# EMPLOYMENT TRIBUNALS

**Claimant:** Ms L March

**Respondent:** Transform Housing and Support

**Heard at:** Reading Employment Tribunal (via CVP)

**On:** 3, 4, 5, 6 October 2022

**Before:** Employment Judge Shastri-Hurst
**Members:** Ms F Betts
Mrs A Crosby

**Representation**

Claimant: In person

Respondent: Mr G Baker (counsel)

# RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal fails
2. The Claimant's claim of automatic unfair dismissal (whistleblowing) fails
3. The Claimant's claim of wrongful dismissal fails
4. The Claimant's claim for holiday pay fails
5. The Claimant's claim of harassment fails
6. The Claimant's claim of victimisation fails
7. The Claimant's claim of detriment (whistleblowing) fails
8. The Claimant's claim for breach of contract fails

# REASONS

1. The Tribunal concluded evidence and submissions within the 4-day timetable, and indicated that judgment would be reserved and deliberations completed on 24 November 2022. In the event, the Tribunal reached its decision on the fourth day of the hearing, but not in time to deliver it to the parties. The 24 November 2022 was therefore not required for further

deliberation. The Tribunal therefore apologises for the time it has taken to produce this reserved judgment; this has been due to judicial commitments.

## Introduction

2. The Respondent is a charity that provides housing, support and care for homeless, vulnerable and excluded individuals. It operates in the areas of Surrey and Crawley, the London Borough of Sutton, and Wokingham.

3. The Claimant, Ms March, was employed as a Housing and Support Officer from 24 September 2007 until her summary dismissal on 12 November 2020. She was initially employed by Hyde In Touch, however her employment transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 to the Respondent on 1 October 2011.

4. By her claim form, presented on 18 March 2021, the Claimant brought the following claims:

    4.1. Unfair dismissal s98 **Employment Rights Act 1996** ("ERA");
    4.2. Automatic unfair dismissal (whistleblowing) s103A ERA;
    4.3. Detriment (whistleblowing) s47B ERA;
    4.4. Victimisation s27 **Equality Act 2010** ("EqA");
    4.5. Harassment s26 EqA
    4.6. Wrongful dismissal
    4.7. Breach of contract **Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994**
    4.8. Holiday pay **Working Time Regulations 1998** ("WTR")

5. The Claimant had mentioned other claims in her claim form, namely a claim under s117 ERA, which relates to enforcing an order for reinstatement made by an employment tribunal, and disability discrimination claims where the complainant was in fact a third party, Ms Grace Foster. Ms Foster was a client of the Claimant's, who is central to the background of this case.

6. At the beginning of the hearing, the Tribunal explained to the Claimant that it did not have jurisdiction to hear these two claims. Regarding the s117 ERA claim, the Tribunal had made no order, and so there was nothing to enforce. Regarding the claims relating to Ms Foster, the Tribunal explained that Ms Foster was not a claimant, and also she was not an employee of the Respondent, and so any claims she had would not be dealt with at the Tribunal. The Claimant accepted these explanations and was content to continue with the eight claims set out above.

7. The Respondent denies all claims. In relation to the main issue of dismissal, the Respondent alleges that the Claimant was dismissed fairly, for the reason of conduct, specifically gross misconduct justifying summary dismissal.

8. The Claimant represented herself, having previously had some assistance from a barrister, Mr Magennis, via direct access. The Respondent was represented by Mr Baker. We are grateful to both the Claimant and Mr Baker for the professional, fair and reasonable way in which they conducted themselves throughout the hearing and presented their respective cases.

9. In determining the claims, the Claimant gave evidence in support of her own case. For the Respondent, the Tribunal heard from:

   9.1. Simone Bartley – Director of People;
   9.2. Adele Duncan – Director of Client Services;
   9.3. Dave Hulme – Head of Business Improvement;
   9.4. Viccy Johnson – Area Manager.

10. The Tribunal received a bundle initially of 380 pages. The Claimant, at the beginning of the hearing, sought to include an additional 3 pages of text messages in the bundle. This was not opposed by the Respondent, and therefore the bundle in total was comprised of 383 pages.

11. The Tribunal also had the benefit of written and oral closing submissions from both parties.

**Preliminary issues**

12. As mentioned above, there was a housekeeping issue of adding three pages to the bundle.

13. A more substantive issue that required the Tribunal's attention was an application to amend the claim by the Claimant, to include a claim for harassment relating to disability. This arose from detail in the Claimant's witness statement at paragraph 118, at which she details treatment she alleges she suffered in connection with her long-standing back problem, as well as pre-menopausal symptoms.

14. The Tribunal enquired of the claimant what the harassment claim would consist of. The Claimant set out that the unwanted conduct was firstly that the Respondent insisted that she was available at night and secondly that she had 16 clients instead of the average 10-11 (pro-rata given she was part-time).

15. Mr Baker opposed the application to amend. He asserted that the application to amend was raised late in the day meaning that the claim would be out of time. Further, he submitted that this was a new claim, which does not arise out of the facts that were pleaded in the Claim Form and Grounds of Complaint, which the Claimant had professional assistance in preparing.

16. The Claimant explained that this allegation was not in the Claim Form as she was focused on the issues surrounding her client, Grace Foster, rather than on issues that were directly about the Claimant herself. She had told Mr Magennis that she was discriminated against in connection with her lumbar spine, but he told the Claimant that this was really a secondary issue to the dismissal claims. It was therefore agreed not to pursue this disability harassment claim at the time of completing the Claim Form and Grounds of Complaint.

17. The Tribunal rejected the application to amend. We reminded ourselves of the guidance regarding the nature of amendments, set out in the case of

Selkent Bus Co Ltd v Moore 1996 ICR 836. When dealing with an application to amend, the relevant factors to consider are:

17.1. The nature of the amendment;
17.2. The applicability of time limits;
17.3. The timing and manner of the application.

18. It is also necessary to consider the interests of justice and the balance of hardship suffered by either party if the amendment is or is not permitted.

19. Dealing with the nature of the amendment first; the proposed claim was entirely new, no hint of it being within the original Claim Form. Although there is a harassment claim in the Claim Form, this relates to Ms Foster's disability, not the Claimant's. This was therefore not relabeling, but a new complaint altogether.

20. This meant that we needed to consider the impact of time limits on the application: given that the new claim would be deemed to have been brought at the date of the application to amend, the date of that claim would be 3 October 2022. Given that the effective date of termination was 12 November 2020, and that as a backstop position any harassment that is said to have been ongoing must have ceased on that date, the claim is nearly 2 years out of time.

21. In terms of the timing and manner of the application, the application was made at the start of the final hearing, although arguably it is raised implicitly in the Claimant's witness statement, which was evidently served on the Respondent prior to the hearing. We considered why this application was made at this point, or put another way, why the claim was not included in the Grounds of Complaint. From the Claimant, it appears that the claim was not included as it was decided to focus on the dismissal. We know that the Claimant had representation at the time, and she has told us that she discussed this potential claim with her barrister. The Claimant was therefore aware of the facts of this claim at the time of completing the Grounds of Complaint, and it was an active decision not to include this harassment claim.

22. In respect of the balance of hardship, as the Claimant herself has said, this claim really is all about the dismissal. This new claim appeared to us to be entirely separate from the core complaint, and the core facts of the Claimant's case as it stands. Therefore, even without this new claim, the Claimant would still be able to pursue all claims relating to the dismissal, and all remedies arising from that dismissal if she were to be successful. This discrete harassment point would not add much, if anything, to her claim and remedy.

23. Turning to consider the hardship to the Respondent if the amendment were to be allowed; new issues would need to be considered by the Tribunal, not least whether the Claimant was in fact disabled at the time of the alleged discrimination (as per the legal definition). The Respondent may well require new evidence in order to deal with the issues that this new claim would raise. We found that to permit this claim to proceed would be to derail the final hearing, put it off for a not insignificant period of time, and increase costs for the parties.

24. Therefore, considering the balance of hardship, and the interests of justice, particularly ensuring that a conclusion to this case is not delayed (for the benefit of both parties), the application was denied.

**Issues**

25. This case had been fast tracked, and therefore had not had the benefit of any case management in order to agree a list of issues. Neither party produced a list of issues. The Tribunal had however taken it upon itself to draw up a draft list for discussion on the first morning of the hearing. This list was agreed by the parties, and a copy was sent to the parties for their reference throughout the hearing.

1. **Jurisdiction**

    1.1. Does the Tribunal have jurisdiction to hear all the claims as currently put forward by the Claimant? Specifically:

        1.1.1. The Claimant's claim under s117 ERA;

        1.1.2. The Claimant's reference to disability discrimination allegedly suffered by GF.

    1.2. It is agreed that the Tribunal does not have jurisdiction to deal with these claims.

2. **Time limits**

    2.1. It is noted that, for the purposes of ACAS Early Conciliation, Day A is 10 December 2020, and Day B is 21 January 2021. The Claimant's claim form was submitted on 18 March 2021.

    2.2. Was the harassment claim made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

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

        2.2.2. If not, was the claim made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

            2.2.2.1. Why was the complaint not made to the Tribunal in time?

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

    2.3. Was the whistleblowing detriment claim made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

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

2.3.2. 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?

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

2.3.4. 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?

3. **Protected disclosure – s43B Employment Rights Act 1996**

3.1. Did the Claimant make qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Claimant relies on the contents of her email of 5 October 2020 as follows:

> "I am unsure why Transform management has chosen to evict GF [Grace Foster] rather than support her to maintain her tenancy as she is a vulnerable and young person" – [109];
>
> "I would like to inform you that GF suffers from epilepsy and has a diagnosis of depressive illness and for young people with this [sic] conditions friends are the most important source of support, sharing and reassurance. Going through difficulties with her house mates impacted negatively on her mood/mental health and GF was in needs [sic] of greater support from her friends at the time of her residency with Transform as she did not receive adequate support elsewhere" – [109];
>
> "And finally the shortage of staff over one year (team operating at only 40% capacity) did not allow concrete evidences [sic] for monitoring and case handling, therefore a possibility of immature, ill informed decision has taken place" – [109].
>
> "It will be morally right and fair if GF could be supported by RBC to file an illegal eviction" – [110].

3.2. In determining whether the above are protected disclosures, the Tribunal will decide:

3.2.1. Did the Claimant disclose information?

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

3.2.3. Was that belief reasonable?

3.2.4. Did she believe it tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation?

3.2.5. Was that belief reasonable?

3.3. If the claimant made a qualifying disclosure, was it made to a relevant person as defined in s43C to s43G Employment Rights Act 1996?

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

4.1. Did the Respondent do the following things:

4.1.1. suspend the Claimant;

4.1.2. tell tenants that she had left before she had been dismissed;

4.1.3. prevent her from speaking to any staff or tenants.

