



# EMPLOYMENT TRIBUNALS

**Claimant:** A  
**Respondent:** Choice Support (Formerly MCCH Ltd)  
**Heard at:** East London Hearing Centre  
**On:** 5, 6, 7, 11 and 12 May 2021  
**Before:** Employment Judge Burgher  
**Members:** Ms G Forrest  
Mr S Woodhouse

## Appearances

**For the Claimant:** Ms E Sole (Counsel)  
**For the Respondent:** Mr S Wyeth (Counsel)

*This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.*

*Pursuant to rule 50 of the 2013 ET rules a permanent anonymity order is made in respect of the Claimant, the Claimant's father, Employee A and Employee A's mother and father.*

## JUDGMENT

1. The Employment Tribunal does not have jurisdiction to consider the Claimant's claim for harassment on grounds of sex, her claim having been presented out of time and it not being considered just and equitable to extend time.
2. The Claimant's claims that she was victimised because she did protected acts fails and are dismissed.
3. The Claimant's claim for automatic unfair constructive dismissal for making protected disclosures fails and is dismissed.

4. **The Claimant's claims that she was subjected to detriment on ground that she made protected disclosures fails and are dismissed.**

## REASONS

### Issues

1. At the outset of the hearing the issues were identified and on the fourth day of the hearing the Respondent formally sought to add a section 109 Equality Act 2010 (EqA) defence as an issue for consideration. This matter was not a pleaded matter and Ms Sole so rightly pointed out that that would require an amendment application.
2. Mr Wyeth therefore applied to amend the Respondent's response to add a section 109 EqA defence. He referred to the Selkent principles and stated the balance of prejudice favoured the Respondent. It was the fourth day of the hearing but there was no new evidence required or recalling of witnesses. It would be a matter for submission only. The Tribunal concluded that there would be no prejudice to the Claimant who was professionally represented by Counsel who would be able to deal with that issue by way of submissions.
3. The amendment application was allowed. The final issues for the Tribunal consideration are therefore:

### Whistleblowing

1. Was the Claimant's email dated 20 March 2018 a protected disclosure (paragraph 5 of the GoC)?
  - a. Was information disclosed which, in the Claimant's reasonable belief tended to show that employee BD had committed a criminal offence.
  - b. If so, did the Claimant reasonably believe that the disclosure was made in the public interest?

### *Detriment complaints*

2. If a protected disclosure is proved, was the Claimant, on the ground of any protected disclosure found, subjected to detriment by the Respondent as follows: -
  - a. the Respondent allegedly changing passwords necessary to access the Respondent's intranet whilst she was absent;
  - b. the Respondent no longer paying full discretionary sick pay from 16 April 2018 whilst Employee A remained on full pay during his suspension and the manner of informing the Claimant of the reduction;
  - c. the allegedly insensitive handling of the instigation of the investigation into the allegations made by the Claimant;

- d. the Respondent's failure to respond to the Claimant's email of 12 April and requests of 17 April 2018 and 19<sup>th</sup> April 2018;
- e. the Respondent put unreasonable pressure on the Claimant to engage in the investigation an unfairly short time after the 19<sup>th</sup> March 2018;
- f. the Respondent's allegedly inappropriate handling of the meeting of 17 April 2018;
- g. the notes produced from the meeting of 17 April 2018 which the Claimant alleges were inaccurate;
- h. the Respondent not removing Caroline King from the investigation following the Claimant's grievance;
- i. the Respondent suspending the Claimant on 11 June 2018 allegedly inappropriately and unfairly and raising allegations against her;
- j. the Respondent unfairly not upholding the Claimant's grievance;
- k. the Respondent allegedly confirming, in a meeting on 17<sup>th</sup> July 2017, that any reference would refer to the Claimant resigning pending disciplinary investigation, refusing to provide details about the allegations and explaining that a decision had been made to refer the safeguarding allegation to the DBS.

*Unfair dismissal complaints*

- 3. Was the making of any proven protected disclosure the principal reason for the Respondent's conduct relied on by the Claimant as breaching the implied term of trust and confidence (identified at 2a. to i. above).

Since the Claimant had less than two years' service the Tribunal will therefore be required to consider whether the Claimant has produced sufficient evidence to raise the question of whether the reason for the dismissal was the protected disclosure?

- 4. If so, did the Respondent's conduct identified above amount to a breach of the implied term of trust and confidence?
- 5. If so, did the Claimant resign in response to the breach of the implied term of trust and confidence?

**Equality Act Claims**

*Harassment*

- 6. Was the sexual act on 19 March 2018 unwanted conduct of a sexual nature?
- 7. If so, did it have the purpose of violating the Claimant's dignity and/or creating a hostile degrading humiliating or offensive environment for the Claimant?
- 8. If found to be harassment, did the Respondent take all reasonable steps to prevent Employee A from doing that thing or from doing anything of that description?

*Victimisation*

9. Was the Claimant's email dated 20 March 2018 and email dated 24<sup>th</sup> April 2018 protected acts?
10. If so, did the Claimant suffer detriments as a result of the act as set out in paragraph 2a to k (first protected act) and 2.h. to k. (second protected act) and was her constructive dismissal a further act of victimisation as a result of both protected acts?

**Jurisdiction**

11. Were the acts complained of brought in time?

The Respondent's position is that any acts occurring prior to 22<sup>nd</sup> April 2018 (namely three months prior to the commencement of Early Conciliation) were brought out of time.

The Claimant's position is that the claims, as pleaded, were presented in time. However, in the alternative the Claimant's position is that whether or not the claims were presented on time will depend on the findings made by the Tribunal and how long the extension of the primary time-limit was, as applied to each particular complaint consequent on the Early Conciliation process.

This issue requires consideration of whether the acts amount to conduct extending over a period (claims under the Equality Act) and/or a series of similar acts or failures (whistleblowing detriment claims)) and what the end date of the period and/or the date of the last act of the series was.

12. If not, should time be extended to allow the claims to proceed: for claims under the Equality Act, is it just and equitable to extend time?; for the whistleblowing detriment claims, has the Claimant proved that it was not reasonably practicable to present the claim before the end of three months, and were the claims nevertheless brought within such further period as the Tribunal consider reasonable?

**Remedy**

13. Where the Claimant has succeeded in any of her claims what remedy is appropriate: to include consideration of a declaration, damages for injury to feelings, damages for pain, suffering and loss of amenity and loss of earnings.

**Evidence**

4. The Claimant gave evidence on her own behalf. The Claimant's father also provided a witness statement but was not called or questioned on it.

5. The Respondent called the following witnesses:

- 5.1 Leone Brooks, HR manager.
- 5.2 Caroline King, Team Leader and investigation officer.
- 5.3 Jenny Yore, Team Leader and Claimant's line manager.

- 5.4 Lisa Parle, Senior Operations Manager.
- 5.5 Mark Ferry, Director of Human Resources

6. All witnesses gave sworn evidence by way of written witness statements and were subject to cross examination and questions from the Tribunal.

7. The Tribunal was also referred to relevant pages of a hearing bundle consisting of over 500 pages and permitted limited additional relevant pages throughout the hearing.

