applying those very broad words, we found that there was a physical feature which applied. We also found that the physical feature found had placed the claimant (and those with asthma) at a substantial disadvantage compared to someone without asthma, as it was entirely self-evident that someone with asthma would find it more difficult to work in an office with damp, than someone who did not.

185. Issue 10.2 (as it applied to the physical feature found) was whether the respondent knew or could reasonable have been expected to know that the claimant was likely to be placed at the disadvantage? On 5 November 2019 (409) the claimant had emailed Ms Nawaz and spelt out clearly that she was asthmatic and had been struggling to breathe in the office for months. There was a dispute about whether Ms Nawaz (as the office manager) and others were aware of the claimant's asthma and difficulties breathing in the office from an earlier date (the claimant said they were because she kept her inhaler on her desk and wheezed in the office), but we did not need to determine when the respondent first knew, where it is clear that it did know about both the disability and the disadvantage suffered by the 5 November 2019 (because the claimant told them explicitly in writing).

186. That left issues 10.3-10.5 to be determined in relation to the damp and the physical feature found. What the claimant contended was that the reasonable step which the respondent should have taken to avoid the disadvantage was to properly maintain her place of work in order to avoid it becoming damp. The focus of the alleged adjustment is on the respondent's obligation to maintain the office. We had no evidence about the landlord's and the respondent's responsibilities regarding the property and how they related. However, in the circumstances and based upon the evidence heard, we did not find that the respondent failed to make the reasonable adjustment (or step) relied upon. It did take steps to address the issues with the landlord (including the claimant's own letter) and it would appear that any delay in fixing, or failure effectively to fix, the damp issues, was the landlord's responsibility and not the respondent's.

187. Had we needed to consider issue one (time/jurisdiction) in relation to the damp, we also would have found that the claim was not brought within the time required. It was not entirely clear whether the steps taken by the landlord completely resolved the issue, but we were presented with evidence that remedial work was undertaken on 11 December 2019. In any event the claimant was not required to work in the office from the start of April 2020, albeit that she did visit (on her evidence) about once every two weeks. Taking either of those dates into account, the claim arising from damp in the office and the requirement for the claimant to work in the office, would have been brought outside the primary time limit. We would not have found that any issues regarding damp were part of conduct extending over a period with any issues relating to smoking, so as to bring the damp issues within time. Had we needed to consider whether it was just and equitable to extend time, we would not have found that we would have exercised our discretion to do so where the claimant is a qualified barrister, there was no explanation for why the claim was not entered earlier, time limits are there for a good reason, and there would have been some prejudice to the respondent in reduced recollections (even balancing the potential prejudice to the claimant).

188. Issues 9.1.3 and 10.1.3 relied upon an alleged PCP that the respondent had a practice of allowing employees to smoke inside the office. We accepted the respondent's evidence that it operated a no-smoking policy and that it did not allow employees to smoke in the office. We also did not find that employees would have routinely smoked in the office prior to lockdown, as if employees had regularly smoked in the office in 2019 or early 2020, we would have expected to have seen the claimant having raised the issue at the time, as she was able and willing to raise issues when they occurred. The issue which the claimant raised during the

Pandemic in 2020 was the fact that she believed, based upon what she had seen and smelt when she entered the office (and particularly on 31 August 2020), that employees were smoking in the office at that time. We accept her evidence about what she found and believed. However, there was no evidence that the respondent as an organisation had authorised or condoned its employees smoking in the office. Accordingly, whether or not individual employees had smoked in the office during lockdown (when senior employees were not visiting, at least prior to the attempted visit and spot check in September 2020), that did not mean that the respondent had the PCP upon which the claimant relied. We did not find that the respondent did have the PCP alleged. As a result, we did not need to go on and consider the other elements of the issues as they applied to the smoking issue (for indirect disability discrimination or breach of the duty to make reasonable adjustments).

Harassment related to disability

189. Issue 11 set out the matters to be determined in the claimant's claim for harassment related to disability. That relied upon the claimant entering the office on 31 August 2020 and finding ash in mugs, sheesha equipment, and the smell of smoke. We accepted the claimant's evidence that is what she found on 31 August. We also accepted that finding those things in the office when she visited was unwanted for the claimant.

