EMPLOYMENT TRIBUNALS

Claimant:	**Miss W Lewis**	
Respondent:	**Secretary of State for Justice**	
Heard at:	**Cardiff**	**On: 21 and 24 to 28 September 2018 and 1 to 3 October 2018** **and in chambers on: 13 November 2018**
Before:	**Employment Judge S Davies**	
Members:	**Ms C Mangles** **Mrs L Bishop**	
Representation:		
Claimant:	**Ms S Sleeman, counsel**	
Respondent:	**Mr J Hurd, counsel**	

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

(1) the complaints of 'whistleblowing' detriment (section 47B Employment Rights Act 1996 (ERA)) are dismissed;

(2) the complaint of automatic unfair dismissal (section 103A ERA) is dismissed;

(3) the complaints of victimisation (both detriment and dismissal) (section 27 Equality Act 2010 (EqA)) are dismissed;

(4) the complaints of unauthorised deduction from wages (section 13 ERA) are dismissed;

(5) the complaint that failing to extend triggers to see if the Claimant recovered was a failure to make a reasonable adjustment (section 21 EqA) is dismissed;

(6) the Respondent's refusal to permit Ms Brelsford-Smith act as representative in period 16 May to 17 June 2016 was a failure to make a reasonable adjustment;

(7) the Respondent's failure to allow the Claimant to work from home instead of dismissing her was a failure to make a reasonable adjustment;

(8) the complaint of 'ordinary' unfair dismissal (section 98 ERA) is upheld;

(9) the Claimant's dismissal was an act of discrimination arising from disability (section 15 EqA).

REASONS

Claims

1. The complaints are of unfair dismissal (ordinary and automatic), whistleblowing detriment, victimisation, discrimination arising from disability and unauthorised deductions from wages.

Issues

2. A list of issues was provided for the reading day, but this was not an agreed version. An updated list of issues was presented on day two. This list was discussed, together with the list of protected disclosures document (C1) and the Scott Schedule (C2) and amended in conjunction with the parties during the morning of day two. Following this discussion, the issues were recorded as follows:

Protected disclosures

3. The Claimant's alleged disclosures (per the updated Scott schedule) are:
   i) disclosure by Claimant to Ms Brelsford-Smith in November 2013 that Mr Williams had failed to investigate Ms Smith's failure to attend police station interviews to represent two vulnerable female clients and the falsification of records (PDS6 form) to give the impression that she did attend (conceded as a protected disclosure by Respondent);

ii) disclosure to Ms Brelsford-Smith in November 2013 that SG remained in contact with vulnerable women during the course of his employment despite an admission he had undressed, showered and slept in the same bed as another PDS employee;

iii) disclosure to Ms Brelsford-Smith in November 2013 that Mr Williams acted in an inappropriate sexual manner towards employees under his management;

iv) disclosure to Ms Brelsford-Smith in December 2013 that Ms Smith had submitted false mileage claims on various client files; misrepresented herself as being a solicitor on PDS letterhead; and falsified a letter of advice to a client on the right of appeal (sic) in retrospectively inserting the date following the expiry of the appeal period (conceded as a protected disclosure by the Respondent);

v) on 12 June 2014 disclosing to Ms Brelsford-Smith the peer review files from October/November 2013 which evidenced that Mr Williams had instructed employees to change their files for audit purposes. The Claimant contends she disclosed that Mr Williams instructed that one file should not be made available for audit due to the need for retrospective changes (conceded as a protected disclosure by the Respondent);

vi) on 18 July 2014 repeating disclosures I-V to Mr Flury during the "Flury investigation" (conceded as a protected disclosure by the Respondent);

vii) on 18 November 2014 repeating the disclosures I-V to Mr Cable during the "Cable investigation" (conceded as protected disclosure by the Respondent);

viii) on 14 and 16 June 2016 informing Mr Jones that the refusal to allow Ms Brelsford-Smith to represent her in relation to her employment with the Respondent was a breach of the EqA [949, 950, 956 and 957]; and

ix) on various dates from December 2014 to dismissal, informing Mr Jones, Mr Marshalsay, Mr Flury and Mr Cable that her colleagues had been dishonest through the investigations carried out by Ms Phillips (the "Philipson" investigation), Flury investigation and Cable investigation.

4. Where there is difference between the list of issues and C1, we have used the information from C1 above. The Respondent concedes disclosures I and IV-VII are protected disclosures.

5. In relation to the alleged disclosures which it is not conceded qualify for protection:

    (a) Did the Claimant disclose information?

    (b) Did the Claimant have a reasonable belief that she was disclosing information that:

        (i) a breach of a legal obligation had occurred (section 43B(1)(b) ERA 1996)? The Claimant asserts the legal obligation breached was; section 26 EqA – harassment in respect of disclosures II and III and section 20 EqA – breach of a duty to make reasonable adjustments in respect of disclosure VIII. As for disclosure IX the Claimant relies on the same legal obligation asserted for disclosures I-VII;

        (ii) There was a danger to the health and safety of any individual (section 43B(1)(d) ERA)? In respect of disclosure II the Claimant relies upon the employer's duty to provide a safe working environment.

    (c) Did the Claimant reasonably believe that the disclosure was in the public interest? The Claimant asserts that the disclosures relate to a large public-sector organisation in respect of which breach of EqA provisions is of wider public interest. The Respondent disputes this and asserts the disclosures were personal to the Claimant alone.

Detriments

6. Was the Claimant subject to detriments on grounds of making protected disclosures? The alleged detriments under section 47B (1) ERA are:

    (i) in September 2014 the failure by the Respondent to investigate the disclosure of private medical information and/or

    (ii) during the period 16 May to 17 June 2016 being refused (as a reasonable adjustment) permission to continue with the arrangement that Ms Brelsford-Smith represent the Claimant

7. The detriments complained of are not linked to particular alleged protected disclosures; rather the Claimant relies on the culmination of all disclosures

as causative of the detriments complained of. This is subject only to the chronology of events, in that alleged protected disclosures post-dating detriment (i) cannot be causative of it.

Unfair dismissal

8. The Respondent accepts the Claimant was dismissed

   (i) Was the Claimant dismissed for a potentially fair reason, namely capability (section 98(2)(a) ERA); or was the reason (or, if more than one, the principal reason) for the Claimant's dismissal because she had made one or more of the alleged protected disclosures (automatic unfair dismissal section 103A ERA) and/ or was going to do a "protected act"(see below)? The Respondent contends that dismissing officer did not dismiss the Claimant for having made protected disclosures or that she would do a protected act; rather, he dismissed the Claimant on grounds of medical inefficiency taking into account the relevant guidance in the Respondent's attendance management policy.

   (ii) Was the decision to dismiss within the range of reasonable responses?

   (iii) Was the Claimant dismissed after the Respondent carried out a reasonable and proper capability procedure?

   (iv) If the Claimant's dismissal was procedurally unfair, would the Respondent have dismissed the Claimant even if it had followed fair procedure and is it appropriate for the Tribunal to make a Polkey deduction?

   (v) If the Claimant is awarded compensation for unfair dismissal, should the Claimant's award of compensation be reduced by up to 25% on the basis that she did not elect to appeal against dismissal and so did not comply with the ACAS code?

Reasonable adjustments

9. The Respondent accepts that the Claimant was disabled by reason of PTSD at all material times.
   The Respondent concedes that it operated the following 'provision, criterion or practice's (PCPs), which put the Claimant at a substantial disadvantage on grounds of disability:

a) the Respondent only allowed colleagues and trade union officials to provide representation at internal (formal) meetings and this put the Claimant at substantial disadvantage because her disabling condition required her to put across her position fully and articulately, with the assistance of someone who properly understood her (paragraph 3.2 of Regional Employment Judge Clarke's Order [83]);

b) the requirement to provide a certain level of attendance in order not to be subject to a warning/dismissal and that this put the Claimant at substantial disadvantage because she was more likely to be absent on grounds of ill-health.

10. As the Respondent accepts it operated PCPs which placed the Claimant at substantial disadvantage, did the Respondent comply with its duty to make reasonable adjustments?

11. In relation to PCP (a), the Claimant contends it would be reasonable to have allowed her to be represented in the period 16 May to 17 June 2016 by Ms Brelsford-Smith, even though, from around January 2016 Ms Brelsford-Smith ceased to be employed by the Respondent.

12. In relation to PCP (b), the Claimant contends it would be reasonable to (i) have allowed the Claimant to work elsewhere (at home or in a different office location) and (ii) extend trigger points under the capability/sickness absence procedure to see if the Claimant's health could improve and she could return to work.

13. The Claimant withdrew a third, un-pleaded, reasonable adjustment, (that the Respondent should have paid for counselling/EMDR) at the start of the hearing.

Discrimination arising from disability

14. The Respondent accepts the Claimant was disabled by reason of PTSD at all relevant times.

15. The Respondent accepts the Claimant was dismissed for a reason related to her disability.

16. The Respondent accepts that the dismissing officer had knowledge the Claimant was likely to be disabled by reason of PTSD at the time of dismissal.

17. Was the Respondent's decision to dismiss unfavourable treatment? The Respondent contends the claim was dismissed on grounds of medical inefficiency.

18. The Claimant accepts that the Respondent has a legitimate aim in the requirement to have staff who can provide regular and effective attendance in order to provide an appropriate level of service to the public.

19. Was the decision to dismiss a proportionate means of achieving this legitimate aim? The Respondent asserts the proportionate means was a fair and proper application of its management of attendance procedure.

Victimisation

20. Did the Claimant make a protected act? The Claimant asserts:

    (i) on 18 May 2015 the Claimant indicated her willingness to appear as a witness for Ms Brelsford-Smith in her Employment Tribunal proceedings (the Claimant relies on section 27 (1) (a) and (b) and (2) (b), (c) and (d) EqA); and

    (ii) on 14 June 2016 the Claimant complained to Mr Jones that in preventing Ms Brelsford-Smith from being permitted to communicate on her behalf the Respondent was breaching the EqA 2010 (the Claimant relies on section 27 (1) (a) and (2) (c) & (d) EqA).

21. The Respondent accepts that if the Claimant establishes the factual matters relied upon, these will amount to protected acts.

22. Did the Respondent subject the Claimant to a detriment or dismissal because it believed the Claimant would do/had done a protected act?

23. The Claimant relies on the Respondent's refusal to allow her to be represented by Ms Brelsford-Smith between 16 May to 17 June 2016 as a detriment.

24. With regard to the Claimant's dismissal, the Respondent contends the Claimant was dismissed for capability rather than because she carried out a protected act.

Unpaid wages

25. Did the Respondent cause the Claimant to suffer an authorised deduction from her wages by not paying her occupational sick pay equivalent to:

a) gross weekly pay for the period 13 November to 12 December 2016 in the sum of £826.46;

b) gross weekly pay for the period 13 December 2016 to 15 February 2017 in the sum of £5548.16; and/or

c) gross weekly overtime and standby payments for the period 9 May 2014 to 15 February 2017 in the sum of £16,583.65.

26. The Claimant contends she was entitled to the full sick pay/overtime and standby payments in relation to the periods above pursuant to section 4 of the MOJ occupational sick pay and policy guidance.

27. Does the Tribunal have jurisdiction to determine the Claimant's claim that the Respondent acted in breach of contract? The Respondent contends the Tribunal does not have jurisdiction to hear this claim. It asserts the Claimant attempts to argue a claim in negligence for personal injuries which should properly have been bought in the civil courts and which is not properly pleaded or evidenced;

28. If so, does the MOJ occupational sick pay and policy guidance have contractual effect between the parties?

29. If so, in relation to:

a) the periods detailed in a) and b) was the Claimant's absence due wholly or in part to the negligence of the Crown and/or was the Claimant, pursuant to section 4, entitled to be paid the additional amounts claimed; and

b) the period detailed in c), was the Claimant's absence due to her suffering an assault in the line of duty and was the Claimant, pursuant to section 4, entitled to be paid the additional amounts claimed?

