EMPLOYMENT TRIBUNALS

Claimant: Miss J Tyler
Respondent: Virgin Atlantic Airways Ltd

Heard at: Reading
On: 24, 25, 26 March 2025
Before: Employment Judge Shastri-Hurst
Members: Ms A Crosby
Mr A Morgan

Representation
Claimant: In person
Respondent: Mr T Brown (counsel)

RESERVED JUDGMENT

1. The claim of detriment (public interest disclosures) is ill-founded and fails;

2. The claim of direct disability discrimination is ill-founded and fails;

3. The claim of harassment related to disability is ill-founded and fails;

4. The claim of victimisation is ill-founded and fails;

5. The claim of unauthorised deduction of wages is ill-founded and fails.

REASONS

Introduction

1. The claimant is employed by the respondent, an airline operating passenger carriers from both Manchester and Heathrow Airports. She commenced her employment, based at Heathrow, on 6 June 2005, and remains employed.

2. The early conciliation process started on 18 August 2023 and ended on 21 August 2023. The claim form was presented on 3 October 2023. That claim form presented claims of disability discrimination and harassment, arrears of pay, and victimisation.

3. Two preliminary hearings have taken place in this case: the first on 10 July 2024, the second on 17 October 2024 – at [70] and [76] respectively. At the October hearing, Employment Judge Anstis set out, in narrative form, the claims that the claimant sought to pursue: direct disability discrimination, harassment related to disability, victimisation, detriment due to whistleblowing and a pay claim.

4. Prior to this hearing, the Judge drafted a Draft List of Issues. It should have been sent out to the parties the working day before the hearing, but this did not happen. The parties were provided with a copy of the Draft List on the first morning of the hearing and we spent some time discussing the Draft List at the commencement of the hearing. Both parties were content that it accurately reflected the claims as recorded by Judge Anstis.

5. In terms of documentation, we had the benefit of a bundle of 1445 pages. During the claimant's evidence, she mentioned a number of documents, including in her re-examination. As a reasonable adjustment to the process, the Tribunal permitted the admission of quite a number of documents, despite the fact that most appear not to be relevant to the issues with which we are dealing. Mr Brown was content for the documents to be admitted, with the proviso that he could make any submissions he felt he needed to about those documents.

6. At the commencement of the hearing, it also transpired that the claimant had several recordings of conversations that she had not previously disclosed to the respondent. We asked the claimant to disclose those to the respondent, and the respondent could check them and make any representations as to how we should proceed with those recordings on the morning of Day 2. At that time, the respondent had been able to produce transcripts of the recordings, and the Tribunal admitted those into evidence.

7. In terms of witness evidence, the following witnesses provided evidence for the respondent:

    7.1. Ms R Snocken – barrister instructed by the respondent to be the disciplinary appeal officer;
    7.2. Ms C Gardiner – Crew Performance Manager (at the relevant time) and the claimant's line manager from June 2022;
    7.3. Ms S Pleydell – Manager: People Partnerships and Advice (at the relevant time).

8. The Tribunal extends its gratitude to the parties for the professional and courteous manner in which they conducted this hearing. We do not underestimate the work that the claimant (and her supporters) put into preparing and attending this hearing; it demonstrates a respect for the process and the Tribunal that is appreciated. The claimant acquitted herself admirably.

Issues

9. As above, the Judge drafted the List of Issues which was then approved by the parties on the first morning of the hearing. It is set out below for completeness.

10. We consider it necessary to highlight something that the Judge repeated several times during the course of the hearing. The scope of the decisions that the Tribunal makes is governed by the scope of the claim form and then by the List of Issues. The claimant had brought a prior claim, presenting that on 7 May 2021. That first claim form raised claims of disability discrimination relating to the requirement to wear a face mask as cabin crew. Those claims were dismissed by judgment dated 12 August 2022 due to a lack of jurisdiction, in that the claims were out of time – [66].

11. The claimant then presented the claim form giving rise to the index claim on 3 October 2023 – [38]. That claim, in turn, led to a lengthy discussion with Employment Judge Anstis as to the basis of this claim, at a preliminary hearing on 10 July and 17 October 2023. Out of those hearings came a narrative of the relevant issues at [76/77]. That narrative is what the Judge at this hearing used to produce the List of Issues.

12. Despite these discussions and production of the List of Issues, the claimant's clear focus was on the requirement to wear a face mask, and the imposing of a final written warning. The Tribunal repeatedly reminded her that those are not matters relevant to the claims before us. We make this clear again at this early stage in our judgment: this is to manage the claimant's expectations. We have not covered in any depth the requirement to wear a facemask, and we have not considered whether Mr Maughan's decision to implement a final written warning was unlawful in any way. This is because those matters are not part of the claimant's claims before this Tribunal. We have not included reference to every piece of evidence we have heard and seen: this does not mean that we have ignored it. We have only made findings of fact that are relevant to the List of Issues.

13. The issues that the Tribunal need to decide are as follows:

1) **Protected disclosure**

a) Did the claimant make the following disclosure:

i) On 11 November 2020, in writing, the claimant raised a grievance including disclosures concerning PPE being ineffective and non-sterile.

b) Did they disclose information?

c) Did they believe the disclosure of information was made in the public interest?

d) Was that belief reasonable?

e) Did they believe it tended to show that:

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

ii) the health or safety of any individual had been, was being or was likely to be endangered.

f) Was that belief reasonable?

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

2) **Detriment (Employment Rights Act 1996 section 48)**

a) Did the respondent do the following things:

i) Hold an appeal hearing (instead of a back to work chat with her manager);

ii) In that appeal hearing, (i) repeatedly ask the claimant why she did not share her medical records, and (ii) not listen to her replies to those questions?

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

c) If so, was it done on the ground that they made a protected disclosure?

3) **Remedy for Protected Disclosure Detriment**

a) What financial losses has the detrimental treatment caused the claimant?

b) What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

c) Was the protected disclosure made in good faith?

d) Should the claimant be awarded aggravated damages?

4) **Disability**

a) Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

i) Did they have a physical or mental impairment (Fragile X Syndrome)?

ii) Did it have a substantial adverse effect on their ability to carry out day-to-day activities?

iii) If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

iv) Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?

v) Were the effects of the impairment long-term? The Tribunal will decide:

(1) did they last at least 12 months, or were they likely to last at least 12 months?
(2) if not, were they likely to recur?

5) **Direct disability discrimination (Equality Act 2010 section 13)**

a) Did the respondent do the following things:

i) Hold an appeal hearing (instead of a back to work chat with her manager);

ii) In that appeal hearing, (i) repeatedly ask the claimant why she did not share her medical records, and (ii) not listen to her replies to those questions?

b) Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

c) If so, was it because of disability?

d) Did the respondent's treatment amount to a detriment?

6) **Harassment related to disability (Equality Act 2010 section 26)**

a) Did the respondent do the following things:

i) Hold an appeal hearing (instead of a back to work chat with her manager);

ii) In that appeal hearing, (i) repeatedly ask the claimant why she did not share her medical records, and (ii) not listen to her replies to those questions?

b) If so, was that unwanted conduct?

c) Did it relate to disability?

d) 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?

e) 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.

7) **Victimisation (Equality Act 2010 section 27)**

a) Did the claimant do a protected act as follows:

i) On 11 November 2020, raise a grievance including a complaint of disability discrimination?

b) Did the respondent do the following things:

i) Hold an appeal hearing (instead of a back to work chat with her manager);

ii) In that appeal hearing, (i) repeatedly ask the claimant why she did not share her medical records, and (ii) not listen to her replies to those questions?

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

d) If so, was it because the claimant did a protected act?

e) Was it because the respondent believed the claimant had done, or might do, a protected act?

8) **Remedy for discrimination or victimisation**

a) Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

b) What financial losses has the discrimination/victimisation caused the claimant?

c) What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

d) Should interest be awarded? How much?

e) Should the claimant be awarded aggravated damages?

9) **Unauthorised deductions**

a) Did the respondent make unauthorised deductions from the claimant wages and if so how much was deducted? This relates to wages in respect of a period of unpaid leave spanning August and September 2023.