190. Issue 11.3 is whether those issues related to the claimant's disability. The fact that those things were present, was certainly not because of the claimant's disability. When asked in submissions about this, the claimant's representative submitted that because of the impact on the claimant and her asthma it related to her disability. The presence of sheesha equipment (the respondent did not dispute that some equipment was present) was not related to the claimant's disability and her criticisms in her grievance highlight that her objections to the presence of that equipment were of a moral/criminal nature. However, for the objection to smoking apparently having occurred in the office, we accepted that in a broad-sense and because of the particular impact those things had on the claimant, they were related to her asthma. We noted that the respondent's representative did not make any specific submission explaining why she said they were not.

191. Turing to issues 11.4 and 11.5, the respondent's submission was that the alleged conduct did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. She highlighted that the claimant was on furlough leave during this period (and we would observe it was not in dispute that any work she did was predominantly from home, and she was visiting the office to collect things at the time not to undertake work). We agreed with the respondent's submissions on those issues. It was obviously the case that the <u>purpose</u> of the smoking and state of the office was not those required for harassment, as that was not why ash etc was in the office. Whatever the effect on the claimant in fact, we did not find that the claimant finding the ash in the office and smelling smoke had the requisite effect where she was not at the time working in the office and was collecting things from the office. The impact of what occurred was relatively transitory and we did not find was sufficient for it to reasonably have had the effect of violating dignity or creating an offensive etc environment.

The breach of contract claim

192. The final issue which we determined was issue 13, being the claimant's breach of contract claim. As issue 13.2.1 we were asked to determine whether the respondent required the claimant to work whilst on furlough for no additional pay over and above the government granted 80% of pay. As issue 13.3 we needed to determine whether than was a breach of contract?

193. In her submissions, the respondent's representative acknowledged that the claimant volunteered to work on the Covid campaign whilst she was on furlough. The claimant's evidence was that she did so, supported to a limited extent by some documents. It was the claimant's evidence that she attended the office occasionally, about once every two weeks. The requirement imposed as part of the furlough scheme in place at the time, was that workers who were on furlough were not to carry out any work for the employer during the period of furlough. We could see no genuine difference between an employed fundraiser of the respondent undertaking work for the respondent as an employee, and someone who was employed by it undertaking voluntary work doing the same (or similar) things for the respondent as a charity. As the claimant undertook work for the respondent during the furlough period (even if it was described as voluntary), she was not in fact on furlough in accordance with the rules which applied at the time, irrespective of whether she was instructed to do so or not.

194. In their submissions, neither party put forward any detailed arguments about the contractual terms and the effect of the claimant undertaking work in breach of the furlough rules. The agreement between the parties which applied at the time was set out in the letter from the respondent of 27 March 2020 (416) and the claimant's acceptance of it. The letter expressly linked the agreement to receive only 80% of salary for a period, to the claimant being placed on furlough leave and to what the Government had confirmed at the time. As we have found that the claimant was not genuinely on furlough in compliance with the rules in place at the time, we did not find that the terms which applied to the payment of only 80% of salary in fact applied. Under her statement of terms and conditions of employment, the claimant was entitled to receive her full salary payable monthly. As the claimant was not on furlough in accordance with the rules which applied at the time, the respondent was in breach of contract when it paid the claimant only 80% of salary.

Remedy

195. Prior to hearing submissions on remedy, the damages for breach of contract were agreed by the parties as being the net sum of £1,607.16. Accordingly, we found that sum to be the damages payable for the breach.

196. The only other remedy sought by the claimant was an injury to feelings award as a result of having suffered the detriments found because she had made public interest disclosures. The claimant sought an injury to feelings award of £37,500 in the middle of the upper band. The respondent contended that such an award was not justified and submitted that any award should be in the lower **Vento** band. The respondent contended that some of the symptoms relied upon by the claimant were from previous events and not from the detrimental treatment found. The respondent

also submitted that any award should be reduced by 10% because the claimant had made a covert recording.

197. We found that the claimant had suffered injury to feelings as a result of the detriments found. We reminded ourselves of what is set out in the legal section of the Judgment, including that any award is not to punish or reflect any outrage, but is to compensate the claimant for the injury to feelings which she has suffered. We did not agree with the respondent's submission that the award should be in the lower band, as the detriments which we found were not isolated or one-off when taken together. What we found included some one-off acts such as being removed from a WhatsApp group, but also included a detriment from the most senior person in the organisation and also the redundancy consultation detriment addressed in the liability part of this decision.

