EMPLOYMENT TRIBUNALS

Claimant:	**Ms Rachel Gladstone**	
Respondent:	**The Commissioners for His Majesty's Revenue & Customs**	
Heard at:	**Cardiff**	**On: 4, 5, 7, 8, 11, 12, 18 & 19 (in Chambers) November 2024**
Before:	**Employment Judge S Jenkins** **Mr A Fryer** **Ms R Hartwell**	

Representation:
Claimant: In person
Respondent: Ms J Russell (Counsel)

RESERVED JUDGMENT

The Claimant's complaints of; constructive unfair dismissal, detriment on the ground of protected disclosure, direct disability discrimination, discrimination arising from disability, and failure to make reasonable adjustments; all fail and are dismissed.

REASONS

Background

1. The hearing was to deal with the Claimant's complaints of constructive unfair dismissal, protected disclosure detriment, direct disability discrimination, discrimination arising from disability, and failure to make reasonable adjustments. Those complaints had been brought by way of a Claim Form lodged on 17 June 2023 following a period of early conciliation with ACAS between 8 May 2023 and 18 May 2023. The claim arose principally from the termination of the Claimant's employment on 20 May 2023, following her notice of resignation on 22 April 2023.

2. The case had been through four preliminary hearings, which had identified that the hearing, whilst listed to take place over eight days, should proceed in blocks of two days at a time as an adjustment to limit the impact of the Claimant's medical conditions on her ability to manage the hearing. In the event, due to prior judicial commitments on 14 and 15 November 2024, the final two days of the hearing took place after a gap of three working days.

3. As a further adjustment for the Claimant's medical conditions, the assistance of note-takers was provided by HMCTS, with copies of the notes taken being made available to the Claimant and the Respondent at the end of each day. We also took regular breaks during the hearing, and looked to bring each day to an end no later than 4.00pm, although we did slightly overrun that on two days.

4. In terms of the chronology of the hearing, after a day of reading, we heard evidence from the Claimant, by way of two written witness statements and answers to questions, over two days, 5 and 7 November 2024. We then heard evidence from the following witnesses, again by way of written witness statements and answers to questions, on behalf of the Respondent:

    * On 8 November 2024, we heard from Vivienne Harris, former Site Lead for Debt Management in the Respondent's Cardiff office.

    * On 11 November 2024, we heard from Sandra Edwards, Debt Management Team Leader and the Claimant's line manager for the last period of her employment; and Patricia Wilkinson, former Site Lead for Debt Management in the Respondent's Bradford office, and the Disciplinary Decision Maker in relation to disciplinary action taken against the Claimant in November 2022.

    * On 12 November 2024, we heard from Mark Incledon, Regional Operational Leader for Debt Management in the Respondent's Cardiff office.

    * On 18 November 2024, we heard from Ketan Tanna, Senior Leader in the Respondent's Debt Management Field Collection Team, and the Appeal Manager in relation to the Claimant's appeal against the disciplinary sanction imposed on her, which took place in January 2023. Mr Tanna was unfortunately not well enough to give evidence on 12 November 2024, and we therefore had to hear from him on the penultimate day of the hearing.

5. We also heard the parties' submissions in the afternoon of 18 November 2024 and concluded our deliberations on 19 November 2024 in chambers. There was then insufficient time to complete our deliberations and for the Judgment to be drafted and delivered orally, thus leading to this Reserved Judgment.

6. In terms of documents, we considered the documents in a main hearing bundle of 2008 pages, and a supplemental bundle of 97 pages, to which our attention was drawn. We also had regard to a small number of documents in a medical records bundle of 1169 pages.

7. We were also assisted by a Chronology, Cast List and Key Documents List.

Issues

8. An agreed List of Issues had been prepared by the parties and that is set out in the Appendix to this Judgment. It had been made clear at an earlier preliminary hearing that this hearing would deal with liability only, and we did not therefore consider sections 4, 6 and 11, relating to remedy.

Law

Time Limits

Discrimination claims

9. With regard to time limits in discrimination claims, Section 123 of the Equality Act 2010 ("EqA") provides as follows:

> **"123 Time limits**
>
> *(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *…*
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> *(a) when P does an act inconsistent with doing it, or*
>
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*"

10. The three-month period is to be extended by virtue of any time spent pursuing early conciliation with ACAS, which essentially means that a claimant must make contact with ACAS for the purposes of early conciliation during that three months.

11. With regard to conduct extending over a period, the Court of Appeal, in ***Commissioner of Police of the Metropolis v Hendricks*** **[2003] ICR 530**, noted that the Tribunal must look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer and thus linked to each other.

12. A course of conduct where individual acts are linked, either by reference to the application of a policy or practice or in another way, and where the last such connected act falls within time, will mean that all such acts will fall within time. The Employment Appeal Tribunal ("EAT") confirmed however, in ***South Western Ambulance Service NHS Trust -v- King*** **[2020] IRLR 168**, that reliance is not to be placed on "*some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time*".

13. With regard to the potential just and equitable extension of time, the Court of Appeal, in ***Robertson -v- Bexley Community Centre*** **[2003] IRLR 434**, noted that there is no presumption in favour of extending time in discrimination claims, and it is for the claimant to convince the Tribunal that it is indeed just and equitable to extend time.

14. The EAT in ***British Coal Corporation -v- Keeble*** **[1997] IRLR 336**, noted that the provisions of Section 33 of the Limitation Act 1980, which applies to civil claims, should also be applied in relation to Tribunal claims. That involves an assessment of the prejudice to each party and an assessment of all the circumstances of the case, which includes; the length of and reasons for the delay, the extent to which the cogency of evidence is likely to be affected, the extent to which the party sued has cooperated with the requests for information, the promptness with which the Claimant acted once they knew of the facts, and the steps taken by the Claimant to obtain advice. It is clear however that an assessment of all the circumstances is to be undertaken.

15. Further guidance on this issue was provided by the Court of Appeal in ***Adedeji -v- University Hospitals Birmingham NHS Foundation Trust*** **[2021] EWCA Civ 23**, that the guidance provided in the ***Keeble*** case should not be treated as a checklist, as that would lead to a mechanistic approach to what is meant to be a very broad general discretion. The Court of Appeal guidance was that the best approach for a Tribunal, in considering the exercise of its discretion, is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including, in particular, the length of, and the reasons for, the delay.

Detriment claims

16. Section 48(3) of the Employment Rights Act 1996 ("ERA") provides that an Employment Tribunal should not consider a complaint of detriment on the ground of having made a protected disclosure unless it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that three month period.

17. The case law relating to "*conduct extending over a period*" in discrimination claims, referred to at paragraphs 11 and 12 above, has similar application to the issue of "*a series of similar acts or failures*" in detriment cases.

18. Again, the three-month period is to be extended by virtue of early conciliation with ACAS, which again essentially means that a claimant must make contact with ACAS for the purposes of early conciliation during that three months.

19. There has been a considerable amount of case law on the issue of reasonable practicability over the years, principally relating to unfair dismissal complaints, which applies equally to detriment complaints. One point that has been made clear is that it is a strict test; it is for a claimant to justify the conclusion that the claim was not able to be reasonably practicably brought within time, and that it was then brought within a reasonable time thereafter.

20. The appellate cases have made clear that a number of reasons for delay can arise in assessing the reasonable practicability question, including whether the claimant was aware of the right to pursue matters before the Tribunal, and ill health.

21. With regard to ill health, the cases make clear that a debilitating illness may prevent a claimant from submitting a claim in time, but usually this will only constitute a valid reason for extending time if supported by medical evidence which demonstrates not only the illness, but the fact that the illness prevented the claimant from submitting the claim in time. Although equally the cases do confirm that medical evidence is not absolutely essential.

22. The issue of reasonable practicability includes an assessment of the claimant's ignorance of rights, but any ignorance must be reasonable. Scarman LJ (as he then was), in ***Dedman -v- British Building Engineering Appliances Limited*** **[1974] 1 WLR 171**, noted that a Tribunal must ask the questions of, "*What were [the claimant's] opportunities for finding out that [they] had rights? Did [they] take them? If not, why not?*"

23. The Court of Appeal also noted, in ***Porter -v- Bandridge Limited*** **[1978] ICR 943**, that the test was not whether the claimant knew of their rights, but whether they ought to have known of them.

24. The appellate courts have also made clear that where a claimant is generally aware of their rights, ignorance of a time limit will rarely be acceptable as a reason for delay.

25. If the decision is that it was not reasonably practicable for the claim to have been brought in time then the EAT confirmed, in ***Cullinan -v- Balfour Beatty*** **(UKEAT/0537/20)**, that consideration of whether the claim is brought within a further reasonable period will require an objective consideration of the relevant factors causing the delay and what period should reasonably be allowed in the circumstances having regard to the strong public interest in claims being brought in time.

<u>Constructive Unfair Dismissal</u>

26. Section 94(1) of the Employment Rights Act 1996 ("ERA") provides that an "*employee has the right not to be unfairly dismissed by his employer*.

27. Under section 95(1) ERA, an employee is considered to have been dismissed in circumstances where "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*", commonly known as a constructive dismissal.

28. In a constructive unfair dismissal case such as this, the touchstone authority remains ***Western Excavating (ECC) Limited -v- Sharp*** **[1978] ICR 221,** which noted that three matters fall to be considered:

    (i) Was there a repudiatory breach of contract?
    (ii) If so, did the claimant resign in response to that breach and not for another reason?
    (iii) If so, did the claimant nevertheless affirm the contract, whether by delaying too long in resigning, or by words or actions which demonstrated that they chose to keep the contract alive?

29. The principal breach in this case was asserted to be a breach of the implied term of mutual trust and confidence. Whilst the ability to pursue a constructive dismissal claim based on that implied term had been established by the EAT as far back as 1981 in the case of ***Woods -v- WM Car Services (Peterborough) Limited*** **[1981] ICR 666**, it was expressly approved by the House of Lords in ***Malik -v- BCCI SA (in compulsory liquidation)*** **[1997] ICR 606**, where Lord Steyn confirmed that it imposed an obligation that the employer shall not, "*without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*".

30. It has been clear, since ***Woods*** in 1981, that any breach of the implied term of mutual trust and confidence will be a repudiatory breach. However, as noted in ***Malik***, the conduct has to be such that it is likely to "destroy or seriously damage" the relationship of trust and confidence. The EAT, in ***Leeds Dental Team -v- Rose*** **[2014] IRLR 8**, confirmed that the test of whether there has been a breach is an objective one.

31. The prevailing law of constructive dismissal was summarised by the Court of Appeal in ***Omilaju -v- Waltham Forest London Borough Council*** **[2005] ICR 481**, where Dyson LJ explained it, at paragraph 14, as follows:

> "*1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.*
>
> *2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H—35D (Lord Nicholls) and 45C—46E (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.*
>
> *3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, per Browne Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to* destroy or seriously damage *the relationship (emphasis added).*
>
> *4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik, at p 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at* objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).*
>
> *5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para DI [480] in Harvey on Industrial Relations and Employment Law: "[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant*

their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to terminate a deteriorating relationship.""

32. Dyson LJ continued at paragraph 15:

"*The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd [1986] ICR 157. Neill LJ said (p167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p169F:*

"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?" *(See Woods v W.M. Car Services (Peterborough) Ltd. [1981] ICR 666.) This is the "last straw" situation.*"

33. With particular reference to the "last straw", Dyson LJ went on to say, at paragraphs 19 and 20:

"*…A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred."

34. The approach to be taken in last straw cases was considered further by the Court of Appeal in ***Kaur -v- Leeds Teaching Hospitals NHS Trust*** **[2019] ICR 1**, where Underhill LJ stated, at paragraphs 45 to 46:

"*If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the Omilaju test), it should not normally matter whether it had crossed the Malik threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so.*

"Fourthly, the "last straw" image may in some cases not be wholly apt. At the risk of labouring the obvious, the point made by the proverb is that the additional weight that renders the load too heavy may be quite small in itself. Although that point is valuable in the legal context, and is the particular point discussed in Omilaju, it will not arise in every cumulative breach case. There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)."

35. Underhill LJ then set out, at paragraph 55, a number of questions that the Tribunal should ask itself in a constructive dismissal claim:

"*I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

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

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

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

None of those questions is conceptually problematic though of course answering them in the circumstances of a particular case may not be easy."

36. With regard to the question of affirmation, Lord Denning MR, in ***Western Excavating (ECC) Ltd v Sharp***, noted that the employee '*must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged*'.

37. Subsequent decisions have made clear that the issue of affirmation is essentially one of conduct, not simply passage of time, but there comes a point when delay will indicate affirmation, even where the employee has protested against the alleged breach.

Protected disclosures

38. Section 43B ERA provides as follows:

"*43B.— 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."

39. In deciding whether a disclosure is protected by law therefore, a Tribunal has to have regard to:

- Whether there has been a disclosure of information.
- The subject matter of disclosure in accordance with Section 43B ERA 1996.
- Whether the claimant had a reasonable belief that the information tended to show one of the relevant failures in Section 43B ERA 1996.
- Whether the claimant had a reasonable belief that the disclosure was in the public interest.

40. With regard to disclosure of information, the EAT, in ***Cavendish Munro Professional Risks Management Limited -v- Geduld*** **[2010] ICR 325**, drew a distinction between the making of an allegation, which would not be said to disclose information, and the giving of information in the sense of conveying facts. However, the Court of Appeal in ***Kilraine -v- London Borough of Wandsworth*** **[2018] ICR 1850**, noted that the two categories are not mutually exclusive, and that the key guidance from ***Geduld*** was that a statement which was devoid of specific factual content could not be said to be a disclosure of information.

41. With regard to reasonable belief, we needed to be satisfied that the information tended to show a relevant failure in the reasonable belief of the worker, i.e. in this case, the Claimant. The EAT, in ***Korashi -v- Abertawe Bro Morgannwg University Local Health Board*** **[2012] IRLR 4**, directed that that involved applying an objective standard to the personal circumstances of the discloser. The EAT also noted, in ***Darnton -v- University of Surrey*** **[2003] ICR 615**, that the claimant does not need to be factually correct and need only demonstrate that they have a reasonable belief.

42. With regard to public interest, we were mindful of the guidance provided by the Court of Appeal, in ***Chesterton Global Limited -v- Nurmohamed*** **[2017] EWCA Civ 979**, that noted that the following matters would be relevant:

a. The numbers in the group whose interests the disclosure served.
b. The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed.

c. The nature of the wrongdoing disclosed.
d. The identity of the alleged wrongdoer.

Detriment

43. Section 47B(1) ERA provides that, "*A worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure*".

44. A claim of detriment under section 47B involved two elements; there must have been a detriment, and that must have been "on the ground" of the disclosure, i.e. there must be a causative connection.

45. "Detriment" is not defined within the ERA, but the House of Lords, in ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**, noted, in relation to similar claims under the Equality Act 2010, that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. The Court noted that an unjustified sense of grievance cannot amount to a detriment, but emphasised that whether a Claimant has been disadvantaged is to be viewed subjectively. The Court of Appeal confirmed that the same test applies in relation to detriments in protected disclosure cases in the case of ***Jesudason v Alder Hey Children's NHS Foundation Trust*** **[2020] IRLR 374**.

Causation

46. In relation to the question of whether detriment is "on the ground of" the disclosure, the Court of Appeal in ***Manchester NHS Trust v Fecitt*** **[2012] ICR 372** noted that section 47B "*will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*" (paragraph 45).

47. Again, the House of Lords had previously examined similar provisions within the Equality Act 2010 where treatment was required to be "by reason that". In ***Chief Constable of West Yorkshire v Khan*** **[2001] ICR 1065**, Lord Nicholls noted that the test of assessing whether treatment had arisen "by reason that", involved questioning, "*why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason?*". The Court of Appeal in ***Jesudason*** endorsed that approach and we bore it in mind, changing "alleged discriminator" to "alleged causer of a detriment".

48. In any detriment claim, section 48(2) ERA provides that it is, "*for the employer to show the ground on which any act, or deliberate failure to act, was done*".

