EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals
"This has been a partly-remote hearing at the request of the parties. The form of remote hearing was hybrid: the claimant and one of the respondent's witnesses attending in person; the respondent's counsel and 3 witnesses attending by video via C.V.P.. A fully face to face hearing was not held because it was not practicable."

Claimant		**Respondent**
Mrs M O'Hagan	**v**	**The University of the Creative Arts**

Heard at: Reading

On: 2, 5, 8, 9 (hybrid) and 11 November 2021 (by C.V.P.)

Before: Employment Judge George (in person), Ms A Brown and Mr F Wright (by C.V.P.)

Appearances:

For the Claimant: In person
For the Respondent: Mr D Mitchell, counsel

JUDGMENT

1. The claim of unfair dismissal is not well founded and is dismissed.

2. The claim of detriment on grounds of protected disclosure is not well founded and is dismissed.

3. The claim of automatic unfair dismissal on grounds of protected disclosure is not well founded and is dismissed.

4. The claims of disability discrimination (direct discrimination, discrimination arising in consequence of disability and breach of the duty to make reasonable adjustments) are not well founded and are dismissed.

REASONS

1. This hearing had been scheduled to take place on 1 to 5 and 8 to 9 November 2021. It had been postponed to those dates from its original listing of October 2020. Unfortunately, the first day having been postponed to 2 November and the hearing converted to liability only (due to lack of available judicial resource), a subsequent change of employment judge (due to compassionate leave of the original judicial panel member) meant that the panel was unable to sit on 3 November. An unexpected medical emergency involving a family member of the respondent's counsel caused the hearing to be postponed from 4 November by consent. Happily, the panel and the parties were able to additionally convene on 11 November 2021 and it was possible to hear all the evidence, submissions, deliberate and deliver oral liability judgment with reasons within the 5 days. The tribunal would like to thank the parties and their representatives for their constructive attitude at the hearing which enabled a full exploration of the evidence and issues in the case despite the last minute changes which we have described above. Furthermore, we commended the claimant for the composure and clarity with which she argued her case.

2. The documentary evidence was comprised of an agreed bundle of documents running to 827 pages. An additional page was added on the second day of the hearing. Page numbers in these reasons refer to that bundle. We also heard oral evidence from the claimant who adopted a written statement, and her disability impact statement (page 93), in evidence and was cross-examined upon them. Additionally, we heard from the following witnesses called by the respondent: Prof. Victoria Kelley, currently Director of Research and Education; Ms Gemma Gabriel, currently Assistant Director of Human Resources; Prof. Bashir Makhoul, Vice-Chancellor of the respondent university; and Ms Marion Wilks, at the relevant time the University Secretary but who is no longer in the respondent's employment. All of these witnesses also adopted in evidence written statements upon which they were cross-examined. We had the benefit of written submissions prepared by both the claimant and Mr Mitchell which are referred to as CWS and RWS respectively in these reasons.

The Issues

3. Following a period of conciliation which lasted from 15 April 2019 to 15 May 2019, the claimant, who was employed by the respondent university from 1 April 2007 to 31 January 2019, latterly as a Research and Enterprise Manager, presented a claim on 5 June 2019 by which she complained of whistleblowing detriment and dismissal, failure to make reasonable adjustments and that her dismissal was both unfair and due to her disability of depression, exhaustion, work-related stress and/or a mental breakdown; this was argued as being contrary to s.13 and s.15 of the Equality Act 2010 (EQA) in the alternative. The respondent entered a response on 26 July 2019 by which it denied the claims and argued that the claimant was fairly dismissed by reason of redundancy.

4. The case was case managed at preliminary hearing conducted by Employment Judge McNeill QC on 27 September 2019 (when particulars were ordered) and Employment Judge Gumbiti-Zimuto on 30 June 2020. As a result, at the start of

the hearing before us, the issues were in part found in the order of Judge McNeill QC (at page 44 and following) and in part in the particulars of the protected disclosure provided and clarified at the hearing before Judge Gumbiti-Zimuto (page 52). At the start of the hearing before us, the claimant clarified that the earliest point at which she contended the respondent should have made reasonable adjustments was October 2017 and therefore the issue of disability was refined in that, although the claimant's case was that she first became ill in June 2017, what was necessary for the Tribunal to consider was whether the claimant was disabled within the meaning of s.6 of the EQA between October 2017 and October 2018. The respondent conceded that the claimant was and was known to be disabled from October 2018 but disputed both the fact or and knowledge of disability prior to that date.

5. The parties co-operated on agreeing a single list of the issues to be decided which is incorporated within these reasons (retaining the original numbering).

6. On reading the CWS it appeared to the Tribunal that the claimant appeared to think that the claim included reliance upon 2 or more alleged oral disclosures of information pre-dating the written disclosures when those were not in the agreed list of issues. WE asked the claimant about this before hearing closing oral submissions and she indicated that she wished to be able to amend the agreed List of Issues. We pointed out to her that the evidence and argument had proceeded on the basis of reliance upon one written alleged protected disclosure and that, were an application for amendment to be successful, that would be likely to have consequences for whether it was possible fairly to continue to determine the case without re-opening the hearing. The claimant then decided not to proceed with the application.

7. The liability issues to be determined were therefore as follows:

"Time limits / limitation issues

1. Were all of the Claimant's complaints presented within the primary three-month time limits set out in the relevant sections of the Equality Act 2010 (EqA) and the Employment Rights Act 1996 (ERA)? It is noted that the Claimant's last day of employment was 31 January 2019 and that the date of presentation of her ET1 was 5 June 2019.

2. If all or any of the claims were out of time, is it just and equitable to extend time (the discrimination claims) or to extend time because it was not reasonably practicable for the Claimant to bring her claims within the relevant time limits and she brought such claims within a reasonable time after the expiry of the primary time limit *[the whistleblowing detriment claims, the Respondent accepting that the unfair dismissal claims are in time]*?

Unfair dismissal

3. What was the reason or principal reason for the Claimant's dismissal? The Respondent asserts that the reason was redundancy. The Claimant disputes this.

4. If the reason or principal reason for the Claimant's dismissal was redundancy, was the dismissal fair or unfair in accordance with section 98(4) of the ERA?

5. Did the Respondent act within the so-called 'band of reasonable responses' in the process it followed before dismissing the Claimant and in determining that the Claimant should be dismissed?

Public interest disclosure (PID)

6. Did the Claimant make one or more protected disclosures in a letter to the Respondent dated 17 or 18 October 2018? The qualifying disclosure the Claimant relies on is:

"that the claimant has been unwell and unable to make a formal grievance; the claimant has had three periods of illness in four/five years; the health issues are due to issues occurring over the years; they are physical and mental (life threatening); the claimant has been managing 'the provision' with little or no support; when the claimant requested support she was told by the respondent that it was not justified; the claimant suffered in the ways listed and numbered 1-10 in the letter/email of the 16 October 2018.

The claimant will say that the information above tends to show (a) a breach of legal obligation-providing the claimant with a safe system of work or safe way of working and or (b) that the claimant's health is likely to be or is being endangered."

7. Was the reason or principal reason for the Claimant's dismissal that she made one or more protected disclosures? If so, the Claimant's dismissal is automatically unfair.

8. Did the respondent subject the Claimant to detriment in:

a. Failing to consider the Claimant's complaints made in her letter of 17 or 18 October 2018;
b. Not dealing with the issues raised by the Claimant so as to enable her to return to work;
c. Failing to carry out any risk assessment in relation to the Claimant's work; and/or
d. Failing to reduce the Claimant's workload so as to enable her to carry out her job?

9. If so was this done on the ground that she made one or more protected disclosures?

Disability

10. Was the Claimant at all relevant times a disabled person within the meaning of section 6 of the EqA by reason of depression, exhaustion, work-related stress and/or mental breakdown? *[The Claimant contends that she was a disabled person from October 2017 onwards. The Respondent admits that the Claimant was a disabled person from October 2018 onwards by reason of depression/work related stress and that it had knowledge of her disability. For the period prior to October 2018 the Respondent does not admit that the Claimant was a disabled person or that it had knowledge of her disability].*

EqA, section 13: direct discrimination because of disability

11. Was the Claimant dismissed because of her disability?

12. If the Claimant makes out all or any of the detriments set out at 8 above, was the Claimant subjected to such detriment(s) because of her disability?