Hearing

30. We heard live evidence from the Claimant and Ms Marie Brelsford-Smith, former colleague, on her behalf. For the Respondent, we heard evidence from Mr David Marshalsay, formerly Head of Operations of Public Defender Service (PDS) Solicitors at the Legal Aid Agency (LAA), Mr Matt Jones, formerly Senior Business Change Manager PDS, Mr Jamie Barnett formally temporary acting Head of PDS Solicitors and Ms Clare Toogood, formally Head of PDS. We also read a written statement from Mr Hugh Barrett, former Director of Legal Aid Commissioning and Strategy; Mr Barrett did not appear at the Tribunal to give live evidence. Mr Barrett, Mr Jones and Mr Marshalsay have now all left the Respondent's employment.

31. The hearing started with a reading day on 21 September 2018, however progress was hampered partly due to late delivery of the witness statements but more so due to the fact that the Respondent had redacted the names of numerous individuals (all of the Claimant's colleagues) in the papers. The Respondent provided a key to decode the redactions in the bundles however this had been incorrectly applied to the papers in the bundle, which meant that witnesses had to be taken to specific documents to confirm the correct identity of those whose names had been redacted. No application for anonymisation had been made by the Respondent prior to taking this course of action.

32. The bundle was in excess of 1500 pages in length, despite a limit of 500 pages (direction 13) imposed by Regional Employment Judge Clarke at a case management preliminary hearing on 11 May 2017. Prompted by the Tribunal, the parties made a joint application to extend the length of the bundle, which was granted on the condition that its tripling in size would not affect the overall timetable for completion of evidence and submissions. The Tribunal is grateful to the representatives' efforts in managing the hearing around these difficulties and maintaining the timetable.

33. Specific adjustments were made to the hearing times and sitting pattern for the parties to accommodate the Claimant. These adjustments included starting the hearing at 11am on sitting days and listing so that the Claimant need only attend the Tribunal a maximum of two days consecutively. This meant that Wednesday, 26 September 2018 was a further reading day for the Tribunal.

34. The Respondent's counsel produced written opening submissions, which was supplemented by oral closing submissions. The Claimant's counsel produced written closing submissions supplemented by oral closing submissions. All submissions completed on Monday 1 October 2018 leaving 2 and 3 October 2018 as chambers days for the Tribunal.

35. A further chambers day was listed on 13 November 2018 at which this reserved judgment was agreed.

36. Page numbers in the bundle are referred to in square brackets in this judgment.

Rule 50 applications

37. The Tribunal prompted the Respondent into making applications under Rule 50, without which there was no basis to remove reference to individual's names either in this judgment or in the evidence.

38. A temporary restricted reporting order was made in respect of three individuals on the second day of the hearing; this was revoked upon full consideration of the application on 27 September 2018.

39. We refused an application for permanent anonymity in respect of Mr Williams, the Claimant's former line manager and Ms Smith, the Claimant's former colleague. This judgment will refer to these individuals by their surname only, which reflects their peripheral involvement in the particular issues central to the claims (Mr Williams and Ms Smith are neither parties nor witnesses in these proceedings). We stress that we were not required to, and make no finding on, whether the allegations made by the Claimant about Mr Williams and Ms Smith are upheld.

40. We granted permanent anonymity in respect of GS, one of the Claimant's former colleagues. Additionally, we directed that reference to GS's workplace location be removed from the witness statements and it will not appear in this judgment.

41. Full reasons for these Rule 50 decisions were given orally at the hearing and no request was received for written reasons.

Factual background

42. This is not a case where there are substantial factual issues to be determined; the parties are largely in agreement when it comes to the factual context for the claims.

43. The Claimant was employed by the Respondent (and its predecessor organisations) from 21 May 2001 until her dismissal on 15 February 2017. Her substantive role was as an Accredited Police Station Representative within the PDS. Between 2010-2013 the Claimant was assigned to debrief a police informer who had been involved in terrorist activity (client X). The Claimant attended hundreds of interviews with client X and the work was of

such a sensitive nature that she was required to sign the Official Secrets Act. The Claimant was required to travel to the North of England and stay away from home for 2 weeks at a time to complete the assignment. Her working days were lengthy; 12 hours on week days and 6 hours on Saturdays. The Claimant was unable to discuss the case with colleagues due to its nature and had no outlet for sharing her experiences during the assignment. The Claimant says that as a result of this work she experienced psychiatric symptoms and she was subsequently diagnosed with PTSD. Details of the effects of the Claimant's mental impairment are set out in her impact statement [58-62]. The following passages (taken from paragraphs 15 – 21) describe her condition:

> '*On a day-to-day basis I am isolated and lack trust even in my closest friends and family at times… I do not like to go out places with which I'm not familiar or where there are crowds of people. I have suffered panic attacks when I do go out and so avoid this at all costs. I always check for an escape route wherever I am and cannot sit with my back towards a door. I like to have doors open except at home where they are all locked. I avoid using the telephone at times, never answer the telephone if I do not recognise the caller and even avoid answering the door to friends.*
> *I have lost interest in things I used to enjoy. My concentration span is very short as a consequence I find watching TV or reading a book sometimes impossible without rewinding TV or rereading paragraphs in books….*
> *I feel unsafe even though I don't know that what I am fearful of is going to happen. I suffer frequent headaches and panic attacks. I am on significant dosages of prescription medication to manage my symptoms and I worry how this may be affecting my physical health. The only time I feel safe is at home…*
> *I feel frightened all the time. I am on medication to control my heart rate but this does not seem to help all the time. I suffer shaking in very stressful situations and have also disassociated at times during treatment and in day-to-day stressful situations*.'

44. When the Claimant returned to her usual place of work in the summer of 2013, she began to have concerns that her colleague, Ms Smith, had committed acts of misconduct. The Claimant raised concerns with her line manager Mr Williams but the issue was not investigated. The Claimant raised those concerns again with Ms Brelsford-Smith in late November/early December 2013 (protected disclosure 1). The Claimant also raised with Ms Brelsford-Smith issues of misconduct against other colleagues (Mr Williams and SG) (alleged protected disclosures 2 and 3).

45. In December 2013, the Claimant raised further issues of misconduct by Ms Smith to Ms Brelsford-Smith and re-iterated them to Ms Phillipson, who was

tasked with investigating (protected disclosure 4). Ms Smith was suspended from work for an extended period whilst investigations were underway into the allegations, which resulted in disciplinary action short of dismissal and being moved to work in a different office location.

46. On 8 May 2014, the Claimant became aware, via a receptionist, that Ms Smith had returned to work at the Pontypridd office, of which the Claimant had not been previously informed. Mr Marshalsay gave evidence that the arrangements put in place to inform the Claimant in advance were undone by intervening events; he acknowledged that the way the Claimant learned of Ms Smith's return was unfortunate. The Claimant commenced a period of sick leave the following day (Claimant's witness statement paras 20 and 22).

47. In June 2014, while still on sick leave, the Claimant raised further allegations of misconduct on the part of Mr Williams with Ms Brelsford-Smith, this related to instructions to staff regarding files for an audit in November 2013 (protected disclosure 5).

48. An Occupational Health (OH) report dated 23 June 2014 [171-2] recommended the Claimant should attend counselling sessions funded by the Respondent as the waiting list for NHS counselling was around six months. The report anticipated that the Claimant would be able to return to work but could give no clear timeframe and suggested a review in six weeks' time.

49. Mr Marshalsay initially responded to concerns raised by the Claimant in an email of 11 June 2014. Following prompting by HR [187], Mr Marshalsay procured that the Claimant raise a formal grievance on 27 June 2014 [223-228] covering some of the misconduct she had raised to date and management's response. Mr Marshalsay provided a formal grievance response [208-210], the terms of which largely mirrored his email of 11 June 2014. Mr Marshalsay partially upheld the grievance in respect of issue six (the communication of Miss Smith's return to work); the rest of the grievance was rejected. The Claimant appealed the grievance outcome on 19 September 2014, which was dealt with by Mr Sirodcar [308 and 290-298]. The Claimant's appeal was rejected on 12 November 2014 [369-373]. Mr Sirodcar noted however that issues with regard to Miss Smith's business cards, details on the PDS website, email signature and office letterheads had not been resolved and he would ask managers to do so quickly.

50. The Claimant restated the issues of misconduct, already raised with Ms Brelsford-Smith and Ms Philipson, to Mr Flury in July 2014 (protected disclosure 6), who had been tasked with investigating concerns that Ms

Brelsford-Smith had reported about the culture and attitude of PDS staff, including matters that the Claimant had raised with her. Also, in July 2014, Mr Marshalsay agreed to change the Claimant's line manager from Mr Williams, about whom she had raised concerns, to Mr Jones. Mr Jones unchallenged evidence was that prior to his line management of the Claimant, they had enjoyed a friendly working relationship. Mr Jones had been on a period of extended sickness absence himself, just prior to taking up line management responsibility for the Claimant.

51. The OH report dated 22 July 2014 [213-4] was written following the Claimant's first session of counselling. The advice was that the Claimant remained too distressed to return to work and no timescale could be offered for her return at that point. The Claimant was provided with six counselling sessions funded by the Respondent [185, 199, 202]

52. On 13 August 2014 Mr Barrett instructed a colleague, Ms Wensley, Deputy Director of Service Development and Commissioning, to undertaking a fact-finding exercise with Ms Brelsford-Smith and the Claimant "*to understand the background to the allegations made about Mr Williams in the Swansea office of the Public Defender Service*." Ms Wensley met with Ms Brelsford-Smith (but did not meet with the Claimant, who remained on sick leave) and communicated the outcome by email to Mr Barrett of 12 September 2014 [257]. No investigation or action was taken against the Claimant in this regard. Ms Wensley concluded that there was no case to answer in respect of Ms Brelsford-Smith, that she had been encouraged to articulate allegations in writing by Mr Marshalsay and a number of those allegations were found to be true. Ms Wensley also drew Mr Barrett's attention to recommendation in the investigator's report regarding management actions to address the 'cultural and environmental issues raised by the investigation'.

53. The OH report dated 26 August 2014 [235-6] was written following the final session of counselling; it referred to the Claimant's GP's belief that she had PTSD and concurred with this view. The report indicated that the Claimant wished to return but that, until her workplace grievance was addressed, a successful return to work was unlikely. The report also suggestion workplace mediation with colleagues. The Claimant agreed to enter mediation, but her colleagues declined to participate. This created, what Mr Jones referred to in evidence as, an impasse and he began to look at other options to find work for the Claimant.

54. On Friday, 26 September 2014 the Claimant reported to Mr Jones that confidential information concerning her mental health had apparently been leaked to member of the local legal community [282]; '*they were aware that I had been referred to a Psychiatrist'*. The Claimant strongly suspected that Mr Williams was responsible for the breach. Mr Jones evidence was that

the Claimant informed him of this when he was travelling long distance home from work, and that he broke his car journey to have a long conversation on the telephone with the Claimant about her concerns. On the following Monday, 29 September 2014, [283] the Claimant wrote to Mr Jones informing him that she could not obtain support from the individual who had reported the issue to her and so '*I am reluctantly not pursuing this at this stage*'. The Claimant went on to explain: '*I am therefore not prepared to put myself in a situation which allows Mr Williams to vilify my character further. I am aware of some of the things he has been mentioning about my character to others outside the organisation and can only imagine the same is happening within it. I am not prepared to give him cause to make any further insinuations without being able to fully prove what I say. This is the only reason that I am not pursuing this at this time*.'

55. On 13 October 2014 the Claimant emailed Mr Jones to inform him that she had been formally diagnosed with PTSD [342] and she maintains that she forwarded him the report of Claudia Herrieven, Psychologist dated 10 October 2014 setting out details of the diagnosis [344-346], forwarded to the Claimant's GP on 13 October 2014 [344], around the same time. The diagnosis recorded the Claimant's scores for anxiety, depression and 'impact of event' scale including "hypervigilance", giving a total score of 70, indicating significant distress. It is not clear how Ms Herrieven's report was sent to Mr Jones; it was not attached to the emails of 13 October 2014 [342]. Mr Marshalsay's evidence was that he had never seen Ms Herrieven's report prior to the Tribunal hearing. Similarly, Mr Jones did not recall seeing the report at that time or at all prior to the tribunal hearing; reacting with '*this is new'*, when directed to the report. Both Mr Marshalsay and Mr Jones conceded that they were not surprised by its content. We find that the report was not seen by either Mr Marshall's or Mr Jones prior to the tribunal hearing.

