



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs N Pilgrim

**Respondent:** Herefordshire & Worcestershire Health & Care NHS Trust

**Heard at:** Birmingham (in public, by CVP)

**On:** 30 March 2023

**Before:** Employment Judge Kenward (sitting alone)

**Representation**  
**Claimant:** in person  
**Respondent:** Mr A MacMillan, Counsel

## PRELIMINARY HEARING RESERVED JUDGMENT

1. The Claimant was disabled within the meaning of section 6(1) of the Equality Act 2010, by reason of anxiety and depression, at all material times from 19 February 2018.
2. The application of the Claimant to amend her claim, as set out in the Case Management Order of 13 October 2022 is allowed to the extent that the Claimant is given permission to amend her Claim to include the complaints of disability discrimination set out at paragraph 5(b) to (e) of the Case Management Summary.
3. The application of the Claimant to amend her claim, as set out in the Case Management Order of 13 October 2022 is allowed to the extent that the Claimant is given permission to amend her Claim to include the complaint of unlawful deductions from wages / breach of contract set out at paragraph 8 of the Case Management Summary.
4. The Claimant is refused permission to amend her Claim in respect of the application of the Claimant to amend her claim, as set out in the Case Management Order of 13 October 2022, to include the complaint of disability discrimination

contrary to Equality Act 2010 set out at paragraph 5(a) of the Case Management Summary.

5. The Claimant is refused permission to amend her Claim in respect of the application of the Claimant to amend her claim, as set out in the Case Management Order of 13 October 2022, to include the complaints of race discrimination contrary to Equality Act 2010 set out at paragraph 6 of the Case Management Summary.
6. Any complaint of race discrimination contrary to Equality Act 2010 made in the ET1 Form of Claim is dismissed on the basis that any complaint of race discrimination is entirely unparticularised so that the ET1 Form of Claim fails to disclose the basis of a complaint of race discrimination.
7. The Claimant is refused permission to amend her Claim in respect of the application of the Claimant to amend her claim, as set out in the Case Management Order of 13 October 2022, to include the complaints of (whistleblowing) victimisation contrary to Employment Rights Act 1996 section 47B by being subjected to detriment on the ground of making public interest disclosures and by being automatically unfairly dismissed contrary to Employment Rights Act 1996 section 103A by reason of making public interest disclosures.
8. Case Management Orders have been made to enable the Claimant's remaining complaints of (ordinary) unfair dismissal, disability discrimination and unlawful deductions from wages / breach of contract to be listed for a final hearing.

## **REASONS**

1. This was an open / public Preliminary Hearing to determine whether the Claimant was disabled at the material time and whether she should be permitted to amend her Claim. Depending on the determination of those issues, the Tribunal would also need to decide whether any part of the Claim should be dismissed. In relation to any part of the Claim in respect of which the proceedings continued, the Tribunal would need to make any further orders necessary for any subsequent hearing to take place.
2. I apologise for the time taken in providing this Judgment to the parties.
3. The issues to be determined were set out in the Case Management Order of Employment Judge Kelly on 13 October 2022 (which followed a Case Management Summary). The issues to be determined were listed on the basis that it would be subject to the discretion of the Employment Judge on the day of the hearing, and subject to there being sufficient time, with the issues being as set out below.

*“1.2.1. Does the Tribunal allow the Claimant to amend her Claim as set out in paragraphs 5 to 8 inclusive of the Summary above?”*

1.2.2. *If the Tribunal refuses the Claimant to amend her claim in any of the ways sought, this may mean that the parts of the claim are entirely unparticularised and that the Tribunal may dismiss those parts of the Claimant's claim.*

1.2.3. *Was the Claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times (2017 to November 2020) because of the following condition(s): anxiety and depression? (This will only need to be considered by the Tribunal if the Respondent does not concede the disability issue for the whole of the relevant period or if the Tribunal allows the Claimant to amend her claim to add acts of alleged disability discrimination for the period prior to her dismissal.)*

1.2.4. *Making any further orders as may be required to prepare for the final hearing.*

1.2.5. *Finalising a list of issues to be determined at the final hearing.*

1.2.6. *Arranging a final hearing".*

### **The Claim and subsequent proceedings**

4. The Claimant was employed by the Respondent from 4 September 2000 until the termination of her employment with effect from 10 November 2020 on the stated grounds of capability (related to health in that she had been absent from work due to sickness for 13 months). At the time of her dismissal, she was employed as a senior human resources manager.
5. The Claimant provided notification to ACAS on 8 February 2021. The ACAS certificate was issued on 17 March 2021. Tribunal proceedings were commenced by way of an ET1 Form of Claim on 16 April 2021.
6. The Claimant completed section 8.1 of the ET1 Form of Claim by ticking boxes to indicate that she was bringing complaints of unfair dismissal, race discrimination and disability discrimination. Similarly, she ticked the requisite boxes to indicate that she was claiming that she was owed arrears of pay and other payments. She also ticked the final box of section 8.1 to indicate that she was bringing another type of complaint, with this being identified as "*vicarious liability for bullying*".
7. At the beginning of the ET1 Form of Claim, immediately above section 1, an instruction appears in bold type which states that a Claimant must complete all questions marked with an asterisk. Both section 8.1 and section 8.2 of the ET1 Form of Claim are marked with an asterisk. Thus, section 8.2 of the ET1 Form of Claim requires that the Claimant set out the "*background and details of your claim*" with a further instruction to the effect that the details of the Claim should include the dates when the events which have been complained about happened. The Claimant simply inserted the words "*see attached*" into the box at section 8.2 of the ET1 Form of Claim. Unfortunately, nothing was attached.
8. Section 9.1 of the ET1 Form of Claim provides for a Claimant to tick the requisite boxes to indicate the remedy or remedies being sought. The Claimant ticked the requisite boxes to indicate that she was claiming compensation and a

recommendation. Section 9.2 of the ET1 Form of Claim then provides for a Claimant to give details as to the compensation or remedy being sought including the way in which any sum had been calculated. "*To be advised*" were the words simply inserted by the Claimant in this box.

9. For the sake of completeness, it should be noted that the Claimant ticked the requisite box at section 12.1 of the ET1 Form of Claim to indicate that she did not have a disability. This part of the ET1 Form of Claim is really seeking to identify any adjustments which the Tribunal might need to make over the course of the Tribunal proceedings.
10. On the basis of the Claimant's employment having ended on 10 November 2021, it can be seen that the Claimant had notified ACAS on the penultimate day before the expiry of any three-month preliminary time limit running from the date of her dismissal. She would then have had a period of a month from the date of the issue of the ACAS certificate on 17 March 2021 in order to issue proceedings and subsequently issued proceedings shortly before the end of this period. It follows that there was never going to be much time to rectify any defects before the time limit expired.
11. However, the Tribunal wrote to the Claimant on 10 May 2021 stating that her Claim had been accepted (so that it would be dealt with by the Tribunal). On the same date, the Claim was served on the Respondent. A notice of hearing was also sent out on 10 May 2021 listing the case for a preliminary hearing on 30 September 2021 to make case management directions. The notice of hearing attached a Case Management Agenda form for the parties to complete for the purposes of the preliminary hearing. Also on 10 May 2021, the Tribunal sent a letter to the Claimant stating that Employment Judge Harding had directed that the Claimant should be asked "*to send in their particulars of claim as they were not sent in with the claim form*". The Claimant was directed to do so by 17 May 2021.
12. On 14 May 2021, the Claimant replied to the Tribunal (although not copied to the Respondent) stating that she would send her Particulars of Claim in separately. The main purpose of the e-mail was to seek a postponement of the preliminary hearing listed for 30 September 2021 because the Claimant was planning to be out of the country. This was because her husband was going to see his mother overseas and her husband "*also cares for me so I would not be able to remain on my own*".
13. On 16 May 2021, the Claimant then wrote to the Tribunal stating that "*I have attached my particulars of claim; I've not done this before and continue to be unwell which makes it more difficult*". She added that if "*I have not done this correctly please let me know?*".
14. In fact, the document which the Claimant attached is a single page which effectively answers the questions being asked at boxes 1 to 3 of the Case Management Agenda form. The questions being asked by the remainder of the Case Management Agenda form (boxes 4 to 10) were not answered.
15. Box 2.1 of the Case Management Agenda form asks a party to identify the complaints that are being brought. For these purposes, the Claimant listed the

complaints set out below (by way of explanation, it should be noted that the references to "*Betrayed By Her Trust*" and "*Betrayed By Their Trust*" are not references to a complaint of breach of trust but references to the name of third-party organisations involved in conducting campaigns against the Respondent).

*"Unfair Dismissal*

*Breach of Trust and Confidence*

*Victimisation by Mr John Bagnall.*

*Direct Discrimination due to Disability*

*Associative Discrimination due to Race*

*Breach of Confidentiality relating to my personal data,*

*Harassment and Bullying; directly by Mr Bagnall, Andrew Crooke,*

*Harassment and Bullying directly by Dianna Compton, Nigel Gilbert, Betrayed By Her Trust and Betrayed By Their Trust.*

*Harassment and bullying indirectly (vicarious) by Nigel Gilbert, Betrayed By Her Trust, Betrayed By Their Trust and Dianna Compton".*

16. It should be noted that the above list of complaints still did not provide any detail as to the basis of the complaints, for example identifying the conduct or treatment which was alleged to amount to victimisation or discrimination or harassment or the date of that alleged treatment.
17. The Claimant's e-mail of 16 May 2021 was followed by another e-mail of 25 May 2021 seeking confirmation that the previous e-mail had been received and asking "*if there is anything I need to do urgently?*" It should be noted that it is not the responsibility of the Employment Tribunal to advise parties.
18. In the meantime, the Respondent had filed a Response on 17 May 2021. The covering e-mail made it clear that the correct name of the Respondent was Herefordshire & Worcestershire Health & Care NHS Trust. The name of the Respondent has subsequently been amended in this way.
19. The covering e-mail also made it plain that the Respondent was filing its Response without any Particulars of Claim having been included with the ET1 1 Form of Claim so that, other than commenting on the unfair dismissal complaint, it was submitted that the Respondent cannot or could not respond to any other allegations as these have not been particularised.
20. The position of the Respondent in this regard was also set out by completing box 6 of the ET3 Form of Response (rather than attaching any separate document). It was stated that the Respondent was unable to comment on any allegations of whistleblowing, race or disability discrimination without having any Particulars of Claim. It had concerns as to whether these complaints had been brought in time. It was also submitted that insufficient information had been provided to enable the discrimination complaints to be either accepted by the Tribunal or responded to by the Respondent.
21. The Respondent similarly pointed to the lack of detail regarding any complaint of being owed arrears of pay or other payments.

22. As far as the unfair dismissal complaint was concerned, it was accepted that the Claimant's employment had been terminated on 10 November 2020, with this being by reason of capability and being fair in all the circumstances of the case, with it being specifically asserted that the Claimant had "*agreed termination of employment without a hearing, following a period of 13 months sickness absence with no prospect of a return to work*". In these circumstances, it was contended that any unfair dismissal complaint had no reasonable prospect of success.
23. The Tribunal accepted the Response by letter dated 24 June 2021. In the process of doing so, it recognised that the document which had been sent by the Claimant on 16 May 2021 (in reply to the Tribunal's request to forward her Particulars of Claim) had not been provided to the Respondent. Accordingly, the letter attached this document, describing it as the Claimant's Particulars of Claim, and stated that the Respondent had 21 days to amend its Response, if it so wished.
24. The Respondent did not, as such, amend its Response. However, it wrote to the Tribunal on 14 July 2021 and the terms set out below.