13. The claimant relies on hypothetical comparators.

EqA, section 15: discrimination arising from disability

14. Was the Claimant off sick in consequence of her disability?

15. Did the Respondent dismiss the Claimant because of her sickness absence?

16. If so, has the Respondent shown that the dismissal (unfavourable treatment) was a proportionate means of achieving a legitimate aim? *[The Respondent does not rely on a justification defence, its case being that the Claimant's dismissal was by reason of redundancy and was unrelated to any sickness absence].*

17. Has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant was disabled? *[The Respondent admits that the Claimant was a disabled person for the period October 2018 onwards – see paragraph 10 above].*

EqA, sections 20 & 21: Reasonable adjustments

18. Did the Respondent not know and could it not reasonably have been expected to know the Claimant was a disabled person at the relevant times?

19. Did the Respondent have a provision, criterion or practice (PCP) which required employees to carry out the work assigned to them by the Respondent?

20. Did that PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at any relevant time, in that that workload was excessively heavy and challenging for the Claimant?

21. If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

22. If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The Claimant contends that her workload could have been reduced and/or a risk assessment carried out. *[The Claimant contends that these adjustments should have been made in the period from October 2017].*

23. If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

Findings

8. We make our findings of fact on the balance of probabilities taking into account all of the evidence both documentary and oral which was admitted at the hearing. We do not set out in these reasons all of the evidence which we have heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary for us to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

9. We start with our findings on the impact on the claimant of the health conditions on which she relies for the purposes of her disability discrimination claim.

10. The claimant's first stress related absences of which we have been told were in 2007, very soon after she was re-employed by the respondent. There was then a one month work related stress absence and she returned from that on 18 October 2010, when the respondent sought occupational health advice on the phased return and on what adjustments needed to be made in the short and long term (page 150). The claimant then had two months of stress related absence in 2014 as we see from page 163, one of the earlier Occupational Health reports.

11. The impairment relied upon by the claimant as giving rise to disability is recorded in list of issues as being "depression, exhaustion, work related stress and/or mental breakdown". She details the effect on her ability to carry out day to day activities in the witness statement on the issue of disability, the so-called "impact statement" (page 93). At page 94 she describes encountering problems, in particular, from February 2017 onwards. She talks about extreme fatigue, restlessness and inability to relax, often going without sleep at all, memory loss, disorientation and dizziness. She relies upon her GP records to support this.

12. In those records, at page 556, is a record of a consultation on 1 March 2017. There we find a description of the sort of "distance from self" that the claimant described to us as being an impact of her condition of being under stress and she also described to her GP difficulty in concentration, fainting, dizziness, fatigue and forgetting things. This is evidence of a contemporaneous report of

memory loss to her GP which corroborates what the claimant said in her impact statement.

13. To judge by the consultations over the next few months, the impact of work-related stress and difficulty in coping with her workload caused her health to deteriorate to the point where in the middle of June 2017 she was certified unfit to work and this is also reflected in a meeting she had with the HR Department on 14 June 2017 (page 156). She was absent between 14 June 2017 and 17 October 2017, a period of four months.

14. The claimant was seen by Occupational Health and a report at page 165 records that the work triggers need to be addressed, specifically workload and lack of managerial support. A follow up report at page 169 says that she "continues to experience symptoms which are impacting on her ability to do day to day activities and have not significantly improved since our last review". That is dating from a 2 August 2017 consultation and, although this is the first reference in the Occupational Health report to the impact on her ability to do day to day activities, it would or ought to suggest to the reader that the same impacts had been in place at the time of the page 165 referral in the previous June.

15. In September 2017 (page 181) the claimant was recorded as having had a set back and suffering significant fatigue and needing sleep for extended periods after activity.

16. By the report on 5 October 2017 (page 190), it is clear that she was still experiencing symptoms of fatigue but her energy levels had improved and she was able to trial a return to work.

17. The history in her GP records from early September 2017 suggest that she was then still reporting dizzy spells and was recorded as having a generalised anxiety disorder, which we recognise is distinct from depression, see page 551. However, there was nothing specific in the claimant's GP records to show that she sought advice from her GP specifically about the symptoms which had caused her absence from work until 30 May 2018, page 548, when she apparently told the GP that there was no support at work and she referred to her direct report, whom we refer to in these reasons as SB, going on sickness related absence herself. We note that the comment there says that the claimant "felt she was coping with work until the last week when overwhelming fatigue and tiredness affecting her".

18. The claimant's evidence in her witness statement, paragraph 43, was that on her return to work in October 2017 she was still suffering from extreme fatigue and she was not challenged upon that.

19. We find that the claimant's description of her own symptoms was not overstated. However our view is that her memory of specific points in time was impaired by the effects of her condition. We accept that although she was well enough to return to work in mid-October 2017 the impact upon her of her mental health

condition which has been described as depression and was at the time described as work related stress remains significant because of that continued fatigue.

20. The Occupational Health Report following her return to work after her 2017 absence is at page 197 and reports on a consultation on 3 November 2017. It says that "she is managing her workload but is still experiencing some fatigue". It is completely silent about what might happen in the future.

21. We see from an email at about the time of that return to work that is at page 216 that TP, who was in the process of handing over line management of the claimant to Prof. Kelly, was due to meet with her and set a series of initial tasks. The claimant agreed that initial tasks had been set but said that it was the annual report that had been required for the University of Brighton and that was described as urgent. On the other hand, the claimant accepted in her evidence that the Handbook that was referred to by Prof. Kelly in her evidence, had been completed by SB by the time she, herself, returned and had been signed off. The claimant did not regard it as satisfactory so did further work upon it which is some support for Prof. Kelly's comment that there was an element of the claimant taking on work that she had not been expressly directed to do. However, it was accepted, that the additional resource recruited to help with her phased return was only due to cover one day a week. As a result, the claimant argued, she did not feel the benefits of the phased return.

22. There had been a recommendation that a Stress Risk Assessment be carried out in the Occupational Health Report as far back as June 2017 and a letter at page 174 suggests that that was a planned to be carried out upon the claimant's return. There is no credible evidence that one was carried out before 20 February 2018 which is when one was completed by Prof. Kelly. The latter was not aware, as she explained in her evidence, that there had been any previous Stress Risk Assessment. Page 197 to which we were referred by the respondent, is merely a record that the Occupational Health Advisor understood that was to take place the following week. We find that none was undertaken. We see that KK said in an email at page 212 that she thought it had been completed but had that been the case, we expect that the respondent would have been able to provide a copy of it and none was available.

23. At this period of the return to work, the claimant was being line managed in part by TP and in part by Prof. Kelly. On page 216 we see that TP said that he would manage the claimant back into her role and copied Prof. Kelly into that communication as she was moving into the role – having been appointd Interim Director of Research in May 2017. It appears from the email on page 211 that the handover to the line management by Prof. Kelly was completed by 22 November 2017.

24. We can only think that that completing a risk assessment on the claimant's return fell between the cracks. Prof. Kelly arranged for CP to continue in a role for a period to support the phased return but she was only available for one day a week and we find that the other additional resource referred to by Prof. Kelly in

her evidence, was there to support Prof. Kelly herself and not to support the claimant's phased return to work.

25. The claimant made a particular point about the delay in arranging a meeting between 29 November 2017 (the email at page 210 stating an intention to meet with the claimant) and it not happening until 19 December. In the circumstances of Prof. Kelly being fairly recently in post we do not think that this is sufficient to show a pattern or a substantive failing which disadvantaged the claimant. Some things happened rapidly and some things did not.

26. The claimant accepted that she had told Prof. Kelly that she was coping with the workload on her return although her evidence to us was that in reality she was not. This was borne out by an email from her on page 219 on 29 November when she said:

> "It has been fine up til now and the work is manageable but I did find the four days a week very tiring. This week I am expected to be fully back and working five days but as I was struggling with four days I don't think I'm quite ready to do five days yet."

27. At page 218, there is an email of 13 December where she said:

> "Apart from feeling overwhelmingly tired at times I am enjoying being back at work and there is no stress from the work situation."

28. On 10 January, at page 222, she said that the work was manageable in a four day week.

29. She made a request to extend her phased return to work and that was granted by return on 29 November. The extended phased return was then to last up until 22 December 2017 (page 219).