8. The Tribunal indicated to the Respondent at the outset of the hearing that it was concerned that it would not be hearing any evidence from Employee A (EA) who was the employee in respect of the Claimant's sexual harassment complaint. Mr Wyeth submitted that the contemporaneous documentary evidence would be referred to demonstrate that the sexual assault did not take place.

9. EA was dismissed by the Respondent on 30 May 2018, nearly 4 months prior to the Claimant bringing the claim. The Claimant did not name EA as an individual Respondent to the claim. No application for a witness order was made to secure the attendance of EA. During his evidence on the fifth day of the hearing Mr Ferry stated that, following the Tribunal's observations about the absence of EA made at the start of the hearing, he attempted to contact EA to see if he would be willing to attend. He was informed by EA's father that EA was suffering from a 'catastrophic mental breakdown' and would be unable to attend. We did not have any medical evidence to this effect. The Tribunal was therefore left to determine the very serious allegation in respect of the sexual assault in the absence of the alleged perpetrator.

## **Facts**

10. The Tribunal has found the following facts from the evidence.

11. The Respondent is an organisation that provides support to vulnerable adults with mental health needs. It employs approximately 1500 people across various locations. Each location has its own operational budget and management requirements. Each location also has dedicated care staff who are supported by organisational HR and financial personnel.

12. 10 South Canterbury Road is a building owned by the Respondent to provide support services. It is a home for six people and had two staff working the service between the hours of 9am to 5pm weekdays and one member of staff working reduced hours at weekends. The building is a two-storey detached house, the ground floor layout has a kitchen dining room and two lounges and an office and the client bedroom which is opposite the office. The office layout is a room with two entrances one door to enter an emergency exit at the far end.

13. EA commenced employment with the Respondent on 1 August 2016.

14. The Claimant commenced employment with the Respondent on 2 October 2017 as a PA. The Claimant informed Ms Yore that she had suffered from post-

traumatic stress disorder and that she had been sexually abused by a teacher when she was at secondary school and this resulted in the recent successful prosecution of the schoolteacher. The Claimant referred to PTSD in her regular supervision notes.

15. On the fifth day of the hearing following review by Mr Wyeth of the redactions in the remedy bundle, it transpired that the Claimant had been previously diagnosed with Emotional Unstable Personality Disorder (EUPD) at the relevant time. The Claimant was recalled to evidence why this diagnosis was redacted. The Claimant stated that she believed that her diagnosis of EUPD was irrelevant to the issues, she is a high functioning individual and she stated that she did not mention this to the Respondent or the Tribunal previously because of the stigma that could be attached to it. She stated that her fear of the repercussions of the stigma outweighed any benefits of support that could have been provided to her by occupational health.

16. The Claimant anticipated the application Mr Wyeth made to remove the redactions from her medical records and produced a letter dated 11 May 2021 from Rosanna Bond Principal Psychotherapist, Team Lead East Kent Personality Disorder Service stating:

“C has a diagnosis of Emotionally Unstable Personality Disorder. This means that she can struggle with emotional regulation, finds interpersonal relationships challenging, she is vulnerable to abuse from others and less aware when this is taking place and lacks confidence and core self-esteem in many areas. Personality Disorder is an enduring and distressing condition which puts those diagnosed at risk of being pulled into abusive or coercive relationships, often without realising and affects every aspect of a patient’s world. from their relationship with food and their physical body, to how they manage their emotions. Patients with EUPD are more likely to go into crisis when feeling overwhelmed and find challenging situations can lead to unbearable distress, feelings of being misunderstood and a deep-seated struggle with conflict. Patients with Personality Disorder are more likely to self-harm or attempt suicide when trying to manage difficult or traumatic experiences. C has a history of serious childhood sexual assault and trauma which she has worked courageously to process in therapy and associated PTSD. My experience of C in therapy is that she is highly thoughtful, self-aware and reflective and able to think and reflect upon her decisions and engagement with others around her.”

17. The Claimant was considered to be an excellent employee by the Respondent. She only had two days sickness absence prior to the incident on 19 March 2019. She had a positive and supportive relationship with her line manager Ms Yore who she was able to confide in. The Claimant’s text on 13 June 2018 to Ms Yore following her resignation illustrates this. She wrote:

*“Thank you so much for all your guidance and support. I’ve loved working at 108. You’ve been a wonderful manager, and fab to work with. I really didn’t want to leave. And still don’t but feel that I have to under the circumstances. I hope you understand. I am truly devastated.*

*Thank you again for a wonderful six months. Onwards and upwards and I hope we meet again professionally in the future. My best wishes always.”*

Relevant Policies

18. The Respondent has a sick pay policy which says that employees will not be entitled to occupational sick pay for the first year of employment. The Respondent has a personal relationships policy that states:

“13 Personal Relationships (see Conflicts of interest Policy)

Partners and immediate/close family members will not be appointed within the same service/department.

There may be occasions when employees who are already in post become partners. These situations may pose a potential conflict of interest and must be disclosed. If both partners report to the same line manager or one employee manages another, one partner would then be transferred to another post following negotiation with both parties.”

19. The conduct at work policy states:

“Personal relationships can impact on the team and raise potential difficulties or staff delivering professional services. To avoid any confusion, as a matter of principle, any staff who are related (or who become related) or who are in what is generally called understood to be ‘significant relationship’ will not be allowed to work in the same service nor a role where one might line manage the other. All staff have a responsibility to inform line managers of any such relationship at an early stage so that appropriate action can be taken.”

20. We accept that the Respondent’s policies were brought to the attention of EA the Claimant. Indeed, the Claimant signed the policies this effect during her induction. The Claimant asserted her belief that there was not nothing significant about the relationship she had with EA. EA stated in a written statement submitted during the internal investigation that he believed he had a relationship with the Claimant but he ended it due to the Claimant seeing her ex-partner and being on dating sites.

21. Having considered the evidence we conclude that the EA and the Claimant dated from Christmas 2017. The Claimant and EA were involved in consensual sexual activity most recently on two separate occasions days before the incident on 19 March 2018.

22. Whilst the policy could be ambiguous relating to how a special relationship is determined, the relevant context was the small building in which the Claimant and EA worked together as the only members of weekday staff. We conclude the spirit of the policy was that they reasonably ought to have told the Respondent that they were dating as this could inevitably had affected their ability to deliver professional services. The Respondent was ignorant of the fact that EA and the Claimant were dating and there was nothing to suggest this and as such the Respondent had no opportunity to consider how to manage this relationship within the work environment and how could impact on future work.

Incident 19 March 2018

23. On 19 March 2018 the Claimant was at work with EA. At about 3:15pm in the office at South Canterbury Road Canterbury Road and a sexual act took place between the Claimant and EA. The Claimant stated that she was raped and is undergoing physical health and mental health treatment due to this.

24. The initial record of the Claimant is in the medical notes on 19 March 2018. It is recorded that the rape happened at approximately 15:00, she was alone at work with the male who dragged her into one of the offices and penetrated her, he did not use a condom. Before us the Claimant stated that the nurse wrongly recorded this and that she was not dragged into the office.