Findings of fact

CAA attestation

14. At [232] we have an excerpt from the respondent's Safety and Emergency Procedures ("SEP") Manual, which sets out the process regarding regulatory fitness to fly – [549] (copy at [232]):

> "**12.2.1 UK CAA Medicals**
>
> 12.2.1.1 Introduction To Cabin Crew Medicals
>
> Cabin Crew medical fitness is determined by UK CAA legislation.
>
> In a nutshell, all crew will need an official document known as a Medical Report to confirm fitness to fly See Fig [Figure 12.1]
> ...
> UK CAA Regulations state that all members of staff who fly in a cabin crew role, must have a medical assessment every 5 years in order to comply with CAA medical standards.
>
> This process will be managed via Cabin Crew records and alerts will be sent by email from our occupational health provider to let the crew member know that some action is required on their part.
>
> The first stage of the medical assessment will be the completion of a questionnaire by the crew member. This questionnaire will be generated in Employee Self-Service for crew who have been in a crew role for a minimum of 5 years continuously or whose last medical assessment is due to expire in 91 days.
>
> The questionnaire details may require a review by OH and, where necessary, additional information may be obtained from the employee or p=other parties.
>
> Once the OH Practitioner has sufficient information on which to make a judgement as to the employee's fitness to fly, the Medical Report will be completed and a fit-to-fly status recorded."

15. The respondent outsources the completion of these medical assessments to AXA Healthcare, to be conducted by an Aeromedical Examiner – [Gardner statement paragraph 7].

16. We accept that the requirement for cabin crew to undertake UK CAA Medicals is not an internal policy or rule implemented by the respondent. It is a regulatory requirement that applies across the aviation industry - [Gardner statement paragraph 7].

Issue 4 – disability status

17. The claimant's disability discrimination claim is based upon her assertion that she satisfies the definition of disability as set out in employment law in s6 of the Equality Act 2010 ("EqA"). The Tribunal clarified at the beginning of the hearing that the disability the claimant relies upon as having been the cause of the alleged less favourable treatment or unwanted conduct (ss13 and 26 EqA respectively) is Fragile X Syndrome only.

18. In the bundle we have various pieces of medical evidence. We set out the relevant pieces of that evidence below:

    18.1. [80] - 13.01.16 from Kingston Wellbeing Service – this relates to the claimant's anxiety and low mood. Fragile X is not mentioned here;

    18.2. [87] - 12.09.18 - this is a referral from the claimant's GP surgery to an ENT consultant at Kingston Hospital, regarding the claimant's tinnitus. There is no mention of Fragile X here;

    18.3. [89] - 07.03.19 - this is a response to that referral from a Speciality Doctor in ENT, suggesting that the claimant's tinnitus symptoms are "mild";

    18.4. [90] - 02.11.20 - this is a letter prepared by the claimant's GP at Robin Hood Lane surgery, following a payment of £25, regarding the claimant's difficulties in wearing masks. The reference to Fragile X is a passing reference in which the doctor states "she has a diagnosis of Fragile X syndrome and reports she has ongoing hearing difficulties and uses lip reading to assist with her hearing". There is no evidence in that document as to the effects of Fragile X on the claimant;

    18.5. [91] - 02.11.20 - OH report which deals with the claimant's anxiety around wearing face masks. It does not mention Fragile X.

    18.6. [117] - 04.03.20 - OH report – this report was done in relation to the claimant's view that she should not be required to wear a face mask. There is detail regarding Fragile X therein: "Fragile X is a genetic condition and female sufferers may have difficulty with concentration and communication due to it. It can cause sufferers to have short attention spans, and to be easily distracted. There has been a link between the condition and anxiety

symptoms especially in social situations. ... [The claimant] finds she has to write lists to help jog her memory and needs to plan her day carefully to ensure that things are not missed. She did advise me that she suffers with a degree of poor memory due to her condition. [The claimant] states that she has significant difficulty processing and assimilating written data, and she learns better by hands on practical training, in a kinetic type of methodology. [The claimant] told me that she can sometimes feel agitated and overwhelmed when presented with new situations". On [118] it is reported that "Fragile X has caused her to develop anxiety which in turn impacts her daily living activities". The report concluded that the claimant was not fit to fly at this time. We note that this information within this report is all self-reported.

18.7. [120] - 29.03.22 - OH report – this was focused on the issue of face masks. There is reference in this report to an unnamed condition: "[the claimant] has a medical condition where it takes longer for her to read and write. This is affected by not being able to lip read...";

18.8. [125] - 26.04.22 - this is a letter from the claimant's GP to AXA. This primarily focuses on the claimant's anxiety which flared up in relation to the requirement to wear a face mask. This letter, on [126], states "[the claimant] also has a diagnosis of Fragile X Syndrome, which she says causes her to feel clumsy and anxious in certain situations. She says that it is hard to wear a mask as this causes distress and makes it harder for her to carry out tasks". We note again that this is based on the claimant's subjective history provided to her GP (with the phrase "she says that....").

18.9. [173] - 27.11.22 - response to a referral, from the Department of Neurology, regarding the claimant's migraines. That letter noted that there is a family history of Fragile X, but makes no reference to any effects of that condition.

18.10. [179] - 25.03.23 - a referral to ophthalmology. This communication records clinical details as "known Fragile X, with persistent pixelated vision and no migrainous symptoms and normal MRI brain" - [180].

18.11. [215/217] - 04.07.23 - Dr Holcroft's assessment of the claimant for her CAA attestation". We have set this out in detail below as the relevant entries are rather lengthy, but warrant being set out in full.

18.12. [472] - 22.08.23 - South West London CAS – this again refers to "[the patient] states she has Fragile X...". This is reported information, reported by the claimant to a medical expert.

18.13. [512] - 19.09.23 - letter from NHS Sutton – this covers the claimant's depressive episodes, recorded as being connected to "difficulties at work". This document does not mention Fragile X Syndrome'.

18.14. [544] - end of 2023 - medical records from The Health Centre – entry of 30.10.23 "feels depressed low, h/o [history of] fragile x...pt [patient] if [sic] carrier to F x syndrome which would be associated with ADHD and she had

all the symptoms of tome of depression". Entry of 23.08.23 "has notified employer of Fragile X diagnosis, also that has anxiety and depression...".

18.15. [190] - TOR from June 2023 – the respondent accepts that FX "impacts on her ability to take on and digest information".

19. We have limited evidence as to the actual effects of Fragile X on the claimant's daily life. In fact, the most reliable evidence we have that addresses the effects is from the above-mentioned assessment from Dr Holcroft at [215] and [217]. We set out the relevant entries immediately below:

> "AXA: ...From the point of view of the Fragile X, I mean I am hoping with the occupational health report that maybe we can put that one to bed because in the occupational health report if you are happy for me to say so, I can indicate that this is not something which causes you significant problems and we already know that because we have spoken to you, Meg spoke to you last year, Geraldine has spoken to you, you have Fragile X but you know you have reached this point in your life and you've been able to function effectively normally without any significant issues, and for many people with Fragile X, more the girls than the boys, if doesn't seem to create major issues. ... in the ladies I have spoken to over the years it's just a label they've attracted but you know it doesn't seem to affect their day to day functioning, although sometimes they'll feel that they perhaps have some problems with concentration and overwhelmed with information, but whether or not that is different significantly than other people, you know, it's hard to say that its actually got anything to do with Fragile X, it might just be a situation at the time. So you know that I want to do hopefully with the occupational health report is to indicate that there is nothing to see here from that point of view, you know it's a condition you have but effectively doesn't affect your functionality, does that sound fair?
>
> JT: Yeah, I mean to be honest I definitely have got ADHD but I've always had ADHD, I've never taken any medication for it, but I think like i said in this situation this has really stressed me out (laughs) to the point where literally I just want this over.
>
> ...
>
> AXA: ...Coming back to Fragile X whilst that may have an effect at certain times it is certainly not something that is stopping you from functioning broadly speaking on a level of day to day, so does that sound like a reasonable summary of what has been going on? Have I missed anything key in your past medical history?
>
> JT: No I think that is literally everything, yeah that is literally everything yeah."

20. This is the only good evidence within the bundle that we have as to the effect of Fragile X. The majority of references to Fragile X within the bundle simply attach that label of "Fragile X" to the claimant, without going further to explain the effect of that label.

21. We note from the notes of the transcript of Dr Holcroft's meeting with the claimant that the claimant appears to accept Dr Holcroft's summary of the position in terms of her Fragile X: namely that is does not cause her significant issues with her functionality. That aligns with the remaining body of evidence within the bundle.