30. The claimant then applied on 7 January 2018 formally to reduce her working pattern to a four day working week from Monday to Thursday with one day working from home; see the application at page 230. Unfortunately, on 7 February 2018, when the claimant had a discussion with the Research Degrees Officer, the claimant's version of which is at page 245, this provoked a reaction which ultimately led to SB going on sick leave herself. At the time of that email the claimant told KK and Victoria Kelly that she was on top of most of the work in any case and thought she would be able to cope. However, despite this, on 13 February the claimant went to see KK in confidence which led to the latter reporting to Prof. Kelly that the claimant was feeling the pressure of SB's absence and that she, KK herself, was concerned about the claimant's health. It seems that the meeting with KK had been initiated by an email from SB to the claimant dated 13 February but, among other things, the email evidence is SB was not happy with the suggestion that she amend her hours as part of a change of hours in the department which might have allowed an additional person to be recruited in support of the claimant's application to reduce her working hours.

31. The Stress Risk Assessment was completed on 20 February 2018 (page 260). It was recorded that the claimant has physical manifestations of stress, see page 262. The claimant refers to extreme tiredness and said that it was difficult to manage but that it was under control pending SB's expected return on 26 February. She was advised to take a pragmatic approach to prioritising her tasks and there was a discussion about the lack of clarity about the delineation of her role and those of her colleagues, specifically the Research Degree Officer and the Research Degree Leader.

32. SB's return to work was postponed. As a result, active consideration of the flexible working request was suspended pending Shan Bennett's return and that was done with the claimant's agreement - as she confirmed.

33. There is an email of 27 February 2018, at page 279, where the claimant told Prof. Kelly that she did not need help at the moment and would let her know if she was finding it difficult to manage. This email was sent after the Stress Risk Assessment had been completed.

34. It was on 7 March 2018 that the claimant met KK confidentially and told her that she was struggling and that her health was deteriorating. This was recorded by KK in a note (page 284) which also notes a discussion where the claimant indicated that she might be interested in leaving on mutually agreed terms. Those are our words - not the words of the note - but the gist of what is recorded points to that discussion having taken place.

35. We think that the claimant, although speaking confidentially to HR, at that point was concealing the extent of her health problems and her concerns about her health from her line manager.

36. By the end of March, however, the claimant had apparently told Prof. Kelly that she was interested in an exit plan. Pages 285 to 286 contain an email from the claimant to KK in HR of 26 March 2018 in which she refers to a conversation with Prof Kelly to that effect having taken place. She also said that a meeting has been arranged for the claimant's Performance Development Review and there is reference to steps being taken to look to recruit somebody as sickness cover for SB.

37. The PDR is at page 290 and it includes an addendum comparing the claimant's role with that of the Research Degrees Leader. The themes recorded are discussions about delineation of roles, taking steps to manage workload and that that should be revisited as part of the request to reduced hours. It is recorded that the claimant is said she is feeling supported by her line manager at that point and Prof. Kelly says that the addendum was intended to help the claimant understand what she did and what she did not have to take responsibility for. We note from Prof. Kelly's paragraph 6.22 that this delineation of roles was apparently also discussed with the Research Degrees Leader. So, a practical step was taken by Prof. Kelly to try to encourage the Research Degrees Leader

not to allow the claimant to take on matters that should properly have been part of his role.

38. The sickness absence cover for SB ultimately was not put in place until May 2018, see page 303, time having been taken to arrange the authorisation. It appears by the time SH was in place, the reality was that she was there to facilitate a return to work by SB on a phased return or reduced hours rather than to support the office in SB's absence. The claimant appears to say in her letter of 17 October, that this resource was authorised when she made clear that she could not arrange the progress panels on her own (see page 379).

39. SB returned on a phased return to work on or around 22 May 2018, see page 308. The claimant put support in place for her return; see page 313, where she is giving SB limited tasks in order to support her return to work.

40. The claimant herself was then signed off sick on 6 June 2018 and referred to Occupational Health who reported on 10 July 2018 (page 345). They recorded that she was absent for stress and depression and that this was the third such absence. They also recorded that the claimant was experiencing significant symptoms and they advised that, in their opinion, the EQA was applicable although, of course, that is not a decision that binds us. Nevertheless, it is information the respondent had in front of them at the time.

41. Other Occupational Health Reports (page 361) show a review on the 11 September and another on 24 October 2018 (page 318). Throughout that period the claimant remained too ill to work and, by 24 October, she had been told that her role was at risk of redundancy. Ultimately, she remained unfit to work until she was dismissed in January 2019.

42. There is a file note from a meeting between the claimant and KK on 30 July 2018 (page 349) which records information provided by the claimant as to her health over the period. She said how bad she was feeling at the time when she first went off and she reported that she was then on medication and felt better. She attributed that, in part, due to being off work and in part to being on medication. However, she said that there were side effects to the medication and that it took time for it to settle down. She also discussed some issues with the department with KK and said that she loved her job but was weighing up her options. There a point where is it recorded that the claimant feels "between a rock and hard place - she doesn't want to come to work but financially will need to".

43. The claimant had been advised by her GP not to discuss leaving on negotiated terms when she was so unwell and she agreed with KK that that topic of conversation would be revisited at the expiry of the next sick note. Then, at page 362, there is a record that shows that after the claimant had dropped off her next sick note, arrangements were made for a face to face meeting between her, Gemma Gabriel and KK which took place at the claimant's home on 18 September 2018. This was in part a protected discussion within s.111A ERA and a note of the meeting is at page 363. The claimant was told that there was

a business case going through which would potentially impact upon her role and we note No. 11, the penultimate paragraph on page 376 (within the claimant's letter of concern of 17 October) where it is recorded that she had been told that her post may be at risk on that occasion.

44. There was also discussion about the claimant's unhappiness at work at the meeting at her home on 18 September 2018 and she was asked by Gemma Gabriel if she had raised a grievance. The claimant confirmed that she had not. It was recorded that Gemma Gabriel suggested that might be a way for the claimant to get her concerns into the open and also asked the claimant if she considered a protected disclosure or whistleblowing. The claimant said that she had not and wanted to know whom she might make "that grievance to". The response was that it might be to Prof. Kelly or another Leadership Team member. This shows an apparent lack of knowledge on Gemma Gabriel's part that she, herself, was the contact for whistleblowing. However, this is not evidence from which we think it is right to draw any particular inference. This is because, although the question came after Ms Gabriel raising the question of whistleblowing, the way the claimant's was phrased (to judge by the note) was as a request about how to send in a grievance which would, quite appropriately, have gone to the line manager. The policy about whistleblowing was immediately sent to the claimant, see page 366 – where KK summarised the conversation from 18 September.

45. The claimant took some time to set out the matters of concern in her letter (page 375) that was sent under cover of an email at page 374. It is this which is relied on as the claimant's protected disclosure. As set out in the Agreed List of Issues, the letter includes 12 points on page 375 to 376 which she describes as issues she has been facing that have resulted in "my current health issues". The details of the qualifying disclosure relied upon as set out in Issue 6 above are a fair summary of the first page of the letter. Other matters are set out in the remainder of the 6 page letter which are not summarised in the List of Issues as being relied upon by the claimant within these proceedings as a qualifying disclosure.

46. We can see why Gemma Gabriel needed to clarify with the claimant what she wanted done with that letter. It is headed "without prejudice" and it is in part a response to the protected conversation. It is in part referring to matters personal to the claimant but, in part, reports matters that one might fairly describe as being potentially of institutional concern. The claimant's evidence was that, at the time, she did not think that she was making a public interest disclosure but that she thinks now that it was perceived as that or that it might be perceived that she might be going to make a public interest disclosure. In her evidence to the tribunal she refuted the suggestion that she had intended to bring a grievance under the Grievance Policy. However, we think that that was because of her previous experience of the procedure and not an indication that she did not want the matters of concern that she raised to be investigated.

47. After a discussion on 30 October, and following the informal consultation meeting on that date, Gemma Gabriel wrote a letter on 16 November (page 412) setting out her version of how the parties had reached where they were in relation to the claimant's matters of concern and setting out some options for the claimant to respond to (page 414). These were 4 options for the claimant to consider and, in the second paragraph on page 415, GG asked her to indicate how she would wish the respondent to proceed with investigating the concerns she had raised and gave her a time limit by which to do so of 22 November 2018.