*"Despite a requirement to file further particulars as there were no particulars included in the ET1 that was lodged (despite stating see attached on the form), the Claimant has not provided any further clarification in respect of the detail of the Claim. The Respondent has responded in respect of the unfair dismissal element of the Claim as it is acknowledged that given the Respondent admits that they dismissed the Claimant, the Respondent was able to outline the potentially reason for dismissal, ie capability and that in all the circumstances, the dismissal was fair.*

*"The Claimant indicated in her ET1 that there were other Claims relating to race and disability discrimination, as well as vicarious liability for bullying but did not provide any details. The Claimant was then required to file further particulars by 17 May but her further particulars do not provide any amplification as to what the Claims are, the dates they are said to have occurred or why it is alleged that this amounts to discrimination or which jurisdiction is said to be invoked. In those circumstances the Respondent submits that the Tribunal should not accept all other elements of the Claim, other than unfair dismissal, in accordance the Court of Appeal decision of (Secretary of State for BEIS v Parry [2018] EWCA Civ 672, CA) and rule 12 (1)(b) Employment Tribunals Rules of Procedure 2013 (as amended)".*

25. The Claimant replied on 15 July 2021. The e-mail stated that she had been extremely unwell mentally due to her experiences in the workplace (she referred to the way in which the Respondent had treated her after she had acted as a whistleblower and made a complaint about the behaviour of her manager towards her which she had believed to have been discriminatory). This had led to her not being able to attend work. She stated that she also believed that the Respondent had discriminated against her in the management of her sickness absence and so treated her differently from others in her situation. She described the effect on her mental health on the basis that she had been caused to find it very difficult to focus or to process information or to get motivated. She was extremely fatigued and her memory was affected. She found it difficult to look after herself and had been unable to maintain her home. She made reference to recent ill-health in that,

following a week of trying to manage her symptoms at home, she had been admitted to hospital on 29 May 2021 and discharged on 4 June 2021.

26. The correspondence from the Respondent which had brought this reply from the Claimant seems to have prompted the Tribunal to make directions on 3 August 2021 that the Claimant should provide further and better particulars of her race discrimination complaint and her disability discrimination complaint by 23 August 2021.
27. On 23 August 2021, the Claimant e-mailed the Tribunal with four attachments providing further information and documentation about her Claim.
28. One of the attachments to the Claimant's e-mail was a document headed "*Racial and Disability Discrimination*". It referred to including "*two examples of correspondence previously sent to the Trust in relation to my concerns about discrimination*". There seem to have been letters attached to the e-mail of 23 August 2021 which dated from 2020.
29. The document headed "*Racial and Disability Discrimination*" set out a number of allegations regarding the Claimant's treatment by John Bagnall, the Respondent's Associate Director of Human Resources, though these were essentially in summary form.
30. The allegations of race discrimination were that John Bagnall:
  - (1) treated the Claimant differently to other members of the operational Human Resources team;
  - (2) isolated the Claimant from and treated her as if she was not part of the senior team;
  - (3) undermined the Claimant's position as Senior Human Resources Manager, with the Claimant stating that she had many examples of this;
  - (4) made decisions based on personal allegiances and friendships of which the Claimant was not a part;
  - (5) undermined the Claimant's role in the Human Resources Department; and
  - (6) made decisions and treated the Claimant in a way which was influenced by race so as to amount to associative discrimination.
31. It can be seen that the further particulars provided as above are notably short on detail, for example as to what amounted to isolating or undermining the Claimant or the dates of any decisions or incidents which were influenced by race.
32. The allegations of disability discrimination were similarly fairly vague and involved allegations that John Bagnall:
  - (1) paid lip service only to the applicable requirements in respect of managing the Claimant's sickness absence;
  - (2) ignored her repeated requests for access to support to protect her mental health;
  - (3) did nothing to prevent the Claimant having to sit in a grievance meeting instigated by Andrew Crooke against her, although she had absent for a month with anxiety related to work.
33. Other allegations of disability discrimination were made against the Respondent in that it was alleged that the Trust:

- (1) manipulated the Claimant's allegations so as to protect John Bagnall while the Claimant did not have the capacity to make major decisions;
- (2) failed to manage her absence in accordance with the applicable policy for promoting staff health, well-being and attendance;
- (3) failed to protect the Claimant's mental health by allowing Andrew Crooke to target her notwithstanding the Claimant raising this with John Bagnall;
- (4) failed to instigate a redeployment search on the Claimant's behalf;
- (5) failed to place the Claimant at risk in accordance with the applicable policy;
- (6) failed to offer the Claimant access to the vacancy bulletin;
- (7) failed to offer the Claimant access to vacancies;
- (8) failed to identify any suitable alternative employment opportunities;
- (9) failed to identify how the Claimant could be supported back to work;
- (10) failed to provide a response to a letter sent by the Claimant to John Bagnall on 2 October 2019; and
- (11) failed to investigate a formal complaint made by the Claimant in an e-mail to Sarah Dugan dated 15 December 2019 (which had the effect of allowing John Bagnall to victimise her).

34. The Claimant's e-mail of 23 August 2021 also attached a document which had the top line / heading which stated "*I consider the termination of my contract to be unfair because*". These would appear to be the further particulars of her unfair dismissal complaint. Five matters were then listed by way of five bullet points which alleged that:

- (1) the Respondent had taken an adversarial stance against the Claimant after her meeting with the Chief Executive, Sarah Dugan, on 11 October 2019;
- (2) the Respondent had not investigated the complaint that the Claimant made at this meeting on 11 October 2019 against her line manager, John Bagnall;
- (3) the Respondent had not investigated the additional complaints that the Claimant made against her line manager on 15 December 2019;
- (4) the Respondent had failed to act on the Claimant's requests to be provided with additional support to protect her mental health;
- (5) the Respondent failed to act in accordance with the applicable policy for promoting staff health, well-being and attendance.

35. In this document (the further particulars of her unfair dismissal complaint), the Claimant described the concerns that she had raised at the meeting on 11 October 2019 as being concerns that she was raising under the whistleblowing policy, in respect of bad practices within the Respondent's HR department and more widely. As well as John Bagnall's behaviour towards her, which amounted to bullying, she claimed that she was then victimised as a result of having raised these concerns. This included being treated differently from other members of the team who were on long-term absences. As a result, she submitted an additional complaint on 15 December 2019 which was complaining about John Bagnall being allowed to victimise her because she had made a complaint against him.

36. The further particulars of the unfair dismissal complaint also refer to other factors which contributed to her long-term sickness absence such as being bullied by Andrew Crooke, who was described as a Unison representative, Dianna Compton,



described as a sexual health nurse, and Angela Allen, described as a sexual health administrator. The Respondent failed to protect her from the bullying of Andrew Crooke or investigate his behaviour towards her. The Respondent also failed to protect the Claimant from external bullying from Nigel Gilbert (the husband of a former employee) and protest groups created by Nigel Gilbert, namely Betrayed By Her Trust (BBHT) and Betrayed By Their Trust (BBTT) or the members of those groups. The Claimant suggests that this bullying had been ongoing since 2011. Details are given of the way in which Nigel Gilbert and other members of these groups, including Dianna Compton, abused the Claimant. In her oral evidence to the Tribunal, the Claimant explained that it was this bullying that she was referring to when she had ticked the box at section 8 of the ET1 Form of Claim to indicate that she was bringing another type of claim, namely vicarious liability for bullying. In other words, although she recognised that the bullying was by a party other than the Respondent, she was suggesting that the Respondent was responsible for it.

37. The further particulars of the unfair dismissal complaint then set out various extracts from the Respondent's policy for promoting staff health, well-being and attendance and suggested that there had been a failure by the Respondent, in particular John Bagnall, to act in accordance with these provisions. The Claimant suggests that there was a failure to manage her absence as a result of the fact that her line manager should not have been in a position to do so, since she had made a complaint against him, but an alternative manager was not identified. She does refer to Naomi Manning, Deputy Director of Strategy & Partnerships, having been assigned as a neutral point of contact in October 2019 but suggests that she was not neutral, in that she forwarded medical certificates to John Bagnall and was in communication with him, as well as providing information which was inaccurate but which was used for the purposes of the Claimant's ill-health retirement application, which was ultimately unsuccessful, albeit subject to appeal.
38. Within the further particulars of the unfair dismissal complaint, the Claimant also complains that the Respondent, through Sarah Dugan, refused her request for her sick pay not to drop to half pay in March 2020. The Claimant had sought to argue that the Respondent's failure to deal with her complaint or to manage sickness absence had caused her sickness absence to continue to the point where her contractual sick pay entitlement reduced.
39. The Claimant also references having sought to apply for an injury allowance in August 2020 which would potentially have reinstated her pay, whilst off sick, at 85% of her normal salary. The injury allowance application was to be investigated by a Solicitor, Rebecca Ollivere, who would then make a recommendation to the Director of Finance.
40. The Claimant was also critical of the delay in processing any ill-health retirement application. She is suggesting that any dealings with her ill-health retirement application may not have been entirely in good faith as the Respondent may have been seeking to protect its position in relation to possible employment law complaints by the Claimant. In fact, the Claimant decided not to pursue her application for ill-health retirement at the point in time when the Respondent was reviewing the position in respect of her long-term absence but did ultimately submit an application, after her employment had ended, on 17 December 2020.

41. Within the further particulars of the unfair dismissal complaint, the Claimant also makes reference to a colleague within the human resources department having been given alternative duties transporting welfare packages and donations to employees which the Claimant suggests is an opportunity which could have been offered to her so as to ease her back into work.
42. The Claimant refers to her own role having included involvement in seeking redeployment for an employee who was absent due to work-related stress with thirteen redeployment opportunities having been identified for that employee, which the Claimant contrasts with their own situation where she states she was not offered access to any vacancies.
43. Within the further particulars of the unfair dismissal complaint, the Claimant is also critical of the occupational health advice provided by the Occupational Health Consultant, Dr Basheer, to whom she was referred for an appointment on 16 July 2020, with the advice being to the effect that the Claimant had a low to moderate degree of anxiety and depression whereas an assessment undertaken by Dr Lisa Ingleby, a Senior Clinical Psychologist who was treating the Claimant, assessed the Claimant as having severe symptoms of depression and anxiety. This assessment by Dr Lisa Ingleby had referred to the Claimant describing trauma-related symptoms such as sleep disturbance and nightmares, significant lethargy, weight gain related to over-eating and anhedonia, with the Claimant struggling to take care of herself. The point which the Claimant seems to be making is that the assessment of Dr Basheer ultimately adversely impacted on her application for ill-health retirement (although the Claimant refers to this in the context of the outcome of her application made in December 2020 which was after she had left the Respondent).
44. The Claimant's covering e-mail which attached these further particulars also shows the attachments which were sent to the Tribunal. As stated, two other documents were also attached to the email, in addition to the document detailing her complaints of race discrimination and disability determination.
45. One of these documents was a letter dated 12 June 2020. The letter dated 12 June 2020 appears to be commenting upon a letter dated 28 April 2020 which appeared to be detailing the outcome of a review which had been conducted by an independent HR professional into the matters raised by the Claimant. Indeed, it can be seen that part of this document has later been cut and pasted so as to form part of the content of the document setting out the further particulars of the Claimant's race discrimination and disability discrimination complaints.
46. The 12 June 2020 letter refers to the investigator having suggested that the Claimant did not raise the issue of racial bias being behind John Bagnall's decisions and comments until a letter which she sent on 3 April 2020. In responding to this point, the Claimant's letter sought to set out the context in which she had raised the issue of racial bias. She did not believe John Bagnall to be racist, but believed that many of his decisions had been influenced by race. She specifically states that the actions that he took in relation to her were influenced by the ethnicity of her family, and her beliefs, so as to constitute associative racism. She states that these issues had previously been raised with John Bagnall on a number of occasions.