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

4.3. If so, was it done on the ground that she made a protected disclosure as set out at issue 3 above?

5. **Ordinary unfair dismissal – s98 Employment Rights Act 1996**

5.1. It is common ground that the Claimant was dismissed on 12 November 2020.

5.2. What was the reason or principal reason for dismissal? The Respondent says the reason was the potentially fair reason of conduct. The Claimant says the reason or principal reason for dismissal was the email of 5 October 2020 which constitutes a protected disclosure/protected act.

5.3. Was the reason or principal reason a potentially fair reason?

5.4. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant? The Tribunal will decide whether:

5.4.1. the Respondent had a genuine belief that the Claimant had committed the misconduct of which she was accused;

5.4.2. there were reasonable grounds for that belief;

5.4.3. at the time the belief was formed the Respondent had carried out a reasonable investigation;

5.4.4. the Respondent otherwise acted in a procedurally fair manner; the Claimant relies upon the eight factors at paragraph 13 of her Grounds of Complaint – [19].

5.4.5. dismissal was within the range of reasonable responses.

6. **Automatic unfair dismissal – s103A Employment Rights Act 1996**

6.1. Was the reason or principal reason for dismissal that the Claimant made a protected disclosure as set out at issue 3 above? If so, the Claimant will be regarded as unfairly dismissed.

7. **Victimisation (dismissal) – s27 Equality Act 2010**

7.1. Did the Claimant do a protected act? Specifically, do the following two statements within the Claimant's email of 5 October 2020 amount to a protected act:

> "I am unsure why Transform management has chosen to evict GF rather than support her to maintain her tenancy as she is a vulnerable and young person" – [109];
>
> "I would like to inform you that GF suffers from epilepsy and has a diagnosis of depressive illness and for young people with this conditions friends and the most important source of support, sharing and reassurance. Going through difficulties with her house mates impacted negatively on her mood/mental health and GF was in needs of greater support from her friends at the time of her residency with Transform as she did not receive adequate support elsewhere" – [109].

7.2. A protected act is defined at s27(2) Equality Act 2010 as follows:

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

7.3. If the Claimant did do a protected act, did the Respondent dismiss the Claimant because the Claimant did a protected act, or because the Respondent believed the Claimant had done a protected act?

8. **Harassment s26 EqA**

8.1. Did the Respondent exclude the Claimant from all conversations relating to GF?

8.2. If so, was that unwanted conduct?

8.3. If so, did that conduct relate to disability?

8.4. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

8.5. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

9. **Wrongful dismissal / breach of contract/notice pay**

9.1. What was the Claimant's notice period?

9.2. Was the Claimant paid for that notice period?

9.3. If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

10. **Breach of contract**

10.1. Did the Respondent breach the Claimant's contract by preventing her from carrying out her job responsibilities in accordance with her job description. Specifically, the Claimant says that she was prevented from:

> "[carrying] out housing management activities such as rent collection, tenancy enforcement, reporting maintenance issues and health and safety checks for named clients, ensuring a firm but empathetic approach to support clients to maintain their tenancies" as per one of the main purposes of her job description at [60].

10.2. Did the Respondent breach the Claimant's contract, specifically the Whistleblowing Policy?

10.2.1. The Claimant relies upon the following specific breaches:

10.2.1.1. did the Respondent fail to include within the investigation documents (those at [263-285]) provided by the Claimant which she asked to be included?

10.2.1.2. Did the Respondent fail to disclose to the Claimant documents she requested during the course of the investigation?

10.2.1.3. Did the Respondent fail to investigate the matter within 10 days, as per the Whistleblowing Policy (paragraph 56 of the Claimant's witness statement)?

10.2.2. If the Respondent did fail in any of the above ways, do those failures constitute a breach of contract? The Respondent argues that the Whistleblowing Policy is not contractual.

11. **Holiday pay**

11.1. Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when her employment ended? The Claimant says that, if she had had her notice period and pay, she would have accrued more holiday for which she should be paid. The Respondent denies any payment is due.

12. **Limited remedy issues for unfair dismissal**

If the Claimant is successful in her claim of unfair dismissal, the Tribunal will consider:

12.1. 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?

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

12.2. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

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

## LEGAL FRAMEWORK

### Time limits – whistleblowing detriments

13. S48 ERA makes provision for an extension of time for cases of detriment (whistleblowing) when the primary time limit is missed, as follows:

> "(3) An employment tribunal shall not consider a complaint under this section unless it is presented –
>
> (a) 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
>
> (b) 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 be presented before the end of that period of three months."

14. This legislation therefore provides for a two-stage test for tribunals:

14.1. Firstly, the Tribunal must be satisfied that it was not reasonably practicable for the Claimant to have presented her claim within the primary three month period; and

14.2. Secondly, if it was not reasonably practicable, the Tribunal must be satisfied that the period from the expiry of the primary time limit to the

date when the claim form was presented was a reasonable further period.

15. The burden of proof regarding both limbs of this test falls to the Claimant.

Reasonably practicable

16. The first question must be why the primary time limit was missed. Then we must ask whether, notwithstanding those reasons, was the timely presentation of the claim still reasonably practicable.

17. The meaning of "*reasonably practicable*" has been held to mean "*reasonably feasible*"– Palmer & Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945. What is "*reasonably feasible*" has been held to sit somewhere between the two extremes of what is reasonable, and what is physically possible.

*Ignorance/incorrect advice*

18. Where the reason for missing the primary time limit is said to be mistake, the question remains whether, in all the circumstances, it was reasonably practicable for a litigant to have presented the claim in time.

19. The Court of Appeal has stated, in a case of mistake, that the term "*reasonably practicable*" should be given liberal meaning so as to favour a claimant – Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490. One factor of relevance to ignorance/mistake cases will be whether a claimant has instructed a professional adviser. Where a litigant has no professional advice, they need only show that their ignorance or mistake was reasonable. As per Lord Denning in Wall's Meat Co Ltd v Khan [1979] ICR 52:

> "It is simply to ask this question: had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."

20. The question becomes whether the mistake or ignorance is itself reasonable. Brandon LJ in Khan held:

> "The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made …"

21. Where a claimant instructs a legal professional, the default position will be that it was reasonably practicable to submit a claim in time **–** Dedman v British Building Engineering Appliances Ltd 1974 ICR 53. If that legal professional makes a mistake, then a claimant is lumbered with that mistake and must (generally) bear the consequences: the claimant's remedy in that scenario is against their legal representative.

Reasonable time period

22. What is considered reasonable depends on the circumstances at the time. It is not just a question of the time period that has passed since the expiry of the limitation period. For example, a delay of almost five months has been found to be reasonable – Locke v Tabfine Ltd t/a Hands Music Centre UKEAT/0517/10. Having said that, the Tribunal does not have unfettered discretion to permit claims to continue, regardless of the length of delay – Westward Circuits Ltd v Read [1973] ICR 301. The length of delay is one factor to be considered, but not to the exclusion of all other relevant factors in any given case – Marley (UK) Ltd v Anderson [1994] IRLR 152.

23. A claimant must present his/her claim as soon as possible once the impediment stopping him/her having presented the claim in the initial three month period is removed.

24. It is necessary to consider the relevant circumstances throughout the period of delay and, at each point, what knowledge the Claimant had, and what knowledge he/she should have had if he/she had acted reasonably in all the circumstances – Northumberland County Council v Thompson UKEAT/209/07.

**Time limits – harassment claim**

25. The issue as to whether a claim is brought within such time as is just and equitable has been established to be one of fact for the first instance tribunal.

26. It is well established that, despite the broad scope of the "just and equitable" test, the default position is that time limits within the Tribunal are to be strictly adhered to: there should be no presumption that the Tribunal's discretion to extend time will be exercised. Indeed, the exercise of discretion should be "*the exception rather than the rule*" – Robertson v Bexley Community Centre [2003] IRLR 434, paragraph 25.

27. The burden of persuading a tribunal to extend time falls squarely to a claimant. As held by HHJ Peter Clark, "*if the claimant advances no case to support an extension of time, plainly, he is not entitled to one*" – Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278.

28. In Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, the Court of Appeal warned against using the list of factors highlighted as relevant in British Coal Corporation v Keeble [1997] IRLR 336, and those criteria within s33 the *Limitation Act 1980,* as a checklist as had previously been the standard practice. The Court of Appeal held that:

> "The best approach for a tribunal in considering the exercise of the discretion under s123(1)(b) 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".

29. The Tribunal will pay particular attention to:

    29.1. The length and reason for delay;
    29.2. The prejudice which each part would suffer as a result of granting/refusing the delay; and,
    29.3. The potential merits of the claim.

Ignorance/incorrect advice

30. The Tribunal's discretion under the "just and equitable" test is much broader than under the "reasonably practicable" test set out above in relation to incorrect advice.

31. Presuming that any incorrect advice relied upon is in fact the cause of the delay in presenting a claim, then receipt of incorrect advice can be enough for the Tribunal to exercise its discretion to extend time – Hunwicks v Royal Mail Group plc EAT 0003/07.

32. In terms of ignorance, as above under the "reasonably practicable" test, the issue is whether any ignorance was itself reasonable.

**Ordinary unfair dismissal**

33. The relevant legislation for the Claimant's unfair dismissal claim is found at ss98(1), (2) and (4) *ERA*.

Reason for dismissal

34. It is for the Respondent to prove the reason for dismissal and that it is a potentially fair one. As above, here the Respondent relies upon the potentially fair reason of conduct.

35. The burden of proof here is not a high hurdle. As per the Court of Appeal in Gilham and ors v Kent County Council (No2) [1985] ICR 233 CA:

> "if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to s98(4), and the question of reasonableness".

Reasonableness of dismissal

36. In considering whether the reason of conduct was a sufficient reason to justify dismissal, the Tribunal turns to the case of British Home Stores v Burchell [1978] IRLR 379, and the three-stage test as follows:

    36.1. Did the Respondent had a genuine belief that the Claimant was guilty of the misconduct with which she was charged?

36.2. If so, were there reasonable grounds for the Respondent reaching that genuine belief?

36.3. Was this following an investigation that was reasonable in all the circumstances?

37. The Respondent bears the burden of proof regarding the first stage; the burden is then neutral regarding the second and third limbs of the test.

38. In all aspects of such a case, in deciding whether an employer has acted reasonably or unreasonably within s98(4) *ERA*, the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. We remind ourselves that we must not substitute our decision for that of the Respondent's – Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, London Ambulance NHS Trust v Small [2009] IRLR 563. In other words, we must not step into the decision makers' shoes and consider how we would have acted faced with the same evidence they had at the time of the decision making. We can therefore only look at the facts and beliefs that were known and held by the Respondent's decision makers at the time of their decision making.

39. In terms of the investigation, in Shrestha v Genesis Housing Association Ltd [2015] IRLR 399 the Court of Appeal upheld the Tribunal's finding that it was not necessary for an employer to investigate every incident and explanation proffered by an employee.

