Case Number: 3314948/2023

EMPLOYMENT TRIBUNALS

Claimant: Miss A Tero

Respondent: GXO Logistics UK Ltd

Heard at: Bury St Edmunds (via video)

On: 14, 15, 16 and 17 April 2025

Before: Employment Judge Graham
Mr C Grant
Ms S Elizabeth

Representation
Claimant: In person with Ms S Scotland (friend)
Respondent: Mr R Allen, Counsel

JUDGMENT having been sent to the parties on 30 April 2025 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Introduction and procedural history

1. ACAS Early conciliation took place between 23 October and 4 December 2023. By ET1 dated 18 December 2023 the Claimant sought to complain about unfair/constructive dismissal, disability discrimination and she also made a claim for other payments. By ET3 dated 20 December 2023 the Respondent defended the complaints.

2. A private preliminary hearing for case management took place on 28 May 2024 at which time both parties were legally represented, the Claimant having the benefit of Mr Wright of counsel. At that hearing the legal issues were clarified and Mr Wright confirmed that the Claimant was pursuing complaints of direct discrimination and harassment related to disability, however she was not pursuing a complaint of failure to implement reasonable adjustments. It was also recorded that the Claimant sought to argue that she had made protected disclosures and complained of automatic unfair dismissal.

3. A tribunal cannot determine a claim until it knows what the complaints are. At the start of this final hearing I indicated to the parties my observation that the list of issues presented to me was inadequate as it did not record what the alleged protected disclosures were said to be (save for the alleged dates and whether they were oral or written), and the automatic unfair dismissal complaint was incomplete and did not set out the legal issues for us to decide.

4. In response the Claimant withdrew one alleged protected disclosure (issue 10.1.2) and she told me that one oral disclosure was made to Greg Cawthorne and Ian Docherty on 19 July 2023 and a written disclosure on 20 July 2023 was made to Mr Docherty and Paulina Spurgeon. The latter disclosure is said to be the third bullet point in the Claimant's email of that date. No particularisation was provided as to what was said on 19 July 2023 and it was not put to any of the Respondent's witnesses in oral examination by the Claimant.

5. The Claimant sought permission to amend her claim to include a third alleged protected disclosure contained in a Teams message dated 20 July 2023 however permission was refused and oral reasons were provided. Written reasons for that refusal appear at Annex A below.

6. As regards the automatic unfair dismissal complaint, I clarified with the Claimant that it was a complaint of automatic constructive unfair dismissal and that the Claimant was alleging that she had been subjected to detriments for having made protected disclosures and that these detriments breached the implied duty of mutual trust and confidence entitling her to resign on notice. The Claimant confirmed the alleged breaches relied upon were the six acts relied upon for the discrimination complaints and also the 12 matters at paragraph 60 of her witness statement.

7. I re-drafted the list of issues at the start of the hearing with the agreement of the parties so that the Claimant, the Respondent and the Tribunal understood the complaints we were here to determine. Mr Allen for the Respondent helpfully typed and circulated the amended list of issues set out below.

8. We were provided with an opening note from the Respondent, a hearing bundle of 478 pages, three witness statements for the Respondent from Wayne Roberts, Nicola Keable, and Lynsey Mahon. The Claimant also provided a witness statement.

9. We made adjustments for the Claimant's disability of bipolar by way of frequent breaks and sufficient time for the Claimant to gather her thoughts. The hearing took place by video and worked well. The Claimant explained she did not wish Mr Roberts to appear on camera, and before we made a decision the Claimant instead put a post-it note over his image on her screen. We started reading the documents for the morning of 14 April, the Claimant gave evidence that afternoon, we then heard evidence from the Respondent's witnesses on 15 April, and closing submissions took place on the morning of 16 April. We then retired to deliberate and provided our decision and oral reasons on the afternoon of 17 April 2025.

10. The Tribunal indicated that a unanimous decision had been reached in

respect of all complaints save for one of the harassment complaints which was a majority decision by the two non-legal members in favour of the Claimant.

11. At around 4:10pm that afternoon the Respondent indicated that it would apply for a Reconsideration, and I invited the Respondent to consider putting that in writing given it was past 4pm and the panel would require time to deliberate, and moreover the Tribunal staff responsible for recording the hearing were scheduled to leave at 4pm that day. In addition, I was concerned given the Claimant's disability and my observation that she was distressed, it may be more helpful for the Reconsideration application to be submitted in writing. Mr Allen again helpfully agreed to do so.

12. The Reconsideration application has since been received and will be dealt with separately.

Issues

Direct discrimination: Equality Act 2010 s13

1. *The Claimant alleges that the Respondent did the following things which constituted direct disability discrimination under Section 13 of the Equality Act 2010:*

    1.1 Failed to conduct an internal investigation according to its internal process and procedure between 19.7.23-17.10.23

    1.2 Behaved aggressively towards her in the conduct of its internal investigation.

    1.3 Conducted the investigation without due regard for C's disability and associated mental health.

    1.4 Stopped C's contractual pay during the investigation.

    1.5 Suspended C without good reason or justification.

    1.6 Delayed in hearing and deciding her grievances until 6.12.23.

Whether the Claimant subjected to a relevant detriment

    1.7 Did the Respondent do the things at 1.1-1.6 above?

2 *Whether the treatment was less favourable?*

    2.1 In doing the act complained of, did the Respondent treat the Claimant less favourably than it would have treated others in comparable circumstances who were not disabled? (i.e, the Claimant relies upon a hypothetical comparator)

3 *Reason for less favourable treatment*

    3.1 If the Respondent treated the Claimant less favourably, was this because of the Claimant's disability?

Disability related harassment: Equality Act s26

4 *The Claimant alleges that the Respondent engaged in the following conduct which constituted disability related harassment:*

4.1 Failed to conduct an internal investigation according to its internal process and procedure between 19.7.23-17.10.23

4.2 Behaved aggressively towards her in the conduct of its internal investigation.

4.3 Conducted the investigation without due regard for C's disability and associated mental health.

4.4 Stopped C's contractual pay during the investigation.

4.5 Suspended C without good reason or justification.

4.6 Delayed in hearing and deciding her grievances until 6.12.23.

5 *Whether incidents/events complained of occurred*

5.1 Did the Respondent do the above alleged acts at 4.1-4.6?

6 *Whether conduct related to disability*

6.1 Was the conduct in question related to the Claimant's disability?

7 *Whether conduct unwanted*

7.1 Was the conduct in question unwanted?

8 *Purpose/effect of conduct*

8.1 Did the conduct in question have the purpose of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

8.2 Did the conduct in question have the effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account: the Claimant's perception, the circumstances of the case, and whether it was reasonable for the conduct in question to have that effect?

Automatically unfair dismissal (whistleblowing)

9 *Whether Claimant made a qualifying disclosure*

9.1 Did the Claimant disclose information?

9.2 Did the Claimant reasonably believe the information disclosed tended to show that the Respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject, namely its implied

duty of trust and confidence through the fair and consistent application of its disciplinary policy and procedure?

9.3 Did the Claimant reasonably believe it was in the public interest to make the disclosure?

10 *Whether disclosure was a protected disclosure*

10.1 Was the disclosure made in accordance with section 43C of the Employment Rights Act 1996? The Claimant alleges that she made a qualifying disclosure to the Respondent as follows:

10.1.1 On 19/07/2023 orally to Greg Cawthrone and Ian Docherty;

10.1.2 Omitted due to withdrawal

10.1.3 On 20/07/2023 in an email to Ian Docherty and Paulina Spurgeon.

11 *Reason for dismissal*

11.1 Did any of the matters at 1.1 to 1.6 of the list of issues and paragraph 60 of the Claimant's witness statement occur?

11.2 If so, did they individually or cumulatively (if we find more than one occurred) amount to a breach of the implied duty of mutual trust and confidence?

11.3 If so, did the Claimant delay her resignation thereby waiving any breach?

11.4 If not, the Claimant was constructively dismissed.

11.5 If the Claimant was constructively dismissed, was the reason, or the principal reason, because she had made a protected disclosure?

12 *Remedy – Equality Act Claims*

12.1 Is it just and equitable to award compensation?

12.2 What amount of compensation would put the Claimant in the position they would have been in but for the contravention of the Equality Act 2010?

12.3 What injury to feelings has the Claimant sustained?

12.4 Has the Claimant taken reasonable steps to mitigate their loss?

12.5 Was the Claimant guilty of contributory fault and, if so, to what extent should any compensation be reduced?

Findings of fact

13 There are few disputes of fact in this matter. From the information and evidence before the Tribunal it made the following findings of fact. We made our findings of fact on the balance of probabilities taking into account all of the evidence,

both documentary and oral, which was admitted at the hearing. We do not set out in this judgment all the evidence which we heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the issues to be decided.

14 Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against any contemporaneous documents. We have not referred to every document we read or were directed or taken to in the findings below, but that does not mean they were not considered.

15 The Respondent is a logistics business and the Claimant was employed as an Assistant Manager / Export Relationship Manager between 30 May 2022 and 17 October 2023.

16 The Claimant has bipolar and she underwent a health screening when she started work. The advice letter dated 14 June 2022 from AXA Health recorded that she was fit for the position and the disability provisions in the Equality Act may apply. No further advice was provided and there was no mention of her disability in that letter. The Claimant did not tell anyone within the Respondent about her bipolar until 14 August 2023.