56. On 21 October 2014, the Claimant began to undertake billing work for the Advocacy Unit, which was in the process of being established [138]. Whilst working for the unit, the Claimant reported to Ms Kappas, who in turn reported to Mr Barnett. The Claimant undertook the work from home but travelled to London on at least one occasion to meet the team. Initially the Claimant was told that the work would last over a period of three months [405] but it in fact continued for nine months.

57. Mr Barnett and Ms Toogood were involved in the establishment of the Advocacy Unit, which was set up, "in haste" according to the Respondent's witnesses, in response to the risk of criminal legal aid barristers refusing to take on new work in protest at legal aid rates. Ms Toogood was engaged in making the business case to obtain authority for staffing and writing job descriptions. A senior clerk was appointed to the unit who was based in London. The process of recruitment for a junior clerk commenced some

point after the Claimant started working for the unit assisting with a backlog of billing work which she performed almost exclusively from home. Ms Toogood described the process of making a business case to recruit a junior clerk, which post was required to support the senior clerk; the recruitment process started in or around February 2015, with recruitment of the successful candidate, Andrea, in or around June 2015.

58. In November 2014 the Claimant restated some of her earlier concerns about the file audit to Mr Cable who had been asked to investigate issues raised (protected disclosure 7).

59. In February 2015, Ms Toogood received an anonymous letter alleging that the Claimant had breached the Official Secrets Act by recounting aspects of her assignment involving client X to various parties [548]. Mr Marshalsay met with the Claimant to discuss the letter on 4 March 2015 [532], following which the matter was not pursued by the Respondent, either against the Claimant or to investigate the identity of the sender. It was the Claimant's belief that the anonymous letter must have been created and sent by one of her colleagues.

60. Mr Marshalsay met with the Claimant on 10 July 2015 and confirmed that the work with the Advocacy Unit was coming to an end [556]. During this meeting the Claimant said that she would be unable to return to work with her colleagues and expressed her dissatisfaction that there was no investigation into who had sent the anonymous letter.

61. The OH report dated 18 August 2015 [563-4] confirmed the Claimant was not fit to return to work, particularly into the same environment with the same colleagues as this would be detrimental to her mental health. Further clarification was provided on 21 and 25 August [567 and 571]. The email of 25 August clarified that if alternative paid work were to become available which was suitable for the Claimant, she would be fit to return/commence this after suitable discussion.

62. There was a 6-week handover with the Claimant after the junior clerk was recruited into the Advocacy Unit. In or around July/August 2015 [1155] the Claimant ceased billing work for the Advocacy Unit. From 12 September 2015, Mr Marshalsay agreed to a request for Ms Brelsford-Smith to act on behalf of the Claimant in communications [601-7] with the Respondent. Ms Brelsford-Smith indicated that the Claimant sought an exit from the Respondent and wished to be considered for ill-health early retirement [601, 604]. The emails indicated that the Claimant S was '*agoraphobic had difficulty being in unfamiliar places with unfamiliar people, cannot travel north by train as she associates this will work with client X, only socialises with family and one or two very close friends, suffers from panic attacks and insomnia and has traumatic flashbacks*'. Ms Brelsford-Smith indicated "*the*

sole outcome I am seeking is that Wendy's assessment for ill-health retirement on account of her PTSD is facilitated with urgency by the organisation.… I have attempted to have you understand that Wendy needs to be exited from the organisation rapidly and that any attempt to explore alternative work opportunities for her within the civil service – in which she will be reminded of the trauma she has experienced – are not only misguided but will add to her ill-health."

63. In an OH report of 30 September 2015 [618 – 620], which indicated that she did not meet the criteria for ill health retirement, the prognosis for the short term (six – twelve months) was poor but longer term (one – five years) would depend upon the Claimant's response to further treatment and recommended referral for psychiatric assessment and consideration of other treatment options. The occupational health doctor, Dr Critchley opines that the Claimant will not be able to return to her current role in the short term and he does not feel that any adjustment within the workplace would enable her to return to the role within the next six months; "*alternative roles could be considered and discussed with Wendy*" including administrative duties in a non-custodial setting.

64. Following receipt of this report, the Claimant was placed on two registers for redeployment (the reasonable adjustment and compassionate transfer registers). These registers allowed the Claimant access to job vacancies prior to them being advertised amongst civil service staff generally and included a guaranteed interview. Mr Jones arranged for vacancies to be sent to the Claimant. Mr Jones also assured the Claimant that if she did not apply for any of the roles that this would not have a detrimental impact for her. Mr Jones explained that jobs were sent without applying any filter, as he did not want to narrow the scope of what the Claimant might feel she wanted to do.

65. Absence management case conferences took place on 19 October and 24 November 2015, which were attended by the Claimant and Ms Brelsford-Smith. In December 2015, the Claimant applied for Injury at Work Benefit [664], a scheme under which employees who have sustained injury in the course of employment are entitled to financial benefits over and above those available under the Respondent's Occupational Sick Pay Policy. The Claimant's application, made on the basis of her PTSD, referred to her assignment to the case of client X, her grievances and concerns about colleagues and the anonymous letter. The application was signed by Mr Jones and Mr Marshalsay as her line managers; Mr Marshalsay indicated that he understood the PTSD to have been triggered by work related stress in 'debriefing a murderer over a prolonged period'. The Claimant's application was approved on 22 April 2016 [781].

66. In the interim period Mr Jones made applications for extensions of sick pay for the Claimant, pending approval of the Injury at Work Benefit application. Mr Jones also made efforts to facilitate the "sale" of accrued holiday entitlement to ameliorate the financial impact of long-term absence on the Claimant.

67. There were various issues with the Claimant's sick pay and delays in dealing with her applications for benefit and sale of holiday. These were compounded by errors in communications from shared services, the operational unit which dealt with payroll. These errors by shared services, led Mr Jones to notify the Claimant that she should regard communications from him as definitive on pay instead [870]. In March 2016 the Claimant's pay slip [742] indicated that she had been underpaid; understandably, the Claimant found these matters stressful and says that they impacted her health. Internally, Mr Jones expressed his own frustration with shared services' errors [742] and raised concerns for the Claimant's wellbeing which led to a police visit to check that she was safe.

68. In April 2016 Mr Jones was in email discussion with the Claimant about arranging a KIT day [770]. On 17 April 2016 the Claimant asked whether Ms Brelsford-Smith could attend with her. By this time Ms Brelsford-Smith had left the employment of the Respondent having bought her own Employment Tribunal claim, which she settled by judicial mediation in January 2016. Mr Jones took advice from HR about this request [769]. Mr Jones set out his thoughts, in an email of 18 April 2016, about the nature of the meeting, what policy said about representation and whether adjustments should be made. Mr Jones proposed to decline to allow Ms Brelsford-Smith to attend but offer internal alternatives. On 19 April 2016, HR responded agreeing the meeting could take place by phone and outlining that adjustments had been made in other business areas, including allowing a family member to attend to support an employee. Ms Brelsford-Smith is not a family member; she is the Claimant's friend.

69. Shared services sent a letter of 11 May 2016 to the Claimant which indicated that her sick leave application had been rejected for the period 2 March 2016 to 11 May 2016 [855]. This was again an error [869]. The Claimant was distressed by the content of the letter and informed Mr Jones that she was too unwell to speak to him about it. She asked that he communicate with Ms Brelsford-Smith, as a reasonable adjustment [871]. Initially this request it was declined, Mr Jones suggested that another colleague or trade union representative could be nominated and offered the option of obtaining further OH opinion on adjustments [870-871]. The Claimant agreed to an OH appointment.

70. Prior to the Claimant's request on 15 May 2016, Mr Jones corresponded with the Claimant directly and did not copy Ms Brelsford-Smith (e.g. in April 2016 [770]). The Claimant did not object to this until after the letter from shared services of 11 May 2016. After Mr Jones declined to send communications to Ms Brelsford-Smith he continued to email the Claimant directly on 16 May 2016 [868-9].

71. The OH report, dated 31 May 2016 [944 – 945], responded to the following question: '*Following a recent communication from shared services which Wendy found distressing, she has indicated that she is unable to communicate with us other than by email. Please advise on any strategies that may assist this*.'

72. The OH advisor responds: "*Ms Lewis would like a close friend Ms Brelsford-Smith to deal with any communication from the MOJ as she gets so distressed she cannot understand what is being asked and cannot communicate back what she needs to. Management are not getting a true reflection of her issues unless her friend can speak on her behalf. Ms Lewis has given her consent for this*."

73. On 14 June 2016, Mr Jones emailed the Claimant with an update following her non-acceptance of voluntary severance (VED), informing her that management under the absence policy would recommence and asking her to attend a formal absence review meeting (FARM) on 22 June 2016. Despite the recommendation of OH, Mr Jones declined to allow Ms Brelsford-Smith to attend the FARM and set out the right of representation under the Respondent's policy [908-9] with an offer to help find another representative. The Claimant responded to Mr Jones the same day, stating that she was shocked and upset by the email's contents, that she was particularly unwell at that time and re-iterated her request for Ms Brelsford-Smith to accompany her [949] as an adjustment. The Claimant goes on to suggest that she believes the communication was deliberately timed "*as I filed my case against the organisation last week*".

74. The Claimant sent a further email of 16 June 2016 [956-7] reiterating her position and stating she was not well enough to attend a meeting without Ms Brelsford-Smith. In her email, the Claimant also suggests that the Respondent is '*setting upon a course to dismiss'*... despite the fact that the billing work which she had performed effectively had been removed from her.

75. Mr Jones took HR advice and responded to the Claimant on 17 June 2016 [968] agreeing to Ms Brelsford-Smith attending the FARM with the Claimant. Mr Jones notes: "*additional comments in relation to support at the FARM*

meeting and for confirming the suggestions I made are not workable for you. In light of this I would be happy to accommodate requests for Marie to join you in this capacity."

76. The Claimant relies on the content of her emails to Mr Jones of 14 and 16 June 2016 as alleged protected disclosure 8.

77. An offer of VED was made to the Claimant, whilst Mr Jones was her line manager, and the deadline for acceptance of this offer was extended (requested by the Claimant [957]). Ms Brelsford-Smith indicated during the FARM meeting on 8 July 2016, that whilst the Claimant wished to exit the Respondent the VED offer was not sufficient. This meeting was terminated early due to Mr Jones' objection to the Claimant's recording of it [989 and 1366-1367].

78. Following the FARM, Mr Jones sent an outcome letter to the Claimant dated 20 July 2016 [1077-8]. The letter suggests the consideration of ill-health retirement again and warns that if attendance cannot be improved a further FARM will be held to review sickness absence and consideration of whether the Respondent can continue to support her absence.

79. In August 2016, Mr Barnett took over as the Claimant's line manager following Mr Jones's departure from the Respondent. Mr Barnett was previously second line manager to the Claimant when she undertook billing work for the Advocacy Unit. The Claimant indicated to Mr Barnett that she considered the act of sending her alternative vacancies as one of harassment and 'mocking her condition' [1136].

80. Email exchanges took place between the Claimant and Mr Barnett on 28 September 2016 [1159], in which the Claimant indicated that nothing had changed since the last FARM and she had not yet received further treatment. The Claimant asked, and Mr Barnett agreed, that the next FARM meeting be conducted by telephone and recorded.