25. The Claimant's email of 16 April 2019 at 12:51 email attached a statement as follows:

"It was a perfectly ordinary working day, although very busy as we were preparing for the viewing the following day. EA and I spent all morning cleaning with the clients; I did all of the bathrooms, both upstairs and down, and the landing space, whilst EA focused on the downstairs communal areas.

At approximately midday, EA conducted a 1:1 session, with JD I believe. After this, I caught up on paperwork and worked through a "to do" list I had made myself the week before. There was quite a lot of odd paperwork jobs on it, little bits of updating here and there.

EA had been unwell most of the day, and had forgotten his lunch. As EA did not have his car, I offered to take him to the Sainsbury's at the Cricket Ground to get something to eat, as he looked rather unwell, and I was concerned.

At approximately 1340, we left the office to pop to Sainsbury's, and were gone for no more than 10 minutes.

On our return, EA ate his lunch in the office, while I ate mine at the desk, working on the computer.

At approximately 1515, the incident took place. I do not wish to make any comments on what took place and understand it is within my legal right not to disclose the details of what occurred.

I left the office at 1540.

I arrived at KCH Minor Injuries within 15 minutes of leaving the office.

The incident was reported to the police late on Monday 19 March 2018, but I have since withdrawn my support from the investigation against EA."

26. The Claimant's email of 16 April 2018 at 22:51 attached a statement that was identical to her earlier statement save for the description of the incident and reason for withdrawing from the investigation. She writes:

"At approximately 1515, the incident took place in the office at 10 South Canterbury Road. EA cornered me, while standing, behind the desk. At this point a serious sexual assault took place.

I left the office at 1540.

I arrived at KCH Minor injuries within 15 minutes of leaving the office.



The incident was reported to the police late on Monday 19 March 2018, but I have since withdrawn my support from the investigation against EA due to my current mental wellbeing. I have up to two years to reopen the case against him.

27. 30 April 2018 EA submitted a written response to the allegation that he had raped the Claimant. At the time he made this statement he had no information to respond to in relation to how he was alleged to have carried out the attack. He wrote:

“C and I had been seeing each other since about November 2017, and I would say that we were having a relationship.

On a number of occasions more recently before the 19th March, C had seen her ex partner and had been messaging other men on an internet dating site.

Over the course of time this behaviour led me to believe the relationship was over, and we had a conversation via Whatsapp to that effect the evening of the 18 March 2018, where I told her that it wasn't comfortable for me to carry on the relationship, especially as we were work colleagues.

I went in to work as usual on the 19 March, and the atmosphere was amicable. We carried out our duties as normal, until about 13:00 hours when we were both in the office and then C started a conversation about our relationship.

The conversation carried on until 14:00 or so, we hadn't resolved our relationship problems but C wanted a hug, which I did. C then tried to kiss me which startled me, however I returned the kiss, and she sat on my lap.

We were then intimate, which I knew was inappropriate at work and regret very much, but she had instigated it and it was totally consensual as far as I knew. C was encouraging me, and, afterwards we agreed to continue with our relationship and arranged that we would meet at her place later that evening.

Very soon afterwards C's mood changed abruptly and she accused me of sexually assaulting her. This totally surprised and shocked me, as this was totally false, and at which point C left the house (at approximately 1540), and I was in a state of confusion and bewilderment.

I finished my shift and went home, I was feeling extremely anxious and depressed over the situation so went to bed.

At 21:00 hrs 3 police officers arrived at my parents home, and informed me that I was under arrest due to an allegation of rape.

I was handcuffed and taken to Canterbury police station, where I was medically examined, my clothes and possessions taken away and I was detained in police cells until the 20th March.

On 20<sup>th</sup> March I was questioned at length by the investigating officers and was finally released without bail at 16:00hrs.

My phone and possessions were retained as potential evidence and I was told by the liaison officer that I would be informed of the outcome in due course, and that I would be re-arrested if there was any evidence to support the allegation, but that it could potentially take months for a decision to be made.

As you can imagine this increased my anxiety enormously since I knew I was innocent and that the allegation was malicious. I became very depressed and sought assistance and advice from the Canterbury & Coastal Mental Health Team following my arrest.

Please note that on the evening of the 21<sup>st</sup> March, C messaged me (an emoji of a cat eating a donut) which added to my confusion, and on the 23<sup>rd</sup> March I visited my GP who diagnosed anxiety and depression.

On 24<sup>th</sup> March C sent me a Facebook friend request which I ignored.

On 25<sup>th</sup> March C made an attempt to contact me via Facebook messenger which I again ignored. I informed the Police liaison officer who advised that they would instruct C to cease contact.

On 27<sup>th</sup> March I attended a follow-up appointment with my GP.

On 30<sup>th</sup> March at 2100 C actually visited my parents home and wanted to deliver a birthday present for me!

On 1<sup>st</sup> April I contacted the police liaison officer and reported these communication attempts, and was advised that they would contact C once again and instruct her to stop contacting me.

On 2<sup>nd</sup> April the gift bag containing a birthday present from C was left hanging on the wing mirror of my car with 'I love you' written on the address tag.

On 4<sup>th</sup> April I received a letter from the police duty solicitor informing me that the police would be taking no further action in respect of this matter and to consider the case concluded.

I would point out that attempts by C to contact me by various means — notes on my car windscreen, letters to my parents, emails, messages, visits to my address and waiting outside my parents house in her car, an attempt to accost me in person have continued throughout this episode. The last attempt to date was made 29<sup>th</sup> April. These have included both veiled and overt threats, and declarations of love, statements that C does not understand how this situation occurred and other confusing and mixed messages. This has seriously undermined my own mental health.

I have chosen not to make any formal complaint about this behaviour on C's part however as I believe that C is suffering from emotional instability due to a personality disorder.

I would like to state that the allegation of sexual assault which was made against me by C was malicious and false, and has no basis in fact.

The whole matter has left me feeling very traumatised and depressed and at this point I do not feel that I can function normally at any level, I am currently receiving treatment from the GP, and am on medication for anxiety and depression.

28. The Claimant was able to write a more detailed statement on 11 June 2018, after EA had already been dismissed and in the context of her being invited to attend a disciplinary meeting to answer EA's statement that they had consensual sex on work premises, which would have been inappropriate. The Claimant wrote:

"At approximately 15:15, the incident took place in the office at 10 South Canterbury Road. EA cornered me, while standing, behind the desk. I turned my back to EA indicating that I was not interested in making any physical contact with him. I said "no", and had already said no at least three times at this point. The office chair was in front of me, and EA directed me into the chair. I resisted, yet he assisted my right leg and therefore rest of my body, into the chair, using his right hand. I then said "I'm scared, EA," to which EA replied "So am I", which made no sense to me. I could no longer move.

EA then placed his left hand on my lower back and pushed me toward, and then grabbed each side of my jeans and underwear together, pulling them down forcefully until they reached the back of my knees, exposing my buttocks. EA then proceeded to hold me in this position with his left hand, by my lower back, and take his penis in his right hand and insert into my vagina.

I was terrified, paralysed and unable to move. Once EA finished, I reached for my clothing immediately, and I said "You do just realise you raped me in our office" and EA replied "I know" I grabbed my handbag, keys and mobile phone, leaving the desk exactly as it had been while I was working, and I ran out of the property at 10 South Canterbury Road, without saying goodbye to Service Users, as I usually would.

I left the office at 1540. On leaving the office, I got into my car, which was parked on the drive at 10SCRB, and was unable to drive away due to the severity of distress I was in. I called my ex—partner but was unable to speak, and was chronically hyperventilating. I managed to get my car off the drive a few minutes later, and started to drive down the hill, but was unable to see and had to pull over, in Nunnery Road and a lady knocked on my window to see if I was ok. All the while, I was still on the phone, and unable to speak. I then made the decision to drive to the nearest place of safety, Kent and Canterbury Hospital.

I arrived at KCH Minor injuries within 15 minutes of leaving the office. I spent over 4/5 hours at the minor injuries unit, until I was met there later by the Police. The incident was reported to the police late on Monday 19 March 2018. The first Respondent Police took DNA swabs from my hands, all of the clothing I was wearing, my office keys, and an account of what had happened. I was then taken to a specialist victims unit, a SARC, to have my intimate DNA swabs taken, whereby EA's DNA was extracted from my body.

I arrived home in the early hours of 20 March 2018.

Caroline King was notified of the rape by a first Respondent Officer, PC Ben Sutton of Dover Police force, who first met with me at KCH minor injuries unit."

29. Doing the best we can on the available evidence, given the lack of context provided by the Claimant to the lead up to the incident and her denial that her prior connection with EA amounted to a 'significant relationship' we conclude that there was a discussion between her and EA of the state of their relationship, the Claimant sought to comfort EA by hugging him, intimacy progressed consensually and then the Claimant objected, she said no and EA continued, without the Claimant's consent, in having sex. The Claimant mentioned this to EA after the act had completed, she was upset and immediately left to go to the hospital, the matter was reported to the police and the Claimant was then subjected to an invasive medical assessment.

30. On the evidence before us we therefore find that the sexual act was unwanted.

#### Investigation regarding the incident

31. On 20 March 2018 Ms King was informed by PC Sutton. He informed me that an incident of alleged rape had taken place against the Claimant. PC Sutton was limited in the information he could provide. Ms King then notified the relevant senior officers of the major incident.

32. The police attended South Canterbury Road on the morning of 20 March 2018 to collect evidence. At 10:15 on 20 March Ms King telephoned the Claimant who at that time was unrested, upset and distressed following the incident. The Claimant expressed concern about the Respondent's service delivery. Ms King told the Claimant that the service was covered, and that the Claimant should just take care of herself. Ms King also stated that EA would not be returning to the service at the present time and reassured the Claimant that no tenants or other members of staff, other than senior management and HR, were aware of the incident and this would be kept confidential. Ms King asked the Claimant if she wanted the support line numbers

and employee counselling by DAS. The Claimant said that the hospital had given her lots of leaflets and support numbers and thanked Ms King for the call.

33. On 20 March 2018 at 14:48 the Claimant emailed Ms Hoiles, a junior HR officer, the following:

“I’d like to report to HR a serious incident that occurred yesterday at 10 South Canterbury Road.

Whilst at work, I was raped by a fellow employee. This has been reported to the police and management; Caroline King (in the absence of Jenny Yore) and Lisa Parle are both aware of the incident.

I am not yet certain if I wish to proceed with the police investigation, and would like to know what the next stages are for me as an employee in this situation. I am hoping to return to work on Monday.”

34. At 3.15pm on 20 March 2018 Ms Leonie Brooks, HR Director called the Claimant and explained that she had received her email from Ms Hoiles and that she was calling her back to see what support she may need and to answer any specific questions she may have at this time. The Claimant said that she was feeling overwhelmed and wanted to know where she stands. Ms Brooks responded to the restating the support that was indicated by Ms King earlier that morning. Ms Brooks explained that a police investigation has been started and that Ms Parle will be liaising with them and provided updates about this. Ms Brooks explained that the Respondent’s internal investigation would need to take place, could not say when this would be started as the police sometimes ask employers not to start their own investigations if they think it may interfere with a criminal investigation and that the Respondent had follow the police lead on this. Ms Brooks advised the Claimant that she would have to be involved in the investigation process and that she would be interviewed as part of this. Ms Brooks asked the Claimant to put a statement in writing, setting out what happened so she that has a record of this fresh In her mind and that Ms Parle would confirm with the police what the Respondent was able to do.

35. The Claimant asked about what happens from an employer’s perspective and Ms Brooks advised that the priority was to make sure the Claimant was supported at this time and that, when appropriate, an investigation would take place. Ms Brooks asked the Claimant what support she had at home and she said that she had her mum and dad and ex- partner, who all came up to meet her at the hospital. Ms Brooks asked the Claimant what support the police had given her and the Claimant stated that she had been contacted by a liaison officer. Discussion ensued about the Claimant’s indication that she wanted to return to work the following Monday. Ms Brooks said that if the Claimant wanted to come back to work the Respondent would not want to prevent her but that they needed to make sure she is supported to do so. Discussion took place about whether the Claimant wanted to consider returning to a different service, at least initially, the Claimant was reassured that the service is covered and that she did not need to worry about this. Ms Brooks was supportive, she stated that the Respondent would understand if the Claimant needed to take some time out of work and gave the Claimant the DAS counselling service contact number and the Claimant was informed that she could call Ms King, Ms Parle or Ms Brooks if she needed anything further.

36. The contents of this telephone call, including the invitation for the Claimant to write a statement were recorded in a letter dated 22 March 2018 that was sent to the Claimant. Ms Brooks wrote:

“During our conversation, I asked you to consider writing a statement in respect of your account of the events that took place on Monday 19<sup>th</sup> March 2018. I said that I understood that this may be difficult for you to do at this time and that the police have probably already asked you for this. I explained that when MCCCH are eventually able to start an internal investigation, it may be some time away and it is important that statements are obtained as close to the time of the alleged incident taking place as possible. You said you would try to do this.”

37. The Claimant lays criticism at Ms Brooks in respect of being asked to write a statement so soon after the incident. We do not accept the Claimant's criticisms in this regard. This conversation, that was recorded in the letter was in direct response to the Claimant's email to Ms Hoiles about what would happen next. Ms Brooks was communicating to the Claimant the process that would follow in response to the request.

38. Separately EA was suspended on 21 March 2018 pending investigation. The Respondent was charged with ensuring that it acted fairly to EA and that it was acting sensitively to the Claimant regarding her allegation.

39. The Claimant had a meeting with Ms King and Ms Parle on 22 March 2018. We accept Ms King's evidence that the Claimant presented positively with them in this meeting leaving Ms King with the impression that the Claimant was being supported.

40. On 26 March 2018 the Claimant was signed off sick for work for post-traumatic stress and anxiety. On 29 March 2018 Ms Yore contacted the detective for information about the police investigation into the incident. By this stage there was no detail of the incident. At this stage Ms Yore considered that the Claimant had dropped the charges but that they would check with the detective first. We accept there was a level of misunderstanding between what the Claimant was saying to Ms Yore and what the Ms Yore believed to be the position. The Claimant was saying that she was withdrawing from the investigation, not that she was dropping the charges. However, we accept Ms Yore's evidence that she was specifically told by the police that the Claimant had dropped the charges and Ms Yore relayed this Ms Brooks.

