Case No. 1302286/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
S. SHOKER	**WOLVERHAMPTON HOMES LTD.**

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Birmingham via CVP

ON: 12 - 16 April 2021 and 21 – 25 and 28 February 2022

EMPLOYMENT JUDGE Algazy QC

MEMBERS: Mr J.Wagstaffe

Mr K. Palmer

Representation

For the Claimant: In Person

For the Respondent: Ms R. Wedderspoon – Counsel for April 2021 Hearing dates

Mr R. Powell – Counsel for February 2021 Hearing dates

J U D G M E N T

The Unanimous judgment of the tribunal is that:

1. The Tribunal does not have jurisdiction to hear any claims for that pre-date 26 September 2019 as they are out of time and it is not just and equitable to extend time in respect of such claims.

2. The claims for detriment for having made a public interest disclosure are unfounded and are dismissed.

3. The claims for direct disability discrimination are unfounded and are dismissed.

4. The claims for failing to make reasonable adjustments are unfounded and are dismissed.

5. The claims for harassment related to disability are unfounded and are dismissed.

R E A S O N S

1. INTRODUCTION

1.1. The Claimant was employed by the Respondent ALMO (Arms Length Management Organisation) as a Fire Safety Compliance Officer. He commenced employment on 1 March 2019 and underwent a probationary period of employment. He resigned with immediate effect on 8 November 2019

1.2. The Claimant gave evidence on his own behalf and called no other witnesses. The Respondent called two witnesses: Simon Bamfield, Head of Stock Investment and Mark Taft. Stock Condition Manager.

1.3. The Hearing did not conclude in the first tranche of Hearing dates in April 2021 and it did not prove possible to relist the case until February 2022. In the meantime, counsel for the respondent took a public appointment and was replaced by Mr R. Powell of counsel for the remainder of the Hearing dates. The claimant represented himself.

1.4. The Tribunal was provided with a bundle of documents. That bundle was increased by several hundred pages in the interval between the two hearings The respondent also provided written closing submissions in the form of 3 separate documents. Numbers in square brackets in these Reasons refer to the bundle.

1.5. The appeal courts in cases such as *Mensah v East Hertfordshire NHS Trust* 1988] IRLR 531 have laid down guidance as to the appropriateness of the tribunal stepping in to assist litigants in person with the tribunal process. The limits to such assistance are also identified. In this case the tribunal sought to provide such assistance on a regular basis to the claimant. Examples included the explanation of the purpose of cross examination and how to go about it.

1.6. In particular, the Tribunal emphasised the significance of the List of Issues that had been agreed and set out in the Case Management Order of EJ Miller dated 22 May 2020 (the " Miller Order") - [157- 169]. When lengthy cross examination of the respondent's witnesses appeared to be directed to matters not before the Tribunal, the claimant was reminded of the need to put his case and his challenges to the respondent's witnesses in respect of the specific matters that the Tribunal was going to have to decide by reference to the List of Issues. Considerable latitude was afforded to the claimant in this regard as a litigant in person. The claimant did not heed that guidance and at one stage, made it clear that he did not regard the Tribunal's interventions as helpful. In consequence, the claimant's cross examination of the respondent's witnesses then proceeded uninterrupted save where there was an objection from the respondent or where the Tribunal felt obliged

to step in to ensure fairness to the witness such as where a question was too wide or was predicated on a premise unsupported by the evidence.

2. THE ISSUES

2.1 As above referred to, the issues that the Tribunal had to determine had been discussed and are set out in the Miller Order. The List of Issues is appended to this judgment

3. THE FACTS

3.1. On the evidence presented to the Tribunal, we found the following facts and such additional facts as are contained in the conclusions section set out below. The evidence put before the tribunal ranged far beyond matters which were strictly pertinent to the issues that we had to determine. The facts set out below are limited to those relevant to the resolution of the claims before the tribunal.

Credit

3.2. Before turning to the salient facts, it is appropriate to deal with questions of credit and credibility at the outset. This issue was particularly pertinent in this case as there are head on conflicts and disputes of evidence. Significant parts of the claimant's evidence are flatly denied by the respondent.

3.3. The respondent produced a document entitled **"The relative reliability of the witnesse**s". Considerable detailed criticism is made of the claimant's testimony before the Tribunal. We do not repeat all of those matters in these reasons. The Tribunal nonetheless finds that those criticisms are well founded and that there is considerable merit in the

observations advanced by the respondent which coincides with the Tribunal's own independent assessment.

3.4. We note the single material error in Mr Banfield's evidence before us. We did not feel that error tainted his testimony in any significant manner. We found that both of the respondent's witnesses did their best to answer questions with candour and gave careful reflective answers

3.5. On balance, and doing the best we could, we came to the conclusion that we were unable to rely on the claimant's version of events unless admitted or supported by contemporaneous documents. The Tribunal preferred the recollection of the respondent's witnesses but did not do so in a mechanical way and considered each conflict of evidence on its own merits. Specific findings on certain of the conflicts of evidence that arose are set out in these reasons.

Key facts

3.6. The respondent is an arm's length management organisation which manages and looks after more than 22,000 homes on behalf of the City of Wolverhampton Council. It is a not-for-profit company that provides housing services on behalf of a local authority and is set up by the local authority to manage and improve all or part of its housing stock.

3.7. The claimant, Stephen Shoker ("SS"), commenced employment with the respondent on 1 March 2019 as a Fire Safety Compliance Officer ("FSCO") following a recruitment process. Simon Bamfield ("SB") is the respondent's Head of Stock Investment. Mark Taft ("MT") is the respondent's Stock Condition Manager and he reports directly to SB.

3.8. The Claimant had a Level 4 Diploma in Fire Safety and experience within an enforcement role at West Midlands Fire Service. The FSCO job description is at [382] and a copy of his contract is at [194-209]. The claimant's employment was subject to a six-month probationary period

and provided that his employment could be terminated at any time during or after the probationary period. The probationary period could be extended. The probationary policy [994A to 994E] also provides that should an individuals' line manager not deem an employee to be suitable at the conclusion of a probationary period, the case would be referred to a review panel so that a review of the employee's performance, as well as the steps put in place to improve performance can be undertaken before a final decision is made as to whether the employee's employment will continue or not.

3.9. SB told the tribunal that the claimant was set a number of tasks upon appointment and that these are reproduced in an email to MT on 4 June 2019 [300]. They are also reproduced in an email sent to Cara Weatherly at the respondent on 11 July 2019. In that email SB states that the information was shared with the claimant via OneNote. The claimant disputes having received this set of tasks and relies on the fact that the respondent is unable to produce documentary support that the document was shared by email or OneNote. The respondent's position is that unless specifically saved, the record of communicating the list is automatically deleted. SB told the Tribunal that the list was gone through in detail in a meeting lasting 4 hours or so on 1 March 2019. SB went on to say that he was very conscious of what he had discussed with the claimant on his first day as he had cleared his diary to have that conversation with him. The claimants employment started on a Friday which was an odd day to start but it was the only spot that SB had free for some weeks. We accept that evidence. On balance we think it more likely than not that the claimant was sent this list. There would have been no reason not to have done so following a lengthy exposition of the claimants role.

3.10. SB explained that the list was not just a short-term list of actions, as some items would have to be delivered over the medium-term due to their complexity, size, or scale.

3.11. MT has worked for the respondent since 1st October 2005. Part of his role is oversight of the respondent's fire safety compliance function. A key part of that regime is the requirement to carry out fire risk assessments (FRA's) which is a review undertaken of a building in order to assess its fire risk and to offer recommendations to make the building safer, if necessary. Proactively managing the FRA regime was a primary role of the Fire Safety Compliance Officer. MT undertook that responsibility prior to the claimant joining the respondent in addition to his own workload and managerial responsibilities. A function which he was only too keen to pass on to the claimant so as to unburden himself of that particular responsibility. He saw the claimant as a welcome addition to his team.

3.12. MT met with the claimant on his first day, introduced himself and introduced the claimant to members of the team. MT conducted the claimants induction and also a tour of the respondent's head office with the claimant to show the claimant round and introduce him to various officers and sections of the business. A recurring theme in the presentation of the claimant's case before the tribunal was that the claimant would adopt an inconsistent stance on a particular topic at different times. In the latter stages of the hearing, the claimant eschewed the notion that he had been critical of the respondent in respect of a lack of a proper induction. Yet in his cross examination, the claimant referred to the induction as a "tick box exercise" and that he didn't raise any concerns at the time because he did not want to put his head above the parapet.