81. Further OH evidence was obtained dated 26 October 2016 [1162 – 3]. Ms Tate advised that the referral to OH should include a question about adjustments and the OH report suggests the Respondent should review options for possible redeployment. The report refers to the Claimant's symptoms not having improved and confirms that she is unfit for her own role or "*any role involving interviewing alleged criminals in confined spaces*" for the next 12 months. The report indicates that the Claimant is fit to attend meetings, with support, and to review options for possible redeployment. The doctor is of the opinion that the Claimant does not satisfy the criteria for ill-health retirement "*as there are further treatment options available to*

her for her symptoms to improve prior to normal retirement age". In terms of outlook, the Claimant's symptoms are "*not likely to improve without further treatment and the resolution of outstanding work issues*". The doctor recommends that "*alternative roles be explored as part of normal procedures*".

82. Mr Barnett conducted a FARM, by telephone, with the Claimant on 10 November 2016, with Ms Brelsford-Smith attending as the Claimant's representative [1180-1182]. During the meeting Mr Barnett explored with the Claimant whether she could return to her substantive or an alternative role; the Claimant's response was that she was too unwell to return to work pending further treatment. An enquiry was made by Ms Brelsford-Smith as to whether the Respondent would fund private treatment and Mr Barnett agreed to look into this.

83. The outcome of the FARM was sent by letter dated 17 November 2016 [1183-1185]. The letter set out the decision to terminate the Claimant's employment on notice, with effect from 15 February 2017. Mr Barnett indicated that he had explored paying for treatment but was "*unable to identify any provision to allow for this*". The reasons for dismissal were: no foreseeable return to current or alternative role, no reasonable adjustments that could be identified to aid a return to work, OH advice that the Claimant was not suitable for ill health retirement and that the Respondent was unable to continue to support absence.

84. The Respondent asserts the reason for dismissal was on grounds of "medical inefficiency" / capability. The Claimant asserts that it was on grounds of her protected disclosures or as an act of victimisation. The Claimant remained on sick leave until her termination took effect and did not appeal the decision to dismiss her.

85. From November 2013 onwards, the Claimant asserts that she continued to re-state the concerns she had previously raised with Mr Jones, Mr Marshalsay, Mr Flury and Mr Cable (these oral exchanges over various dates are relied upon as alleged protected disclosure 9).

Law

86. The relevant statutory provisions are as follows:

Discrimination
Equality Act 2010 (EqA)

Section 15 EqA discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Section 20 EqA duty to make adjustments

(2) The duty comprises the following three requirements:

(3) The first requirement is a requirement, where a provision, criterion or practice of A's put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Section 21 EqA failure to comply with duty

(1) a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person

Section 27 EqA Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) each of the following is a protected act –
(a) bringing proceedings under this act;

(b) giving evidence or information in connection with proceedings under this act;

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

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

Section 136 EqA Burden of proof

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Wages

Employment Rights Act 1996 (ERA) – Part II

Section 13 ERA Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

'Whistleblowing'

Section 43B ERA 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)that a criminal offence has been committed, is being committed or is likely to be committed,
(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d)that the health or safety of any individual has been, is being or is likely to be endangered,
(e)that the environment has been, is being or is likely to be damaged, or
(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

Section 43C ERA

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, or

(b)where the worker reasonably believes that the relevant failure relates solely or mainly to—
(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

Section 47B ERA Protected disclosures (detriment)

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

Section 103A ERA Protected disclosure (dismissal)

An 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

Unfair Dismissal

Section 98 ERA General

(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and
(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—
(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
….
(3)In subsection (2)(a)—
(a)“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
…
(4)Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case.

Authorities

Discrimination

87. As for the correct approach when determining section 15 claims we refer to **Pnaiser v NHS England and others UKEAT/0137/15/LA** at paragraph 31. The relevant steps to follow are summarised as follows:

    - the tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;
    - the tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the "something" must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;
    - motive is irrelevant when considering the reason for treatment;
    - the tribunal must determine whether the reason is "something arising in consequence of disability"; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;
    - the more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;
    - this stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;
    - knowledge is required of the disability only, section 15 (2) does not extend to requirement of knowledge that the "something" leading to unfavourable treatment is a consequence of disability;
    - it does not matter precisely which order these questions are addressed. Depending on the facts the tribunal might ask why the Respondent treated the Claimant in an unfavourable way in order to answer the question whether it was because of "something arising consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to "something" that caused the unfavourable treatment.

88. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business/organisational needs of the Respondent.

89. **Buchanan v Commissioner of Police of the Metropolis [2016] IRLR 918** reminds us that in section 15 EqA complaints a Tribunal should consider whether each step taken in respect of a disabled person has been justified; it is not sufficient to look at the overall justification for a policy. The judgment reminds us that the purpose underlying disability discrimination legislation is to secure favourable treatment of disabled people and requires employers to assess on an individual basis whether allowances or adjustments should be made for them. **Buchanan,** in common with this case, also related to the application of an absence management procedure leading to dismissal.

90. **O'Brien –v- Bolton St Catherine's Academy [2017] EWCA Civ 145** provides, at paragraph 45, that a Tribunal when determining justification for dismissal will not be unreasonable in expecting evidence of the impact of the continuing absence of an employee on the Respondent's business. '*What kind of evidence is appropriate will depend on the case. Often, no doubt, it will be so obvious that the impact is very severe that general statements that affect will suffice; but sometimes it will be less evident, and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing*.'

91. We also note that the case is authority for the proposition that despite differences in statutory wording and the burden of proof in unfair dismissal and Section 15 discrimination, the outcome should rarely be different in the context of long term sickness absence dismissal.

92. **Chief Constable of South Yorkshire Police v Jelic [2010] IRLR 744**
In this decision taken under the Disability Discrimination Act 1995, the EAT found that in the particular circumstances of the case, it would have been a reasonable adjustment to swap jobs undertaken by the Claimant and another police officer to retain the Claimant's services. In particular in a disciplined service, the other police officer could have been ordered to swap jobs. The judgment at paragraph 86, notes the general duty of police officers to obey lawful orders. The special nature of service in the police force was an important part of the factual matrix in the case.

Wages

93. **Agarwal v Cardiff University [2018] EWCA Civ 2084**
This recent Court of Appeal decision confirms the Employment Tribunal's jurisdiction to determine issues of contractual construction, when determining Part II ERA deduction from wages claims. We were referred to paragraph 27 of Underhill LJ's judgment which cites **Delaney v Staples** as binding authority in this regard.

Whistleblowing

94. On the issue as to whether the disputed protected disclosures disclosed information as opposed to an allegation we were referred to **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38** by the Respondent and **Kilraine v London Borough of Wandsworth [2018] IRLR 846** by the Claimant.

95. In particular, we note the example given to convey the difference between information and allegation at paragraph 24 in **Cavendish Munro;** in a hospital setting: "communicating information would be 'the wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around'. Contrasted with what would be a statement that 'you're not complying with health and safety requirements'. In our view this would be an allegation not information."

96. **Kilraine** provides that the distinction between information or allegation is a matter for evaluative judgment by a Tribunal in the light of all facts of the case. There should be no 'rigid dichotomy between information on one hand and allegations on the other'. The example given in **Cavendish Munro** is used to illustrate the importance of context, with the example of a worker who brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "you are not complying with health and safety requirements"; 'which statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure'.

97. The Claimant referred us to **El-Megrisi v Azad University (IR) in Oxford UK EAT/0448/08** in the context of having made multiple protected disclosures. At paragraph 19, the EAT provides that in an automatic unfair dismissal claim under section 103A ERA, there is no requirement for the contribution of each protected disclosure to the reason for dismissal to be considered separately and in isolation. If the Tribunal finds that the protected disclosures operated cumulatively, the question must be whether that cumulative impact was the principal reason for dismissal.

Unfair dismissal

98. The Respondent referred us to **McAdie v Royal Bank of Scotland plc [2007] IRLR 895** as authority for the proposition that the fact an employer has caused incapacity, however culpably, does not preclude them from effecting a fair dismissal. A Tribunal should resist the temptation, driven by sympathy for an employee, into awarding compensation for unfair dismissal which is in truth an award of compensation for injury. We note that the Court of Appeal's cites, with approval, the EAT at paragraph 37 as follows "*it seems to us that there must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and, common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to "go the extra mile*" *in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable*."

Conclusions

Whistleblowing

99. The Respondent concedes that the Claimant made 5 protected disclosures. A dispute remains in relation to the remaining 4 alleged disclosures. In the circumstances, the Respondent submits that our primary focus should be on causation; we agree.

100. We take into account the cumulative effect of all protected disclosures when considering causation. We are also realistic about the scant likelihood of there being direct evidence of influence of protected disclosures on dismissal (or detriment). Having carefully considered the evidence of Mr Marshalsay, Mr Jones and Mr Barnett we are not persuaded that these witnesses were motivated in their interactions with the Claimant by animus as a result of her being a whistleblower (nor motivated to retaliate with victimisation, see below). To the contrary, we formed the impression that Mr Jones, in particular, had gone to great lengths to support the Claimant during her absence.

101. We were shown the email of Mr Barrett [232] dated 13 August 2014 and his witness statement, in which he makes no reference to that email. The email is notable, as it instructs investigation of the Claimant and Ms Brelsford-Smith '*to understand the background to the allegations made about Mr Williams*'. The Claimant was not informed of this investigation at the time, which in fact only proceeded in respect of Ms Brelsford-Smith. The outcome of which, was no case to answer and reiteration of the fact that the content of complaints made by Ms Brelsford-Smith and the Claimant were with merit and had resulted in disciplinary actions. We treat Mr Barrett's

witness evidence as having limited weight as he did not attend to be questioned. We note however the undisputed fact that he was based in London and had little contact with the Claimant.

102. We are satisfied that we heard live evidence from the managers who had decision making power over the matters which are subject of complaint.

103. Our findings on the whistleblowing complaints are primarily based on our findings on causation. For that reason, we do not set out our conclusions in depth on whether disputed protected disclosures qualify as such.

Disputed disclosures

104. **II) disclosure to Ms Brelsford-Smith in November 2013 that SG remained in contact with vulnerable women during the course of his employment despite an admission he had undressed, showered and slept in the same bed as another PDS employee**

105. This alleged disclosure was oral and is dealt with in paragraphs 15 and 16 of the Claimant's witness statement. The pleaded disclosure [113] is more extensive than the version in C2. The Claimant asserts that the information disclosed tended to show an alleged breach of a legal obligation (section 26 EqA) and that health and safety was endangered in respect of the Respondent's duty to provide a safe working environment.

106. It is unclear to us what the information in respect of events after the office party tends to show; the colleague with SG may have consented to what transpired. In the circumstances, we do not consider that it could reasonably be viewed as tending to show a breach of section 26 EqA or that health and safety at work was endangered.

107. The serious matter of a complaint of rape made by a former client of SG was investigated by the Respondent. The Claimant, in her witness statement, acknowledges that there may have been an issue around consent. We appreciate that SG's behaviour could be considered an abuse of position. It cannot, we think, tend to show information that breaches section 26 EqA. The incident did not take place within the workplace and nor did it take place during the provision of services; it seems to us, if anything, it would fall to be considered under criminal law. Whilst the behaviour complained of could indicate a risk to vulnerable women that SG came into contact with during his employment, we note that the Respondent did take steps to address the complaint by investigating it. We heard no evidence about the investigation itself and the Claimant has not indicated

personal knowledge of it so as to challenge its propriety. We accept that the Claimant genuinely believed that SG posed a risk to vulnerable women, however, in the circumstances we do not consider that she had a reasonable belief that the Respondent's actions tended to show a failure to comply with the duty to provide a safe working environment.

108. We find that there was no protected disclosure.

109. **III) disclosure to Ms Brelsford-Smith in November 2013 that Mr Williams acted in an inappropriate sexual manner towards employees under his management**

110. This alleged disclosure was oral and is dealt with in paragraph 14 of the Claimant's witness statement. The content of the disclosure is vague; without detail of any particular instance of 'inappropriate' or 'sexual' behaviour. The reference to Mr Williams being regarded as a womaniser is merely reporting the Claimant's opinion about others perception of Mr Williams, this cannot be considered information but squarely falls into the category of an allegation. We viewed the context of the words spoken (that is Ms Brelsford-Smith indicated Mr Williams engaged in sexual innuendo with her) and it is likely that both Ms Brelsford-Smith and the Claimant had a common understanding of the type of behaviour being referred to. However, we find that the lack of specifics is fatal; for the information conveyed to tend to show a breach of section 26 EqA we would need specific information about the allegations.