17 The Respondent operates a discretionary sick pay policy. The HR policy sets out the circumstances when sick pay may be withheld. It is also the practice of the Respondent to withhold sick pay if staff go off sick during a formal process such as a disciplinary and this is due to previous instances of staff elongating the process by going sick.

18 One of the Respondent's clients is Costa and the Claimant's team worked on their exports in the Costa International Team ("CI team"). Costa's International Franchise Partners had previously been contacting the Respondent directly for issues regarding stock and changes to their orders however as this was not a matter for the Respondent the CI team would have to forward the requests to the various Costa Account Managers to deal with.

19 The volume of contact was high and was deemed to be interfering with the CI team's work, therefore in February 2023 the Respondent told its CI team to inform all Franchise Partners that they would deal only with their respective Account Managers in Costa for all queries/requests, and that the only time they were to make contact with the Respondent was to arrange a booking slot.

20 On 23 May 2023 the Claimant was asked by Greg Cawthorne (General Manager Costa Contract) via Teams whether the customer calls had dropped off since this change, to which she replied that they had. A separate email dated 29 June 2023 from Anthony Smith Director, Supply Chain Operations repeated this and said:

> *"Please ensure that you and your team only deal with the CI account managers and any customers contacting you by phone or email receive NO answers from your team, only a redirection to their account managers."*

21 On 3 July the Claimant confirmed her understanding of this by email to Costa where she said:

> *"we are not allowed to contact the FP anymore directly, it needs to come through yourself."*

22 The Claimant also confirmed in evidence to us that she had briefed her team on this change.

23 Logistic companies utilise Incoterms, which is short for International Commercial Terms, which are a set of internationally recognised rules defining the responsibilities of buyers and sellers in international trade contracts. These terms specify who is responsible for various aspects of the shipment, including costs, insurance, and customs clearance.

24 On 20 July 2023 the Costa Account Manager contacted the Claimant by email. This concerned the export of coffee from Costa to the franchise partner. There had been a prior issue where the coffee had been sent with a short date and the Respondent appeared to have accepted some responsibility for it and agreed to be responsible for the air freight costs of transporting the replacement coffee.

25 The query from the Costa Account Manager was about a different issue. It had come to the client's attention that that the client's franchise partner had requested a change in the freight of stock to be delivered overseas. A change was made which meant that the stock would be delivered under incoterm DDP which means delivered duty paid which places the majority of the responsibility for the delivery of the goods on the seller who is responsible for the costs and risks associated with the delivery of the goods.

26 There are a number of other incoterms, one of which is DAP which means delivered at place where the seller assumes all risk but only up to the point of unloading. This incoterm might be more attractive to the client as it involved assuming less risk or responsibility.

27 The client's concern was that the change had been made with the delivery of Costa stock which would mean that the client would be liable for the customs and duties in Kazakhstan where they had no means of payment. The client account manager asked why this had happened, why the change had been made without the client's involvement, and he said that the change had been factually and legally incorrect.

28 We make it clear that it is not the function of this Tribunal to determine which was the correct incoterm to have used.

29 The change had been made by HK who was a member of the Claimant's team, rather than the Claimant. The Claimant replied to the client and said it was not wrong as the Respondent was paying for the airfreight so it would be either DDP or DAP, it was done at the request of the franchise partner, she apologised for not copying in the customer account manager, and in future they would contact him first.

30 The client's account manager replied and maintained it was wrong to have done this, he maintained that DAP ought to have been used not DDP and he

maintained that it was for the client to decide which term to use, not the Respondent, and he asked the Claimant to confirm they were aligned on this.

31 The Claimant replied again and said that DDP had been requested by the franchise partner, they were not paying for the transportation the Respondent was, she agreed DAP was a better term, and the Respondent would consult the account manager if there was a change requested by the franchise partner.

32 The client was unhappy and escalated the matter within the Respondent.

33 The Claimant made Mr Cawthorne aware of the issue and he replied to say that it had gone nuclear, he asked why they were taking calls from the franchise partner given the change agreed earlier in the year, and in future they should go via the account manager, and he said he would calm down the situation and it was an own goal. It was clear that Mr Cawthorne was concerned about what had happened and the potential implications on relations with the client. The Claimant sent two replies, in one she said there was no risk to the customer and in the other she said it was not a major issue.

34 During a subsequent discussion between Mr Cawthorne and the Claimant and HK he said that someone would need to take the fall for this but that the Claimant and HK's jobs were safe.

35 Mr Smith (the Operations Director) determined that the matter should be investigated and it was allocated by Mr Cawthorne to Wayne Roberts a Stock and Admin Manager to investigate. The Claimant expressed concern with this to various people as she assumed she should be the one to investigate it as it was a member of her team who had made the change. The Respondent's policy does not mandate who can conduct the investigation and Mr Roberts' evidence, which we accept, was that it could be a peer or someone higher up, and he had been involved in interviewing someone a grade higher, and the key requirement is that the person chosen should be appropriate. Mr Roberts had some previous knowledge of the work in the CI team having spent time there, and he considered it was appropriate for him to deal with it.

36 The Claimant has sought to rely on an alleged oral protected disclosure allegedly made to Mr Cawthorne and Ian Docherty on 19 July 2023 however she has provided no detail at all, and we therefore make no findings on it.

37 The Claimant also relies on her email of 20 July 2023 to Ian Docherty and her line manager Paulina Spurgeon as a protected disclosure. In her email the Claimant admitted that HK should not have made the change, she said that she should have been the one investigating, she said that Mr Roberts was the same grade as her so shouldn't be investigating her anyway, and she said that *"if one of your subordinates made a mistake, you would not be investigated by your peer or investigated at all."* This latter sentence is alleged to be a protected disclosure. Mr Roberts did not have sight of this email at the time of his investigation.

38 Mr Roberts conducted investigation interviews with the Claimant, HK, and also with Mr Cawthorne. The initial premise of the investigation was due to an alleged failure to follow a management request with respect to not taking instruction from franchise partners.

39 The Claimant's interview took place first on 28 July 2023. It was explained that the purpose of the investigation was to consider all of the circumstances around the incident.

40 During her interview the Claimant was asked about the change communicated to staff that they needed to go through the client's account managers. The Claimant's reply was brief, and she said nothing had been put in writing. It was put to the Claimant that she was informed verbally to which she said nothing was formal it was just a discussion. Mr Roberts said the Claimant admitted knowing about it in June 2023 when it was put in writing, but she also knew in February to which she repeated it was discussed but not finalised, and she was again asked if she had been told verbally about the change to which she replied that it was not finalised. The Claimant added that it was her who had requested the change on behalf of the team but it had not been finalised or agreed in writing. We accept that Mr Roberts genuinely found the Claimant's replies to be evasive as it was clear that she knew about the change in policy but appeared to rely upon it not having put in writing initially.

41 Some of the Claimant's answers appeared confusing as she appeared to accept that HK had made a mistake but she maintained that it had not been wrong to make the change.

42 The Claimant was asked about her reply to the client account manager where she had said it had not been wrong. The suggestion from Mr Roberts was that the Claimant was in effect telling the client that he was wrong. The Claimant was asked, given that the client was clearly disgruntled, whether it was appropriate for her to have said to him it was not wrong to which she replied probably no. The Claimant later explained she probably should not have gone back to him, she was defending her team and did not want to drop HK in it.

43 This meeting lasted an hour and was adjourned for Mr Roberts to conduct further enquiries. During her interview HK admitted that the Claimant had told her not to answer queries from franchise partners unless it related to documents, and she acknowledged she had made a mistake by not following the change in policy.

44 The Claimant's interview was reconvened on 3 August during which it was explained to her that whereas the original investigation had been into a potential failure to follow management request, the investigation was now also looking at her response to the client account manager where she said it had not been wrong. The Claimant maintained her position that it had not been wrong to make the change but she acknowledged in her reply to the client she perhaps did not answer as effectively as she could have.

45 It was put to the Claimant that her email to the client had been abrupt and suggested that he was wrong to which she acknowledged that she could have apologised and then gone on to say it was not wrong to have made the change. When the client's difficulties in paying customs in Kazakhstan were explained to the Claimant by Mr Roberts she said she was not happy that the change had been made.

46 These were clearly difficult meetings. The notes record that that the Claimant said that she did not like Mr Roberts' tone and that he was passing his opinion. In a later Teams message the Claimant apologised for being defensive.

47 The Claimant has alleged that Mr Roberts was aggressive to her in the interviews and that she was repeatedly asked the same question over and over again. The Claimant has also told us that Mr Roberts behaved the same way before us in the hearing as he had then. We have read the notes of the interviews and there are instances where Mr Roberts has asked the Claimant a number of times about the change in policy and why she chose to email the client in the way she did, and he also explored with the Claimant why she had said it was not wrong to have made the change when she also accepted that HK had made a mistake.

48 Mr Roberts denies that he was aggressive and says that the Claimant's replies were contradictory and needed to be explored to establish the facts and that she was defensive and he suggests that she was trying to intimidate him.