3.13. Early concerns arose in the first few weeks of the claimants employment. MT was surprised when the claimant bought to his attention that he thought that he felt that he should not be solely responsible for overseeing the administrative duties associated with the FRA regime

and the subsequent ‘actions’ arising following an inspection. MT said that he was concerned by this, as this was one of the primary functions in the claimant's job description. Namely ‘'To proactively manage the Fire Risk Assessment (FRA) Regime''. He recalled explaining to the claimant that he was not expected to undertake administrative duties as the respondent had a dedicated team and additional support available.

3.14. SB referred to a matter that arose on 7 March 2019 which concerned an email sent by the claimant to Nicola Downing, Leasehold Management Officer and David Cockfield, Senior Chartered Legal Executive at the Council. SB felt the need to clarify certain matters with the claimant so as to ensure that the Claimant appreciated the subtle differences between the status and responsibilities of residential and commercial leaseholders.

3.15. On 9 April 2019, MT received an email from the claimant [238] in which he explained that he was concerned about the workload that he was getting from different parts of the organisation and that he was struggling to deliver on these actions. The claimant expressed the view that they needed to "be more realistic with workloads and expectations". MT forwarded the email to SB who responded by indicating that he was currently in the process of creating a re-structure of his department, to include additional support for fire safety. The claimant was informed of this by MT who also told him that support was always available. This was also discussed with SB at a meeting, pre-arranged for something else, on 11 April 2019. SB considered that the administration of FRA actions needed to be improved so that the Tenancy Officers were only referring the more complex fire safety issues to the claimant. SB arranged a meeting on 23 April 2019. The invitation to the meeting explained that SB was concerned about the volume of FRA actions being generated and that he wanted to establish some ground rules to reduce the administrative burden on the claimant [257]. This, said SB in

his evidence, demonstrated that the claimant's concern over workload was being addressed.

3.16. One matter which was investigated at some length in the oral evidence presented to the tribunal concerned a report sent by the claimant to Angela Barnes, Assistant Director – Housing Options, regarding a property called the Whitehouse Hostel. The report had not been shown to SB or MT before it was sent. The email chain that followed shows that Ms Barnes and Kevin Manning, Assistant Director - Property, had serious concerns about the report.

3.17. Ms Barnes wrote:

Hi Kevin

As per conversation, please see attached from Stephen Shoker. He may well have shared it already but just in case he hasn't!
Concerned about some of the comments made about doors etc. Dave Bugby (one of the members of staff at The Whitehouse) has emailed Ian Rawlings regarding fire alarm and emergency lighting tests frequencies, seeing if the inspections can be picked up by Chris Hastilow and Ian Cotterill.
There is a comment in the report about staff at The Whitehouse not having had certain fire-related training. I was under the impression they had had some training but will check with Skills what they have actually been on and, if not the training needed, I will see what is available.

Please can I be informed of what, if any, works would need to be done in light of Stephen's comments.

Many Thanks

3.18. Mr Manning then wrote to SB as follows:

Hi Simon

Angela B has just spoken to me regarding the attached document. (Please note spelling mistake)
I am sorry to have to write to you but it appears that we have scored a serious 'own goal'.
Can you please check with Steve and other officers as a matter of urgency.
The findings of the report correctly is causing some concern.
As you are aware new fire doors were fitted and approved via the stock investment and the SCP team. You will recall that we crawled all over this property in terms of specification and quality control. This was signed off and verified with CWC. In fact you will recall that the work was commended at AMG.
It appears that we now have a report sent out to Angela Band other managers outside Property Services from Steve regarding the doors being substandard and having excessive gaps.

Could you please as a matter of urgency speak to Steve and arrange a meeting of key officers to establish if corrective action is actually needed.
Depending upon your findings this could be embarrassing.
I assume you were aware of this inspection and findings before circulation.
Can you please arrange for a briefing note of what action is now proposed, if any, regarding the fire doors by next week, as SMT will now pick this up.

If I recall correctly and Wates did the work it would be advisable that it is raised at today's core group meeting.

Regards
Kevin

3.19. This caused SB to write to MT on 1 May 2019 to say how he felt ‘’blind-sided’’ by the publication of the report . He was not aware of its findings before it went out. SB felt that he should have been so that he could ensure the accuracy of statements and assumptions that had been made. Further even if the report was wholly accurate, he would have wanted to ensure that he and his superiors were aware of potentially high-profile issues before they were discussed and debated in meetings. SB considered it imperative that all aspects of such a report were verified before its issue.

3.20. This matter was explored in cross examination with SB. He was challenged as to why he accepted the views of Peter Cresswell (the Lead Designer) and the recommendations of Building Control over that of the claimant as to whether the doors should be 60-minute fire doors as contended for by the claimant in his report or 30 minute doors as specified. SB pointed to the email exchange between him and Mr Cresswell on 5 June 2019 in which the claimant appeared to concede the point [318-319].

3.21. It seemed to the Tribunal that this was a sterile exchange given the objective factual position that emerged from consideration of the report and the subsequent emails, yet the claimant persisted in insisting that he was right.

3.22. As MT was to explain, he considered that the claimant was *"ruffling a few feathers again."* - see email to SB on 5 June 2019 [316]. By which MT meant that the claimant was not in possession of all the facts before issuing formal instructions, resulting in confusion. For MT, it was becoming clear that the claimant wasn't building positive relationships with his peers and was querying matters that had been cleared more than once with Building Control which caused frustration.

3.23. It is also to be noted that in his own cross examination and in order to justify his decision not to send the Whitehouse report to SB or MT he said;

> *" I'm a senior officer, I have taken responsibility of looking at a fire safety measure, some were quite concerning. I wasn't willing to have it swept under the carpet".*

This is another example of an inconsistent stance being adopted by the claimant. He had spent some time challenging the view of SB that the claimant was a senior officer as this was a description that was not communicated at his interview, nor did it appear in the job description. As the respondent observed in submissions, the claimant seemingly seeks to rely on his status as a senior officer in his evidence when it suits him and challenges that perception of his seniority when it doesn't suit him.

3.24. A meeting had taken place on 13 May 2019 between MT, the claimant and MR Manning. It was a significant meeting in that MT considered that the claimant had falsely accused him of doctoring a spreadsheet that the claimant was trying to extract information from. MT was upset as he had spoken to the claimant on a call at some length before the meeting in which he explained that the claimant may have had a "filter on" which prevented him seeing all of the outstanding FRAs.

3.25. In his oral testimony to the Tribunal, MT was explicit in explaining his shock and upset at what he considered to be an unjustified attack on his integrity He unequivocally confirmed that at that meeting, the claimant accused him of manipulating the spreadsheet. The claimant does not accept that he did so. We prefer and accept the evidence of MT on this point. We note that at §54 of his witness statement, the claimant says

"I strongly suspected that MARK TAFT may have deliberately edited the FRA register and arranged to apportion blame to me during this meeting as I was the easiest scapegoat. This had backfired for MARK TAFT and he was visibly upset how things had turned out."

3.26. This led to an email from MT to SB [290] which contained the following remarks:

"Evening Simon,

Apologises for emailing at this time, I thought it best to take a deep breath before ' putting pen to paper'.
Following on from my meeting with Kevin and Steve this afternoon, I thought it best to give you 'heads-up' on what I feel was an underhanded suggestion (and some may say a stab in the back) bought to the attention of Kevin by Steve.

…..
During our meeting, Steve broadsided me and again raised this directly with Kevin clearly stating that he was of the opinion addresses had been removed off Teams, at which time I interrupted and made it clear that at no time have addresses been removed, and that I felt Steve's comment was 'out of order' and un-called for, and that I felt disappointed with his suggestion that information had been removed.
I then proceeded to inform Kevin, that if he sees fit he can request an audit trail from I.T. which will clearly show Steve's comments to be completely false, and unjustified.
…..
Simon, I have a really bad feeling about this one, as on a number of occasions both you and I have been 'hung out to dry' including The Whitehouse, pay discrepancy, and now this, so hopefully you can

appreciate my concerns regarding this individuals actions and motives, bearing in mind the concerns raised by those outside of W-ton Homes prior to his appointment.
…. "

3.27. SB Responded:

"Thanks for the heads-up. It certainly not the sort of behaviour we want. I have got to provide an update to the Board on the status of FRAs, so could really do with getting clarity tomorrow. We can then discuss the broader issues in the days that follow.
Regards"

3.28. MT's view at that time was that was that there were major warning signs about the claimant's performance and conduct. He had accused MT of lying; he was sending reports without authority, he had that same evening emailed Mr Manning when SB had requested him not to do so; he was raising pay issues and generally wasn't producing anything valuable in terms of work output.