49. Section 48(2) however, does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

Disability

26. Section 6 of the Equality Act 2010 ("EqA"), which deals with the definition of "disability", provides as follows:

"*6 Disability*

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

27. With regard to the constituent elements of that definition, Part 1 of Schedule 1 of the Act provides as follows in relation to "long-term effects":

"*2 Long-term effects*

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

28. Section 212 of the Act provides that, "*"substantial" means more than minor or trivial*".

29. Paragraph 12 of Schedule 1 of the Act notes that, "*In determining whether a person is a disabled person, [a Tribunal] must take account of such guidance as it thinks relevant*". In that regard, the Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ("the Guidance") under S.6(5) of the Act. Section B9 noted that, in determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do, or can only do with difficulty, a point reiterated by the EAT in ***Goodwin v Patent Office*** **[1999] ICR 302**.

30. Sections C3 and C4 of the Guidance discuss the meaning of "*likely*". They provide as follows:

"*C3. The meaning of 'likely' is relevant when determining:*

- *whether an impairment has a long-term effect*
- *whether an impairment has a recurring effect*

…

In these contexts, 'likely', should be interpreted as meaning that it could well happen.

C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should

also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)."

31. In that regard, the Guidance echoed both the House of Lords decision in ***SCA Packaging -v- Boyle*** **[2009] ICR 1056**, which noted that "likely" should be interpreted as meaning that it could well happen rather than something which is probable or more likely than not, and the Court of Appeal decision in ***Richmond Adult Community College -v- McDougall*** **[2008] ICR 431**, which noted that account should only be taken of the circumstances at the time the alleged discrimination took place.

32. The EAT said, in ***Goodwin -v- Patent Office*** **[1999] ICR 302**, that the words used to define disability (in what was then section 1(1) of the Disability Discrimination Act 1995, which is now section 6(1) EqA) require tribunals to look at the evidence by reference to four different questions (or "conditions", as the EAT termed them):

- Did the claimant have a mental and/or physical impairment? (the 'impairment condition')
- Did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')
- Was the adverse condition substantial? (the 'substantial condition'), and
- Was the adverse condition long term? (the 'long-term condition').

These four questions should be posed sequentially and not together.

33. The burden of proof in establishing disability lies on a claimant, but there is no onus on a claimant to adduce medical evidence to establish each of the four conditions comprising the test set out in ***Goodwin***.

<u>Direct Discrimination</u>

34. Section 13(1) EqA 2010 provides that:

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

35. Section 23(1) then notes that there must be "*no material difference between the circumstances relating to each case*" when undertaking the comparison, with section 23(2)(a) further noting that the circumstances relating to a case "*include a person's abilities if… the protected characteristic is disability*".

36. The Court of Appeal summarised the approach to be taken in relation to section 13, and in particular the required degree of causation arising from the words, "because of", in ***Chief Constable of Greater Manchester -v- Bailey*** **[2017] EWCA Civ 425**, and stated, at paragraph 12:

"*Both sections use the term "because"/"because of". This replaces the terminology of the*

predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in Nagarajan v London Regional Transport [1999] UKHL 36, [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well-established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, Nagarajan, at p. 513B."

Discrimination arising from disability

37. Section 15(1) of the EqA, which is headed '*Discrimination arising from disability*', provides that, "*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.*"

38. In ***Pnaiser v NHS England and anor*** **[2016] IRLR 170**, the EAT summarised the proper approach to establishing causation under section 15. First, the tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then establish whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

39. With regard to the justification of any unfavourable treatment that may be considered to have arisen we noted that the EAT provided guidance, in the second case of ***Department for Work and Pensions -v- Boyers*** **[2022] IRLR 741**, at para. 22:

    "*When assessing whether unfavourable treatment can be justified as a proportionate means of achieving a legitimate aim, the discriminatory effect of the treatment must be balanced against the reasonable needs of the employer. The treatment must be appropriate and reasonably necessary to achieving the aim. The more serious the impact, the more cogent must be the justification for it. It is for the ET to undertake this task; it must weigh the reasonable needs of the employer against the discriminatory effect of the treatment and make its own assessment of whether the former outweigh the latter.*"

Reasonable adjustments

40. Section 20 EqA provides as follows:

    "20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts 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…"

41. The "*applicable Schedule*" is Schedule 8, and that provides, at paragraph 20, that a respondent is "*not subject to a duty to make reasonable adjustments if [it] does not know, and could not reasonably be expected to know -… that [the claimant] has a disability and is likely to be placed at the disadvantage…*".

42. Our focus here would be, as identified by the EAT in ***Environment Agency -v- Rowan*** **[2008] IRLR 20**, on identifying:

(i) The provision criterion or practice applied by or on behalf of an employer;

(ii) The identity of non-disabled comparators, where appropriate; and

(iii) The nature and extent of the substantial disadvantage suffered by the Claimant, in comparison to the non-disabled comparators.

43. In this regard, the Claimant was relying on a hypothetical non-disabled comparator. As noted by the Court of Appeal in ***Smith v Churchills Stairlifts plc*** **[2006] ICR 524**, the test is an objective one and it is ultimately the employment tribunal's view of what is reasonable that matters. The focus is on assessing whether a PCP had indeed been applied, whether the employee was, as a result, placed at a substantial disadvantage, and then whether the employer had taken such steps as were reasonable to avoid any disadvantage caused.

44. A claim of a failure to make reasonable adjustments may therefore require a tribunal to take the unusual step of substituting its own view for that of the employer, in marked contrast to the approach taken in respect of unfair dismissal, where such an approach amounts to an error of law.

45. The EAT noted, in ***Salford NHS Primary Care Trust v Smith*** **(UKEAT/0507/10)**, that the reasonable adjustment duty is "primarily concerned with enabling the disabled person to remain in or return to work with the employer".

46. There must be a causative connection between the disability relied on and the "substantial disadvantage". The EAT in ***Project Management Institute -v Latif*** **[2007] IRLR 579** noted that the Tribunal should look at the "overall picture" when considering the effects of any disability, and that there must be evidence of some apparently reasonable adjustment which could be made.

47. In assessing the reasonableness of any step, regard should be had to its likely efficacy, practicability and cost. So far as the efficacy of any step is concerned, it is only necessary to establish that there was a real prospect of the step avoiding or reducing the relevant disadvantage.

Burden of proof

48. Section 136 Equality Act 2010 deals with the burden of proof in discrimination cases and provides as follows:

"*(1) This section applies to any proceedings relating to a contravention of this Act.*

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

49. A two stage test is therefore usually involved. First, the claimant has to prove facts from which the Tribunal could decide that discrimination had taken place, and secondly, if so, the burden of proof then shifts to the respondent, which would have to prove, on the balance of probability, a non-discriminatory reason for the treatment in question.

50. We noted that the Court of Appeal, in ***Madarassy -v- Nomura International PLC*** **[2007] ICR 867**, confirmed that the statutory provisions dealing with the burden of proof require something more than less favourable treatment compared with someone not possessing the Claimant's protected characteristic. In that case, Mummery LJ noted, at paragraph 56, that, "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*".

51. We also noted that Sedley LJ, in ***Deman -v- The Commission for Equality and Human Rights*** **[2010] EWCA Civ 1279**, had confirmed that the "more" needed to create a claim requiring an answer need not be a great deal. In some instances it may be furnished by the context in which the act has allegedly occurred.

52. The EAT also confirmed, in ***Essex County Council -v- Jarrett*** **(UKEAT/0045/15)**, that it is not enough for a claimant simply to show that he or she has been treated badly in order to satisfy the tribunal that he or she has suffered less favourable treatment. A claimant must adduce evidence to support the contention that the treatment was less favourable in comparison with the treatment of others who did not share the same protected characteristic. In reaching its decision in that case the EAT drew on the earlier House of Lords decision of ***Glasgow City Council -v- Zafar*** **[1998] ICR 120**, which confirmed that the subjection of a claimant to unreasonable treatment is not, of itself, sufficient as a basis for an inference of discrimination.

53. That point was also made by Simler J, as she then was, in ***Chief Constable of Kent Constabulary -v- Bowler*** **(UKEAT/0214/16)**, where she said that, "*Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic*".

54. Finally, we noted that there can be occasions, particularly where a claimant is relying on a hypothetical comparator, where it is appropriate to dispense with the first stage of the burden of proof test and to focus on the second stage, the reason why the respondent treated the claimant in the way that it did. The utility of that approach was first pointed out

by the House of Lords, in ***Shamoon v Chief Constable of the Ulster Royal Constabulary*** **[2003] UKHL 11**, which in fact pre-dated the statutory burden of proof rules, where Lord Nicholls noted that, "*employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was*".

55. That approach was endorsed by Elias J, as he then was, in ***Laing -v- Manchester City Council*** **[2006] ICR 1519***,* where he noted that, "*it might be sensible for a Tribunal to go straight to the second stage…where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator - whether there is a prima facie case - is in practice often inextricably linked to the issue of what is the explanation for the treatment*". The Judge had made the same point in ***Brown - v- London Borough of Croydon*** **(UKEAT/0672/05)** which was subsequently endorsed by the Court of Appeal in that case.

Findings

56. We set out below our findings relevant to the issues we had to determine, reached on the balance of probability where there was any dispute. In fact, there was little material dispute between the parties over what had happened, although there were differences of view on how the events that took place were, or should have been, interpreted.

57. As we have noted, our focus was on the issues we had to determine, and we do not therefore comment on every aspect of the evidence we read and heard. Similarly, arising from our focus on the issues we had to determine, our findings, whilst broadly chronological, do also, in part, focus on matters of particular concern, e.g. the protected disclosures the Claimant asserted she made. We have inserted headings for ease of reference, but they should only be considered as broad guides to the content covered in each section, and not as exclusive demarcations.

The Claimant's background

58. The Claimant, born in 1970, is a clearly intelligent person. She obtained a first degree, started postgraduate study, and was awarded a PHD grant to study mathematical logic and uncertain reasoning, but, in her MSc year, became ill with chronic fatigue syndrome or an ME or post viral type illness. That disabled her for most of her 20's and, in her witness statement, she noted that she continues to have minor effects to this day.

59. As she recovered, the Claimant developed a psychosis in early 1999 and was diagnosed with schizophrenia in 2006.

60. Having been working in the statistics group at Unilever at the time of the onset of her psychosis, the Claimant worked at statistical officer grade for the Government Statistical Service in the Department of Health in London between 2000 and 2003, but struggled due to episodes of psychosis and confusion.

61. The Claimant commenced work as an Administration Officer in the Respondent's Debt Management Department in its Cardiff office in February 2016. The work of the department involves recovering payments from tax payers, principally by telephone, negotiating payment plans, and taking tax payments. This includes negotiating complex PAYE and VAT payments.

62. The Claimant confirmed in her evidence that she had had positive reviews of her work from the commencement of her employment in 2016 up to the latter part of 2018, and none of

the Respondent's witnesses who were in a managerial role were able to provide any evidence to the contrary as they only took up their positions from 2019 onwards. We noted that the Claimant indicated that she had been managed by eight to ten different managers between February 2016 and late 2018, which seemed to us to be rather a large number, but there were no contentions on the Respondent's side that the changes of manager at that stage were in any way down to difficulties with the Claimant.

63. The Respondent was aware of the Claimant's health issues and, after training, the Claimant was allowed to work a 4-day week. The Claimant was also always allowed to use paper notepads to jot down notes during calls, and to keep notebooks of training notes and of key sequences as her memory was poor. The Claimant noted in her witness statement that her recall had been bad in her 20's due to chronic fatigue syndrome and, whilst it had partially recovered, it remained poor in some ways.

<u>The Respondent's operation and policies</u>

64. The Respondent's Debt Management Team in Cardiff was split into three "spans", each being made up of some 10 to 15 Administration Officers under the leadership of a Team Leader, who reported to a Higher Officer. Higher Officers reported to a Site Lead, who in turn reported to a Regional Operational Leader. For the periods in which the events at issue in this case took place, the Claimant's Team Leader was Sandra Edwards, who reported to a Higher Officer named Jayne Collins, from whom we did not hear evidence. Ms Collins then reported to the Site Lead for Debt Management, Vivienne Harris, who in turn reported to the Regional Operation Leader, Marc Incledon.

65. The Respondent's employees are subject to a document entitled "*Our Commitments*" in relation to how they interact with each other. These were that colleagues would:

    * *Be fair, kind and human*
    * *Not create fear in others*
    * *Include people regardless of difference*
    * *Work together, recognising our common goal*
    * *Have honest conversations, with respect*

66. Concerns about conduct, which would include failure to comply with "*Our Commitments*", are dealt with under the Respondent's "*Upholding Our Standards of Conduct*" Policy, in essence its disciplinary policy. That Policy notes that, in less serious cases of misconduct, an informal word can often be all that is required. However, where matters are more serious, formal action is implemented.

67. Two possible methods of dealing with such misconduct are indicated; Formal Approach A and Formal Approach B. The wording around which approach should be used is not entirely clear. An opening paragraph notes that, "*Where the facts are clear and not contested, and the potential outcome is misconduct, Formal Approach A is appropriate*". However, "*If the facts are unclear or contested and or the potential outcome is gross misconduct*", Approach B will be used.

68. The Policy then goes on to provide more detail and notes that Formal Approach A "*does not apply in more serious cases where the outcome could be dismissal or dismissal with reengagement at a lower grade*", and that approach B "*applies in all cases where the potential misconduct is more serious, such that the outcome could potentially be dismissal or dismissal with reengagement at a lower grade*".

The asserted protected disclosures

69. The Claimant asserted that she made 5 protected disclosures, referred to as PID 2 to PID 6 in the List of Issues. We deal with each in turn.

PID 2

70. On 2 October 2018, the Claimant sent an email to a manager whose name she had found on the Respondent's intranet. In that she stated as follows:

"*It seems to me to be morally and legally wrong and against the hmrc and civil service code, to collect debts or to allow DCA's to collect debts on our (hmrc's) behalf, where the validity of the debt is under dispute and where we agree the dispute is open and we haven't attempted yet to resolve it.*

…

Until now our guidance has made it clear that if a debt's validity is disputed and we've accepted this, particularly if it's the value of a PAYE return that is under dispute, then we do not collect the debt until the dispute is resolved.

We also do not send disputed debts to Debt Collection Agencies (DCAs). Often we withdraw the debt from a DCA if it goes into dispute.

There is guidance about this, for instance, on the Debt Management Guidance hub.

Invalid debts can arise through hmrc or other administrative or computer errors. Its just obvious common sense and decency not to cause stress, which can be immense, to companies (who may be part time sole trader individuals as well as large companies) for debts which may well be admin errors, quite possibly hmrc admin errors.

Recently I have come across cases where I have been told its acceptable for debts where we have agreed their validity is under dispute, to be sent to DCAs to chase and collect.

In the main case, I was told today that (after I spent some time – weeks on and off? – objecting and mentioned whistleblowing yesterday, though that may be coincidence), that the debt was being withdrawn from the DCA.

However I have also been told, by email, that in general hmrc debts in open dispute can be sent to DCA's to actively collect.

I am wondering whether I can successfully whistle blow on this practice and get it stopped."

71. Having received a bounce-back notice to the email, the Claimant forwarded it to Barrie Williams, a Business Unit Head, on 4 October 2018, who acknowledged receipt of it on the same day.

PID 3

72. The Claimant indicated in her evidence that she had verbally raised an issue with her then manager, Gareth Rees, in spring 2019 about the pursuit of debts from a dissolved company. No evidence to dispute that was provided by the Respondent, and there was indirect support for it from an email sent to Mr Rees by the Claimant on 25 July 2019 in which she said as follows:

"*I just took payment from a tax payer of a final PAYE return because I failed to check whether or not it was a dissolved limited company.*

I thought from the tp's conversation that it was just a ceased ltd company, but I should have checked and I think always have, until today.

As this is an issue I feel really strongly about and as the hub guidance does say to check, I am particularly worried about my mistake.

I'm not sure whether to phone the tax payer and suggest she checks the rules on dissolved limited companies. She may wish to claim the money back.