49 It was clear to us that Mr Roberts was trying to establish the facts of what had happened and why, and he found the Claimant's replies to be contradictory and evasive. We did not find that Mr Roberts was aggressive in the record of interviews presented to us, and we did not observe anything of that nature before us in the hearing either. It appeared to the Tribunal that Mr Roberts was firm and thorough, he was concerned about the Respondent's reputation and relationship with an important client, and he was concerned about the Claimant's reply to the client, however we do not find that he behaved aggressively in his conduct of the investigation interviews.

50 We have also noted the Claimant's oral evidence to us that the reason for Mr Roberts' alleged bias against her was that he was protecting his own back as she suggested his team were responsible for the previous error picking the short dated Costa stock. It was put to the Claimant if that was her belief then this alleged aggressive behaviour had nothing to do with her disability to which she said she believed that it was.

51 At no point did the Claimant express in the interviews that she had bipolar or required some sort of support or adjustment to be made for her. Mr Roberts' evidence, which we accept, was that he took into account that the Claimant, like anyone else, would feel stressed and anxious during an investigation and it was normal to do so, and that had she asked for an adjustment he would have made it.

52 Mr Roberts made further enquiries with Mr Cawthorne who disclosed to him the communications with the CI team and the Claimant confirming both the change in policy and also the Claimant's understanding of it in May 2023.

53 Having read the notes of the interviews, we observed no difference in Mr Roberts' expressed tone towards the people he spoke to. The Claimant was asked more questions but we have observed that her answers appeared to be contradictory, for example disputing that there had been a mistake but then suggesting that HK had made a mistake. Similarly, the Claimant's answers with respect to her knowledge of the change in policy were opaque as she clearly knew about the change in policy but insisted that it had not been put in writing.

54 Mr Roberts determined that the Claimant should be suspended pending further investigation and he told us that this was due to concerns that the Claimant had

been disingenuous about changes in the policy, she showed a lack of understanding about how she could have handled things differently with the client, and the Claimant was also asking Mr Roberts who he had spoken to at Costa which he said concerned him. Mr Roberts told us that he was concerned that there was a potential risk to the business and he wanted to prevent further damage, that there was a potential case of gross negligence or misconduct on her part and that it was appropriate to suspend her pending that further investigation.

55 The suspension decision was communicated to the Claimant on 10 August 2023 by Daniel Symcox, Systems Lead Architect on the direction of Mr Roberts who was away.

56 On Monday 14 August 2023 Mr Roberts sought to engage with the Claimant to reconvene the investigation however the Claimant declined, initially because she said she had the builders in at home. Later that morning the Claimant sent Mr Roberts a message and said she was unwell due to stress and bipolar.

57 The Claimant conceded in her evidence that this was the first time she had told the Respondent that she suffered from bipolar. The Claimant had previously informed her line managers that she had been stressed on one or two occasions, however she had not mentioned bipolar before. The AXA report did not mention bipolar, it merely said that the disability provisions of the Equality Act 2010 may apply to the Claimant. We do not find that the Respondent had actual or constructive knowledge that the Claimant was disabled before 14 August 2023 as the Claimant said very little about it other than occasionally feeling stressed.

58 Some time later Mr Roberts recorded that there was a disciplinary case to be answered by the Claimant, namely that she had brought the Respondent into disrepute which may amount to gross misconduct or negligence.

59 Shortly afterwards the Claimant emailed Ms Spurgeon to say that she was going off on sick leave due to her mental health as she was so stressed as she has bipolar and the work situation had made her ill. Ms Spurgeon immediately forwarded the Claimant's email to Nicola Keable and Nicola Brown in HR and recorded that she was unaware that the Claimant had bipolar and asked them to check if it had been recorded.

60 Ms Spurgeon did not respond to the Claimant until Thursday 17 August 2023 at 11:46am and within her email she said she was sorry to hear that the Claimant was unwell, she explained that it was natural to feel stressed when involved in a process like this and she provided details of the Employee Assistance Programme she could speak to.

61 Ms Spurgeon also informed the Claimant that company sick pay was discretionary and that *"as you have become unwell during an investigatory process, we will have to withhold your company sick pay from Monday 14 August, until such time as this process has been concluded. We will review whether to reinstate CSP at that time. Company Sick Pay is a discretionary benefit."* The Claimant was also asked to agree to be referred to Occupational health for advice to assess her fitness to continue with the investigatory process whilst signed off from work.

62 Ms Keable gave honest and reliable evidence to us that this was the established practice of the Respondent which applies to non-disabled and disabled staff who go off sick during a formal process and it is reviewed at the end of the process, and a decision is made then whether to reinstate sick pay. The reasoning is due to previous cases where sickness absence has elongated the process.

63 The Claimant argued that she had previously been off sick before she informed the Respondent that she had bipolar and she had been paid that sick pay. Ms Keable's evidence was in the former situation the Claimant had not been under investigation which explained the difference, and she said that the decision is not automatic but a practice that has been in place for some time. It was not clarified before us who made the decision in the Claimant's case but nevertheless we were satisfied based upon the honest and cogent evidence of Ms Keable, together with the contemporaneous documents, that this was the Respondent's established practice notwithstanding it does not appear in the HR policy although the latter makes it clear that sick pay is discretionary and lists examples of situations where it may be withheld.

64 At 12:31pm on 17 August 2023 the Claimant filed her first grievance and complained about the handling of the investigation by Mr Roberts and also the previous comments from Mr Cawthorne about someone having to take the fall. The Claimant disputed that there had been a failure to follow management instruction, she said that she felt like she was going through a disciplinary not an investigation, she complained about a lack of support and not being able to discuss the matter with other people, and she said her manager ought to have conducted the investigation.

65 In the Claimant's cover email she also said that she was resigning as she was not going to continue with an unfair investigation into something she had not done, she said her treatment had been appalling, and she also said that being told she would not be paid due to something caused by the Respondent's other employees was the final straw. In her letter the Claimant said that withholding her sick pay had been a low blow. In her witness statement the Claimant said that the decision contributed to her feelings of depression, anxiety, stress and PTSD. The Claimant was not directly challenged on this in her evidence but in any event we find that is how she genuinely felt at the time.

66 Ms Brown in HR acknowledged the Claimant's resignation the following afternoon and repeated Ms Spurgeon's earlier explanation about withholding sick pay. The Claimant was invited to attend a grievance hearing the following week on 24 August 2023 however she objected to the choice of chair. Ms Brown explained the chair was independent and had no prior knowledge or involvement.

67 On 21 August 2023 the Claimant submitted a further grievance in two parts to Mr Docherty, the first concerned a lack of reasonable adjustments for the investigation and the choice of chair for the grievance. The second part concerned the sick pay decision, and also being referred to Occupational Health. The Claimant said that the conduct of the investigation exacerbated her bipolar and increased her anxiety and stress requiring her to undergo counselling, and that not receiving sick pay was further discrimination as well as contacting her whilst off was harassment. The Claimant's grievance was acknowledged the following day.

68 On 4 September 2023 the Claimant asked for the grievances to be heard at a neutral venue and to be accompanied by a friend as a reasonable adjustment. An Occupational Health assessment took place on 6 September 2023 and the subsequent report confirmed that the Claimant has diagnoses of bipolar, anxiety and depression for which she takes medication and is subject to routine medical review. The report advised that the Claimant would be able to attend investigation and grievance meetings on neutral premises and accompanied by a friend or family member. The report was not received by the Respondent until 28 September, accordingly this initial delay was not due to the Respondent.

69 On 28 September 2023 the Claimant was invited to a grievance meeting to take place on 9 October 2023 and there was some discussion around the date to accommodate the Claimant's companion and also the availability of the chair. The meeting took place on 11 October at one of the Respondent's other offices and was chaired by Lynsey Mahon who gave evidence before us, and the Claimant was accompanied by a friend.

70 The contents of that meeting do not form the subject matter of this complaint nevertheless we note that this was a thorough discussion about the contents of the Claimant's grievances and she was able to talk freely about the matters she wished to complain about including the conduct of the earlier investigation and also the decision to withhold sick pay.

71 The Claimant's employment ended on 17 October 2023.

72 The notes of interviews within the hearing bundle demonstrates that thorough interviews were conducted with Mr Cawthorne, Mr Roberts and Mr Symcox separately on 15 November 2023.

73 There was a delay in issuing the Claimant the outcome of her grievance and we note from the witness evidence of Ms Mahon and the contemporaneous documents that she had been very busy due to other work commitments including the departure of a member of staff in her team at this time. The calendar entries for Ms Mahon show back to back meetings throughout the period.

74 The grievance outcome was given to the Claimant orally on 6 December 2023 at which time she was notified that her complaints about the conduct of Mr Roberts during the investigation had not been upheld, he had approached the matter fairly and without bias or preconceived ideas, the correct process had been followed and the investigating manager could be from any department, they could be a peer or at a higher level. As regards the allegation of bringing the Respondent into disrepute Ms Mahon informed the Claimant that she could not comment as that investigation had ceased. We understand that the Claimant's resignation brought that process to an end.