48. The claimant's response was that she did not agree with the contents of the letter and needed to seek legal action on it, see page 439. The claimant does not appear to have subsequently replied to GG to say whether she wanted one of those options set out on page 414 to be carried out.

49. We now jump back slightly in time to consider the business case for the restructuring and the process followed in relation to staff consultations on it. The reason for the business case and the rationale for it is set out in the first paragraph of page 422, which is where the written business case is found. We accept that that background is correct as a matter of fact and are satisfied that there was a genuine restructure of the whole department. The creation of the post of Director of Research and Education seems to have happened as long ago as January 2018 and Prof. Kelly had been in that position on an interim basis until May 2018.

50. The claimant argues that her redundancy was a pretext either because she had made, was believed to have made or expected to make protected disclosures or because she was disabled or on sickness absence. So, the question for us is whether the rationale for the disestablishment of the claimant's post is a way of targeting her or part of a bigger picture.

51. We are quite persuaded that it was part of a bigger picture for, amongst others, the following reason: there was a disestablishment of other posts as was set out in the business case included in the Galleries Department. The judgment that the university made and was entitled to make was that they needed a new post of External Funding Developer. This seems, from what we have heard, to be connected with their aspirations to be able to award their own research degrees and to beef up, if you like, the amount of research that the staff were doing in order to be able to target parts of the application for the ability to award their own degrees that had been seen as not quite as efficient.

52. Therefore, there were clearly expressed financial and educational objectives and they were, we accept, genuinely the objectives of the respondent and not a sham. In particular, we were persuaded by the logic of the purpose of business case in relation to the Research Office as it set out in paragraph at page 423 and following where it says:

> "The purpose of this part of the business case is two-fold: 1) to restructure support for the delivery of research degrees with greater emphasis on academic leadership and 2)

> to allow the recruitment of a permanent one full time equivalent external funding developer to support the strategic priority of increasing external funding for research."

53. It is the first part of that purpose that explains why it is the Research Degrees Manager post which goes. The selection of the claimant's post is consistent we find with the overall objective.

54. We have taken into account the arguments raised by the claimant before us, some of which she also argued at her appeal: that the business case is low on detail, that it was not clear why her post was identified and that it was illogical to disestablish the post at the time when the Research Officer (the postholder in the surviving post) had started maternity leave. She also argued that the summary of feedback did not include feedback that she had made.

55. We make the following comment; it is understandable that someone in the claimant's position who has put her heart and soul into doing her job well for many years would see the disestablishment of that role as a judgment on her performance. However, we are persuaded that what the university did when seeking to carry out the purposes we have outlined was to look dispassionately at how the activities in the Research Office might be carried out more efficiently to achieve those objectives. The respondent was not making a judgment about the claimant's ability to carry out her role and that is consistent with the high regard with which Prof. Makhul spoke of the claimant and the way she executed her role.

56. The claimant alleged that there was a lack of transparency in the way that the restructure was described to the Research Committee as recorded in the draft minutes of 25 October 2018 (page 384) and the way it was described to students by email (page 480A). Taking the latter first, there was nothing unusual in the wording of the email at page 480A when you see the whole of the context. We do not think that Prof. Kelly was seeking to hide anything by that wording.

57. As far as the minutes are concerned, even setting aside Prof. Kelly's evidence that these were not minutes that she had written herself, and therefore may not have properly reflected exactly what she said at the meeting, we think that the use of the term 'minor' to describe the effect on the Research Office is not inconsistent with what was proposed when you look at the way the impact on the Galleries Team is also described. It was not a minor event for the claimant but the word was not used as a cloak to mislead the Research Committee about what was happening to her post, in our view.

58. The points that the claimant makes to some extent are about the question of who is in the post rather than what the structure should be and Prof. Kelly was focussing on what the structure should be. That deals with the claimant's point about the decision being taken to disestablish the post at the time when somebody goes on maternity leave. However, the claimant also argued that the redundancy process was procedurally unfair. She pointed to the timeline set out in the business case and said that her consultation had taken place after that.

She pointed to Gemma Gabriel failing to send attachments of the business case in good time and, as I have already mentioned, criticised the summary of feedback.

59. We accept Gemma Gabriel's evidence that the timeline was extended to take account of the claimant's absence on sick leave. The consultation took place at a time prior to a final decision being taken and that is key when it comes to effective consultation. The failure initially to send the attachments is, in our view, a very minor matter.

60. The chronology of the consultation was that there was an informal meeting on 30 October 2018 and that was recorded in the letter at page 392 on 6 November. The claimant's daughter accompanied her. The claimant was recorded as saying that the administrative requirement had been underestimated and this would still require co-ordination and management. It is not until the appeal stage that a full critique of the business case was given by the claimant. She was offered the opportunity to provide more detail but did not do so because she was too unwell. She was invited to the formal consultation meeting by that letter of 6 November and it was held on 12 November 2018. Again, her daughter was present with her. The claimant explained to us that she has no detailed recollection of that meeting because her state of health at the time and, potentially, her state of health in the interim.

61. She was told that she was selected for redundancy on 15 November, see page 404.

62. A summary of the feedback that was received during the course of the consultation is at page 420. Prof. Kelly accepted that there was no reference in that summary to the claimant's feedback and said that that was because she had been expecting more feedback which she did not receive and therefore did not report it. However, it is clear to us that the claimant had made feedback and it was not in the summary. Nevertheless, we do not consider that absence to be sufficient reason to infer that the claimant's comments at the informal consultation were not taken on board by Prof. Kelly.

63. In our view, there is insufficient reason to think that the claimant's view of the extent of the administrative function and the managerial function was not taken into account. Prof. Kelly did not agree with the claimant's view and that was a judgment that it was open to her to make. In any event, it is for the respondent to judge that the management functions can satisfactorily be taken into the academic leadership. It is true that the rationale for the disestablishment of the claimant's post suggest that Prof. Kelly saw the whole of the claimant's role as administrative. We note the comment in the first paragraph on page 781 of which the claimant was very critical. However, in our view, that could be read as including the managerial administrative function; the claimant's post had been graded as Grade 9 because of its content and no doubt justifiably so. We accept Prof. Kelly's explanation of the post as being the leadership of the administrative effort around the research degrees; we do not see this statement as indicating

that Prof. Kelly was making a flawed judgment about where the managerial functions could best be undertaken. It is not for the tribunal to tell the respondent how to run their business or to tell the respondent whether it is making a good judgment, it is a question for the tribunal as to whether the respondent has shown us that they have genuinely made the evaluation that they claim to have made.

64. The chronology of the claimant's appeal (page 444) is that it was presented on 29 November 2018, referred to Prof. Makhoul and heard on 11 January. The claimant was invited on 21 December 2018, page 459, to apply for an alternative post and indicated that she did not wish to do so. The claimant does not suggest that there were other available posts that she should have been considered for.

65. The discussion with Prof. Makhoul at the appeal hearing, in which the claimant raised her concerns about her treatment within her employment and not only her arguments in relation to the restructure, suggests that she would have been unlikely to apply for any post within the university, had one been available, because of her view that there had been a breakdown of trust and confidence between them.

66. It seems to us that Prof. Makhoul considered the points that he was asked to consider on the appeal, to judge by the outcome at page 478. Our view is that he came to conclusions that were reasonably open to him.

67. At point 4 of his outcome letter he records that, so far as it is possible, he would arrange for an exploration of the other issues of concern raised by the claimant now so that appropriate action could be taken.

68. There was then an exchange of correspondence with the claimant's solicitor and on 28 March 2019 RG wrote to the claimant (page 501) to explain that particular concerns would be investigated. Those included consideration of the management of the claimant's sickness absence for work related stress, see point 5 on page 479. The points highlighted by RG were investigated by Ms Wilks who reported, see page 511.

Law applicable to the issues in dispute

Protected disclosures detriment and dismissal

69. The structure of the protection against detriment and dismissal by reason of protected disclosures provides that a disclosure is protected if it is a qualifying disclosure within the meaning of s.43B ERA and, so far as is material for the present case, is made by the claimant in one of the circumstances provided for in s.43C ERA.

70. Section 43B(1), as amended with effect from 25 June 2013, reads as follows,

> "In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following —
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

71. In relation to s.43B(1)(b) ERA, guidance of the EAT in Blackbay Ventures Ltd t/a Chemistree v Gahir [2014] I.C.R. 747 about the approach to take in protected disclosures cases recommends that where a breach of a legal obligation is asserted, save in obvious cases, the source of the legal obligation should be identified (para 98.5)

> "it is not sufficient … to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations."