198. We noted the contemporaneous records which evidenced the impact which the detriments found had on the claimant at the time. In particular, we noted the entry in the GP's record of the consultation with the claimant on 29 September 2020 which described the impact on the claimant at that time. We also noted the reference in the documents provided to suicidal ideation by the claimant. In our view that evidence showed that the detriments had the maximum impact possible on the claimant. The detriments found were very personal and were perceived by the claimant as being very personal. We found and had no doubt that the impact on the claimant evidenced was genuine. The incident immediately outside the office (D2) had scared the claimant and had clearly had a significant impact upon her. The claimant worked hard and tried to retain her job and did engage in the redundancy consultation process, a process which we also found was a detriment as explained for D13.

199. Focussing on the injury to the claimant's feelings and the impact the detriments found had, we found that was of the utmost seriousness. It led the claimant to suicidal ideation. The reality is that is of the utmost seriousness. As a result, we concluded that the injury to feelings found was such that the top **Vento** band applied.

200. We were, however, mindful that the impact on the claimant was not such that she was unable to work very shortly afterwards (when she commenced alternative employment). We were mindful that the higher awards in the top **Vento** band reflected the most serious and lengthy cases of harassment with the most significant impact. In that context, we placed the claimant's injury towards the lower end of the highest band. We determined that the correct award for injury to feelings was £30,000.

201. We found that there was no basis for reducing the award in the light of the claimant's concealed recording of her meeting with Dr Al Ramadhani and we declined to do so.

Summary

202. For the reasons explained above, we found that the claimant was treated detrimentally and dismissed as a result of having made a public interest disclosure, and we found that the respondent breached the claimant's contract of employment

when it paid the claimant only 80% of salary for the period of furlough when the claimant undertook work (even though labelled voluntary work). We did not find for the claimant in her other claims.

203. The damages for breach of contract were agreed as being £1,607.16 and we awarded that amount. We awarded the claimant an injury to feelings award of £30,000 for the reasons we have explained.

Employment Judge Phil Allen
1 March 2024

REASONS SENT TO THE PARTIES ON
13 March 2024

FOR THE TRIBUNAL OFFICE

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

ANNEX
Complaints and Issues

1. Time limits

1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 7th August 2020 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

Reason

2.1 Has the respondent shown the reason or principal reason for dismissal?

2.2 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

2.3 Was the reason or principal reason for dismissal that the claimant made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed.

2.4 If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

2.4.1 The respondent adequately warned and consulted the claimant;

2.4.2 The respondent adopted a reasonable selection decision, including its approach to a selection pool and any scoring within the pool;

2.4.3 The respondent took reasonable steps to find the claimant suitable alternative employment;

2.4.4 Dismissal was within the range of reasonable responses.

3. Remedy for unfair dismissal

n/a

4. Protected disclosures

4.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?

4.1.1 The claimant says she made a disclosure at 6.15am on 11th September 2020 by email to Nabil Al Ramadhani (President of the Organisation), Iram Khan (HR), Mohammed Rahman (Trustee) and Wasim Iqbal (Head of Fundraising).

4.1.2 The claimant disclosed drug taking on the work premises, smoking indoors and health and safety breaches.

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

4.1.4 Was that belief reasonable?

4.1.5 Did she believe it tended to show that:

4.1.5.1 a criminal offence had been, was being or was likely to be committed;

4.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

4.1.5.3 the health or safety of any individual had been, was being or was likely to be endangered;

4.1.6 Was that belief reasonable?

4.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

5. Detriment (Employment Rights Act 1996 section 48)

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

D1 11/09/20 at 13.36pm – removed from Manchester staff WhatsApp group by colleague Shareen Nawaz

D2 11/09/20 at 17.00pm – placed in an uncomfortable situation with other colleagues at the office

D3 14/09/20 – claimant logged out of the Manchester Office staff Instagram

D4 16/09/20 – claimant removed from HRF Manchester Core Vol WhatsApp group at 10.39am and HRF Socials Broadcast at 10.41am by colleague Wajahat Hussain.

D5 21/09/20 at 16.22pm – anonymous Instagram message sent to claimant's colleague from another organisation referring to the claimant.

D6 21/09/20 – claimant messaged Matthew Gerraty and spoke to him on the phone about how she was feeling but this was not actioned.

D7 22/09/20 – told by Nabeel Al Ramadhani to seek alternative employment after claimant complained of bullying from colleagues.