75 As regards the Claimant's second grievance she was informed that Mr Cawthorne ought not to have made the comments he made however he had no involvement in decisions of the investigation. As regards the third grievance and the alleged lack of support to her, the Claimant was advised this was not upheld as the process had been followed; and she had not requested support. With respect to the sick pay Ms Mahon advised the Claimant that the correct

process had been followed however she had reviewed the case and decided to reinstate the sick pay and the Claimant would be paid £5,949.

76 The Claimant was issued with an exceptionally detailed nine page letter dated 9 December 2023 which demonstrates a particularly thorough investigation of all of the Claimant's grounds of complaint and the factors taken into account when reaching the decisions previously communicated to her on 6 December.

77 Ms Mahon gave us clear and honest evidence and she was candid in her admission that the grievance took longer than it should have, however she denied that the time taken had anything to do with the Claimant's disability.

Law

Direct disability discrimination

78 Section 13(1) Equality Act 2010, together with section 6 of that Act, provide that direct discrimination takes place where an employer treats an employee less favourably because of disability than it treats (or would treat) others. Under s. 23(1), when a comparison is made there must be no material difference between the circumstances relating to each case. A comparison may be made with an actual comparator, or with how a hypothetical comparator would have been treated.

79 Section 39 of that Act provides that an employer must not discriminate against its employee by dismissing them or subjecting them to any other detriment. A detriment will exist if a reasonable worker would or might take the view that the treatment was in all the circumstances to their detriment.

80 It is often appropriate to first consider whether a claimant has in fact received less favourable treatment than an appropriate comparator, and then consider whether this less favourable treatment was because of the protected characteristic, in this case that is disability. In some cases, particularly if there is only a hypothetical comparator relied upon, it may be appropriate to first consider the reason why the claimant was treated as they were.

81 The reason for decisions or treatment can often be for more than one reason. Provided that the protected characteristic (here disability) had a significant influence on the outcome, then discrimination will be made out. The Tribunal may need to consider the mental processes of the alleged discriminator, and whereas this is often referred to as motivation, it is not to be confused with motive as this is not a relevant consideration.

82 Very little discrimination today is overt or deliberate, and those accused of discrimination are usually unlikely to accept that they have done so, and possibly will be unlikely to recognise it in themselves. In cases of direct discrimination or victimisation, an examination of the "reason why" someone was treated as they were should not be reduced to a simple "but for" question. It is therefore not appropriate to ask but for the protected characteristic (here it is disability) would the Claimant have been treated better? Rather we must conduct a more rigorous inquiry into the mental processes of the Respondent to establish the underlying core reason for the treatment. This might be easier in cases where there is an overt or obvious reason for the treatment, however in other cases a more detailed analysis of the facts will be necessary.

83 The courts have previously noted the special nature of discrimination proceedings and that the person complaining of discrimination may face great difficulties when it comes to proof. The court held that it may be appropriate to take into account evidence of hostility before and after the event (or act complained of) where it is logically probative of a relevant fact.

Harassment

84 Section 40 provides that an employer must not harass an employee. Section 26 provides that a person (A) harasses another (B) if it engages in unwanted conduct related to a relevant protected characteristic, and 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 effect referred to into account must be taken of the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect. This analysis is not required where the conduct had the purpose of violating B's dignity or creating the proscribed environment.

85 As to whether the conduct had the requisite effect, there are both subjective considerations – the Claimant's perception of the impact on them – but also objective considerations including whether it was reasonable for it to have the effect on the particular claimant, the purpose of the remark or treatment, and all the surrounding context.

86 In ***HM Land Registry v Grant*** **[2011] EWCA Civ 769** it was held:

> *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."* [47]

87 As regards whether unwanted conduct is related to the protective characteristic (in this case disability), it is appropriate for the tribunal to take into account the wider context and this is clear from ***Warby v Wunda Group Plc*** **[2012] UKEAT 0434/11**. The EHRC Code at paragraph 7.9 makes it clear that unwanted conduct related to a protective characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic. The recent case of ***Carozzi v University of Hertfordshire and another*** **[2024] EAT 169** provides that:

> *"The requirement that the conduct be related to a protected characteristic is different to the requirement in a claim of direct discrimination that the treatment is because of a protected characteristic. The term "related to" is designed to cover all forms of conduct that, properly viewed, has a relationship to the protected characteristic."* [15]
>
> And
>
> *"There is no requirement for a mental element equivalent to that in a claim of direct discrimination for conduct to be related to a protected characteristic. Treatment may be related to a protected characteristic where it is "because of" the protected characteristic, but that is not the only way conduct can be related to a protected characteristic, and there may be*

circumstances in which harassment occurs where the protected characteristic did not motivate the harasser." [24]

88 In ***Tees Esk Wear Valleys NHS Foundation Trust v Aslam*** **[2020] IRLR 495** the court held that there must be some feature of the factual matrix identified by the tribunal which properly leads to the conclusion that the conduct in question was related to the protected characteristic and further the tribunal therefore needs to articulate distinctly and with sufficient clarity what feature of the evidence or facts found led to the conclusion that the conduct was related to that characteristic. It was further held that:

"Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.' [25]

89 Section 212 of the Act provides that a detriment does not include harassment. Accordingly, it is not possible for impugned treatment to amount to both direct discrimination and harassment at the same time.

Burden of proof – discrimination claims

90 Section 136 of the Equality Act 2010 provides that 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. However this does not apply if A shows that A did not contravene the provision.

91 Guidance on the application of the burden of proof in discrimination complaints was provided in ***Igen Ltd v Wong*** **[2005] IRLR 258**:

"*(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of* [the protected characteristic], *since no discrimination whatsoever is compatible with the Burden of Proof Directive.*

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] *was not a ground for the treatment in question.*

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof...."

92 It is not sufficient for a claimant to merely to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. Rather a claimant must establish a prima facie case of discrimination. As was held in ***Madarassy v Nomura International Plc*** **[2007] ICR 867**:

"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." (paragraph 56)

93 The court in ***Madarassy*** indicated that at the first stage the tribunal would need to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like; and available evidence of the reasons for the differential treatment. The absence of an adequate explanation for differential treatment of the complainant is not 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.

94 At the first stage the tribunal should take into account all of the relevant evidence from both sides and usually disregard any explanation provided the respondent. The consideration of the tribunal then moves to the second stage whereby the burden is on the Respondent to prove that it has not committed an act of unlawful discrimination. The Respondent may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If it does not, the tribunal must uphold the discrimination claim.

95 As regards the "something more" needed to shift the burden of proof onto a respondent, this will depend upon the facts of each case but it may include evidence of stereotyping, statistical evidence, lack of transparency or inadequate disclosure, or inconsistent explanations. However, mere unreasonable treatment by an employer "casts no light whatsoever" as to the question of whether an employee has been treated unfavourably - ***Strathclyde Regional Council v Zafar*** **[1998] IRLR 36**. This has also been followed by the Employment Appeal Tribunal in ***Law Society and others v Bahl*** **[2003] IRLR 640** where it was held that mere unreasonableness is not enough as it tells us nothing about the grounds for acting in that way.

96 In ***Laing v Manchester City Council and others*** **[2006] IRLR 748** the EAT provided helpful guidance on the application of the burden of proof, and in particular the potential for a tribunal to move direct to the second stage where the evidence suggests that the employer had discriminated against the claimant:

"75. The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race".

76. Whilst, as we have emphasised, it will usually be desirable for a tribunal to go through the two stages suggested in Igen, it is not necessarily an error of law to fail to do so. There is no purpose in compelling tribunals in every case to go through each stage. They are not answering an examination question, and nor should the purpose of the law be to set hurdles designed to trip them up. The reason for the two-stage approach is that there may be circumstances where it would be to the detriment of the employee if there were a prima facie case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the employer. But where the tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever.

77. Indeed, it is important to emphasise that it is not the employee who will be disadvantaged if the tribunal focuses only on the second stage. Rather the risk is to an employer who may be found not to have discharged a burden which the tribunal ought not to have placed on him in the first place. That is something which tribunals will have to bear in mind if they miss out the first stage. Moreover, if the employer's evidence strongly suggests that he was in fact discriminating on grounds of race, that evidence could surely be relied on by the tribunal to reach a finding of discrimination even if the prima facie case had not been established. The tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to let form rule over substance."

97 In addition, it has been held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another - ***Hewage v Grampian Health Board*** **[2012] IRLR 870**.

Protected disclosures

98 The Employment Rights Act 1996 provides:

S. 43B(1) Disclosures qualifying for protection.

(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) …

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

…

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

…

S. 43C Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —

(a) to his employer, …

99 A qualifying disclosure therefore becomes a protected disclosure when it is made to the worker's employer or in accordance with the requirements made to external bodies or the press under s.43C-H.

100 In ***Williams v Michelle Brown AM*** **UKEAT0044/19/00**, HHJ Auerbach set out the test for identifying whether a qualifying disclosure has been made. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held. The EAT in ***Blackbay Ventures Ltd v Gahir*** **[2014] ICR 747** endorsed the same approach.

101 First there must be a disclosure of information. In ***Cavendish Munro Professional Risks Management Ltd v Geduld*** **[2010] IRLR 38**, the EAT held that to be protected, a disclosure must involve giving information and must contain facts, and not simply voice a concern or raise an allegation.