40. Another factor for consideration is whether the sanction of dismissal was fair. The test again is that of the band of reasonable responses; in other words, the question we must ask is "would no reasonable employer have dismissed the Claimant in these circumstances?".

41. Dismissal does not have to be the last resort before it can fall within the range of reasonable responses – Quadrant Catering Ltd v Smith EAT 0362/10. It is not the case that dismissal for gross misconduct will always fall in the band of reasonable responses; mitigating factors may lead a tribunal to find that dismissal was unfair – Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854 EAT.

42. Lack of remorse may make a harsher penalty more reasonable – Hodgson v Menzies Aviation (UK) Ltd EAT 0165/18. In that case, the Employment Appeal Tribunal upheld the Tribunal's finding of fair dismissal. On the facts, the Tribunal found that it was the lack of admission of an error of judgment, the failure to give any reassurance that the conduct would not be repeated in the future, and the failure to accept any wrong doing, that made dismissal fall within the band of reasonable responses.

43. In terms of redeployment/transfer as a sanction short of dismissal we remind ourselves of how the issue has been dealt with at appellate level:

43.1. In P v Nottinghamshire County Council [1992] ICR 706, the Court of Appeal held that the duty to consider redeployment extended to

misconduct cases. In an appropriate case, and where the size and administrative resources of the employer's undertaking permit, it may be unfair to dismiss an employee without first considering whether he/she could be redeployed in an alternative job, notwithstanding that the employee could definitely not be permitted to return to his/her original job;

43.2. Barcelos v London Borough of Hammersmith and Fulham EAT 0331/03. An employee's failure to follow the employer's reasonable instructions had a bearing on the trust and confidence required for a continuing employment relationship. Consequently, the Tribunal had been entitled to conclude that the employer had been reasonable to reject the option of alternative employment.

*Procedural fairness*

44. Lord Bridge in Polkey v AE Dayton Services Ltd [1987] UKHL 8 itemised the procedural steps that will be necessary generally in order for an employer to be found to have acted reasonably in dismissing. For misconduct dismissals, it is necessary to investigate fully and fairly and listen to what the employee wants to say in explanation and mitigation.

45. The issues of substantive fairness and procedural fairness are not separate questions, rather procedural issues should be considered along with the reason for dismissal – Taylor v OCS Group Ltd 2006 ICR 1602. For example, it may be that the misconduct in question was so serious that the employer was reasonable in dismissing the employee, notwithstanding that there were some procedural imperfections. So not every procedural error will lead to an unfair dismissal.

**Limited remedy issues for unfair dismissal**

Polkey reduction

46. The decision in Polkey v AE Dayton Services Ltd [1987] UKHL 8 permits the reduction of compensation when, even if a fair procedure had been followed, the Claimant would have been dismissed in any event.

47. Compensation can be reduced as a percentage, if a tribunal considers that there was a percentage chance of the employee being dismissed in any event. Alternatively, where it is found that a fair procedure would have delayed dismissal, compensation should reflect this by compensating the employee only for the length of time for which dismissal is found to have been delayed.

48. The Tribunal has to consider what difference a fair procedure would have made, if any. It is for the Respondent to adduce evidence on this point. It is always the case that a degree of uncertainty is inevitable, unless the process was so unreliable it would be unsafe to reconstruct events. However, the Tribunal should not be reluctant to undertake the exercise just because it requires speculation – Software 2000 Ltd v Andrews [2007] ICR 825.

Contribution

49. Under s123(6) *ERA*, the test is whether any of the Claimant's conduct prior to dismissal was "*culpable or blameworthy*" – Nelson v BBC (No.2) [1980] ICR 110, CA. This requires the Tribunal to look at what the Claimant in fact did, as opposed to being constrained to what the Respondent's assessment of C's culpability was – Steen v ASP Packaging Ltd [2014] ICR 56.

50. The EAT in Steen summarised the approach to be taken under s122(2) and s123(6) ERA – paragraphs 8-14:

    50.1. Identify the conduct which is said to give rise to possible contributory fault;
    50.2. Ask whether that conduct was blameworthy, irrespective of the Respondent's view on the matter;
    50.3. Ask, for the purposes of s123(6), whether the conduct which is considered blameworthy caused or contributed to the dismissal; and, if so,
    50.4. Ask to what extent the award should be reduced and to what extent it was just and equitable to reduce it.

**Automatic unfair dismissal**

51. A claim under s103A *ERA* will only succeed when a tribunal is satisfied that the principal reason for dismissal was a protected disclosure. "Principal" reason has been held to be the reason operating on the decision maker's mind at the time of dismissal, in other words, the primary reason – Abernethy v Mott, Hay and Anderson [1974] ICR 323. This is a question of fact, which requires the Tribunal to answer the question "*what consciously or unconsciously was the decision-maker's reason for dismissing?*".

52. When a claimant relies upon several disclosures, the question for the Tribunal is whether, taken as a whole, the disclosures were the principal reason for dismissal – El-Megrisi v Azad University (IR) in Oxford EAT 0448/08.

53. In Kong v Gulf International Bank (UK) Ltd [2022] IRLR 854, it was held that where a dismissal is due to the manner of the disclosure, or some other fact about the disclosure, as opposed to the disclosure itself, then a claimant will not have been automatically unfairly dismissed. This has been referred to as "*the separability principle*". Simler LJ held that:

> 56...there may in principle be a distinction between the protected disclosure of information and conduct associated with or consequent on the making of the disclosure. For example, a decision-maker might legitimately distinguish between the protected disclosure itself, and the offensive or abusive manner in which it was made, or the fact that it involved irresponsible conduct such as hacking into the employer's computer system to demonstrate its validity.

**Detriment**

54. A detriment has been held to exist "*if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment*" – Ministry of Defence v Jeremiah [1980] ICR 13. In other

words, if the claimant has suffered a disadvantage compared to other employees (whether real or hypothetical), they will have suffered a detriment. Despite this, there is no strict need for a comparator in cases of detriment.

55. The causative test under a detriment claim is less strict than that for automatic unfair dismissal, in that a protected disclosure need only materially influence the decision-maker. The burden of proof is on the Respondent to demonstrate the reason for its conduct – s48(2) *ERA*. The Claimant must prove (on the balance of probabilities) that she made a protected disclosure, that she suffered a detriment, and that the detriment was inflicted by the Respondent. At that point, the burden of proof moves to the Respondent to demonstrate the reason for its behaviour, and must satisfy the Tribunal that the protected disclosure was "in no sense whatsoever" on the grounds of the protected disclosure – Fecitt and ors v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372.

**Protected disclosure**

56. A disclosure will only be protected when it satisfies three conditions:

    56.1. It must be a "disclosure of information";

    56.2. It must be a "qualifying disclosure". In other words, it must be a disclosure that, in the reasonable belief of the worker making it, is made in the public interest and tends to show (in this case) that a person had failed, was failing or was likely to fail to comply with any legal obligation; and

    56.3. It must be made in line with one of the six methods set out in ss43C-H *ERA*.

Disclosure of information

57. A practical example of the difference between a disclosure of information, and an allegation, was set out in Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325. Placed in the context of a hospital ward, a disclosure of information would be "yesterday, sharps were left lying around", whereas an allegation would be "you are not complying with health and safety requirements". However, the disclosure should not simply be categorised into "disclosure of information" or "allegation". The key point is that a bare allegation, such as the example above, cannot amount to a disclosure of information. It is however possible for an allegation to contain sufficient information to be capable of tending to show a failure (or likely failure) to comply with a legal obligation (for example).

58. An enquiry, or request for information, as opposed to the supply of information, will not amount to a disclosure of information – Blitz v Vectone Group Holdings Ltd EAT 0253/10, Parsons v Airplus International Ltd EAT 0111/17.

Reasonable belief

59. The issue for determination is whether the words used by the Claimant, in her reasonable belief, tended to show a failure (or likely failure) to comply with a legal obligation. This is both an objective and subjective test, requiring a tribunal to determine whether the Claimant held the requisite belief and whether, if so, that belief was reasonable. This test will require the Tribunal to look at all the circumstances of the case: someone with professional or insider knowledge will be held to a different standard that lay persons – Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4. For example, the CEO of a supermarket will be held to a different standard than an employee who stacks shelves. The reasonable belief test in relation to "tending to show" is a fairly low threshold but does require a claimant to have some evidential basis for her/his belief, as opposed to, say, unfounded suspicion. It is also not necessary for the belief to be correct, as long as it is reasonable in the circumstances in which the claimant finds themselves.

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

61. Regarding the requirement that the claimant had a reasonable belief that the disclosure was made in the public interest, it is important to bear in mind the purpose of making this addition to the legislation. Government added the need for reasonable belief that a disclosure is made in the public interest to avoid protection being received by employees raising private employment disputes (the effect of Parkins v Sodexho Ltd [2002] IRLR 109).

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

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

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

    62.3. The nature of the wrongdoing disclosed; and,

    62.4. The identity of the alleged wrongdoer.

Breach of legal obligation

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

64. If on the facts the identity of the legal obligation is obvious, then a claimant need do little to specify the obligation further. If, however, the legal obligation at play is not obvious, it will be necessary for a claimant to provide some detail so that the Tribunal is satisfied that the concern is not simply about guidelines or morals, but is in fact a legal concern.

Method of disclosure – to whom was the disclosure made?

65. In this case, the email said to contain protected disclosures was sent to the Housing Allocations email address at Runnymede Borough Council, and copied to Samantha Williams and Vicki Ellis of the Respondent – [108].

66. There are six methods by which a disclosure can be made in order for it to be protected; these are set out in ss43C-H *ERA*:

    66.1. Disclosure to employer or other responsible person (s43C);
    66.2. Disclosure to legal adviser (s43D);
    66.3. Disclosure to Minister of the Crown (s43E);
    66.4. Disclosure to prescribed person (s43F);
    66.5. Disclosure in other cases (s43G); and
    66.6. Disclosure of exceptionally serious failure (s43H).

67. Ss43D, E and F are clearly not relevant to this case.

68. S43C(1)(a) *ERA* provides that a disclosure may be made to the employer. Disclosure to an employer means that the disclosure is made to someone above a claimant in the organisation's hierarchy, with express or implied authority over that claimant.