Please note that this was a genuine mistake and not at all what I intended to do. I am shocked at my mistake and sorry for it. But I am still angry at you about the time when I picked up a call from someone with a dissolved ltd company whom we'd been chasing for months for payment, – this was before you were my manager– and I went over to you as one of the only managers available and you said to pass the call to a colleague as it was a matter of conscience whether or not to take the payment. (It wasn't. Legally we shouldn't have done so.)"

PID 4

73. The evidence in relation to this was far from clear. The disclosure was said to have been made by the Claimant in an email to her then line manager, Tom Lloyd, on 7 October 2020. However, that email simply referred to the Claimant having put in a formal grievance in relation to "interest objections", i.e. objections by a tax payer to the levelling of interest following deferral of the liability to pay PAYE during the early COVID period. The grievance itself was not before us.

74. However the Claimant's underlying concern appeared to relate to what she contended to have been the falsification of notes of calls with companies relating to their objections to being charged interest on PAYE payments which had been deferred. The Claimant contended that the deletion and replacement of call notes involved a breach of data protection obligations.

75. It was difficult for us to form firm conclusions as to whether the Claimant had raised this concern and how. However, the Respondent accepted that the grievance had been processed under its Whistleblowing Policy, which indicated to us that the concern had been raised and related to concerns about data protection breaches.

76. We noted evidence from the bundle that the Claimant was told, in February 2021, by her managers, that notes could not be altered, and that the Claimant continued to object to that and took advice from her Trade Union, with the Trade Union confirming that it was not possible to alter notes. The Claimant confirmed in her witness statement that she left the Union at this point, finding the statement that notes could not be altered dubious.

PID 5

77. On 1 December 2021, the Respondent introduced a new process for revenue loss cases, i.e. cases where the tax owed was to be written off. A new FUSE process[1] was introduced.

[1] It was never explained to us what the acronym, "FUSE", stood for, but it appears to be a workflow process by which officers go through an electronic form, with the answers inserted leading to further questions and ultimately an outcome.

78. The Claimant, on 10 December 2021, emailed the person who had notified her of the new process, copying in Sandra Edwards who by then had become her Line Manager noting that she was "*HORRIFIED*" by some of the questionnaire questions. She went on to say with specific reference to two of the questions as follows:

"*1. "What are the available assets" implies that a dissolved limited company can have assets. Legally, it can't as far as I know. My most serious concern about this questionnaire is that it appears to encourage collectors to break or disregard the law, by treating dissolved limited companies as entities with assets. (I gather there are very occasions when directors actions have been criminal where assets might be relevant, but in that case should the revenue loss process be used anyway?)*" and

"*2. You can't chase progress on appeals and disputes for a dissolved company because it is illegal to contact / go through security / discuss the accounts*".

79. The colleague replied to the Claimant, attempting to address her concerns, noting, with regard to the Claimant's point 1 that available assets could be noted on the form if the company had applied for deregistration, but otherwise the facts as known should be included, with a simple "*Not aware of any aspects for assets/ cannot check this/not applicable*" being sufficient, and, with regard to the Claimant's second point noting, *"Revenue losses do not always relate to a dissolved case, hence as long as we choose the exact Type, I am fairly confident that it wouldn't be an issue and advising that you are no aware of any disputes or is not applicable, or whatever the case might be*".

80. Ultimately, it appeared to us that the issue of the possible pursuit of payment from directors of dissolved companies was very much the same as the subject matter of PID 2.

PID 6

81. In summer 2022, a new telephone software system was introduced within the Respondent, which it appears to have been accepted by all concerned had significant "teething troubles", with several problems arising. The particular concern articulated by the Claimant in her evidence before us was that the software would introduce a new call immediately upon termination of the previous one, at a time when the first customer's computer record was still open. The Claimant was concerned that errors could be made, and that the first customer's information could be provided to the second customer by mistake.

82. The Claimant sent an email to the Civil Service Commission on 18 August 2022, noting that she had been raising the issues internally in relation to the new software, and that she wondered if the Civil Service Commission pressure could free up funds for very good systems analysts to check the new software and that the approaches to using it did not break the Civil Service Code. She noted that she was, "*mainly concerned about software faults leading to security risks to client data*". She also referenced concerns about the poor quality of service the Respondent was able to offer due to the problems with the system, and also about the mental health of colleagues, and the Claimant herself, trying to cope with the system, although she noted that some colleagues were happy that the issues were teething issues and would be resolved.

<u>Issues which led to conduct allegations being raised with the Claimant</u>

83. Ms Harris recorded in her witness statement that, when she started as Site Lead in 2019, she had been aware that the Claimant's behaviour had been causing challenges for her line manager, and she noted that she recalled that Jayne Collins had reported to her that there were issues in communicating with the Claimant and with her repeatedly highlighting

detailed concerns about a variety of issues which was causing managers' time to be monopolised by dealing with the Claimant. That suggested that issues arising from the management of the Claimant had arisen prior to 2019, although, as we have noted, the Claimant indicated that she had had only positive reviews prior to 2019. The Claimant herself in her witness statement however noted that she had poor relationships with her managers in 2019, noting a deterioration in the working environment with Gareth Davies, and that her relationship with Gareth Rees started poor and remained poor. In fact, she noted that she was "*delighted to be rescued from Gareth Rees in late 2019 by Tom Lloyd*".

84. The factual background to the specific concerns about the Claimant which were raised with her as possible disciplinary allegations, although not all ultimately were pursued in that manner, is set out in the following sections below.

Spreadsheet alterations

85. The concerns raised by the Claimant in relation to what she contended to have been the falsification of notes, as noted in relation to PID 4 above, progressed through 2020 and up to February 2021. A not dissimilar concern was then raised by the Claimant with Ms Edwards in April 2021, regarding what the Claimant contended to have been the alteration of spreadsheets. Ultimately, Ms Edwards showed the Claimant how to check who had changed an entry on the spreadsheet, but that only occurred after a considerable period, with the Claimant complaining that her concern had not been investigated. A form of internal mediation process also took place between the Claimant and Ms Edwards which, although ultimately resolved, was only closed when Ms Edwards insisted upon it, the Claimant having first asked for it to be kept open in case further issues arose.

Additional leave

86. Also in early 2021, an issue arose regarding additional leave for the Claimant. The Claimant's daughter was due to turn 18 in September 2021, and it appears from the emails within the bundle, that, prior to that, the Claimant had been in the habit of taking parental leave, along with part of her annual leave, to help with her mental health conditions.

87. In February 2021, the Claimant then emailed her manager asking if she could have up to 12 days (3 weeks) unpaid leave for mental health reasons to be taken throughout the leave year, business need allowing. In her witness statement, the Claimant noted that she saw mental health leave and additional leave partially as a replacement of parental leave and additional leave, because she had been using some of her annual leave days to help with her mental health. In her email, the Claimant noted that she could not really take any further parental leave as her daughter would be 18 that year.

88. The Claimant's request was referred to Ms Harris who discussed it with HR, and, in April 2021 concluded that the request should be rejected. Ms Harris noted that the request did not fall under specific special leave options operating within the Respondent's organisation, and also noted that if someone is not well enough for work then sickness absence would be appropriate. Ms Harris also noted that, whilst she could appreciate the Claimant's rationale for the request in terms of having a bank of unpaid leave available to use, she was concerned that if it was granted others, with their own personal reasons, would make similar requests which could not be sustained.

89. Ms Harris noted that there were ways in which the Respondent could, and did, support the Claimant to manage her wellbeing, such as additional breaks throughout the day, and queried whether she had considered requesting a change to her working pattern, possibly working fewer days or hours. She also noted that the Respondent could, on occasion,

support the Claimant in altering her non-working day from a Wednesday if she was having a difficult week.

90. The Claimant initially sought to appeal Ms Harris's decision, although that did not ultimately appear to have been pursued. In the event, after further discussions, it was agreed that the Claimant would work one day less every fourth week, with that arrangement commencing in January 2022.

Salary and holiday entitlement

91. In view of the change to the Claimant's working patterns at that time, there was a consequential change to her salary and holiday entitlement. The Claimant indicated that she sought clarification of those matters verbally in January 2022, and there were emails in the bundle from February 2022 in which the issue was discussed.

92. On 10 February 2022, the Claimant emailed the Respondent's HR Service Centre, noting that her January payslip was incorrect, and that she had been advised by HR that the payslips would continue to be incorrect every month as a result of the changed working pattern.

93. On the same day, the Claimant raised the issue with Ms Edwards who replied, again on the same day, noting that the Claimant could use a leave calculator on the Respondent's intranet to get a better picture of her leave on a week-by-week basis. On 23 February 2022, the Respondent's HR Service Centre informed the Claimant that the Respondent's systems worked on projected working hours during the leave year, and that, due to the Claimant's working hours, her entitlement would change at the start of each week based on her working hours history, such that the Claimant's entitlement may need to be adjusted at the end of a leave year. The Claimant complained that that information showed "*an almost incredible degree of incompetence on behalf of HR*", and that she was looking into getting legal advice on the issue.

94. Ms Edwards then completed the Claimant's leave calculator and provided it to her on 1 March 2022. Whilst it was not clear from the documents, it appeared that the Claimant's annual salary was clarified at around the same time.

"Rate It" feedback

95. The Respondent operates a system of feedback on its operational guidance known as "Rate It". The Claimant was a regular, and indeed it seems unusually high, user of Rate It, and it appeared that many of her Rate Its led to further clarification of the internal guidance.

96. On 7 March 2022, a member of the debt management technical team, who provided support to the team behind the guidance, emailed Ms Edwards noting that they were receiving an unusually high number of Rate Its from one of Ms Edwards's team, i.e. the Claimant. He noted that the Claimant had submitted 204 Rate Its over the last few years, half of which had been rejected as not requiring a change to the guidance. He queried if there was any particular reason for the number of Rate Its, and whether the Claimant was submitting them on behalf of her team. He questioned whether a more effective way of supporting the Claimant to understand the guidance locally could be found and also queried whether the Claimant was just really engaged and enthusiastic.

97. Ms Edwards replied to the email the following day noting that the Claimant felt that if she saw something wrong with the guidance then she would do a Rate It on it. She commented that she felt that the Claimant did not look at the bigger picture before doing it, and confirmed

that the Claimant did not do Rate Its on behalf of the team, and all were her own. In answer to the particular questions, Ms Edwards replied that she did not think that the Claimant was being enthusiastic or engaged, and that she just found fault with a lot of things and rated them even when there was no reason to do so.

Remissions

98. A recurring concern of the Claimant revolved around the Respondent's practice relating to "remissions", essentially the writing off of tax debts due. As we have noted in relation to our findings relating to the protected disclosures above, the Claimant had a particular concern around the process used, and, in particular, how it could potentially involve directors of dissolved companies being pursued for the tax debts of those companies.

99. Whilst little evidence was put before us of the specific practices adopted by the Respondent, it appeared to us that the Respondent has a process by which debts of certain taxpayers are viewed as irrecoverable, largely due to insolvency, with the debts then being "remitted" or written off. The employees dealing with these situations had to go through processes and complete electronic forms in order to effect the remissions.

100. A new process was introduced by the Respondent in relation to remissions in November 2021, and that led to the concerns that the Claimant raised as part of her PID5. As we have noted, the Claimant had issues about the process and refused to apply it. That did not have a significant impact on the Respondent, as the need for remissions did not arise frequently.

The "DWGM incident" and its aftermath

101. A particular incident arose between the Claimant and Ms Edwards on Friday 17 June 2022, which continued on Monday 20 June 2022. The team in which the Claimant worked, led by Ms Edwards, held Daily Work Group Meetings, or "DWGMs" every day for 15 minutes. These were to discuss work-related matters relevant to the whole team, but also, particularly on Fridays, involved discussion of personal information, particularly about what people were going to do at the weekend.

102. On 17 June 2022, Ms Edwards shared with the group that she was going to attend a scan with her daughter, at which they were going to find out whether her daughter was expecting a girl or boy. A member of the team asked what her daughter would like, and Ms Edwards replied that, as she already had two boys, it would be nice to have a girl, commenting that it would be nice to be able to buy pink dresses for her. The Claimant then said, "*Sexist*", which she contended had been said under her breath and left the meeting.

103. Soon after, the Claimant sent Ms Edwards a message on Teams, noting that a colleague sitting behind her in the office was wearing a very smart pink shirt. She noted that she hoped that Ms Edwards had a nice time with her daughter and that the baby would be healthy whatever sex, but noted that "*no everyone is entirely happy with the pink means baby girl culture*". She concluded by noting that that was unimportant compared with having a healthy grandchild, and that she therefore wished Ms Edwards all the best. Ms Edwards replied, thanking the Claimant and noting hopefully that the colleague wearing a pink shirt would be a good omen.

104. At the following DWGM on Monday 20 June 2022, a question was asked of Ms Edwards as to how the scan had gone, and she replied by noting that, as her daughter had put it, they were destined to be a mother and grandmother of boys, as it had been confirmed that Ms Edwards's daughter was having another boy. The Claimant left the meeting.

105. Soon after, the Claimant sent Ms Edwards an email with the subject heading "*Complaint about DWGM topic – please apologise*". The Claimant opened by saying that she was extremely glad that the Claimant appeared to have a healthy granddaughter (the Claimant later corrected this to grandson) so far, and that she hoped that she (corrected to he) remained healthy and had a wonderful and long life. The Claimant then said, "*I don't think DWGM is the appropriate place for informal sexism, please apologise. Please keep the overt spoilt–pink–baby–girl–princess sexism for your private and family life. Please be aware we don't all share your beliefs and culture.*".

106. The Claimant then concluded her email by saying, "*Please respect the fact we don't all belong to the same culture within the UK. I spent a lot of time when [the Claimant's daughter] was little trying hard to counteract the "pink is for girls" culture, which I personally regard as mildly damaging when taken to extremes.*".

107. The Claimant sent a further email to Ms Edwards some 24 minutes later, in which she noted that she had tried to protest against Ms Edwards's attitude on the Friday, but that instead of taking notice and respecting her point, Ms Edwards seemed to intensify her attitude on the Monday. The Claimant noted that it had triggered her mental health symptoms although not badly.

108. As we have noted, the Claimant then sent a further email some 11 minutes later noting that she had incorrectly referred to granddaughter when she had meant to refer to grandson. The Claimant then sent a further email to Ms Edwards on 23 June 2022 repeating her apology for the mistake she had made in her original email, and also commenting that she did not think her complaint was well worded and saying sorry. She then went on to say, "*Also, I suspect it's possible you haven't met someone with my culture before, although it was common place in the social circles in which I grew up*". The Claimant went on to say that she had expected a reply, and did not think she could be expected to attend DWGM if the matter was not sorted out. She asked Ms Edwards to either attempt to reply to her complaint or to ask her to re-word it.

109. Ms Edwards, after discussions with her manager, Jayne Collins, considered that it would be best not to reply. The matter was however brought to Ms Harris's attention, and she met the Claimant on 28 June 2022. It was not considered by Ms Harris that an apology from Ms Edwards was needed as it was not felt that she had done anything wrong, and that the Claimant may have misinterpreted the sentiment behind the conversation. Ms Harris noted that the heading of the email, particularly the reference to "*apology please*" was a bit aggressive.

110. The Claimant accepted that, and that possibly an apology was not required, but stated that she wanted an assurance that Ms Edwards would not in future push "*sexism/cultural differences*" in DWGMs, and that, until that was received, she was refusing to attend any DWGM led by Ms Edwards. Ms Harris advised the Claimant that it was not acceptable to refuse to attend a DWGM, and they would need to consider how that could be resolved.

111. Ms Harris also raised with the Claimant that she had previously spoken to her about the number of concerns she raised, and that it could become unreasonable for a leader to receive so many, to which the Claimant replied that she felt the concerns raised in emails she sent had been justified and did not agree that they were excessive. Ms Harris also raised the Claimant's refusal to comply with guidance regarding remissions and to complete the remission process, with the Claimant confirming that she was not complying as she did not agree with what she was being asked to do.