102 However, in ***Kilraine v London Borough of Wandsworth*** **[2018] ICR 1850** the Court of Appeal held that we should not introduce a rigid dichotomy between information on the one hand and allegations on the other, what matters is what information was conveyed or disclosed and:

"Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)." [35]

103 A communication asking for information or making an inquiry is unlikely of itself to be constitute conveying information.

104 As regards the Claimant's belief about the information disclosed, the question is whether the Claimant believed **at the time** of the alleged disclosure that the disclosed information tended to show one or more of the matters specified in section 43B(1). Beliefs the Claimant has come to hold **after** the

alleged disclosure are irrelevant. Whether at the time of the alleged disclosure the Claimant held the belief that the information tended to show one or more of the matters specified in s.43B(1) and, if so, which of those matters, is a subjective question to be decided on the evidence as to the Claimant's beliefs. It is important for a tribunal to identify which of the specified matters are relevant, as this will affect the reasonableness question.

105 Account should be taken of the worker's individual circumstances and the focus is on the worker making the disclosure and not on a hypothetical reasonable worker. Workers with a professional or inside knowledge may be held to a higher standard than lay persons in terms of what it is reasonable for them to believe.

106 Whereas the test for reasonable belief is a low threshold, it must still be based upon some evidence. Unfounded suspicions, rumours and uncorroborated allegations are insufficient to establish reasonable belief.

107 The belief must be as to what the information **tends** to show, which is a lower hurdle than having to believe that it **does** show one or more of the specified matters. There is no rule that there must be a reference in the disclosure to a specific legal obligation or a statement of the relevant obligations nor is there a requirement that an implied reference to legal obligations must be obvious. However, the fact that the disclosure itself does not need to contain an express or even an obvious implied reference to a legal obligation does not dilute the requirement that a claimant must prove that they had in mind a legal obligation of sufficient specificity at the time they made the disclosure - ***Twist DX and others v Armes and others*** **UKEAT/0030/30/JOJ**.

108 As regards the public interest, the Court of Appeal in ***Chesterton Global Ltd v Nurmohamed*** **[2017] EWCA Civ 979**, identified the following principles:

i. There is a subjective element - the Tribunal must ask, did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest?

ii. There is then an objective element - was that belief reasonable? That exercise requires that the Tribunal recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest.

iii. The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. As per Underhill LJ:

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

different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable." [29]

iv. The reference to public interest involves a distinction between disclosures which serve only the private or personal interest of the worker making the disclosure, and those that serve a wider interest.

v. It is still possible that the disclosure of a breach of the Claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest. In such a case it will be necessary to consider the nature of the wrongdoing and the interests affected, and also the identity of the alleged wrongdoer. These are also referred to as the four factors in ***Chesterton***.

109 It is not for the Tribunal to determine if the disclosure was in the public interest. Rather the question is (i) whether the worker considered the disclosure to be in the public interest; (ii) whether the worker believed the disclosure served that interest; and (iii) whether that belief was reasonably held.

Breach of a legal obligation

110 As regards legal obligation, in ***Boulding v Land Securities Trillium (Media Services)*** **Ltd (2006) UKEAT/0023/06** HHJ McMullen QC held the following:

"… the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following:

(a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on.

(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

"Likely" is concisely summarised in the headnote to Kraus v Penna plc [2004] IRLR 260, EAT Cox J and members:

"In this respect 'likely/ requires more than a possibility or risk that the employer (or other person) might fail to comply with a relevant obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable, or more probable than not that the employer (or other person) will fail to comply with the relevant legal obligation. If the Claimant's belief is limited to the possibility or risk of a breach of relevant legislation, this would not meet the statutory test of likely to fail to comply."" [24 and 25].

111 In ***Eiger Securities LLP v Korshunova*** **[2017] ICR 561**, Slade J held:

"In order to fall within ERA s.43B(1)(b)… the ET should have identified the source of the legal obligations to which the claimant believed Mr Ashton or the respondent were subject and how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it

must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation…

The decision of the ET as to the nature of the legal obligation the claimant believed to have been breached is a necessary precursor to the decision as to the reasonableness of the claimant's belief that a legal obligation has not been complied with" [46 and 47].

112 Accordingly, whilst the identification of the legal obligation does not need to be precise or detailed, it has to be more than a belief that what was being done was wrong.

Detriment

113 S. 47B Employment Rights Act 1996 sets out the right not to be subjected to a detriment (or deliberate failure to act) by the employer done on the ground that the worker has made a protected disclosure. Detriment has the same meaning as in discrimination law, meaning that someone is put to a disadvantage – ***Ministry of Defence v Jeremiah*** **[1980] ICR 13 CA**.

114 In ***Jesudason v Alder Hey Children's NHS Foundation Trust*** **[2020] EWCA Civ 73** clarification of the term "detriment" was provided by Elias LJ who held:

"In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases…" [27]

And

"Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective." [28].

Causation

115 As per Linden J in ***Twist DX***:

"…even where the worker has made a qualifying disclosure which is protected, they will not succeed unless the ET concludes that the disclosure of the qualifying information was a, or the, reason for the treatment complained of…" [105].

116 As to the issue of causation the court in ***Jesudason*** summarised the relevant authorities including ***Manchester NHS Trust v Fecitt*** **[2011] EWCA 1190; [2012] ICR 372** where it was held that:

"In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower." [45].

117 In ***Jesudason*** the Court endorsed a reason why test as opposed to a but for test for detriment claims and held:

"Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B." [31].

118 In ***Kong v Gulf International Bank (UK) Ltd (Protect (the Whistleblowing Charity) intervening)*** **[2022] IRLR 854**, the court examined the process for determining the reason for impugned treatment. Simler LJ made reference to the "separability principle" whereby it is possible to distinguish between the protected disclosure of information on the one hand, and conduct associated with or consequent on the making of the disclosure on the other. It is possible that the protected disclosure is the context for the impugned treatment, but it is not the reason itself. It was held:

"The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way. This factual question is easy to state; but it can be and frequently is difficult to decide because human motivation can be complex, difficult to discern and subtle distinctions might have to be considered. In a proper case, even where the conduct of the whistle-blower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant's conduct that is distinct from the protected disclosure and is the real reason for impugned treatment.

All that said, if a whistle-blower's conduct is blameless, or does not go beyond ordinary unreasonableness, it is less likely that it will be found to be the real reason for an employer's detrimental treatment of the whistle-blower. The detrimental treatment of an innocent whistle-blower will be a powerful basis for particularly close scrutiny of an argument that the real reason for adverse treatment was not the protected disclosure. It will 'cry out' for an explanation from the employer, as Elias LJ observed in Fecitt, and tribunals will need to examine such explanations with particular care." [59-60].

Burden of proof in whistle-blowing detriment claims

119 Section 48(2) Employment Rights Act 1996 provides that it is for the employer to show the ground on which any act, or deliberate failure to act was done. The Employment Appeal Tribunal in ***Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust*** **UKEAT/0047/19/BA** held:

"…Firstly, it will not necessarily follow, from findings that a complainant has made a protected disclosure, and that they have been subjected to a detriment, alone, that these must by themselves lead to a shifting of the

burden under Section 48(2) . The Tribunal needs to be satisfied that there is a sufficient prima facie case, such that the conduct calls for an explanation.

Secondly, if the burden does shift in that way, it will fall to the employer to advance an explanation, but, if the Tribunal is not persuaded of its particular explanation, that does not mean that it must necessarily or automatically lose. If the Tribunal is not persuaded of the employer's explanation, that may lead the Tribunal to draw an inference against it, that the conduct was on the ground of the protected disclosure. But in a given case the Tribunal may still feel able to draw inferences, from all of the facts found, that there was an innocent explanation for the conduct (though not the one advanced by the employer), and that the protected disclosure was not a material influence on the conduct in the requisite sense." [33 and 34]

Automatic unfair dismissal

120 Section 103A of the Employment Rights Act 1996 provides:

"A*n employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason or, if more than one, the principal reason for the dismissal is that the employee made a protected disclosure."*

121 As set out above, the statutory question is what motivated a particular decision maker to act as they did – ***Kong v Gulf International Bank (UK) Ltd (Protect (the Whistleblowing Charity*) *intervening)* [2022] IRLR 854**.

122 The reason or principal reason for the dismissal means the employer's reason.

123 As regards the burden of proof, in ***Kuzel v Roche Products Limited* [2008] IRLR 530**, the Court held:

"The tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the tribunal that the reason was what he asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason." [59 and 60]

Constructive dismissal

124 The applicable law is found in section 95(1)(c) of the Employment Rights Act 1996 which provides that "*for the purpose of this Part an employee is dismissed by his employer if .....the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".*

125 The leading case on constructive dismissal is ***Western Excavating (ECC) Ltd v Sharp 1978* ICR 221, CA**. The employer's conduct must give rise to a repudiatory breach of contract. In that case Lord Denning said "*If the employer is guilty of conduct which is a significant breach going to the root of the contract, then the employee is entitled to treat himself as discharged from further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

126 There will be a breach of the implied term of trust and confidence where, looking "*at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and. sensibly, is such that the employee cannot be expected to put-up' with it*" - ***Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666**.