22. There is some evidence to suggest that Fragile X can be connected to anxiety/depression/ADHD. We also note the reference to "a link between the condition and anxiety symptoms especially in social situations" as cited at paragraph 18.6 above. However, we note that this is reported by the claimant to the medical expert in question. This, we find, is not sufficient evidence to satisfy us that the claimant's anxiety/depression/ADHD was/is caused by her being a carrier of Fragile X.

Chronology – 2020

23. We remind ourselves that a major relevant factor in these proceedings was the COVID-19 pandemic. We take judicial notice that the Government issued the advice to "stay at home" on 23 March 2020, commencing the first national lockdown of the pandemic. The majority of legal limits and restrictions were lifted by 19 July 2021. However, the effects and guidance regarding COVID-19 evidently continued (and continue still) to have an effect on workplaces and individuals in the UK.

Issue 1 – alleged protected disclosure/protected act

24. The claimant on 11 November 2020 sent Harley Corfield an email - [94]. It is this email that is said by her to be a protected act for the purposes of her victimisation claim and a protected disclosure for the purposes of the whistleblowing claim.

25. The respondent accepts that this email is a protected act under s27 EqA (in relation to the claim of victimisation).

26. The respondent disputes that this email amounts to a protected disclosure as defined by s43B of the Employment Rights Act 1996.

27. The email in question is relatively short and the substantive paragraphs merit citing in full:

> "Please see attached discrimination act 2010 and regard to mask wearing. Virgin Atlantic has no policy regarding mask exemption. But has one in place for passengers.
>
> This is biased and unlawful.
>
> In accordance of section 6 of the discrimination act/equality act 2010; I am protected against unlawful discrimination by my employer because of my disability/medical exemption. Under the act, you have a duty of care to make reasonable adjustments for any individual who is at a substantial disadvantage due to their (hidden) disability.
>
> I am legally under no obligation to divulge my private medical issues or provide proof in any way of my exemption, as per data protection act 2018. Please see links below.
>
> I enjoy my job and I would like to keep this civil as possible, but as per my rights, I will be taking legal action if I face any disciplinary action because of my exemption."

28. The factual disclosure recorded in the list of issues is said to be:

> "On 11 November 2020, in writing, the claimant raised a grievance including disclosures concerning PPE being ineffective and non-sterile".

29. Factually, there is nothing in the above cited email that could be taken to mean (whether expressly or implicitly) that PPE was ineffective and non-sterile. That factual statement or allegation is simply not present in the email. The one allegation that is contained within this email is that there was no mask exemption policy. This is not relevant to the pleaded disclosure as set out immediately above.

30. We will return to our conclusions on this email within the "Conclusions" section below.

Chronology – 2021

31. On 4 March 2021, AXA produced an occupational health report at [117], having had an assessment with the claimant by telephone on 3 March 2021. The report covers the claimant's diagnosis of Fragile X, and her view that this led her to some struggles with her education. The report also detailed the claimant's reported problems during the pandemic due to the requirement to wear face masks - [118]:

> "She explained that when other people wear masks it can be very difficult for her to communicate as she loses all the non-verbal cues and facial expressions, and is unable to lip read people. She has found that this causes difficulty with communication and she had felt somewhat overwhelmed by that. Ms Tyler told me that her GP has advised her that she is exempt herself from wearing a mask due to the level of her anxiety condition".

32. The claimant also discussed her tinnitus at this appointment:

> "[The claimant] told me that she had also been diagnosed with tinnitus in 2018, and she tells me that she had hearing issues related to that which cause her to need to rely on lip reading. [The claimant] expressed that her tinnitus worsens when she gets stressed".

33. At this point, we note that AXA has two distinct roles with the respondent: first, it produces occupational health reports when an employee is referred to it in the course of their employment, if they have a health difficulty that is relevant and potentially impacts their ability to perform their job. The second role AXA holds is as the provider of the CAA Attestation Certification, specifically it is Dr Girgis who is the qualified aeromedical expert.

34. On 6 July 2021, the claimant was informed by email that her EASA Assessment (synonymous with CAA Attestation) was due to expire on 13 July 2021 - [272]. We have seen the claimant's previous CAA Attestation, issued on 14 July 16, which expired on 13 July 2021 - [1311]. This certificate is signed by "the CCA applicant", who was the claimant in relation to this specific certificate.

35. On 13 July 2021, the claimant's Civil Aviation Authority regulatory medical was due for reassessment (reference at [175]).

36. On 6 August 2021, the claimant completed a medical assessment with an AXA nurse as part of the Regulatory Medical Assessment process (reference [175]).

37. On 8 August 2021, AXA requested a medical report from the claimant's GP, and repeated this request on 26 August 2021.

38. In October 2021, the claimant was grounded due to mask requirements. This period commenced when the claimant stood herself down from a flight due to her anxiety about the requirement to wear face masks on board the respondent's aircraft.

Chronology – 2022

39. On 29 March 2022, a second OH report was produced, following an assessment on 10 March 2022 - [120]. This report was focused on the respondent's requirement that its cabin crew wear face masks (due to COVID-19) and the claimant's need to be grounded as a result of not being able to wear masks.

40. On 17 June 2022, the respondent's Employee Health team followed up with the claimant about the CAA medical - [128/129]. This email includes a request for the claimant's report to be released to AXA in order that it can complete her assessment. Although the claimant responded to that email on 20 June at [128], she did not provide her consent for the medical report from her GP to be released.

41. On 21 June 2022, AXA emailed Employee Health to state that the claimant's GP report was still being chased. That email stated "Our clinicians have requested a medical report from the GP practice in August last year following the cabin crew assessment and have since been trying to obtain it but are unsuccessful. Our clinicians required the report so they can assess her ability and to assure that she is fit to fly".

42. Also on 21 June 2022, Ms Gardner emailed the claimant to introduce herself as the claimant's new Crew Performance Manager – [133]. Ms Gardner set up a welfare meeting in order to get up to date with the claimant's position, given she was still grounded. A welfare meeting took place on 5 July 2022. We will return to this meeting shortly.

43. Furthermore on 21 June 2022, Helen Parsons, within the respondent's Employee Health Team emailed the claimant to set out that the requirement from AXA for the claimant's GP report "relates to [her] CAA medical attestation...[AXA] are unable to issue your medical attestation certificate without this report and as such you cannot fly until this process is completed" - [135].

44. The next day, on 22 June 2022, Ms Parsons stated at [137]:

> "...I don't know the detail of what you have disclosed or discussed to AXA as part of this process however there will be something for which they need further information as to whether or not you meet the criteria as laid out by the CAA for fitness to fly. This would need to be up to date, contemporaneous information (they won't accept anything from 2 years ago) for them to be able to clear you to return to fly. .. suffice it to say that everyone has to go through the same process in order to be cleared for a CAA attestation at some point".

45. Another email from Ms Parsons on that day records at [138]:

> "...I cannot override the Occupational Health (AXA) decision not to issue a CAA attestation for you. If you have anything that you can provide that will negate their need for further information from your GP then please forward it direct to them and they will take it into consideration".

46. The outcome of the claimant's welfare meeting with Ms Gardner on 5 July 2022 is recorded in a letter from GP dated 19 July 2022 – [144]. That outcome letter records that the claimant disclosed to Ms Gardner in that welfare meeting that she had various medical conditions, including Fragile X. The letter went on to state, under the subheading of "Employment":

> "a recommendation was made to follow the medical capability procedure to ensure that, despite [the respondent's] mask wearing requirement, you were otherwise fit to fly".

47. On the second page of the letter, there is a separate subheading of "Outstanding CAA Attestation". In that section, Ms Gardner set out her understanding that, although the claimant had attended the relevant AXA appointment, she had not provided the further information required from her GP - [145]. Ms Gardner went on to clarify the position regarding CAA attestation in that letter:

> "...all operating crew must hold a valid CAA Attestation issued in accordance with the relevant aviation legislation and without this you are not licensed to work as cabin crew. Therefore, the CAA Attestation is of crucial importance, and I urge you to cooperate with this process and now request that the GP report is provided to the AXA Aeromedical Examiner by no later than Tuesday 26th July 2022".