112. Ms Harris concluded the conversation by noting that, whilst that conversation had been informal, the Claimant needed to understand that if she continued to raise complaints on

unfounded matters and out of proportion then there may be no option other than to go down a formal route.

113. Ms Harris had prepared a file note of the discussion, which the Claimant did not materially challenge, and which we therefore accepted as an accurate record of it.

114. We were somewhat surprised that no formal action was taken in relation to the Claimant at that stage. Indeed the Claimant noted in her evidence before us that she felt that her original email to Ms Edwards had been "*appalling*", and noted in her witness statement that she thought that what should have happened was that she should have been told off by senior management within a day or two for the language used. She commented that she should have been told what language was not acceptable, and that action should have been taken against her on the spot if needed.

115. Nevertheless, no action was taken in relation to the Claimant's email. The Claimant however wanted the matter to be taken further formally, and, after some discussion about mediation, which Ms Edwards refused to participate in due to her concerns over the mediation that had taken place between herself and the Claimant in 2021, the Claimant submitted a formal concern form.

116. The concern was dealt with by Neil White, a member of the Respondent's Internal Investigations Team, and that led to the Claimant preparing an email to Ms Edwards, which she sent to Mr White for approval. The proposed email opened by noting that the Claimant looked forward to attending DWGM from that point onwards, and that, in future, she would aim to handle problems arising in a DWGM in the time allocated for it. She went on to say that if she left a DWGM early due to some unpleasantness she would aim to attend the next one as usual unless the matter was very serious. She commented that valuing diversity involves respecting the deeply held, differing, beliefs and views of co-workers, and that if she found herself in deep disagreement with a colleague about a non-work topic and if she thought the colleague was over emphasising their view to the exclusion of other views, then she may politely state her view. She commented that if relationships then deteriorated, for example if she was completely ignored or if she was abused for her viewpoint, she could then excuse herself from the remainder of that particular meeting.

117. The Claimant then concluded her email with the following:

"*On the triggering topic:*

I guess your grandson was born a while ago? I hope he is healthy and doing well. I'm quite certain he is very very much loved indeed.

In some places, China particularly, there's been a very strong tendency to prefer boy babies to girl babies. I take it we would both be dismayed to be in a 20th C Chinese workplace discussion, with colleagues expressing disgust at the birth of a "useless" girl baby. But our opinions on how to stop that happening differ, I guess.

If you ever want to discuss this triggering topic further, I'm happy to do so, but we must take great care not to antagonise each other".

118. Mr White and the Claimant discussed the proposed email and, in an email on 19 October 2022, he summarised the discussion. With regard to the Claimant's draft email to Ms Edwards, he noted that he and the Claimant had talked about the fact that everyone drafts things differently, but that he did not think the content of the email was offensive.

119. We have to say that we found that view rather surprising, and that appears to have been the view of the Claimant's other managers who ultimately pursued the email as a matter of discipline. In our view, the way the Claimant concluded the email would have left Ms Edwards in no doubt that the Claimant continued to feel that she, Ms Edwards, had been in the wrong in relation to the comments she had made in the meetings in June 2022, and had been, in the Claimant's view, sexist.

The instigation of the disciplinary process

120. By 9 September 2022, Ms Harris had completed an "Upholding Our Standards Misconduct Form", commonly referred to as a Manager's Referral Form, and had sent it to a member of the Respondent's HR Team. In that form, Ms Harris noted, in some detail, the issues that had arisen during the DWGM meetings, although she mistakenly referred to the incident arising in "*a recent DWGM*" rather than across two recent DWGMs. After summarising the issues that had arisen from the DWGMs and their aftermath, Ms Harris noted that there was, "*an ongoing concern that Rachel continues to refuse to attend DWGM's and therefore, is failing to comply with a reasonable leadership request*.".

121. Ms Harris then went on to note that that was one example of unacceptable behaviour and/or unnecessary complaints and concerns being raised by the Claimant since December 2021. She noted that local leadership had been reticent to progress formal action whilst occupational health advice had been sought but that, following receipt of occupational health advice, in which there was clear recognition of the Claimant's medical conditions, there was a statement in relation to the Claimant's behaviour which Ms Harris felt was key, which was, "*…To be clear, none of the concerns that you raised in your original referral or subsequent email appear to be health related and I would recommend that you refer to your internal policies and procedures in managing these concerns in the normal manner...*". Ms Harris noted therefore that there appeared to be no contra-indications to the consideration of the formal conduct process where those behaviours continued to prevail. Ms Harris then listed, in seven bullet points, other instances that she contended appeared to be unacceptable behaviour or unnecessary complaints. These ultimately formed the basis of Ms Harris's notification to the Claimant that she faced disciplinary allegations, although nearly all did not ultimately proceed to be considered in a formal disciplinary hearing.

122. In the referral form, Ms Harris noted that, whilst the Claimant's conduct was not believed to be vexatious, as it was clear that she was passionate about her concerns, the frequency and volume of the complaints and concerns raised often led to a feeling that the Claimant was simply being difficult. Ms Harris went on to note that that, combined with the time commitment placed on the Claimant's management to respond, placate and support the Claimant, was unsustainable. Ms Harris noted that, at every juncture, local leadership had assumed that the concerns being raised were raised in good faith, and had considered each concern on its own merits and had tried to support the Claimant in conjunction with HR. Ms Harris also noted that the Claimant's personal and health related issues had also been taken into account, but concluded that it was nevertheless felt that the volume and frequency of concerns needed to be addressed via the formal conduct procedure, to reduce continued pressure on the leadership team, and to provide a clear expectation of the behavioural improvements needed going forward.

Occupational health referral

123. A referral to Occupational Health had in fact been made in June 2022, in which it was noted that the Claimant seemed to be questioning guidance and processes more frequently, and to be struggling to accept the requirements of her role. Reference was made to the Claimant currently refusing to complete a specific process which we understood to be a reference to the remissions process.

124. The Occupational Health Report, issued on 6 June 2022, noted that, "*Ms Gladstone agreed that there is a specific issue that has arisen since returning to business as usual in relation to which you have met, and a way forward has been determined. It would be helpful if protected time could be allocated to enable this specific issue to be progressed, though her reaction to the issue and her response to it not appear to be related to underlying mental health conditions. On the basis of that discussed, current adjustments including a flexible approach to breaks, an adjusted work pattern and one-hour lunch breaks appear supportive.*".

125. Following a request for clarification, the Occupational Health Adviser submitted an additional report on 1 July 2022, in which she noted that the underlying intent of her report had been, "*to clarify that I found no evidence of current mental health disorder symptoms, and that therefore, any concerns regarding workplace behaviours….. might best be discussed during protected time on a one-to-one basis in the usual format. To be clear, none of the concerns that you raise in your original referral or subsequent email appear to be health related and I would recommend that you refer to your internal policies and procedures in managing these concerns in the normal manner*".

Disciplinary steps

126. Following Ms Harris's completion of the Manager's Referral Form, it was decided that formal consideration of the Claimant's conduct under the Respondent's Upholding Our Standards Policy would be implemented. Ms Harris met with the Claimant on 26 September 2022 to advise her on that, and informed her that a formal letter notifying her of the process to be adopted would be emailed to her later that day. That letter was then sent by email on 26 September 2022, and stated as follows:

    "*We met on 28th June to discuss an incident that led to your refusal to attend DWGM's. Unfortunately, we were unable to reach a resolution despite support from our Mediation and Resolution Support Services.*

    In recent months, we have also discussed some broader concerns we hold around your reluctance to follow HMRC Guidance on Revenue Loss/Remission cases, despite our assurance to you, that this is the correct protocol for all colleagues and as such, a reasonable leadership request.

    In addition, we have seen numerous other behavioural examples that we have been unable to resolve in an informal setting, which include the following:

    - *Concerns raised regarding HMRC leave allocations and a reticence to accept team leader and HR / EAS explanation.*
    - *Concerns around entitlement to parental leave.*
    - *Suggesting that entries on an excel share point were being altered and that notes on core systems were being amended / adjusted.*
    - *Repeated escalations to numerous offsite teams, circumnavigating local leadership channels available.*
    - *Repeated concerns raised with the rate-it guidance teams.*"

127. Ms Harris noted that, as work needed to be done to determine the facts and understand the

events and the Claimant's actions, it would be necessary to appoint an independent decision manager who would shortly be in touch. Ms Harris noted that the process would be as set out in the Upholding Our Standards of Conduct Policy Approach B.

128. The Claimant replied to Ms Harris's letter by email on 30 September 2022, seeking clarification of what Ms Harris had meant by the reference to repeated concerns raised with the Rate It Guidance Team. She commented that it appeared to mean that the Respondent was objecting to her raising and following up guidance Rate Its, which she felt was praiseworthy behaviour on her part. Ms Harris replied shortly afterwards, acknowledging the points the Claimant had raised and confirming that she would pass them on to the decision manager once appointed for due consideration and as part of the Claimant's representations within the formal conduct process.

129. Following Ms Harris's completion of the Manager's Referral Form, Letitia Duguid, of the Respondent's HR Expert Advice Service ("EAS"), was appointed as the EAS Case Worker. She obtained further information from Ms Harris about the issues of concern that had arisen and the timelines involved in relation to them.

130. Ms Harris and Ms Duguid then discussed the matters of concern, with Ms Duguid's advice being that, although the matters needed to be dealt with, some had occurred some time earlier and some of the individual events had eventually been resolved, which made it less appropriate to raise them as part of a formal disciplinary.

131. In addition, a further matter of concern had arisen following an email the Claimant had sent to the Respondent's Business Support Team on 12 October 2022 regarding Christmas leave. In that email, the Claimant had made her requests for leave over the Christmas period and had then said, "*I know that I may get the sack as a result of the current disciplinary procedure, but until I do, I intend to work under the assumption that I won't*". Ms Harris was of the view that that reference infringed the requirement within the Respondent's Disciplinary Policy to keep the detail of it confidential.

132. In Ms Harris's initial letter of 26 September 2022, she had outlined possible sources of support for the Claimant and had then indicated that the Claimant should not talk to other colleagues or customers beyond that, and that if she did, it could amount to a breach of the Respondent's standards.

133. Ms Harris also felt that a further concern had arisen in the way the Claimant had emailed Ms Edwards on 18 October 2022 relating to her indication that she would return to attending DWGMs. We have already noted the concluding section of that email at paragraph 117 above.

134. Ms Harris, in discussion with Ms Duguid, therefore concluded that the focus of any Upholding Our Standards Process should be on four matters:

- *The Claimant's ongoing refusal to attend DWGMs due to the incident with Ms Edwards, where although the Claimant had now indicated that she would attend DWGMs, her refusal to do so had been without good reason.*

- *The Claimant's ongoing refusal to undertake remission work.*

- *The Claimant telling people outside of the support network available to her about the ongoing disciplinary process.*

- *The Claimant continuing to refer to the DWGM incident in correspondence to Ms*

Edwards.

135. Ms Harris then updated the Manager's Checklist to record that. She included the following:

"***Update Checklist***

Following submission of the Upholding Our Standards Checklist, a conversation was held with Letitia Duguid (HR EAS) who advised that this case would fall more appropriately under Misconduct and dealt with via Formal Approach A. Whilst there is severity with the concerns, and despite informal approaches to resolve, there are no formal warning in place which would be expected in a case of this nature.

Having discussed this with the appropriate people within the Business, we are in agreement with the EAS advice and will now deal with under Formal Conduct Approach A and address the following conduct concerns".

The remaining concerns were then set out.

136. The rationale for proceeding under Approach A rather than Approach B was that the level of misconduct being looked at was less serious, and therefore dismissal was not a possible outcome' and that the Respondent's position was that the basic facts underlying the allegations were uncontested. In that regard, it was noted that the Claimant did not contest that she had refused to attend DWGMs or that she had refused to do remissions work. It was felt that she could not contest sending the email to the Business Support Team referring to the disciplinary process, and that she could not contest that she had continued to raise the DWGM issue in the email to Sandra Edwards. It was further noted that the Claimant could well contest that those matters amounted to misconduct and to argue that she had done nothing wrong and put forward reasons for that, but that was all open to her to do under Approach A.

137. Ms Harris met the Claimant on 18 October 2022 to explain the change of approach, and sent her an email on 19 October 2022 to confirm that. In that, Ms Harris noted as follows:

"*Further to our informal conversation on Tuesday October 18th, I'm writing to confirm that after further consideration I have decided that formal Approach A of the Upholding Our Standards of Conduct process is more appropriate.*

The concerns raised below will now be considered under Misconduct instead of Gross Misconduct as originally stated in my letter to you of 26th September 2022.

- *Your non-attendance at DWGM's*
- *Your refusal to work within the parameters of guidance that all staff are expected to adhere to in relation to remissions work*
- *Discussing that you are under a disciplinary procedure with people outside of the support available to you which was referenced in my letter of 26th September 2022*
- *Continued reference to the DWGM issue in email communication.*"

138. On 20 October 2022, Ms Harris telephoned the Claimant to check that she had seen her email regarding the revised disciplinary concerns, and that the matter now was proceeding under the basis of being allegations of misconduct rather than gross misconduct. The Claimant confirmed that she had not had time to read the email.

Disciplinary hearing

139. Patricia Wilkinson was appointed to be the Decision Manager in relation to the Upholding Our Standards of Conduct process relating to the Claimant. She received Ms Harris's revised Manager's Referral Form, from which she took the allegations that were to be considered. There appears to have been a disconnect between Ms Harris and Ms Wilkinson in relation to the allegations that were intended to be addressed and which were ultimately addressed.

140. Ms Harris had listed four particular bullet points, but the first, the DWGM issue which occurred in June, was followed by a block of text spanning some 25 lines. The other three bullet points were made up of between two and four lines each. Reading the Manager's Referral Form, it was clear to us that Ms Harris intended that all four matters should be addressed formally. However, Ms Wilkinson appears only to have considered that the last three bullet points should be addressed. These were; the refusal to undertake remissions work, the referencing of being under disciplinary investigation when requesting leave, and the further email to Ms Edwards referencing the underlying issue that had arisen in the June DWGM.

141. Ms Wilkinson wrote to the Claimant on 26 October 2022 noting the three matters of concern that she was considering. Unhelpfully, the letter was not particularly well drafted. In particular, two further matters were included within bullet points underneath the three bullet points outlining the allegations, but they simply referred to background circumstances, the first noting that the three concerns were felt not to maintain the expected standards of conduct and behaviour, with the other simply stating that previous informal meetings had been held with management.

142. Ms Wilkinson also noted, "*As the issue concerned is clear and not contested (i.e. you agree the circumstances set out above took place) it is possible to deal with these matters quickly. I am using Formal Approach A under the Policy.*".

143. Ms Wilkinson invited the Claimant to a meeting on 3 November 2022 via Teams, and reminded her of her right to be accompanied and that the Claimant should alert her to any reasonable adjustments required, either for the Claimant or her companion, in advance of the meeting. The Claimant replied to Ms Wilkinson on 27 October 2022 querying whether Process A or B would be used. She also sought time to read Ms Wilkinson's letter. She concluded her email by saying, "*If the allegations are not in the attached document, then I need to know what they are first, before attending any meeting*".

144. Ms Wilkinson replied to the Claimant by email later than day, attaching the Manager's Referral Form that she had received and noting that she had been advised that the matter should be dealt with under Process A as that was discussed and agreed by EAS. The Claimant sent a further email again later that day stating that the disciplinary rules she had been sent stated that if the person undergoing the process disagreed with the charges then Process B must apply.

145. The Claimant then sent a more detailed email to Ms Wilkinson on 31 October 2022, again noting that she contested many of the facts behind the allegations and suggesting that Formal Approach B would be more appropriate. She then inserted her initial responses to the three allegations.

146. The Claimant emailed Ms Wilkinson further on 2 November 2022, indicating that she did not feel able to attend the meeting on 3 November as she had not read the documents fully, and was looking to arrange for a colleague to attend the meeting with her. Ultimately, no colleague was available to attend with the Claimant and she therefore attended the meeting

on her own. The meeting was however put back to 10 November 2022 to give the Claimant more time to prepare.