3.29. It was the claimant's case before the Tribunal that it is from this date (13 May 2019) that his dismissal was pre-determined and that the actions of MT and SB from that date onwards are to be seen as part of a concerted plan to oust the claimant from his employment. We reject that submission and do not accept that the evidence supports such a conclusion.

3.30. In advance of the claimant's 121 meeting scheduled for June 2019, SB spoke with MT and made some preparatory notes [304]. It is this exchange with MT that SB denied in cross-examination had occurred until it was pointed out that it is referred to in his witness statement. The statement also does not make reference to this being an exchange over the phone which is how SB now recalls it. He told the Tribunal *"I accept what the statement says, my recollection is that it was a phone call but*

I can say categorically, there was no discussion about extricating the claimant from the business"

3.31. Those manuscript notes show that they discussed the claimants approach with regard to his breaking professional protocols. That was explained by SB as reasonable standards of conduct between professionals. Although this had not been communicated by the claimant, SB noted that *" This is down to Steve potentially being on the spectrum".* As of 4 June 2019, neither the Claimant, the Respondent's HR Team nor SB had informed MT that the Claimant had been diagnosed with autism or even referred for an assessment.

3.32. MT completed the first draft of Mr Shoker's 121 and three months review documents and sent them to SB on 5 June 2019 [306-314]. 16. On 6 June 2019, MT received an email from SB explaining that he had made some changes to the draft documents and had "*whittled things back so that the workload was reasonable for the next 2 to 3 months*" [324]. MT considered that the objectives set for the claimant were achievable given his role, position and level of knowledge and experience. MT denied the suggestion that was put to him that this was a case of setting the claimant an unachievable workload. We accept his evidence that, in fact, it was intended to help and support the claimant in his role so that his performance could be brought up to an expected level.

3.33. In his 2nd email to MT on 6 June 2019 [32], SB had included the comment *" a case of less is more*" which he explained as being less wordy and succinct, i.e. easier to read. We reject the strained construction that the claimant sought to put on that comment by SB in his own cross examination and in his cross examination of SB, namely that it was intended to describe how SB had made it look as though the workload appeared lighter when in fact it was increased. The phrase, as SB said in evidence, is one often used and in common understanding. The Tribunal does not accept that this was part of a grand scheme concocted

by MT and SB to do down the claimant and set him up to fail by cleverly disguising an increase in workload.

3.34. On 6 June 2019, MT held the claimant's 121 Performance Management meeting and also the Probationary Review meeting.

3.35. During the meetings on 6 June 2019, the claimant explained to MT that he felt under pressure, that he had a history of anxiety and had been referred for an autistic spectrum disorder assessment by his GP. MT was surprised at this as had no idea the claimant suffered from anxiety. Additional support via the respondent's 'in-house' Occupational Therapist was offered to the Claimant and an email was sent by MT to the respondent's HR team that day, requesting that an appointment be set up. Separately, MT wrote to SS scheduling a Stress Risk Assessment meeting [344].

3.36. The claimant describes the meeting in his witness statement thus:

> *"55. It was during this meeting that MARK TAFT surprised me with a number of accusations never mentioned to me before or even discussed with me. MARK TAFT during this meeting simply read from the paper in front of him. During this meeting he accused me of things such as being "distant" and preferring to "work in isolation" not being "fully engaged" "lacking focus…" amongst other personal remarks.*
>
> *56. MARK TAFT had never before this point raised any concerns of this nature to me. He had over 3 months to discuss with me or arrange a 1:1 meeting to raise these issues, if they were to be believed. He never did until raising them formally in writing during this meeting.*
>
> *57. It was also during the same meeting that MARK TAFT accused me of failing to meet objectives. To which I responded*

"What objectives? You haven't set me any?" however, he was not able to respond to this.

58. Within this meeting, in spite of the fact that MARK TAFT knew my workloads were already unreasonably high and difficult to manage, he then set me an additional 16 new work tasks in the meeting."

3.37. MT takes considerable issue with the claimant's account of the meetings on 6 June 2019. He denied that he raised a number of issues in the meeting that had not been raised before and failing Mr Shoker on objectives that had never been set. He told us that the claimant was made fully aware of what was expected of him by SB at the very start of his employment. He felt that as a manager it was his duty to raise concerns if there were issues with an employee who he manages.

3.38. MT accepted making remarks about the claimant being distant with colleagues and preferring to work in isolation. However, he denies that the comments were said in a derogatory way or linked to the claimant's anxiety. He told the Tribunal that the comments were as a result of his general observations as the claimants manager as he had noticed that the claimant was not fully engaging with colleagues and, in his view, somebody operating in that role at that level needed to engage with others to ensure collaboration across departments and to ensure compliance obligations were met. He referred to the claimant's job description which includes the requirement to "Develop strong working relationships internally and externally". For MT, a Fire Safety Compliance Officer who was having minimal engagement with colleagues and external stakeholders was a problem.

3.39. MT went on to say that making derogatory comments is simply not in his nature. Based on our assessment of the witnesses and on balance, we prefer and accept MT's description of the 6 June meetings.

3.40. Mr Shoker was given a document of both the 121 Performance Management meeting [325 – 328] and a Probationary Period Review form [331 – 333]. He was asked to sign the document, but he refused as he did not agree with the remarks made in it and he did not agree with the workloads given the support he was given.

3.41. After the meeting, MT wrote to the claimant [343] at 16.32, copied to SB [345] and encouraged him to use the Respondent's Employee Assistance Programme and to let MT know if he needed any further assistance. MT also put steps in place for the claimant to be referred to Occupational Health so that support could be put in place to support him in his role [334 to 335]. MT further arranged for a stress risk assessment to take place to see what, if any, further support needed to put in place for example assistance in prioritising workload. MT explained that this was absolutely because the respondent wanted to support the claimant [344 and 346]. In addition, MT also emailed Shaun Malloy, Head of Repairs and Maintenance as it had been identified that the claimant would benefit from undertaking work shadowing within his team [337] and MT sought to facilitate this.

3.42. SB also gave evidence about an instance of a regular meeting, scheduled to talk about fire strategy attended by Darren Baggs, Assistant Director - Housing and Kevin Manning on the afternoon of 6 June 2019. He described the claimant's performance at that meeting as poor and cites, amongst other matters, the claimant's inability to answer questions about fire strategy. SB was unable to feed back his concerns for some time as the claimant was signed off as unfit due to work related stress the following day, 7 June 2019. Following the claimant's return at the end of July 2019, SB confirmed to MT that the claimant did not need to attend these regular meetings. They were not on the claimant's work

plan and were held at a strategic level rather than operational meetings. Moreover, SB did not want to be embarrassed by the claimant's performance again.

3.43. On 25 June 2019, MT wrote to the Claimant. A meeting had been arranged to take place with MT, the Claimant and Cara Weatherley (CW) HR Officer, to discuss the situation and to find a way forward to enable SS to return to work [368]. The OH report was received and the meeting took place on 3 July 2019 [390-391]. SS reported that he felt that the amount of work made him feel unable to cope and affected his health. A further OH report was received on 17 July 2019 {419-420]

3.44. SS's fit note was to expire on 29 July 2019.Discussions were taking place in emails between MT, SB and CW about the fact that the claimant's probationary period was due to end on 31 August 2019 and that he had been off since 7 June 2019. on 23 July 2019 [424]. SB wrote that it was ‘*'critical that we proactively manage the situation to ensure that Steve doesn't become a permanent member of staff by default.''* He also explained that there were ''serious concerns about his suitability to undertake this high-profile role in a pressurised work area given what we now understand about his mental health and problems with anxiety''.

3.45. On 25 July 2019, Jacqui Rowley (JR) Occupational Therapist wrote to MT [428] recommending that a meeting with SS and his line manager take place to discuss a work plan and a clearer understanding of expectations within the role. JR also recommended a phased return to work across 4 weeks with SS initially only working 4 hours per day.

3.46. MT developed a phased return to work plan for the claimant. It was SB's view as expressed to MT that they should give the claimant the luxury of focussing on one task at a time and that tasks should be completed in the order set out in the work plan with progress being monitored weekly [440]. SB also believed that the work plan was anything but onerous and

for someone with the claimant's experience should have been easily achieved.