127 In ***Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462** the House of Lords affirmed the implied term of trust and confidence as follows: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".*

128 In ***Kaur v Leeds Teaching Hospitals NHS Trust 2018* IRLR 833** the Court of Appeal listed five questions that should be sufficient for the Tribunal to ask itself to determine whether an employee was constructively dismissed:

a. What was the most recent act (or omission) on the part of the employer the employee says caused, or triggered, their resignation?

b. Has the employee affirmed the contract since that act?

c. If not, was that act (or omission) by itself a repudiatory breach of contract?

d. If not, was it nevertheless a part (applying the approach explained in ***Waltham Forest v Omilaju [2004]* EWCA Civ 1493**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign).

e. Did the employee resign in response (or partly in response) to that breach?

Submissions

129 We were not referred to all the authorities which have been recorded above, nevertheless they were considered as many of them are well known and set

out the key legal principles for us to consider. The parties provided helpful submissions which are not repeated verbatim. Mr Allen went first and provided his submissions in writing in advance to assist the Claimant which was appreciated by her and the Tribunal. This was supplemented by oral submissions. In short the Respondent argued that the Claimant had been an evasive witness and invited us to consider that was how she presented at the material time, although it noted the Claimant's concession that she had not mentioned bipolar to the Respondent before 14 August 2023. The Respondent also reminds us of the Claimant's oral evidence that she thought that Mr Roberts had been biased against her *"as he was protecting his own back"* and the Respondent says that is distinct from discriminating against her because of her disability.

130 The Respondent argues that Mr Roberts' conduct during the investigation was appropriate and reasonable, it was the Claimant who was argumentative, she made no mention of her wellbeing to him, and Mr Roberts did not even have sight of the Claimant's alleged protected disclosure email of 20 July 2023 at the time. As regards Ms Mahon's evidence the Respondent repeats that the grievance outcome took longer due to not having sufficient time. With respect to Ms Keable's evidence, we are reminded of her evidence that it is the Respondent's practice to stop discretionary sick pay when staff go sick during a formal process, albeit it is not automatic, and the reason for paying sick pay to the Claimant previously was because she was not under a process at that time.

131 The Respondent says that there is an issue about knowledge of disability, the Respondent only knew and could only have known that the Claimant was disabled (by reason of bipolar) from 14 August 2023 and all the AXA report said was that the disability provisions of the Equality Act 2010 may apply therefore it disputes actual or constructive knowledge of disability before that time and in any event the relevant actors' knowledge of the Claimant's bipolar is highly relevant to their motivations in treatment of her and whether or not the decisions and actions they took related to her bipolar.

132 As to the conduct of the investigation by Mr Roberts, the Respondent maintains it was fair and thorough but not aggressive, it was consistent with how he interviewed HK and Mr Cawthorne, and manner of the Claimant's interview had nothing to do with disability and any differences was due to the Claimant's approach and her answers to questions. The Respondent repeats Mr Roberts had no knowledge of the Claimant's disability and that he understood the Claimant to be stressed in the meeting as many people would be in that situation.

133 As regards the sick pay issue, the Respondent repeats it was discretionary, it is not a question of whether the Respondent was entitled to withhold sick pay but rather whether or not the act of temporarily withholding sick pay was because of or related to the Claimant's disability which it says plainly it was not – it was related to and because the Claimant was pending investigation and in any event the Claimant was reimbursed her company sick pay for the period following her grievance outcome. Further the Respondent says it has given a clear account for the reasons for suspension, and also the reasons why the grievance outcome took as long as it did which is supported by populated diary entries contained within the hearing bundle.

134 The Respondent argues that the burden of proof has not shifted to the Respondent as there is no prima facie case of discrimination, but even if it has then the Respondent says it has discharged that burden by way of clear justification and reasoning in respect of each complaint.

135 With respect to the sick pay complaint which is alleged to be harassment, the Respondent relies upon the case of ***Warby*** referenced above and urges us to take account of the wider context at the time which was that the Claimant was under the investigation and it was the usual practice to stop sick pay pending the outcome so as not to elongate the process. We raised the contents of the EHRC Code at paragraph 7.9 which makes it clear that unwanted conduct related to a protective characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic and we referred the parties to the judgment in ***Carozzi*** which makes a similar point that the term "related to" is designed to cover all forms of conduct that, properly viewed, has a relationship to the protected characteristic. Mr Allen argued that the trigger for the decision was not the Claimant's bipolar, the trigger he says was the Claimant being under investigation and then going sick once that process had started and he refers us to the decision in ***Tees*** which reminds tribunals that there must be some feature of the factual matrix identified by the tribunal which properly leads to the conclusion that the conduct in question was related to the protected characteristic, and further the tribunal therefore needs to articulate distinctly what feature of the evidence or facts leads to the conclusion that the conduct was related to that characteristic.

136 The Respondent also repeats that the Claimant had not made a protected disclosure, the first of which was not advanced in the hearing and the second did not tend to show the legal failing relied upon and moreover it referred us to the factors identified in ***Chesterton*** which it said that leads to the conclusion that the Claimant did not have a reasonable belief that the disclosure was in the public interest.

137 As regards whistleblowing and the automatic constructive unfair dismissal complaint, the Respondent argued that the only connection the Claimant alleged between these in her witness statement was that her alleged disclosure had been ignored by the Respondent and that as a matter of logic, the Respondent ignoring that disclosure was not because the Claimant raised a protected disclosure and therefore the Claimant failed to show that the Respondent did anything as a result of the disclosure which would entitle her to resign.

138 The Claimant provided her submissions after a break and told us that she had been an honest and credible witness, she suggested that Mr Roberts had displayed a lack of respect towards her and that he did know about her bipolar. The Claimant said that throughout the investigation process no one approached her to offer assistance, she felt completely ignored and she described the work environment as incestuous whereby anyone could investigate anyone and that it was dysfunctional. The Claimant said that no one asked her if she was making a protected disclosure, that she was the best person to know about her disability rather than sending her to Occupational Health. Finally, the Claimant said she had been made extremely ill for two years and that she would never work in logistics again after a career of thirty years.

Conclusions and analysis

Whistleblowing

139 We will address the whistleblowing claim first. The Claimant did not advance the alleged oral disclosure of 19 July 2023 before us. We have no evidence on what was said, what it tended to show, nor why the Claimant reasonably believed that it was a disclosure in the public interest. We therefore do not find that this was a protected disclosure.

140 As regards the alleged written disclosure, the Claimant relies upon the third bullet point in her email of 20 July 2023 however that does not refer to a breach of a legal obligation. By way of reminder the Claimant expressed *"if one of your subordinates made a mistake, you would not be investigated by your peer or investigated at all."*

141 At the very most it is an assertion that she should not be investigated for the mistake of someone else. This was not the conveying of information and we therefore do not find that the Claimant reasonably believed at the time that this tended to show the legal failing that she relies upon now, namely a breach of her employment contract.

142 Moreover, it is clear from the case of ***Chesterton*** that the Claimant did not have a reasonable belief that this was a disclosure in the public interest. The identity of the Respondent is a private employer, the number of those whose interests are affected is one (the Claimant only), the nature of the interests affected is limited to her own employment situation, and the nature of the wrongdoing is allegedly having someone the same grade as the Claimant investigating a customer complaint arising out of her team. It was not reasonable for the Claimant to have believed that this was a disclosure in the public interest, it concerned her own interests.

143 We therefore find that the Claimant did not make a protected disclosure, and as such her complaint of automatic constructive unfair dismissal fails and is dismissed. We also note for completeness that Mr Roberts did not even have sight of this email at the material time, therefore anything he did could not have been caused or influenced in any way by the contents of that email.

Direct disability discrimination

144 The factual premise of issues 1.1, 1.2 and 1.3 have not been made out. With respect to issue 1.1, there was no failure of the Respondent to comply with its internal process and procedure with respect to the investigation. It was open to the Respondent to appoint whoever it wished to conduct that investigation, the Respondent deemed Mr Roberts to be appropriate and it was open to them to have done so. The initial investigation expanded from examining why there had been a failure to follow the change in policy to looking at why the Claimant responded as she did to the client account manager and her insistence that the action of HK had not been wrong.

145 With respect to issue 1.2, we did not find that Mr Roberts had been aggressive in any way. Mr Roberts was thorough and firm, but he was not aggressive. We appreciate that the Claimant did not like to be questioned and

felt the need to defend herself and her team, however Mr Roberts remained professional throughout.

146 With respect to issue 1.3, Mr Roberts could not have had regard to the Claimant's disability as no one told him that she was disabled and the Claimant failed to raise it with him until 14 August 2023 which is after all of these three matters are alleged to have occurred. Moreover, we did not find that the Respondent had constructive knowledge of the disability or that it should have known that the Claimant was disabled by virtue of her saying that she had been stressed or anxious on occasion. Mr Roberts took account of the Claimant's mental health and noted that everyone is stressed during an investigation.

147 We therefore dismiss issues 1.1, 1.2 and 1.3 as the factual premise behind them has not been made out therefore we do not need to go on to look at whether this was less favourable treatment.

148 As regards issue 1.4 which is the allegation about stopping the Claimant's sick pay, the factual premise is made out in so much that she was informed on 17 August that the decision had been made to withhold discretionary sick pay and that this would be reviewed at the end of the process. The decision was made three days after the Claimant first informed the Respondent that she had bipolar. The decision was based upon established practice albeit not recorded within the non-exhaustive reasons in the Respondent's HR policy.