111. We find that there was no protected disclosure.

112. **VIII) on 14 and 16 June 2016 informing Mr Jones that the refusal to allow Ms Brelsford-Smith to represent her in relation to her employment with the Respondent was a breach of the EqA** [949, 950, 956 and 957]

113. This alleged protected disclosure is written; the following passages from the emails are relevant.

114. On 14 June 2016 the Claimant wrote "*as I believe the occupational health report states I am particularly unwell at present and I am not well enough at this time to attend an appointment without support. Due to my disability status I believe it is a reasonable adjustment to have the person who has supported me throughout the previous two years regarding this matter. She has attended all appointments with me and is the only person who fully understand my circumstances and the full circumstances of my case. The report explains that I am unable to effectively communicate with*

others at this time and therefore your suggestion does not assist me as I would not be able to effectively communicate with whoever you appoint"

115. On 16 June 2016 the Claimant wrote "*the policy document you attach to support your position that MOJ policy is that only a trade union representative or MOJ employee can assist me allows for reasonable adjustment to any policy or action due to my disability. Your own occupational health advisor has advised you I am unable to communicate effectively with you and advised you my health is worse than before and recommended that Marie Brelsford-Smith communicate on my behalf.… I am not well enough to attend a face-to-face meeting with you without the support of Ms Brelsford-Smith.… I could not participate in any meeting on an equal footing and I would not be safe to drive myself away from the meeting from Cardiff to Swansea due to likely tremor and disassociation*…"

116. The context for these comments is the Claimant's request, using the terminology of 'reasonable adjustment', Ms Brelsford-Smith's previous support of the Claimant and OH report recommendations. The inference we derive from the emails, is that the Claimant was informing Mr Jones that the Respondent was breaching its obligations under section 20 EqA.

117. We have no difficulty in concluding that the Claimant had a reasonable belief that the information tended to show the Respondent was in breach of its legal obligation.

118. The Respondent submits that there is no public interest in this disclosure, as it is a personal matter that relates to the Claimant's circumstances only. We disagree; we view 'public interest' as having wider connotations. At times what is important at a personal level also has wider importance to society. The Respondent is a large public-sector organisation, subject to the public sector equality duty. We accept the submission of the Claimant; there is a public interest in the organisations they fund complying with discrimination law.

119. We find that the Claimant made a protected disclosure.

120. **IX) on various dates from December 2014 to dismissal, informing Mr Jones, Mr Marshalsay, Mr Flury and Mr Cable that her colleagues had been dishonest through the investigations carried out by Ms Phillips (the "Philipson" investigation), Flury investigation and Cable investigation**.

121. This protected disclosure is oral and relates to matters previously raised. We were provided with no specifics of words spoken to the

individuals concerned on particular dates. The allegation is too vague for us to consider. We find there was no protected disclosure.

Detriment

122. The Claimant complains that, in September 2014, the Respondent failed to investigate the disclosure of her private medical information and that this was a deliberate failure to act on the ground that she was a whistleblower. We accept, following the broad definition in **Shamoon,** that this alleged failure is capable of being a detriment.

123. We note that the burden of proof is on the Respondent to show that the protected disclosure did not materially influence the decision to take, or omit to take, action (section 48 (2) ERA).

124. We accept Mr Jones' explanation for the events as they unfolded. Mr Jones spoke with the Claimant about the issue to provide her with support. On receipt of the Claimant's subsequent email, sent after the weekend, in which she says she does not wish to pursue the matter and put herself in a position that would allow Mr Williams to vilify her character further [283].

125. We note that the allegation was made shortly after the counselling report [261] was sent to Mr Williams (in error, as he was originally the responsible line manager). This circumstantial evidence is somewhat undermined by what it is reported Mr Williams is alleged to have said: that the Claimant had been referred to a psychiatrist [282], which is not reflected in the content of the counselling report [235].

126. We reject the submission that Mr Jones should have continued to act to investigate, despite the sentiments expressed by the Claimant in her email. We accept Mr Jones' evidence in this regard; it would have flown in the face of the Claimant's express wishes to have done so and in her view opening her up to the possibility of Mr Williams 'vilifying her character'. Rather than investigate, Mr Jones spoke to Mr Marshalsay, his line manager, and agreed that Mr Jones would speak with all managers, including Mr Williams, to remind them of the need for confidentiality regarding personal data (para 38 witness statement).

127. Whether Mr Jones should have taken it upon himself to investigate the matter, we think, is beside the point. Our focus is on the reason why he omitted to do so; we conclude that this was not on grounds of whistleblowing but rather because Mr Jones understood the Claimant's email as asking him not to proceed. Mr Jones' decision making was based on his belief that the Claimant did not wish to pursue the matter. The complaint is dismissed.

128. The Claimant also complains of detriment in that during the period 16 May to 17 June 2016 she was refused permission to continue with the arrangement that Ms Brelsford-Smith represent her (after Ms Brelsford-Smith left employment with the Respondent). Again, we consider this is capable of being a detriment.

129. Again, our focus is on the grounds for Mr Jones' decision to decline the Claimant's request. We note that the Claimant had the status of whistleblower from 2013 onwards. Mr Marshalsay agreed that Ms Brelsford-Smith could act as representative [pages 601-607] in September 2015; at a time when she was an employee of the Respondent. The Respondent's policy on companions at meetings allows colleagues or trade union representatives to act in this capacity (although flexibility is afforded for reasonable adjustments [769]).

130. Mr Jones and the Claimant historically enjoyed a good working relationship. Communications had been made direct between them in the period after Ms Brelsford-Smith left employment without complaint [770]. It was not until shared services' errors about sick pay, that the Claimant made the request, on 15 May 2016 [871], for Mr Jones to communicate with Ms Brelsford-Smith about that issue.

131. A few weeks previously, on 18 April 2016, Mr Jones had taken advice from HR about Ms Brelsford-Smith; she was no longer a colleague and no longer within policy as a companion [769]. Mr Jones did not seek advice from HR again in the context of the request to send communications to Ms Brelsford-Smith. Mr Jones informed the Claimant that he could not send communications to Ms Brelsford-Smith both before and after seeking OH advice. It was only after the Claimant made further representations about the impact of refusal upon her health and ability to engage in the Respondent's processes that Mr Jones agreed to Ms Brelsford-Smith acting in this capacity.

132. Regardless of our view on whether Mr Jones should have recognised at an earlier stage that a different approach and flexibility was required due to the Claimant's particular circumstances, our focus must be on the grounds for his decision making. We are satisfied that those grounds were the fact that Ms Brelsford-Smith's status had changed; she was no longer a colleague and had not been for some time. This fell outside policy. Following receipt of the Claimant's request, Mr Jones formed an initial view on what course of action to take and then sought advice; we are satisfied that the reason for the change in approach to Ms Brelsford-Smith's attendance was because her status had changed. We do not think the fact that Mr Jones did not seek advice from HR on communications, as distinct from attendance

as a companion, alters our conclusion. We are satisfied that Mr Jones had in mind the change of Ms Brelsford-Smith's status when he declined to send communications to her. The complaint is dismissed.

Dismissal

133. We are mindful of the Claimant's submission that we should consider the cumulative effect of all her disclosures when considering the reason, or principal reason, for dismissal. It was submitted on the Claimant's behalf that she was viewed as a problematic employee by management because of whistleblowing, due to the time and resources that had to be dedicated to deal with her various complaints. Mr Jones' evidence was that this suggestion misunderstood the way in which the civil service operated; if a complaint was raised then resources were allotted to deal with it which were sourced from outside the unit concerned. This evidence was persuasive, particularly in circumstances where the Respondent has such significant resources. We reject the suggestion that dismissal was motivated by animus towards the Claimant as a whistleblower.

134. Mr Barnett took the decision to dismiss. He accepted that he was aware of the Claimant's previous complaints and the resulting investigations. Mr Barnett had not dealt with the Claimant on a day to day basis prior to August 2016; when working for the Advocacy Unit, the Claimant did not report directly to Mr Barnett. He was in a position to approach the decision on termination with sufficient independence from preceding events. We refer to our findings below on the reason for dismissal; this was the Claimant's capability and long-term absence. The evidence from medical experts and the Claimant was that she was too unwell to work; this was supported by her companion, who had been vocal in advocating her departure from the organisation for more than 12 months. There was more than enough evidence upon which to base the decision on capability grounds and we find that is what Mr Barnett did. We are satisfied that the principal reason for dismissal was not for making protected disclosures, either individually or collectively.

135. The complaint of automatic unfair dismissal is dismissed.

Victimisation

Protected acts

136. The Respondent accepts that if the Claimant establishes the factual matters she relies upon, they amount to protected acts. The Claimant asserts she made two protected acts.

137. Firstly, on 18 May 2015 the Claimant indicated her willingness to appear as a witness for Ms Brelsford-Smith in her Employment Tribunal proceedings brought under the EqA. Mr Marshalsay accepted that he was aware of this intention from around the time it was communicated to the Tribunal during case management. We find that this amounts to a protected act of which the Respondent was aware under section 27 (2)(b) and (d) EqA.

138. Secondly, on 14 June 2016 [949] the Claimant complained in an email to Mr Jones about preventing Ms Brelsford-Smith acting as her representative; she asserts her belief that to allow the request would be a reasonable adjustment. The original request was couched in terms of 'reasonable adjustment' and expressing concerns about failure to comply with that request amounts, we consider, either to an allegation of contravention of the EqA or 'doing any other thing for the purposes or in connection with' the EqA (section 27(2)(c)&(d) EqA).

139. We find that the Claimant made two protected acts.

140. Having established the possibility of a successful victimisation complaint, we must consider whether the Respondent subjected the Claimant to a detriment or dismissal because it believed the Claimant would do/had done either protected acts?

Detriment

141. The Claimant relies on the Respondent's refusal to allow her to be represented by Ms Brelsford-Smith between 16 May to 17 June 2016 as a detriment. We conclude that the only protected act that the Claimant can rely upon in establishing this as a detriment, is first one - the intention to appear as a witness for Ms Brelsford-Smith. This is because Mr Jones acceded to her request for representation after her complaint (the second protected act).

142. When considering whether the burden of proof switched, we were invited by the Claimant to consider the closeness of her involvement with Ms Brelsford-Smith with regard to whistleblowing, Ms Brelsford-Smith acting as a representative and her forceful correspondence on behalf of the Claimant. We accept the submission that the Respondent is likely to have viewed the Claimant and Ms Brelsford-Smith as working closely together, on matters relating to her sickness absence and complaints regarding colleagues. It seems that they did. We consider it appropriate to look to the Respondent for an explanation for the alleged detriment.

143. When considering the 'reason why' Mr Jones refused Ms Brelsford-Smith as representative we refer to our findings above; we accept Mr Jones' evidence in this regard and reject the assertion that Mr Jones took the approach he did as an act of victimisation. There was a significant period, of around 7 months, between the first protected act and Ms Brelsford-Smith leaving employment in January 2016 where there was no issue with regard to representation. We have already concluded that the factual circumstance which led to the refusal by Mr Jones of Ms Brelsford-Smith acting, was her changed employment status; we are satisfied that Mr Jones was not motivated by the first protected act. The complaint is dismissed.

Dismissal

144. The Respondent contends the Claimant was dismissed for capability rather than because she made either protected act. We refer below to the reason for dismissal; we are satisfied that Mr Barnett's decision was based on the Claimant's long-term sickness and capability. We conclude that he was not motivated to dismiss the Claimant because of either protected act; it is not clear that he was even aware of the protected acts. At paragraph 15 of his witness statement he refers to handover with Mr Jones, who gave a 'high level summary' of issues relating to the management of the Claimant, including complaints and grievances and that processes had run their course, but the Claimant was not satisfied with the outcome. Even if he was aware of both protected acts we consider the reason he gave for dismissal was that which operated on his decision making.