47. The preliminary hearing listed for 30 September 2021 was eventually postponed on the application of the Claimant by reason of both her ill-health and being overseas at the time of the hearing.
48. The parties were requested to provide availability from February 2022 although there was subsequently a delay in such availability been provided so that the date for the relisted preliminary hearing was ultimately 13 October 2022, when the preliminary hearing took place, as a private preliminary hearing for case management purposes, before Employment Judge Kelly.
49. The resultant Case Management Summary of Employment Judge Kelly identified the need for the Claimant to seek to amend her Claim and confirmed the basis upon which she was seeking to do so. It was explained that the Claimant had intended to provide details of her Claim with her Claim form and that this document was subsequently sent to the Tribunal, which seems to be referring to the e-mail of 16 May 2021. This seems to be incorrect, as the document attached to the 16 May 2021 e-mail was the document providing answers to the questions in the first part of the Case Management Agenda form (and the Claimant would only have been sent this form after she had submitted her ET1 Form of Claim). Similarly, the two documents setting out further particulars which were provided attached to the e-mail of 23 August 2023 had been drafted shortly before the e-mail was sent as the body of the e-mail refers to this. In other words, in so far as it was intended to attach any document as referred to in the box at section 8.2 of the ET1 Form of Claim, any such document has never been provided. In her oral evidence to the Tribunal, the Claimant suggested that she would have written some kind of statement but, if she did not, this was due to her poor mental health. Absent any confirmation that such a document ever existed, it is difficult to see its omission as an oversight.
50. Accordingly, the Case Management Order identified that the Claimant wished to amend her Claim to add the following factual allegations which she says amount to disability discrimination, as set out below.
  - (1) John Bagnall (JB), her line manager, failed to provide adequate support to Band 7 HR managers, in terms of providing a forum to discuss matters that were affecting such managers emotionally. The Claimant says this started in 2017 and that such support was requested in writing. (In the further information which the Claimant provided on 6 February 2023 she referred to a letter to John Bagnall dated 12 February 2019 for a summary of meetings relevant to this issue, between 2014 and 2019, which she had with John Bagnall, which she also listed, on the basis that these were meetings from which John Bagnall would have been aware of her mental health issues and need for support)
  - (2) In an occupational health referral, in October 2020, and in an application for ill health retirement, the Respondent misrepresented why the Claimant was off work with sickness absence saying that she was off work because of a review following whistleblowing concerns which the Claimant had raised; whereas, in fact, the Claimant was off work due to a medical condition.
  - (3) The Respondent did not ask the Claimant why she was absent from work and what was stopping her from returning to work.

(4) Naomi Manning failed to tell the Claimant in a meeting (date to be confirmed) that the Claimant had failed to complete a spreadsheet properly with the result that the Respondent failed to offer the Claimant redeployment. (The further information provided by the Claimant on 6 February 2023 did not identify the date of the meeting but stated that she produced the spreadsheet on 1 April 2020 and relies on e-mails from Naomi Manning sent between 1 April 2020 and 23 April 2020).

(5) The Claimant was dismissed by the Respondent (as the Claimant referred to unfair dismissal on her Claim form, it was suggested that what may be required to allow her to bring this complaint is to relabel a pleaded fact as an act of disability discrimination).

51. At this stage, it can be seen that, in relation to the complaints which it was proposed to add as complaints of disability determination, the type of disability discrimination being alleged had not been identified, for example in terms of whether this was direct disability discrimination contrary to Equality Act 2010 section 13, or discrimination arising from disability contrary to Equality Act 2010 section 15, or indirect disability discrimination contrary to Equality Act 2010 section 19 or breach of the duty to make reasonable adjustments contrary to Equality Act 2010 sections 20 and 21, or harassment related to disability contrary to Equality Act 2010 section 26. This would potentially be important, in terms of the Respondent understanding the way in which it was being suggested that its treatment of the Claimant amounted to unlawful discrimination. In relation to the complaints of disability discrimination, the type of disability discrimination being alleged had not been identified. The further particulars provided on 16 May 2021 did use the label of direct discrimination although the complaints of disability discrimination which the Case Management Summary of 13 October 2022 identified the Claimant as wishing to add by way of amendment appeared more obviously to be complaints of discrimination arising from disability, or a breach of the duty to make adjustments, and the Tribunal has considered the application to amend on this basis.

52. The Case Management Order also identified that the Claimant wished to amend her Claim to add factual allegations which she says amount to associative race discrimination. The Case Management Order stated that this was on the basis that she is associated with her husband and her children; she "*identifies her husband as 'black Caribbean'*" and she "*identifies her children as 'mixed white Caribbean'*". Accordingly, she wanted to amend her Claim to pursue the allegations of associative race discrimination set out below.

(1) From 2019, JB isolated the Claimant and undermined her position as HR manager, as set out below.

(a) In 2019, JB replaced the Claimant with a junior staff member to deal with change management for medical staffing which was within the Claimant's remit, without telling her that he was going to do so.

(ii) JB excluded the Claimant from the management of the absence of Marion Davis (date to be provided). (The further information provided by the Claimant on 6 February 2023 was that this relates to the period between November 2018 and April 2019).

(iii) Regarding Louise Seeney, the Claimant agreed the correct course of action with JB who then went behind the Claimant's back to agree something different

with Louise Seeney and without informing the Claimant (date to be provided). (The further information provided by the Claimant on 6 February 2023 stated that she does not have the date as she no longer has access to her NHS calendar, but she gives a more detailed version of events regarding this issue).

(2) When the Claimant was conducting an investigation (date to be provided), a witness (name to be provided) told the Claimant that JB had made a comment about the KKK outfit of the witness being in the cupboard. (The further information provided by the Claimant on 6 February 2023 seems to be that she does not have the date of the investigation meeting, but the information would be within the electronic investigation folder held by the Respondent's HR, but the conversation which was being described was in 2018 with Alice Horton)

(3) JB returned from a meeting in Birmingham in 2018 with Fran Tummey and told the Claimant they had been playing 'spot the white person' on the way home.

(4) When JB returned from the USA (date to be provided), he displayed a Donald Trump bumper sticker at a time when Donald Trump "was *taking racist actions*". (The further information subsequently provided by the Claimant on 6 February 2023 is that this was in January 2019).

(5) JB failed to take action when racist behaviour to a member of staff (name to be provided) was reported to him in 2018.

(6) JB said that they should make a fly on the wall documentary about the Claimant's family (date to be provided). (The further information provided by the Claimant on 6 February 2023 suggested that this was said often, from 2015 onwards, although she does not have specific dates).

53. Again, at this stage, it can be seen that, in relation to the complaints which it was proposed to add as complaints of race determination, the type of race discrimination being alleged had not been identified, for example, in terms of whether this was direct discrimination contrary to Equality Act 2010 section 13, or indirect discrimination contrary to Equality Act 2010 section 19 or harassment related to race contrary to Equality Act 2010 section 26.

54. The Case Management Order also identified that the Claimant wished to amend her Claim to add the following factual allegations which she said amounted to victimisation on the ground of having made public interest disclosures, as set out below.

(1) JB ensured she did not get travel pay in the December 2019 payroll.

(2) The Claimant's sickness was not managed as it should have been.

(3) The Respondent gave biased instructions to occupational health when asking for a report on the Claimant.

(4) The Respondent completed the ill health early retirement form in a way that was biased against the Claimant.

(5) The Claimant was dismissed (which was adding a complaint of automatic unfair dismissal).

55. In relation to the above complaints of whistleblowing victimisation, the Claimant was directed to send a list of the alleged qualifying protected disclosures she relied upon for the purposes of any complaint of victimisation.

56. The Case Management Order also identified that the Claimant wished to amend her Claim to add the following factual allegations which she says amount to a deduction from wages or breach of contract Claim, namely that the Respondent failed to pay the Claimant injury allowance from 23 March 2020 to 10 November 2020 which would have topped her absence pay up to 85% of pay.
57. The Case Management Order noted that “*many of the matters on which the Claimant wishes to rely took place outside the primary time limit for bringing Claims in the Employment Tribunal*”. In fact, other than any complaints related to her dismissal, it would appear that all of the matters which the Claimant was now seeking to pursue as complaints by way of amendment, would have been out of time, as at the date when the Claimant commenced proceedings, unless it could be said that any complaint of victimisation was part of a series of similar acts or failures (with the last of any such similar act or failure being in time) or any complaint of discrimination amounted to conduct extending over a period (with the end of that period being in time).
58. In listing a further preliminary hearing to decide whether the Claimant should have permission to amend her claim in the way set out above, the Case Management Order provided guidance to the effect that the decision as to whether or not to allow the Claimant to amend her Claim would be made based on the principles set out in the case of *Selkent Bus Company Limited v Moore [1996] ICR 1996, EAT*.
59. The Case Management Order also explained that if the Claimant wished to rely on poor health in making her application to amend, she should obtain medical evidence of poor health preventing her from properly explaining her Claim in her Claim Form or within a reasonable period of her Claim.
60. It was further made clear in the Case Management Order that if the above lists of the complaints which the Claimant was seeking to add by way of amendment did not contain all the events she wished to rely on in making complaints of discrimination or whistleblowing victimisation, then she would need to raise the additional matters she wished to rely on within 14 days of the date of the Case Management Order.
61. In relation to the issue of disability, the Case Management Order noted that the Claimant was contending that she was a disabled person in accordance with the Equality Act 2010 at all relevant times (2017 to November 2020) because of the following condition(s): anxiety and depression. It was further noted that the Respondent conceded that the Claimant was a disabled person, for these purposes, by reason of anxiety and depression, as at the date of the termination of her employment. However, it was not in a position to concede this point back to 2017 when the Claimant was saying that the acts of disability discrimination started. Accordingly, the Case Management Order directed that the parties provide evidence on this point and, once such evidence had been provided, if the Respondent still did not concede the issue of disability for the whole of the relevant period, then the issue would be determined by the Tribunal at a public preliminary hearing.
62. At this stage, given the outstanding amendment applications, the Case Management Order did not seek to identify the issues which would need to be

determined in relation to each of the Claimant's proposed complaints other than that in respect of ordinary unfair dismissal (as distinct from the complaints that the dismissal amounted to discrimination or victimisation), it was identified that the Respondent was relying upon capability (related to ill health) as the potentially fair reason for the dismissal. The grounds on which the Claimant was alleging that the dismissal was unfair were as set out below.

(1) The Respondent's policy 'promoting staff health, wellbeing and attendance' was not followed, in that:

- (a) the Respondent did not try to find alternative employment for the Claimant;
- (b) no HR representative attended the two long-term absence meetings;
- (c) the Claimant was not provided with the vacancy bulletin;
- (d) no long-term absence review was carried out until six months had passed; and
- (e) the Respondent did not adequately investigate the reasons for the Claimant's absence.

(2) The Claimant would have been able to return to work if a suitable position had been offered to her.

(3) The Claimant takes issue with the findings of the Respondent's occupational health report on which the Respondent relied in deciding that her employment should be terminated.

(4) The Claimant says that she was forced to agree to a consensual termination of employment because the Respondent said it would dismiss her if she did not do so.

63. The Tribunal also identified and listed the issues as to remedy which would need to be determined in the event that the Claimant's complaint of ordinary unfair dismissal succeeded. In this regard it was noted that the Respondent had confirmed that it would not be seeking to argue that any award should be reduced by reason of blameworthy or culpable conduct or that there should be a reduction in any award on the basis that the Claimant failed to comply with a relevant ACAS Code of Practice. However, subsequent to the preliminary hearing, the Respondent provided clarification on 24 November 2022 to the effect that there might potentially be an issue as to the Claimant having failed to comply with the ACAS Code of Practice on disciplinary and grievance procedures through not appealing against her dismissal.

64. Having listed the issues to be determined in respect of ordinary unfair dismissal, the Case Management Order suggested that other "*issues may be added to this list at the next preliminary hearing*", by which it was envisaged by the Tribunal that the Judge at the subsequent preliminary hearing would give consideration to identifying the issues to be determined in respect of any complaints of discrimination and victimisation (and unlawful deductions from wages / breach of contract) which the Claimant was allowed to add to her Claim by way of amendment.

65. The Case Management Order directed that the parties must inform each other and the Tribunal in writing within fourteen days of the Case Management Order if any issue was taken with the accuracy or completeness of the Case Management Summary and the List of Issues set out in the Case Management Order.

66. Directions were made for the Claimant to provide the further information which had been identified as being needed in respect of the complaints which she was seeking to add by way of amendment. This further information was to be provided by 27 October 2022 and was listed in the Case Management Order. The Claimant eventually sent an email on 6 February 2023 dealing with these various requests for further information. The information provided has been summarised above in relation to each complaint in respect of which further information was required.
67. The Case Management Order also directed that the Claimant provide full details of the qualifying protected disclosures on which she was relying “*as referred to in para 5a*” of the Case Management Summary, for the purposes of her complaint of whistleblowing victimisation including: (a) whether the disclosure was oral or in writing; (b) to whom it was made; (c) what the Claimant said; (d) the applicable sub-section of 43B(1) of the Employment Rights Act 1996 in relation to each disclosure (in other words, what any information communicated by the Claimant tended to show). In fact, the Claimant did not provide this information in her e-mail of 6 February 2023 but, in fairness, she was clearly confused by the erroneous reference in the Case Management Order to paragraph 5(a) of the Case Management Summary (when the reference should have been to paragraph 7(a)) and so, instead, provided a list of the meetings between 2014 and 2019 from which she says John Bagnall would have been aware of her mental health issues and / or at which the need for support was being raised. However, it follows that the Claimant has not provided further particulars identifying the alleged qualifying protected disclosures relied upon for the purposes of her complaints of whistleblowing victimisation.
68. After the preliminary hearing on 30 March 2023, the Claimant did write to the Tribunal asking whether it is appropriate to send documentation relating to the whistleblowing disclosures? This was not necessary, in that the preliminary hearing was not determining the issue as to whether any disclosure amounted to a qualifying protected disclosure. However, the Claimant also made it clear that the disclosures were made in October 2019 after she was unable to attend work due to the deterioration in her mental health. Her case is that she made verbal disclosures and submitted communications she had sent to Mr Bagnall when she met with the Chief Executive and the Chief Executive followed that meeting up with a letter to the Claimant outlining what had been discussed. It can be seen from the further information that the Claimant provided in August 2021 that the meeting with the Chief Executive was on 11 October 2019 when she raised complaints against her line manager, John Bagnall, and that she then made additional complaints on 15 December 2019.
69. The Case Management Order also gave directions for the disclosure of medical evidence including medical records, by 16 December 2022. By the same date, the Claimant was also to serve a disability impact witness statement. The Respondent was then to inform the Tribunal and the Claimant of the extent to which the disability issue was conceded (and for what time period), and the basis for any dispute, by 16 January 2023.
70. The Claimant was also directed to provide a Schedule of Loss by 16 December 2022.



71. On 24 November 2022, the Respondent wrote to the Tribunal setting out various amendments which it was contended needed to be made to the Case Management Order. Where appropriate, the summary of the Case Management Order set out above takes account of the corrections put forward by the Respondent.
72. On 23 November 2022 the Claimant had requested more time to provide the information which she had been required to produce. She explained that she had been unwell and unable to focus on the case.
73. On 29 November 2022, the Claimant provided a letter from Medigold Health which she stated provided confirmation of her health condition between 2017 and 2020. In fact, the bundle for the preliminary hearing contained a letter from Medigold Health dated 28 November 2022 which now confirmed that the Claimant had been assessed under the applicable 1995 Scheme as meeting the criteria for ill-health retirement (whereas her previous application, which was stated to have been made in 2021, had originally assessed her as not meeting the criteria for ill-health retirement under the applicable 2015 Scheme).
74. Revised directions were given by Employment Judge Kelly on 20 January 2023 as a result of there having been delay in complying with the original directions. The Claimant had stated in an email of 16 January 2023 that she had not been able to meet the deadlines due to the impact of her anxiety and depression.
75. The Claimant emailed a copy of her disability impact statement on 6 February 2023. The Respondent was seen trying to be helpful when, on 17 February 2023, it asked if the Claimant could provide further detail "*in order for the Respondent to fully respond and to see whether the Respondent can concede disability from an earlier point*". Thus, the Claimant was asked as to "(at) *what points (month/year) were you experiencing the symptoms you list in your disability statement*".
76. The Claimant replied on 28 February 2023 acknowledging that the disability impact statement "*isn't adequate*", but explaining that she had been struggling to write the statement. Despite a gentle reminder, the further information requested does not seem to have been forthcoming.
77. Ultimately, the Respondent provided a document dated 23 March 2023 setting out its position in relation to the disability issue. This response pointed to the limited information provided by the Claimant so that, for example, although she provided a long list of symptoms, she had not provided evidence or explained when she had experienced the symptoms. Reference is made to the fact that this further information had specifically been sought from the Claimant. It was also submitted that the medical evidence provided suggests a fluctuating presentation. However, it was recognised that the report dated 10 December 2020 from Dr Lisa Ingleby, Senior Clinical Psychologist, had effectively stated that between June 2019 and December 2020 the clinical observations and assessments undertaken indicated a significant level of depression and anxiety disorder. The Respondent therefore accepts that there is evidence to suggest the Claimant was significantly impacted by depression and anxiety from June 2019, and there was a deterioration in her mental health from this point. The Respondent accordingly accepted that, from June 2020, the Claimant was a disabled person as defined in the Equality Act 2010, as by that time the depression and anxiety disorder had been ongoing for twelve

months. However, the Respondent did not accept, on the basis of the evidence provided, that the Claimant has demonstrated that she was a disabled person from 2017 (and in the period up to and including May 2020). The Respondent invited the Claimant to set out further detail as to the timing and impact of her illness over the relevant period of time (essentially from 2017 to June 2019).

78. The Claimant did not do so, although subsequent to the hearing she had sought to provide copies of notebooks which she had subsequently found whilst sorting out cupboards which covered the period from January 2018 to October 2019 and included entries as to *“life, work, how I was feeling and the effect on my personal life and mental health”*. She had similarly found communications between herself and a wellbeing coach to whom she had been referred by her GP. This was evidence which could have been relied upon at the preliminary hearing, in that the documentation was clearly within the Claimant’s possession. Ultimately, the Tribunal has been able to deal with the disability issue on the basis of the evidence available at the hearing and accordingly did not consider that it was in accordance with the overriding objective to allow evidence to be submitted after the hearing.
79. The Claimant has also provided a Schedule of Loss. This is essentially claiming past and future loss of earnings from the point in time when the Claimant’s sick pay was reduced to half pay until 7 August 2025 so that the total amount being claimed (allowing for an uplift of 25% claimed on the basis of alleged non-compliance by the Respondent with the applicable ACAS Code of Practice) was £190,591.76 (this did not set out or include any figure being claimed for injury to feelings).
80. The Claimant subsequently sought to postpone the preliminary hearing listed for 30 March 2023 claiming that she had recently had an accident and was in a lot of pain. She had a cast on her right arm and was finding it very difficult to do things, especially typing. The application was refused by Employment Judge Meichen on 22 March 2023 as it was not supported by any medical evidence. The decision letter stated that the Claimant should still be able to participate in the hearing if she was in a cast as it was by video link and she could bring a friend or family member to take notes, if she wanted. It is to be noted that sometime after the hearing the Claimant wrote to the Tribunal to request a copy of the notes taken by Giselle Dyche, the Assistant Solicitor who attended the hearing on behalf of the Trust, on the basis that the Claimant’s right arm had been in a cast at the time so that she was unable to take notes. Clearly, it had been open to the Claimant to make her own alternative arrangements for notetaking at the hearing. Obviously, any notes taken by the other party would have been taken on the basis that those notes were confidential and privileged so would not need to be provided to the Claimant.

## **Evidence**

81. As set out above, the Case Management Order of 13 October 2022 had set out directions as to evidence for the purposes of the preliminary hearing. As a result, the Tribunal was provided with a joint bundle of documents which included the documents which had been exchanged by the parties as being relevant to the issues to be determined at the preliminary hearing. Other than the documents generated by the Tribunal proceedings themselves, this largely consisted of medical evidence in the form of medical records and reports.

82. The directions in relation to the bundle had also raised the possibility that, if the Respondent wished to argue that forensic prejudice to the Respondent would arise from allowing the amendments sought, then it was open to the Respondent to seek to rely upon any witness evidence to this effect.
83. Whilst recognising that it would be fairly common for a Respondent not to seek to rely upon witness evidence in relation to a Claimant's application to amend, the only Statement of Evidence relied upon by the Respondent was an undated Statement of Evidence from John Bagnall, the Claimant's former line manager, which was stated to be in relation to the issue of disability . The statement was of very limited effect. It set out the Claimant's sickness absence record from return-to-work documentation for the period between December 2017 and August 2019. This showed that there had been eight separate absences between these dates for anxiety or low mood with all of the absences being for three days or less, other than an absence of eight days in December 2017. The witness suggested that he was not aware of any issues with the Claimant's mental health before these dates. There was a lengthy paragraph referring to contact with the Claimant on 13 December 2017. In summary, this simply confirmed that there had been a lengthy conversation during which the Claimant's health and accessing support had been discussed, with it being suggested that John Bagnall had assisted the Claimant in accessing support and she had access to support a number of times during work time. Other than this, the only other event referred to was that of a return-to-work discussion on 21 August 2019 when John Bagnall claims to have offered the Claimant a referral for an occupational health appointment which she declined, apparently on the basis that she was already accessing appropriate support from different sources.
84. The Claimant did seek to challenge the evidence of John Bagnall as to the extent of his awareness regarding the Claimant's mental health problems and the extent of any discussions that took place between him regarding this. However, this evidence was more relevant to the issue of the Respondent's knowledge of any disability which was not an issue to be determined at the preliminary hearing.
85. Although the GP records which had been printed out contained test results going back to January 2016, the attendance notes from GP appointments seemed to date from September 2017. The Claimant has also obtained and disclosed the clinical notes from the psychology sessions which she underwent with Dr Lisa Ingleby, Senior Clinical Psychologist, in the period between 4 June 2019 and 14 June 2022. Obviously, evidence from the period which post-dates the period of alleged discrimination (between 2017 and November 2020) is unlikely to be relevant to the issue of disability, save to the extent that the evidence provides information relating to the extent of any impairment during the relevant period. However, as the Case Management Order identified, evidence as to the Claimant's medical position post-dating her dismissal may be relevant in terms of explaining any delay in bringing any complaints.

## **Findings**

86. In 2017 the Claimant began to experience anxiety and depression. The first relevant entry in the GP records appears to be from 21 November 2017 when the Claimant was recorded as giving a three-week history which included her work

being stressful, waking up at night and lacking concentration as she felt tired. The Claimant's Statement of Evidence is to the effect that she was having difficulty sleeping, felt exhausted, was very tearful, and had poor concentration. The Claimant also states that her poor mental health was affecting her attendance at work and her confidence in her own abilities.

87. The Claimant's Statement of Evidence lists the symptoms which she says she has experienced and continued to experience since 2017. In fact, some of the matters listed, are not symptoms so much as descriptions of the adverse impact of her mental health condition on her life. Thus, the effects listed include, sleep disturbance, lack of self-care, negative thoughts, poor food choices, struggling to experience joy in life, inability to problem solve, nightmares, excessive worry, inability to focus, lack of concentration, poor memory, inability to gain pleasure from simple things and not wanting to get out of bed.
88. The Respondent's sickness absence records show that she was off work on 1 December 2017 for one day due to anxiety. This appears to be the first such absence.
89. On 13 December 2017, the Claimant was signed off work for one week with the reason given as anxiety state. The Claimant states that her GP wanted to prescribe anti-depressants but she was not keen at this point as she had no previous experience of this kind of medication. The Claimant's Statement of Evidence is to the effect that, by the time that she was getting home from work in the evening, she was not capable of doing anything other than lying down.
90. The Respondent's sickness absence record shows an absence of eight days between 13 December and 20 December 2017 so that the dates are presumably inclusive dates. The date of 13 December 2017 is also the date of the incident described by John Bagnall when the Claimant called him from her car outside the workplace and he ended up having a discussion with her in her car about her health and accessing support. It is noteworthy that the Claimant was seeking to avoid a particular member of staff. The Claimant was distressed at the time. This resulted in Fran Tummey from the Respondent's Adult Mental Health Services making arrangements for the Claimant to access support from the Trust in work time. The Claimant also describes this encounter with her line manager in her Statement of Evidence.
91. The Claimant describes her state of mind over Christmas 2017 as being "*like a zombie unable to care for myself, my home and my family*". The Respondent sickness absence records seem to record a further absence of three days due to anxiety between 27 December and 29 December 2017 inclusive.
92. It is to be noted that then seems to have been a period of over nine months with no absence from work due to ill-health symptoms. In her oral evidence, the Claimant suggested that she was off work in the period over December 2017 and January 2018 due to her mental health for rather longer than the days signed off sick, because her absence was extended through annual leave and there also seems to have been an element of a phased return to work.