147. During the meeting the three disciplinary allegations were discussed. However there was also a discussion of many of the other matters raised in Ms Harris's original letter of 26 September 2022, although Ms Wilkinson confirmed in her evidence that she had not taken account of those matters as part of her decision or in the outcome she reached.

148. That outcome was that the allegations under consideration were proven, and Ms Wilkinson set out her reasons for reaching those conclusions in a Decision Notice. She decided that the appropriate sanction would be a first written warning for 12 months, which would remain on the Claimant's personnel file for 12 months. She provided this outcome to the Claimant in a letter dated 29 November 2022. We noted, and Ms Wilkinson accepted in her evidence, that her Decision Notice contained reference to an incorrect email in relation to the third allegation. Ms Wilkinson quoted from an email that the Claimant had sent Ms Edwards in June 2022 rather than the particular email that she had sent her on 18 October 2022.

Appeal

149. Ms Wilkinson's letter had noted that any appeal against her decision should be sent to Mr Tanna and the Claimant emailed him on 1 December 2022. In that, she noted that she had mental health problems and would therefore need the full ten working days that she had been afforded within which to appeal. Mr Tanna replied on 5 December 2022, noting that the grant of any further time within which to appeal was not within his remit, but that if the Claimant required one or two days extra above the ten working days then he was prepared to accommodate that. The Claimant then, in an email of 5 December 2022, asked for the appeal deadline to be extended from the day she had considered it would end, 13 December, to 15 December. Mr Tanna replied the same day noting that he was prepared to allow the Claimant until close of business on 15 December 2022.

150. The Claimant then sent her appeal to Mr Tanna on that day. In that, she set out 19 separate points of appeal. In all cases the Claimant included some wording in bold print which formed the core of her particular concern.

151. The Claimant separately submitted a complaint to the Respondent's HR Department on 20 December 2022, in which she referenced her appeal and raised concerns about the way she had been treated by management and HR in relation to the issues which had led to the disciplinary allegations. It was considered that those matters would be best addressed by Mr Tanna as part of the appeal consideration.

152. Mr Tanna sent the Claimant a letter, attached to an email, on 19 December 2022, inviting her to attend an appeal meeting on 10 January 2023. The Claimant replied by email later that day, noting that, while she suspected she did not actually need to ask it, that care be taken that communication with her was clear and clearly understood during the meeting. She observed that her mental health problems meant that she may misinterpret subtle or indirect communication. The Claimant also asked if, before the appeal meeting, she could have a short telephone discussion with the Occupational Health Doctor who prepared the report.

153. Mr Tanna replied a few minutes later, noting that he had scheduled three hours for the appeal meeting, so that it would not be rushed, and would give time to clarify questions and answers. He noted that the request to speak with the Occupational Health Doctor was something that the Claimant would have to take up with her manager. The Claimant did that and a call with the Occupational Health Adviser was arranged for the morning of the Appeal Hearing, 10 January 2023.

154. The Claimant then sought to push the appeal hearing back, and it was ultimately agreed that it would take place a day later, on 11 January 2023.

155. Whilst Mr Tanna did not see the Occupational Health Report or any reference to it prior to the appeal hearing, he confirmed in his evidence that he was satisfied that his management of the appeal hearing had complied with the recommendations, although the focus of them appeared to be on the Claimant herself, e.g. that she was encouraged to formulate notes to refer to in order to minimise the risk of emotionally charged communication, rather than the Respondent. The Adviser did however recommend that regular breaks be offered during the appeal hearing, and we noted that that occurred, with two ten minute breaks taking place within the three hour meeting. We noted that the Claimant did not materially complain that the meeting had been conducted inappropriately.

156. During the meeting Mr Tanna discussed the Claimant's appeal points with her, and also the points raised in her complaint letter. Following the meeting, Mr Tanna needed to undertake some further investigations, and he wrote to the Claimant on 16 January 2023, noting that he hoped to be able to decide the appeal by 27 January 2023.

157. On 16 and 17 January 2023, the Claimant sent Mr Tanna emails with further comments on her appeal, and Mr Tanna raised queries with Ms Wilkinson, Ms Edwards and Ms Harris, to which they responded by email. Mr Tanna then prepared his outcome letter and he issued it to the Claimant on 8 February 2023.

158. In that, Mr Tanna noted that his decision was that he did not uphold the appeal and that the penalty would remain, because, irrespective of the additional allegations discussed by Ms Wilkinson, which Mr Tanna noted should not have happened and for which he expressed an apology, the allegations that were relevant and appropriate were also discussed and found proven. He confirmed that he was satisfied that the decision had been made taking into account the relevant allegations only and that the additional allegations were not a factor. He then confirmed that there had been no information or evidence presented by the Claimant, and nor had she demonstrated that the correct process had not been followed, which could have altered the decision and/or the penalty.

159. Mr Tanna addressed the issue of whether Approach B should have been used instead of Approach A, and noted that the approach to be used had also been considered by Ms Harris and Ms Wilkinson, and that, on the advice of the HR EAS, the level of potential misconduct had been reduced from gross misconduct to misconduct, leading to the use of Approach A.

160. The confusion that appeared to have arisen between Ms Wilkinson and Ms Harris about the inclusion of the Claimant's non-attendance at DWGMs as a disciplinary allegation also appears to have extended to Mr Tanna, as he listed that only four allegations should have been discussed at the meeting on 10 November 2022, one of them being the Claimant's non-attendance at DWGMs. Whilst, as we have noted, it appears that Ms Harris had intended that that matter be pursued as a disciplinary allegation, it had not, in fact, been taken forward as a disciplinary allegation by Ms Wilkinson.

161. Mr Tanna then addressed all of the Claimant's numbered points of appeal and the thrust of her complaint letter, confirming his conclusion that he did not uphold the Claimant's appeal or complaint.

<u>Further complaint</u>

162. On 9 February 2023, the day following receipt of Mr Tanna's outcome letter, the Claimant

sent a lengthy email to Ms Harris and two HR managers, copied to Ms Wilkinson and Mr Tanna. The subject header of the email was "*Document I was previously unable to read is largely libel – and note for future of what adequate support would mean in a disciplinary process*".

163. The Claimant complained in the email that, with hindsight, she should have sought more proactive support through the disciplinary processes. She noted that she was not asking for anyone to do anything because she did not know what could or should be done at that point. The Claimant attached to her email a document entitled, "*False statements in the Manager's referral form*". One of the HR Managers replied later that morning, thanking the Claimant for her feedback and noting that she would raise discussions within the business areas with a view to investigating what could be put in place if a person who required support did not have a Union representative or colleague to support them.

164. The Claimant replied the following day noting that she expected her "*allegation of libel to be taken seriously*". She commented that Mr Tanna had made clear in his decision the allegations which would form part of the decision, and that she was therefore going to be asking for most or all of the other allegations made during the process to be either clarified and supported with evidence or to be recognised as false, possibly libellous. She noted that she would be seeking an apology for all those that were false, and would be asking for the record to be noted that they were false so that anyone who read them also read that they were false or at least had not been supported.

165. The Claimant sent a further email later that night attaching a document setting out how she contended that some of the statements in Ms Harris's initial document had been, as she described them, "*false*". On 14 February 2023, Ms Harris forwarded the Claimant's emails to her line manager, Mr Incledon.

166. Mr Incledon then wrote to the Claimant on 16 February 2023, noting that the decision reached by the Appeal Manager had been final, and therefore that those copied into the Claimant's emails were unable to respond or comment further in respect of the decision reached or the stages that came before it. Mr Incledon concluded his email by asking the Claimant to refrain from further communications relating to the matter and to work alongside managers to move forward. He reminded her of support mechanisms available to her.

<u>Data protection matters</u>

167. The Claimant responded to Mr Incledon later the same morning, setting out comments on the matters Mr Incledon had raised. Within her comments the Claimant made a request under the Data Protection Act for, "*copies of all information held in HMRC about me relevant to all allegations raised against me between 20th June 2022 and today*".

168. Mr Incledon forwarded that request to the Respondent's HR team on the same day, and replied to the Claimant confirming that he had done so.

169. The request was passed to Ms Edwards as the Claimant's line manager on 17 February 2023, and she forwarded it to Ms Harris on the same day. Ms Harris then circulated an email to the Claimant's managers, noting the date by which a response was needed and what she considered to be the scope of the request. She noted that her understanding of the request was that it would cover all of the allegations within the Upholding Our Standards document that formed the formal misconduct process, i.e. the four matters identified in her final Manager's Referral document. Ms Harris noted that there had been an initial reference to other concerns, but they were not included in the allegations raised against the Claimant and did not form part of the disciplinary process.

170. Ms Edwards then sent the subject access request response to the Claimant on 17 March 2023 as an attachment to an email. Some documents were provided via links to be clicked on within the document. The Claimant emailed Ms Edwards on 19 March 2023 noting that one document seemed to be missing, which Ms Edwards provided on the following day.

171. The Claimant did not raise any further issues about the subject access request response. During her evidence in this hearing however, she raised concerns that she should have received background documentation relating to the initial allegations set out in Ms Harris's letter of 26 September 2022, rather than relating to the making of the allegations themselves, which was how the Respondent's managers, in particular Ms Harris, appeared to have interpreted the request.

172. With regard to the Claimant's post-appeal communications and her request for the retraction or correction of what she contended to be false statements within the Manager's Referral Form, Mr Incledon replied to the Claimant on 17 February 2023. He noted that the Claimant's earlier emails had not referenced an application to correct information asserted to be incorrect under the data protection laws, but that, as the Claimant had mentioned that in her latest email, he had sent that request to the Respondent's SAR Team who would take the matter forward in line with the Respondent's Data Request Protocol.

173. Mr Incledon went on to say that, having sought advice from HR, he had to reiterate that the Manager's Referral was a summary of the manager's belief at the time, and that the process that then followed, namely the investigation, formal meeting and appeal, had now concluded and had looked at all the elements of the referral to establish facts on the balance of probabilities. He noted that the Claimant had been found, on the balance of probabilities, to be in breach of her conduct obligations and that, after an appeal process, the warning in relation to that remained.

174. The Claimant then, on 8 March 2023, sent a formal complaint to Ms Harris and Ms Duguid described as an "Information Rights Complaint", noting ICO Guidance that stated that the accuracy of personal data held by an organisation can be challenged.

175. Ms Duguid replied to the Claimant later that day, noting that, as the Manager's Referral document was no longer required, she was happy to delete any copies that may be on file. Mr Incledon wrote to the Claimant on 9 March 2023 making the same point, and also noting that Ms Harris's original letter of 26 September 2022, whilst needing to be retained, could be amended to reflect only the concerns that formed the ultimate investigation process. He attached an amended letter showing that, which effectively left the opening two paragraphs and removed the bullet points.

176. The Claimant replied to Mr Incledon on 13 March 2023 asking if he minded her asking questions of the ICO about the removal and amendment of documents, and Mr Incledon replied shortly afterwards noting that he was happy for the Claimant to contact the ICO.

177. The Claimant had further communications with Ms Duguid over the issue between 15 and 17 March 2023. In those, the Claimant noted that her preference would be to attach corrections to documents rather than to delete them, which Ms Duguid confirmed would be acceptable. Mr Incledon then, on 20 March 2023, produced a version of Ms Harris's letter of 26 September 2022 showing the allegations not ultimately taken forward in red, with a summary explaining that.

<u>Resignation</u>

178. As already noted, communications with the Claimant in relation to the SAR request and her

request for corrections ended on 19 and 20 March 2023 respectively. In her oral evidence, the Claimant confirmed that she had made up her mind to resign by late March, but then took legal advice on her position and on her resignation letter. That letter was then submitted on 22 April 2023 with a further document described as "*Footnotes*" to her letter. In those documents the Claimant outlined her concerns about the disciplinary process, issues regarding her health, clashes with management, and concerns regarding her data and information request. It also noted what she considered to have been positives in relation to her time working for the Respondent. The Claimant's employment then ultimately ended on the expiry of her notice period on 20 May 2023.

Conclusions

179. Taking into account our findings and the relevant legal principles, our conclusions in relation to the issues we had to determine are as follows. We considered it appropriate to address time limit matters at the end, once we had formed our conclusions in relation to the Claimant's substantive claims. We considered the remaining issues in order, with the exception, as we have previously noted, of the sections relating to remedy.

Protected Disclosures

180. We considered each of the five asserted protected disclosures in turn, assessing whether, in each case, the Claimant had disclosed information which in her reasonable belief had been made in the public interest and tended to show one of the prescribed matters set out in Section 43(b)(i) ERA. We deal with each of the asserted protected disclosures in turn.

PID 2

181. We noted that, in her email of 2 October 2018, the Claimant stated that she felt that it was "*morally and legally wrong and against the hmrc and civil service code*" to pursue the collection of debts where the validity of the debt was under dispute and the Respondent had agreed that the dispute was open and had not attempted to resolve it. She expressly referred to "*whistleblowing*" in the header of the email. We were satisfied that that involved a disclosure of information by the Claimant to the Respondent, as the person to whom it was sent was someone the Claimant understood to be the recipient of whistleblowing disclosures, and, when the Claimant received a bounce-back of the email she then forwarded it to another manager who was a Business Unit Head.

182. We noted the guidance of the EAT in ***Korashi*** that the assessment of whether the disclosed information tended to show a relevant failure in the reasonable belief of the worker involved the application of an objective standard to the personal circumstances of the discloser. We further took into account the EAT's guidance in ***Darnton*** that the Claimant did not need to be factually correct, and needed only to demonstrate that she had a reasonable belief.

183. We noted further that the EAT observed, in ***Parkins -v- Sodexho Limited*** **[2002] IRLR 109**, that the scope of Section 43B(1)(b) is "*broadly drawn*". However we further noted that the EAT, in ***Eiger Securities LLP -v- Korshunova*** **[2017] ICR 561**, had stated that it does legal obligation does not cover a breach of guidance or best practice or something that is considered merely morally wrong. We further noted the first instance, and therefore not strictly binding, decision of the Employment Tribunal in ***Azzaoui -v- Apcoa Parking UK Limited*** **(ET Case Number 2302156/01)**, where a parking attendant's concern that they were being unduly pressured to meet targets, which led to the falsifying of entries in log books, involved a breach of legal obligation to fairly administer the provisions of road traffic legislation.

184. In this case, we noted the Claimant's contention that what was being done was against the

Respondent's and/or the Civil Service Code, and involved what the Claimant appeared to be contending was a breach of the Respondent's practice of not pursuing the recovery of debts until a dispute over an outstanding sum had been resolved. Similar to the Tribunal in ***Azzaoui***, we considered that the Claimant was contending that the Respondent was breaching a legal obligation to fairly administer the recovery of tax that was asserted to be due. The Claimant may not have been right about that, but we considered that her belief about it was reasonable. We then considered that the raising of a concern about the proper recovery of tax due was clearly in the public interest. We were therefore satisfied that PID 2 was a protected disclosure.

PID 3

185. There was no direct evidence of the disclosure the Claimant asserted she had made in early Spring 2019 to her manager, Gareth Rees, although as we noted in our findings above, the Claimant appeared to reference a similar concern in an email she sent to Mr Rees on 25 July 2019. There she reported what she felt had been an error on her part in taking payment from a director of a company, only subsequently realising that the company was a dissolved one.

186. We were again satisfied that the Claimant had disclosed information to her manager about what she contended to be an improper process of pursuing debts, and taking payment from, directors of dissolved companies, in circumstances where the company had, for all legal purposes, ceased to exist.

187. We again assessed the reasonableness of the Claimant's belief of wrongdoing by applying an objective standard to her personal circumstances. Whilst we did not consider that the Claimant was right in suggesting that it would be improper to pursue a debt of a dissolved limited company from one of its directors, as there are circumstances in which a director could be personally liable for a company's assets, whether a live company or a dissolved one, where wrongful trading or fraudulent trading has taken place. Nevertheless, we considered that the Claimant, in her personal circumstances, genuinely and reasonably felt that it was wrong of the Respondent to pursue debts in such a manner, and had taken steps to try and obtain further information to underpin her concerns from Companies House and HMRC Guidance.