#### Sick pay

41. On 29 March 2018 Ms Parle emailed Ms King and Ms Brooks her thinking regarding paying the Claimant occupational sick pay. It was determined that the Claimant was to be paid occupational sick pay, outside of any contractual entitlement. Ms Parle stated that they would pay sick pay for period until 16 April which would be reviewed depending on whether EA gets charged.

42. The Tribunal was not impressed with Ms Parle's evidence in relation to paying discretionary sick pay. The Claimant was to receive discretionary sick pay and the question was how long the Claimant would receive it for. There was a need to investigate the incident of 19 March 2018 and EA been suspended on full pay pending investigation.

43. The Tribunal find that the review regarding payment of discretionary sick pay was dependent on the police charging EA. It follows that had EA been charged the Claimant would likely to be granted discretionary occupational sick pay for a longer period of time. The Tribunal conclude that it would have been reasonable for the Claimant to be medically suspended on full pay until such time of their internal investigation had taken place. However, we find that the reason why discretionary sick pay was withdrawn because the Respondent believed that the Claimant was not pursuing the allegation against EA with the police and the police had told Ms Yore that the Claimant had dropped the charges against EA.

44. The Claimant attempted suicide on 2 April 2018 and subsequently notified Ms Yore of this during a text conversation on 4 April 2018.

45. The Respondent sought to obtain detail regarding the incident from the Claimant. Ms Yore therefore sent the Claimant a letter on 10 April 2018 stating that they needed to progress the investigation into the allegations and requested a statement. The Respondent sought to manage the matters expeditiously and this letter was written in order to proceed with the investigation into what happened without further unnecessary delay. EA was suspended on full pay, the decision had been made not to pay the Claimant discretionary occupational sick pay from 16 April 2018; at this stage the Respondent had no statement from the Claimant to put to EA as part of the investigation; the police had informed the Respondent that the Claimant had dropped the charges against EA and over 4 weeks had elapsed since the incident. The Tribunal can readily accept how this letter could be perceived as insensitive especially in the context of the Claimant having a suicide attempt on 2 April 2018, being previously diagnosed with post-traumatic stress disorder and being subject to the incident on 19 March 2018.

46. On 11 April 2018 the Claimant stated that she made another suicide attempt. Despite this the Claimant she sent an email to Ms Yore on 12 April 2018 at 11.54 stating:

“Hi Jenny,  
I received a letter yesterday inviting me to meet with both you and Caroline King on Tuesday 17th April. I am able to attend.

Please could you confirm what is required at the meeting i.e anything I may need to prepare in advance or bring with me. I have so far been unable to write an account of the event as it has been too difficult and upsetting (as mentioned in the letter). However, I will try and do this between now and when we meet on the 17th.”

47. On 13 April 2018 the Claimant sent Ms Brooks an email, compounding the Claimant’s inconsistent presentation at the time, stating that she is able to attend the meeting, The Claimant asked for full details of the purpose of the internal investigation and stated that she was not legally required to provide the statement that the Respondent had asked her to provide. The Claimant wrote that it has been a very upsetting and traumatic time for her to relive the events for the purpose of internal investigation so close to the event and indicated this was unfair. She indicated that she would try to put together a document with as much information as possible whilst maintaining her dignity. The Claimant requested the contact details of the CEO.

17 April 2018 meeting

48. The Claimant attended a meeting on 17 April 2018 with Ms King and Ms Yore, Ms Yore had informed the Claimant the previous day that the meeting could only be rescheduled one more time. The Claimant provided emailed the two separate statements of 16 April referred to above.

49. We accept that there were inconsistencies in relation to the Claimant's messaging about whether she could proceed with an internal investigation meeting and whether her mental health condition would affect this. Before the meeting Ms Yore and Ms King ought to have properly satisfied themselves that the Claimant was in the position to proceed with this meeting by asking her at the outset of the meeting whether in view of the previous indications of suicide attempt she could have proceeded. On the contrary, Ms Yore repeated the indication that the Claimant could only postpone the meeting once because the investigation needed to be proceeded with. The Tribunal recognise that the Respondent could reasonably be perceived as acting insensitively and hastily by the Claimant in this meeting investigation considering the nature of the allegation, the fact that the Claimant stated she was overwhelmed and that they were aware that she suffered from PTSD. Ultimately, it was a balancing exercise to ensure the integrity of its disciplinary process against the need to support the Claimant during this very difficult period.

50. At Ms King stated that the Claimant was not making eye contact at the meeting and asked for a break. Following the break, the Claimant stated that she had spoken to a solicitor and was advised not provide a statement. We find that this was a difficult meeting and could have been undertaken with more sensitivity and understanding. We accept that the Claimant was in a distressed emotional state at this time and accept that she was upset by the number of questions being asked by Ms King to contextualise the incident.

51. As far the meeting is concerned the Claimant alleges that Ms King shouted at her, asked numerous unnecessary questions and said that the meeting was unprofessional. We do not accept the Claimant's evidence that Ms King shouted at her during this meeting. Ms King presented as a caring, compassionate individual, supportive of the Claimant and we accept it would have been out of character for to have shouted as alleged by the Claimant.

Notes of the 17 April meeting

52. Following the meeting of 17 April, the Claimant complained that she had been interrogated during the meeting and emailed several requests for the notes to be sent to her. The Tribunal do not accept the Claimant's concerns in respect of the timing of the notes being provided to her. There was no entitlement or reasonable expectation for the notes to be provided immediately to the Claimant. We accept Ms Yore's evidence that she had other pressing professional and personal matters that had to deal with first. In any event the notes were provided to the Claimant on 23 April 2018 less than 2 working days after her first request.

53. The Claimant gave evidence that she did not think that it was relevant to consider that she has EUPD. The Tribunal concluded that it was relevant to the Claimant's state of mind during this process. Importantly had the Respondent known about for extent of the Claimant's condition it is possible approached the inconsistent positions with more caution. The Claimant was presenting in inconsistent ways and the Respondent had to deal with this difficult position of the Claimant vacillating between being present to deal with matters on one moment and being stressed and unable the next.

#### Continuing investigation

54. As mentioned, the Claimant was sent the notes of the 17 April 2018 meeting on 23 April. The Respondent also sent the Claimant a letter on the same date stating that the Respondent would proceed with its internal investigation on the basis of the evidence provided. The Claimant invited to provide any additional information that will assist the enquiries if she felt able to do so. She was asked of she could obtain a copy of the statement she made to the police of the incident.

55. The Claimant states that this 23 April letter was a strong indication that the Respondent had drawn the wrong conclusions based on protecting its own interests without gathering information respecting her situation and well-being. We do not accept the Claimant's evidence in this regard. This letter outlines to the Claimant that evidence was required and sought to provide the Claimant with the opportunity to help them get evidence whether from the police or herself. With the limited information there was nothing more the Respondent could be reasonably expected to do to. EA was still suspended on full pay and limited detail of the incident was available.

56. On 24 April 2019 the Claimant sent the Respondent an email chasing for a conclusion to the investigation. She stated that had been sexually harassed and requested that the investigation be concluded. The Claimant requested that she be kept abreast of the investigation in writing on a weekly basis and that she should be placed on medical suspension on full pay until such time as her grievance outcome. She stated that she was not happy with the way the investigation was handled will not satisfied with the outcome would appeal and if not satisfied would take her case to an employment tribunal.

57. On 25 April 2018 Mr Ferry responded to the Claimant's email stating that the incidents treated as a serious disciplinary matter. He stated that that is currently under investigation and the Claimant would be informed of developments as appropriate. He stated that it does take some time to investigate matters, they were not able to commence on the investigation until authorised by the police to ensure that they did not compromise the criminal investigation. He stated that at this stage there was nothing that could done to speed up the investigation but the Claimant could seek to assist investigation and she was encouraged to give her consent to the police to release the witness statement or provide a more comprehensive statement of events leading up to the alleged incident if she feels able to do so. Mr Ferry reiterated that if this was not done they would proceed on the evidence they have available.



58. The Respondent was reasonably seeking to try and get information for the disciplinary investigation to proceed against EA. The Claimant had not consented to provide the police information or provide a fuller statement.

59. On 27 April 2018 the Respondent offered the Claimant the opportunity to be assessed by occupational health. The Claimant responded that she was not in a good space and was not well enough to face that at the moment.

60. On 30 April 2018, a service user made a complaint against the Claimant regarding inappropriate contact and this was dealt with by the Respondent as a safeguarding issue.

61. Also, on 30 April EA provided his account of the sexual activity and raised concerns he had about the Claimant subsequently contacting him and inconsistent messaging. This is set out in his statement referred to above. Following his statement EA was subject to the disciplinary process and was subsequently dismissed on 30 May 2018 for having sexual activity at work. At no stage before EA was dismissed had the Claimant provided a detailed version of events to put EA as part of the investigation.

62. In the interim and the Claimant was given an opportunity to provide further information about the incident. Ms King wrote to the Claimant on 3 May 2018 question the Claimant to provide a final opportunity to engage in the investigation process and provide a detailed statement of the alleged incident. The Claimant was informed that if she did not contact Ms King by providing further information by 9 May the investigation and decisions made will be made based on the evidence available.

63. On 7 May 2018 the Claimant submitted a grievance expressing concern about Ms King's conduct and involvement if the investigation.

64. Ms King proceeded to complete investigation report and allegations were levelled against EA. Having reviewed EA's case statement. On 8 May 2018 Ms Yore wrote to the Claimant to state that in the course of our investigation into the allegation made against EA further information has come to light claiming that the sex act did take place in the workplace on 19 March but that the report suggests that it was consensual initiated by the Claimant. Ms Yore reiterated that the Respondent had a duty to investigate this. The Claimant was not provided with the context of this which affected her health. Ms Yore accepted that it would have been preferable to have had a conversation with the Claimant instead of sending it by email however by this stage the desire to get the matters resolved was the key consideration for the Respondent bearing in mind the time had elapsed.

65. The Claimant responded to this email asking what was meant by an allegation of misconduct. The Claimant stated that what she provided to the police was not an official statement it was an account and as a result could only obtain a copy by submitting a Freedom of Information Act request. The Claimant stated that she was not prepared to do this at that time due to her own health and well-being.

66. The Claimant chased Mr Ferry in respect of her grievance. Mr Ferry responded on 9 May 2019 stating:

“You have been offered the opportunity for an Occupational Health assessment but I understand that you advised Jenny you did not feel that you were in a position to be able to engage with this. I would urge you to re-consider this. An occupation health assessment is intended to ensure that we understand your medical circumstances sufficiently to enable us to ensure you are being appropriately supported at this time and is in your best interests.”

67. Later on 9 May 2018 the Claimant wrote to Mr Ferry and Ms Brooks stating that she is now willing to consent to the Respondent accessing her medical reports from 19 March 2018 to show the medical attention she received. She stated that she is going to reopen the police investigation and this information may therefore be a matter of ongoing police enquiry. The Tribunal note that the Claimant was only prepared to give consent to medical records from 19 March 2019 and this would have omitted referred to ongoing condition of EUPD and would have prevented the Respondent having the full evidential picture in relation to the Claimant’s ill-health. The Tribunal is critical of the Claimant in this regard. It is possible that had the Respondent had the full medical picture it may have amended its procedures accordingly.

68. On 11 May 2018 the Claimant attempted suicide for the fourth time. On 13 May 2018 the Claimant’s ex-partner notified the Respondent that the Claimant had attempted suicide on a further occasion and the Respondent agreed that it would not make any further contact with the Claimant before 11 June 2018. Therefore, the proposed meeting of 14 May 2018 with the Claimant to discuss further investigation issues did not take place.

69. EA was unable to attend his disciplinary hearing due as he was too unwell. He was summarily dismissed by the Respondent on 30 May 2018 for having sex at work.

70. On 11 June 2018 Ms Parle suspended the Claimant and invited her to attend the investigation meeting to discuss allegations raised by EA and regarding unprofessional conduct raised by a service user. Ms Parle acknowledged that this is difficult for the Claimant however it was necessary for matters to be concluded now for the benefit of all concerned. It was stated that there was also a need to consider the ongoing cost to the Claimant’s suspension and this was not something that the service could sustain on a long-term basis. Investigation meeting dates were proposed for 14 June or 18 June 2018 and the Claimant was invited to submit a written statement in response to the allegations in order to the investigation to be concluded

71. The Claimant provided a fuller statement regarding the incident on 11 June 2018 that has been referred to above. This was sent with under cover of email where the Claimant refuted the allegations.

72. By letter dated 13 June 2018 the Claimant submitted her resignation. She stated:

“I am respecting my family’s wishes resigning with immediate effect.  
This is notwithstanding that all information given is true in and the counter allegations put forward are utter nonsense and I think you are aware of this.

I will continue to give consideration to my next actions alongside the police and taking into consideration the treatment I received at work in line with the equality act, namely disability discrimination around mental health.”

73. The Claimant has not brought a disability discrimination complaint for the Tribunal despite her resignation letter.

74. The Claimant's grievance was not upheld Ms Parle wrote to the Claimant not upholding her grievance 22 June 2018.

75. The Respondent assessed it's safeguarding policy and concluded that in view of the service users complaint the threshold for a DBS referral was met, and it therefore made a reference with the caveat that there had been no investigation in relation to the matter.

76. The Claimant attended a meeting on 17 July 2018 with Ms Brooks to discuss her resignation. The Claimant stated that she was concerned that insufficient attention was paid to her health during the investigation period. The Claimant indicated not sure herself what other support the Respondent could have provided but that she did not believe her health situation was properly dealt with. She stated that she needed more time than the Respondent had allowed for the investigation and that she had not been able to engage in the process.

77. The Claimant contacted ACAS on 21 August ACAS certificate on the 28th August 2018 and subsequently presented her complaint to the Tribunal 27 September 2018.

## Law and submissions

78. The Tribunal was provided with helpful written and oral submissions from both counsel parties on the law and relevant issues. There was agreement on the applicable legal principles.

79. The following statutory provisions are relevant to the claims.

### Harassment

1. S.26 EqA:

(2) A also harasses B if -

(a) A engages in unwanted conduct of sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b) [(i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

### Victimisation

2. S.27 EqA:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because:

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

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

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

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

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

80. The burden of proof is set out in S.136 (2) EqA. This provides:

*“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.”*

81. S.136 (3) provides that: S. 136 (2) does not apply if A shows that A did not contravene the provision.

82. The guidance in Igen Ltd v Wong 2005 ICR 931 and Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT outlines a two-stage approach. At stage one the Claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. If stage two is reached the Respondent is then required to prove that the discrimination did not take place by proving a non-discriminatory reason for the conduct, which is in no way whatsoever to do with the protected characteristic.

83. In respect of the statutory defence section 109(4) EqA provides that:

*In proceedings against A’s employer (B) in respect of anything alleged to have been done by A in the course of A’s employment it is a defence for B to show that B took all reasonable steps to prevent A -*  
*(a) from doing that thing, or*  
*(b) from doing anything of that description.*

84. The EAT in Allay (UK) Limited v Gehlen [2021] UKEAT0031/20/AT gave guidance on section 109(4), which included that whether a step would have prevented discrimination is a relevant factor but not solely determinative; and the quality of preventative measures is particularly significant. At paragraphs 35 and 37 HHJ Tayler stated:

35 *“Brief and superficial training is unlikely to have a substantial effect in preventing harassment. Such training is also unlikely to have long-lasting consequences. Thorough and forcefully presented training is more likely to be effective, and to last longer.”*

37 *“It is not sufficient merely to ask whether there has been training, consideration has to be given to the nature of the training and the extent to which it was likely to be effective. If training involved no more than gathering employees together and saying “here is your harassment training, don’t harass people, now everyone back to work”, it is unlikely to be effective, or to last.”*

85. The Respondent bears the burden on proving the s.109(4) defence.

86. By virtue of S.47B Employment Rights Act 1996 (ERA), a worker has the right not be subjected to a detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure. In NHS Manchester v Fecitt [2012] IRLR 64, it was stated that the test is whether the

protected disclosure “materially influences (in the sense of being more than a trivial influence) the employer’s treatment of the whistle-blower”.

87. The Court of Appeal in Fecitt also determined (para 51):

*“Where a whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistle blower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer...”*

88. Under S.103A ERA, an employee shall be regarded as unfairly dismissed if the reason, or if more than one, the principal reason, for the dismissal is that the employee made a protected disclosure.

89. A protected disclosure qualifying for protection is one made in accordance with s.43A (which refers to s.43 C to s.43H about the conveyance of a qualifying disclosure) and s.43B (which defines a qualifying disclosure). S.43B ERA says:

*“...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...”*

90. S.43B ERA requires consideration of whether the Claimant had a reasonable belief that the information disclosed is made in the public interest and tends to show one of the six matters listed (subjective test) and if so, was that belief a reasonable one. Chestertons Global Ltd v Nurmohammed 2018 ICR 731 CA and Babula v Waltham Forest College 2007 EWCA Civ 174.

91. In respect of causation for the victimisation and protected disclosure claims the Tribunal followed the House of Lords decision in Chief Constable of West Yorkshire v Khan [2001] UKHL 48 where Lord Nichols stated at paragraph 29:

*“29. Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [2001] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.”*

92. Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact... Employers, acting honestly and reasonably, ought to be able to take steps to preserve

their position in pending discrimination proceedings without laying themselves open to a charge of victimisation.

93. In relation to S.103A ERA, the burden of proof in relation to dismissal was addressed in Kuzel v Roche Products Ltd [2008] EWCA Civ 380, CA:

*“57...when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.*

*58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.*

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

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

## Time limits

94. Section 123 EqA provides the limit for Equality Act complaints:

- (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.
- (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
  - (a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.

95. The tribunal's discretion to extend time is wide but emphasises that, as Auld LJ observed in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 at [25]:

*"there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of the discretion is the exception rather than the rule".*

96. Sedley LJ's stated in Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 at [31] and [32] that there is "*no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised*" and that whether to grant an extension "*is not a question of either policy or law*" but "*of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it*".

## Conclusions

97. Having regard to our findings of fact, relevant law and competing submissions the Tribunal's conclusions are as follows.

### Protected disclosure/ Protected act

98. The first matter considered was whether the Claimant's email dated 20 March 2018 amounted to a qualifying protected disclosure for the purposes of section 43B and 43C ERA and/or a protected act pursuant to section 27 EqA.

99. There was no dispute that the Claimant made an allegation of sexual assault which would amount to a criminal offence for the purposes of section 43B ERA and unlawful harassment to engage section 27 of EqA.

100. The central issue of dispute was whether the Claimant reasonably believed that the sexual assault allegation took place (section 43B ERA) and/or whether the information was false and in bad faith (section 27(3) EqA). In summary the Respondent contended that the sexual assault did not take place and therefore the Claimant could not have reasonably believed this as it was false.

101. In view of our finding, on the evidence, that there was nonconsensual sex we conclude that the Claimant had a reasonable belief in sexual misconduct. Given the nature of allegation we conclude that it was made in the public interest. Therefore, the Claimant's email of 20 March 2018 amounted to a protected disclosure for the purposes of section 43B ERA.

102. Similarly, we conclude that the allegation of sexual assault made in the email of 20 March 2018 was not false and as such was not made in bad faith. It therefore amounted to a protected act for the purposes of section 27 EqA.

103. We also conclude that the Claimant's email of 24 April 2018 that referred to the incident and harassment amounted to a protected act,

**Detriment because of protected disclosure/ protected act**

104. The first allegation related to not being provided with a password which was necessary for the Claimant to access the Respondent's intranet. The passwords were changed every month and the Respondent's employees were provided a new password with their payslip. The Claimant was absent from work at the end of March 2018 and did not receive her payslip. The Claimant's managers did not have the staff passwords to provide and there was no request made by the Claimant to HR to be provided with the password whilst she was absent from work. We do not conclude that the failure of the Claimant to get her password when she was absent was because of, or on the ground that she had made a protected act or protected disclosure.

105. The Claimant was not paid contractual sick pay from 16 April 2018. The Tribunal is critical of the Respondent in this regard. The Claimant had experienced a distressing incident and had been paid three weeks occupational sick pay, which she was not contractually entitled to. We conclude that the decision to stop paying sick pay was based on the police not proceeding with the allegation. It would have been reasonable for the Claimant to have discretionary sick pay continued or be paid medical suspension until the internal investigation had completed. Despite our criticism of the Respondent we do not conclude that the reason for stopping occupational sick pay was because of a protected act or on grounds of a protected disclosure. We accept Mr Wyeth's submission that it would have been wholly illogical to assert that the protected act or protected disclosure founded the decision to provide her sick pay, which she was not contractually entitled, and then remove it two weeks later.

106. The Claimant maintains that her complaint was insensitively handled. The Tribunal accept that the Claimant has some justified criticisms regarding the Respondent's handling of the investigation when considering her state of health. The Respondent knew that the Claimant had post-traumatic stress disorder and by April knew that she had attempted suicide. The Claimant was presenting inconsistently, one moment positively and able to engage and the other being disengaged. The Respondent was aware of the inconsistent messages that the Claimant was sending to EA, declaring love for him in some, and making accusations against him in others. However, this was not a disability discrimination claim. Had it been a disability discrimination complaint there may have been far more forceful and persuasive arguments raised in this regard. However, such arguments were unpersuasive in the context of the protected disclosure detriment and victimisation claims the Tribunal was considering.