149 The Claimant has not established facts from which we could conclude that direct discrimination had taken place with respect to the sick pay – something more would be needed to shift the burden onto the Respondent. There was nothing to suggest that a hypothetical comparator would have been treated any differently. We make it clear that a hypothetical comparator would have been someone in precisely the same situation as the Claimant without her disability, in other words someone subject to the initial stages of a disciplinary investigation who does not have bipolar.

150 A prima facie case of discrimination has not been established but even if it has, the Respondent has given a fully adequate explanation as to why it behaved as it did, which was that it was in compliance with the Respondent's established practice to withhold discretionary sick pay to anyone subject to a disciplinary process so as not to elongate that process. We have accepted that explanation from the Respondent and this treatment was not because the Claimant has bipolar therefore we dismiss allegation 1.4.

151 As regards suspending the Claimant without good reason or justification, the factual premise of the allegation was only partially made out as the Claimant was suspended, however we were not satisfied that it was without a good reason or justification. There were grounds for suspension based upon the Claimant's answers to the questions from Mr Roberts which caused him concern and which he considered to be evasive, and he had a genuine concern about further damage to the Respondent's business or relationship with its client based upon the Claimant asking him who he had spoken to at Costa.

152 The Claimant has not established a prima facie case of discrimination here. Something more would be required to shift the burden to the Respondent. There was no evidence to suggest that a hypothetical comparator (someone subject to the same investigation as the Claimant who gave the same answers

as her but without bipolar) would have been treated any differently than the Claimant was.

153 Even if the burden had shifted the Respondent has again given a fully adequate and non-discriminatory reason for the Claimant's suspension. Mr Roberts had a genuine concern that the Claimant may present a risk to the business at that time due to what he perceived to be her disingenuous and evasive answers on the change in policy, her insistence that the change made by HK had not been wrong, and requests to know who he had spoken to within the client. Mr Roberts was clearly concerned that there was some damage to the client relationship as the matter had already gone "nuclear" and he was concerned about further damage. This had nothing whatsoever to do with the Claimant's disability which Mr Roberts did not know anything about. We dismiss allegation 1.5.

154 As regards the time taken to hear the Claimant's grievance, there was a delay. This was admitted candidly by the Respondent and the factual premise of the allegation is made out. Some of the delay was in the initial period as the Claimant objected to who had been selected to hear it and then awaiting the outcome of the referral to Occupational Health which we note had been arranged swiftly. The time taken to produce that brief report was not the fault of the Respondent but it took almost a month to arrive after the referral. Following that the first meeting in October was set up quickly but there was a further gap of two months before which the Claimant received the outcome.

155 Whereas there was a delay, we find Claimant has not established a prima facie case of discrimination here. Something more would be required to shift the burden to the Respondent. There was no evidence to suggest that a hypothetical comparator (someone with a large and complex grievance but without bipolar) would have been treated any differently.

156 However, even if the burden had shifted, the Respondent has again given a fully adequate and non-discriminatory reason for the time taken to deal with the grievance which was because this was a relatively large and complex grievance and Ms Mahon was clearly incredibly busy during the intervening period. Moreover, we have noted the length and contents of the eventual outcome which demonstrate the amount of work which went into producing the decision with respect to three complex grievances about disability discrimination. We do not find that the time taken had anything whatsoever to do with the Claimant's disability and we dismiss allegation 1.6.

157 All of the complaints of direct discrimination failed and are dismissed.

Harassment related to disability

158 We have already found that the factual premise of issues 4.1, 4.2 and 4.3 have not been made out. With respect to issue 4.1, there was no failure to follow the Respondent's internal processes and procedure. As regards issue 4.2, Mr Roberts was not aggressive during the interviews, and with respect to issue 4.3 the Claimant did not make the Respondent aware of her bipolar until 14 August 2023 and as such there was nothing for Mr Roberts to take into account. As the factual premise of the complaints have not been made out there was no unwanted conduct, and we therefore dismiss issues 4.1, 4.2 and 4.3.

159 With respect to issue 4.5 which is the decision to suspend the Claimant, whereas we find that this was unwanted conduct we do not find that it related to the Claimant's disability in any way. The decision to suspend the Claimant was taken for the reasons we have set out above which related to the Claimant's answers during the investigation meetings which Mr Roberts deemed to be evasive or disingenuous in connection with the change in policy, her insistence that the change made by HK had not been wrong even though she admitted that HK had made a mistake, and the contents of her email to the client account manager which suggested that he was wrong. The decision to suspend the Claimant related to a concern on the part of Mr Roberts about a future risk to the business from the Claimant. This had nothing whatsoever to do with the Claimant' disability (which Mr Roberts was not even aware of at the time) and we dismiss issue 4.5.

160 With respect to issue 4.6 which concerns the time taken to deal with the Claimant's grievance, whereas we find that this was also unwanted conduct, we do not find that it related to the Claimant's disability in any way. The time taken was due to a number of factors including the size and complexity of the grievance, the Claimant's initial objections to the first chair, the time taken to receive the results of the Occupational Health referral, and ultimately the workload of Ms Mahon which meant that she had back to back meetings routinely throughout this period as evidenced by the calendar entries provided to us. The unwanted conduct did not relate to the Claimant's disability in any way and we dismiss issue 4.6.

161 Finally, as regards issue 4.4 regarding withholding discretionary sick pay on 17 August 2023 it is the unanimous decision of the Tribunal that this was unwanted conduct.

162 As regards whether it related to the Claimant's disability, it is the majority decision of the two non-legal panel members that the Claimant's absence commencing on 14 August 2023 was due to her bipolar which the Claimant says had been exacerbated by the investigation as recorded in her resignation email of 17 August. The decision to withhold discretionary sick pay was communicated three days later on 17 August 2023.

163 Accordingly, as the absence was due to the Claimant's disability, the subsequent decision to withhold sick pay for going sick during the disciplinary investigation, which the Respondent tells us is not automatic, was related to the Claimant's disability. The non-legal panel members place reliance on paragraph 7.9 of the EHRC Code which confirms that unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic. Further reliance is placed upon paragraph 15 of the judgment of the EAT in ***Carozzi*** which also makes it clear that the term "related to" is intended to be wider than the "because of" test under direct discrimination but it may occur where there is a relationship to the protected characteristic. Reliance is further placed on paragraph 24 of the judgment which reiterates that there is no requirement for a mental element, and that there may be circumstances in which harassment occurs where the protected characteristic did not motivate the harasser.

164 Applying that to the facts of this case, it is the majority decision that there was a relationship between the Claimant's bipolar and the decision to withhold

discretionary sick pay. The decision to withhold the sick pay was related to the sickness absence caused by the bipolar condition which is conceded to be a disability. Accordingly, it is the majority view that there was a relationship between the disability and the unwanted conduct.

165 It is the minority view of the Employment Judge that the unwanted conduct did not relate to the Claimant's disability but rather it related to the operation of the Respondent's practice not to pay discretionary sick pay during formal processes until a review upon completion of that process. It is the minority view that whereas the test of "related to" is broader than the test of "because of" for direct discrimination as noted in ***Carozzi*** and the EHRC Code, nevertheless there was no direct relationship between the Claimant's bipolar and the unwanted conduct.

166 The Claimant's bipolar was part of the wider context which should be taken into account on the basis of ***Warby.*** However, I accept the Respondent's argument that it was not the "trigger" for the unwanted conduct. An assessment of the wider context shows that the trigger for the unwanted conduct was the act of going sick during the formal process whereby the Respondent then decided to apply its practice of withholding discretionary sick pay. That decision is made in cases where the employee is disabled and non-disabled, it was not triggered by the Claimant having bipolar, it was triggered by the Claimant going sick during a formal process.

167 I of course note that the word trigger does not appear in the statute nor in the authorities to which I have been referred, and I note that the EHRC Code and caselaw are clear that the term "related to" is wider than the "because of" test for direct discrimination. I do not consider that the Respondent's use of the word "trigger" (which I have adopted) is synonymous with the "because of" test. The use of the word trigger is a helpful device in examining the issue of causation and ascertaining whether the decision to withhold sick pay related to the Claimant's bipolar, or whether it related to something else, and if so what.

168 It is an inescapable conclusion in my view that someone else without bipolar who went sick during a disciplinary investigation would have found themselves in the same position as the Claimant with their sick pay withdrawn to avoid elongating the process. In my view, it cannot therefore be said that the decision related to the Claimant's bipolar, notwithstanding that the Claimant's bipolar was the reason for the Claimant going sick in the first place. It was simply part of the factual matrix.

169 Nevertheless, the Tribunal therefore finds by a majority decision that the unwanted conduct related to the Claimant's disability.

170 If we consider the remainder of the test for harassment it is the unanimous decision of the Tribunal that it was not the purpose of the unwanted conduct to violate the Claimant's dignity, nor to create the proscribed environment. We were not provided with the identity of the decision maker in this case, nevertheless it was clear to us that the purpose was simply to enforce an established practice not to pay sick pay to those undergoing a formal process in order to avoid elongating that process. There was no intention on the part of the Respondent to harass the Claimant within the meaning of s. 26 Equality Act 2010.