72. In the case of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] I.C.R. 325, the EAT held that there is a distinction between "information" and an "allegation" and that it is only when there has been a disclosure of information that there is protection under the Act. Geduld has been revisited in Kilraine v Wandsworth LBC [2018] I.C.R. 1850 CA where Sales LJ explained that if the judgment in Geduld was relied upon as authority for a rigid dichotomy between "information" and "allegation" that was not what had been intended. As he put it in paragraphs 35 and 36,

> "35. …In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). …
>
> 36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in [Nurmohammed], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is

capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

73. The structure of s.43B(1) therefore means that the tribunal has to ask itself whether the worker subjectively believes that the disclosure of information, if any, is in the public interest and then, separately, whether it is reasonable for the worker to hold that belief. Similarly, we need to ask ourselves whether the worker genuinely believes that the information, if any, tends to show that one of the subsections is engaged and then whether it is reasonable for them to believe that.

74. The reference to Nurmohammed is to Chesterton Global Ltd v Nurmohammed [2017] I.R.L.R. 837 CA, where the Court of Appeal gave guidance to the correct approach to the requirement that the Claimant reasonably believed the disclosure to have been made in the public interest at paragraphs 27 to 31 of the judgment:

74.1. The tribunal has to ask (a) whether the worker believed, at the time that he or she was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

74.2. Element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured.

74.3. The tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not determinative.

74.4. The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters which the tribunal finds were not in his or her head at the time that he or she made it. Of course, if he or she cannot give credible reasons for why he or she thought at the time that the disclosure was in the public interest, that may cast doubt on whether he or she really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his or her belief, but nevertheless find it to have been reasonable for different reasons which he or she had not articulated to herself at the time: all that matters is that his/her (subjective) belief was (objectively) reasonable.

74.5. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it. Lord Justice Underhill stated that he was inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase '*in* the belief' is not the same as 'motivated by the belief'; but that it was hard to see that the point would arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

75. If the worker has made a protected disclosure then they are protected from detriment and dismissal by s.47B and s.103A of the ERA respectively. So far as is relevant, s.47B provides that:

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

76. It is noteworthy that a detriment caused by a failure to act must relate to a *deliberate* failure to act and s.48(4)(b) ERA sets out the date on which such a failure should be treated as having been done.

77. Section 103A, so far as is relevant, provides that:

> "An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure"

78. This involves a subjective inquiry into the mental processes of the person or persons who took the decision to dismiss. The classic formulation is that of Cairns LJ in Abernethy v Mott Hay and Anderson [1974] ICR 323 at p. 330 B-C:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee."
>
> The reason for the dismissal is thus not necessarily the same as something which starts in motion a chain of events which leads to dismissal.

79. The legal burden of proving the principle reason for the dismissal is on the employer although the claimant may bear an evidential burden: See Kuzel v Roche Products Ltd [2008] IRLR 534 CA at paragraphs 56 to 59

> "… There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. …
> **57**
> I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
> **58**
> Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
> **59**
> The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET *must* find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."

80. As can be seen from the quotations from the relevant sections, the test of causation is different when one is considering unlawful detriment contrary to s.47B ERA to that applicable to automatically unfair dismissal contrary to s.103A ERA**.** Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower: Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] I.R.L.R. 64 CA.

Disability Discrimination

81. A person has a disability, for the purposes of the Equality Act 2010 (or hereafter the EQA), if they have a mental or physical impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Substantial in this context means more than trivial: s.212(1) EQA and Goodwin v The Patent Office [1991] I.R.L.R. 540. There is no sliding scale, the effect is either classified as "trivial" or "insubstantial" or not and if it is not trivial then it is substantial: Aderemi v London and South Eastern Railway Ltd [2013] ICR 591 EAT. As it says in paragraph B1 of the Guidance on the definition of disability (2011), this requirement reflects the general understanding that

disability is a limitation going beyond the normal differences which exist among people.

82. When considering whether the adverse effects on the claimant's ability to carry out day-to-day activities are substantial the following factors are taken into account (see the Guidance Section B),

82.1. The time taken to carry out an activity,

82.2. The way in which an activity is carried out,

82.3. The cumulative effects of impairments,

82.4. How far a person can reasonably be expected to modify his or her behaviour by the use of a coping or avoidance strategy to prevent or reduce the effects of the impairment,

82.5. The effects of treatment, and

82.6. There may be indirect effects, such as that carrying out certain day-to-day activities causes pain or fatigue (See Guidance on definition of disability (2011) paragraph D22).

83. In the Court of Appeal's decision in All Answers Ltd v W [2021] EWCA Civ 606, their summary of the relevant law is at paras 24 to 26:

"24. A person has a disability within the meaning of section 6 of the 2010 Act if he or she (1) has a physical or mental impairment which has (2) a substantial and (3) long term adverse effect on that person's ability to carry out day to day activities….

25. Paragraph 2(1)(b) of Schedule 1 to the 2010 Act defines long term, so far as material to this case, as "likely to last at least 12 months". "Likely" in this context means "could well happen": see Boyle v SCA Packaging Ltd. [2009] UKHL 37, [2009] ICR 1056,...

26. The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. I note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months,

"account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood".

84. All Answers was considering para.2(1)(b) of Schedule 1 of the EQA. In the present case it is necessary to take into account the full wording of para.2(1) which explains that the effect of an impairment is long-term if it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.

85. When considering the effect of a mental impairment such as depression the most frequently cited case is J v DLA Piper [2005] I.R.L.R. 608 EAT. Paragraphs 40 & 42 of the judgment of Underhill LJ read,

"40: Accordingly in our view the correct approach is as follows:
(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.
(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.
…
42: The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at paragraph 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as 'clinical depression' and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or - if the jargon may be forgiven - 'adverse life events'. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – […] - and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraph 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a commonsense observation that such reactions are not normally long-lived."

86. The claimant alleges that her dismissal was an act of direct disability discrimination contrary to s.13 EQA. Direct discrimination contrary to s.13, for the present purposes, is where, by dismissing their employee (A) the employer treats A less favourably than they treat, or would treat, another employee (B) in materially identical circumstances apart from that of disability and does so because of A's disability.

87. All claims under the EQA (including direct discrimination and discrimination for a reason arising in consequence of discrimination) are subject to the statutory burden of proof as set out in s.136. This has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the following guidance is still applicable to the equivalent provision of the EQA.

88. When deciding whether or not the claimant has been the victim of direct discrimination, the employment tribunal must consider whether theyhave satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was disability. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of disability.

89. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by disability we must have a sound evidential basis for that inference.

90. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of disability. The burden of proof provisions may be of assistance, if there are considerations of subconscious discrimination but the

Tribunal needs to take care that findings of subconscious discrimination are evidence based.

91. Furthermore, although the law anticipates a two stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

92. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of disability, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

93. Section 15 EqA provides as follows:

> **"15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

94. Discrimination arising from disability is where the reason for the unfavourable treatment is something arising in consequence of disability. The example given in the EHRC Code of Practice on Employment (2011) (hereafter the EHRC Employment Code), is dismissal for disability related sickness, the allegation that is made in the present case. It is a defence to the claim if the respondent can show that they did not know that the employee was disabled or that the action was a proportionate means of achieving a legitimate aim.

95. The importance of breaking down the different elements of this cause of action was emphasised by Mrs Justice Simler in Pnaiser v NHS England [2016] I.R.L.R. 160 EAT at paragraph 31,

> "the proper approach can be summarised as follows:
> (a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant […].

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g)[…].

(h) Moreover, the statutory language of s.15(2) makes clear […] that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. […]

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

96. The Court of Appeal considered the justification defence in City of York Council v Grosset [2018] ICR 1492 CA and held that the test is an objective one, according to which the employment tribunal must make its own assessment: see also Hardy & Hansons plc v Lax [2005] ICR 1565 and Chief Constable of West Yorkshire Police v Homer [2012] ICR 704 . What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. This is for the respondent to prove.

97. The other potential defence is lack of knowledge of disability. This requires the respondents first to show that they did not know and could not reasonably have been expected to know that the claimant was disabled (constructive knowledge is discussed in the case of Gallop v Newport City Council [2013] EWCA Civ 1583 CA).

98. The obligation upon an employer to make reasonable adjustments in relation to disabled employees so far as it is relevant to this claim is found in ss. 20, 21, 39 and 136 and Schedule 8 EqA 2010.

99. By s.39(5) the duty to make reasonable adjustments is applied to employers;

    99.1. By s.20(3) and Sch.8 paras.2 & 5 that duty includes the requirement where a PCP applied by or on behalf of the employer puts a disabled person, such as the claimant, at a substantial disadvantage in relation to his employment in comparison to persons who are not disabled to take such steps as are reasonable to have to take to avoid the disadvantage.

    99.2. When considering whether the duty to make reasonable adjustments has arisen, the Tribunal must separately identify the following: the PCP (or, if applicable the physical feature of the premises or auxiliary aid); the identity of non-disabled comparators and the nature and extent of the substantial disadvantage: Environment Agency v Rowan [2008] ICR 218 EAT.

    99.3. By s.21 a failure to comply with the above requirement is a failure to comply with a duty to make reasonable adjustments. The employer discriminates against their disabled employee if they fail to comply with the duty to make reasonable adjustments.

    99.4. By s.136 if there are facts from which the tribunal could decide, in absence of any other explanation, that the employer contravened the Act then the tribunal must hold that the contravention occurred unless the employer shows that it did not do so. The equivalent provision of the Disability Discrimination Act 1995 (DDA 1995), which was repealed with effect from 1 October 2010 upon the coming into force of the EqA 2010, was interpreted in Project Management Institute v Latif [2007] IRLR 579 EAT in relation to an allegation of a breach of the duty to make reasonable adjustments to mean that the claimant must not only establish that the duty

has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. This requires evidence of some apparently reasonable adjustment which could be made.

99.5. Sch 8 para. 20 provides that the employer is not subject to a duty to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage in question.

100. It is clear from paragraph 4.5 of the Equality and Human Rights Commission (EHRC) Code of Practice Employment (2011) that the term PCP should interpreted widely so as to include "any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions."

101. The duty imposed on an employer to make reasonable adjustments was considered at the highest level in the case of Archibald v Fife Council [2004] IRLR 651 HL where it was described as being "triggered" when the employee becomes so disabled that he or she can no longer meet the requirements of their job description. In Mrs Archibald's case her inability, physically, to carry out the demands of her job description exposed her to the implied condition of her employment that if she was not physically fit she was liable to be dismissed. That put her at a substantial disadvantage when compared with others who, not being disabled, were not at risk of being dismissed for incapacity. Thus the duty to make reasonable adjustments arose.

102. Lord Rodgers made the point, as appears from paragraph 38 of the report of Archibald v Fife Council, in relation to the comparative part of the test that the comparison need not be with fit people who are in exactly the same situation as the disabled employee. This was relied upon in Fareham College Corporation v Walters [2009] IRLR 991 EAT where it was explained that the identity of the non-disabled comparators can in many cases be worked out from the PCP. So there the PCP had been a refusal to allow a phased return to work and the comparator group was other employees who were not disabled and were therefore forthwith able to attend work and carry out their essential tasks; the comparators were not liable to be dismissed whereas the disabled employee who could not do her job, was.

103. In Archibald v Fife Council, having posed the question whether there were any adjustments which the employer could have made to remove the disadvantage and when considering the adjustments which were made Lord Hope explained ([2004] IRLRL 651 at page 654 para.15) that,

> "The making of adjustments is not an end in itself. The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, by reason of any arrangements made by or on behalf of the employer or any physical features of premises which the employer occupies"

104. Furthermore (at para.19);

> "The performance of this duty may require the employer, when making adjustments, to treat a disabled person who is in this position more favourably to remove the disadvantage which is attributable to the disability."

105. The requirement on the employer is, in the words of s.20, to take "such steps as it is reasonable to have to take to avoid the disadvantage". The test for a breach of the duty to make reasonable adjustments is an objective one and thus does not depend solely upon the subjective opinion of the respondent based upon, for example, the information or medical evidence available to it.

Unfair Dismissal under s.98 of the ERA

106. It is for the respondent to prove that the reason for dismissal was one of the potentially fair reasons set out in s. 98(1) of the Employment Rights Act 1996 (hereafter the ERA) which include redundancy. An employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to a broad range of situations set out in s.139(1) of the ERA.

> "For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish."

107. In Safeway Stores plc v Burrell [1997] ICR 523 the EAT set out a three stage test based upon the statutory formulation:

    107.1. Was the employee dismissed?

107.2. If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

107.3. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

107.4. In this case the fact of dismissal is admitted. The issues for the tribunal, identified above, require us to determine whether one or more of the s.139(1) situations had arisen and secondly whether Mrs O'Hagan's dismissal was wholly or mainly attributable to it.

108. It is apparent from the above that it is requirement for *employees* to carry out the work that should have diminished for a redundancy situation to exist – rather than the amount of the work itself. If the redundancy situation exists, the employment tribunal has limited scope to investigate the business decision to make the claimant redundant. The employer does not have to show an economic justification for the decision to make redundancies. However, that is qualified by the tribunal's jurisdiction to determine whether the redundancy situation is in fact the reason for the claimant's dismissal and whether it was fair within the meaning of s.98(4) of the ERA.

109. If the respondent proves that the dismissal was because of the potentially fair reason then the tribunal must go on to consider whether the decision to dismiss was fair or unfair in all the circumstances. This can involve consideration of matters such as whether the respondent used objectively fair and justifiable selection criteria? Did they give sufficient warning and engage in meaningful consultation? Were alternatives to redundancy actively considered?

110. In Polkey v A E Dayton Services Ltd [1988] ICR 142, the House of Lords explained that a failure to follow correct procedures is likely to make the resulting dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been "utterly useless" or "futile". Normally an employer contemplating redundancy dismissals will not act reasonably unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes reasonable steps to avoid or minimise redundancy by redeployment. However the employment tribunal should go on to consider whether compensation should be reduced to take account of the likelihood that a fair dismissal would have happened in any event.

Conclusions

111. We now set out our conclusions on the issues applying the law as set out to the facts which we have found. We do not repeat all of the facts here in order that the judgment should not be unnecessarily long but have them all in mind in reaching our conclusions.

112. We start with the **public interest disclosure claims** (List of Issues paragraphs 6 to 9).

113. The claimant relies upon the written communication (page 375) sent under cover of an email on 17 October (page 374). As we have said, we can understand why Ms Gabriel asked for clarification about how the claimant wished the respondent to handle it because it was headed "without prejudice" and read in part like a grievance, in part like a response to the pre-termination settlement discussions and in part it raised matters of institutional concern. Our impression of the letter as a whole is that it reads like a grievance notwithstanding the claimant's view that it was not. We think that was more to do with the route that by which she wished it to be handled. However, we do not think that that means it is incapable also of being a disclosure of information.

114. We have concluded that the letter contains information which can be summarises as being that the claimant's health has been affected because of her workload and due to a number of factors, specifically different line managers, lack of additional support in the department, the competing roles occupied by her superior which means he cannot give her the support to do her job, a growing number of students and other matters. These matters are specific pieces of information that she provides rather than merely an allegation that the respondent has caused her ill health.

115. We go on to consider whether that information tended to show that there was a breach of the legal obligation to provide a safe system of work? Our view on this is that the information is not sufficiently precise to come within s.43B(1)(b) ERA, tending to show that there is a failure to comply with a legal obligation. However, we think that it is information which tends to show that the health and safety of an individual, namely the claimant, was being endangered and therefore it was information which tended to show the matters that are in s.43B(1)(d) ERA.

116. We then go on to consider whether this disclosure of information was, in the reasonable belief of the claimant, made in the public interest. The fact, as she confirmed in oral evidence, that the claimant did not herself think that she was making a public interest disclosure is not definitive of the issue (see paragraph 46 above for her evidence on her intentions when sending the letter). However, her explanation of what she was doing does tend to suggest that she did not genuinely believe that she disclosed the information that she has relied on in the list of issues in the *public* interest rather than in her own *personal* interest.

117. The respondent argues that as a matter of fact the claimant made it to better her negotiating position. Even if that were right, that would not preclude it being also made, in her reasonable belief, in the pubic interest. As the claimant says, relying on Chesterton v Nurmohamed, the public interest does not need to be the dominant motive.

118. The case that the claimant has run seems to us however to concern her personal concerns and by that we mean the case that the claimant has run as set out in

the agreed list of issues, and it is hard to see that she disclosed that information genuinely and reasonably believing that it was in the public interest to inform the respondent of those matters which essentially concern her health and are personal to her.

119. So, the case that was being run by the claimant as outlined in the case management order of Judge Gumbiti-Zimuto, does not show that the communication on 17 October 2018 was a protected disclosure within the meaning of s.43B(1) of the Employment Rights Act because it was not made in the reasonable belief that the communication was in the public interest. That claim is dismissed.

120. At times in her conduct of her case it seemed to us that the claimant sought to refer to communications of information made orally prior to 17 October 2018, which she says contained broadly the same information. It was pointed out to her that the issues to be decided had been clarified through two preliminary hearings, one of which had been expressly concerned with clarification of the way she argued her communications were protected under the ERA. The parties had confirmed at the start of the hearing that these remained the issues for the tribunal to consider. As we have already said, prior to submissions, the claimant withdrew any suggestion in the CWS that she sought to rely upon other communications.

121. Having decided that we do not consider the communication to be a protected disclosure, we nonetheless consider the reasons for the actions relied upon as amounting various detriments on grounds of protected disclosures (List of Issues 8.a. to d. and 9).

122. List of Issues 8.a.and b. are the alleged failure to consider the claimant's complaints and the alleged failure to deal with the issues that she raised so as to enable her to return to work. These are both concerned with the respondent's response to the letter of 17 October 2018. Our view is that any failure to consider the complaints or to deal with the issues prior to a return to work was due to a combination of factors none of which were the nature of the complaints themselves.

123. The claimant was asked to clarify how she wished the respondent to look into them and she did not do so (see page 392). This request for clarification was a few days before the notice of risk of redundancy. We accept that the lack of immediate response was understandable given the claimant's then present circumstances but it was part of the reason why the respondent delayed in dealing with them. Ms Gabriel genuinely and, we find, understandably, did not know how to react to it initially. The claimant then indicated that she wanted the respondent to look into the issues informally (page 485) and Gemma Gabriel sought advice from Ms Wilks about how to proceed before she went on maternity leave.

124. The concerns about institutional matters were picked up by Prof. Makhoul later during the claimant's appeal about redundancy (see point 4 on page 478 in the outcome letter) and then investigated by Ms Wilks. There was some confusion between the respondent's witnesses about the extent to which the personal matters set out in the letter of 17 October 2018 were covered in the appeal. There seemed to be some acceptance by Prof. Makhoul in evidence that they were not all dealt with. However, we can see that some of the matters to do with managing sickness absence and support on return to work were picked up by him – to judge by item 5 on page 467 and in the outcome letter on page 479. However the statement by Ms Wilks in her investigation report to the effect that they were investigated under the grievance procedure is not evidenced by any formal grievance outcome. Indeed the claimant had said she wanted matters to be dealt with informally.

125. The correspondence from RG at page 501 suggests that those in the HR department believed the matters of individual concern to have been covered. Viewed objectively, although the individual matters of concern raised were dealt with piecemeal and after some delay, and that may have been a detriment to the claimant, we are quite satisfied that that it was not because of the complaints themselves or the nature of them.

126. The second two detriments relied on by the claimant, set out in the list of issues at paragraphs 8.c. and d. could not have been caused by the communication on 17 October 2018 because the claimant was unfit to work from that period onward. The alleged failure to carry out a risk assessment long predates that communication since one was carried out on 20 February 2018. Similarly, the alleged failure to reduce her workload self-evidently relates to a period before she was signed off sick on 6 June 2018.

127. We turn next to the **claims of disability discrimination** in paragraphs 10 to 23 of the List of Issues. The first question we ask is whether the claimant was a disabled person within the meaning of x.6 EQA from October 2017 onwards. In other words, from what date did the adverse impact on the claimant of her condition of depression, exhaustion, work related stress and/or mental breakdown become both substantial and long term?

128. We find that there were significant adverse impacts upon the claimant beginning from at least the end of February/beginning of March 2017 in terms of difficulty in concentration, forgetting things and fatigue (see paragraphs 11 and 12 above). We find that the claimant's ability to carry out day to day activities was adversely affected by these difficulties in a way which was more than trivial. Therefore, by the time of the 2 August 2017 Occupational Health consultation at page 169, the claimant had been suffering significant adverse impacts for a period of about five months.

129. There was a diminution in the adverse impact to a sufficient extent to allow her to return to work on 17 October, which is seven and a half months after the significant adverse effects start. What is the evidence about whether those

adverse impacts were still significant in the sense of more than trivial? We accept the claimant's evidence of continued fatigue and that is supported in the Occupational Health reports. We find that although the adverse impact had been reduced, it was still more than trivial.

130. What is the evidence at that point that the adverse impact could well have continued for a further five months from October 2017 when she returned to work? That is the question we need to ask ourselves when considering the claimant's argument that she was disabled from that point.

131. The last Occupational Health Report following the first period of sickness absence is at page 197. It is dated 3 November and it says that "she is managing her workload but is still experiencing some fatigue". As we have already noted it is completely silent as to what might happened in the future and we do not find that there is evidence from the vantage point of October 2017 as to what was likely to happen in the following months. Therefore, we reject the argument that the claimant was disabled from October 2017. As at that date, she had suffered significant adverse impacts upon her ability to carry out day to day activities for about seven months but there is no evidence to which we think it right to give weight from which we can make any inference about the likelihood that those impacts would continue for a further five months from that vantage point. However, we find that, as things turned out, the significant adverse impact continued and therefore by the end of February 2018 the adverse impact had been substantial for 12 months. That is the date from which we conclude the claimant was a disabled person within the meaning of s.6 EQA.

132. We also conclude that there was actual knowledge on the part of the respondent that the claimant was a disabled person from July 2018. On receipt of the Occupational Health Report dated 10 July 2018 (page 345 especially at page 346) they had actual knowledge of the opinion of the adviser that the claimant was likely to be covered by the terms of the EQA. The impact upon the claimant of her health conditions was also apparent from the meeting of 14 June 2017, see page 156. This information was against the background of the claimant having previous stress related sickness absences of a month in 2010, two months in 2014 and four months from June 2017. There was also evidence available to them in February 2018 that the claimant was still suffering from fatigue. On 7 March 2018 (see the note at page 284) the claimant told the HR Department that her health was deteriorating and spoke of the impact on her of her direct report being on sick leave herself.

133. We consider that against the background of the pattern of work related stress absences that were lengthening each time, by March 2018 the respondent was put on notice that poor mental health was a continuing situation dating at least from the start of the absence the previous year which had not improved to the point where there were no significant adverse impacts on the claimant's ability to carry out day to day activities. Our view is that by early March 2018 the respondent ought to have realised that the substantial adverse impacts had, to their knowledge, continued for nearly nine months. They also ought to have

realised that, without taking steps to address the claimant's workload, the substantial adverse impacts could well continue. By receipt of the July 2018 Occupational Health report they had the adviser's opinion that the adverse effects were significant and their own knowledge that they were long-term in the sense that they had lasted for at least 12 months at that point.

134. That is not inconsistent with our finding that as a matter of fact the significant adverse impacts pre-dated the respondent's knowledge of them. We note that Prof. Kelly said she had no knowledge of the previous absences apart from the 2017 absence, although that suggests to us she may not have read all of the previous Occupational Health Reports which included some information about the 2010 and 2014 absences.

135. The above lead to the conclusion that there was constructive knowledge of the fact of disability from the end of February/beginning of March 2018 (when the claimant confided in HR) and actual knowledge of disability from July 2018.

136. We then go on to consider whether the respondent had knowledge of the substantial disadvantage alleged, namely that the workload was excessively heavy and challenging for the claimant (see List of Issues para.20 and 21). We have to take into account that the claimant was telling HR that she was not coping although even in her Performance Development Review she was saying to her line manager, Prof. Kelly, that she was coping. We think that information provided to HR that should count as information provided to the respondent notwithstanding the fact that Prof. Kelly herself was not getting the same information as HR was.

137. List of Issues paragraphs 19 and 20 requires us to consider whether the respondent had a PCP which required employees to carry out the work assigned to them and then whether the claimant was put to the substantial disadvantage alleged namely that the workload was excessively heavy and challenging for her. We accept that the claimant was finding that the workload was excessively heavy and challenging because of her depression. Compared with someone who was not disabled, the claimant was finding it that way and it was that way for her. This is evidenced from the way she described matters to KK as recorded on page 284.