107. The Tribunal had regard to the guidance in Chief Constable of West Yorkshire v Khan. The Respondent had to take steps to deal with the allegation that the Claimant had raised. There was one of three ways in which it could have done so 1) not dealing with it at all; 2) deal with it in a counsel of perfection way which in reality was the way in which Ms Sole presented the Claimant's case; or deal with the matter in accordance with its agreed procedures to try and get the matter resolved as fairly and expeditiously as possible to all concerned, including EA.

108. We accept that the Respondent could have adopted a more reflective and sensitive approach to the Claimant and been less process driven but do not consider



that the way in which they dealt with the allegation was on grounds of the protected disclosure or because of the protected acts. We conclude that the reason the Respondent acted as it did was to try and properly investigate the serious allegation, which was reasonable for it to do.

109. We do not conclude that the Respondent failed to respond to the Claimant's email requests (on 17 and 19 April) for notes of the meeting on 17 April 2021. A response with the notes was provided within a reasonable time given the other commitments and responsibilities of the people involved.

110. The Claimant asserts that there was unreasonable pressure placed on her to engage in the investigation such a short time after the 19 March incident. We do not accept that there was any unreasonable pressure on the 20 March call. This was a direct response to the Claimant enquiring what would happen next with her returning to work the following Monday. The Claimant wanted to know what the process would be and that was what was being explained to her this occasion. There was no detriment to the Claimant in this regard.

111. In relation to the subsequent correspondence and meetings we accept that there was some insensitivity in relation to asking the Claimant for a statement of the incident. The Respondent was seeking to proceed with the investigation. This was not on grounds of the protected disclosure or because of the protected act. The Respondent was seeking to investigate the allegations themselves. There is an obvious distinction between the Respondent responding to the allegation in a detrimental manner because the allegation has been made and the Respondent managing the allegation by seeking to fairly, if not perfectly, investigate the allegation which it was appropriate to do.

112. As far as the meeting of 17 April 2018 is concerned, we do not conclude that Ms King shouted at the Claimant. We accept that there was detailed questioning that the Claimant perceived as oppressive given her state of health at the time. However, neither managers at the meeting were aware of the full extent of the Claimant's mental health difficulties. We do not conclude that the way the meeting was handled was on grounds of the protected disclosure or because of the protected act.

113. The notes of the meeting of 17 April were not verbatim. The Claimant commented on them and made corrections to them. We do not conclude that the reason the notes were drafted as they were was because the Claimant made a protected disclosure or protected act.

114. The Claimant was concerned that Ms King was not removed from the investigation into her complaint. However, Ms King was not investigating the Claimant, she was investigating Employee A's conduct under the disciplinary procedure to see if there was a case to answer. The Claimant was a witness in relation to this. We do not conclude that the refusal to remove Ms King from the investigation was on grounds of the protected disclosure or because of the protected act.

115. The Claimant was suspended on 11 June 2018 following the period agreed not to contact her. Her suspension was directly related to the service user concern and

the statement that EA had made on 30 April 2018 denying the rape and putting his version of events. For the process to be dealt with fairly it was an appropriate step to take in the circumstances. We do not conclude that the Claimant's suspension was on grounds of the protected disclosure or because of the protected acts.

116. The Claimant's grievance was considered and not upheld. We do not conclude that the grievance conclusions were on grounds of the protected disclosure or because of the protected acts.

117. The Respondent referred the Claimant to DBS. We conclude that this was an appropriate and neutral referral to comply with the Respondent's safeguarding obligations, the parameters of harm having been met. It was clearly identified that the matters had not been investigated and proven to DBS. We do not conclude that this was on grounds of the protected disclosure or because of the protected act.

118. Given our conclusions above the Claimant's claims for protected disclosure detriment and unlawful victimisation fail and are dismissed.

#### **Unfair dismissal section 103A ERA**

119. In relation to the unfair dismissal complaint under 103A we have not concluded that any of the issues that were alleged occurred on because of a protected disclosure. Therefore, the Claimant's automatic unfair dismissal claim was not by reason that she made a protected disclosure. The claim fails and is dismissed.

#### **Harassment - section 26 EqA**

120. The Tribunal has found that the Claimant was subjected to a sexual act that she did not consent to on 19 March 2018. We conclude that this amounts to harassment for the purposes of section 26 EqA.

121. The Respondent relied on the statutory defence under section 109 EqA. We did not accept this and prefer Ms Soles submissions that clear and cogent evidence is required to establish this defence. Save for pointing to policies and induction processes the Respondent has not overcome this hurdle. Whilst the Respondent has a relationship at work policy and neither EA nor the Claimant notified the Respondent of this, we do not consider that is sufficient in itself to establish the section 109 EqA defence.

#### Time limit

122. The Claimant has established that she was harassed on 19 March 2018. For the purposes of section 123 EqA, the Claimant ought to have contacted ACAS in respect of this claim by 18 June 2018. No contact with ACAS was made until 21 August. ACAS issued a certificate on 28 August 2018 and the Claimant subsequently presented her complaint to the Tribunal on 27 September 2018. The Claimant's claim for harassment has therefore been presented out of time.

123. We considered the guidance in Robertson v Bexley Community Centre t/a Leisure Link and Chief Constable of Lincolnshire Police v Caston when considering our discretion to extend time.

124. The Claimant has established this very serious allegation, she was very unwell and had been in hospital on several occasions during the period. Against this is the fact that the Claimant had access to legal advice at the time, she mentioned that in her meeting on 17 April; she stated in her letter of 24 April that if she is not happy with the outcome she would consider going to tribunal; she states in her 13 June resignation letter that she is going to consider her options. Curiously disability discrimination and mental health concerns are raised at that time, not harassment, protected disclosures or victimisation.

125. The Claimant attended a further meeting with the Respondent on 17 July 2018 and contacted ACAS over a month later.

126. The Claimant did not name EA as a Respondent, and the Respondent has defended the claim in the absence of EA and has been unable to fully assess the reliability of the allegation as EA was too unwell at the time and had been dismissed by them long before the claim was presented.

127. We reviewed the Claimant's medical notes and there were no further hospital admissions prior to October 2018.

128. The Tribunal also had regard to the Respondent's relationship policy when considering whether to exercise our discretion to extend time. The Respondent did not know anything about the prior relationship between EA and the Claimant. Therefore, the Respondent had no opportunity to try and manage the relationship at work or consider the ramifications of any relationship breakdown.

129. In these circumstances the Claimant has not convinced us that it is just and equitable to extend time and we conclude that the balance of prejudice favours the Respondent. Therefore, whilst the Claimant has established that she was subject to harassment at work by the serious sexual incident the Tribunal does not have jurisdiction to consider it.

130. The Claimant's unlawful harassment claim is therefore dismissed.

**Employment Judge Burgher**  
**Date: 16 June 2021**