3.47. It is the claimants position that the work plan was onerous and meant that he couldn't adhere to the recommended phased return to work, and this was a deliberate act to exacerbate his disability. We do not accept that characterisation of the phased return to work. We accept MT's evidence about the aims and objectives of the workplan as designed to help and support SS. MT was going to pick up all the claimant's other work on top of his own workload. MT estimated that the plan represented around 10% of the claimant's normal duties. Although SS rejected that figure in cross-examination, his own best estimate was that it represented around 30% of his normal duties, that is to say a reduction of some 70%.

3.48. The return-to-work meeting took place on 30 July 2019 [443-444]. MT updated SB in an email the next day [453]. MT expressed some dissatisfaction with the claimant and some concern that SS asked to take a week's leave as his parents were having building work undertaken on their property. The email concluded with a recommendation that steps were put in place as a matter of urgency to dismiss the claimant while still in his probation period. MT explained that his views were not influenced by the claimant's absence from work or becoming aware that he suffered from anxiety but rather that he simply was not able to operate at the level required of someone in this high-profile position, as had become plainly clear in the period 1 March 2019 to 7 June 2019. We accept that explanation.

3.49. A revised return to work plan, which took account of the claimant's annual leave was sent to him on 31 July 2019 [455-457]

3.50. An issue arose as to whether the claimant was prevented from working weekends which had a negative impact on the completion of his work. MT explained that this was discouraged but not blocked. Insofar as it is suggested that this was a further deliberate ploy to hamper the claimant in the completion of his work, we do not find this to be the case.

3.51. A stress risk assessment was undertaken on 5 August 2019 with MT and SS. Weekly meetings were agreed to assess progress and the first one took place on 13 August 2019. It is the claimants case that between 12 September 2019 and 24 October 2019, such meetings were specifically designed to take the claimants focus away from completing his work and to make it difficult to achieve his allocated tasks. We prefer MTs evidence that this was no more than a management tool he used with other employees as well. There is nothing sinister in the scheduling of weekly meetings by MT on the facts as we find them. The suspicion voiced at §127 of the claimant's witness statement that MT was deliberately using diversion tactics to waste time and prevent SS from doing his work is unfounded.

3.52. The claimant's probationary review meeting was held on 22 August 2019 [489-494]. The claimant's work plan was due to be completed on 6 September 2019. The probationary period was to be extended by two months to enable additional time to assess the claimant's performance and capability to meet the expectations of the FSCO role. A new work plan was to be devised and start on 9 September 2019. This was confirmed in a letter to the claimant on 28 August 2019 [512-3]. A review meeting was set up for 28 October 2019 to evaluate the claimant's performance against the new work plan. The letter also referred to the possibility of termination If the performance requirements of his role were not met. It was this letter that prompted the claimant to seek a further OH referral - see §100 of the claimant's witness statement.

3.53. MT and SS met on 9 September 2019 [708]. The new work plan was discussed [723-5] as well as an Improvement Plan. MT explained that the latter plan was devised to support and bring about an improvement in the claimant's performance. Clear-cut areas for improvement were set out for the claimant to complete, with additional support being provided to the claimant by MT and other key officers. Additional measures to support SS were also put in place.

3.54. MT raised concerns with SB in an email on 18 September 2019. [749]. One such concern was that SS had informed Occupational Health that he was expected to do other work as well as that in his work plan, hence the phased return had overrun. That did not accord with MT's understanding. MT held the view that despite intensive management and support being given to the claimant, no progress was being made and that the claimant's employment should be terminated as despite the continued support it was apparent that the claimant couldn't deliver in his role.

3.55. A meeting was held on 23 September 2019 attended by CW,SB and MT to discuss the situation. CW was of the view that usual processes needed to be followed rather than immediate referral to the review panel.

3.56. At a meeting on 25 September 2019 with CW and MT, SS raised concerns about the respondent's resources for fire issues and its compliance with legislation in terms of the "competent person". It is at this meeting that the claimant says he made a number of protected disclosures as follows:

> *a) The claimant's heavy workload and the fact that one person was trying to manage fire safety arrangements for the whole organisation*

(b) That as an organisation, the respondent could be failing in its duty to comply with Fire Safety regulations, putting people at risk, particularly in mixed commercial and residential premises which had fire safety deficiencies

(c) That there was a lack of competence in the internal repairs team, a lack of knowledge and a lack of resources

(d) That the claimant was being used as a scapegoat for the respondent's failure to address fire safety concerns, of which the respondent was aware. [see §(vi) a - page160]

3.57. It is part of the claimant's case [see §(vii) a - page161] that, as a result of those disclosures, the respondent took steps to deliberately remove the claimant from his role by making it appear that he was underperforming when he wasn't. Quite apart from the question of whether protected disclosures were made on that occasion, we decline to make any such finding on the evidence placed before us. The respondent had serious and, we find, justifiable concerns about the claimant's performance well before the meeting of 25 September 2019. As MT put it, the catalyst for performance managing SS was his performance and not the fact that he raised compliance concerns in September 2019.

3.58. The planned meeting to discuss the extended probation took place between MT, CW and the claimant on 28 October 2019 [786-792]. SS's performance against the plan was gone through with him. MT was of a different view to SS in respect of his performance and he felt that

improvements were still needed. A particular concern that was raised was in relation to Fire Risk Assessments (FRA) in general, with SS appearing to step back from that specific responsibility. In one particular instance, there was a failure by the claimant to notify MT that an FRA had been undertaken on a block of flats that had been demolished in 2018. This had not been challenged and investigated by SS until MT raised it as a concern on 17 October 2019.

3.59. MT confirmed to SS at the end of the meeting that he still felt that his performance against the work plan had not been satisfactory and therefore the decision as to his continued employment would be passed to the review meeting to make a final decision in accordance with the respondent's policy. SS maintains that information was used and manipulated to incorrectly show that he was failing at this meeting. We reject that characterisation of the meeting and find that genuine and legitimate concerns were being raised.

3.60. To that end in respect of the review meeting, SB and CW were scheduled to conduct the review meeting on 5 November 2019 and to make a decision.

3.61. On 30 October 2019,SS sent an email the HR inbox attaching a copy of a resignation letter. [793 - 794]. The claimant also indicated that he was going to raise whistleblowing concerns.

3.62. Unaware of the resignation email, MT wrote to SS on 1 November 2019 following up on the meeting of 28 October 2019 [797-801]. MT also emailed SB the same day attaching his letter to SS; work plans and one to ones in contemplation of the meeting to be held with the claimant on 5 November 2019.

3.63. The claimant wrote to SB on 4 November 2019 [829] as follows:

" *Dear Simon*

Thank you for responding.
For clarity my resignation letter dated 30th October gives due notice. I understand this to be two months as per my contract. Therefore, please confirm if a further meeting, leading to my dismissal is still required given that I have resigned?

It is my intention to raise a formal grievance having already raised in formal grievances with my line manager and also the HR advisor on 25th September 2019 and also with yourself previously when we met at the UL offices.

There are serious concerns that will require to be raised in my grievance and these are inextricably linked to my overall safety concerns and feel this would be better raised at board level using the whistleblowing procedure.

Many thanks"

3.64. SB responded the same day and told the claimant that as he would remain an employee of the respondent during his notice period, he (SB) was duty-bound to follow the process through to conclusion. The meeting to confirm the outcome of the claimants probationary period was re-fixed for 11 November 2019 [828]

3.65. A phone call took place between SB and SS on 7 November 2019. SB repeated what he had said in his email of 4 November 2019 about following due process. This would result in SS having his employment terminated at the meeting on 11 November 2019 for failing his probationary period. SB went on to say that it might be in the claimant's best interest to resign with immediate effect. He told the Tribunal that this was said to protect the claimant so that there would not be a

termination recorded on his CV. SB added that he would have said that to anyone in an identical situation to the claimant. It was entirely unconnected to any efforts on the part of the claimant to "blow the whistle". We accept that evidence and explanation from SB.

3.66. It was agreed that the claimant would resign with immediate effect and be paid in lieu of 1 weeks' salary. This was the notice that SS would have been entitled to if dismissed for failing his probationary period. The mechanics of returning the respondent's equipment was also touched on in that call on 7 November 2019.

3.67. There was a further call on 8 November 2019 between SB and SS. SB's evidence was that it was just to confirm that one of his team would collect the respondent's items the following Monday and that the claimant should ensure they were ready to be collected. That call lasted less than a minute according to the phone records produced in evidence [964].