171 We therefore have then gone on to consider whether the unwanted conduct nevertheless had that effect, and whether it was reasonable for it to have done so. The Claimant indicated at the material time that she considered that her treatment had been appalling, she said that the decision was a low blow and the final straw. The Claimant raised a grievance about the decision four days later on 21 August and said that the way she had been treated had caused her bipolar to get significantly worse, had increased her anxiety and stress necessitating her having counselling to handle the situation. This was a contemporaneous account of how the Claimant says that the decision made her feel at that time, and we accept that is how she genuinely felt. Moreover, at paragraph 58 of the Claimant's witness statement she gave evidence that the decision further contributed to her feelings of depression, anxiety, stress and PTSD.

172 Whereas the Claimant has not used the precise language within s.26 Equality Act to describe the effect upon her of the unwanted conduct, given the impact she has described particularly the increase in anxiety, stress, depression and the need for counselling to deal with it, it is our unanimous decision that the Claimant's dignity had been violated, and that it was reasonable for it have had that effect upon her given her underlying health condition and the impact that the withdrawal of pay had upon that condition.

173 The feelings as described by the Claimant at the time and in her evidence fall within the definition of both violating her dignity and creating a hostile environment for her given the feelings that she has explained to us in the context of her underlying health conditions.

174 Accordingly, it is the majority decision of the Tribunal that issue 4.4 which is the complaint of harassment related to disability succeeds solely with respect to the decision to withhold discretionary sick pay on 17 August 2023. All of the other complaints fail and are dismissed.

175 We have not listed the matter for a Remedy Hearing as we will need to consider the Respondent's application for a Reconsideration first. Directions will be issued separately.

Annex A – Amendment application

176 The Claimant sought permission to add a further protected disclosure which is alleged to be a Teams message on 20 July 2023 to Anthony Smith in which she said:

> *"the logic of this does not make sense. When a Manager's direct report does something wrong, they don't get investigated as well.* [HK] *is my direct report why am I not doing the investigation?… Doesn't make sense unless GX wants me to leave…"*

177 The Claimant said she believed that she had intended to raise this as a protected disclosure before, she had asked it for it to be included in the original list of issues which she had not agreed, and she believed that this was a disclosure in the public interest as she was raising concerns about her treatment and something which happened to her predecessor as well. The Claimant acknowledged that it was not in her ET1 nor the case management summary but she had included it in her witness statement.

178 The Respondent objected to the application and referred us to the summary of law on amendments as set out in the judgment of Tayler J in ***Vaughan v Modality Partnership Limited*** **[2020] UK EAT 0147/20** (summarised below) and it urged us to take into account the delay in making the application, the timing of the application, and what it said were lack of merits in the proposed amendment.

179 The Respondent also relied upon the judgment in ***Ladbrokes Racing Ltd v Traynor EAT/0067/06*** where the EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise. Here it was held that the tribunal would need to consider (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) whether delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

180 The Respondent argued that the Claimant had ample time to raise this matter before now, the list of issues was prepared over a year ago at which time the Claimant was represented by counsel and nothing has changed in that time to cause her to add something new now.

181 The Respondent argued that the delay in raising this will have caused prejudice to its ability to respond, Mr Smith had not been called as a witness, it had not been able to take instructions from him, and we do not have the benefit of his evidence nor are we able to examine if there was a causal link between what was said by the Claimant and what she says caused her resignation.

182 The Respondent also argued that the alleged disclosure would not amount to qualifying disclosure in any event, it would not fall within s. 43B Employment Rights Act 1996, and it disputed that there was a public interest in raising private employment concerns as there was no wider concern.

183 The Respondent drew our attention to the case of ***Olayemi v Athena Medical Centre and others*** **UKEAT/0613/10/ZT** which is authority for the proposition that a tribunal can take into account the merits of a proposed amendment, and in this case the Respondent tells us those prospects do not appear good.

184 The Respondent reiterated that there would be significant prejudice to it if the amendment were allowed, it would be a new line of enquiry, and the witness is not currently here to help with it.

Law on amendments

185 The jurisdiction of the Employment Tribunal is limited to the complaints which have been made to it – ***Chapman v Simon*** **[1994] IRLR 124** [33].

186 In ***Chandhok v Tirkey*** **[2015] ICR 527** it was held that:

"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made— meaning, under the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1." [16]

187 The Court of Appeal has recently endorsed this approach in the matter of ***Moustache v Chelsea and Westminster NHS Foundation Trust*** **[2025] EWCA Civ 185**. Nevertheless, putting forward the essence of a case in an ET1 does not require a party to set out every fact and evidential matter in support of their case – ***Veizi v Glasgow City Council*** **[2022] EAT 182**.

188 The approach to be adopted when considering applications to amend has been recently considered in the matter of ***Vaughan v Modality Partnership Limited*** **[2020] UK EAT 0147/20**. Here it was noted that the Tribunal has a broad discretion when considering applications to amend.

189 The key test for considering amendments has its origin in the decision of ***Cocking v Sandhurst (Stationers) Ltd*** **[1974] ICR 650**:

"In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused." [657BC]

190 In ***Selkent Bus Co Limited v Moore*** **[1996] ICR 836** it was said:

"Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it." [843D]

And:

"Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment." [844B]

191 In ***Selkent*** the court identified the relevant circumstances as:

i. the nature of the amendment;
ii. the applicability of time limits; and
iii. the timing and manner of the application.

192 These are merely examples of factors which may be relevant to consider. Each application will be different and will require an assessment of the circumstances of each case. There may be a situation whereby a minor

amendment if refused may cause great prejudice to a claimant who would not be able to pursue an important of their claim. Likewise, an amendment if granted may cause a respondent prejudice in having to defend a claim it would not otherwise have to, and one which may have been dismissed as out of time had it been brought as a new claim on a fresh ET1. Clearly some prejudice may be experienced if witnesses have left their roles or documents have been lost in the interim, as well as additional costs. Accordingly, it is clear to see that each application must be viewed in its own particular circumstances.

193 It is clear from the case law that the overriding principle is the balance of justice between the parties rather than any specific factor weighing more heavily than others. It is of course possible to balance the additional expense faced by a party by an award of costs against the applicant, although costs remain relatively rare in the Tribunal, and it would depend upon the paying party's means and ability to pay. Moreover, costs will not help where witnesses have gone away or documents have been lost.

194 It is necessary to focus upon the practical consequences of allowing an amendment when conducting the balancing exercise – what will be the effect if the application is approved or rejected? As per Tayler J in ***Vaughan***:

> *"Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later."* [22]

195 In ***Vaughan*** it was noted that:

> *"An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice."* [28]

Decision on amendment application

196 The amendment the Claimant seeks to add has been made very late in proceedings on the first day of the final hearing. This allegation did not appear in the ET1, nor was it raised at the case management hearing where the Claimant was represented by counsel. The Claimant does not seek to add a new cause of action, she already has a complaint for automatic unfair dismissal which was brought within time.

197 There would be considerable prejudice to the Respondent if we granted the application to amend. Further instructions would be needed, a new witness statement would need to be produced, and the witness would need to be called to give evidence. We had no information as to Mr Smith's availability and we proceeded on the basis that he was still employed by the Respondent. The addition of a new witness at this late stage would be disruptive as it could potentially extend the length of the hearing, although it did appear to us to have been generously listed and the witness evidence would likely be limited. Nevertheless all of this would put the Respondent to additional work and increase legal costs.

198 There did not appear to be comparable prejudice to the Claimant as she already has a complaint for automatic unfair dismissal arising out of an alleged protected disclosure, and the addition of this new alleged disclosure did not appear to add a great deal. If the amendment is refused the Claimant would suffer the prejudice of not being able to rely on one of three alleged protected disclosures which she says resulted in detriment to her and causing her to resign.

199 We have considered the likely merits of the proposed amendment, and we bear in mind that we can only do so to a very limited extent not having heard the evidence yet. Nevertheless, this is a case where we have the benefit of the alleged disclosure in writing, captured in a Team message. The message says very little beyond stating that it did not make sense to investigate a manager for something one of their subordinates had done unless the Respondent wanted the Claimant to leave.

200 On the face of it this appeared to have little reasonable prospects of successfully amounting to a protected disclosure given that it was very difficult to see how the Claimant would show she had a reasonable belief that it tended to show a legal failing. In addition, by taking into account the factors in the case of ***Chesterton***, it was even more difficult to see how the Claimant would demonstrate that she had a reasonable belief that it was a disclosure in the public interest.

201 At the most this appeared to be a question or an allegation from the Claimant, although we appreciate the guidance in ***Kilraine*** that we should avoid a rigid dichotomy between allegations and the disclosure of information. Nevertheless, this disclosure appeared to relate to the Claimant's own situation with no apparent wider concern. There is little prejudice to a Claimant and refusing an amendment with such low prospects of success.

202 We considered that the Respondent would suffer the far greater injustice and hardship if we granted the amendment as opposed to what the Claimant would suffer if we refused it. Accordingly, having carried out that balancing exercise we refused the application to amend.

Approved by:

Employment Judge Graham
29 May 2025

REASONS SENT TO THE PARTIES ON

29/05/2025

FOR THE TRIBUNAL OFFICE