93. A further entry in the GP records on 30 December 2017 noted a relevant history of being tearful, and poor sleep and poor concentration. By 8 January 2018 there was a reference to the Claimant having started counselling through work. She was on beta-blockers and HRT.
94. From the entry in the GP records for 22 January 2018, the counselling was still continuing although the Claimant was back at work, but not full days. Sleep was the main issue in that she fell asleep easily but then would wake. The Claimant was started on new medication namely Amitriptyline, which is an anti-depressant.
95. The next entry, for 19 February 2018 described the Claimant as feeling "*much better on amitrip*", on which she was "*keen*" to continue. She was sleeping better and "*more like old self*". She was to be reviewed in two months "*or sooner*".
96. The Claimant was seen by her GP, approximately two months later, on 17 April 2018, when it was noted that her mental health was "*very good*" and "*feels back to normal*". She was to be reviewed "*if needed*",
97. The next relevant entry in the GP records was not until an attendance on 13 August 2018 which described stress building at work. It was noted that the Claimant would access further counselling through work. She was to be reviewed by the GP in two to three weeks.
98. The Claimant was absent from work for one day on 12 October 2018 due to low mood. The next relevant entry in the GP records is from 17 October 2018 when the Claimant's mood was described as low again. Work was still an issue but "*feels more than this now*". The history recorded noted "*sleep ok*" on Amitriptyline. However, her concentration was described as being not great. It seems to have been decided to start her on Sertraline (an anti-depressant) with a view to weaning her off Amitriptyline. A review after three weeks was to take place.
99. The Claimant was absent from work on 31 October 2018 for one day due to anxiety. At her next GP appointment on 6 November 2018 it was noted that her mood was better and she was happier, although there was still stress at work. She was keen to continue on Sertraline. The note from 10 December 2018 refers to the Sertraline as helpful in that she felt a whole lot better. There is a specific reference to running out of Sertraline as this was not (yet) on repeat prescription. It was again noted that she wished to remain on Sertraline.
100. In her oral evidence to the Tribunal, the Claimant described her everyday life being affected in 2018 in that she felt fatigued due to emotional exhaustion, was not capable of doing much, and would simply go home and lie down. She was not able to cook or look after herself. She did not want to shower. She had no enjoyment in life and had lost her confidence at work. She started to doubt herself at work so that she avoided going to some meetings and was working from home quite often. However, it was difficult to correlate this description with the entries in the GP records, so as to be confident as to the precise period of time to which it might relate, given that there was a period from February when she was "*more like her old self*" (and "*back to normal*" in April) with no meaningful indication that this had ceased to be the case until approximately six months later in August 2018. However, she was on repeat prescriptions for Amitriptyline throughout this period

which was bookended by periods when there was clearly a flare up of symptoms which impacted her daily life.

101. The GP attendance note from 17 January 2019 described the Claimant's mood as improved on Sertraline. The Claimant was absent from work for five days between 25 February 2019 and 1 March 2019 due to anxiety. The GP records from 15 March 2019 described the Claimant as still under pressure at work.
102. The Claimant was then absent from work due to anxiety for two days between 7 May and 8 May 2019. The entry the GP records for 22 May 2019 states that she was still on Sertraline and having counselling.
103. In cross-examination, the Claimant was asked about whether she was still driving to work during 2019. She accepted that she was, but sometimes had a lift. Moreover, she suggested that her driving had started to be affected. The Claimant referred to an incident where she had struggled to park at Kidderminster Health Centre and just drove around the car park. There was a period when she took her car off the road as her mental health condition was affecting her driving.
104. In about June 2019, the Claimant was referred by the Enhanced Primary Care Mental Health Service to commence therapy with Dr Lisa Ingleby, Senior Clinical Psychologist. It is to be noted that assessments were not undertaken at this time using the Patient Health Questionnaire (PHQ-9) and General Anxiety Disorder (GAD-7) assessment tools. It is noteworthy that Doctor Ingleby states in her later December 2020 report that these assessments were not undertaken during the initial assessment phase (in July 2019) due to lack of clinical need. However, Dr Ingleby does say that her clinical observations at the time suggested that mild levels of low mood and anxiety were present.
105. The notes from the first session with Dr Ingleby on 17 June 2019 described the presenting problems in terms of "*anxiety which has resulted in periods of time off work and withdrawing/becoming quiet at home*". It was stated that the anxiety symptoms largely subsided during periods of time away from work.
106. The Claimant was absent from work for one day on 20 August 2019 due to anxiety. The next relevant entry in the GP records appears to be from 10 October 2019 when the Claimant was signed off work for two weeks with stress at work. The history given in the GP records refers to whistleblowing at work and makes reference to a "*big meeting tomorrow*" with the Claimant "*feeling unable to attend work*".
107. On 30 October 2019, the Claimant was signed off work for the period between 24 October and 17 November 2019 with the reason given as stress at work. The history given refers to the Claimant having some counselling through work. Effectively, the Claimant continued to be signed off work for the next year until her employment terminated in November 2020.
108. The entry in the GP records for 27 November 2019 describes the Claimant as still struggling in terms of mood and notes a chat about day-to-day activities with the Claimant being concerned regarding fatigue. The dosage of Sertraline was increased in December 2019.

109. There continued to be regular appointments with the Claimant's GP, essentially for the purposes of extending her sickness certificate in relation to her ongoing sickness absence due to work-related stress. Most of the entries provided little detail other than that the Claimant did not feel ready to return to work.
110. By 14 January 2020, the Claimant was having her 15<sup>th</sup> psychology session. The notes from this session report her as feeling much more positive and "*has started to take better care of herself*".
111. It is also to be noted that the notes from the Claimant's 16<sup>th</sup> session with Dr Ingleby on 12 February 2020 refer to the Claimant "*working hard to look after herself*" and state that she "*showed me her new wellness journal and presented as brighter in mood than in recent sessions*". It appears that discussions were beginning to take place about whether the psychology sessions needed to continue.
112. With the commencement of the Coronavirus pandemic, the sessions continued by telephone, with the notes from the session on 24 March 2020 recording that the Claimant was finding it "*difficult to continue with self-care strategies that she was doing well with given restrictions to movement due to Covid-19*". The sessions with Dr Ingleby then seem to have ceased for a period of nearly three months.
113. The Claimant was referred for an occupational health appointment on 27 March 2020 resulting in a report of the same date provided by Amanda Godbold, OHNA. This simply confirmed that she would not be fit to return to work before her current GP fit note was due to expire, which was 17 April 2020.
114. The entry in the GP records for 15 April 2020 stated that the Claimant had "*come to realise cannot go back*" and she was "*probably going to go through solicitor now for ... advice*". The entry for 26 May 2020 then referred to the Claimant's union being involved and simply stated that she "*feels cannot go back*".
115. Telephone sessions with Dr Ingleby seem to have resumed in June 2020. The notes from 15 June 2020 described the Claimant sleeping as very poor.
116. The Claimant attended an occupational health appointment with Dr Shiyas Basheer, Consultant Occupational Physician, on 21 July 2020 resulting in a report dated 30 July 2020. Based upon having "*briefly assessed using a mental health questionnaire*", the report concluded that she had a mild-to-moderate degree of anxiety and depression. The Claimant has subsequently suggested that this assessment appears to have been rather superficial compared to that undertaken at approximately the same time by Dr Ingleby (see below) which arrived at a different outcome as to the degree of the anxiety and depression from which the Claimant was suffering. The report suggested that there was no medical evidence to suggest that the Claimant was permanently incapacitated from undertaking her substantive role or a similar role before she reached normal retirement age. Essentially, it was suggesting that, for this to be the case, she would need to be resistant to treatment and unlikely to improve in the future.

117. The notes from the Claimant's session with Dr Ingleby on 27 July 2020 discuss the content of the occupational health report with the point being made that it was not clear what assessment tool had been used in order to assess the Claimant's depression and anxiety as mild-to-moderate. Dr Ingleby conducted her own assessments and reported as to the outcomes in her report dated 30 July 2020. The note from 27 July 2020 refer to there being several biological markers of depression such as lethargy, changes to appetite (overeating) and marked disturbance of sleep, including recurrence of nightmares.
118. On 30 July 2020, a report was provided by Dr Lisa Ingleby, Senior Clinical Psychologist, providing a summary of the Claimant's "*treatment to date*" following a referral by the Enhanced Primary Care Mental Health Service in 2019 in relation to difficulties with feeling anxious. The report suggests that by February 2020 a possible discharge from psychology services was being discussed due to improvements in the Claimant's mental health. However, in the period since the onset of the Coronavirus pandemic, the Claimant had reported a quite significant deterioration in her mental health. This was partly due to not being able to access strategies such as regular swimming due to public health interventions related to the pandemic. The report describes the assessment tools used, and the scores produced by those assessments. Thus, the scores from the Patient Health Questionnaire (PHQ-9) undertaken in July 2020 placed the Claimant in the range for severe depression. The scores for the General Anxiety Disorder assessment (GAD-7) in July 2020 placed the Claimant in the range for severe anxiety.
119. The Claimant was suggesting an increase in symptoms over recent months. Thus, reference was made to the Claimant describing a resurgence in symptoms such as sleep disturbance, nightmares, significant lethargy and anhedonia. The report described the Claimant as "*struggling to take care of yourself*".
120. In terms of the prognosis, the report suggested that the Claimant's mental health difficulties were extremely unlikely to resolve without a satisfactory conclusion to her work situation.
121. The GP attendance note for 5 October 2020 described the Claimant as remaining low in self-confidence with "*motivation still a challenge*".
122. In October 2020 an assessment was undertaken using the Impact of Event Scale – Revised (IES-R) in order to measure the level to which the Claimant's current work situation was impacting on her daily functioning with scores being given for intrusion, avoidance and hypervigilance. This was in response to increased levels of symptoms which were indicative of trauma.
123. The Claimant also relies upon a work capability assessment decision dated 15 October 2020 undertaken for the purposes of an application for Universal Credit. This decision was simply to the effect that she had limited capability for work.
124. The application for Universal Credit will have reflected the fact that her normal contractual entitlement to sick pay had expired. As of 10 November 2020, her employment had ended.



125. Psychology sessions with Dr Ingleby ceased after 10 December 2020. A further report dated 10 December 2020 provided by Dr Lisa Ingleby, Senior Clinical Psychologist, stated that, on commencing therapy in June 2019, the applicable scores for the Recovering Quality of Life assessment indicated that although there were things that the Claimant was finding difficult, her scores were within the range of the general population. The same assessment in November 2020 had produced a much lower score which was suggested to be a reliable indicator of mental health deterioration. The report describes the deterioration in the Claimant's mental health in the period since December 2019 on the basis that, having spent a significant length of time in a heightened state of anxiety, coupled with loss of routine, structure and job role, as well as increased financial uncertainty, the effect was that events around work had been experienced as a trauma. It was stated that this was evidenced in symptoms such as low mood, hypervigilance, poor emotional regulation, sleep disturbance as well as physical health manifestations such as chronic pain and hair loss.
126. The conclusion to the report was that "*between June 2019 (prior to your period of sick leave from your employer commencing) to the present, the scores on the above measures and my clinical observations indicate significant levels of depression and anxiety disorder*". It was this conclusion which was referenced by the Respondent in its submissions explaining that disability was conceded from June 2020 on the basis that the state of affairs which the report was suggesting had existed since June 2019 had, by that point in time, existed for a year, so could be said to be long-term. The report also stated that, in addition "*there are key symptoms which are consistent with and indicative of the presence of Post-Traumatic Stress such as hypervigilance, irritability, sleep disturbance and intrusion of unwanted thoughts*".
127. In early 2021, the Claimant had taken steps to commence proceedings in the Employment Tribunal, initially by contacting ACAS. The relevant history in relation to those proceedings has already been set out above.
128. In cross-examination, the Claimant accepted that the further particulars which were provided in August 2021 amounted to a lengthy and detailed statement of case. When it was suggested that she was clearly able to concentrate and produce such a document, she pointed out that the document does not show the length of time taken to produce it. It had not been done in one sitting. She did not have any assistance in producing the document. By this time, she had ceased to have assistance from her union. From July to September 2021 she had been out of the country with her family as she was finding life difficult. However, in cross-examination, the Claimant also accepted that the content of the further particulars provided on 23 August 2021 could have been provided when she filed her Claim with the Tribunal on 16 April 2021.
129. It is to be noted that the psychology notes resume in 2022 with an entry from 30 March 2022 recording a referral from Worcester Healthy Minds. This seems to have resulted in a discussion of the new referral by multi-disciplinary team members noting that the Claimant was on anti-depressants, struggled with decision-making, lack of motivation, some forgetfulness, and anxiety.

130. Insofar as the complaints, which the Claimant had indicated (at the preliminary hearing on 13 October 2022) she wanted to add by way of amendment, amounted to additional complaints, the Claimant explained that she thought that she had covered everything in the further particulars provided in August 2021.
131. The Claimant also relies upon a report dated 28 November 2022 from Dr Colin Payton. Consultant Occupational Health Physician, who was instructed to provide an assessment as to whether the Claimant met the criteria for ill-health retirement benefits under the applicable 1995 Scheme as at the date that she left the Respondent's employment on 10 November 2020. Effectively, she was assessed as meeting the requirements of both tier 1, namely that there was a physical or mental infirmity which gives rise to permanent incapacity for the efficient discharge of the duties of her NHS employment, as well as tier 2, namely that there was a physical or mental impairment infirmity which gives rise to permanent incapacity for regular employment of like duration. The original assessment (by reference to the criteria of the applicable 2015 Scheme) had found that the Claimant's mental health would be likely to take some years to recover satisfactorily but she still had nine years up to the Scheme pension age, it was considered that it was considered likely that she would have realised the benefits of further treatment over this period. Dr Peyton also pointed to Dr Ingleby having offered the opinion that a lengthy period of adjustment would be required. The difference between the two assessments of eligibility seems to be that, at the time that she left her employment in November 2020, under the 1995 Scheme, the Claimant was only two years and nine months from her normal benefit age, so that Dr Peyton was of the opinion that this was insufficient time for her to have recovered from her long-term mental health issues.

### **A summary of the relevant law**

132. As far as the whistleblowing victimisation complaints of detriment are concerned, section 48(3) of the Employment Rights Act 1996 ("ERA 1996") provides that an Employment Tribunal shall not consider such a complaint unless it is presented "*(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months*". For these purposes, where an act extends over a period, the "*date of the act*" means the last day of that period.
133. The time limits applying to complaints of unfair dismissal are provided for at section 111 of ERA 1996 namely that a complaint cannot be considered unless it is presented to the Tribunal "*(a) before the end of the period of three months beginning with the effective date of termination, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months*". These provisions also apply the complaint under ERA 1996 section 103A that the dismissal was automatically unfair on the basis that the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

134. Similar provisions apply to a complaint of unlawful deductions from wages, with any discretion to extend time similarly depending on the Tribunal being satisfied that it was not reasonably practicable to bring proceedings earlier.
135. In relation to discrimination complaints, section 123(1)(a) of the Equality Act 2010 (“EA 2010”) provides that “*a complaint ... may not be brought after the end*” of ... “*the period of 3 months starting with the date of the act to which the complaint relates*” or “*such other period as the employment Tribunal thinks just and equitable*”. EA 2010 section 123(3)(a) provides that “*conduct extending over a period is to be treated as done at the end of the period*” and section 123(3)(b) provides that “*failure to do something is to be treated as occurring when the person in question decided on it*”.
136. In Bexley Community Centre v Robertson [2003] IRLR 434, CA, the Court of Appeal provided the guidance set out below.
- “It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule”* (Auld LJ at paragraph 25).
137. Thus, the burden of proof is on a Claimant to satisfy the Tribunal that any complaint was either made within the applicable time limit for doing so, or that it would be just and equitable to extend time.
138. Rule 8(1) of the Employment Tribunals Rules of Procedure 2013 (the “Tribunal Rules”) provides that a “*Claim shall be started by presenting a completed Claim form (using a prescribed form)*”. The prescribed ET1 Form of Claim requires the Claimant to set out “*details of your Claim*”, and details of the remedy that the Claimant is seeking.
139. Rule 12 of the Tribunal Rules deals with the rejection of Claims by reason of “*substantive defects*”, with rule 12(1) stating that the “*staff of the Tribunal office shall refer a Claim form to an Employment Judge if they consider that the Claim, or part of it*” may be “*(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process*”. Rule 12(2) then states that the “*Claim, or part of it, shall be rejected if the Judge considers that the Claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the Claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the Claim*”.
140. In the present case, the Claim was not rejected at this stage. The issue of whether or not the Claim should have been accepted was not an issue listed to be determined at the preliminary hearing.
141. In Baker v Commissioner of Police of the Metropolis [2010] UKEAT0201/09, a case decided under the Employment Tribunals Rules of Procedure 2004, the Employment Appeal Tribunal upheld an Employment Tribunal’s decision that a

Claim Form did not include a complaint of disability discrimination; it was not sufficient for the Claimant to tick the box indicating that he was bringing such a complaint without giving further details. But even so, the EAT considered that the Tribunal had erred in refusing to consider an application to amend the Claim to include a disability discrimination complaint.

142. Similarly, in Mechkarov v Citibank [2017] UKEAT/0119/17, the Employment Appeal Tribunal upheld an Employment Judge's decision that an ET1 Form of Claim could not be taken to include a complaint of detriment for making a protected disclosure simply from the fact that the Claimant had ticked the box indicating that he was making a whistleblowing complaint. Furthermore, the Judge had also been correct to refuse the Claimant's application to amend his Claim to add in a complaint of detriment for making a protected disclosure. The EAT stated that, when deciding whether an ET1 Claim Form contained a complaint of a particular kind, the correct approach was to look at the Claim Form as a whole, giving it a generous construction to see whether it identified an act complained of and the nature of the complaint made about that act. If it identified the complaint in broad and general terms, further detail could be given by way of further information. If, however, it did not identify the complaint, an amendment would be required. This did not mean that the ET1 Form of Claim had to identify the label that a lawyer would apply to defining the particular complaint: provided that the unlawful act and the nature of the complaint is identified, the fact that there is no label or the label is wrong or only one label is given where two would be applicable will not be determinative against the Claimant. However, the EAT reasoned that a whistleblowing complaint had to state that the worker had made one or more public interest disclosures and that he or she was subject to detriment (or dismissal) for doing so. In this regard the ET1 Form of Claim had to identify the linkage between the disclosure and the alleged detriment. In the case before the EAT, merely ticking the box concerning whistleblowing was not in any way decisive. Moreover, looking at the Claim Form as a whole, it could not fairly be read as including a complaint of public interest disclosure detriment.

143. In the case of Secretary of State for BEIS v Parry [2018] EWCA Civ 672, CA, a Claimant did no more than tick the requisite box to indicate complaints of unfair dismissal and arrears of pay and failed to provide or attach particulars in that the Claimant's Solicitors submitted the wrong attachment and so no details were supplied. However, the Court of Appeal disagreed with a decision of the Employment Tribunal to the effect that the Respondent "*would have had no idea of the basis on which the Claimant was making either of her claims*". It was suggested that the Respondent would have been aware of the fact of the dismissal and the reasons for it and could have responded by setting out its position in this regard. Either side could then have been directed to give further details of their case. But at least proceedings would have been properly launched. It was stated that Employment Tribunals should do their best not to place artificial barriers in the way of genuine complaints.

144. However, in stating that a sensible Response could have been given to a complaint of unfair dismissal, Lord Justice Bean stated that the position may be different with complaints of discrimination, as set out below.

*"I am not laying down a general rule that the Respondent to a claim in an employment tribunal must always be treated, for the purposes of rule 12(1)(b), as having detailed knowledge of everything that has occurred between the parties. If, for example, a Claimant brings a claim for sex or race or disability discrimination without giving any particulars at all, or attaching the particulars from someone else's case, that ET1 might well be held to be in a form to which the employer could not sensibly respond and thus properly rejected under rule 12(1)(b). But in many unfair dismissal cases there will be a single determinative issue well known to both parties, so that even if particulars are omitted from the ET1 the employer can sensibly respond".*

145. Although the Claim itself was not rejected at the outset, and the Respondent has been able to respond to the (ordinary) unfair dismissal complaint, the case law set out above suggests that simply ticking a box may be insufficient for the purposes of making a complaint of discrimination (or whistleblowing victimisation) and in order to pursue the complaints any necessary particulars of the complaints will need to be added through amendment for which permission will be needed.

146. The key test for considering amendments is identified in Cocking v Sandhurst (Stationers) Limited [1974] ICR 650, as below.

*"In deciding whether or not to exercise their discretion to allow an amendment, the Tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused".*

147. That key test was effectively refined and repeated in Selkent Bus Company Limited v Moore [1996] ICR 836, which set out some of the factors which may be taken into account in considering whether to exercise the discretion. They are: the nature of the amendment, the applicability of time limits and the timing and manner of the application. Those factors were given as examples as to what may be taken into account when conducting the fundamental balancing exercise which was described in Cocking. They are not therefore the only factors that may be relevant. The exercise of balancing injustice or hardship remains the paramount consideration.

148. In Abercrombie and Others v Aga Rangemaster Limited [2014] ICR 209, CA, Underhill LJ made the observations set out below.

*"Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new Claim and by the old, the less likely it is that it will be permitted".*

149. Underhill LJ advised the Tribunal to focus on the practical consequences of allowing an amendment and this practical approach should underlie the entire balancing exercise. This means that the considerations for the Tribunal may include those of: if the application is refused how severe the consequences will be in terms of the prospects of success of the Claim or defence, and if permitted what would be the practical problems in responding.

150. In Vaughan v Modality Partnership [2021] ICR 535, EAT, HHJ Tayler gave detailed guidance on applications to amend Tribunal pleadings. He confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The parties must therefore make submissions on the specific practical consequences of allowing or refusing the amendment. Where they do not do so, it will be difficult for them to challenge a Tribunal Judgment on the basis that the balancing exercise has not been carried out correctly. The factors identified in Selkent (above) should not be treated as a checklist to be ticked off to determine the application. Representatives should start by considering what the real, practical consequences of allowing or refusing the amendment will be. If the application to amend is refused, how severe will the consequences be, in terms of the prospects of success of the claim or defence? If permitted, what will be the practical problems in responding? Where the prejudice of allowing an amendment is additional expense, consideration should be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party can meet it. In this case, the Tribunal had not erred in law in refusing the Claimant's application to amend her whistleblowing Claim by adding two further alleged protected disclosures. Although the Tribunal's Judgment did not make an express reference to the specific hardship that would be suffered by the Claimant, no such specific hardship had been identified by her. Consequently, there was just enough in the Tribunal's decision to show that it had conducted the appropriate balancing exercise.

151. The case of Transport and General Workers Union v Safeway Stores Limited [2007] UKEAT/0092/07, is authority for the proposition that the fact that an amendment would introduce a complaint that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise. Thus, the extent to which any new allegations are out of time is a factor to be weighed by the Tribunal in the balancing exercise, and the weight to be attached to it varies according to the circumstances of each case.

152. In Galilee v Commissioner of Police of the Metropolis [2018] ICR 634, EAT, it was held that, where new complaints were added by way of amendment to an existing Claim, there was no doctrine of "relation back" by which the new complaints were treated as having been made at the time when proceedings were started. Thus, in relation to the issue of "relation back", the conclusion at paragraph 109(a) of Galilee, was as set out below.

*"Amendments to pleadings in the Employment Tribunal, which introduce new Claims or causes of action take effect for the purposes of limitation at the time permission is given to amend and there is no doctrine of "relation back" in the procedure of the employment Tribunal".*

153. Furthermore, in Galilee, it was held that there was no mandatory rule by which that any limitation defence based on time limits (in respect of the complaints being added by amendment) had to be determined at the point in time of the application to amend. A Tribunal can allow an amendment to introduce a complaint that might be out of time, and order that the question of time limits be determined at the final hearing.

*“I am bound to say that I regard Rawson, Newsquest and Amey Services as wrong on the point that, as a matter of law, out of time points must always be determined prior to or at the same time as an application for permission to amend to add a new cause of action is being considered and I am not prepared to follow them on it. I should make it clear, however, that this does not mean it will be wrong in many cases to decide the matters together. I do not for one moment take issue with the proposition that, in order to exercise properly the discretion as to whether to permit or refuse an amendment, it will be necessary to know whether the new claim is out of time. What I am concerned about is that it may not always be possible to know that until evidence, and sometimes, usually in discrimination cases, a great deal of evidence, has been heard”* (paragraph 68).

154. This decision was followed in Szymoniak v Advanced Supply Chain (BFD) Limited [2021] UKEAT 2019-1201, EAT.

155. As far as disability is concerned, a person is disabled within the meaning of section 6(1) of the Equality Act 2010 if he or she has “a *physical or mental impairment*” which has a “*substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities*”.

156. Substantial is defined as meaning “*more than minor or trivial*” in Equality Act 2010 section 212(1).

157. Equality Act 2010 Schedule 1 paragraph 5 provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect.

158. Equality Act 2010 Schedule 1 paragraph 2(1) provides that the effect of an impairment is long-term if it has lasted or is likely to last for at least twelve months or is likely to last for the rest of the life of the person affected. Likely means “*could well happen*” (see the case of SCA Packaging Limited v Boyle [2009] ICR 1056 as well as paragraph C3 of the Guidance on Matters to be taken in account in Determining Questions relating to the definition of Disability 2011 (the “Guidance”).

159. In the case of Cruickshank v VAW Motorcast Limited [2002] ICR 729, the Employment Appeal Tribunal held that the time at which to assess the issue of disability (whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act. Moreover, the case of All Answers Limited v W [2021] EWCA Civ 606, CA, confirms that the date of the discriminatory act is also the material time when determining whether the impairment has or is likely to have a long-term effect. Paragraph C4

of the Guidance stresses that anything that occurs after the date of the discriminatory act will not be relevant.

160. In considering the question of disability under Equality Act 2010 section 6(1), it is appropriate to adopt a staged approach before determining whether or not a Claimant was disabled.

## Discussion and Decision

### (1) Disability

#### (a) Physical or mental impairment

161. The Claimant relies upon impairments of anxiety and depression and contends, by reason of these impairments, she had a relevant disability at the material time (between 2017 and November 2020). Symptoms certainly date from 2017, although it is not easy to be more precise than that. The first relevant entry in the GP records dates from 21 November 2017 and refers to the Claimant having given a three-week history. In view of this, I was prepared to date the onset of the impairments to 1 November 2017.

162. By the end of 2017, the Claimant was being signed off work with anxiety state and her GP was discussing prescribing anti-depressants. Whilst there may have been some fluctuation in symptoms, any periods when there was a relative improvement in any symptoms have to be seen in the context of the Claimant being prescribed Amitriptyline from early 2018 and Sertraline from late 2018.

#### (b) Substantial adverse effect

163. For the effect to be substantial, it must be something that is more than trivial or minor. Reading the GP records with the Claimant's Statement, this was the position by late 2017. The GP records confirm poor concentration as well as sleep disturbance and being tearful. From the Claimant's evidence, which I accepted, this impacted on her ability to care for herself, her home and her family even to the extent of not wanting to get out of bed. There was some improvement by 2018, initially brought about by Amitriptyline.

164. Accordingly, I am left to conclude that the anxiety and depression were substantial in their adverse effect, being more than minor or trivial. They required the prescribing of medication to relieve their effects.

#### (c) Measures without which the adverse effect would continue

165. The Claimant was started on new medication namely Amitriptyline, which is an anti-depressant, on 22 January 2018. The entry for 19 February 2018 described her as feeling "*much better on amitrip*", on which she was "*keen*" to continue, and "*more like old self*". She was to be reviewed in two months, at which point, on 17 April 2018, it was noted that her mental health was "*very good*" and "*feels back to normal*". She was to be reviewed "*if needed*". The above evidence would seem to suggest that the Claimant had got back to normal with the assistance of Amitriptyline.



166. The next relevant entry in the GP records was not until an attendance on 13 August 2018. This was in relation to stress for which the Claimant was going to access counselling, as well as being reviewed by the GP in two to three weeks. She had continued to be prescribed Amitriptyline throughout the intervening period, which again suggests that the level of normality achieved was assisted by the measures that her GP had decided to keep in place. The fact that she was still finding the Amitriptyline of assistance was specifically noted in the entry in the GP attendance notes for 17 October 2018 although it was decided to start her on Sertraline with a view to weaning her off Amitriptyline. At her next GP appointment, on 6 November 2018, it was noted that her mood was better and she was keen to continue on Sertraline. The note from 10 December 2018 refers to the Sertraline as helpful in that she felt a whole lot better. The GP attendance note from 17 January 2019 described the Claimant's mood as improved on Sertraline.
167. Thus, insofar as the GP records for some months in the middle of 2018 and in the early part of 2019, suggest some improvement in the Claimant's mental health at this time, this was in the context of the Claimant being regularly prescribed Amitriptyline and then Sertraline (and the GP records also refer to her having counselling).
168. I find on balance of probabilities that, in relation to the Claimant's impairment, at those times when it may not have been having a substantial adverse effect on his ability to carry out normal day to day activities, that effect would in all likelihood have returned if the treatment had been or was withdrawn.

(d) Long-term effect

169. A long-term effect is one that has lasted for at least 12 months or is likely to last for at least 12 months or is likely to last for the rest of the life of the person concerned. Having considered the medical evidence and the Claimant's evidence, I accept that the effects described above had lasted for twelve months by October 2018. Given the gap in terms of any record of symptoms in the medical records between February 2018 and August 2018, and the lack of any further absence from work until October 2018, as well as the fact that the symptoms had been caused by particular stressors which might not necessarily continue, it is not straightforward forming a view as to whether the point had been reached earlier than October 2018 where the impairment was likely to last more than twelve months. However, it is also correct that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it should be treated as continuing to have that effect if that effect is likely to recur.
170. The issue is whether the point had been reached where the situation of the impairment lasting at least twelve months "*could well happen*". The reality is that by February 2018 the GP records suggest that any symptoms were being controlled by medication (in that it is specifically recorded that the medication had brought about an improvement). The GP records show that the prescription was noted as a repeat prescription from 19 February 2018. In the absence of a formal diagnosis from a mental health specialist, I find on the balance of probabilities that the Claimant's condition of anxiety and depression was considered by her GP to be a longer-term problem from 19 February 2018. She continued on Amitriptyline

(by way of a repeat prescription) even when symptoms improved. Her condition then worsened despite being on Amitriptyline and she was tried out on Sertraline. In the circumstances, I am satisfied, on the balance of probabilities that the point had been reached by 19 February 2018 where, in relation to whether the impairment was likely to last more than twelve months, it could be said that such a situation “*could well happen*”.

171. As discussed above, although there were periods of improvement, including in the early part of 2019, this was not such that it could be said that the period for which the impairment had lasted had come to an end. The evidence suggests that any symptoms were, at times, controlled by medication. Notwithstanding the positive benefits, in this way, of medication, symptoms reappeared or worsened, so that, for example, the Respondent has conceded, on the basis of the 10 December 2020 report from Dr Ingleby, that the Claimant’s mental health had deteriorated so that she was significantly impacted by depression and anxiety from June 2019.

172. Having concluded that the Claimant’s impairment amounted to a disability by 19 February 2018, the Tribunal was not satisfied, the reasons set out above, that any periods of improvement should be treated as meaning that this ceased to be the position at any point after February 2018.

(e) Conclusion

173. For these reasons, I must conclude that the Claimant was disabled by reason of anxiety and depression at the material time and that she became so disabled from 19 February 2018. Any issue as to the point in time at which the Respondent had any requisite knowledge that the Claimant’s condition amounted to a disability was not an issue to be determined at the preliminary hearing and would obviously depend upon any evidence adduced at any final hearing.

**(2) Application to amend Claim**

174. I turn to consider the application to amend the Claim.

(a) What is the nature of the proposed amendments?

175. I accept the broad thrust of the Respondent’s submissions as to the nature of the proposed amendments, in so far as, in relation to the application to amend, these were not minor amendments, but the Claimant was seeking to add a whole raft of factual allegations. She accepted that there was nothing within her ET1 Form of Claim other than the boxes which she had ticked. Moreover, although she had ticked the relevant boxes in relation to unfair dismissal, race discrimination and disability discrimination, there was no reference to whistleblowing at all in the ET1 Form of Claim.

176. The Respondent had conceded that ticking the requisite box in relation to unfair dismissal could be treated as bringing a complaint of ordinary unfair dismissal which was realistic given the case law referred to above and the fact that it effectively pleaded the fact of the dismissal, in relation to which the Respondent could then set out its position as to any dismissal being fair.

177. I was satisfied that the same could not be said of the discrimination complaints. Ticking the box in respect of discrimination simply amounted to making an assertion. It was now clear that there was a substantial history. The part of that history alleged to constitute discrimination in terms of the specific complaints of discrimination, and the basis for alleging that discrimination had arisen, or that any treatment amounted to discrimination, needed to be included as part of the Claim and had not been. Essentially, the proposed amendments involved putting forward the Claimant's entire case in respect of discrimination. The same was true of any complaint of whistleblowing victimisation, given that issue was not raised at all in the ET1 Form of Claim.

178. However, it was arguable that the position in respect of the complaints as to pay was similar to the unfair dismissal complaint. The effect of the Claimant having ticked the boxes that she had ticked in relation to pay, was that she was claiming that she had not been paid all of the sums to which she was entitled. Clearly, it might have been better to have identified the basis upon which she believed she was entitled to more than she had been paid, but the Respondent was in a position to deal with such a complaint on a limited basis in that the Claimant's contractual entitlement to pay would be within its knowledge as the other party to the contract, and it would be in a position to assert, from its records, its position as to the sum to which the Claimant was entitled, whether that entitlement had arisen, and whether or not it believed that it had met any such entitlement. The Case Management Summary had then put the flesh on the bones of this complaint by having identified that the complaint in respect of pay was the Respondent had failed to pay the Claimant an injury allowance from 23 March 2020 to 10 November 2020 which would have topped her absence pay up to 85% of pay. The Case Management Summary accordingly treated the Claimant as applying to amend her claim to add the factual allegations which provided the basis for this complaint.

(b) Time limits

179. The particulars provided in August 2021 were effectively an attempt to amend the Claim, with a formal application only being advanced in October 2022. The effect of the decision in Galilee (see above), is that, even if permission to amend was granted, there is no doctrine of "relation back" by which the new complaints are treated as having been made at the same time as the original ET1 Form of Claim. Thus, there was a considerable distance in time between the date of the application to amend and the dates of the complaints. For example, many of the allegations related to alleged failures in 2017.

180. Even at the date of the particulars provided in August 2021, the complaints being introduced were significantly out of time, either individually, or on the basis of any possible case which might be advanced by the Claimant that the matters amounted to an act extending over a period or a series of similar acts (even if the end of the period and / or the last of the series of similar acts was to be treated as giving rise to a cause of action which dated from the termination of employment in December 2020). On this basis, even with the discrimination complaints, if the last event in an act extending over a period was itself out of time, establishing whether a particular complaint had been part of a continuing act was not going to cause that act to be in time, but might make a difference in terms of the length of the period by which it was out of time, although establishing jurisdiction would then

depend on whether it was just and equitable to extend time (so that the length of the period by which time needed to be extended might conceivably become a factor).

181. The decision in Galilee (above) is also authority to the effect that the issues in respect of time limits do not have to be determined at the time of the application to amend. In a case where, as here, there may be an issue as to the date any cause of action arose, if this depends on whether the act or omission extended over a period or was part of a series of similar acts or omissions, any decision may be best made having heard evidence as to the acts or omissions in issue, so it is possible that it might be best dealt with at a final hearing.

182. Nevertheless, time limits remain a factor to take into account as part of considering the application to amend. The directions of Employment Judge Kelly did raise the possibility of the Claimant obtaining medical evidence to support any contention that poor health prevented her from properly explaining her case in her Claim Form or within a reasonable period of time after that. However, the GP records produced only go up to November 2020 and do not cover the period of commencing proceedings. There is later medical evidence such as the clinical notes from the psychology sessions which include sessions in 2022, but these clinical notes do not cover the period between December 2020 and March 2022.

183. In cross-examination, the Claimant also accepted that the content of the further particulars provided on 23 August 2021 could have been provided when she filed her Claim with the Tribunal on 16 April 2021. At various times the Claimant has provided detailed documents notwithstanding the impact of her disability. The evidence does not especially establish that the impact of her disability was significantly greater in the period either side of 16 April 2021, although the Claimant's own evidence suggests that there was a decline in May which resulted in her being admitted to hospital.