69. S43C(1)(b) *ERA* sets out that a disclosure will qualify for protection if the disclosure is made:

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

70. S43G *ERA* provides:

> (1) A qualifying disclosure is made in accordance with this section if –
>
> a. ...
> b. [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
> c. He does not make the disclosure for the purposes of personal gain,
> d. Any of the considerations in subsection (2) is met, and
> e. In all the circumstances of the case, it is reasonable for him to make the disclosure.
>
> (2) The conditions referred to in subsection (1)(d) are –

a. That, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
b. That, I a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
c. That the worker has previously made a disclosure tof substantially the same information –

i. To his employer, or
ii. In accordance with s43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to –

a. The identity of the person to whom the disclosure is made,
b. The seriousness of the relevant failure,
c. Whether the relevant failure is continuing or is likely to occur in the future,
d. Whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
e. In a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonable be expected to have taken as a result of the previous disclosure, and
f. In a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

71. S43H provides:

(1) A qualifying disclosure is made in accordance with this section if –

a. ...
b. The worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
c. He does not make the disclosure for purposes of personal gain,
d. The relevant failure is of an exceptionally serious nature, and
e. In all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

## Victimisation

72. S27 *EqA* sets out:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because:
>
> a. B does a protected act; or
> b. A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act –
>
> a. Bringing proceedings under this Act;
> b. Giving evidence or information in connection with proceedings under this Act;
> c. 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.

73. The relevant subsections in the present claim are ss27(2)(c) & (d).

74. Regarding "*doing any other thing for the purposes or in connection with this Act*", this is the catch-all provision. Under pre-Equality Act legislation, it was held that the requirement that something be done "*in reference to*" the Race Relations Act would be met if it was done by reference to that Act "*in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act*" – Aziz v Trinity Street Taxis Ltd and ors [1988] ICR 534∫.

75. In terms of "*making an allegation...*", although it is not necessary for the Equality Act to be mentioned, it is vital that the facts as set out by the claimant would be capable of amounting to a breach of that Act.

76. The meaning of detriment is set out above. For a detriment to be *because of* a protected act, it is necessary that it had a significant influence on the perpetrator, where significant simply means "more than trivial" – Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931.

**Harassment**

77. S26 *EqA* provides that:

> (1) A person (A) harasses another (B) if –
>
> a. A engages in unwanted conduct relating to a relevant protected characteristic, and
> b. The conduct has the purpose or effect of –
>
> i. Violating B's dignity, or
> ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) ...
>
> (3) ...

> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:
> a. The perception of B;
> b. The other circumstances of the case;
> c. Whether it is reasonable for the conduct to have that effect.

78. Whether or not the conduct complained of relates to the protected characteristic is a question of fact for the Tribunal – Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor EAT 0039/19. It therefore follows that a claimant's understanding and a respondent's intention are not strictly relevant to the issue of causation. The context in which the alleged harassment occurs is a key factor in determining whether the conduct was related to the relevant protected characteristic – Warby v Wunda Group plc EAT 0434/11.

79. For the purposes of harassment related to disability, it is not necessary for the protected characteristic in question to be possessed by the claimant.

**Wrongful dismissal/notice pay**

80. The failure to pay notice pay is a repudiatory breach of an employee's contract of employment, unless a respondent is released from their contractual obligations because the claimant fundamentally breached the contract first.

81. Under a claim for notice pay, it is therefore necessary to find as a fact what it was a claimant did, and whether that conduct amounted to a fundamental breach of his/her employment contract. Conduct by an employee which amounts to a repudiatory breach sufficient to justify summary dismissal must:

> "[show] a complete disregard of a condition essential to the contract" – Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698, CA, or;
>
> "so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment." – Briscoe v Lubrizol Ltd 2002 IRLR 607, CA citing Neary -v- Dean of Westminster [1999] IRLR 288

**Breach of contract**

82. Any breach of contract will give rise to a cause of action in damages. It is necessary to establish whether the alleged wrong doing would, if proven, amount to a breach of contract (in other words what is the contractual term said to have been breached?). Then the Tribunal must determine whether that contractual term was in fact breached.

**Holiday pay**

83. The claimant's case on this point is somewhat unusual. She does not claim that she was not paid for holiday not taken but accrued at the point of

termination. She alleges that, if she had not been wrongfully dismissed, she would have served out her notice pay, and so would have accrued more holiday entitlement that she would need to be paid for.

84. This claim is therefore dependent (to some extent) on the wrongful dismissal claim.

**Findings of fact**

85. As stated above, at the time material to the Claimant's complaints, she was employed by the Respondent as a Housing and Support Officer. This role of "HSO" encompassed supporting clients with housing issues, and generally providing them with guidance and support in a holistic way, to enhance their personal development, whilst simultaneously managing risk. There were also some management duties, such as collecting rent and enforcing tenancy agreements.

86. The Respondent receives financial support from Runnymede Borough Council in order to support its delivery of housing and support services. The Respondent has approximately 140 staff members across ten services: services are grouped together with between 4 and 16 employees forming any one team, depending on the geographic spread of the team and the contractual requirements. In terms of front-line workers delivering direct services, there are around 70-75 staff. Regarding Housing and Support, a team is comprised of 4-14 HSOs (around 40-45 across the whole of the Respondent), with a Deputy Manager or Service Manager, and a Housing and Support Manager. Sitting at the top of that hierarchy is the Director of Client Services.

87. In relation to the Claimant's team, the Runnymead Team falls within the North West Surrey remit, along with the Spellthorn Team: both teams have approximately 4 HSOs. Generally, there is little movement of staff between teams, given that one person moving would simply create a vacancy in their original team. Also, employees tend to live near to where they work: given Surrey covers such a large area, it would be a long journey for some people if they were to move teams.

88. The Claimant's immediate manager was Samantha Williams. Viccy Johnson was the Area Manager.

89. In terms of the Claimant's caseload, this was a matter that was disputed between the parties. The Claimant's position was that she had 16 clients at the time of her departure, whereas the Respondent's evidence was that the number of her clients was 10-11. We can see at [239] that the Claimant had 15 clients as at 23 September 2020. Adele Duncan's evidence was that the Claimant had a maximum of 13 clients at any given time – [286-290] and witness statement paragraph 3. Further, at the time of the Claimant's dismissal, Ms Duncan checked with Samantha Williams, and was told that the Claimant had 10 clients around November 2020.

90. It is not necessary as part of the issues in this case for us to determine the precise number of clients that the Claimant had at various stages of her

employment. We accept that her case-load fluctuated, and reached a figure of 15 clients at one point. We also accept (and it was common ground) that there were staff shortages in 2020. We need not delve any further into this matter in order to address the claims before us.

**Policies**

91. The Claimant worked in the Respondent's Runnymede Team; she was employed on a part time basis, covering 22 hours a week. The Claimant was subject to a Code of Conduct, which sets out various standards that must be adhered to by the Respondent's staff – [305]. This Code provides some general responsibilities, including:

> "A3...If you have a genuine concern about possible wrongdoing, you must report it to the appropriate senior person within [the Respondent] – [308];
>
> A5 You must respect the appropriate channels for handling tenancy and service provision issues. You must not act outside [the Respondent's] established procedures in any matter concerning any client – [308];
>
> Main principle: You must report any reasonable and honest held suspicions you may have about possible wrongdoing without delay – [315]; and,
>
> M1 If you are aware of potentially dishonest or fraudulent activity or material breaches of this code, by board members or staff, you must report it to the appropriate senior person within [the Respondent] – [315]."

92. The Claimant was not given a copy of this Code at the time of transferring to the Respondent – [126]. However, in cross-examination, she accepted that she had understood that there was a duty not to denigrate the Respondent.

93. The Respondent also had a Whistleblowing Policy – [316]. This policy sets out who an employee can blow the whistle to, in the following order: a local manager, a member of the Executive Team (first port of call Head of Human Resources or the Chief Executive), or the Deputy Chair of the Board of Directors. The Policy provides the email address for the Deputy Chair, of whistleblowing@transformhousing.org.uk – [319].

**Grace Foster**

94. The Claimant had one particular client, Ms Grace Foster, who she inherited from Sarah Spalding when she left the Respondent in around August 2020. Ms Foster was a resident at Thorpe Lea Road: hers was the first eviction case with which the Claimant had been involved.

95. On 29 May 2020, Ms Foster received a first written warning for breach of house rules and Covid-19 guidelines – [74]. The Claimant was present when this warning was issued – [82/83].

96. On 9 June 2020, Ms Foster received a second written warning, which recorded a conversation that Ms Foster had had with Sarah Spalding and Samantha Williams – [76]. Again, this warning was given in relation to a breach of Covid-19 guidelines and a breach of the previous warning given by

staff regarding visitors in rooms. The second warning led to Ms Foster being banned from having any visitors.

97. On 25 June 2020, Ms Foster received a third written warning – [78]. This warning reported further breaches of the Covid-19 guidelines, as well as a breach of the house rules, namely playing music loudly during antisocial hours. The ban on visitors continued, and Ms Foster was informed that any further breach would result in eviction.

98. On 7 August 2020, Sarah Spalding sent Ms Foster another letter, entitled "Non-Engagement Notice" – [80]. This letter set out that Ms Foster had failed to engage with the Respondent, as per the terms of her licence agreement. The letter makes it clear that if the Claimant continues to fail to engage, her accommodation would be at risk.

99. It was in August that Ms Foster's case was re-allocated to the Claimant, given Ms Spalding's departure from the Respondent. In mid-August 2020, Ms Spalding updated the Claimant as to the current situation with Ms Foster, stating that she wanted to take steps to move on to independent living, but that Ms Spalding's view was that she would need the help of the Council, and assistance with bills and benefits – [365].

100. On 25 September, Samantha Williams attempted to serve Ms Foster with an eviction notice – [96]-[98]. Ms Foster was not at home, and so the notice was placed under her door – [85]. The Claimant went with Ms Williams on this occasion, and raised no concerns about the legality of the eviction – see text of 25 September 2020 at [91].

101. The next day, the Claimant spoke to Ms Foster, confirming that she (Ms Foster) had received the notice – [85]. On 26 September 2020, the Claimant sent a link to Duncan Lewis solicitors with a draft email to herself – [99]. The draft email was an introduction email intended for solicitors, seeking legal advice for Ms Foster regarding the alleged unlawful eviction by the Respondent.

102. In September 2020, a chain of emails took place between Ms Foster and Vicki Ellis (Housing and Support Manager) leading up to, and following eviction – [175]-[180]. In this correspondence Ms Foster accepts breaching her licence agreement, but seeks to appeal the eviction. This appeal was rejected by Vicki Ellis on 28 September 2020; this letter gave Ms Foster some guidance as to next steps, and who to contact – [176]. Unfortunately, that email bounced back, and so at that point Vicki Ellis emailed Samantha Williams and the Claimant, copying in Steve Moore (Area Manager), to ask someone to contact the Claimant and advise her to make an appointment with the Council and to offer advice – [175]. The Tribunal notes that Ms Foster did not seek to overturn the appeal decision: it is possible to go higher up the chain of command within the Respondent, to Steve Moore, and make a complaint about the eviction. Ms Foster did not do this.

103. On 28 September 2020, the Claimant offered Ms Foster support in contacting the Citizens' Advice Bureau, and showed her how to search for a legal aid solicitor to see if she could take any action against the Respondent. The

Claimant also advised Ms Foster to contact the Council – [85]. In a text that same day, the Claimant told Ms Foster to "*discuss all your points with Solicitors and ask them to email directly to [the Respondent]...*" – [92].