3.68. The claimant' own view of both calls is that they were calls in which he was pressured to resign with immediate effect. On the evidence before us, we do not agree that that is a correct representation of the facts.

3.69. A revised resignation letter was sent by SS on 8 November 2019 [842-3]. It contained this sentence:

"As *discussed with you yesterday, I resign from my post with immediate effect on the understanding that a week's salary payment in lieu of two months' notice will be paid"*

3.70. On 9 November 2019, SS raised a grievance citing disability discrimination [851-855]. On 22 November 2019, SS wrote to Angela Davies, Chair of the Board, [865- 873] raising concerns about the respondent's compliance with its legal obligations.

3.71. Amanda MacDonald, (AM) Audit Business Partner at the Council investigated the matters raised by SS. AM wrote to the Claimant on 1 May 2020 to provide her outcome to the claimant's grievance [950 to 956] and on 11 May 2020 to provide her outcome to the claimant's whistleblowing complaint [957 to 962].

3.72. The Claimant issued proceedings on 30 November 2019.

4. THE LAW

Time and just and equitable extension in discrimination claims

4.1. The time limit for a discrimination claim to be presented to a tribunal is normally at the end of "the period of three months starting with the date of the act to which the complaint relates" (**section 123(1), EqA 2010).**

4.2. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it. The key date is when the act of discrimination occurred. The Tribunal needs to determine whether the discrimination alleged is a continuing act and if so when the continuing act ceased. The question is whether the conduct can be categorised as a one-off act of discrimination or a continuing scheme. **Hendricks v Commissioner of Police for the Metropolis (2003) IRLR 96** makes it clear that the focus of inquiry must be not on whether there is something which can be categorised as a policy, rule, scheme, regime or practice but rather on whether there was an ongoing situation or continuing state of affairs for which the respondent was responsible in which the claimant was treated less favourably. **Lyfar v Brighton & Sussex University Hospitals Trust (2006) EWCA Civ 1548** emphasises that what Tribunals should look at

is the substance of the complaints in question as opposed to the existence of a policy or regime. Can the complaints be said to be part of one continuing act by the employer. In **Aziz v FDA (2010) EWCA Civ 304,** it was held that a relevant, but not conclusive, factor is whether the same or different individuals were involved in the incidents in question.

4.3. The tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable **(section 123(1)(b), EqA 2010).** In deciding whether it is just and equitable to extend time to permit an out-of-time discrimination claim to proceed. The Tribunal is entitled to take into account anything that it deems to be relevant (**Hutchinson v Westward Television Ltd [1977] IRLR 69).**

4.4. The tribunal's discretion is as wide as that of the civil courts under section 33 of the **Limitation Act 1980** (LA 1980) (**British Coal Corporation v Keeble [1997] IRLR 336** and **DPP v Marshall [1998] IRLR 494**). Courts are required to consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

- The length of and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the claimant acted once they knew of the possibility of taking action.

- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

(Section 33, LA 1980.)

The emphasis should be on whether the delay has affected the ability of the tribunal to conduct a fair hearing **(Marshall).**

4.5. In **Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] EWCA Civ 576), the court held that time limits are applied strictly in employment cases, and there is no presumption in favour of extending time. In fact, tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so. The burden is on the claimant, and the exercise of discretion to extend time should be the exception, not the rule.

4.6. In **Rathakrishnan v Pizza Express (Restaurants) Ltd UKEAT/0073/15**, the EAT was unable to accept the proposition that a failure to provide a good excuse for the delay in bringing a relevant claim would inevitably result in an extension of time being refused. Rather, a multi-factoral approach is to be preferred, with no single factor being determinative.

4.7. The Tribunal also considered **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR** The case is instructive, and the Tribunal paid particular regard to §§ 18 and 19 of the judgment of Leggat L.J. :

"18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980 , section 123(1) of the Equality Act 2010 does not specify any list of factors

to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corpn v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] ICR 800 , para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998 : see Dunn v Parole Board [2009] 1 WLR 728 , paras 30–32, 43, 48 and Rabone v Pennine Care NHS Trust (INQUEST intervening) [2012] 2 AC 72 , para 75.

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).”

4.8. Further, the case of **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021]EWCA 21** reinforced the caution against over-reliance on the Keeble factors at § 37:

“37.The first concerns the continuing influence in this field of the decision in Keeble. This originated in a short concluding observation at the end of Holland J's judgment in the first of the two Keeble appeals, in which the limitation issue was remitted to the industrial tribunal. He said, at para. 10:

"We add observations with respect to the discretion that is yet to be exercised. Such requires findings of fact which must be based on evidence. The task of the Tribunal may be illuminated by perusal of Section 33 Limitation Act 1980 wherein a check list is provided (specifically not exclusive) for the exercise of a not dissimilar discretion by common law

courts which starts by inviting consideration of all the circumstances including the length of, and the reasons for, the delay. Here is, we suggest, a prompt as to the crucial findings of fact upon which the discretion is exercised."

The industrial tribunal followed that suggestion and, as we have seen, when there was a further appeal Smith J as part of her analysis of its reasoning helpfully summarised the requirements of section 33 (so far as applicable). It will be seen, therefore, that Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar", so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

4.9. It also serves as a reminder that time limits are applied strictly in ETs at § 24

"24. At para. 35 she says that there is a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals. The former point is unexceptionable. The

latter reflects a statement made by Auld LJ at para. 25 of his judgment in Robertson. That statement was the subject of some discussion in the later decision of this Court in Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327 (per Wall LJ at paras. 24-25 and Sedley LJ at para. 31), but it is not a ground of appeal that the Judge's reference to that statement constituted a misdirection, and in any event I do not think that it did."

Burden of proof and the `"reason why"

4.10. Underhill J. (as he then was) said this in **A Gay v Sophos plc UKEAT/0452/10/LA:**

27 "It is now very well-established that a tribunal is not obliged to follow the two-stage approach: see Laing v Manchester City Council [2007] ICR 1519 , at paras. 71-77 (pp. 1532–3) (approved in Madarassy). If it makes a positive finding that the acts complained of were motivated by other considerations to the exclusion of the proscribed factor, that necessarily means that the burden of proof, even if it had transferred, has been discharged."

4.11. The then President of the EAT, Simler J. opined in **Pnaiser v. NHS England and another [2016] IRLR 170:**

38 "Although it can be helpful in some cases for tribunals to go through the two stages suggested in Igen v Wong, as the authorities demonstrate, it is not necessarily an error of law not to do so, and in many cases, moving straight to the second stage is sensible"

4.12. Following the guidance given by the EAT in **Barton v. Investec Henderson Crossthwaite Securities Ltd [2003] IRLR 352,** as developed and refined by

the Court of Appeal in **Igen Ltd v. Wong and others [2005] IRLR 258** & **Madarassy v. Nomura International plc [2007] IRLR 246**, the burden of proof in a discrimination claim falls into two parts.

Stage One

4.13. Firstly, it is for C to prove on the balance of probabilities facts from which a reasonable tribunal could properly conclude, on the assumption that there is no adequate explanation, that R has committed an act of discrimination which is unlawful. (The outcome of the analysis by the tribunal at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.)

4.14. If C does not prove such facts, he/she must fail.

Stage Two

4.15. Secondly, where C has proved facts from which it could be inferred that R has treated C less favourably on proscribed grounds, then the burden of proof moves to R.

4.16. It is then for R to prove that it did not commit or, as the case may be, is not to be treated as having committed that act.

4.17. To discharge that burden it is necessary for the R to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the proscribed grounds of which complaint is made.

4.18. That requires a tribunal to assess not merely whether R has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not any part of the reasons for the treatment in question. If R can do this, the claim fails.

4.19. Since the facts necessary to prove an explanation would normally be in the possession of R, a tribunal would normally expect cogent evidence to discharge that burden of proof.

4.20. If the burden is not discharged, the tribunal is bound to find that discrimination has taken place.

4.21. As observed by Langstaff J. (EAT President, as he then was) when considering whether "stage one" has been satisfied by a claimant in a discrimination claim:

"**It has been so well-established as to be trite that the bare facts of a different status and a difference in treatment are insufficient to achieve this; they only indicate a possibility of discrimination". – Millin v. Capsticks Solicitors LLP - UKEAT-0093/14 and UKEAT/0094/14.**

Direct Discrimination

4.22. Section 13(1) of the Equality Act 2010 ("EqA") provides that direct discrimination occurs where, because of a protected characteristic, a person (A) treats another (B) less favourably than (A) treats or would treat others. An employee claiming direct discrimination must show that she has been treated less favourably than a real or hypothetical comparator in circumstances that are

not materially different to theirs – see Section 23 EqA. The relevant "circumstances" are those factors which the employer has taken into account in deciding to treat the Claimant as it did with the exception of the Claimant's – see **Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.**

4.23. Therefore in a claim based on the Claimant's disability the comparator must be someone whose circumstances are identical to the Claimant in all material respects but does not share the claimant's protected characteristic.

4.24. According to the EqA, discrimination based on disability occurs where the less favourable treatment is "because of" the Claimant's disability. The EqA requires the Tribunal to consider the reason why the Claimant was treated less favourably and determine what was the employer's conscious or sub-conscious reason for the treatment.

Reasonable adjustments- SS 20 & 21 EqA

4.25. On the facts of this case, the Claimant relies on the application of the PCP identified in the LOI, namely " **Increasing claimant's workload and requiring work to be done in short time**". The duty is imposed on an employer where a provision, criterion or practice applied by it puts a disabled person at a substantial disadvantage in comparison with those who are not disabled. In those Circumstances, the employer must take such steps as it is reasonable to take to avoid the disadvantage – Section 20(3) EqA 2010.

4.26. This is subject to Paragraph 20 of Schedule 8 to the EqA 2010, which provides that the duty to make reasonable adjustments will not arise unless the employer knows or ought reasonably to know of the disabled person's disability and that the disabled person is likely to be placed at a substantial disadvantage.

4.27. It is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment - **Royal Bank of Scotland v Ashton UKEAT/0542/09/LA & 0306/10/LA** per Mr. Justice Langstaff at paragraph 24.

4.28**.** In **Ishola v Transport for London [2020] EWCA Civ 112,** the Court of Appeal decided that a "provision, criterion or practice" under the Equality Act 2010 can only be established where there is some form of continuum in the sense of how things generally are or will be done by the employer. Though this will apply to some one-off acts in the course of dealings with an individual employee, it will not apply to one-off acts where there is no indication that the same decision would apply in future.

4.29 The court held that if an employee is unable to make out a claim for direct discrimination or discrimination arising from disability related to an act or decision of the employer, it would be artificial and wrong to convert the employer's act or decision into the application of a discriminatory PCP. This was not the aim of the reasonable adjustments or indirect discrimination legislation.

4.30 The words "provision, criterion or practice" are not terms of art, but are ordinary English words. Though the Equality Act 2010 Statutory Code of Practice issued by the Equality and Human Rights Commission (which courts and tribunals are obliged to take into account in any case in which it appears to be relevant) confirms that these words should be construed widely, it is nevertheless significant that Parliament chose these words specifically and did not choose "act" or "decision" instead

Harassment related to disability

4.31. Insofar as is material section 26 EqA provides:

"26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

….

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

The following propositions emerge from the Authorities in this area;

4.32. Decisions relating to work can amount to 'unwanted conduct'- **Prospects for People with Learning Difficulties v Harris UKEAT/0612/11.**

4.33. 'Unwanted conduct' can take place even when the claimant is not present - IDS Employment Law Handbooks, Volume 4, Chapter 18 notes 3 first instance examples**: Mussilhy v Currie Motors UK Ltd ET Case No.2375566/11,**

Gardner v Tenon Engineering Ltd ET Case No.2374878/11, Dawkins v Benham Publishing Ltd and ors ET Case No.2401159/12.

4.34. Unwanted conduct can include 'a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour'. Unwanted is essentially the same as 'unwelcome' or 'uninvited' – See §§7.7 and 7.8 of the Equality and Human Rights Commission's Code of Practice on Employment.

4.35. The context in which a remark is given is always highly material. **See Grant v H. M. Land Registry [2011] EWCA 769** & **Heafield v Times Newspaper Ltd. UKEATPA/1305/12/BA.**

Whistleblowing

4.36. Section 43A of the Employment Rights Act 1996 (ERA) provides:

"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

4.37 Section 43B ERA states

"(1) In this Part a "qualifying disclosure" means any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following –

….

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."

4.38 Section 43C ERA provides that a disclosure to a worker's employer is a qualifying disclosure.

4.39 Section 47B ERA provides that 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 had made a protected disclosure.

4.40 Under section 48 (2) ERA it is for the employer to show the ground on which any act, or deliberate failure to act, was done (where it is asserted that it was on the ground of having made a public interest disclosure). The employer must prove on the balance of probabilities that the act or deliberate failure was not on the grounds that the employee had done the protected act.

4.41 **Martin v London Borough of Southwark** [2021] 6 WLUK 672 (EAT 10 June 2021) referred to the judgment of HHJ Auerbach in **Williams v Michelle Brown AM** UKEAT/0044/19/OO who identified five separate stages to applying the necessary tests, as follows:

"**9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."**

"'10. Unless all five conditions are satisfied there will be not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work

through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn, its reasoning and conclusions in relation to those which are in dispute."

4.42. **Kilraine v Wandsworth London Borough Council (2018) ICR 1850** is authority for the proposition that that there is no rigid dichotomy between making an allegation and conveying information so that a disclosure may be a mixture of the two.

4.43 The Tribunal must focus on whether the disclosure had a material influence that is more than a trivial influence on the treatment – see **NHS Manchester v Fecitt (2012) IRLR 64.**

5. CONCLUSIONS

5.1. Our conclusions are addressed by reference to the list of issues contained in the Miller Order.

Time Jurisdiction: Issues (i) and (ii) of LOI

5.2. Any complaint in relation to a matter that occurred before 26 September 2019 is potentially out of time. We consider each such allegation separately. The claimant's very short submission on this issue was that he asserted that the conduct he complained of was conduct extending over a period of time. It started, he thought, on 6 June 2019 and continued to the end of his contract. It was behaviour that started with the conduct of SB and MT. It was just and equitable to consider (any

complaints that were potentially out of time) as the respondent's actions were continuous whilst he was away from work.

Public interest disclosure (PID): Issues (iii) to (viii) of the LOI

5.3. It is to be remembered that what is required is that the worker making the disclosure has **a reasonable belief** that the disclosure **is in the public interest and tends to show** one of the six statutory categories of 'failure' set out in ERA S 43B(1).

5.4. The Tribunal's attention was drawn to the case of **Parsons v Airplus International Ltd UKEAT/0111/17** ***(13 October 2017, unreported)*** In which the EAT pointed out that the determination that in law a disclosure does not have to be either wholly in the public interest or wholly from self-interest does not prevent a tribunal from finding on the facts that it was actually only one of them.

5.5. Further, in **Blackbay Ventures Ltd t/a Chemistree v Gahir UKEAT/0449/12,** the EAT held that other than in obvious cases, where a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference, for example, to statute or regulation.

PID- §(vi) a. of LOI- ***The claimant's heavy workload and the fact that one person was trying to manage fire safety arrangements for the whole organisation***

5.6. It is accepted by the respondent that SS stated that he was concerned about the sufficiency of resources for the Competent Person. However, the respondent submits that the claimant did not identify the legal duty, nor assert that there **had been** a breach of a legal duty and could not reasonably believe that one would occur in circumstances where others (MT in particular) were ensuring that the Competent Person tasks were being done.

5.7. Further, it is asserted by the respondent that SS has given no evidence that, at the time the issue was raised by him, he held a reasonable belief that raising the issue was in the public interest as opposed to justifying his underperformance in his role. We find that the matter was raised by SS in his own interest and not in the public interest.

5.8. For all of the reasons advanced by the respondent, we do not find that PID- §(vi) a constituted a protected disclosure.

PID- §(vi) b of LOI - ***That as an organisation, the respondent could be failing in its duty to comply with Fire Safety regulations, putting people at risk, particularly in mixed commercial and residential premises which had fire safety deficiencies***

5.9. There is no evidence to support the making of this disclosure in the notes of the meeting of 25 September 2019 [763 -765]. The respondent disputes any such disclosure was made on that occasion. The claimant broadly accepted the accuracy of the notes in cross-examination whilst pointing out that they were not his notes and that some parts he remembered differently. The claimant had no notes of his own of the meeting.

5.10. In cross examination on this point, the claimant was taken to the letter of 22 November 2019 [871] which is specifically not advanced as a PID where this matter was plainly raised. The suggestion being that he was mistaken about raising it earlier The claimant also pointed to an email in March 2019 but which was also not relied on as a PID.

5.11. On balance, we do not accept that this alleged PID was communicated on 25 September 2019.

5.12. Further, as the respondent argues, even if the allegation was made on 25 September 2019, there are still formidable obstacles to the matter

being raised as constituting a PID. Taken at its highest, the communication is a bland observation which did not disclose any information or detail.

5.13. Lastly, we do not accept that the evidence supported a reasonably held belief that the communication, if made, was:

5.12.1 in the public interest; nor that

5.12.2 It tended to show one of the matters listed in in sub-paragraphs (a) to (f) of S43B91) ERA.

PID- §(vi) c of LOI- *That there was a lack of competence in the internal repairs team, a lack of knowledge and a lack of resources*

5.14. The closest reference to this in the notes of the meeting of 25 September 2019 [763 -765] is at the bottom of 763:

"Legislation – responsible persons should have enough/sufficient no of competent persons"

5.15. The respondent denies that the communication as expressed in **PID- §(vi) c of LOI** was made at the meeting on 25 September and that if it was made, it was no more than an attempt to deflect responsibility for his own failings.

5.16. On the evidence before us, we find that:

5.16.1 the communication as pleaded was not made by SS;

5.16.2 if made, was "just a bland allegation" as submitted by the respondent;

5.16.2 if made, the claimant did not have a reasonably held belief that the communication was in the public interest or that It tended to show one of the matters listed in in sub-paragraphs (a) to (f) of S43B(1) ERA

PID- §(vi) d of LOI- ***That the claimant was being used as a scapegoat for the respondent's failure to address fire safety concerns, of which the respondent was aware.***

5.17. The claimant's evidence on this alleged disclosure was unsupportive of it having been made at the meeting. He initially accepted in cross examination that he may not have used the word scapegoat but may have used other words. That evolved to a position where he said that that was how he felt even though that may not have been what he told the respondent at the meeting. He went on to say whether or not it came across in the meeting, he didn't know. Further he didn't want to come across as accusing anyone at that point.

5.18. On this alleged disclosure, on the evidence before us, we find that:

5.18.1 the communication as pleaded was not made by SS;

5.18.2 especially given that he accepted his own failings at that meeting, if made, the claimant did not have a reasonably held belief that the communication was in the public interest or that It tended to show one of the matters listed in in sub-paragraphs (a) to (f) of S43B(1) ERA.

PIDA detriments – **PID - §(vii) of LOI**

5.19. Strictly, we do not need to go on to consider the issue of detriment in view of our findings on the **PIDA** disclosures. We go on to do so, should we be wrong in respect of our findings above.

PID- §(vii)a of LOI - ***The respondent took steps to deliberately remove the claimant from his role by making it appear that he was underperforming when he wasn't, culminating in the meeting on 28 October 2019.***

5.20. We have already decided above that this is not the case on the facts found - see § 3.57 above.

5.21. We also note the inconsistency in the claimant's case in that he alleges that the efforts to remove him began as early as 6 June 2019 or even

earlier on 13 May 2019. As he put it in cross examination when asked about an alleged conspiracy to remove him as from 6 June 2019:

> *" Looking at the evidence - may have been made from 13 May onwards - seems it escalated amongst members of staff and a method to carry out a pre-determined course of action"*

5.22. We find no evidential basis for even a prima facie case that the alleged disclosures, if made, had any material influence on the respondent's actions in respect of removing the claimant. The respondent had concerns about the claimant long before.

PID- §(vii)b of LOI - ***On 1 November 2019 the respondent sent a letter to the claimant inviting to a meeting on 5 November day with a view to failing his probationary period and dismissing him. The claimant did not receive the letter until 4 November 2019***

5.23. The Tribunal can understand why SS would see this letter as a detriment. However, we find that there is no causal connection between the alleged disclosures and the detriment on the facts. It is the claimant's own case that this was pre-planned by the respondent for some time. It was sent in consequence of the respondent's conclusions about the claimant's performance during his probationary period and not, we find, as a result of the disclosure.

PID- §(vii)c & d of LOI

c. On 7 November 2019, the claimant received a telephone call from Simon Banfield asking him to resign with immediate effect or he would dismiss the claimant anyway.

d. On 8 November 2019, the claimant received a telephone call from Simon Banfield asking the claimant to send a letter of resignation with immediate effect and that if he didn't do that the claimant would have a dismissal on his record.

5.24. We decline to find that this constituted a detriment on the facts. We prefer SB's account that there was no request or insistence on the part of SB. Rather the claimant was being offered options so as to avoid

having a dismissal on his employment record. Our findings on the two calls are set out above at §§ 3.65 to 3.68.

PID- §(viii) of LOI

5.25. For completeness, we record that the claimant abandoned any argument that he suffered a detriment with reference to the loss of 2 months' notice following his immediate resignation.

Direct discrimination because of disability – Issues (x) – (xii) of LOI

Issue (x) a

5.26. We have found that this did not occur, and the claim fails accordingly. Further, at least part of this complaint is out of time insofar as any of the actions relied on by the claimant took place before 29 September 2019.

Issues (x) b to f

5.27. These complains are out of time. We do not accept they were part of a continuing act. No proper or sufficient basis for extending time on and just and equitable grounds was advanced, and we decline to extend time.

5.28. Further insofar as the allegations conflict with our findings of fact, that is an additional basis for rejecting these claims.

5.29. In addition, even if the factual allegations alleged by the claimant had been established, Stage one of the **Igen** test is not satisfied. SS has not proved on the balance of probabilities facts from which a reasonable tribunal could properly conclude, on the assumption that there is no adequate explanation, that the respondent has committed an act of discrimination which is unlawful.

Issue (x) g

5.30. This complaint is said to have continued until the end of the claimant's employment "on a number of occasions". MT denied that SS was allocated additional work on top of the workplan. He gave an example on 30 September 2019 (§57 of his witness statement) of the claimant adding to his workload by taking on work that was outside of his work plan.

5.31. MT went on to say (§58 of his witness statement):

"I can't categorially say that the Claimant wasn't given additional pieces of work to complete outside of his work plan, for example, answering routine queries (such as that at page 776) or answering the phone but such tasks were minimal and a key expectation of the Claimant's role; the Claimant was not asked to take on any large-scale projects outside of his work plan."

5.32. We accept MT's evidence on this point and the allegation fails on the facts. Insofar as any additional work was allocated, we apply the reverse burden of proof. SS has not proved on the balance of probabilities facts from which a reasonable tribunal could properly conclude, on the assumption that there is no adequate explanation, that by allocating such work, the respondent has committed an act of discrimination which is unlawful. Stage one of the **Igen** approach has not been established.

Issue (x) h

5.33. This complaint is partly out of time in respect of meetings prior to 29 September 2019. In any event it is unfounded and fails on our findings of fact. See §3.51 above.

Issue (x) i

5.34. This complaint fails on our findings as set out above at §§3.58 and 3.59. We prefer MT's version of what took place at that meeting.

Issue (x) j

5.35. The respondent accepts that it sought to support the claimant in respect of his caring responsibilities and permitted him as required to leave work

early to tend to his parents' needs. We do not accept that SS was prevented from working weekends by MT or that the advice tendered in respect of life/work balance was given to prevent him completing his work. That is a strained interpretation of events which we reject - see §3.50 of the Key fact section above. This claim is unfounded and fails.

Issues(xi) and (xii)

5.36. Insofar as any treatment alleged by the claimant under this head of claim has been established, it follows from our conclusions that we do not accept that:

5.36.1 It constituted less favourable treatment; or that

5.36.2 the treatment was because of the claimant's disability.

Reasonable adjustments – Issues (xiii) to (xvii) of the LOI

5.37. The respondent's case is that it was not aware of the claimant's disability until this was disclosed at the 6 June 2019 meeting. The claimant suggests that he had mentioned to SB that he had been referred for an assessment autistic at a meeting on 8 February 2019. SB does not recall any such reference.

5.38. In any event, this claim rests on the application of a sole PCP by the respondent, namely:

Increasing claimant's workload and requiring work to be done in short time

5.39. In short, we reject the allegation that the respondent applied that PCP at any time during his employment. Our findings extensively set out above establish the reverse. We do not consider this claim further save to add that we also found that considerable and far-reaching adjustments were made to cater for the claimant's disability as identified in §§169 to 171 of the respondent's submissions.

Harassment related to disability- Issues (xix) to (xxii) of the LOI

5.40. We refer to our determination on the issues (x) a- j set out above and our findings of fact in respect of those issues.

5.41. We accept that, insofar as the claimant has established any of the conduct he alleges on the issues at (x) a- j, such conduct was unwanted.

5.42. We are unable to find any factual basis, for even a prima facie case, that the conduct related to the protected characteristic of disability. Applying the reverse burden of proof approach in **Igen,** this claim also fails.

Remedy

5.43. This does not arise as the claimant has not succeeded in establishing any of his claims.

Final

5.44. We have no doubt that the claimant will be disappointed by the conclusions reached by the Tribunal. The claimant considers that he has suffered a great wrong at the hands of the respondent and has been the subject of a concerted conspiracy by a number of employees of the respondent to remove him from the workplace.

5.45. The claimant is scornful of the extensive efforts made by Wolverhampton Council to investigate the claimant's concerns after his departure [883-962]. He suggests that they went to considerable lengths to procure the services of external contractors to script a predetermined report to portray a facade of compliance when nothing could be further from the truth – see §181 of SS witness statement

5.46. In his evidence and submissions to the Tribunal, the claimant used expressions to describe the respondent's conduct such as "plotting and planning", "an orchestrated effort", a "campaign to deflect blame" and "unfair and predetermined conduct". He alleges that the respondent's actions were deliberately done to degrade and humiliate him. Further, once others became aware of that conduct taking place, others chose to join in to compound his isolation.

5.47. On the basis of our findings above, based on a dispassionate and detailed review of the evidence, the claimant is simply wrong in his overall assessment of the respondent's conduct in its dealings with him.

Employment Judge Algazy QC

On 5 April 2022

Sent to Parties on 27/04/2022

LIST OF ISSUES

Time limits / limitation issues

(i) Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA") / sections 48(3)(a) & (b) of the Employment Rights Act 1996 ("ERA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.

(ii) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 26 September 2019 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

Public interest disclosure (PID)

(iii) Did the claimant make one or more protected disclosures (ERA sections 43B [& 43C]) as set out below. The claimant relies on subsection(s) (b) of section 43B(1). The respondent defends the claim on the following basis in particular: that the claimant did not make any qualifying disclosures and that the claimant was not subjected to any detriments and was not asked to resign with immediate effect. Any detriments that are found were not on the grounds that the claimant made any protected disclosures

(iv) Did the respondent subject the claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.

(v) If so was this done on the ground that he made one or more protected disclosures?

(vi) The alleged disclosures the claimant relies on are as follows:

a. On 25 September 2019 in a meeting with Mark Taft, the claimant's line manager and Cara Weatherley (HR) the claimant raised a number of concerns about the following matters:

(a) The claimant's heavy workload and the fact that one person was trying to manage fire safety arrangements for the whole organisation

(b) That as an organisation, the respondent could be failing in its duty to comply with Fire Safety regulations, putting people at risk, particularly in mixed commercial and residential premises which had fire safety deficiencies

(c) That there was a lack of competence in the internal repairs team, a lack of knowledge and a lack of resources

(d) That the claimant was being used as a scapegoat for the respondent's failure to address fire safety concerns, of which the respondent was aware.

b. On 30 October in the claimant's letter of resignation he expressed his intention to raise formally the complaints that he had raised on 25 September 2019

c. The claimant does not now rely on the letter sent on 22 November 2019 to the directors as a protected disclosure.

(vii) The alleged detriments the claimant relies on are as follows:

a. The respondent took steps to deliberately remove the claimant from his role by making it appear that he was underperforming when he wasn't, culminating in the meeting on 28 October 2019.

b. On 1 November 2019 the respondent sent a letter to the claimant inviting to a meeting on 5 November day with a view to failing his probationary period and dismissing him. The claimant did not receive the letter until 4 November 2019

c. On 7 November 2019, the claimant received a telephone call from Simon Banfield asking him to resign with immediate effect or he would dismiss the claimant anyway

d. On 8 November 2019, the claimant received a telephone call from Simon Banfield asking the claimant to send a letter of resignation with immediate effect and that if he didn't do that the claimant would have a dismissal on his record.

(viii) For the avoidance of doubt, the claimant relies on his alleged treatment in being asked to resign immediately and the way that was done and the attendant loss of the two moth's notice he would otherwise have had as detriments. The claimant does not claim automatic unfair dismissal under s 103A Employment Rights Act 1996.

Disability

(ix) Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition(s): Anxiety?

EQA, section 13: direct discrimination because of disability

(x) Has the respondent subjected the claimant to the following treatment:

a. Pursuing a course of action intended to remove the claimant from the respondent's organisation including:

b. At a performance management and probationary review meeting on 6 June 2019, Mark Taft (the claimant's line manager) raised a number of issues in a meeting that he had never raised before and failed him on objectives that had never been set.

c. At the same meeting, Mark Taft said derogatory things about the claimant – that he was distant form colleagues and prefers to work in isolation; referring to the fact that the claimant had been referred for an assessment as to whether he has autistic spectrum disorder. These allegations were vague and related to the claimant's personality which arise from his anxiety.

d. On 29 July 2019 at a return to work meeting, the respondent presented the claimant with an onerous work plan which meant the claimant was unable to adhere to the recommended phased return. The claimant says this was a deliberate act to exacerbate the claimant's disability.

e. After his return to work on 30 July 2019 the claimant was instructed, through his line management but ultimately by the Head of Department through to stop attending Fire Risk Assessment Senior management team meetings. The claimant is unable to identify the precise date but it was shortly after his return to work.

f. On 9 September 2019 the claimant was put onto another action plan despite successfully completing the previous one. No explicit deadlines were set out in the plan, it was said to be ongoing. The claimant maintains that this was misleading as it transpired that there was a deadline of 28 October 2019. The claimant says he was given an excessive workload under this plan.

g. The claimant was allocated additional work on top of that set out in the workplan. This happened on a number of occasions from the Claimant's return to work at the beginning of August until the end of his employment on 28 October 2019

h. Between 12 September 2019 and 24 October 2019, the claimant was required to attend weekly meetings with his line manager lasting 2 hours. The claimant says that these meetings were intended to take the claimant's focus away from completing his work and to make it difficult to achieve the tasks he had been set

i. On 28 October 2019, (at the end of his probationary period) at a meeting with his line manager and an HR officer the claimant was failed on work within action a plan. The claimant was wrongly accused of failing to complete tasks that had been set and of failing to manage staff who were not his responsibility. The claimant says that information was used or manipulated to wrongly and unreasonably show that he was failing.

j. The respondent had agreed that the claimant could leave work early to go to his parents' house to provide care and specifically to administer insulin to his father. The claimant had therefore been working at the weekends to make up the work to allow him to

comply with the respondent's requirements. The act the claimant complains of is that he was prevented from working weekends thereby being prevented from completing all of his work.

(xi) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it

treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

(xii) If so, was this because of the claimant's disability of anxiety and/or because of the protected characteristic of disability more generally? The claimant asserts that the treatment that he was subject to was part of a deliberate ploy to get him out of the organisation because he was perceived as unable to cope with the work because of his anxiety.

Reasonable adjustments: EQA, sections 20 & 21

(xiii) Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

(xiv) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

a. Increasing claimant's workload and requiring work to be done in short time

(xv) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:

a. Having a lot of work to do in a short period of time raised the claimant's anxiety levels, exacerbating his anxiety?

(xvi) 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?

(xvii) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

a. Providing support and resources and giving the claimant a reasonable manageable workload

b. Providing work to be done over a longer period of time allowing the claimant to manage his workload

c. Giving the claimant the ability to delegate duties or tasks and obtain support from other people

(xviii) If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

EQA, section 26: harassment related to disability

(xix) Did the respondent engage in conduct as follows:

a. Each of the issues set out under (x) (a) – (j) above

(xx) If so was that conduct unwanted?

(xxi) If so, did it relate to the protected characteristic of disability?

(xxii) Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? The claimant asserts that the conduct referred to was intentional for the purposes of seeking to bring his employment to an end.

Remedy

(xxiii) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and that have not already been mentioned include:

a. What losses has the claimant incurred as a result of the

respondent's actions?

b. What steps has the claimant taken to mitigate those losses?

c. Whether the claimant has suffered any injury to feelings. The attention of the claimant is drawn to the case of Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871 and the presidential guidance on Employment Tribunal awards for injury to feelings and psychiatric injury of 5 September 2017 and the update of 25 March 2019 for the purposes of preparing his schedule of loss.

d. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

e. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?