184. In short, although alerted to the potential relevance of medical evidence as to the position on or around 16 April 2021, and although a fair amount of medical evidence covering both the period of employment and post-employment has been provided, the evidence before the Tribunal does not suggest that it was not reasonably practicable to have brought the whistleblowing victimisation complaints at least within three months (plus early conciliation extension) of dismissal. Thus, the basis for seeking an extension of time for the whistleblowing victimisation complaints seems particularly unpersuasive.

185. The complaints of race discrimination which it was proposed to add by way of amendment essentially related to the conduct of John Bagnall whilst the Claimant was still at work, so that the focus was on a period between 2017 and 2019. This was also the position with the complaint of disability discrimination contrary to Equality Act 2010 set out at paragraph 5(a) of the Case Management Summary.

(c) Timing and manner of the application to amend

186. The relevant history has been set out above. If it had been a simple omission to attach the document referred to at section 8.2 of the ET1 Form of Claim then it

would have been a straightforward exercise to remedy the omission by producing the document, but the position remains unclear as to whether any such document ever existed (and what the purpose or intent or explanation was for referring to an attached document if such a document could not be produced).

187. The Claimant was originally required to provide further particulars by 17 May 2021 but simply provided the list of complaints which did not provide any detail as to the factual basis of the complaints. Documentation setting out the factual basis of the complaints was only provided on 23 August 2021. I recognise that the Claimant's disability may have made it harder to take these steps. Thus, her e-mail of 15 July 2021 says that following a week of trying to manage her symptoms at home, she had been admitted to hospital on 29 May 2021 and discharged on 4 June 2021, although the medical evidence in relation to this has not been provided. She had also written to the Tribunal on 16 May 2021 saying that "*I've not done this before and continue to be unwell which makes it more difficult*".

(d) Balancing injustice and hardship

188. The Claimant has a live (ordinary) unfair dismissal complaint which is in time and which the Respondent will have to address on its merits in any event. However, if permission to amend to pursue her other complaints was refused, she would still be able to pursue her complaint of ordinary unfair dismissal.

189. In terms of the discrimination complaints, there was a distinction to be drawn between those complaints which related to handling her sickness absence (essentially complaints of disability discrimination) and those which related to workplace issues prior to her sickness absence (which were mainly complaints of (associative) race discrimination) which, by definition, predated the onset of her sickness absence in October 2019 so were already rather historic by the date of the preliminary hearing. Even with more recent complaints, there was the undoubted possibility of the cogency of the evidence being impacted. Although his evidence was of limited relevance for the purposes of the preliminary hearing, the Respondent had called John Bagnall, the Claimant's former line manager, who was the main focus of many of the more historic complaints, who was also probably the Respondent's main witness in relation to the period before the final sickness absence commenced. Based on the evidence given by John Bagnall, the Respondent made the valid point that it was clear that John Bagnall struggled (understandably) to recall meetings which had taken place some considerable time ago. A number of the allegations related to the finer details of human resources functions which might not be obviously memorable. Many of the allegations related to alleged failures in 2017. Seeking to respond to any such complaints would necessitate pursuing enquiries which might not be particularly productive.

190. On the face of it, the whistleblowing victimisation complaint was significantly out of time, and, although invited to do so, the Claimant had not identified a persuasive basis for contending that it had not been reasonably practicable to bring proceedings in time. Indeed, she had accepted that the content of the further particulars provided on 23 August 2021 could have been provided when she filed her Claim with the Tribunal on 16 April 2021. In these circumstances, I did not consider that the balance of hardship or injustice favoured allowing complaints to be added which were out of time and in respect of which the basis for exercising

the very restricted discretion to extend time did not appear to exist, and where the argument for delaying deciding the issue until having heard all of the evidence as to the merits of the case would place the Respondent in the position of having to decide what steps to take in relation to the complaint in the meantime when certainty could be achieved at this stage.

191. On the basis of these considerations, I turned to look at the individual complaints which the Claimant was seeking to bring through amending her Claim. The actual application to amend the Claim is effectively set out at paragraphs 5 to 8 of the Case Management Summary of Employment Judge Kelly.

192. The proposed complaints of disability discrimination are set out at paragraph 5. The complaints at sub-paragraphs (b) to (e) effectively relate to the management of the Claimant's sickness absence leading to her dismissal and so will eventually form part of her case for unfair dismissal. I was not satisfied that any prejudice to the Respondent in potentially having to deal with these issues outweighed any prejudice to the Claimant if she was prevented from raising the issue of disability discrimination in connection with her dismissal, particularly when it should have been clear to the Respondent by the point in time when she had been absent from work for 13 months that it would potentially be dismissing a disabled employee and would need to justify any unfavourable treatment arising from a disability or any alleged failure to deal with her sickness absence in a way which complied with her rights as a disabled person under the Equality Act 2010.

193. Permission is granted so that the Claim is amended to include the complaints at paragraph 5(b) to (e) of the Case Management Summary, but this is on the basis that it remains open to the Respondent to seek to defend the complaints of disability determination by raising the issues as to the effect of any relevant time limits. In order to determine the date from which any time limit ran, this is likely to involve having to determine whether any of the earlier acts of alleged disability discrimination were part of an act extending over a period, so it is likely that this issue will have to be determined at the final hearing when evidence in relation to events over the relevant period will need to be considered. The Tribunal will also be in a position to consider any evidence advanced by the Claimant in support of the Tribunal exercising any discretion to extend time on the basis of it being just and equitable to do so.

194. The complaint of disability discrimination at paragraph 5(a) of the Case Management Summary regarding an alleged failure by John Bagnall to provide adequate support, both to the Claimant and other managers, in terms of a forum to discuss matters that were affecting such matters emotionally, dates back to 2017; it would seem to relate primarily to the period when the Claimant was in work and being actively line managed by John Bagnall. As such, given the historic nature of this allegation, and having regard to the considerations discussed above, I am not satisfied that the balance of injustice or hardship is in the Claimant's favour and do not grant permission for this complaint to be added by amendment.

195. Permission to amend is similarly refused in respect of the application to amend the Claim to include the complaints of race discrimination at paragraph 6 of the Case Management Summary. These allegations would seem to relate primarily to the period prior to the Claimant's sickness absence and largely involve John

Bagnall. I am satisfied that, given the historic nature of the individual allegations, and having regard to the considerations discussed above, the balance of of injustice or hardship a is not in the Claimant's favour.

196. Permission to amend is also refused in respect of the application to amend the Claim to include the complaints of whistleblowing victimisation at paragraph 7(b) of the Case Management Summary. I recognise that the allegations seem to relate to the period of the Claimant's sickness absence, but even then some of the individual allegations are fairly historic, such as the complaint over travel pay in December 2019, or are put in vague or generalised terms such as the allegation that the Claimant's sickness was not managed as it should have been. In so far as the Claimant was raising issues in respect of the management of her sickness absence in the context of disability discrimination and ordinary unfair dismissal, then the Claimant was still able to pursue those related issues as part of those complaints. However the ET1 Form of Claim had made no reference to whistleblowing victimisation and by the time that the issue was raised in any meaningful way, any such complaint was well outside the applicable time limit and although given the opportunity to put forward evidence suggesting it had not been reasonably practicable to bring any complaint at any earlier stage, the evidence put forward, as analysed above, did not establish the basis for such an exercise of the limited discretion to extend time. The Galilee decision (see above) suggested that the time limits issue could be deferred to the final hearing, but in relation to the whistleblowing victimisation complaints, allowing the Claim to be amended on this basis would have the effect of substantially expanding the potential scope of the Tribunal's enquiries and any steps taken by the Respondent in preparation to deal with the causal connection between any disclosures and any treatment, when the material presently available did not suggest that there was a basis for exercising any discretion so that the issue was brought within the jurisdiction of the Tribunal. As such, I was satisfied that the balance of injustice or hardship in relation to these proposed amendments was not in the Claimant's favour.

197. I was satisfied that there was no real prejudice to the Respondent through allowing the amendment to deal with the pay complaint. As stated above, the Respondent was in a position to deal with such a complaint in that the Claimant's contractual entitlement to pay would be within its knowledge as the other party to the contract, and it would be in a position to assert, from its records, its position as to the sum to which the Claimant was entitled and whether or not it believed that it had met any such entitlement. It was a straightforward question as to whether the Claimant was entitled to the injury allowance, in respect of which the Respondent had previously made a decision so that it would be in a position to explain the basis of that decision to the Tribunal. On the face of it, the Claimant's case was that the Respondent had continued to failed to pay her the sum involved up until the date of her dismissal pay. The balance of injustice or hardship favoured the Claimant. Accordingly, permission is granted to the Claimant to amend her Claim so as to complain that the Respondent had failed to pay injury allowance to her from 23 March 2020 to 10 November 2020 which would have topped her absence pay up to 85% of pay.

198. In the absence of permission to amend having been granted to allow the Claimant to add the complaints of race discrimination set out at paragraph 6 of the

Case Management Summary of the Case Management Order of 13 October 2022, the ET1 Form of Claim fails to disclose the basis of a complaint of race discrimination. As such, the Claimant's complaints of race discrimination contrary to Equality Act 2010 are dismissed.

### **Conclusion**

199. In conclusion, the decision of the Tribunal is as set out below.

(1) The Claimant was disabled within the meaning of section 6(1) of the Equality Act 2010, by reason of anxiety and depression, at all material times from 19 February 2018.

(2) The application of the Claimant to amend her Claim, as set out in the Case Management Order of 13 October 2022 is allowed to the extent that the Claimant is given permission to amend her Claim to include the complaints of disability discrimination set out at paragraph 5(b) to (e) of the Case Management Summary, as set out below.

(a) In an occupational health referral, in October 2020, and in an application for ill health retirement, the Respondent misrepresented why the Claimant was off work with sickness absence saying that she was off work because of a review following whistleblowing concerns which the Claimant had raised; whereas, in fact, the Claimant was off work due to a medical condition.

(b) The Respondent did not ask the Claimant why she was absent from work and what was stopping her from returning to work.

(c) Naomi Manning failed to tell the Claimant in a meeting that the Claimant had failed to complete a spreadsheet properly with the result that the Respondent failed to offer the Claimant redeployment.

(d) The Claimant was dismissed by the Respondent.

(3) The application of the Claimant to amend her Claim, as set out in the Case Management Order of 13 October 2022 is allowed to the extent that the Claimant is given permission to amend her Claim to include the complaint of unlawful deductions from wages / breach of contract set out at paragraph 8 of the Case Management Summary, namely that the Respondent had failed to pay injury allowance to her from 23 March 2020 to 10 November 2020 which would have topped her absence pay up to 85% of pay.

(4) The Claimant is refused permission to amend her Claim in respect of the application of the Claimant to amend her claim, as set out in the Case Management Order of 13 October 2022, to include the complaint of disability discrimination contrary to Equality Act 2010 set out at paragraph 5(a) of the Case Management Summary.



(5) The Claimant is refused permission to amend her Claim in respect of the application of the Claimant to amend her claim, as set out in the Case Management Order of 13 October 2022, to include the complaints of race discrimination contrary to Equality Act 2010 set out at paragraph 6 of the Case Management Summary.

(6) Any complaint of race discrimination contrary to Equality Act 2010 made in the ET1 Form of Claim is dismissed on the basis that any complaint of race discrimination is entirely unparticularised so that the ET1 Form of Claim fails to disclose the basis of a complaint of race discrimination.

(7) The Claimant is refused permission to amend her Claim in respect of the application of the Claimant to amend her claim, as set out in the Case Management Order of 13 October 2022, to include the complaints of (whistleblowing) victimisation contrary to Employment Rights Act 1996 section 47B by being subjected to detriment on the ground of making public interest disclosures and by being automatically unfairly dismissed contrary to Employment Rights Act 1996 section 103A by reason of making public interest disclosures.

(8) The Claimant's remaining complaints (ordinary) of unfair dismissal, disability discrimination and unlawful deductions from wages / breach of contract will be listed for a final hearing.

Signed

**Employment Judge Kenward**  
13 March 2024