104. On 30 September 2020, Ms Foster was informed by the Council that she was not eligible to join the Housing Register due to "poor housing-related conduct" – [100]. This letter sets out the process by which one can request a review of the Council's decision.

105. On 1 October 2020, Ms Foster informed the Claimant that she had contacted the Council and been told that there was no other accommodation available, but that she had been advised to ask the Respondent to review its decision on the eviction – [85]. The following day, the Claimant texted Ms Foster saying "...*you need to go through appealing process. I will be able to support you to appeal a disengagement with [the Respondent]...*" – [92].

106. Also on 1 October 2020, Ms Foster sent to the Claimant the letter she had received from the Council at [100], via WhatsApp – [92]. The Claimant told us that it was this letter that sparked her concerns about the eviction. Prior to seeing that letter, she said she had no reason to doubt the legitimacy of the eviction notice, and had not asked any questions of Samantha Williams about the reason for eviction. However, on seeing that letter, she understood fully the impact of the eviction, and the reasons why the notice to terminate was served. The Claimant said in cross-examination that, at that stage, she "*tried to understand whether [the eviction] was legal or not*".

**5 October 2020**

107. On 5 October 2020, the Claimant had prepared a draft letter to send to Runnymede Borough Council, and sent it to Ms Foster to check – [102]. This letter concluded by asking the Council to reinstate Ms Foster on to the housing register, and to support her in finding appropriate accommodation – [105]. The draft letter also invites the Council to "*file an illegal eviction and harassment court case against*" the Respondent – [105].

108. After drafting and sending that letter to Ms Foster on 5 October, the Claimant had a performance meeting with Samantha Williams and Gill Steers, Senior HR Officer – [106]. In this meeting, various issues were raised with the Claimant, including the correct reporting lines and management structure – [106]:

> "[the Claimant] had contacted Mount Green directly, who then in turn contacted [Samantha Williams], there was a new procedure and therefore the mail from [the Claimant] created confusion, [Samantha Williams] again mentioned the fact that incidents like this make [the Respondent] look as thought [*sic*] they do not know what they are going and is not a good reflection.
>
> [the Claimant] had also sent an email to [Steve Moore, Area Manager] regarding a client, when asked why she did not discuss with [Samantha Williams], she said [Steve Moore] knew about it and therefore she sent it to him."

109. The Claimant sent a finalised version of her letter to the Council on 5 October 2020 at 1319hrs, from her work account, to housingallocations@runnymede.gov.uk, copying in Samantha Williams, Vicki Ellis and another person – [108]. She did so without checking with anyone more senior to her about a process for appealing an eviction, or about whether her letter was appropriate. The email requested a "Stage 1 Review" of Ms Foster's Housing Register status. Also in this email, the Claimant wrote:

> "...therefore a possibility of immature, ill-informed decision has taken place. It looks like [Ms Foster] was singled out and all allegations were purely based on hearsay rather than facts.
>
> ...I would question every step in this process therefore I feel the eviction has been unlawful and likely due to the lack of knowledge of newly appointed manager."

110. Mr Baker suggested to the Claimant that she did not really believe the contents of her letter, but that she was doing the only thing she could think of to help Ms Foster get back on the Housing Register. We do not accept that the Claimant deliberately made up the allegations within her 5 October email. It is clear that, throughout internal proceedings and the Tribunal hearing, the Claimant has genuinely felt that she was fighting for Ms Foster, to right some wrongs that she considered had been done to Ms Foster. We therefore find that the Claimant believed the content of her email of 5 October.

111. At 1446hrs on 5 October 2020, Vicki Ellis (Housing and Support Manager) sent a reply email to the Council asking them to disregard the Claimant's email, as it was sent without management knowledge – [112].

**Disciplinary process**

112. On 7 October 2020, Steve Moore (Area Manager) texted the Claimant in order to arrange a meeting on 8 October. He wrote at [381]:

> "Lucy, as our meeting tomorrow is very important, would you please go straight to Manor Farm at 9:00? We can cancel your 9:30 appointment and rearrange as necessary. Could you also ensure that you bring your phone, laptop and any papers you may have that relate to Grace? We may need to look at these. Thank you and see you in the morning. Steve."

113. On receipt of this text, the Claimant guessed that she was being suspended. This was confirmed to her at the meeting on 8 October, and followed up by a letter of 9 October 2020 – [113]. The letter took some time to reach the Claimant, but she had definitely received it by 12 October – [117/118]. The suspension was necessary in order for the Respondent to complete an investigation regarding the 5 October 2020 email – [113].

114. Paul Summerton, Interim Head of Care Services, conducted the investigation meeting with the Claimant on 15 October 2020 – [125]. In that meeting, the Claimant explained why she had sent the email of 5 October – [126/128]:

> "[The Claimant] said that, as the client had already been evicted & Transform were no longer providing support, so she didn't think it was necessary to inform her manager. She said that she was acting in the best interests of the client, as they remained vulnerable & they had only been given one week's notice. When asked again, why she didn't inform her line manager, she said that, when requested previous "Stage 1 Reviews" she had never previously informed her manager.
>
> ...
>
> [The Claimant] said that the reason she didn't inform her manager is that the information she had provided was factual. She thought that the client should remain on the housing register, as she remained vulnerable. [The Claimant] was concerned that the client's rights for social housing had been taken away for 5 years & she needed help to find alternative accommodation. She said that she was unable to discuss anything with her manager & had never included managers in the submission of a "Stage 1 Review".

115. The Claimant admitted in this meeting that she had helped Ms Foster search for a solicitor to assist her with a Stage 1 Review – [127].

116. Paul Summerton produced his investigation report dated 30 October 2020 – [129]. This report concluded that there was no evidence to show that the Claimant had "*used the correct and appropriate channels to raise her concerns with her manager...*" – [133]. It went on to state that the investigation had shown that possible breaches of the Code of Conduct had occurred and therefore the matter should proceed to a disciplinary hearing.

117. The Claimant was invited to a disciplinary meeting to deal with six allegations – [135]:

> 1. "On 05/10/20 you sent an email using your Transform e-mail account with your email signature to Runnymede Borough Council (RBC) to request a "Stage 1 Review" of a client's (GF) Housing Register status. This email criticized [the Respondent]. You sent this e-mail without consulting with your line manager (SW) nor seeking to address the issue internally first.
> 2. You assisted GF in securing a solicitor, to assist her with the Stage 1 Review and take legal action against [the Respondent], the letter drafted to the solicitor criticised [the Respondent].
> 3. You retained an electronic copy of the eviction notice on your personal phone.
> 4. You shared and used your personal contact details when contacting clients.
> 5. You held inappropriate material related to drug dealing on work WhatsApp account.
> 6. You allowed your son to use your work mobile."

118. The invitation letter set out the parts of the Code of Conduct and Disciplinary Policy that the Respondent relied upon, informing the Claimant that the allegations, if proven, could amount to gross misconduct which could in turn lead to summary dismissal.

119. In advance of the disciplinary hearing, the Claimant requested that various documents be included in the disciplinary process – [139/140]:

119.1. The three warning letters and Notice to Terminate sent to Ms Foster;
119.2. A pack of Pyramid notes printed on 5 October 2020, that the Claimant had given to Steve Moore;
119.3. The letter from the Council to the Claimant regarding her Housing Register status;
119.4. The handover e-mail Sarah Spalding sent to the Claimant attaching the move on report.

120. The disciplinary hearing took place on 5 November 2020 and was chaired by Viccy Johnson. At the beginning of that hearing, there was a debate about the email chain now at [176]-[180]; the Claimant wanted this chain to be included in the disciplinary hearing. Simone Bartley, who was present as Head of HR, agreed that the email could be printed, and there was a short adjournment whilst this took place and parties were given the chance to read the emails – [142]. This document was the only document that had been requested of which Viccy Johnson had been made aware.

121. At this meeting, the Claimant and the Respondent had different matters at the forefront of their minds: the Claimant was still mainly concerned about the lawfulness or otherwise of Ms Foster's eviction. The Claimant was told that, should she wish to make a complaint about the eviction, she could do so in writing to the Respondent and that would then be dealt with separately – [142].

122. When asked if the Claimant regretted sending the email of 5 October, she stated "*perhaps given more time she could have looked at the letter in more details* – [145]. The Claimant was also asked whether something similar would happen again if she returned to work, to which she answered "*no, this is a learning experience for both herself and [the Respondent]*" – [147]. In answer to the question whether there was anything the Claimant needed to apologise for, she said "*this was a very difficult question. Maybe [the Claimant] does need to say sorry for taking the issue to the Council but that was due to [the Claimant] not knowing that [the Respondent] could have done something about the eviction was issued*" – [150].

123. The Claimant continually attempted to bring the disciplinary hearing back to the issues surrounding Ms Foster's eviction and its fairness/lawfulness. This was despite numerous reminders that the meeting was not directly about Ms Foster's eviction.

124. On 12 November 2020, the Respondent confirmed to the Claimant that the decision had been taken to uphold all six allegations, and to summarily dismiss her – [153]. The Claimant indicated her intention to appeal on 12 November, and sent a full appeal letter on 19 November 2020, seeking a less severe penalty – [165]. In her appeal letter, the Claimant also repeated her request for disclosure of the Notice to Terminate and the letter from the Council to Ms Foster regarding her Housing Register status.

125. Dave Hulme was appointed to chair the appeal hearing. In advance of that hearing, he emailed Vicki Ellis, Samantha Williams and Steve Moore to obtain their views on trust between them and the Claimant – [199], [201], [203] respectively.

126. The appeal hearing was held on 3 December 2020 – [205]. The Claimant was supported by a union representative, Rajesh Cheeria. At the beginning of the hearing, it was confirmed that the Claimant was in receipt of all documents she had requested, and was given the opportunity to talk with her union representative about those documents: she declined – [205]. Again, the Claimant's main focus was on the lawfulness of Ms Foster's eviction, and how she (Ms Foster) had been treated. At this hearing, the Claimant accepted that there were some lessons for her to take away from this incident – [210]. The Claimant was given a break to speak to her union representative; on returning, the Claimant offered an apology – [210].

127. By letter of 10 December 2020, the Claimant was informed that her appeal had been rejected – [211]. Dave Hulme had reached the conclusion that the sanction of dismissal was the appropriate one in this matter, and that there was not enough evidence to prove to him that the Claimant fully understood that she had done anything wrong. This is despite the fact that the Claimant had apologised and acknowledged that she may require some training. Notwithstanding these factors, Mr Hulme told us that there was not enough evidence to satisfy him that the Claimant "*properly and fully understood the consequences of what she had done*". He concluded that an alternative short of dismissal was not appropriate given:

    127.1. The implications of the email of 5 October;
    127.2. The risk to the Respondent's reputation as a consequence of that email:
    127.3. The Claimant's failure to follow proper procedure;
    127.4. The Claimant's failure to follow managers; and,
    127.5. The Claimant criticising colleagues to an external agency.