188. We were therefore, again satisfied that the Claimant had reasonably believed that the information she provided to her manager tended to show a breach of a legal obligation, again an obligation to administer the recovery of tax receipts in a proper manner. Again, we had no difficulty in concluding that such a disclosure had been reasonably believed to be in the public interest.

PID 4

189. As we noted in our findings, the precise detail of the concern raised by the Claimant was not clear to us, as the grievance within which the Claimant raised her concern was not before us. The Claimant's covering email to her then manager of 7 October 2020 did however refer to the grievance relating to "*interest objections*", which was subsequently confirmed in evidence as objections by taxpayers to the charging of interest on deferred PAYE payments arising in the peak COVID period. The substance of the Claimant's concern however did not relate to the levying of interest which led to those objections, but to what she contended to be the deletion of call notes and the replacing of them with invented notes. We noted in that regard that the Respondent considered the concerns raised by the Claimant under a whistleblowing policy.

190. Whilst it was ultimately confirmed that the notes of calls could not be altered in the way

asserted, and that was accepted by the Claimant's Trade Union Representative, we considered that it had, at least initially, been objectively reasonable for the Claimant, in her personal circumstances, to believe that a breach of legal obligation had occurred. Although that obligation was not formally identified, it appeared to us that the allegation would have involved possible data protection breaches, and possibly even fraudulent conduct. Again therefore, we were satisfied that the Claimant had made a protected disclosure, as again we felt that a contention that a public servant was falsifying records of calls with the public would clearly have been in the public interest.

PID 5

191. The subject matter of the Claimant's concern here was very much the same as that raised in relation to PID 3, i.e. the pursuit of payments from directors of dissolved companies. We noted that the Claimant, in her email to the manager raising concerns about the new questionnaire, stated that she did not think that a dissolved limited company can legally own assets, which we understood clearly to be correct. The Claimant went on to say however that her most serious concern was that the questionnaire appeared to encourage collectors "*to break or disregard the law, by treating dissolved limited companies as entities with assets*".

192. As was our view in relation to PID 3, we did not consider that the Claimant's concern was necessarily well founded. As we noted in relation to PID 3, there may be occasional situations where the pursuit of the debt of a company, whether dissolved or otherwise, from a director may be justified. Furthermore, as was ultimately demonstrated on several occasions to the Claimant in response to the concern she raised, the process did not appear to encourage collectors to break or disregard the law, in that if they had simply answered that they were not aware of any assets or that the question was not applicable then they could simply have proceeded to complete the form. However, we were again conscious that we were assessing this issue from the perspective of whether the Claimant could reasonably have believed, in her personal circumstances, that a breach of legal obligation had occurred and, for similar reasons to those identified in relation to PIDs 2 and 3, felt that the Claimant, in her personal circumstances, did genuinely believe that it was unlawful to actually pursue debts in those circumstances, even if her belief was not ultimately justified.

193. Again, concern about the proper management of the tax system and the recovery of tax payments from customers was, in our view, in the public interest, and the Claimant certainly reasonably believed that that was the case. We were again therefore satisfied that PID 5 amounted to a protected disclosure.

PID 6

194. We noted that the Claimant, in her email of 18 August 2022 to the Civil Service Commission, had noted that there had been problems with the new telephone software and that she was "*mainly concerned about software faults leading to security risks to client data*". In her evidence before us, she confirmed that her particular concern had been about potential breaches of confidentiality that could have arisen in circumstances where a new call was put through immediately upon completion of the preceding call, in circumstances where the previous customer's records were still open. However, we did not consider that any concern that the Claimant had about such a matter could be viewed as a reasonable belief of a breach of legal obligation on her part.

195. At worst, the problem with the software would have opened up the possibility that a call handler could inadvertently have disclosed information about the earlier customer to the later one. However there was nothing in the concern identified by the Claimant which intrinsically meant that such a concern could happen or was even particularly likely. Whilst

the possibility would have arisen, as the call handler would have had two sets of records open, it would have been straightforward for the call handler to have used only the correct customer's records. Whilst the Claimant clearly was concerned about the prospect of customer data being disclosed to someone other than the customer, we did not think that, objectively, the Claimant could reasonably have believed that that was likely to be the case as that would only have arisen through human error on the part of the call handler and not through any intrinsic problem with the telephone software. We therefore did not consider that PID 6 had been a protected disclosure.

Protected Disclosure Detriments

196. Having concluded that the Claimant had made protected disclosures, we moved on to consider whether the Claimant had been treated to her detriment as a result of those disclosures. We first considered whether the eleven asserted detriments had taken place in fact, and whether they amounted to detriments, applying the guidance in ***Shamoon***. We then moved on to consider whether any of the asserted detrimental acts had been done on the ground of the Claimant's protected disclosures. We considered each of the asserted detriments in turn.

Issue 3.1.1

197. With regard to this asserted detriment, it was clear that, as a matter of fact, the Respondent had adopted Process A rather than Process B under its Disciplinary Policy. We did not however consider that the use of Process A rather than Process B could reasonably be said to have been to the Claimant's detriment.

198. We were conscious that the Claimant, on several occasions, complained about the use of Process A, and indicated clearly that she felt that Process B should be used. We were also conscious, as we noted in our findings, that the Respondent's Policy was not a model of clarity in relation to the approach to be adopted. Disregarding the headings used in the Policy, the sense of it focused on the severity of outcome, with the potential for dismissal or dismissal with re-engagement pointing to Approach B, and with the potential for a lesser sanction pointing to Approach A. It seemed to us that the Respondent focused principally on that wording. However, the headings referred to Approach A being used where the facts are clear or not contested, with Approach B, by contrast being used where the facts are not clear or contested. It was clear to us that the Claimant's perspective on which Approach should be used was very much driven by the headings.

199. Regardless of the potential confusion deriving from the way the Policy has been drafted, we noted that the Respondent, in addition to focussing on the degree of sanction that could be imposed, also relied on the Claimant's acceptance of the factual background to the allegations as pointing towards the facts being clear and not contested. By contrast, the Claimant felt strongly that she disputed the underlying facts.

200. In our view, the underlying facts were clear, with the only matters to be discussed being whether they amounted to misconduct and, if so, the level of sanction that would be imposed as a result. The three allegations being considered by Ms Wilkinson were made clear in her letter to the Claimant of 26 October 2022. These were broadly:

- A refusal to do remissions work, a matter that the Claimant had confirmed.

- Inappropriate reference to the disciplinary process outside of support channels, with the specific email giving rise to that concern being quoted.

- Sending emails to Ms Edwards regarding the DWGM issue making similar references to discriminatory behaviour from her.

201. The only scope for confusion in relation to that was the reference to "emails" in the plural when in fact the reference was only intended to cover the email the Claimant had sent to Ms Edwards on 18 October 2022. Notwithstanding that, it appeared to us that the background to the allegation was clear.

202. Whilst the Claimant clearly took issue with the assertion that the matters raised amounted to misconduct, the background facts were, in our view, clear and were not, in fact, contested by the Claimant. Her focus was on the interpretation of the core facts as matters of misconduct, e.g. arguing that the references in the Policy to maintaining confidentiality related only to the detail as opposed to the fact of the disciplinary proceedings.

203. We noted that, at no point, did the Respondent restrict the Claimant's ability to put forward any matter in relation to the allegations that she was facing, thus meaning that there was no material difference in terms of the depth of consideration of the allegations between Approaches A and B. In addition, the indication to the Claimant that Approach A was being used rather than Approach B made it clear to her that she did not face dismissal or demotion. In all the circumstances, and again applying the ***Shamoon*** guidance, we did not consider that a reasonable worker would have taken the view that the treatment was, in all the circumstances, to their disadvantage.

Issue 3.1.2

204. We noted that this alleged detriment covered the three communications with the Claimant informing her of disciplinary allegations that she was facing. These were Ms Harris's letter of 26 September 2022 and email of 19 October 2022, and Ms Wilkinson's letter of 26 October 2022. We did not consider that any of these communications could be said to have been degrading. They were simply recording, in a very matter of fact way, the issues of concern that were considered to have arisen in relation to the Claimant's conduct and behaviour.

205. We were also not satisfied that the allegations could be described as "false". We were conscious that the Claimant took issue with the allegations that were levelled against her, in particular the allegations in Ms Harris's initial letter which were not taken forward further under the disciplinary process. One of those, by way of example, related to a concern that the Claimant had repeatedly raised matters of concern with the Rate It Guidance Team. The Claimant contended that she had been praised for raising those concerns and that many of the Rate Its she had raised had led to changes to the Respondent's internal guidance. However, as a matter of fact, it seemed clear that the Claimant had raised significantly more concerns than other employees and, to the extent that that may have created issues for the Respondent generally, could not appropriately be described as "false". We noted in any event that that matter was not progressed further.

206. In a similar manner, other allegations set out in the initial letter were not taken forward, on HR advice, due to the fact that they were rather historic and had been resolved. Again however, we were not satisfied that that meant that they were in any way "false", and we again noted that those particular matters were not taken forward beyond the initial letter.

207. We were however satisfied that the communications could reasonably be described as "confusing". To start with, as we have noted, several of the matters of concern outlined by Ms Harris in her initial letter were already quite historic and/or had been resolved. We found it difficult to understand why the matters had been raised as matters of formal concern to

be considered under the Respondent's Disciplinary Policy without their potential suitability to being taken forward in that manner being fully assessed with the involvement of HR. Whilst that subsequently happened, it would have been far less confusing had that assessment been undertaken before any notification was sent to the Claimant.

208. However, following the involvement of HR, the matters of concern were revised and were then set out by Ms Harris in her email of 19 October 2022. Whilst the Claimant, both internally and before us during this hearing, maintained that the state of the allegations following that email were unclear, we did not consider that there should reasonably have been any confusion at that point. Whilst the email did not formally record that the majority of the original matters were not being taken forward, the email said, "*The concerns raised below will now be considered*". That should, in our view, reasonably have led any reader to conclude that only those matters listed below were to be considered, and that any matter not so listed would not be considered.

209. There was however further confusion following Ms Wilkinson's letter in that she had, and in our view this arose following a mistaken reading of the Manager's Referral document, listed only three matters rather than the four listed in Ms Harris's email. Again however, Ms Wilkinson stated, before listing those three matters, "*I am considering*", in bold. Again therefore, in our view, a reasonable interpretation of that letter by any reader would have been that only those three matters were to be considered.

210. Overall therefore, we were satisfied that the communications taken together were, to a degree, confusing, albeit they were not degrading or false. We did not consider that the reference within the List of Issues to the remission allegation having been done with a whistleblowing motive meant that that particular allegation was itself confusing, degrading or false.

211. Having concluded that the communications were confusing, we were also satisfied that they amounted to a detriment, in the context of the reasonable worker taking the view that the communications were to their disadvantage. In that regard, the changes to the allegations the Claimant was facing, in particular the difference between the 19 October communication and 26 October communication were confusing and would, again to a degree, have been to the Claimant's detriment. We nevertheless reiterate that, in our view, the position that the Claimant was finally facing by way of formal process, i.e. that set out in Ms Wilkinson's letter of 26 October 2022, was clear.

Issues 3.1.3 and 3.1.4

212. We took these together. We noted that the Claimant did seek clarity from Ms Harris on 21 October 2022, in two emails, as to whether the original allegations were being pursued further. However, she appeared, in the second of those emails, to indicate that she would wait for the formal allegations from the Decision Maker. Ms Harris then passed on the Claimant's communications to Ms Wilkinson.

213. With regard to the Claimant's communications with Ms Wilkinson, she sent several emails on 27 October 2022. However, that was at a time where, whilst she had received Ms Wilkinson's email with the letter notifying her of the allegations and inviting her to the disciplinary meeting, and her subsequent email with the Manager's Referral Form, the Claimant had not read them and was not specifically seeking any clarification at that point. In any event, as we have already noted, we considered that the position was made clear in Ms Wilkinson's letter of 26 September 2022.

214. With regard to the assessment of whether any aspect of the Respondent's actions or omissions during this period could be said to have amounted to a detriment, we considered

that the failure to expressly respond to the Claimant's question of Ms Harris as to whether the earlier allegations were being pursued or not, could be considered, to a degree, to amount to a detriment, again applying the ***Shamoon*** test. The Claimant asked the question, and it was never ultimately answered which we concluded could reasonably be described as a detriment.

Issues 3.1.5 and 3.1.6

215. We also took these issues together, as they broadly involved the same allegation relating to two managers.

216. As a matter of fact, we did not consider that there was any failure by either of the two managers to realise that the Claimant needed a lot of time and assistance to understand the allegations and to work out how best to respond. No material correspondence relevant to the allegations took place with Ms Harris between 26 September 2022 and her revision of the matters of concern on 19 October 2022. The Claimant did not raise any issue regarding the need for time and assistance.

217. As we have already noted immediately above, the Claimant sent a number of emails to Ms Wilkinson on 27 October 2022, which noted that she needed more time to engage with the allegations, indeed to read them in the first place. She did however engage with the matters, in an email to Ms Wilkinson of 31 October 2022, and then, when the Claimant indicated that she did not feel in a position to attend the meeting originally scheduled for 3 November 2022, albeit due to the lack of ability to obtain a companion rather than the need for additional time to understand the allegations, the meeting was rescheduled and the Claimant was given a further week. We did not therefore consider that these issues were made out in fact.

Issue 3.1.7

218. As we have already noted, we did not consider that the allegations required clarification following Ms Wilkinson's letter of 26 October 2022. However, confusion did appear to have arisen in that meeting regarding the allegations to be discussed, as several of the original matters of concern raised in Ms Harris's letter of 26 September 2022 were discussed. We noted that Ms Wilkinson maintained in her evidence that that had been because the Claimant had raised the matters, but Ms Wilkinson could have, and we considered it would have been better if she had, simply noted that those matters were not relevant as they were not allegations that she was considering.

219. To the extent therefore that some confusion arose following the discussion of broader matters within the disciplinary hearing, we were satisfied that there had been a failure on Ms Wilkinson's part to clarify the allegations, and that that could reasonably be said to have been to the Claimant's detriment.

Issue 3.1.8

220. We did not consider that the disciplinary outcome letter of 29 November 2022 was phrased in a confusing manner. Ms Wilkinson confirmed the allegations that she was considering, noted that she had found them proven, and then set out the rationale for her conclusions in each case. We also did not consider that the disciplinary outcome introduced things that were not discussed. We also considered that there had been some acknowledgment by Ms Wilkinson of the motives behind the Claimant's alleged actions, as she noted that the Claimant had explained to her that she had high principles, and had responded that those principles should not interfere with the Claimant's work duties when the requests made of her by her line managers were reasonable.

Issue 3.1.9

221. As a matter of fact, Mr Tanna's appeal decision on 8 February 2023 did uphold that the disciplinary procedure had been sufficiently carried out. However, that was a legitimate decision based on the documentation he had considered, and the further investigations he had carried out following the appeal hearing. We did not consider that the simple fact of upholding a disciplinary conclusion on appeal could be said to involve any detrimental treatment.

Issue 3.1.10

222. Again, as a matter of fact, the Claimant was prevented from taking her concerns about the disciplinary process any further. However, again, we considered that that was a legitimate action open to the Respondent in the circumstances. The Claimant had been taken through a disciplinary process and an appeal in relation to the conclusion that she had misconducted herself and the sanction that had been imposed, and that had been dealt with.

223. Whilst it is correct that the Claimant was left under the same management chain, albeit neither of the managers who carried out the disciplinary process, Ms Wilkinson and Mr Tanna were in a line management position in relation to the Claimant, we did not see anything which would have justified any move away from that management chain. As Ms Edwards made clear in her evidence, it was better for her, with her experience of the Claimant and her understanding of her, to remain in a line managerial role in relation to her rather than for the Claimant to be passed to another manager who would not have that level of experience and understanding. Again, we did not consider that this amounted to a detriment.

Issue 3.1.11

224. We did not consider that there was any failure to provide the information requested as part of the Claimant's Data Subject Access Request. As we have noted in our findings, the Claimant did note that one document appeared to be missing, and Ms Edwards promptly provided it. The Claimant did not provide any further indication of any document that should otherwise have been provided, whether internally or before us. Whilst the response could have been provided by way of separate documents, or even in hard copy, we did not consider that the provision of the documents electronically, which included a requirement to click on links, involved any form of material detriment to the Claimant, who appeared to us to be technologically quite proficient.

225. In addition therefore to concluding that the Claimant had made protected disclosures, we did find, that some of the asserted detriments took place, and were indeed, albeit to only a limited extent, to the Claimant's detriment. We then moved to consider whether any of those detriments had been on the ground of the Claimant's protected disclosures. We were not satisfied that they had.

226. Importantly, we noted that the decision makers were not part of the Claimant's line management, nor were they even part of the office region within which the Claimant worked, Ms Wilkinson being based in Bradford and Mr Tanna being based in the Midlands. There was no evidence to suggest that either of those decision makers were aware of any of the protected disclosures. We noted in that regard, that Approach A envisaged that the decision would be taken by local management, and that only under Approach B would an independent decision manager be appointed. We considered that had the Respondent, acutely the Claimant's local management in the form of Ms Harris and Ms Edwards, been motivated to act against her by reason of her protected disclosures, then they would have

had a clear opportunity to retain control of the process by operating Approach A in all its aspects, and ensuring that one or other of them acted as the decision maker, but they did not

227. In addition to that, we considered that the trigger for the implementation of disciplinary action against the Claimant was her continued unwillingness to deal with remission work and then the particular issue that had arisen in relation to DWGMs in June 2022, and the way the Claimant had referred to that in her email to Ms Edwards of 18 October 2022. We were satisfied that we could draw a clear connection between those matters and the raising of the disciplinary concerns which were not, in our view, connected to any of the protected disclosures made by the Claimant. Ultimately therefore, our conclusion was that the Claimant's complaint of protected disclosure detriment was not made out.

Constructive Unfair Dismissal

228. The various asserted matters which were said to amount collectively to a breach of the implied term of trust and confidence, set out at Section 5.1.1 of the List of Issues were very similar to the protected disclosure detriments set out at 3.1.1 of the List of Issues. The eleven detriments, increased to twelve allegations of breach of the duty of trust and confidence following the allocation of a separate number to the second paragraph of Issue 3.1.2.

229. Of those twelve, eight were worded identically to the protected disclosure detriments. Four, detriments 3.1.3, 3.1.9, 3.1.10 and 3.1.11 had additional wording when expressed as breaches of the implied duty of trust and confidence at points 5.1.1.4, 5.1.1.10, 5.1.1.11 and 5.1.1.13, although the additional wording did not, in our view, add anything material to the allegations expressed as protected disclosure detriments.

230. Our conclusions in respect of those matters when expressed as protected disclosure detriments, both in relation to whether they happened and, if so, where they involved detrimental treatment, therefore applied to our consideration of the constructive dismissal claim.

231. Only one additional matter was expressed as a breach of the implied term of trust and confidence which had not been also pursued as a detriment claim, the matter set out at Issue 5.1.1.12. That contention was that the Claimant's assertion, in February and March 2023, that there were false allegations on the Claimant's record, specifically in the Manager's Referral Form in October 2022 and in relation to which she was trying to get notes added, had failed. The point noted further that the Claimant had been left in the position that the allegations had been formally raised against her and had not been retracted or explained.

232. In relation to that matter, as we noted in our findings, the Respondent, whilst not engaging with the Claimant's contention that the initial allegations had been false, did, in our view, go quite some way to addressing her concerns. She was initially told that the Manager's Referral Form could be deleted as it had no further purpose. Then, when the Claimant indicated that her preference was to formally amend her record rather than to delete any documentation, the Respondent confirmed that it was willing to amend, and then subsequently annotate, the original letter of 26 September 2022 to confirm that certain allegations had not been progressed further.

233. With regard to the other matter raised at point 5.1.1.12 of the List of Issues, whilst the Claimant was left in the position that the allegations raised against her had not been formally retracted or explained, as we have noted above, we considered that it should reasonably have been clear to her, from the fact that those matters were not taken forward, that they

had indeed been retracted.

234. Considering all the matters raised as amounting to a breach of the duty of trust and confidence, we noted, in relation to our conclusions on the protected disclosure detriment claim, that certain of the matters asserted could be said, to some degree, to amount to detriments, in the context of the guidance on the interpretation of detriment provided by ***Shamoon***. However, we did not consider that any of the matters which we found to be detriments, whether viewed individually or cumulatively, could objectively be said to have impinged on the relationship between the Claimant and the Respondent in the sense that it had been likely to destroy or seriously damage the degree of trust and confidence that the Claimant was reasonably entitled to have in her employer. We did not therefore consider that the Claimant's constructive dismissal claim had been made out.

Disability

235. We noted that the Respondent had accepted the Claimant was disabled by virtue of psychosis, schizophrenia, and reactive mental health symptoms, and also had accepted that the Claimant was disabled by reference to sleep apnoea. The conditions which were contested were those involving fatigue, post viral fatigue syndrome, chronic fatigue syndrome and myalgic encephalitis.

236. The evidence we heard and read indicated that the Claimant had suffered from one or more of those conditions in her 20s, and it appeared that she had been significantly impacted by those conditions at that time. The Claimant confirmed in her evidence however that she had not been significantly affected by those conditions since about the age of 30, and she was aged 54 when her employment with the Respondent ended.

237. There was limited documentary evidence therefore before us about the ongoing impact of those conditions on the Claimant. Indeed, during this hearing, the Claimant noted that her particular concern related to the possible ongoing impact of the conditions on her memory and on her susceptibility to tiredness. She further commented that she did not think the latter matter was a particular issue in relation to her case. With regard to the former, and the impact on memory, the Claimant was frank in her evidence that it could be said that those issues arose from her psychosis, schizophrenia and/or reactive mental health symptoms.

238. We noted the wording of Part 1 of Schedule 1 of the Equality Act regarding long term effects, particularly Section 2(2), which confirmed that, if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if it is likely to recur. We noted then that the Government Guidance, and the House of Lords in ***Boyle***, confirmed that "likely" should be interpreted as something that could well happen, rather than something which is probable or more likely than not.

239. In our view, bearing in mind that the Claimant had not required medical intervention in relation to any or all of the fatigue conditions for many years, and also that her memory problems could, as the Claimant herself confirmed, be considered to be a consequence of her psychosis and/or schizophrenia, we did not consider that it could be said that the Claimant's fatigue conditions could be considered to amount to disabilities for the purposes of the Equality Act. We did not consider that, in isolation, those conditions had a substantial adverse effect on her ability to carry out day- to-day activities beyond roughly the age of 30, and nor did we consider that the substantial adverse effect that those conditions had had on the Claimant prior to approximately the age of 30 had been likely to recur. In any event, as we have noted, even if we were wrong about that, it did not, in our view, have any material impact on the Claimant's disability discrimination claims, as issues arising in

relation to her memory arose, as the Claimant herself accepted, from her other conditions in any event.

Direct Disability Discrimination

240. The Claimant essentially raised two matters as amounting to less favourable treatment of her because of her disability. The first involved three of the allegations raised in Ms Harris's original letter of 26 September 2022, whilst the second related to the adoption by the Respondent of Process A rather than Process B in relation to the disciplinary matters raised against her.

241. We noted the requirement in Section 23 of the Equality Act that the comparison between the Claimant and any comparator must involve no material difference between the circumstances of each, and that that assessment includes an assessment of the respective abilities where the protected characteristic is asserted, as here, to be disability. We noted the particular difficulty that the interpretation of that wording has in relation to claims of direct disability discrimination following the House of Lords decision in ***Lewisham London Borough Council -v- Malcolm*** **[2008] UKHL 43**. Notwithstanding that, we considered it appropriate, applying ***Laing***, to first look at the reason for the treatment and whether it could be said to have been related to the Claimant's disability.

242. In that regard, we noted that the Claimant had worked for the Respondent for many years, and that her psychosis and schizophrenia was well known to her managers throughout that period. We further concluded that the three allegations, which formed part of several allegations included in the 26 September 2022 letter, many of which, including the three at issue, were not subsequently taken forward, were included by Ms Harris at a stage where she felt that the Claimant's behaviour had reached a level which required disciplinary action. The core of that related to the Claimant's refusal to undertake remissions work, and her behaviour at the DWGMs in June 2022 and her subsequent reaction to those meetings. We considered that Ms Harris's approach then was to include everything that she felt had been of concern in relation to the Claimant's conduct and behaviour in order to cover all matters in one go.

243. Subsequently, following discussions with Ms Duguid, Ms Harris was advised that certain of the matters, including the three issues raised as concerns by the Claimant in this regard, should not be taken further, as they were historic and/or had been resolved. Ms Harris appears to have readily accepted that advice and did not offer any argument to the contrary. Implicit within that was Ms Harris's acceptance that the matters would be dealt with as misconduct rather than gross misconduct, thus removing any prospect of the Claimant being dismissed.

244. We considered that had the reason for the inclusion of the allegations by Ms Harris been the Claimant's disabilities, then she would have resisted the change from Approach B to Approach A, and also would have been motivated to consider the Claimant's ongoing capability when it appears that no steps along those lines were ever contemplated by Ms Harris or the Respondent at any time.

245. Overall therefore, having concluded that the reason why the Claimant was treated in the way that she was in the context of the content of Ms Harris's letter of 26 September 2022 was not her disability, we did not need to decide the particular question of the appropriateness of the comparison in the circumstances.

246. Turning to the other alleged matter of direct disability discrimination, the adoption of Process A rather than Process B, we have already recorded our conclusions in relation to that matter when expressed as a complaint of whistleblowing detriment. As we noted there, we did not

consider that the adoption of Process A was detrimental to the Claimant and we similarly concluded that it could not be said to be unfavourable treatment of the Claimant, let alone less favourable treatment by reason of disability. The Claimant's claim of direct discrimination was not therefore made out.

Discrimination arising from disability

247. We noted that the Claimant had raised two allegations of unfavourable treatment arising from her disability. The first related to the communications with her in relation to disciplinary allegations of 26 September 2022, 19 October 2022 and 26 October 2022. We have already considered those matters as part of the Claimant's protected disclosure detriment claim, and concluded there that, to a limited degree, the communications could be said to have been confusing. Taking that conclusion into account, we were satisfied that it could then also be said that the way in which the disciplinary communications were drafted and changed could be said to have amounted to unfavourable treatment.

248. With regard to the second allegation, Mr Tanna's refusal to overturn the written warning, again, it appeared to us that it could be said that a refusal to uphold an appeal could be said to be unfavourable, in the sense of unwanted.

249. We then moved to consider whether the unfavourable treatment that we had identified had occurred because of something arising in consequence of the Claimant's disability, the something arising being said to be her lesser ability to articulate a request for clarity, thus leading to a need for clear and precise communication.

250. Whilst the medical evidence before us did not directly address the question of whether the Claimant was less able to articulate requests for clarity, there was reference in some of the medical documentation to the Claimant benefitting from clear communication. We were therefore satisfied that the matter did arise in consequence of the Claimant's disability. However, we were not satisfied that either of the contended matters of unfavourable treatment had arisen because of the Claimant's need for clear and precise communication.

251. As we have noted in relation to the direct disability discrimination complaint, we felt that the matters raised as conduct issues by Ms Harris on 26 September 2022 had been raised because of her concern that the Claimant's behaviour had reached a stage where it needed to be considered in a formal manner under the Respondent's Upholding Our Standards Policy, and her conclusion that all matters of concern should be raised. As we have noted, following advice from HR, those matters were modified and reduced and, as we have also noted, the matters being pursued changed slightly between Ms Harris's second communication and Ms Wilkinson's letter due, in our view, to Ms Wilkinson's misinterpretation of Ms Harris's Manager's Referral Form. We considered however that the allegations being pursued, whether or not the Claimant agreed with them, were clear, both initially and then when adjusted. Importantly, we did not consider that it could be said that any confusion caused by the adjustment of the allegations being pursued had in any sense been caused by the Claimant's need for clear and precise communication. It was, in our view, simply the way in which the managers dealt with the situation under consideration.

252. With regard to the second allegation, that Mr Tanna refused to overturn the written warning by failing to recognise that the asserted poor procedure had triggered reactive mental health symptoms and put the Claimant at a disadvantage, we were not convinced that that matter had arisen from the Claimant's need for clear and precise communication. In any event, we noted that Mr Tanna had taken into account the Claimant's contention that she needed more time to deal with the disciplinary allegations. Indeed, in the process that he was managing, i.e. the appeal, he afforded the Claimant additional time, and we have no doubt that he would have afforded more time again had the request been made.

253. Overall therefore we saw nothing to indicate that the limited manner in which the treatment of the Claimant in the ways asserted may have been said to be unfavourable arose in consequence of the Claimant's need for clear and precise communication. Therefore, the Claimant's complaint of discrimination arising from disability was not made out.

Reasonable adjustments

254. We were satisfied that the Respondent did operate a PCP in the sense of applying its disciplinary processes under its Upholding Our Standards Policy. That included a decision under the Policy as to whether to apply Process A or Process B. We were not however satisfied that the application of the Policy, or the specific element of it relating to which process to apply, involved putting the Claimant at a substantial disadvantage.

255. In that regard, Issue 10.3 notes that the Claimant needed extra care and clarity in communication, and would have serious reactive mental health symptoms in response to unusually distressing circumstances. However, we were satisfied that the communications with the Claimant had been clear, and she was afforded additional time at both stages of the process in order to put forward her responses. Furthermore, we were satisfied that both Ms Wilkinson and Mr Tanna, had it been clear to them that additional time was needed, would readily have granted it. The Claimant did not herself raise any direct concerns along those lines to either Ms Wilkinson or Mr Tanna.

256. In addition therefore to concluding that the asserted PCPs did not put the Claimant at a substantial disadvantage, we did not consider that the Respondent, acutely in the form of those managing the disciplinary processes, Ms Wilkinson and Mr Tanna, could reasonably have been expected to know that the Claimant could have been placed at any such disadvantage in any event. The Claimant's complaint of failure to make reasonable adjustments was also therefore not made out.

257. All the Claimant's claims therefore were not made out and fell to be dismissed.

Time limits

258. In the circumstances, we did not need to address the matter of time limits. Had we needed to do so however, we considered that we would have concluded that the Claimant's claims of protected disclosure detriment, discrimination arising from disability, and failure to make reasonable adjustments did involve "*conduct extending over a period*" for the purposes of the discrimination complaints, and "*a series of similar acts or failures*" for the purposes of the detriment complaint. The Claimant had an overall concern about the way she had been treated from September 2022, and although we were not satisfied that her complaints were made out, we considered that they had been "anchored" by specific allegations of discrimination occurring over time.

259. That was not the case with the Claimant's claim of direct discrimination, where all the acts complained of had concluded by October or November 2022. However, we considered that the Claimant had proceeded on the basis that all her matters of concern remained live and relevant, and we noted that she had not taken legal advice until close to the end of her employment. In circumstances where we saw little prejudice caused to the Respondent, as it had to deal with the subject matter of the direct discrimination allegations in any event, we considered that we would have considered it just and equitable to have extended time for the direct discrimination complaint to be considered had we needed to do so.

Employment Judge S Jenkins
Dated: 16 December 2024

JUDGMENT SENT TO THE PARTIES ON

16 December 2024

Katie Dickson
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

APPENDIX

Final List of Issues dated 15 October 2024

1. The issues the Tribunal will decide are set out below.

1. **Time limits**

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

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

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

1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

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

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

1.2 Was the protected disclosure detriment complaint made within the time limit in section 48 the Employment Rights Act 1996? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

1.2.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. **Protected disclosure**

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

2.1.1 What did the Claimant say or write? When? To whom? Did she disclose information?

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

2.1.3 Was that belief reasonable?

2.1.4 Did she believe it tended to show that:

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

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

2.1.4.3 a miscarriage of justice had occurred, was occurring or was likely to occur;

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

2.1.4.5 the environment had been, was being or was likely to be damaged;

2.1.4.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

2.1.5 Was that belief reasonable?

2.1.6 The Claimant says she made disclosures on the following occasions:

No.	**Date**	**Gist of information disclosed**	**C's belief as to information disclosed tending to show breach of a legal obligation**	**Detriments arising**
PID2	2/10/18	By email on 2/10/18 to Rebecca Yardley, forwarded to Barrie Williams, both HMRC? I asked them for help in stopping cases like the following, being sent to debt collection agencies: In an earlier email to a caseworker, I had threatened to whistleblow, after caseworkers persistently refused to withdraw a company's debt back to HMRC from a private debt collection agency, despite HMRC having formally accepted months earlier, that the debt was disputed and that it needed checking by an HMRC tech team.	The Claimant believed, and was expressing in her email, that HMRC guidance was being breached. The Guidance said that where debts were legitimately in dispute and awaiting assessment by the dispute team, they should not be actively pursued. She believed that guidance reflected legal obligations on the part of HMRC.	All the detriments set out below
PID3	Early spring 2019	Verbally to Gareth Rees. I said there had been repeated verbal attempts by colleagues, along with debt letters sent, to collect debt from an individual, ex director of a one person dissolved ltd company.	The Claimant believed she was disclosing information that tended to show breach of a legal obligation as (other than in exceptional circumstances) a debt formerly belonging to the (dissolved)	All the detriments set out below

		So that the individual now believed he had to pay.	Limited company is not a personal liability of an ex director and yet the debt was being pursued by HMRC against the individual. The Claimant was proceeding on the basis of what she had been told previously by an experienced colleague, information on Companies House website, and HMRC Guidance manuals. She also telephoned an internal guidance telephone line that existed at the time.	
PID4	7/10/20	I raised the following by email to someone unknown and I alerted my manager Tom Lloyd by email. I raised a formal objection, (initially as a grievance), that some 2020 call notes appeared to have been removed and the call record falsified, for a few taxpayers with Covid deferred Paye debt, who objected to paying interest on the deferred debt.	The Claimant says that on 7/10/20 she raised a grievance (subsequently processed by the Respondent under their whistleblowing procedure) and emailed TL to inform him of that grievance, that it appeared call notes were being removed from deferred Paye cases. The Claimant says she believed that deleting call notes, and replacing them	All the detriments set out below

			with invented notes was in breach of a legal obligation, including data protection obligations.	
PID5	10/12/21 or a few days prior to that	Via email to Sandra Edwards and Ioana Preoteasa on 10/12/21, but I may have initially raised the issue a few days earlier? Layout of new remission form seemed very likely to make colleagues think it was OK to collect tax debt from dissolved ltd companies or their ex directors.	The Claimant believed she was disclosing information that tended to show breach of a legal obligation as (other than in exceptional circumstances) a debt formerly belonging to the (dissolved) Limited company is not a personal liability of an ex director. She believed the form, as structured, would make colleagues mistakenly think it was ok to collect debt from dissolved limited companies or their ex directors, as individuals.	All the detriments set out below
PID6	18/8/2022	The communication was to the Civil Service Commission – which falls under S.43G(2)(c)(i) ERA 1996.		All the detriments set out below

		"My log book notes show that it says that I had been raising problems internally about the new AUI/ Odigo phone software, but was concerned the internal response was inadequate. My log books says I wrote in the email that I was concerned about risks to client data and risks to our mental health. That I was concerned because the software was unstable and slow and had problems including call dropping. *That email to the CSC contained a summary of the combined effects of a series of specific problems, disclosed to my employer in emails and teams messages, as stated in the documents "Narrative of disclosures at HMRC" sent 29th September 2023 and, "Details of emails etc sent to HMRC staff about the AUI/ Odigo phone system", of 27th February 2024."*		

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

3. **Detriment (Employment Rights Act 1996 section 48)**

3.1 Did the Respondent do the following things:

3.1.1 Adopt Process A rather than Process B under its disciplinary policy;

3.1.2 On 26/9/22, 19/10/22, 26/10/22 multiple confusing, sometimes degrading or

false, formal allegations were made by Viv Harris, EAS staff, and Pat Wilkinson. The particulars of this detriment are set out in the claimant's document titled "Confused, false and degrading allegations document" attached to the Email dated 23/11/23 Claimant to Respondent and Tribunal RE: allegations and disability discrimination. This state of affairs continued until the allegations were set out more clearly in the appeal outcome letter.

The allegations were also phrased with no recognition that at least one of the Claimant's alleged actions (refusal to complete the FUSE remission form for dissolved companies) was done with whistleblowing motive and a direct result of whistleblowing apparently having failed (as the Claimant thought was the case at the time). The allegations also gave no recognition to the fact that another allegation (the Claimant raising feedback rate-its) appeared to be for actions for which some had earned certificates. The Claimant says that the meaning of this allegation was never properly explained to her, and was not included in the appeal outcome.

3.1.3 On 26 September 2022 onwards, Viv Harris failed to clarify the formal allegations when asked to do so;

3.1.4 On 26 October 2022 onwards, Pat Wilkinson failed to clarify the formal allegations when asked to do so;

3.1.5 On 26 September 2022 onwards, Viv Harris failed to realise the Claimant needed a lot of time and assistance to understand the most confusing and degrading allegations and to work out how best to respond;

3.1.6 On 26 October 2022 onwards, Pat Wilkinson failed to realise the Claimant needed a lot of time and assistance to understand the most confusing and degrading allegations and to work out how best to respond;

3.1.7 On 10 November 2022 Pat Wilkinson failed to clarify the allegations during the disciplinary hearing;

3.1.8 On 29 November 2022 the disciplinary outcome was phrased on a confusing manner, introducing things not discussed. There was a lack of clarification, in

the decision text, of the allegations. There was no acknowledgment of the motives behind the alleged actions, e.g. whistleblowing/public good motives.

3.1.9 On 8 February 2023 the appeal decision in upholding that the disciplinary procedure was sufficiently correctly carried out;

3.1.10 After 8 February 2023 EAS staff, Marc Ingledon, Sandra Edwards, Viv Harris and Ketan Tanna refused to allow any of the above to be taken further. The Claimant was left under the same management chain that had caried out the disciplinary process;

3.1.11 In February and March 2023 failure of a data protection request to provide the information requested. There were also technical problems with accessing the information that was provided;

3.2 By doing so, did it subject the Claimant to detriment?

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

4. **Remedy for Protected Disclosure Detriment**

4.1 What financial losses has the detrimental treatment caused the Claimant?

4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

4.3 If not, for what period of loss should the Claimant be compensated?

4.4 What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

4.5 Has the detrimental treatment caused the Claimant personal injury and how much compensation should be awarded for that?

4.6 Is it just and equitable to award the Claimant other compensation?

4.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.8 Did the Respondent or the Claimant unreasonably fail to comply with it?

4.9 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

4.10 Did the Claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the Claimant's compensation? By what proportion?

4.11 Was the protected disclosure made in good faith?

4.12 If not, is it just and equitable to reduce the Claimant's compensation? By what proportion, up to 25%?

5. **Constructive unfair dismissal / Protected disclosure constructive unfair dismissal**

5.1 Was the Claimant dismissed?

5.1.1 Did the Respondent do the following things:

5.1.1.1 Adopt Process A rather than Process B under its disciplinary policy;

5.1.1.2 On 26/9/22, 19/10/22, 26/10/22 and 27/10/22 multiple confusing, sometimes degrading or false, formal allegations were made by Viv Harris, EAS staff, and Pat Wilkinson. The particulars of this detriment are set out in the claimant's document titled "Confused, false and degrading allegations document" attached to the Email dated 23/11/23 Claimant to Respondent and Tribunal RE: allegations and disability discrimination. This state of affairs continued until the allegations were set out further in the appeal outcome letter;

5.1.1.3 The allegations were also phrased with no recognition that at least one

of the Claimant's alleged actions (refusal to complete the FUSE remission form for dissolved companies) was done with whistleblowing motive and a direct result of whistleblowing apparently having failed (as the Claimant thought was the case at the time). The allegations also gave no recognition to the fact that another allegation (the Claimant raising feedback rate- its) appeared to be for actions for which some had earned certificates. The Claimant says that the meaning of this allegation was never properly explained to her, and was not included in the appeal outcome;

5.1.1.4 On 26 September 2022 onwards, Viv Harris failed to clarify the formal allegations when asked to do so. The ongoing lack of clarity cause the Claimant mental health systems and impeded her ability to present her case at the disciplinary hearing;

5.1.1.5 On 26 October 2022 onwards, Pat Wilkinson failed to clarify the formal allegations when asked to do so;

5.1.1.6 On 26 September 2022 onwards, Viv Harris failed to realise the Claimant needed a lot of time and assistance to understand the most confusing and degrading allegations and to work out how best to respond;

5.1.1.7 On 26 October 2022 onwards, Pat Wilkinson failed to realise the Claimant needed a lot of time and assistance to understand the most confusing and degrading allegations and to work out how best to respond;

5.1.1.8 On 10 November 2022 Pat Wilkinson further failed to clarify the allegations during the disciplinary hearing;

5.1.1.9 On 29 November 2022 the disciplinary outcome was phrased on a confusing manner, introducing things not discussed. There was a lack of clarification, in the decision text, of the allegations. There was no acknowledgment of the motives behind the alleged actions, e.g. whistleblowing/public good motives.

5.1.1.10 On 8 February 2023, despite the mishandling of the disciplinary process, the appeal decision upheld that the disciplinary procedure was sufficiently correctly carried out;

5.1.1.11 The appeal outcome left out of consideration some of the most confusing allegations. The Claimant hoped to get allegations which were ultimately left out acknowledged as being false or confused and hoped to get an explanation why the false allegations were raised in the first place. She hoped there would be some form of investigation to prevent other employees facing similar unfair practices. But on a date after 8 February 2023 Marc Ingledon and EAS staff told the Claimant she had no further avenue of complaint about the disciplinary process or the managers involved, leaving her under the same management chain that had carried out the disciplinary process and without redress;

5.1.1.12 In February and March 2023 the Claimant's information rights complaint that there were false allegations on the Claimants' record, specifically in the manager's referral form of 27 October 2022, in which she was trying to get notes added to allegations, failed. Further, the Claimant was still left in the position that the allegations had been formally raised against her and had not been retracted or explained;

5.1.1.13 On 16 March 2023 the response to a subject access request that sought all allegations made against the Claimant since June 2022 together with supporting information, did not contain all the information the Claimant had asked for. It did not show additional allegations or provide material supporting the allegations. The information was also mis-indexed with the electronic index linking to different documents than those titled.

5.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

5.1.2.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between

the Claimant and the Respondent; and

5.1.2.2 whether it had reasonable and proper cause for doing so.

5.1.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

5.1.4 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

5.1.5 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

5.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract?

5.2.1 Was the reason or principal reason for dismissal that the Claimant made a protected disclosure? If so, the Claimant will be regarded as unfairly dismissed;

5.2.2 If not, was it otherwise a potentially fair reason? Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

6. **Remedy for unfair dismissal**

6.1 Does the Claimant wish to be reinstated to their previous employment?

6.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

6.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

6.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular

whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

6.5 What should the terms of the re-engagement order be?

6.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

6.6.1 What financial losses has the dismissal caused the Claimant?

6.6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

6.6.3 If not, for what period of loss should the Claimant be compensated?

6.6.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

6.6.5 If so, should the Claimant's compensation be reduced? By how much?

6.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.6.7 Did the Respondent or the Claimant unreasonably fail to comply with it?

6.6.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

6.6.9 If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

6.6.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

6.6.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

6.7 What basic award is payable to the Claimant, if any?

6.8 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

7. **Disability**

7.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Respondent admits the Claimant is disabled by virtue of psychosis and schizophrenia and has admitted (e-mail on 13 August 2024 to the Tribunal) that the combined effects of psychosis / schizophrenia and reactive mental health symptoms amounted to a disability, and subsequently that sleep apnoea amounted to a disability. In relation to the other impairments relied on, the Tribunal will decide:

7.1.1 Did she have a physical or mental impairment: PVFS/CFS/ME.

7.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

7.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

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

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

7.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

7.1.5.2 if not, were they likely to recur?

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

8.1 Did the Respondent do the following things:

8.1.1 In an email from Viv Harris dated 26 September 2022 make 3 allegations against the claimant as follows:

8.1.2 (allegation 3) – "Concerns raised regarding HMRC leave allocations and a reticence to accept Team leader and HR/ EAS explanations". The claimant says that the allegation was false and appeared to be worded to suggest her mental illness is causing her to behave badly, making use of her paranoid schizophrenia to make falsely described behaviour plausible and possibly attributable to delusional paranoia.

8.1.3 (allegation 5) – "suggesting entries in an excel share point were being altered and that notes on core systems were being amended / adjusted". The claimant says these are two separate incidents that had already been dealt with (as such there was no need to include them) and were included to demonstrate the claimant had paranoid delusion / mental health problems.

8.1.4 (allegation 7) – "repeated concerns raised with the rate-it guidance teams". The claimant says she raised many rate-its over a number of years and the claimant accepts that she occasionally raised the same subject more than once but says she was being marked out as a special case who must be stopped from raising "rate its" when everyone else is encouraged and rewarded for doing so.

8.1.5 Adopt Process A rather than Process B under its disciplinary policy.

8.2 Was that less favourable treatment?

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

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The Claimant has not named anyone in particular who she says was treated better than she was other than other staff who do not have paranoid schizophrenia are encouraged to raise "rate its".

8.3 If so, was it because of disability?

8.4 Did the Respondent's treatment amount to a detriment?

9. **Discrimination arising from disability (Equality Act 2010 section 15)**

9.1 Did the Respondent treat the Claimant unfavourably by:

9.1.1 In formal disciplinary emails dated 26/9/22, 19/10/22 and 26/10/22 and

27/10/22 make disciplinary allegations[2] that were unclear, unclarified, confusing, false and degrading and ;

9.1.2 On or around 8 February 2023 Mr Tanna refused to overturn the written warning by failing to recognise the poor procedure had triggered reactive mental health symptoms and put the claimant at a serious disadvantage in making g her case.

9.2 Did the following things arise in consequence of the Claimant's disability:

9.2.1 A need for clear and precise communication; being less able to articulate request for clarity and memory problems causing the claimant to raise similar issues repeatedly.

9.3 Was the unfavourable treatment because of any of those things?

9.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

9.5 Managing disciplinary allegations in a fair and reasonable way in accordance with its published policies and procedures The Tribunal will decide in particular:

9.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

9.5.2 could something less discriminatory have been done instead;

9.5.3 how should the needs of the Claimant and the Respondent be balanced?

9.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

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

10.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

[2] The claimant confirmed she does not wish to complain about the sanction itself, the complaint is about the procedure that was used.

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

10.2.1 The respondent's disciplinary processes and in particular the policy of electing which process is applied namely Process A or Process B.

10.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the claimant needed extra care and clarity in communication and would have serious reactive mental health symptoms in response to unusually distressing circumstances?

10.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

10.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

10.5.1 Follow a fair procedure;
10.5.2 Elect process B which would have enabled the claimant to challenge the truth of the allegations;
10.5.3 Not present allegations that were degrading confusing and unclear;
10.5.4 Taken extra care with clarity and communication

10.6 Was it reasonable for the Respondent to have to take those steps and when?

10.7 Did the Respondent fail to take those steps?

11. **Remedy for discrimination**

11.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

11.2 What financial losses has the discrimination caused the Claimant?

11.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

11.4 If not, for what period of loss should the Claimant be compensated?

11.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

11.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

11.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

11.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

11.9 Did the Respondent or the Claimant unreasonably fail to comply with it?

11.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?

11.11 By what proportion, up to 25%?

11.12 Should interest be awarded? How much?