145. The complaint is dismissed.

Reasonable adjustments

146. The Respondent accepts that it operated the PCPs asserted by the Claimant which caused her substantial disadvantage. The duty to make reasonable adjustments was triggered, which can involve engaging in more favourable treatment (compared to colleagues who are not disabled) to accommodate an individual's disability.

First PCP

147. The Respondent only permitted colleagues and trade union officials to provide representation at internal meetings. This put the Claimant at a substantial disadvantage because of her disabling conditions, in that she was prevented from putting across her position fully and articulating it fully without the assistance of Ms Brelsford-Smith.

148. Over an extended period of time Ms Brelsford-Smith acted as representative for the Claimant in respect of internal meetings and

communications with the Respondent. Ms Brelsford-Smith accompanied the Claimant as a representative in a grievance meeting [248]; Ms Brelsford-Smith continued to communicate on behalf of the Claimant including lengthy email correspondence with Mr Marshalsay during September 2015 [601 – 607] and into October 2015 where Mr Jones communicated with Ms Brelsford-Smith with regard to an occupational health report [627]. Ms Brelsford-Smith settled her Tribunal claims with the Respondent in January 2016. The Claimant complains about communications from Mr Jones in May and June 2016 in which he indicated that he would not accommodate the Claimant's request to pass communications through Ms Brelsford-Smith and that she could not attend as companion at a FARM meeting.

149. We note that Mr Jones sought HR advice from Ms Tate in April 2016. This indicates to us that he had considered the content of the Respondent's internal policies which stipulate that companions at meetings should be employees or trade union officials. Ms Tate's advice indicated that adjustments are made at times for those with disabilities and that this included allowing family members as companions [976]. The advice did not extend, explicitly, to making an adjustment to allow a former employee who was not a family member act as a companion.

150. We accept Mr Jones' evidence that the reason for his change in stance with regard to Ms Brelsford-Smith acting as companion and/or representative arose from her change in status from employee to former employee, which fell outside the terms of the policy. However, a failure to make a reasonable adjustment can of course arise where the decision maker has entirely benign intention towards the Claimant.

151. The nature of the Claimant's condition was such that she was not able to communicate effectively without Ms Brelsford-Smith's support; this was not challenged. Mr Marshalsay had permitted Ms Brelsford-Smith to act as representative from September 2015 and we are satisfied that the Respondent was aware of the substantial disadvantage faced by the Claimant.

152. The Claimant experienced a severe negative reaction to the errors in communication from shared services around her pay and could not deal with communications on the topic. We note the Claimant's symptoms included short concentration span, panic attacks, shaking in stressful situations and disassociation. Had she been well, the Claimant could have forwarded emails to Ms Brelsford-Smith but in light of her symptoms we are not persuaded that she was well enough to be able to do so (or should have been expected to do so). The Claimant's upset and distress at Mr Jones's indication that he would not permit Ms Brelsford-Smith to act as her representative in the circumstances, including shared services repeated

errors, Ms Brelsford-Smith's history of support for the Claimant and the Claimant's ill-health is to us clearly genuine.

153. We are particularly puzzled at the continued refusal despite the recommendation of OH in the report of 31 May 2015. The continued reliance on policy to refuse the request, in circumstances where flexibility was required, illustrates to us a failure to grasp the ongoing and changing nature of the obligation on a Respondent to ensure adjustments are appropriate and reviewed regularly. Reasonable adjustment involves considering steps tailored to the individual's circumstances and may require consideration of steps that fall outside established process and procedures.

154. We note that no meetings were held in the period 16 May to 17 June 2016. The issue regarding Ms Brelsford-Smith accompaniment of the Claimant had arisen when a meeting was scheduled for 22 June 2016, which the Claimant was unable to attend and was rescheduled to a later date. However, there were instances of emails being sent to the Claimant directly in the period in question.

155. Although the PCP relates to companions at meetings, we find that Mr Jones relied upon the policy in a wider sense to encompass communications more broadly. We consider that allowing Ms Brelsford-Smith to act as representative would have been an effective step in allowing the Claimant to participate in processes affecting her at the time in question, as it had done in the past. The history of the matter was extensive, the Claimant's symptoms complex, and it would not have been effective to introduce a completely new representative at this stage. Although precedent is not required for adjustments, the fact that family acted as representatives, illustrates that flexibility had been introduced to policy in the past to accommodate adjustments.

156. There was a failure by the Respondent to make a reasonable adjustment by refusing to allow Ms Brelsford-Smith to represent the Claimant in the period 16 May to 17 June 2016.

Second PCP

157. The Respondent requires employees to provide a certain level of attendance so as to avoid warning/dismissal and it is accepted that the Claimant was at substantial disadvantage as she was more likely to be absent and at risk of dismissal.

158. The Claimant asserts two adjustments should have been made by the Respondent before dismissal; to permit her to work at home or elsewhere and/or to extend trigger to see if her health improved.

Work elsewhere – home or different office

159. We note that Ms Brelsford-Smith indicated in September 2015 [601 – 7], that the Claimant was too unwell to work and that she was seeking to exit her from the Respondent; at this point Ms Brelsford-Smith sought assessment for Claimant in respect of early ill-health retirement and suggested that looking for alternative work would worsen the Claimant's ill-health.

160. During her period of absence, the Claimant was placed on two redeployment registers which gave her priority access to newly available jobs. The Claimant never applied or showed any interest in any of these roles. When Mr Barnett took over as the Claimant's line manager at the end of August 2016 [1136], the Claimant indicated by email that she was too unwell to work and that her condition was worse than when she commenced sick leave. She also indicated that sending job adverts to her was a form of harassment and that the Respondent was mocking her.

161. At the final FARM meeting on 10 November 2016, the Claimant and Ms Brelsford-Smith repeated that the Claimant was too unwell to return to her substantive post and would not be well enough to consider alternative jobs until she had received treatment that she was waiting for, that she could not return to work with former colleagues in South Wales as there was "too much water under the bridge" and it was "unforeseeable" that the Claimant could work in the justice system [1180-1]. We accept Ms Brelsford-Smith's evidence that when she referred to the "justice system" that she was referring to the criminal justice system.

162. The last OH report dated 26 October 2016 [1162 – 3] notes that the Claimant is too ill to return to work in her substantive role or in a role involving 'interviewing criminals in confined spaces' for at least 12-month period. In reality, the option for the Claimant to work in another South Wales office was not practical, for reasons related to the grievances about her former colleagues, their unwillingness to mediate with her with regard to return to work, as well as her ill-health (the symptoms of which included agoraphobia). OH recommends that the Respondent should explore alternative roles as part of normal procedures.

163. In light of these matters we do not consider that offering the Claimant the opportunity to work in another South Wales office would have prevented

substantial disadvantage and it would not have been practicable. As Ms Brelsford-Smith pointed out, the Claimant could not return to work with former colleagues in Swansea and Pontypridd and travelling long distances would have posed difficulties in light of her medical condition.

164. Mr Barnett properly explored the possibility of her returning to her substantive role or to another post and was entitled to take on face value what the Claimant and Ms Brelsford-Smith said about that not being possible. The last OH report noted the Claimant's inability to work in her substantive or prescribed role for a 12-month period but did not specifically address homeworking, rather it refers to redeployment. Mr Barnett did not explore the possibility of working remotely from home at all. The omission to discuss this as an option is particularly striking in circumstances where the Claimant had performed the billing role for the Advocacy Unit over a nine-month period remotely. Mr Barnett had direct knowledge of this arrangement. A precedent had been set, which showed the Claimant could work effectively within the team, so much so that her temporary assignment for three months was extended to a nine-month period. This was despite the fact that she was unwell at the time she performed the work and was working remotely from the rest of the Advocacy Unit team.

165. The Respondent is a large organisation and we accept the evidence of Ms Brelsford-Smith that there was frequently project work available. This evidence was not challenged and when the scale of the Respondent organisation is considered, it seems uncontroversial that there would be this type of work available. We viewed this complaint in the context of the Claimant's email of 16 June 2016, in which she specifically refers to the removal of the billing work despite an ongoing need for that work to be performed (page 957).

166. We note Ms Toogood's evidence that billing work was carried out by the senior and junior clerks based in London, as part of their substantive roles, but she acknowledged the fact that there was always billing work to be done within the Advocacy Unit. Mr Barnett did not address with the Claimant any options for project work, working from home, any overflow of work from the Advocacy Unit or indeed from the wider civil service that could be performed from home. We are not persuaded by the Respondent's suggestion that a remote location would act as a bar to work being performed by the Claimant. Telephone lines can be redirected, paper correspondence can be scanned and emailed; communication in the workplace is now frequently facilitated remotely by email, telephone and Skype. The Respondent asserted that the billing process was still paper-based at the time in question, but this is not an insurmountable issue. Increasingly invoicing is carried out electronically and presumably a phase-out period for paper billing would not have been particularly lengthy if

implemented. We note that the advocates working for the Advocacy Unit were based all over England and Wales; not solely in London. Remote methods of communication must have been deployed between advocates and the unit. The Respondent has significant resources; these small adjustments to ways of working could have been accommodated without significant financial or practical difficulty.

167. We were referred to **Chief Constable of South Yorkshire v Jelic** as authority for the proposition that a Tribunal is not precluded from concluding that swapping roles to retain a disabled employee would be a reasonable adjustment in appropriate circumstances. There is a distinction, in that the EAT referred to the fact that the Respondent in **Jelic** was a disciplined service and so officers could be ordered to move into different roles. Ms Sleeman did not go so far as to submit that an entirely new role should have been created for the Claimant, but we note that the Advocacy Unit had only recently been created with new posts and job descriptions. The Respondent's witnesses had not applied their mind to adjusting any of the roles for the Claimant at the point they were being created; at the time they viewed the Claimant's work as only temporary in nature and did not consider the possibility of remote working. In all the circumstances we consider that the Respondent should have taken steps to explore adapting roles to offer the Claimant work.

168. Since being at home ameliorated the effects of the Claimant's symptoms, we are satisfied that home working would likely have avoided the substantial disadvantage experienced by the Claimant and enabled her to be retained in employment, albeit in some different role.

169. In light of all these considerations we conclude that the Respondent failing to allow the Claimant to work from home (either on billing or other project work) was a failure to make a reasonable adjustment and the complaint is upheld.

Extend trigger to see if health improves

170. Should the Respondent have waited longer to see if the Claimant's health improved allowing her to return to work? The medical evidence indicated that she would not be fit for at least 12 months in her own role or one which involved interviewing criminals in confined spaces. The prognosis therefore was poor in the immediate and medium-term although OH did not rule out the possibility of recovery at some future point prior to normal retirement age.

171. We note Mr Barnett's evidence (paragraphs 34-38) about the process that he followed when considering dismissal which was that

applicable in cases of continuous absence (defined as 14 consecutive calendar days).

172. The Claimant did not suggest any further period of time that it would have been appropriate for the Respondent to wait for. The Claimant indicated that she was waiting for treatment and would not be well until the treatment started. The Claimant's ill-health was linked to the workplace issues she complained about and, on her behalf, Ms Brelsford-Smith had indicated that a return to work with these colleagues was not possible.

173. We have taken into account that the financial implications of the Respondent waiting longer prior to dismissal would not have been significant, since they had deemed her occupational sick pay entitlement had exhausted. We weigh that against the efficacy of the step contended for in avoiding substantial disadvantage. The evidence presented to Mr Barnett by OH, the Claimant and Ms Brelsford-Smith was not encouraging in terms of potential improvement to the Claimant's health. What was not explored, and we think should have been, was the fact that she had been previously able to work from home whilst unwell; this allowed her to engage in useful work effectively despite her medical condition.

174. In all the circumstances we do not consider that waiting for an unspecified further period, would have the practical effect of avoiding substantial disadvantage. The complaint is dismissed.

Section 15 – dismissal

175. The Claimant accepts that the aim pursued by the Respondent is legitimate and the parties are agreed that the focus for our consideration is on justification, in particular, the proportionality of the decision to dismiss. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act of dismissal with the business/organisational needs of the Respondent. The burden of proof lies with the Respondent to demonstrate justification. We must consider whether in pursuing its aim the decision to dismiss was reasonably necessary.