48. We find that, objectively, it is clear from this letter that the reference to "medical capability procedure" is separate to the CAA attestation issue. Ms Gardner's letter made it clear what was required from the claimant in order to complete her CAA attestation, and why.

49. On 28 July 2022, Ms Gardner sent a further email at [150]. At the second paragraph, she asked the claimant to confirm that she had responded to the Aeromedical Examiner's request for her consent to release her GP report. Again, we find that Ms Gardner went to some effort to ensure that it was made clear to the claimant that there were two separate matters in play at this time: first, the CAA Attestation, which required the claimant's GP report and, second, the reason for the claimant's current absence regarding the wearing of face masks.

50. On 25 August 2022, Ms Gardner sent the claimant a letter at [155]. Again, this letter clearly sets out the fact that the claimant's CAA Attestation was outstanding, what she had to do to complete the process, and the fact that she would be unable to fly until this process was completed. Ms Gardner set out a deadline for the claimant in this letter - [156]:

> "[b]y no later than 8th September 2022 please can you either let the AXA Aeromedical Examiner have your GP's report...or give your consent to your GP to release their report to AXA".

51. On 29 September 2022, following further email correspondence, the Employee Health Team sent to the claimant the link to the CAA website regarding crew attestation information - [168].

52. On 26 October 2022, the claimant was informed that Matt Hamil, the Crew Performance Manager, was commencing a disciplinary investigation. This was in order to determine whether a disciplinary process should be undertaken in light of the claimant's apparent inability or unwillingness to engage with the AXA team regarding the CAA medical assessment.

53. On 27 January 2023 at [175], Ms Gardiner informed the claimant that the investigation had been paused to allow the claimant to agree to a new AXA referral for her CAA Attestation. Ms Gardner required a response by 30 January 2023. This email, once again, made the distinction between the process for obtaining CAA Attestation, and the process regarding OH referrals for the claimant's mask wearing concerns - [175]:

> "As you know in order for you to return to your role as cabin crew, you must have a valid Cabin Crew medical which [is] a CAA regulatory requirement. The CAA require all cabin crew to have a medical assessment every 5 years from their initial assessment...
>
> In your case, your Regulatory Medical Assessment was up for reassessment on 13 July 2021. While you were grounded at the time, on 6 August 2021 you completed a medical assessment with an AXA nurse as part of the Regulatory Medical Assessment process. Following this I understand that AXA requested your consent to obtain a medical report from your GP and/or for you to release this report directly to them. You have repeatedly been asked to comply with this request. I know, however, you were also referred to occupational health in relation to your inability to wear a mask (which was required as part of Virgin Atlantic's response to the covid-19 [*sic*] pandemic). However, to be clear these occupational health processes were distinct and dealt with different and separate issues.
>
> In any case, as Virgin Atlantic lifted its requirement to cabin crew to wear masks last April 2022 and as you told me that you wanted to return to work as cabin crew, i have been trying to support your return to work by encouraging you to cooperate with AXA's request so that they could conclude the Regulatory Medical Assessment. But as you didn't agree to AXA's requests this has resulted in Matt carrying out an investigation to determine whether a disciplinary hearing should be convened against you. As part of this process further enquiries were made with the Health team/AXA, who have informed us that for the purposes of the Regulatory Medical Assessment given the time that has elapsed since you initial medical assessment with the AXA nurse, you should now be referred to them again so that an up to date medical assessment can be carried out by an Aeromedical Examiner and if they gather all the information they need through this process, they may be able to issue a medical certificate and assess you as fit to fly without the need for your GP's report (although they will need to confirm this).
>
> In light of the above, Matt has agreed to temporarily suspend this investigation into the disciplinary matter to give us some time to look to correct the position. Therefore, please can you let me know by no later than **Monday 30th January 2023** whether:
>
> 1. You agree to the new AXA referral as set out above; and/or
> 2. You no longer wish to return to your role as cabin crew.

> If I do not hear back from you by Monday in response to the above questions and/or if you do not consent to the AXA referral, Matt will then be asked to continue to conclude his investigation."

54. No response as to whether the claimant would agree a new referral was received from her by the deadline.

55. The investigation therefore continued and, on 15 February 2023, Mr Hamil concluded his investigation and recommended that there was a disciplinary case to answer. The matter therefore proceeded to a disciplinary hearing with Mr Andy Maughan (Crew Performance Manager) as the chair. A disciplinary hearing was conducted on 25 April 2023.

56. On 17 May 2023, Mr Maughan set out his decision on the disciplinary hearing in a letter to the claimant - [183]. His decision was to impose a final written warning ("FWW") on the claimant's record for a period of twelve months. This FWW related to three allegations set out on [183]. The key allegation is the first, which alleges that the claimant was guilty of:

> "a repeated failure to obey reasonable instructions to disclosure, and/or provide consent to release your GP's report to AXA and/or undertake a new medical assessment with AXA for reassessment of your Regulatory Medical Report necessary to certify you are fit to fly and operate as crew".

57. Mr Maughan set out at [185] that he considered dismissal, but decided against it on the basis that the claimant had confirmed that she was now willing to cooperate in order to reach compliance with the CAA Attestation.

58. At this point, we note one part of the claimant's evidence, regarding the reason why she did not consent to her GP report being disclosed to AXA for the purposes of the CAA Attestation. In cross-examination, the claimant told us that the reason she did not want to consent to another medical was she was concerned that she would have failed and that this would have been used to force her out of the respondent's employment.

59. When Mr Brown and the Tribunal followed up this evidence by asking then whether it was right that the claimant's refusal was not connected to her disability (her Fragile X), the claimant stated that it was an inappropriate, discriminatory question and she refused to answer it. We find that the question was not inappropriate or discriminatory. It was a reasonable question in response to the claimant's evidence. From the claimant's evidence set out at paragraph 53 immediately above, we find that the reason for the claimant's refusal to release her GP report for the purposes of CAA Attestation was not connected to her Fragile X.

60. By email of 23 May 2023, the claimant appealed the decision to give her a FWW, as is her right under the respondent's disciplinary policy - [188]/[554].

61. The respondent decided to instruct external counsel (a barrister), Rosalie Snocken, to undertake the role of Appeal Officer. On 13 June 2023, Terms of Reference

("TOR") were agreed upon between the respondent and Ms Snocken. In the TOR, it was stated that the claimant had been diagnosed with Fragile X syndrome "which impacts on her ability to take on and digest information" - [190].

62. On 16 June 2023, Ms Snocken sent a letter to the claimant, inviting her to an appeal meeting on 7 July 2023 - [207].

Issue 2(a)(i)/5(a)(i)/6(a)(i)/7(b)(i) – reason for holding an appeal meeting

63. At paragraphs 2(a)(i)/5(a)(i)/6(a)(i)/7(b)(i) of the List of Issues, the act of holding an appeal hearing, as opposed to a back to work chat) is said to be a detriment/less favourable treatment/unwanted conduct.

64. The Claimant originally answered the respondent barrister's supposition of "they organised an appeal hearing because you appealed. They did not organise a back to work meeting because you were not certified as fit to fly" by saying "it is discriminatory". However, later on in cross-examination, the claimant accepted that the reason an appeal hearing was held was because the claimant had appealed the disciplinary sanction.

65. We accept this as being the reason an appeal hearing (and not a back to work chat) was arranged. The claimant had appealed and, under the respondent's disciplinary process, the next procedural step is to hold an appeal meeting - [554]. A back to work chat is just that, a chat between employee and employer: it would not be appropriate to hold a back to work chat in response to an email from the claimant appealing the FWW.

7 July 2023 – the appeal meeting

66. The appeal meeting took place on 7 July 2023. The notes of that meeting (not held out by the respondent to be verbatim) are at [306]. The claimant's comments on those notes, and the respondent's position on her comments, are set out at [372]. The appeal hearing was chaired by Ms Snocken and Shelley Pleydell (Manager – People Partnerships and Advice) sat in as the note taker. The claimant attended with her trade union (Unite) representative, Ryan Johnstone.