D8 22/09/20 – claimant blamed by Nabeel Al Ramadhani for leaking of whistleblowing statement

D9 24/09/20 – when the claimant sought help from nationwide WhatsApp group the group was closed down.

D10 24/09/20 – information given to Irram Khan (HR) that claimant was feeling suicidal was not actioned.

D11 25/09/20 – claimant invited to business update meeting with colleagues who were bullying and intimidating her.

D12 28/09/20 – notified that redundancy process may begin by Irram Khan (HR).

The following were incorrectly numbered in the list in the bundle (249) but the numbering has been updated in this schedule

D13 Inaccurate scoring for redundancy and no proper consultation.

D14 07/10/20 – claimant's email comments sent to Irram Khan at 15.54pm regarding data considered within the redundancy consultation ignored.

D15 22/10/20 – claimant spoken over in her final appeal hearing by Irram Khan.

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

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

6. Remedy for Detriment

6.1 n/a

7. Direct discrimination – religion or belief (Equality Act 2010 section 13)

7.1 The claimant identifies herself as a liberal Muslim.

7.2 What are the facts in relation to the following allegations:

7.2.1 Claimant made redundant despite not having any warnings or disciplinaries, and was chosen for redundancy over those who did have issues on their record.

7.3 Did the claimant reasonably see the treatment as a detriment?

7.4 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances but who was considered an orthodox Muslim was or would have been treated?

7.5 The claimant says she was treated worse than Zenab Islam and Wajahat Hussain (colleagues).

7.6 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of her religion and how she chose to practice her religion?

7.7 If so, has the respondent shown that there was no less favourable treatment because of this?

8. Direct disability discrimination (Equality Act 2010 section 13)

8.1 n/a.

9. Indirect discrimination (Equality Act 2010 section 19)

9.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

9.1.1 *[Claimant to state the PCP(s) contended for]*

9.1.2 The respondent had a practice of not maintaining the claimant's place of work, which resulted in the property to becoming damp.

9.1.3 The respondent had a practice of allowing employees to smoke inside the office.

9.2 Did the respondent apply the PCP(s) to the claimant?

9.3 Did the respondent apply the PCP to *persons who did not have the claimant's disability of asthma* or would it have done so?

9.4 Did the PCP put *persons with the disability of asthma* at a particular disadvantage when compared with *persons who did not have the claimant's disability of asthma*?

9.5 Did the PCP put the claimant at that disadvantage?

9.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

9.6.1 [Respondent to state the legitimate aim contended for]

9.7 The Tribunal will decide in particular:

9.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

9.7.2 could something less discriminatory have been done instead;

9.7.3 how should the needs of the claimant and the respondent be balanced?

10. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

10.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

10.1.1 *[Claimant to state the PCP(s) contended for]*

10.1.2 The respondent had a practice of not maintaining the claimant's place of work, which resulted in the property to becoming damp; and

10.1.3 The respondent had a practice of allowing employees to smoke inside the office.

10.1.4 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that they exacerbated the symptoms of her asthma.

10.1.5 Did a physical feature, namely the water and structural damage to the office property, the damp in the office, put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that such conditions impacted the claimant's asthma?

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

10.3 What steps could have been taken to avoid the disadvantage? The claimant suggests:

10.3.1 It would have been reasonable for the respondent to properly maintain her place of work in order to avoid it becoming damp; and

10.3.2 It would have been reasonable for the respondent to prevent employees from smoking in the office.

10.4 Was it reasonable for the respondent to have to take those steps?

10.5 Did the respondent fail to take those steps?

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

11.1 Did the respondent do the following things:

11.1.1 On 31 May 20200, having ash in mugs, sheesha (hookah pipe) equipment, coal burners and burned coals together with a strong smell of smoke in the Manchester office?

11.2 If so, was that unwanted conduct?

11.3 Did it relate to disability?

11.4 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?

11.5 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.

12. Remedy for discrimination

12.1 n/a

13. Breach of Contract

13.1 Did this claim arise or was it outstanding when the claimant's employment ended?

13.2 Did the respondent do the following:

13.2.1 Require the claimant to work whilst on furlough for no additional pay over and above the government granted 80% pay.

13.2.2 [not pursued].

13.3 Was that a breach of contract?

13.4 How much should the claimant be awarded as damages?

14. Remedy - General

14.1 n/a?