176. It is not necessary for the grounds of justification to have been articulated at the time a discriminatory act took place; it is possible for the Respondent to articulate the grounds of justification after the event. However, in those circumstances the Tribunal is entitled to look with greater scrutiny at the justification presented.

177. Relevant factors include the fact that the Respondent is a large organisation, when the whole of the civil service is taken into account, with significant resource. The Respondent's witnesses indicated that there was no real difficulty with the Claimant's absence from her substantive post as the Swansea office was in fact overstaffed, the only impact related to being one person down for the out of hours on call rota.

178. An important factor in our consideration is that the Respondent had identified work for the Claimant to do from home whilst she was on sickness absence. Ms Toogood accepted that no thought was given to adjusting the junior clerk role so that the Claimant's employment could, in one way or another, continue with the Advocacy Unit. The Respondent's witnesses asserted that because the senior clerk was based in London that the junior clerk needed to be co-located. We are not persuaded of this argument. Increasingly people work remotely in various different locations including from home, even in circumstances where they work within the same team and we refer to our findings above about adjustments to working processes.

179. At the point of considering dismissal, further OH advice was sought. Ms Tate advised that the OH referral should include a question in respect of reasonable adjustments. The OH advice up until that point had given a poor prognosis, but that position shifted slightly with the final OH report of October 2016. That report suggested redeployment options should be considered and that the Claimant was not suitable for ill-health retirement as all treatment options had not been exhausted.

180. Mr Barnett properly explored with the Claimant during the final FARM meeting whether she could return to her own substantive post and whether she was well enough for any post pending treatment; the answer to both of these questions being in the negative. We think that it was appropriate for Mr Barnett to take these comments on face value, particularly in the context of the email sent by the Claimant a couple of months previously, to the effect that she considered the Respondent sending job vacancies to her as harassment and mocking her medical condition.

181. However, Mr Barnett did not take the additional step of enquiring whether the Claimant was well enough to perform work from home. Omitting to enquire whether work could have been done from home was an important factor in the particular context of this case, particularly since we have found that this was a failure to make a reasonable adjustment.

182. The Claimant submitted that the Respondent failed to comply with the provisions of its own Attendance Management Procedure; in particular paragraphs 69 [925] and 82 [926] and as such the decision to dismiss was not a proportionate one.

183. Paragraph 69 provides that '*during any continuous sickness absence period, the manager and employee should work together to explore what the employee can do, or might be capable of doing with help and support, to return to work as soon as they are able'*. There was no exploration of the option of home working and as such the Respondent has not fully engaged with the requirements of its policy, particularly bearing in mind the Claimant's previous work for the Advocacy Unit. Additionally, it seems the request for financial support for treatment could have been considered under this provision.

184. Paragraph 82 provides that before a FARM '*managers will have considered in consultation with the employee whether any informal support mechanism or other practical working arrangements are appropriate and would assist the employee with their attendance or whether any reasonable adjustments are required for employees who are absent for reasons related to their disability (following a referral to and recommendations of Occupational Health)'.* The fact that vacancies were sent to the Claimant of itself is not sufficient to discharge the obligation on the Respondent to make reasonable adjustment; as mentioned above a more individualised approach is required. In this case a discussion about home working could have led to that option being implemented had the Claimant been well enough to carry out suitable work.

185. We are mindful of the representations made on behalf of the Claimant by Ms Brelsford-Smith, who confirmed from 12 September 2015 [602] that she was acting on the Claimant's behalf. Ms Brelsford-Smith's communications were emphatic; that the Claimant should be exited from the organisation. Ill health retirement was not supported by OH and at the November 2016 FARM meeting, Ms Brelsford-Smith made enquiries about funding for further treatment options. It is not clear why the Respondent was unable to fund further private treatment for the Claimant. Mr Barnett says he could find no provision upon which to do so and since he was dismissing he did not think the Respondent had any obligation to pay for further treatment.

186. We were not taken to particular evidence of negative impact for the Respondent in light of the Claimant's ongoing employment. We also note the fact that the Claimant had exhausted her sick pay benefit entitlement. Mr Barnett says that the Respondent could not recruit for the Claimant's post but the team in Swansea was in fact overstaffed (para 16 of Mr Jones' witness statement)**.** There was no evidence of the actual cost implications of covering the Claimant's absence, if there were any. Mr Barnett refers to costs of agency staff (paragraph 45 of his witness statement) but does not

confirm whether agency staff were in fact engaged or what their cost was. Mr Barnett said in cross examination that costs were a consideration, without giving particulars, when asked about funding further treatment for the Claimant's medical condition.

187. The evidence of the Respondent's witnesses with regard to the unsuitability of work for the Claimant in the Advocacy Unit was provided retrospectively and we are entitled to subject it to close scrutiny. For the reasons already given, we do not accept the Respondent's submission that remote working was not possible.

188. In light of the finding that failure to allow home working was a failure to make a reasonable adjustment, we conclude that the Respondent cannot show justification for dismissal in the circumstances of the case without having complied with that adjustment.

189. We do not consider that the failure to permit Ms Brelsford-Smith act as representative for a short period between 16 May and 17 June 2016 had any impact on justification.

190. The impact of discriminatory dismissal on the Claimant is significant. Having considered the Respondent's justification evidence we conclude that it has not discharged the burden placed upon it. The dismissal of the Claimant was an act of discrimination arising from disability.

Unfair dismissal

191. We were referred to **O'Brien** and take into account the comments of LJ Underhill, particular to capability dismissals, noted above. The tests under section 15 EqA and section 98 ERA are distinct but in the circumstances of this case, and having concluded that the Respondent has failed to show justification under section 15 EqA, we conclude that the decision to dismiss was not reasonable.

192. We took into account the CA judgment in **McAdie** and note that even in circumstances where an employer has caused incapability that does not preclude a fair dismissal. Equally we note that there may be an expectation in such circumstances for the employer to 'go the extra mile' and wait longer than it ordinarily would before dismissal. We think that this is a relevant consideration in this case, in light of the latest occupational health report which rules out ill health retirement and advises looking at redeployment.

193. Without taking the steps identified above in terms of reasonable adjustment, we do not consider the decision falls within the range of reasonable responses.

194. We rely on our findings above (under s15 EqA) with regard to the process applied to the Claimant's dismissal. The policy was not fully engaged with by the Respondent. Section 98 (4) ERA requires us to consider the size and resources of the Respondent, which in this case are significant, and as such a factor in concluding that the decision to dismiss was not reasonable.

195. The claim of unfair dismissal is upheld.

Unlawful deductions

196. The claim for unlawful deductions under section 13 ERA (Part II Protection of Wages) is particularised in the Claimant's solicitor's letter of 18 May 2018 [126o – p]. The Claimant contends that the dates on which wages were not paid were:

a. 30 November 2016 – 12 December 2016 when Claimant was in receipt of payment of half wages (gross weekly basic wage x 2.8 = £826.45);

b. 13 December 2016 – 15 February 2017 when Claimant was in receipt of nil wages (gross weekly basic wage x 9.4 = £5548.16);

c. 9 May 2014 – 15 February 2017 during which Claimant was absent due to sickness (gross weekly average over time and standby payments x 145 weeks = £16,583.65)

197. The Claimant contends that she has not been paid her full contractual entitlement in terms of sick pay and relies upon the Respondent's Occupational Sick Pay Policy and Guidance dated December 2014 (the 'Policy' [1476]). The Claimant contends that the unpaid sick pay is a contractual entitlement, relying upon the offer of employment made to her dated 19 April 2001 [127 – 128]. The Tribunal was not referred to any separate contract of employment.

198. In closing submissions, the Respondent was unable to confirm, when asked by the Tribunal, whether it believed the sick pay provisions in the Policy amounted to a contractual entitlement and submitted only that this was a matter for the Claimant to demonstrate.

Offer of employment

199. The relevant paragraph of the offer letter of 19 April 2001 is as follows:

> "*this handbook forms the first part of your induction and details the terms and conditions of your employment, including important information on your holiday entitlement, notice periods, season-ticket loans as well as the flexitime, sick pay and pension schemes and confidentiality of information. In accepting this offer you are accepting these terms and conditions of employment*."

200. We were not shown a copy of the handbook to which the offer letter refers.

Policy

201. As for the Policy, it provides for occupational sick pay limits of full pay for six months and half pay for six months, subject to maxima within certain rolling periods [1488]. Additional payments are possible in case of accident, injury, assault or disease [1483], these include: an extension of sick pay at full pay for six months and an injury allowance where earning is impaired by injury or disease in circumstances where injuries are sustained, or disease contracted, in the course of duties.

202. The Claimant relies on the following passage [1483] in support of her contention that she should have received full basic pay throughout her sickness absence:

> "*where the injury is due wholly or in part to the negligence of the Crown, the whole period of absence, or a proportion of it, will not be taken into account for occupational sick pay limits*."

203. The Claimant also submits that she has been subject to an assault and so is entitled to payment for overtime and standby payments for the entirety of her sickness absence. She relies on the following passage at [1484] in this regard:

> "*where an employee's absence is as a result of an assault in the course of duty or when not on duty but clearly connected with duty, the absence will not count towards the limits for occupational sick pay.*
>
> *Where absence is due to an assault, as defined above, and no claim for damages is made, the employee will:*

> *receive full pay, less any Social Security sick or injury benefit;*
>
> *plus any additions for excess hours, shift and night working payments, calculated on average"*

The Policy does not provide definitions of terms used within it, such as 'accident', 'injury', 'assault' or 'disease'.

Assault

204. In response to a request by the Respondent's solicitor of 23 May 2018 [126q], the Claimant clarified the nature of the assault in an email from her solicitors dated 18 September 2018 [126r]. The Claimant described an assault committed by the Ministry of Justice and a named individual (which we assume to be client X) between January 2010 and December 2013 (the period of time that she worked on assignment to client X). The Claimant described the assault as follows:

> "*the Claimant attended approximately 980 interviews with client X over this period of time dealing with 500 individual serious offences including numerous murders, attempted murders and conspiracy to murder; this was privy to terrorism and other information protected by the Official Secrets Act 1989. The Claimant was therefore prevented from discussing this assignment with anyone else. The Claimant had no support from the MOJ despite working excessive hours in extremely challenging conditions. The Claimant regularly worked 12 hours or more each day for consecutive two week periods. The Claimant would be locked in a confined cell complex comprising of two rooms (the cell where client X was housed and the interview room) for upwards of 10 hours each day. Client X was a special branch former over a considerable period of time and so the Claimant was locked in a confined space with a dangerous individual. These rooms have very little or no natural light. The MOJ never asked the Claimant about the conditions of the work she was working under despite being fully aware of the excessive hours she was working over this period of time; the Claimant submitted numerous overtime claims which were authorised and paid without question however these did not concern the MOJ and they did not look to take steps to enquire about her health and welfare. The Claimant was offered no support throughout all the time she worked on this assignment.*

Injury at work benefit

205. During the course of her absence, Mr Jones arranged for temporary extensions to her occupational sick pay on two occasions, pending the approval of her application for Injury at Work Benefit [664 – 667]. This

application was approved and signed by Mr Jones as line manager [671 – 672] and Mr Marshalsay on 22 December 2015 [675]. In his approval Mr Marshalsay notes an OH report by Dr Critchley which refers to PTSD; Mr Marshalsay writes with reference to PTSD [674]:

> "*This injury is understood to have been triggered by Ms Lewis's work related stress in debriefing a murderer over a prolonged period*".

The Claimant's claims

206. In respect of claims a) and b), the Claimant relies upon section 4 of the policy [1483] that her injury is due wholly or in part to the negligence of the Crown.

207. As for claim c), the Claimant relies on the policy at [1484] and her assertion that she has been assaulted.

208. The Claimant has not brought a separate personal injury claim against the Respondent (although in submissions the Respondent indicated this was intimated by the Claimant but did not proceed beyond an initial letter seeking disclosure (paragraph 106B of the Respondent's submissions)).