138. Did the respondent know or ought they have known from late February/early March onwards that the claimant was put to that substantial disadvantage? The respondent did authorise someone to be employed to provide temporary cover which suggested there was some acknowledgement that this was needed, see page 288. Unfortunately, the additional resource was not in place fast enough for the claimant. Nevertheless, we are satisfied that Prof. Kelly did not delay in her part of the process.

139. Although the claimant positively told Prof. Kelly she would alert her if she was unable to cope (and did not) she was also open with KK that she was struggling (see the second and third bullet points on page 284) before moving on to raising

with KK the prospect of an exit strategy. The claimant's evidence to us was that she was clear she was raising the prospect of an exit strategy because she did not see an alternative way to save herself.

140. There is a report in the PDR, page 293, that her workload and responsibilities "had become impossible". However, it is equally clear from that PDR record from the meeting on 5 April 2018 that the claimant regards Prof. Kelly as being responsive to her requests. Prof. Kelly made proposals for how to revisit the respective roles of the claimant and that of the Research Degrees Leader and Research Degrees Manager in order that she be not burdened with tasks which were properly those of other members of staff (see page 295). At about the same time, the email dated 30 April 2018 at page 285 shows the claimant working to get delineation of the role of her direct report.

141. So, steps were being taken to delineate the roles both above and at the level of the claimant and reporting to the claimant. Prof. Kelly seems to have taken the view that the claimant herself was responsible for keeping her own role within the bounds of the job description and that this was not a matter for further line management responsibility. We are mindful of the fact that the claimant was a Grade 9 in a relatively senior position. The request to reduce hours to a 0.8 FTE was still in process. The claimant is recorded on page 294 as accepting that she needed to learn that she did not need to take responsibility for everything and the correspondence she sends does not convey to the reasonable reader the sense of desperation that the claimant tells us that she was feeling at that time.

142. So, putting all of that together, at the time of the period we are considering (namely late February/early March 2018 to 6 June 2018), we are of the view that the respondent knew, or ought to have known, that the claimant was finding the workload excessively heavy and therefore had a duty to make reasonable adjustment arose in around late February/early March 2018. But, were there steps that ought reasonably to have been taken in order to alleviate that workload? Although the burden is not on the claimant she argues that her workload could have been reduced and/or a risk assessment could have been carried out and that those had a prospect of alleviating the disadvantage.

143. A Stress Risk Assessment had been carried out 20 February 2018. The claimant was not as open in her discussions with Prof. Kelly (who carried out the assessment) as she was with HR and it is difficult to see that she would have responded differently in any subsequent assessment. The other argument which has been raised is that there should have been a reduction in her workload. The claimant described herself as coping to Prof. Kelly, although as not coping to HR. The action points agreed between the claimant and Prof. Kelly in the PDR involved practical steps to seek to delineate all three roles. There was an attempt to recruit sick leave cover for SB which ultimately provided little relief to the claimant, although that was not due to any default of Prof. Kelly. There was also an expectation that, on SB's return a discussion would enable progress to be made on the request by the claimant to reduced her working hours. Taking these matters into account, we do not think there were any other steps which the

respondent ought reasonably to have taken to alleviate the impact of the workload on the claimant at this period.

144. She became unfit to work form 6 June 2018 and started a period of absence from which she did not return, so no adjustment to the workload thereafter would have alleviated the substantial disadvantage.

145. We stress that there is no criticism of the claimant in this finding, our job is to judge whether the respondent ought reasonably to have done more and we conclude that, in this case, there were no further steps which the respondent ought reasonably to have taken to alleviate the disadvantage relied upon. So, for the reason we have given, the claim under ss.20 and 21 EQA is dismissed.

146. As a result of our conclusions on the fact and knowledge of disability, we are only concerned with the period of time between late February/early March 2018 and 6 June 2018 in the context of the ss.20 and 21 EQA claim. The Employment Tribunal does not have jurisdiction to consider a claim for a breach of duty under the Health and Safety at Work Act 1974. The claimant, in her paragraph 95 of her witness statement, refers to the duty to ensure, in as far as is reasonably practicable, the health and safety and welfare at work of its employees and that is not something that is enforced through the Employment Tribunal. She also refers to the leading authority concerning the liability of an employer for an employee's psychiatric illness caused by stress at work: Sutherland v Hatton (also referred to as Barber v Somerset CC and Sandwell MBC v Jones) [2004] UKHL 13 HL where the House of Lords approved the guidance of the Court of Appeal [2002] EWCA Civ 76. That guidance is applicable to claims for a breach of duty made in the County Court or High Court and not a question of whether there was a breach of a duty to make reasonable adjustments to a workplace practice for a disabled employee.

147. Had the claimant been successful in the breach of a duty to make reasonable adjustments and then proved psychiatric illness caused by that breach, it would have been lost, we could have considered whether compensation should be awarded for that psychiatric illness. That would not make this a claim for compensation for psychiatric illness caused by stress at work but for any additional illness caused by the statutory tort of disability discrimination. In that event, we would not have been considering whether the respondent was responsible for causing ill health in the first place.

148. We go on the finally to the dismissal based claims which are brought under s.13 and 15 EQA and under the Employment Rights Act 1996.

149. What was the reason for dismissal? Was it redundancy or was it, as alleged by the claimant, either her disability of depression, exhaustion, work related stress and/or mental breakdown or her sickness absence because of those conditions? This question requires us to look at the reasons, the state of affairs known to the respondent that they had in mind when deciding first to disestablish the post that the claimant occupied and to choose the claimant for redundancy.

150. It is clear that Prof. Kelly was aware of the claimant's sickness related absences and the respondent accepts both that she was, in fact, disabled by October 2018 and that they had knowledge of that. The relevance of that is that that consultation on redundancy started with the informal consultation meeting on 30 October 2018. The claimant had been told on 18 September 2018 that there was a business case going through which might lead to changes in the department.

151. We refer to our findings on that business case at paragraphs 49 to 58 above and our conclusion that there were clearly expressed financial and educational objectives of the restructure which were genuinely the objectives of the respondent and not a sham. We take into account our findings on the criticisms by the claimant of the process and Prof. Kelly's actions, but have concluded that there is nothing from which the inference could be drawn that the reason for dismissal was anything other than redundancy. The proposal was for work to be redistributed which meant that the need of the respondent for employees to carry out the work carried out by the claimant had decreased.

152. Both the s.13 direct disability discrimination and s.15 discrimination for a reason arising from disability claims fail because the claimant has not shown facts from which it might, in the absence of any other explanation, be inferred that the fact of her disability or her sickness absence were reasons for the decision to make her redundant or to dismiss her. In any event, we have considered the evidence put forward by the respondent and are persuaded that redundancy was the entire reason for the dismissal.

153. That also means that we have concluded that the respondent has shown that the reason for dismissal was the potentially fair reason of redundancy: s.98 ERA. The question is then **whether the decision to dismiss for that reason was fair or unfair in all the circumstances**.

154. We have taken into account the respondent's redundancy policy at page 123. We accept that the original timeline was changed (see para.59 above) and the consultation kept open until the claimant had both her informal and formal consultation meetings on 30 October 2018 and 12 November 2018. She had the business case; albeit slightly later than she would have liked she had it in time before the formal meeting. She was accompanied by her daughter as a support because of her ill health. She was offered available alternative employment and does not argue that there were other roles available which should have been offered to her. Indeed, it was clear from the discussion with Prof. Makhoul that she would not have wished to remain employed by the respondent. Her feedback was taken into account. Her challenges to procedure we disagree with. She did not feel able to comment on the business case in detail prior to the decision to make her redundant and it is no criticism at all of her that she did not. However, she did have the opportunity to make all of the points she wished to make at the appeal stage. Her arguments were fully considered by Prof. Makhoul at the appeal. This we consider was a fair process in all the circumstances.

155. For those reasons we consider that the decision to dismiss was fair in all the circumstances and dismiss the unfair dismissal claim.

156. In the light of the above conclusions, we do not need to make judgments on the limitation issues.

_____
Employment Judge George

Date: …17 March 2022 ……..

Sent to the parties on: 17 March 2022

For the Tribunal Office