67. The appeal meeting lasted 5 hours. Regarding her alleged disability, the claimant raised Fragile X towards the end of the appeal hearing (line entry 370 at [334]). However, Ms Snocken was aware of the claimant's condition as it appears in the TOR agreed between Ms Snocken and the respondent on [190]

Issue 2(a)(ii)(i)/5(a)(ii)(i)/6(a)(ii)(i)/7(b)(ii)(i) - allegation of repeatedly asking questions

68. At paragraphs 2(a)(ii)(i)/5(a)(ii)(i)/6(a)(ii)(i)/7(b)(ii)(i), the claimant alleges that Ms Snocken asked repeatedly why she did not share her medical records, and that this is a detriment/less favourable treatment/unwanted conduct.

69. We accept that the main topic of conversation during the appeal hearing was the reason why the claimant had not shared her medical report. That was the reason for

Mr Maughan imposing the FWW. Therefore, it was inevitable and necessary for the appeal manager to explore this reason as it was the foundation of the FWW which in turn was the subject of the claimant's appeal. The claimant's appeal was on the basis that a FWW was too harsh, it was therefore necessary to look at the underlying conduct that led to the sanction.

70. Ms Snocken herself set out the basis of the disciplinary sanction at entry 4 [307]:

> "What is important to remember is that I am only looking at it in context of the allegations that formed the disciplinary. Andy's outcome letter forms the basis of the disciplinary, 1) repeated failure to obey reasonable instructions to disclose, and/or provide consent to release your GP's report to AXA and/or undertake a new medical assessment with AXA for reassessment of your regulatory medical report necessary to certify you fit to fly and operate as crews and some more details is given on that; 2) your refusal to disclose any of the information required for employment or any other information that may have a bearing on the performance of duties; and 3) Breach of company policy, rules and procedures as laid down by VAA or a regulatory body such as the CAA, BAA or HM Customs and Excise".

71. At entry 5 of the appeal notes, Ms Snocken explained to the claimant the broad areas of investigation which we consider to be reasonable and appropriate in light of the grounds of the appeal:

> "I will be looking at whether there were repeated requests, and whether you failed to comply and why that happened and your thought process and any mitigation".

72. In order to explore whether the penalty was appropriate, we accept it was reasonable and necessary for Ms Snocken to ask questions around these areas.

73. We therefore accept, as a fact, that Ms Snocken and the claimant did explore the reason why the claimant had not shared her medical records. We are not satisfied that there was an unreasonable repetition of questions, but accept that this topic was a clear focus of the appeal meeting. In any event, the reason for Ms Snocken's conduct in terms of the topics she chose to cover was to obtain the evidence she needed to enable her to come to a decision on the claimant's appeal grounds.

<u>Issue 2(a)(ii)(ii)/5(a)(ii)(ii)/6(a)(ii)(ii)/7(b)(ii)(ii) – allegation of not listening</u>

74. At paragraphs 2(a)(ii)(ii)/5(a)(ii)(ii)/6(a)(ii)(ii)/7(b)(ii)(ii), the claimant alleges that Ms Snocken did not listen to her replies to the questions asked, and that this is a detriment/less favourable treatment/unwanted conduct.

75. The claimant suggests to us that the meeting should not have lasted as long as it did (around 5 hours including breaks) and the length just demonstrates that Ms Snocken was not listening. We find that the opposite is true. We consider it unlikely to be a result of a chair not listening that a meeting goes on for over five hours. We consider that in fact the reverse is evidenced by the length of the meeting: namely that Ms Snocken made reasonable and thorough enquiries relevant to the appeal. Her questions demonstrate that she was responding to the information she was given by the claimant, meaning that she was in fact listening. The notes of the appeal

do not support the suggestion that Ms Snocken needed to repeat questions because she was not listening. This was not a case of her answering exactly the same questions and eliciting the same answers. The notes demonstrate someone asking exploratory questions in an attempt to understand the claimant's viewpoint.

76. Regarding this allegation, the claimant gave us the specific example of entry 377 on [335]:

> "I am pausing because I generally don't want to increase your stress by going over this, but having said that, through this process, the medical information we have is that you were able to engage with the process. Whilst I understand you were asking questions and were confused, I have no evidence that you were unable to rationally engage".

77. We do not accept that this is an example of Ms Snocken not listening to the claimant. This entry demonstrates Ms Snocken's view that the claimant could engage in the process for provision of the requisite medical information. Evidently, this is not the claimant's view, and she disagrees with this conclusion of Ms Snocken. However, the reaching of a conclusion that the claimant disagrees with is not the same as Ms Snocken not listening. This entry is the only specific entry to which we were pointed.

78. The claimant characterised the appeal hearing as "humiliating and shameful". We do not accept that characterisation. Having read the notes of the appeal, those notes do not evidence anything that could objectively and reasonably be labelled as humiliating and shameful. In fact, we find that Ms Snocken dealt with the appeal hearing in a compassionate, professional, courteous manner. Regular breaks were given, the tone of Ms Snocken's questions were polite and enquiring, not accusatory. We make no criticism of the manner in which Ms Snocken conducted the appeal hearing.

79. We therefore reject the factual allegation that Ms Snocken did not listen in the appeal. As such, the claims at paragraphs 2(a)(ii)(ii)/5(a)(ii)(ii)/6(a)(ii)(ii)/7(b)(ii)(ii) fail.

80. The claimant also complained to us that a manager should have been an appeal officer instead of an external barrister. This is not part of the claimant's claim before us and as such we will not address this complaint.

Chronology 2023

81. The claimant had a telephone call with Dr Holcroft on 4 July 2023 in order that he could obtain the relevant information that was required for the CAA Attestation to be completed - [214]. Dr Holcroft's medical opinion on the claimant's Fragile X is set out at [215/217], as set out in detail at paragraph 19 above.

82. By letter of 4 July 2023, Dr Holcroft confirmed to the respondent that the claimant was "fit to operate as Cabin Crew" - [224/225]. Those were, as Mr Brown suggested in cross-examination, the "magic words" that satisfied the respondent's regulatory requirements, and meant that the claimant could then (from a regulatory point of view) return to work.

83. Ms Snocken's appeal outcome was sent to the claimant on 2 August 2023 – [441/442-451]. Ms Snocken did not uphold the claimant's appeal.

Issue 9 – unauthorised deduction of wages

84. Once the claimant had been certified as fit to fly by AXA for the purposes of the CAA Attestation on 4 July 2023, the next step was to put the claimant through her refresher training in order to get her back flying. She had, by this time, been grounded for 21 months, since October 2021.

85. She was initially requested to complete the training on 25 July 2023 (reference at [390]). This request was sent to the claimant on 11 July 2023 (reference at [391]). She told us that she did not consider she was given enough notice to undertake the training on that date.

86. We have seen an email from her union representative on 19 July 2023 at [367] in which he stated that "[the respondent] can roster you a course 48 hours before, I know it's not the best but better they [gave] you a week than just the 48". We find that it was understood by the union that the respondent did not need to give more than 48 hours' notice of such training sessions to the delegates.

87. On the same date, the claimant emailed "Crew Support" to state that she had no childcare and "It's been a long break and I want to be mentally and physically prepared for my return" - [400]. Crew Support replied to explain - [399/400]:

> "Our REF courses are highly oversubscribed and unfortunately do not run that frequently to be able to amend them so easily. This does have an impact on the operation.
>
> I can see Carol [Gardner] authorised your return to flying on 8 July 2023. You were allocated the REF course on 10th July, ..."

88. In the event, the claimant failed two of her exams that are a pre-requisite to undergoing the refresher training course (reference at [391]). This leads to the need for an employee to undergo a VIVA.

89. On 16 August 2023, Ms Gardner attempted to make contact with the claimant on Teams and attempted to call her to discuss her VIVA and refresher course, to no avail – [470]. That email confirmed that the claimant's training had been rescheduled to 22-24 August 2023.

90. The claimant responded to Ms Gardner on the same day to tell her that she was "not in the right head space to complete training" and to ask for her training to be postponed until September - [469].

91. Ms Gardner emailed the claimant to ask if she could call later that day – [468]. When that email elicited no response, Ms Gardner emailed the claimant again to inform her that she had booked a slot for 1600hrs on 18 August to have a supportive conversation with the claimant – [468].

92. On 18 August 2023, the claimant emailed Ms Gardner in the morning to state that "today isn't a good day" - [467]. The claimant explained to us that it was her daughter's birthday. Ms Gardner responded to the claimant to reiterate that the purpose of the call was to discuss the claimant's refresher course the following week, and the options available to her – [467]. Ms Gardner offered to change the time of the meeting. The Claimant replied at [466] setting out that she had been deeply affected and upset by the respondent's perceived treatment of her over the past few years.

93. Ms Gardner then telephoned the claimant on 18 August 2023. The claimant was at that time in the supermarket, getting supplies for her daughter's birthday. The connection was poor and it was not a productive conversation. Ms Gardner therefore sent the follow up email at [466]. This email confirmed that the claimant had her VIVA and refresher course on 22 August 2023. Ms Gardner explained that the claimant was back on the roster, but that she should let the respondent know if she was not well enough to complete the training, and that her absence would then be marked as sick leave on the roster.

94. The day before the claimant's training was due to start, 21 August 2023, she emailed Ms Gardner and others to say that she was not prepared to go through the training with what she perceived to be too short a notice period; she felt pressured to complete the training – [483]. She asked for a training date in September.

95. Mark Crouch, Crew Performance Manager, responded to her email, setting out the following – [482]:

> "Jennie as you have been built a roster, and are expected on the course, I have been advised to tell you should you not be able to attend the course then unfortunately it will be classed as a failed duty and subsequently every duty there after until we can get you onto the next available course which is looking like later September and I need to inform you these days will be unpaid".

96. We find that this was a very clear communication, setting out the consequences of a failure to attend the refresher training. This was effectively a management instruction to the claimant to attend the refresher training course. The claimant did not argue or debate with Mr Crouch about this instruction.

97. On 22 August, the day on which the claimant was to start her training, she sent an email to Ms Gardner and Mr Crouch at 0824hrs - [479]. The claimant explained that:

> "I have no child care. And the pressure to pass it and then be told I won't get paid is adding stress and causing a hostile work environment. The pressure if I don't pass is no job".

98. The claimant mentioned Fragile X, stating "...because people do not know what fragile x is the barrister didn't know what it is, this is causing me more hurt to my feelings".

99. The claimant was then rostered onto another refresher course on 12-14 September 2023 – [487]. She completed that course and then returned to her flying roster.

100. As per Mr Crouch's email cited above at paragraph 95, the claimant was not paid for the day between and including 22 August 2023 and 11 September 2023.

Law

Whistleblowing – protected disclosure

101. S43B ERA provides:

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

102. There are therefore six "gateways" that can be used in making a qualifying disclosure. The relevant two in this case are those at s43B(1)(b) and (d).

103. The EAT recently held in Kealy v Westfield Community Development Association [2023] EAT 96 that:

> "There are two essential terms to consider in deciding whether there has been a protected disclosure. There must first be a "qualifying disclosure".

104. The term "qualifying disclosure" concerns the nature of the disclosure that is made. The qualifying disclosure must then become a "protected disclosure".

105. As to whether there has been a "qualifying disclosure", HHJ Auerbach provided guidance in Williams v Michelle Brown Am UKEAT/0044/19. There are five steps that need to be satisfied in order to find that a qualifying disclosure exists:

105.1. Disclosure of information;

105.2. The worker must have a belief in that the disclosure is in the public interest;

105.3. If the worker has that belief, the belief must be reasonable;

105.4. The worker must believe that the disclosure tends to show one of the matters in s43B(1)(a)-(f) ERA;

105.5. If the worker has that belief, the belief must be reasonable.

Disclosure of information

106. A practical example of the difference between a disclosure of information, and an allegation, was set out in Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325. Placed in the context of a hospital ward, a disclosure of information would be "yesterday, sharps were left lying around", whereas an allegation would be "you are not complying with health and safety requirements". However, the disclosure should not simply be categorised into "disclosure of information" or "allegation". The key point is that a bare allegation, such as the example above, cannot amount to a disclosure of information. It is however possible for an allegation to contain sufficient information to be capable of tending to show a failure (or likely failure) to comply with a legal obligation (for example) – Kilraine v London Borough of Wandsworth 2018 ICR 1850 CA. There must be sufficient facts within a disclosure to be capable, in the reasonable belief of the employee, of tending to show one of the factors in s43B(1)(a)-(f) ERA.

Reasonable belief

107. The requirement that a disclosure tended to show, in the reasonable belief of an employee, one of the matters in s43B(1)(a)-(f) is both an objective and subjective test. It requires a tribunal to determine whether the Claimant held the requisite belief and whether, if so, that belief was reasonable – Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731 CA

108. As put in Soh v Imperial College of Science, Technology and Medicine EAT 0350/14, there is a difference between "I believe X is true" and "I believe that this information tends to show that X is true". It is the latter, not the former, that is required here.

109. Regarding the requirement that the claimant had a reasonable belief that the disclosure was made in the public interest, this is a relatively low threshold. A list of factors for consideration as to whether it is reasonable to regard a disclosure as being in the public interest was provided by the Court of Appeal in Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731:

109.1. The numbers in the group whose interests the disclosure serves;

109.2. The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;

109.3. The nature of the wrongdoing disclosed; and,

109.4. The identity of the alleged wrongdoer.

Breach of legal obligation – s43B(1)(b)

110. The term "breach of legal obligation" has a fairly wide remit. It covers legal obligations set out in statute, secondary legislation and those deriving from common law. However, it will not encompass breach of internal policies, guidance or best practice, or breach of any moral codes – Eiger Securities LLP v Korshunova [2017] IRLR 115. There is no need for a claimant to give precise detail about the legal obligation in question, however there must be more than just a belief that something is wrong – Eiger Securities LLP v Korshunova [2017] ICR 561.

111. More detail may be required at the stage of the tribunal proceedings. The claimant, by that stage, will be expected to be able to set out what the infringer's legal obligation was – Arjomand-Sissan v East Sussex Healthcare NHS Trust UKEAT/0122/17

Endangering of health and safety – s43B(1)(d)

112. Under this gateway of s43B ERA, there is no obligation to identify a breach of health and safety requirements. It is sufficient that someone's health and safety is in fact, or is likely to be, endangered. This gateway is therefore wider than that at s43B(1)(b) ERA.

Whistleblowing – detriment

113. S47B(1) ERA provides that:

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

114. A detriment has been held to exist "*if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment*" – Ministry of Defence v Jeremiah [1980] ICR 13. In other words, if the claimant has suffered a disadvantage compared to other employees (whether real or hypothetical), they will have suffered a detriment. Despite this, there is no strict need for a comparator in cases of detriment.

115. The causative test under a detriment claim requires that a protected disclosure materially influenced the alleged perpetrator. This means that the protected disclosure must be more than a trivial influence – Fecitt and ors v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372.

Burden of proof

116. The burden of proof is on the respondent to demonstrate the reason for its conduct – s48(2) ERA. The Claimant must prove (on the balance of probabilities) that she made a protected disclosure, that she suffered a detriment, and that the detriment was inflicted by the respondent. At that point, the burden of proof moves to the

respondent to demonstrate the reason for its behaviour, and must satisfy the Tribunal that the protected disclosure was "in no sense whatsoever" on the grounds of the protected disclosure – Fecitt. If the employer fails to discharge this burden of proof, the Tribunal may draw adverse inferences - Kuzel.

Disability status

117. S6 of the EqA provides:

> "(1) A person (P) has a disability it –
>
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

118. At s212, substantial is defined as "*more than minor or trivial*".

119. The meaning of "long-term effects" is set out in Schedule 1 to the EqA:

> "2(1) the effect of an impairment is long-term if –
>
> (a) it has lasted for at least 12 months,
> (b) it is likely to last for at least 12 months, or
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
>
> ... "

120. There are four questions the Tribunal must therefore ask itself when considering whether a claimant fulfils the definition of disability:

120.1. was there an impairment;

120.2. what were its adverse effects;

120.3. were they more than minor or trivial;

120.4. had those effects lasted 12 months, or was it likely that they would continue for 12 months or that they would re-occur.

121. In terms of impairment, the relevant question is the *effect* of an impairment not the *cause*.

122. Tribunals can approach the question of disability in two ways: it can consider the impairment first, followed by the effects of that impairment. In the alternative, when there are difficult issues as to the nature and extent of an impairment, the tribunal can consider the question of long-term substantial adverse effect first.

Substantial adverse effect

123. In Elliott v Dorset County Council [2021] IRLR 880, the Employment Appeal Tribunal set out the test of substantial adverse effect. This requires a comparison between the ability of the person as an individual to carry out these activities versus how they would carry them out if not suffering from an impairment.

Long term effect

124. When considering whether the effects are likely to last for 12 months or more, or are likely to recur, the meaning of "likely" has been held to mean "could well happen", as opposed to something that is more likely than not to happen – SCA Packaging Ltd v Boyle [2009] UKHL 37.

125. The question as to whether the adverse effect was likely to occur or last 12 months or more is one that needs to be answered without having regard to subsequent events (McDougall v Richmond Adult Community College [2008] EWCA Civ 4). It involves a "prediction on the available evidence" (Pill LJ at paragraph 23):

> "In my judgment, it is on the basis of evidence as to circumstances prevailing at the time of [the alleged discrimination] that the Employment Tribunal should make its judgment as to whether unlawful discrimination by the employer has been established"

126. In other words, the Tribunal must discount any evidence regarding the effects of the claimant's impairment that post-dates the alleged discrimination.

127. Ultimately, the question of disability is a legal question for the Tribunal. Although it is assisted by medical evidence, it is not bound by that evidence.

Direct disability discrimination

128. Employees are protected from discrimination by s39 EqA:

> "(2) An employer (A) must not discriminate against an employee of A's (B) -
> …
> (d) by subjecting B to any other detriment."

129. Direct discrimination is set out in s13 EqA:

> "(1) 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."

130. There are two parts of direct discrimination: (a) the less favourable treatment and (b) the reason for that treatment. Sometimes, however, it is difficult to separate these two issues so neatly. The Tribunal can decide what the reason for any treatment was first: if the reason is the protected characteristic, then it is likely that the claim will succeed – Shamoon v Constable of the Royal Ulster Constabulary [2003] UKHL 11.

"Because of": reason for less favourable treatment

131. The correct approach to the issue of causation under s13 EqA is to determine whether the protected characteristic, here disability, had a "significant influence" on the treatment – Nagarajan v London Regional Transport [1999] IRLR 572. The ultimate question to ask is "what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?" - Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48. This is a question of fact for the Tribunal to determine, and is a different question to the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding circumstances into account.

132. If there is more than one reason for the treatment complained of, the question is whether the protected characteristic (in this case, sex) was an effective cause of the treatment – O'Neill v Governors of ST Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372.

Burden of proof under the Equality Act 2010

133. The burden of proof for discrimination claims is set out in s136 EqA:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision".

134. In Laing v Manchester City Council and anor [2006] ICR 1519, Mr Justice Elias held that:

> "the onus lies on the employee to show potentially less favourable treatment from which an inference of discrimination could properly be drawn".

135. It is not enough for the claimant to show that there has been a difference in treatment between him and a comparator, there must be something more. In Madarassy v Nomura International plc 2007 ICR 867, Lord Justice Mummery held:

> "56. The court in *Igen Ltd v Wong [2005] ICR 931* 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".

136. At this first stage, the Tribunal is required to consider all the material facts without considering the respondent's explanation. However, this does not mean that evidence from the respondent undermining the claimant's case can be ignored at stage one – Efobi v Royal Mail Group Ltd 2021 ICR 1263. The case of Efobi also upheld the approach of the decisions set out above, that it is for the claimant to

prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the Tribunal could infer discrimination. Although the Tribunal may consider all the evidence before it (not just that of the claimant) the burden rests firmly with the claimant at this first stage – see discussion at paragraphs 21 to 34 of Efobi.

137. In terms of comparators, the definition is at s23 EqA:

> "(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case".

138. Regarding a hypothetical comparator, the claimant must show that the comparator would have been treated more favourably. This requires the Tribunal to be able to draw inferences of likely treatment of a hypothetical comparator from the evidence before it.

139. It is only if the initial burden of proof is reached that the burden shifts to the respondent to prove to the Tribunal that the conduct in question was in no sense whatsoever based on the protected characteristic – Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931.

140. Overall however, the courts caution against placing too much emphasis on the burden of proof provisions. This was emphasised in Martin v Devonshires Solicitors [2011] ICR 352 when the EAT held that:

> "39. …[The burden of proof] provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally, that is, facts about the respondent's motivation (…) because of the notorious difficulty of knowing what goes on inside someone else's' head (…). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or another, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law".

Harassment related to disability

141. The definition of harassment is set out at s26 EqA:

> "(1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
>
> (i) Violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, mediating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable to have had the effect."

Unwanted conduct

138. It is for the individual to set the parameters as to what they find acceptable, and what is unwanted: "it is for each person to define their own levels of acceptable" – Reed v Stedman [1999] IRLR 299, and more recently Smith v Ideal Shopping Direct Ltd UKEAT/0590/12.

Purpose or effect

139. S26 makes it clear that it is sufficient for the unwanted conduct to have the effect set out in s26(1)(b): it is not necessary for that to be the purpose of the alleged perpetrator.

140. In terms of effect, the alleged perpetrator's motive is irrelevant. The test is both subjective and objective. First, it is necessary to consider what the effect of the conduct was from the claimant's perspective (subjective element). If it is found that the claimant did suffer the necessary effect set out in s26(1)(b), the next stage is to consider whether it was reasonable for the claimant to feel that way – s26(4)(c).

Related to the protected characteristic

141. The causal link required for harassment is much broader than that for direct discrimination. The requirement is that the conduct must be related to the protected characteristic, in this case disability.

142. There is limited guidance from the appellate courts as to what is meant by "related to". Some guidance has been given by the Court of Appeal in the case of UNITE the Union v Nailard [2018] EWCA Civ 1203. The facts of this case were that the respondent had failed to deal with the claimant's sexual harassment complaint. The Employment Tribunal found that, because the failure related to a grievance regarding harassment, that was sufficient to find that the failure was itself an act of sexual harassment. The Court of Appeal found the tribunal had got it wrong. The tribunal had not made findings as to the thought processes of the individuals who failed to deal with the grievance; therefore, it could not be found that the failure itself was an act of sexual harassment. A finding would have to be made that those who failed to deal with the grievance were guilty of sexual harassment. The tribunal had, in effect, used the "but for" test; in other words, they found liability on the basis that, but for the grievance, there would have been no failure. This is not the correct legal test under section 26.

143. In Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, HHJ Auerbach reminded tribunals that they must:

> "articulate distinctly, and with sufficient clarity, what feature or features of the evidence or facts found have led it to the conclusion that the conduct is related to the characteristic as alleged".

144. A claimant's understanding and a respondent's intention are not strictly relevant to the issue of causation. The context in which the alleged harassment occurs is a key factor in determining whether the conduct was related to the relevant protected characteristic – Warby v Wunda Group plc EAT 0434/11.

Victimisation

142. S27 EqA sets out:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because:
>
> (a) B does a protected act; or
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act –
>
> (a) Bringing proceedings under this Act;
> (b) Giving evidence or information in connection with proceedings under this Act;
> (c) (c) Doing any other thing for the purposes of or in connection with this Act;
> (d) (d) Making an allegation (whether or not express) that A or another person has contravened this Act."

Detriment

143. In terms of the meaning of detriment, this is the same as under whistleblowing detriment set out above.

144. For a detriment to be because of a protected act, it is necessary that it had a significant influence on the perpetrator. It is not necessary for the Tribunal to identify conscious or subconscious motivation – Nagarajan v London Regional transport [2000] 1 AC 501 at p512-513. The meaning of "significant" has been held to mean "more than trivial" – Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931.

Unauthorised deduction of wages

145. S13 ERA provides:

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless –
>
> (a) He deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

> (b) The worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> ...
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employer by him is less than the total amount of the wages properly payable by him to the worker on that occasion (After deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion. "

146. The question of what is properly payable generally requires the Tribunal to determine what payment the worker is legally entitled to receive by way of wages – New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA. This is an issue to be decided in line with the approach of the civil courts in contractual actions – Greg May (Carpet Fitters and Contractors) Ltd v Dring 1990 ICR 188, EAT. The question for the Tribunal is "on the basis of ordinary contractual and common law principles, what was the total amount of wages that was properly payable to the worker at the relevant time?".

147. The burden of proof is on the claimant to prove to the Tribunal, on the balance of probabilities, that he was paid an amount less than that which was properly payable to him.

Conclusions

Overarching conclusions

148. In the List of Issues, there are three factual allegations that are said to be the basis of the claims of detriment (whistleblowing), direct disability discrimination, harassment related to disability, and victimisation. Those three factual allegations are as follows:

    148.1. Holding an appeal hearing (instead of a back to work chat) - "Allegation 1";

    148.2. In that appeal hearing, repeatedly asking the claimant why she did not share her medical records – "Allegation 2"; and,

    148.3. In that appeal hearing, not listening to her replies to those questions - "Allegation 3".

149. In our findings at paragraphs 74-79 above, we have rejected the factual allegation at Allegation 3, and found that Ms Snocken was not guilty of not listening. As such, that claim, labelled as detriment (whistleblowing), direct disability discrimination, harassment related to disability, and victimisation, fails.

150. In terms of Allegations 1 and 2, we have found that factually those matters did occur. We therefore turn to the reason why those acts were done by the respondent.

151. Regarding Allegation 1, we have found, at paragraphs 64/65 above, that the reason why the claimant was invited to an appeal meeting is because she presented a written appeal against a disciplinary sanction. Under the respondent's disciplinary policy, when an employee appeals, the default position is that an appeal meeting is held at which the employee should attend.

152. In terms of Allegation 2, we have found that the reason for Ms Snocken asking repeated questions as to the claimant's reason for not sharing her medical report was because that was the conduct that had led to the claimant's FWW. Our findings on this are at paragraph 73 above.

153. In light of our findings as to the reason for the respondent's conduct in Allegations 1 and 2, we reject the claims that those Allegations were done on the ground of:

    153.1. A protected disclosure;
    153.2. Disability;
    153.3. A reason related to disability; and/or,
    153.4. A protected act.

154. We will address each claim individually below, for completeness

Whistleblowing – protected disclosure s43B ERA

155. We have found that the alleged disclosure is simply not present within the email of 11 November 2020 – see paragraphs 24-30 above. Therefore, the suggestion that this email is a protected disclosure on the basis it contained "disclosures concerning PPE being ineffective and non-sterile" must be rejected.

156. We therefore conclude that the email of 11 November 2020 is not a protected disclosure as pleaded. If we are wrong on this, we will in any event continue to consider the whistleblowing detriment claim.

Whistleblowing – detriment s47B ERA

157. We have found that the email of 11 November 2020 was not a protected disclosure. The claimant has failed to prove that she made a protected disclosure and, as such, the claim fails at this point.

158. We are also not satisfied that the claimant has proven that Allegations 1 and 2 amount to a detriment.

159. Regarding Allegation 1, it cannot be said that holding a disciplinary appeal is a detriment to an employee who has appealed a disciplinary sanction, unless something specific had been said by that employee in the appeal letter to indicate a meeting would be to their detriment. No such indication was given by the claimant. The holding of an appeal hearing is a right following a disciplinary decision, as set out in the ACAS Code of Practice regarding disciplinary hearings. In fact, the failure to hold an appeal hearing would be more likely to give rise to an argument that a detriment had been suffered.

160. In terms of Allegation 2, in order to deal with the appeal fairly and justly, Ms Snocken needed to explore the claimant's reasons for not providing the requisite information/consent. In fact, a detriment would be more likely to have occurred had Ms Snocken not asked about the reason for the claimant's conduct that led to the FWW.

161. Further and in any event, we are satisfied that the respondent has demonstrated that Allegations 1 and 2 were in no sense influenced by the 11 November 2020 email. The decisions to hold an appeal hearing and the manner in which that hearing was conducted were not materially influenced by that email.

162. The claim fails.

Disability – s6 EqA

163. We have set out our findings on the effects of Fragile X on the claimant's ability to do day-to-day activities at paragraphs 17-22 above.

164. On the basis of this evidence, we cannot be satisfied that the claimant is disabled as defined under s6 of the Equality Act. Specifically, we understand that the claimant is a carrier of Fragile X, however, we are not satisfied that this condition has caused the claimant to experience substantial adverse effects on her ability to carry out normal day-to-day activities. We therefore conclude that the claimant was not at the relevant time disabled by way of her Fragile X.

165. We have not considered whether the claimant was disabled by way of her anxiety/depression/ADHD, as these conditions are not relied upon by the claimant as being disabilities for the purpose of this litigation. This matter was expressly explored with the claimant at the commencement of the hearing and the claimant confirmed that it was her view that she had suffered certain alleged treatment because of her Fragile X (as opposed to any other condition).

166. Her disability claims therefore fail at this stage. However, we will go on to consider the claims on their other merits, in case we are wrong and the claimant was disabled at the relevant time.

Direct disability discrimination – s13 EqA

167. First, we have found that the claimant was not disabled as per the definition at s6 EqA. The claim therefore fails at this point.

168. In any event, we have set out our findings as to the reason for both Allegations 1 and 2 above at paragraphs 64/65 and 73 respectively: the reason is non-discriminatory. Tt actions of the respondent in holding the appeal meeting, and the manner in which it was held, were therefore not significantly influenced by the claimant's Fragile X. As such, the causative link between the claimant's alleged disability and the treatment allegedly suffered is not proven.

169. We have not gone into depth regarding the burden of proof, given that we are in a position to make positive findings as to the respondent's reasons for Allegations 1 and 2 – see above Martin v Devonshires Solicitors. For completeness, we are not satisfied that the claimant has shifted the burden of proof to the respondent: we do not have in front of us evidence that could lead us to draw an inference that the respondent discriminated by Allegation 1 and 2. In any event, if the burden had shifted to the respondent, we are satisfied that the respondent has demonstrated that its actions in terms of Allegations 1 and 2 were in no way tainted by discrimination.

170. The claim fails.

Harassment – s26 EqA

171. This claim is based on the claimant's premise that the respondent's conduct was done in relation to, or for a reason connected with, her disability. As above, we have concluded that the claimant was not disabled for the purposes of s6 EqA. We have however considered the claim further in case we are wrong on that.

Allegation 1

172. In terms of Allegation 1, the Tribunal is not satisfied that the holding of an appeal hearing is "unwanted conduct". Given that the claimant had appealed the FWW unprompted, without any representations made (for example) that she wanted the appeal dealt with on the papers without a hearing, it is implausible then to say that the hearing is unwanted. It is implicit, in light of the respondent's policy and the ACAS Code of Practice that, in wanting to raise an appeal, the claimant wanted, or at least expected, an appeal hearing.

173. In any event, the reason for the holding of the appeal was not connected to the claimant's Fragile X, but to her having written to the respondent to appeal the disciplinary decision – see paragraphs 64/65 above.

174. Furthermore, it is not plausible that the holding of an appeal for an employee who has presented a written appeal could reasonably lead to the claimant's dignity being violated, or to the creation of an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

Allegation 2

175. In relation to Allegation 2, we accept that the asking of certain questions in the appeal could constitute unwanted conduct from the claimant's perspective. However, as we have already set out, the reason for the manner in which Ms Snocken conducted the appeal in relation to her questioning was not related to the claimant's Fragile X – paragraph 73. The claim therefore fails due to the lack of causative link between the conduct and the claimant's Fragile X

176. In any event, if we are wrong on this, we conclude that it was not reasonable for the claimant to perceive Ms Snocken's questioning as either violating her dignity or

creating the environment set out at s26(1)(b)(ii) EqA. We refer to our findings as to the manner in which Ms Snocken conducted the appeal, at paragraph 78 above.

177. The claim fails.

Victimisation – s27 EqA

178. It is common ground that the email of 11 November 2020 amounted to a protected act. We therefore consider the causative link between that email and the conduct at Allegations 1 and 2.

179. We have already set out the reasons for the respondent's conduct at Allegations 1 and 2 – see paragraphs 64/65 and 73 above. In light of those findings, we reject the claim that those Allegations were significantly influenced by the claimant's email of 11 November 2020.

180. The claim fails.

Unauthorised deduction of wages – s13 ERA

181. The claimant was not willing or able to work between 22 August 2023 and 11 September 2023 inclusive. Neither was she signed off as sick, or self-certificated as sick. As such, there was no contractual or legal reason to pay her for those days: they are days on which she did not work. As such, the respondent was entitled not to pay the claimant for those days.

182. This claim therefore fails.

Approved by

Employment Judge Shastri-Hurst

Date 14 May 2025

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON – 21/5/2025

FOR EMPLOYMENT TRIBUNALS

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