128. Having exhausted internal routes of challenging her dismissal, the Claimant presented her claim to the Tribunal.

**Conclusions**

Time Limits: harassment – Issue 2

129. The Claimant contacted ACAS in December 2020 as she had researched and read on the internet what the next steps should be in complaining about her dismissal: she followed those steps.

130. In terms of legal assistance, the Claimant explained that she contacted Garden Court Chambers on 12 November 2020; they replied on 18 November 2020. The Claimant believes that it was some time in January 2021 when Mr Magennis explained to her the time limits and deadline for presenting a claim; he told her that her claim was in time. The Claimant was guided by him and had no control over when he drafted the Grounds of Complaint. The Grounds of Complaint drafted by Mr Magennis are dated 18 March 2021; the ET1 was presented, with those Grounds, on that same date. The Claimant relied upon Mr Magennis' advice that the claim was in time.

131. The Claimant's reasonable reliance upon her legal professional's advice was the reason for the delay in this case. The Tribunal finds that the harassment claim was presented within a period that was just and equitable. Therefore the claim is in time, and the Tribunal will consider the claim on its merits.

Time limits: whistleblowing detriment – Issue 2

132. This issue requires application of the more stringent "not reasonably practicable" test. As set out above, the reason for the Claimant's delay in submitting the Claim Form was that she relied upon the advice she received from Mr MaGennis. Unfortunately, under this test, a claimant is stuck with the mistake of her legal adviser, unless it is reasonable for that adviser to have made the mistake – Wall's Meat Co Ltd v Khan [1979] ICR 52.

133. We have no evidence to demonstrate that Mr Magennis' incorrect advice in relation to time limits was due, for example, to any fault on the part of the Respondent. We therefore conclude that there is no reason for us to depart from the Dedman Principle, and the Claimant's claim for whistleblowing detriment was brought out of time and as such is struck out.

134. In the event that we are wrong on this point, we will consider this claim on its merits.

Reason for dismissal (relevant to Issues 5, 6 and 7)

135. We determined to deal with the reason for dismissal first, as this will inform the outcome of several of the Claimant's claims.

136. We are satisfied that the Respondent has demonstrated that the reason for dismissal was the Claimant's conduct. Although there were the six allegations that were upheld, we accept Ms Johnson's evidence that her main concerns were the sending of the 5 October email, and the Claimant assisting Ms Foster with obtaining legal advice against the Respondent. These two issues she considered to be gross misconduct; the other four matters demonstrated a pattern of breaching of policies and procedures, which added to the situation. This is consistent with the weight placed on the various allegations in the internal proceedings, and also in the Tribunal proceedings in terms of how the Respondent has put its case.

137. The Claimant asserts that the reason for her dismissal was her making protected disclosures/protected acts. We address the issue as to whether in fact protected disclosures/protected acts were made later in this judgment. However, we are satisfied that this is a case like that of Kong, where the Claimant's conduct in sending the email of 5 October 2020 can be separated from the disclosures within that email. It was clear from Ms Johnson and Mr Hulme's evidence that their concern was that the Respondent's reputation could be affected by the manner in which the Claimant had addressed her concerns to the Council, and the fact that she had effectively acted against her employer, by seeking to call into question (to put it mildly) its decision-making regarding the eviction. We further accept that the fact that the email was sent without the Claimant discussing it with her line management was a

serious concern leading in part to the Claimant's dismissal; this is unrelated to any protected disclosures.

138. We accept Ms Johnson and Mr Hulme's evidence as to what matters influenced their thinking. They were consistent in cross-examination with the contents of their witness statements, and indeed their contemporaneous decision letters. There is no good evidence to undermine their evidence as to the reason for their decision-making.

139. We are therefore satisfied that the reason for dismissal was conduct.

Automatic unfair dismissal (s103A ERA) – Issue 6

140. We are satisfied, in light of our findings as to the reason for dismissal set out above, any protected disclosures made by the Claimant were not the reason, whether consciously or unconsciously, for her dismissal. The claim for automatic unfair dismissal fails, as the reason (or principal reason) for the Claimant's dismissal was not any protected disclosures.

Victimisation (s27 EqA) – Issue 7

141. We have already concluded that the reason for the Claimant's dismissal was conduct. We are satisfied that any protected act did not have a significant influence of the decision to dismiss the Claimant. Therefore the victimisation claim fails.

142. For completeness, we will consider whether in fact the Claimant did a protected act.

*Protected Act*

143. The Claimant relies upon two parts of her 5 October email as being protected acts – [109]:

> "I am unsure why [the Respondent's] management has chosen to evict GF rather than support her to maintain her tenancy as she is a vulnerable and young person.
> ...
> I would like to inform you that GF suffers from epilepsy and has a diagnosis of depressive illness and for young people with this conditions [sic] friends and [sic] the most important source of support, sharing and reassurance. Going through difficulties with her house mates impacted negatively on her mood/mental health and GF was in needs [sic] of greater support from her friends at the time of her residency with [the Respondent] as she did not receive adequate support elsewhere."

144. The first paragraph is not an allegation of a contravention of the Equality Act 2010. It is a query as to why Ms Foster was evicted. There is no reference to treatment being inflicted upon her in connection to a protected characteristic. Although there is mention that the Claimant is young, this is not said to be connected to the reason for the Respondent's treatment of her. For the same reasons, this paragraph also does nothing for the purposes or in connection with the Equality Act 2010.

145. Again, in relation to the second paragraph, there is no allegation of a contravention of the Equality Act 2010. Although the Claimant asserts that Ms Foster suffers from various conditions, there is no assertion (whether express or implied) of the Respondent discriminating against Ms Foster.

146. The Tribunal therefore finds that there is no protected act here, and so the victimisation claim fails on this point, as well as the above issue regarding reason for dismissal.

Ordinary unfair dismissal (s98 ERA) – Issue 5

147. Having determined that the reason for dismissal is the potentially fair reason of conduct, we must go on to consider whether that was in fact a fair reason in this specific case.

*Genuine belief on reasonable grounds*

148. As stated above, both Ms Johnson and Mr Hume were consistent in their evidence to the Tribunal when compared to their witness statements, and consistent with their decision letters sent at the time of the dismissal and appeal.

149. We also note that Vicki Ellis replied to the Claimant's email of 5 October very promptly, inviting the Council to disregard the email. That also indicates to us that the Respondent had a real concern about the reputational damage that this email could do.

150. In terms of reasonable grounds, and focusing on the key allegation of sending the email to the Council without speaking to management first, as a fact, it is common ground that the Claimant did those things. What this really comes down to is a matter of interpretation of the Claimant's email, and the suitable sanction to be imposed.

151. We therefore conclude that both decision-makers held a genuine belief that the Claimant was guilty of the conduct with which she was charged. Further, we find that this genuine belief was based on reasonable grounds.

*Reasonable investigation*

152. As above, the fact of sending the email of 5 October without consulting with the Claimant's management is common ground. Therefore, the matters for investigation revolved around any mitigation the Claimant could produce for acting in that manner.

153. The Claimant was given the opportunity to put forward mitigation and discuss those matters at each stage of the disciplinary process.

154. We note that at paragraph 13 of the Grounds of Appeal, the Claimant has set out specific issues she says made her dismissal unfair. The matters in that list that relate to the investigation are dealt with immediately below:

155. At paragraph 13.4 it is said "*[t]he investigation failed to consider evidence that tended to show that GF had been failed by the Respondent*". In short, whether or not GF was failed by the Respondent is not relevant to this issue of whether the Claimant's actions in sending the email amounted to misconduct. There was no need for the decision-makers to explore whether GF had been failed by the Respondent; there were separate routes open for that issue to be explored if necessary, but it is irrelevant to the fairness of the investigation.

156. At paragraph 13.5 it is said "*[t]he investigation failed to consider the Equality Act 2010*". This allegation is vague, and does not set out why the investigation should have considered the Equality Act 2010. Again, we conclude that any failure to consider the Equality Act was not relevant to the investigation at hand.

157. Neither the allegation at paragraph 13.4 nor that at paragraph 13.5 renders the investigation, or dismissal, unfair.

158. The Claimant also alleges that the failure to include her Pyramid notes at [263-285] within the investigation was unfair. These notes do not affect the issue of the Claimant's conduct in writing and sending the email of the 5 October without discussing it with management. Therefore these notes are irrelevant to the investigation into the Claimant's conduct.

159. We conclude that the investigation was reasonable.

<u>Other points regarding fairness</u>

160. We will now address the other matters raised specifically by the Claimant at paragraph 13 of her Grounds of Complaint.

161. Paragraph 13.1 "*[w]hen the Claimant requested that all documents be provided to her, that request was refused*". By the time of the appeal hearing, there were only two documents outstanding; the Notice of Termination and the letter from the Council. Simone Bartley's response to the initial request by the Claimant at [195] was not a refusal, but an enquiry in order to enable her to identify the documents sought. Copies of these documents were given to the Claimant and her representative at the beginning of the appeal hearing, and they were given the opportunity to take a moment to discuss them. Therefore, we find as a fact that there were no outstanding requests for documents by the time of the appeal hearing.

162. Paragraph 13.2 "*[t]he Respondent wrote confusing warning letters to GF containing allegations that GF denied*". The warning letters to GF were written prior to the Claimant taking her on as a client. We also note that GF accepted some of the alleged breaches of her licence agreement, which clearly states that eviction can result from breaches. We do not find that the warning letters were confusing. In any event, the nature and content of the warning letters are irrelevant to the Claimant's conduct in sending the 5 October email without discussing it with her manager.

163. Paragraphs 13.3 "*[t]he Respondent failed to demonstrate that their reputation with [the Council] had actually been damaged*". The Respondent did not allege that its reputation with the Council had in fact been damaged. Reference was made in the decision letter to the Code of Conduct A3 and Disciplinary Rule D which state:

> "A3: You must not bring [the Respondent's] name into disrepute or affect its integrity by your actions or words, either within the organization or outside. ...
>
> D: Conduct which is likely to bring discredit to our business or organization..."

164. A reasonable employer would interpret these rules as meaning that employees must not act in a way to risk the reputation of the Respondent. Therefore, we find that the lack of evidence of actual reputational damage is irrelevant to the fairness of the Claimant's dismissal.

165. Paragraph 13.6 "*[t]he complaints procedure was not followed following GF's complaint, and GF never received a reply to her complaint, which information clearly had a bearing on the investigation into the Claimant's conduct*". GF appealed the decision to evict her, and that appeal was dealt with by Vicki Ellis. GF did not seek to appeal Ms Ellis' decision further. In terms of any complaint by the Claimant, she was told on two separate occasions that she could raise a separate complaint, then she could do so and that would have been dealt with separately – e.g. [142]. The Claimant did not do so. The Claimant contends that her handing some Pyramid notes to Mr Moore on 8 October was sufficient to kick start a complaint: she did not tell Mr Moore that her handing him these documents should be taken as her starting a complaint, nor did she do anything more to progress a complaint under the complaints process/grievance procedure. Even if the Claimant's actions amounted to commencing a complaint, we do not accept that the complaint impacts on the disciplinary process, given that the disciplinary process deals with the manner and wording of the Claimant's email of 5 October. Therefore, any failure to deal with a complaint, whether by the Claimant or GF, did not render the dismissal unfair.

166. Paragraph 13.7 "*[t]he Respondent treated the Claimant's concern for, and actions taken to assist, GF as evidence of her wrongdoing rather than as evidence of her dedication to her job*". As we have set out above, in line with the decision in Kong, we find that it was the way in which the Claimant went about demonstrating her support for GF that led to her dismissal (i.e. the communication within the email of 5 October, and failing to discuss this with her manager). We are not satisfied that the Respondent held the Claimant's dedication to GF against her in the manner alleged. In fact, her dedication to her role was applauded by the Respondent.

167. Paragraph 13.8 "*[t]elling tenants that the Claimant had left her employment before the investigation had concluded, thereby prejudging the outcome*". We find as a fact that this did not happen. The Claimant was asked in her evidence to explain the basis for this allegation: she relied upon the text message at [381] from Steve Moore, which states:

> "Lucy, as our meeting tomorrow is very important, would you please go straight to Manor Farm at 9:00? We can cancel your 9:30 appointment and rearrange as necessary. ..."

168. Adele Duncan in her witness statement at paragraph 32 explains that clients/tenants are not routinely told the reason for the need to reschedule appointments: this evidence was not challenge. We have no evidence to suggest that any of the Claimant's clients were in fact informed that she had left her employment. We therefore conclude that none of the Claimant's tenants were informed of her departure prior to the decision to dismiss being made.

169. None of the Claimant's specific allegations relating to fairness render the decision unfair.

Sanction

170. It is common ground that the Claimant had a clear disciplinary record at the time of the decision to dismiss. Yet we do know that she had been subject of a performance management meeting on 5 October 2020, where various matters were raised with her informally. Viccy Johnson did not consider the Claimant's disciplinary record at the time of making her decision, but did have in front of her the minutes of the 5 October 2020 meeting. Ms Johnson told us, and we accept, that having the Claimant's disciplinary record in front of her would not have altered her decision.

171. It was reasonable of Ms Johnson to place weight on the minutes of the 5 October meeting, given the proximity of that meeting to the Claimant's sending of the offending email – see [144] "*VJ said that from Transform's point of view the notes are very relevant*". The issue of adherence and respect for the management structure was recorded as having been discussed at that meeting – witness statement of Viccy Johnson paragraph 7.

172. In the disciplinary meeting, the Claimant put forward various reasons why she did not discuss her email with management before sending it:

    172.1. She did not think it was appropriate – [144];
    172.2. She did not think that the Respondent could assist with her concerns around GF's eviction – [144];
    172.3. Time constraints – [146];
    172.4. It was separate from what the Respondent had been doing – [146];
    172.5. She did not need to make her manager aware – [146].

173. It was within the band of reasonable responses for Ms Johnson to conclude that the Claimants reasons for not discussing her concerns with her managers were not credible:

    173.1. The Claimant had the opportunity to discuss her concerns around Ms Foster's eviction with her line manager, Samantha Williams, at the meeting on 5 October 2020.

173.2. The Claimant approached the Council in her email of 5 October as an employee of the Respondent, and therefore she was acting within the realms of her employment. If the Claimant thought she could help the situation, then it follows, given she would be doing so within her professional capacity, that the Respondent could help the situation too.

173.3. Given that the Claimant had, just that morning, been reprimanded for failing to use the management structure ([106]), any reasonable person in her shoes would then go out of their way to ensure they abided by that structure.

174. Further, it was reasonable for Ms Johnson to conclude that, particularly in light of the meeting on 5 October, the Claimant was aware that she should not have sent the email without first discussing it with her management line.

Breach of trust

175. Ms Johnson explained to the Tribunal that she could not see how the breach of trust that had occurred when the Claimant sent the 5 October 2020 could be healed. She took into account the Claimant's apology, but felt that it had been a fairly general apology, which did not display much insight into how the Claimant had undermined her managers. Despite the Claimant's assertions in the disciplinary meeting, Ms Johnson was not satisfied that she had shown a real understanding of how she had breached the trust of her managers.

176. Ms Johnson weighed this into the balance when considering the sanction, but concluded that the Claimant had not really understood how her actions had breached the Respondent's trust, and therefore was not satisfied that the Claimant would not repeat this behaviour in the future. The same conclusion was reached by Dave Hulme at appeal stage, following his emails to Samantha Williams, Vicki Ellis and Steve Moore on the issue of trust.

177. In relation to the Claimant contacting solicitors on GF's behalf, in the disciplinary meeting, the Claimant explained that she had contacted two solicitors on behalf of GF stating "*I would question every step in the process therefore I feel the eviction has been unlawful and likely due to the lack of knowledge of newly appointed manager*" – [105/143]. The Claimant told Ms Johnson during the disciplinary that she did this during working hours. When it was explained the Claimant that this conduct was not appropriate, the Claimant's answer was simply "*this was the first time she has dealt with an eviction*" – [144]. In light of the Claimant's inability to see that this action was inappropriate, it was reasonable for Ms Johnson to determine that trust could not be re-established between the Claimant and the Respondent.

178. On the face of the disciplinary and appeal minutes, to conclude that the Claimant did not really understand what she had done wrong, and would do the same type of thing again, may seem at odds with the evidence the decision-makers heard. However, we accept that the Claimant was attempting to reduce the sanction by saying what she thought the decision-makers would want to hear, but did not really accept or understand that she had done anything wrong. For example, when asked in the disciplinary

hearing how she thought she could rebuild trust, the Claimant initially questioned the managers' leadership skills – [149]. We also note the Claimants answers in cross-examination:

> "Mr Baker: It seems at page 150 you thought you did have something to apologise for. Did you think you had done anything wrong by going straight to the Council?
>
> Claimant: No
>
> Mr Baker: Do you think you've done anything wrong now by going straight to the Council?
>
> Claimant: No
>
> ...
>
> Mr Baker: You don't agree you did anything wrong. Do you understand Viccy Johnson's point of view that that was the wrong way of dealing with things?
>
> Claimant: That is her point of view. If there is a breach of practice, one party will believe I brought them into disrepute, and another party will believe there is a lesson to learn and continue working."

179. The Claimant's concern for her clients is admirable, however the Claimant still cannot detach herself from fighting for Ms Foster's rights. Throughout the hearing before us, there has been a disconnect between the issues the Claimant wants to address (the manner in which Ms Foster was treated) and the issues that are relevant to her claim. This is despite the Tribunal explaining this to the Claimant several times. The same was true of the internal disciplinary process: at both the disciplinary and appeal hearings, the Claimant wanted to focus on Ms Foster, rather than the allegations she was facing.

180. The conclusion drawn by both decision makers, that the Claimant had not demonstrated that she fully understood what she had done wrong, was a conclusion that fell within the band of reasonable responses open to a reasonable employer.

Sanctions short of dismissal

181. Viccy Johnson was asked whether any of the six allegations troubled her more than the others, or whether they were all equally important. Ms Johnson explained that her main concerns were the sending of the 5 October email, and the Claimant assisting Ms Foster with obtaining legal advice against the Respondent. These two issues she considered to be gross misconduct; the other four matters demonstrated a pattern of breaching of policies and procedures, which added to the situation. Ms Johnson told us that she had considered sanctions short of dismissal, but in light of the Claimant's lack of understanding and insight into her conduct, she deemed dismissal to be the appropriate route.

182. Dave Hulme explained to the Tribunal that he did consider sanctions short of dismissal, including whether to relocate the Claimant to another part of the organisation. He concluded that, in light of the risk to the Respondent's reputation, the Claimant's failure to follow proper management lines of

communication and the criticism made of colleagues to an external agency, redeployment anywhere within the Respondent would not work.

183. We find that it was within the band of reasonable responses of a reasonable employer to conclude that employment was no longer tenable, and that there was real concern that the Claimant would do something similar again. It was reasonable for the decision-makers to conclude that such communications as the 5 October email could risk the Respondent's reputation with important stakeholders, and that there was a real risk that such behavior from the Claimant may occur again, whichever team she was on, if she thought a client of hers needed her help.

184. In conclusion, the sanction of dismissal falls within the range of reasonable responses open to a reasonable employer. It cannot be said that no reasonable employer would dismiss in these circumstances.

185. We therefore find that the Claimant's dismissal was fair in all the circumstances. As a result, the unfair dismissal claim fails.

**Protected Disclosures (Employment Rights Act 1996 s43B) – Issue 3**

186. We remind ourselves of the four passages the Claimant relies upon as being protected disclosures:

> "PD 1 "I am unsure why Transform management has chosen to evict GF [Grace Foster] rather than support her to maintain her tenancy as she is a vulnerable and young person" – [109];
>
> PD2 "I would like to inform you that GF suffers from epilepsy and has a diagnosis of depressive illness and for young people with this [sic] conditions friends are the most important source of support, sharing and reassurance. Going through difficulties with her house mates impacted negatively on her mood/mental health and GF was in needs [sic] of greater support from her friends at the time of her residency with Transform as she did not receive adequate support elsewhere" – [109];
>
> PD3 "And finally the shortage of staff over one year (team operating at only 40% capacity) did not allow concrete evidences [sic] for monitoring and case handling, therefore a possibility of immature, ill informed decision has taken place" – [109].
>
> PD4 "It will be morally right and fair if GF could be supported by RBC to file an illegal eviction" – [110]."

<u>Protected disclosure 1</u>

187. PD1 is an equivocal statement, almost posing a question. We are not satisfied that the wording here constitutes a disclosure of information. Therefore, we find that PD1 is not a qualifying disclosure.

<u>Protected disclosure 2</u>

188. PD2 does contain information, however it is information referring to GF's circumstances. There is nothing in this passage that could tend to show a failure in legal obligation by the Respondent. Therefore, we conclude that PD2 is not a qualifying disclosure.

Protected disclosure 3

189. PD3 is a disclosure of information. The passage informs that there was a shortage of staff, and that this shortage led to errors in monitoring and case handling, in turn leading to poor decision-making.

190. We move on then to consider whether the Claimant had a reasonable belief that PD3 tended to show that the Respondent had failed to comply with a legal obligation.

191. As we have stated above, we are satisfied that the Claimant believed, and still believes, that the Respondent unlawfully evicted GF. However, the question is not whether the Claimant believed in the unlawful eviction, but whether she believed that PD3 tended to show the Respondent was in breach of a legal obligation – **Soh**.

192. The legal obligation in question appears to be not unlawfully evicting tenants: we find that this is a fairly obvious legal obligation as opposed to guidelines or moral judgments.

193. Turning to reasonable belief, we are satisfied that the Claimant believed that her words would indicate a breach of legal obligation. The question is whether that belief was reasonable. We remind ourselves that the Claimant must not have unfounded suspicion, but must have at least some evidential basis for the belief that what she was saying tended to show a failure in legal obligation.

194. We note the Claimant's role and place within the hierarchy of the Respondent and her team. We also note the acceptance that there were staff shortages across the board during Covid. We accept that someone higher up the chain of command, with a more overarching view of the Respondent's remit, activities and staffing numbers, would not hold the requisite reasonable belief. However, we are satisfied that, given the Claimant's limited understanding of eviction proceedings, her place within the Respondent, and the fact that she was only at the Respondent part-time (and so was not present for every discussion held amongst her team) her belief was reasonable.

195. We then turn to consider whether the Claimant had a reasonable belief that PD3 was made in the public interest. There is a fairly low threshold to overcome regarding the public interest test. Given the nature of the Respondent's work, and the assertion that the Claimant was making, regarding staffing shortages leading to poor decision-making, this quite clearly reaches the requisite threshold. Poor decision-making within a charitable organisation supporting vulnerable clients is clearly a matter that would fall within the public interest.

196. Therefore, the Tribunal finds that PD3 is a qualifying disclosure.

Protected disclosure 4

197. This passage does not contain a disclosure of information. Although there is reference to an "illegal eviction", there is no information within this phrase that indicates why it is said that the eviction is illegal, or that could be said to indicate any failure of legal obligation by the Respondent.

198. As such, we find that PD4 is not a qualifying disclosure.

Method of disclosure

199. The Respondent argues that the Claimant did not make the disclosure in any way that fits within the permitted gateways at s43C-F *ERA*. However, this is to ignore the fact that the 5 October email was not only sent to the Council, but was copied to the Claimant's line manager, Samantha Williams, and the next manager up the reporting chain, Vicki Ellis. Although it was not addressed to these two individuals, s43C requires only that "*the worker makes the disclosure to his employer*". We therefore find that, by copying in her direct manager and Area Manager, the Claimant made the disclosure to her employer.

200. PD3 is therefore, in our judgment, a protected disclosure.

**Detriment (Employment Rights Act 1996 s47B) – Issue 4**

201. As set out above, the Tribunal has found that this claim is out of time. However, for the sake of completeness, we will consider the claim on its merits.

Did the detriments in fact occur?

202. The Claimant relies upon three alleged detriments:

    202.1. Suspending the Claimant (8 October 2020);
    202.2. Telling tenants that she had left before she had been dismissed (7 October 2020);
    202.3. Preventing her from speaking to any staff or tenants (8 October 2020).

203. We conclude that the first and third of these detriments did in fact occur, and that they amount to detriments.

204. However, in relation to the second, the evidence that the Claimant relies upon is the text at [381] in which Steve Moore offers to rearrange one of the Claimant's client appointments in order that she can attend a meeting on 8 October 2020. The Claimant read into this that tenants had been told of the reason for the need to rearrange an appointment. There is no evidence to support this assertion, and in fact Adele Duncan gave unchallenged evidence that the Respondent would not routinely inform a client of the reason for a rescheduling of an appointment. We therefore conclude that the second alleged detriment did not in fact occur.

Reason for detriments

205. Suspension is provided for within the Respondent's Disciplinary Policy – [335/336]:

> "The Head of Human Resources will give consideration to a period of suspension on full pay to allow an unhindered investigation to be conducted and until any disciplinary action takes place if for example:
>
> - The matter to be investigated is thought to involve serious misconduct;
> - Relationships have broken down;
> - It is considered there are risks to our property or responsibilities to other parties."

206. We accept that the reason Simone Bartley determined that suspension was necessary was due to the seriousness of the allegations the Claimant was facing. She told us in answer to our questions that it was rare for an allegation as serious as the one the Claimant was facing to come up. The prohibition on the Claimant of speaking to staff or tenants is part and parcel of the terms of suspension when there is a need to investigation without interruption.

207. Although suspension would not have occurred if it had not been for the 5 October email, this is a case where the separability principle in **Kong** applies. We find that Ms Bartley was not materially influenced by PD3, but that she felt it necessary to suspend the Claimant in order to conduct a proper investigation into the reason for the Claimant sending the email worded as she did, without going through the correct management chain.

208. Therefore, the detriment claim fails on its merits.

**Harassment (Equality Act s26) – Issue 8**

209. The Claimant alleges that she suffered unwanted conduct, in that she was excluded from conversations relating to Ms Foster. She claims that she should have been included in the emails between Ms Foster and Vicki Ellis in September 2020, and the email sent by Vicki Ellis on 5 October 2020 recalling the Claimant's email.

210. Although the connection between disability and the unwanted conduct need only be a loose connection, there is no evidence before us that the reason behind Ms Ellis not including the Claimant in those emails related to any disability experienced by GF, as the Claimant claims. In fact, no evidence was given by the Claimant to explain why she thought her being left out of these emails was connected to GF's alleged disabilities.

211. In any event, we are not satisfied that this conduct by the Respondent could reasonably be felt to have created an intimidating, hostile, degrading, humiliating or offensive environment, or to have violated the Claimant's dignity. The Claimant was included in many communications and activities relating to GF, most importantly, the service of the Notice to Terminate. The Claimant also had access the GF's pyramid notes, and GF's file. Had she felt the need, she had the ability to look at those.

212. Further, the Claimant was part of a team, in which there were two managers above her, Ms Williams and Ms Ellis. We remind ourselves that the Claimant was part time, working 22 hours a week. It is to be reasonably anticipated that communication will take place with clients which does not always include a part-time HSO. In fact, in relation to the chain of emails with Ms Foster, we note it was Ms Foster who started the conversation, and she chose to only address her emails to Vicki Ellis – [179]. It was in fact Ms Ellis who then included the Claimant in that chain – [175].

213. The claim for harassment therefore fails.

**Wrongful dismissal – Issue 9**

214. The question here is whether the Claimant's actions in sending the email of 5 October, along with the other 5 allegations, was sufficient to equate to a fundamental breach of her employment contract.

215. The Claimant had routes available to her by which she could have raised concerns about GF's eviction properly. We find that she chose not to do so, and chose instead to go straight to one of the Respondent's stakeholders, over the heads of her managers.

216. Further, we find that there was a real risk that the Claimant had not learnt from this experience, and could not see what she had done wrong.

217. Her actions in sending such a critical email to the Council, and instigating GF's search for a lawyer to act against her employer we find undermine the trust and confidence required between employer and employee and amounted to gross misconduct. The Tribunal concludes that the Claimant's conduct was such as to equate to a fundamental breach of her contract of employment.

218. As such, the Respondent was entitled to treat itself as released from its contractual obligation to pay notice pay.

219. Therefore, the claim for notice pay fails.

**Holiday pay – Issue 11**

220. Given that we have dismissed the notice pay claim, it follows that the Claimant was not entitled to accrue any more holiday pay during her notice period.

221. Therefore the claim for holiday pay fails.

**Breach of contract – Issue 10**

222. The Claimant relies on the following alleged breaches:

    222.1. Breach of the Claimant's job description (in short, the Claimant asserts that she was prevented from doing her job) ("Breach 1");

222.2. Breach of the Whistleblowing Policy:

222.2.1. Failure to include documents [263]-[285] provided by the Claimant in the investigation documents ("Breach 2");
222.2.2. Failure to disclose to the Claimant documents she requested during the course of the investigation ("Breach 3"); and,
222.2.3. Failure to complete the investigation within 10 days as per the Policy ("Breach 4").

223. We will deal with each of the four alleged breaches in turn, however there are some points worth making at this stage in relation to Breaches 2, 3 and 4.

224. These are said to be breaches of the Whistleblowing Policy.

225. Firstly, we do not find that the Whistleblowing Policy was engaged by either party during the course of the events relevant to this claim. The Claimant did not trigger the use of this Policy and did not raise a complaint under it. We have seen the possible routes for raising a complaint under this Policy at [319]: the Claimant did not take any of those steps.

226. Further and in any event, there is no evidence to suggest that the Whistleblowing Policy is a contractually binding document: it is not referred to within the Claimant's contract, unlike the Code of Conduct for example. Therefore, even if there were a breach of that Policy, it would be difficult to see how that would amount to a breach of contract.

Breach 1

227. There is no evidence to suggest that the Claimant was prevented from doing her job. We accept (and it is common ground) that there were staff shortages during the material time, however clearly the Claimant was able to perform her duties, given the lengths she went to, to assist GF.

228. If this allegation in fact refers to the Claimant being prevented from doing her job whilst suspended, we have already found that the decision to suspend was reasonable, and in line with the Respondent's procedures.

229. Therefore there is no breach of contract in relation to "Breach 1".

Breach 2

230. Regarding Breach 2, it is common ground that the Claimant handed the documents at [263]-[285] to Steve Moore at their meeting on 8 October 2020, at which the Claimant was suspended. However, the Claimant did not state that this indicated her raising an issue under the Whistleblowing Policy. She did nothing to even suggest that those documents were to be taken as her starting a complaint of any kind.

231. We have already found that there was no obligation on the Respondent to include these documents within the disciplinary process, given that they were irrelevant to the allegations facing the Claimant.

232. As above, we are not satisfied that the Claimant triggered the use of the Whistleblowing Policy at all. From her answers in cross-examination, we understand that the Claimant was aware of the Whistleblowing Policy, and yet did not refer to it in handing the documents to Mr Moore on 8 October.

233. Therefore, we conclude that any failure to include the documents at [263-285] was not a breach of contract.

Breach 3

234. We have dealt with this factual allegation above. During the course of the disciplinary process, we are satisfied that the Claimant had seen all documents she requested that were relevant to the process.

235. In any event, there appears to be conflation in the Claimant's mind between the disciplinary process and the Whistleblowing Policy. Even if the Respondent had failed to provide her with a document during the course of the disciplinary proceedings, this would not amount to a breach of the Whistleblowing Policy.

236. There was no breach of the Claimant's contract regarding "Breach 3".

Breach 4

237. Given that we have found that the Whistleblowing Policy was never engaged, there was no investigation under this Policy, and therefore there can be no failure to have investigated within the requisite time period.

238. Therefore, there is no breach in relation to Breach 4.

239. The breach of contract claim fails.

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Employment Judge Shastri-Hurst

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Date: 1 December 2022

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

6 December 2022

FOR EMPLOYMENT TRIBUNALS