Jurisdiction

209. The Respondent submits that in reality the Claimant seeks to bring a personal injury claim, which we are precluded from considering on jurisdictional grounds. The Claimant submits to the contrary that she does not bring a personal injury claim; rather as a consequence of the Respondent's choice to draft sick pay eligibility criteria based on the concept of negligence, that we must consider the claims in this context. The Claimant refers us to **Agarwal,** in particular paragraph 27;

> *"(1)* ***Delaney v Staples****, to which the ET and the EAT in* ***Agarwal*** *were not referred, is binding authority that the ET has jurisdiction to resolve any issue necessary to determine whether a sum claimed under Part II is properly payable, including an issue as to the meaning of the contract of employment…*
> *(3) There is no good – or even, frankly, comprehensible – policy reason for carving out from the jurisdiction of the ET one particular kind of dispute necessary in order to resolve a deduction of wages claim. On the contrary, to do so would be incoherent and would lead to highly unsatisfactory procedural demarcation disputes. ETs are well capable of construing the terms of employment contracts governing remuneration have to do so in many other contexts*."

210. We note the terms of the Extension of Jurisdictional Order 1994 which excludes the Tribunal from determining breach of contract claims in respect of personal injury. Whilst the Order specifies those matters that a Tribunal can and cannot determine when it comes to breach of contract, we are mindful that the claim is advanced under section 13 ERA. **Agarwal** is specific that the Tribunal has jurisdiction to determine Part II ERA claims. We accept the submission by the Claimant that we are not asked to determine a personal injury claim, rather it is a breach of contract claim, legitimately presented as unauthorised deductions from wages. The fact that it involves consideration of matters which would not ordinarily come for consideration in the Tribunal is as a result of the Respondent's choice of qualifying criteria in the Policy.

211. We conclude therefore, following **Agarwal,** that we have jurisdiction to consider this claim for unauthorised deductions.

Does the Policy have contractual effect?

212. The Respondent was unable to give a definitive position on this question. The Claimant has consistently asserted her entitlement to sick pay, as claimed in these proceedings, during the course of her sickness absence. The Claimant relies on the offer letter, which expressly

incorporates reference to a handbook, which includes contractual sick pay entitlement amongst other benefits. The offer letter cannot refer specifically to the Policy, dated December 2014, which significantly postdates the offer letter.

213. The Policy is silent as to whether it's contents form part of employee's terms and conditions. Although at [1488] the Policy defines sick pay limits by reference to an employee's contractual terms. Those limits that apply to the Claimant come under the line 'For existing staff and those transferring to MOJ on pre-modernised Terms and Conditions'. Different limits apply to new staff or those on modernised terms and conditions. The terms of the Policy relied on by the Claimant, appear to us to be specific enough to be apt for incorporation as contractual terms. Since the handbook sent with the offer letter included contractual sick pay entitlement, we accept the Claimant's submission that any updated policy documents relating to sick pay (including the Policy) varied her contractual entitlement in that regard. We conclude that the Policy has contractual effect between the parties to the extent relied upon by the Claimant for the purposes of her unlawful deduction from wages claim.

Negligence of the Crown

214. In order to qualify for the dis-application of occupational sick pay limits for all of her sickness absence or proportion thereof, the Claimant must establish that her injury is due wholly or in part to the 'negligence of the Crown'. The Policy does not provide a definition of what negligence in this context means. We therefore infer that it has its usual meaning in the context of personal injury and in this regard the Respondent refers us to **Sutherland v Hatton (2002) EWCA Civ 76** as authority on those matters which must be established by the Claimant to demonstrate negligence by the Respondent; that there is a duty of care owed by the Respondent to the Claimant, that the Respondent has breached the duty by not taking care which can reasonably be expected in the circumstances and that the breach has caused the harm complained of by the Claimant. To be successful in establishing negligence, the Claimant must demonstrate foreseeability of harm if the requisite care is not taken.

215. The Respondent submitted that we were faced an unenviable task in circumstances where the claim of negligence is not clearly pleaded and there is no expert evidence as to the cause of the Claimant's injury, in circumstances where it may have multiple causes (including the effects of the Claimant's whistleblowing with regard to her colleagues, the handling of her grievance and its outcome and the anonymous letter sent to Ms Toogood). Furthermore, we have no expert evidence to assist with what a reasonable employer should have foreseen; although we note that factors likely to be relevant are set out at paragraphs 25 – 31 in **Sutherland**.

216. The fact that the task may be unenviable, however, is not relevant to whether it is one we must attempt. It seems to us, in light of the way in which the Policy is drafted, we must tackle the question of whether there has been negligence to determine the claim. That task must, we think, involve consideration of the tests set out in **Sutherland.**

217. The Claimant's account is that her PTSD was caused by her work with client X (amongst other matters). The Claimant relies upon the Respondent's approval of her Injury at Work Benefit application as evidence of negligence. The Respondent has not admitted negligence and refers us to the Injury Benefits scheme a brief guide [1042] which provides that Injury at Work Benefit is paid on a no-fault basis [1044]:

> "*that means you can receive it whether or not there is negligence on the part of your employer in connection with the injury*"

Whilst we note the Claimant's application was supported by management and successful, those facts are not conclusive on the issue of whether the Respondent was negligent in causing her injury at work.

218. As part of the Injury at Work Benefit application process, the Claimant was assessed by Dr Saravolac, whose opinion includes the following passage [784]:

> "*the medical evidence is consistent with the conclusion that Ms Lewis' illness arose as a result of her perception of circumstances related to her working environment. It is important to note that the Pensions Ombudsman has now determined that individuals are likely to qualify for an injury benefit purely on the basis of their perceptions since their symptoms are just as genuine even if they have had a disproportionate response to what has taken place within the working environment.*"

Thus, the supporting medical opinion is not contingent on a finding of negligence by the Respondent.

219. Although it is not specifically pleaded; we infer that the duty of care relied upon is with regards to employees' health and safety. Further, and again although not specifically pleaded, we infer that the Claimant suggests the duty has been breached because of the circumstances of her assignment to client X; that she was sent for extended period of time to work long hours, far from home in isolation from colleagues and close confinement with a violent criminal, without the co-colleague she was initially promised or the ability to discuss the case due to the Official Secrets

Act. The inference appears to be that the nature of the assignment to client X was such, that the role was intrinsically so stressful as to lead to psychological harm.

220. **Sutherland,** at paragraph 24, points out that "*the notion that some occupations are in themselves dangerous to mental health is not borne out by the literature…: It is not the job but the interaction between the individual and the job which causes the harm. Stress is a subjective concept: the individual's perception that the pressures placed upon him are greater than he may be able to meet. Adverse reactions to stress are equally individual, ranging from minor physical symptoms to major mental illnesses*."

221. As for causation, we have the Claimant's own account which she provided to various medical advisers and has been recorded as a trigger for PTSD, for example, in her application for Injury at Work Benefit. In this regard we note, however, that there are multiple potential causes for ill-health, certainly in terms of the period of the Claimant sickness absence, which was only triggered when she learned of Ms Smith's return to work at another office following disciplinary investigation.

222. Even if we are to accept for a moment that there was a breach employer's duty of care, the difficulty we consider the Claimant faces in establishing negligence is that of foreseeability. The question is '*whether a harmful reaction to the pressures of the workplace was reasonably foreseeable in the individual employee concerned. Such a reaction will have two components: 1, an injury to health; which 2, is attributable to stress at work*' (**Sutherland** paragraph 25)

223. The factors which **Sutherland** suggests we consider include the nature and extent of the work being done by the employee. On this count the Respondent should have been alert, to pick up on signs from the Claimant of potential harm. Signs from the employee of potential harm are particularly important, however, on the Claimant's own account she did not explicitly raise any concerns with the Respondent for the duration of the assignment. The only reference she makes, is the suggestion that the Respondent should have picked up on her high level of overtime.

224. **Sutherland** acknowledges that harm to health can be foreseeable without express warning however there was no evidence that the Claimant had periods of absence from work whilst carrying out the assignment, which may have been a flag to the Respondent that there was a risk of harm. The Claimant did not say she complained contemporaneously about potential harm to health, and she did not present any medical evidence about the impact the work was having on her.

225. Paragraph 29 in **Sutherland,** provides that '*unless he knows of some particular problem of vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job. It is only if there is something specific about the job or the employee or combination of the two that he has to think harder. But thinking harder does not necessarily mean that he has to make searching or intrusive enquiries. Generally, he is entitled to take what he is told by or on behalf of the employee at face value'*.

226. In **Sutherland** paragraph 27, reference is made to the case of Mr Walker a; '*highly conscientious and seriously overworked manager of a social work area office with a heavy and emotionally demanding caseload of child abuse cases. Yet although he complained and asked for help and extra leave, the judge held that his first mental breakdown was not foreseeable. There was, however, liability when he returned to work with the promise of extra help which did not materialise and experienced a second breakdown only a few months later*.'

227. In the circumstances of the assignment with client X, it is not difficult to conclude that the Respondent should have made further provision to support the Claimant, whether by providing a co-working colleague or someone with sufficient security clearance to enable the Claimant to talk to about the assignment. However, in the absence of any previous history of vulnerability or contemporaneous sign from the Claimant that she was not coping, we do not consider that the harm experienced by the Claimant was foreseeable by the Respondent.

228. Accordingly, we do not consider that the Claimant has demonstrated negligence by the Respondent within the meaning of the Policy. We have reached this conclusion on the basis of limited evidence and stress that our finding is in relation to the contractual term of the Policy only.

229. The claim for unauthorised deduction from wages in respect of gross basic pay between 30 November 2016 – 12 December 2016 (half pay) and between 13 December 2016 – 15 February 2017 (full pay) is dismissed.

Assault

230. There is no definition of "assault" within the Policy. We therefore referred to the definition provided by the Respondent from Halsbury's Laws of England:

> "*assault is an intentional and overt act causing another to apprehend the infliction of immediate and unlawful force.… An assault may be committed by words and gestures alone, provided they cause an apprehension of immediate and unlawful force*."

Footnote 1 to "intentional" provides:

> "*there appears to be no decision in which mere negligence has been held sufficient to constitute an assault*".

231. The Claimant agreed to the assignment between 2010 and 2013 to work on debriefing client X, which was initially for a six-month period but was extended over three years. The Claimant does not suggest that she complained to the Respondent during the course of the assignment but rather suggests that the Respondent should have inferred that she was overworked in circumstances of isolation because it was aware of her working arrangements and her substantial overtime claims during the relevant period.

232. We note the circumstances of the Claimant's assignment and we have great sympathy with the Claimant, in that she was tasked with a difficult and isolating assignment, spending prolonged periods in close proximity with a dangerous and violent criminal. However, we are unable to conclude that the circumstances were such that the Respondent subjected the Claimant to an assault, as the term can be understood from the Halsbury's definition. The assignment to client X can be considered an 'intentional and overt act' but we do not consider the Claimant has established that it caused her to 'apprehend the infliction of immediate and unlawful force'. The Claimant did not contemporaneously complain about the assignment and must have agreed to its extension; these circumstances are not in our view consistent with the apprehension of immediate and unlawful force.

233. Accordingly, the Claimant's claim for unauthorised deductions from wages of gross weekly over time and standby payments in the period May 2014 to February 2017 is dismissed.

Remedy

234. A remedy hearing will be listed in due course.

Chance of non-discriminatory dismissal and ACAS Code adjustment

235. At the remedy hearing, the Tribunal will deal with the issues of whether a non-discriminatory dismissal would have been affected at some point and whether the Claimant's award of compensation should be reduced on the basis that she unreasonably failed to appeal against dismissal (failure to follow ACAS code). At the remedy stage, the tribunal will have the benefit of reflecting on the size of the award of compensation overall and this may assist in determining the appropriate amount of deduction, (if it is determined that any deduction should be made at all).

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Employment Judge S Davies

Dated:14 November 2018

JUDGMENT SENT TO THE PARTIES ON

……15 November 2018…….

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS