EMPLOYMENT TRIBUNALS

Claimant: **Mr K Bright**

Respondent: **RSPCA North Somerset Branch**

PRELIMINARY HEARING

Heard at: **Bristol** **On: 13, 14, and 15 December 2021**
4, 6 July 2022 (hearing)
11 July 2022 (chambers)
10 and 21 October 2022 (writing)

Before: Employment Judge Midgley

Representation
Claimant: In person
Respondent: Mr D Mason, Counsel

JUDGMENT

1. The claim for unpaid annual leave is dismissed upon its withdrawal by the claimant.

2. The claimant's claims under s.47B and 103A ERA 1996, s.20 and 26 EQA 2010, and of breach of contract are not well founded and are dismissed.

3. The employer's contract claim is not well founded and is dismissed.

REASONS

Claims and Parties

1. By a claim form presented on 17 March 2020, the claimant brought claims under the Employment Rights Act 1996 of automatically unfair dismissal (section 103A ERA 1996), detriment on the grounds of having made a protected disclosure (section 47B ERA 1996), unpaid annual leave (section 13 ERA 1996), a claim of breach of contract in respect of notice pay, and claims under the Equality Act 2010 relying on the protected characteristic disability, alleging a failure to make reasonable adjustments (section 20 EQA 2010), and

harassment (section 26 EQA 2010).

2. The claimant commenced the Early Conciliation process with ACAS on 13 January 2020 (Day A). The Early Conciliation Certificate was issued on 28 January 2020 (Day B). Accordingly, any act or omission which took place before 3 December 2019 (which allows for a 15 day extension under the Early Conciliation provisions whilst the "clock was stopped") is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

3. The respondent is a well-known national charity. The claimant was employed by the respondent as a relief manager between. His claims arise out of events that occurred between July 2018 and January 2020.

Procedure, Hearing and Evidence

4. The hearing was initially conducted as a hybrid hearing, with the Judge and claimant attending in person and the respondent's representative and witnesses attending remotely. Following the postponement of the hearing and its relisting, for reasons which are detailed below, the hearing was conducted as a fully remote hearing by video as a reasonable adjustment in respect of the claimant's disabilities.

5. The parties had previously consented to my sitting alone without Tribunal members, notwithstanding the claims of discrimination and detriment on the grounds of having made protected disclosures. At the outset of the hearing, it was agreed that we would take breaks of approximately 10 to 15 minutes every hour as a reasonable adjustment to help manage the claimant's anxiety levels. The claimant was also supported by an individual from Support at Court on 13 and 15 July 2021, to whom the Tribunal extends its gratitude.

6. The parties produced a bundle of 190 pages, and I was provided with the following witness statements:

7. For the claimant, a statement from Mr Bright himself, and statements from the following:

   7.1. Mrs Lena Pope, a volunteer for the respondent

   7.2. Mrs Claire Olive, a volunteer for the respondent

   7.3. Mr Sean Underhay, a volunteer for the respondent

   7.4. Mr George Short, a former employee of the respondent;

   7.5. Mr Chris Simmons.

8. For the respondent, statements from the following:

   8.1. Mrs Rita Hinton, the respondent's Branch Secretary and Trustee

   8.2. Mrs Carol O'Leary, the respondent's Branch Chair of the Trustees

   8.3. Mrs Sue Badger, a Trustee of the respondent

   8.4. Mr Daniel Harris-West, a Trustee of the respondent, who investigated the

claimant's grievance

8.5. Mr John Whitlow, a Trustee of the respondent, who took the decision to dismiss the claimant

9. In the event Mr Short and Mr Simmons did not give evidence, I therefore gave their statements very little weight.

10. On the morning of the first day, I clarified the issues and the extent of dispute with the parties, agreed an indicative timetable for evidence, including regular breaks (the reasonable adjustment detailed above) and took the morning to read the statements and the documents referred to in them. I explained the issues to the claimant, together with their purpose the requirements of cross-examination and its limitations.

11. The claimant suggested that he possessed a copy of the email which he relied upon for the purposes of the detriment claim at issue 7, which he alleged had been omitted from the bundle. He agreed to send a copy of that email to the respondent that day.

12. The Annual leave claim and breach of contract claim for expenses: Prior to evidence commencing, the respondent conceded that the claimant was owed three hours annual leave, and that it would pay the sum of £355.76 to the claimant by BACS in satisfaction of that claim. The claimant agreed to withdraw the claim and for it to be dismissed.

13. Expenses claims: In relation to the expenses claims which were pursued as damages claims for breach of contract, the respondent further undertook to review any itemised breakdown of expenses, supported by receipts, that was provided by the claimant to the respondent and to pay the sums that were properly payable to the claimant. The respondent maintained that the claimant had consistently failed to provide such breakdown and therefore it had been unable to identify whether any sums properly due to the claimant as expenses.

14. The course of the hearing: The claimant gave evidence for the afternoon of the first day and until midday on the morning of the second. On the morning of the second day, the claimant sent various documents by email to the Tribunal which he wished to rely upon. These consisted of emails from the witness Mr Short to Mrs Hinton, a statement from an individual named Alison Hynam, 30 pages of timesheets, and a series of photographs showing volunteers. In addition, he sent an email from Mrs Hinton to the claimant and Mrs O'Leary dated 11 July 2019 timed at 23:48, and a further email sent into the same addressees dated 7 September 2019 timed at 16:51.

15. The respondent objected to the admission of the statement of Ms Hynam and the email from Mr Short, and to the admission of timesheets on the grounds that the latter were utterly irrelevant; I upheld those objections. The respondent did not object to the admission of the photographs, having had an opportunity to consider them, and consented to the admission of the two emails from Mrs O'Leary referred to above.

16. When the claimant's evidence concluded, Mr Underhay, Miss Olive, and Mrs Pope gave evidence and were cross examined by Mr Mason for the respondent. The respondent was due to call Mrs Hinton as its first witness.

When I asked the claimant whether he was ready to ask his questions of Mrs Hinton, he said that he was not; it was therefore agreed that Mrs O'Leary would give evidence as the claimant was ready to ask his questions of her. The claimant agreed with me that if he were able to consider his questions for Mrs Hinton overnight, he would be ready to proceed with her evidence the following day. I agreed to that course as a further reasonable adjustment for the claimant. In relation to each witness, I identified for the claimant what it appeared from the issues that his challenges to their evidence would be, I explained the need to challenge the evidence and specifically to put the allegations that he pursued in the Tribunal to witnesses, saying what they did and why he alleged it was wrong. Where it was unclear who had been responsible for a decision, I directed that the respondent should clarify that overnight, to identify who it said had taken the relevant decision, so as to assist the claimant.

17. Mrs O'Leary then gave evidence and answered questions from the claimant.

18. It was agreed that Mr Whitlow would give his evidence as the first witness on the third day of the hearing, as he had a doctor's appointment the following day. The claimant did not object to him being called out of sequence.

19. Consequently, on the morning of the third day, Mr Whitlow gave evidence and answered questions from the claimant. The claimant was again supported by Support at Court. Mrs Hinton was called to give evidence. The claimant had initially indicated that he would require an hour to cross examine Mrs Hinton. I had proposed on the second day that that time should be extended to 2 hours, to consist of an hour and a half cross-examination and 30 minutes for re-examination and my questions. (At the start of the third day, the claimant again forwarded additional documents to the Tribunal by email which he wished to add to the bundle. They were not relevant to the issues which I had to decide, and I rejected the application to admit them.)

20. During Mrs Hinton's cross-examination by the claimant, at approximately 12;30, the claimant became very distressed, stating that he had not been able to sleep since 4pm the previous day. I asked whether he felt fit enough to effectively participate in the hearing; he replied "no, I just want to die…" He subsequently collapsed in the Tribunal, and the security staff and clerks arranged for the claimant to be taken to hospital by ambulance.

21. The hearing was therefore postponed, and directions made for a further telephone case management hearing at a point when the claimant was sufficiently well to participate, to relist the final hearing and to determine the necessary reasonable adjustments. The case management hearing was conducted by EJ Bax on 3 May 2022 and it was agreed that the appropriate adjustment was to take evidence on alternate days to manage the claimant's anxiety levels. The claim is therefore relisted with the parties concerned for the 4, 6, 8 and 11 July 2022.

22. In the event I could not sit on the 8 July and the parties agreed that the case could be concluded within the reduced listing.

23. On 4 July 2022 the hearing resumed. The claimant cross examined Mrs Hinton. I was told that the claimant and respondent had agreed a figure in settlement of the expenses and annual leave claim through ACAS; there was uncertainty

whether that had been paid and the parties agreed to investigate and update me on 6 July, the next day of the hearing.

24. On 8 July, Mr Harris-West, Mrs Lonsdale and Mrs Badger gave evidence and were cross examined by the claimant. The parties agree that the appropriate course was for them to adjourn and file and exchange written submissions and I should use the 11 July as a day for deliberation. The respondent had prepared submissions which were sent to the claimant and the Tribunal on 6 July, the claimant filed and exchanged his written submissions on 7 July and the respondent was permitted to and did file a reply on 11 July 2022.

25. I used the 11 July 2022 as a deliberation day in chambers. Regrettably due to Judicial annual leave, including my own, and the pressure of the Tribunal diary, it was not possible to be allocated writing time until October 2022. The parties were therefore notified of the delay and an apology was offered. I reiterate that apology: the case has been complicated by the split hearing and the volume of evidence, but I recognise the anxiety and frustration that the delay in the promulgation of my Judgment has caused and apologise to the claimant, the respondent and its representative for it.

The Issues

26. The issues were identified by EJ Dawson at a preliminary hearing on 8 March 2021 as detailed in the issues below, save that the issue of disability has been removed, as the respondent conceded that the claimant was disabled as a consequence of depression and anxiety.

27. The Issues were revised further following a second preliminary hearing before EJ Roper on 9 November 2021, as reflected by the sections in italics below. Subsequently, during evidence the claimant clarified further details of the allegations (which are indicated by italicised and underlined text below).

28. The issues for me to determine were therefore as follows:

<u>Time limits</u>

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

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

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

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

1.3 Were the detriments complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the acts complained of?

1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

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

1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2 Protected disclosure ('whistle blowing')

2.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

2.1.1.1 by email to the trustees about the fact that they had dismissed a disabled person (the claimant will provide a copy); *identified as a letter dated 29 January 2020*

2.1.1.2 in person to a trustee, Mr Harris West, on 6/10/2019 stating that the respondent had a history of dismissing people who were disabled/transgender/for age-related reasons; *Identified as having occurred on 26 October 2019*

2.1.2 Were the discloses of 'information'?

2.1.3 Did he believe the disclosure of information was made in the public interest?

2.1.4 Was that belief reasonable?

2.1.5 Did he believe it tended to show that:

2.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation namely the Equality Act 2010;

2.1.6 Was that belief reasonable?

3 Dismissal (Employment Rights Act s. 103A)

3.1 Was the making of any proven protected disclosure the principal reason for the claimant's dismissal?

3.2 The claimant did not have at least two years' continuous employment and the burden is therefore on him to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosures.

4 Detriment (Employment Rights Act 1996 section 47B)

4.1 Did the respondent do the following things;

4.1.1 by a trustee, send an email to the claimant asking how he dare interfere with the operation of the organisation;

4.1.2 dismiss everybody who the claimant had employed engaged; *Specifically, the dismissal of Jaden and Chris in July 2019, and Rachel in the last weeks of July, early August 2019*

4.1.3 refuse to pay the claimant sick pay from September 2019; *Specifically, the period 24th September until 22 October 2019, 31 October until 11 November 2019, and 13 November 2019 until 22 January 2020*

4.1.4 fail to pay the claimant 10 days of accrued annual leave when he was dismissed; *specifically, in the payment of his salary on 22 January 2020*

4.1.5 dismiss the claimant [on 22 January 2020].

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

4.3 If so, was it done on the ground that he had made the protected disclosure(s) set out above?

6 Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

6.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability?

6.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

6.2.1.1 Requiring the claimant to return to normal working hours after a period of sickness in Dec 2019 without allowing him to return on a phased return basis

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that

6.3.1 not having a phased return to work increased his anxiety?

6.4 Did the respondent know or could it reasonably have been expected to know

that the claimant was likely to be placed at the disadvantage?

6.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:

6.5.1 allow him to return to work on a phased basis.

6.6 Was it reasonable for the respondent to have to take those steps and when?

6.7 Did the respondent fail to take those steps?

7 Harassment related to disability (Equality Act 2010 s. 26)

7.1 Did the respondent do the following things:

7.1.1 Refuse to acknowledge that the claimant was disabled. *Specifically, the first four lines of the email of 7 September 2019 from Mrs Hinton to the claimant?*

7.1.2 Send emails to claimant while he was off sick saying he needed to return to work?

7.2 If so, was that unwanted conduct?

7.3 Did it relate to the claimant's protected characteristic, namely disability?

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

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

8 Holiday Pay (Working Time Regulations 1998)

8.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

9 Breach of Contract (Extension of Jurisdiction Order 1994)

9.1 Did this claim arise or was it outstanding when the claimant's employment ended?

9.2 Did the respondent do the following:

9.2.1 Fail to pay the claimant expenses which were due to him

9.3 Was that a breach of contract?

9.4 How much should the claimant be awarded as damages?

10 Employer's contract claim

10.2 Did the claimant receive too much remuneration in respect of holidays and

fail to return it.

10.3 Was that a breach of contract?

10.4 Is the claim which the Tribunal has jurisdiction to consider under Breach of Contract (Extension of Jurisdiction Order 1994)

10.5 How much should the respondent be awarded as damages?

Factual Background

The parties

29. The respondent is a well-known national charity. One of its primary fundraising mechanisms is through high street shops which sell donated goods. The respondent employs a number of employees to manage such shops and additional support is provided by volunteers.

30. The claimant is an intelligent and articulate man who unfortunately has been affected by severe mental ill-health for lenghty periods of his life, at times requiring significant treatment and support in respect of it. The respondent accepts that his condition of anxiety and depression amounted to a disability for the purposes of the EQA 2010. The claimant is dyslexic, although that condition is not relied upon and is not material to the claimant's claims under the EQA.

31. Notwithstanding those matters, the claimant completed a Masters in Charitable Fundraising and Marketing and has over 20 years' experience of work in the sector.

The claimant's application and roles with the respondent

32. In June 2018 the claimant applied for the part-time role of Relief Manager at the respondent's North Somerset Branch. He completed the application form and a 'Disabled Applicants Monitoring Form.' In answer to the question "do you consider yourself to have a disability or health condition?" the claimant ticked the "yes" box. However, no details of the disability were requested or disclosed, and the claimant further indicated that the condition did not affect his ability to attend for interview and he did not tick the box to indicate whether he required reasonable adjustments.

33. The claimant's application made no reference to either his depression and anxiety or his dyslexia. Indeed, under the heading 'Special Skills and Knowledge' (a title which the claimant had used) the claimant wrote "I am confident in my written abilities," later indicating that in one role "I would need to produce a monthly magazine that I compiled and then had volunteers to copy in house. I would often be editing the magazine as volunteers arrived." Later in the application he wrote "I'm calm under pressure, resilient were necessary and able to relate to people from various backgrounds." There was certainly no indication within the application form itself either of the fact of the disabilities or of the effect upon his ability to deal with pressured situations or written documents.

34. The claimant was interviewed by Carol O'Leary, who was then the respondent's

Chair of Trustees and he was acting as the chair of the interview panel, Simon Mercer, the Shops Manager, and a Mrs Susan Badger, a Trustee and who was then Dean of Veterinary Nursing at Bristol University.

35. The Disabled Applicants Monitoring Form was not provided to those who interviewed the claimant, only his application itself was provided. Consequently, the interviewing panel did not ask any questions about the claimant's disability, and the claimant for his part did not discuss his condition or its effect at all. I accept the evidence of Mrs Badger and Mrs O'Leary to that effect, I found them to be credible and honest witnesses, and in any event their evidence that there was no discussion of the claimant's disability at interview was consistent with the claimant's own evidence.

36. The claimant performed very well at interview and was the preferred and unanimous choice of all the interviewers. On 16 July 2018 he was employed by the respondent as a Relief Manager working 20 hours a week. His role required him to act as cover for other Managers during the absences, whether for annual leave or sick leave. Mr Mercer was his immediate line manager.

37. The parties agree that there was an implied term through practice in the claimant's contract that he was entitled to reimbursement of reasonably incurred expenses on the presentation of appropriate receipts.

The claimant's decision to leave the respondent

38. One of the high street shops that the respondent operated was in Milton. In late 2018, the Shop Manager of the Milton shop, Ms Nicky Bartlett, sought a move to Worle for personal reasons. Mr Mercer suggested that the claimant should run the shop on a part-time basis and made a recommendation that the claimant should be offered a further contract with the respondent to work 20 hours a week to run the Milton Shop. On 12 November 2018, that proposal was approved by the trustees at a meeting. The claimant began work in the store on 7 January 2019.

39. The claimant worked hard to turn the Milton Shop around, recruiting approximately 11 volunteers by July 2019. Amongst the volunteers were a young man with learning disabilities and his support worker, and two teenagers. His hard work was noticed and appreciated by the respondent and by Mrs Hinton, the Branch Secretary of the respondent's North Somerset Branch and a Trustee, in particular.

40. In the late spring, the Shops Manager, Simon Mercer, gave notice of his resignation to the respondent. His role required him to manage and oversee approximately nine or ten shops within North Somerset. The claimant was very keen to take over Mr Mercer's role, alternatively to fill the Milton shop Manager role on a full-time contract, and believed that his success in turning the Milton branch around made him a highly attractive replacement for Mr Mercer.

41. However, partly as a consequence of Mr Mercer's resignation, the respondent was at that time uncertain of how it wished to structure its organisation, in particular whether it would move towards a structure that was based upon managers who were not tied to shop locations but could be moved more readily between them. Various proposals were made by Simon Mercer to the Trustees as to how operations might be altered. Amongst those proposals was that the

claimant could become a full-time roaming Shop Manager.

42. In late June or early July 2017, following the claimant's attempt to recruit an individual who had entered the Milton shop as a customer, the customer was impressed by the claimant and encouraged him to apply to the charity for whom she worked, the Leonard Cheshire Disability charity ("Leonard Cheshire"), as a volunteer coordinator. The hourly rate for the role was approximately £4 more than the claimant's. Consequently, when the claimant discussed the matter with his line manager, Mr Mercer, he was supportive but encouraged the claimant to maintain his role as Relief Manager because of the extent of staff shortages which the respondent faced.

43. Shortly after that encounter, the claimant saw Mr Mercer's proposal that he should be a full-time roaming Manager on Mr Mercer's computer. The claimant believed that the proposal amounted to a final decision, that he would not therefore be offered the position of shop Manager for Worle (and by implication that that decision had been made without consultation with him), and that he had been unfairly and unreasonably rejected as replacement. At or about the same time, the claimant was criticised by the respondent's bookkeeper in respect of a minor error that he had made in submitting a receipt, which included personal items, but the effect of which was to prevent the respondent's accounts from reconciling.

44. The claimant's immediate reaction to those two matters, but most particularly to what he perceived to be the effect of the document on Mr Mercer's computer, was one of intense disillusionment with the respondent and of incredible anger, as he believed that the respondent did not value his efforts in turning the Milton Shop around, and in light of hours of work and expertise that he had brought to his role.

45. On 8 July 2019 the claimant met with Carol O'Leary at his request. During the meeting the claimant told Mrs O'Leary that it was possible he would be offered a job by Leonard Cheshire. He was not certain at that time as to whether the role would in fact be offered, and certainly he had no idea as to the number of hours that he would be required to work and/or of its direct impact upon his ability to work the respondent. He did not however express his disillusionment or anger.

46. On 11 July 2019, Mrs Hinton emailed the claimant and Mrs O'Leary in relation to the claimant's job offer with Leonard Cheshire. Mrs Hinton was supportive noting that the claimant had "outstanding people skills, and that the new role would offer greater financial reward and enable the claimant to use his strengths." She stated that it was unclear from the claimant's email whether he would leave the respondent's employment or would be able to remain albeit with reduced hours. She expressed a willingness to listen to the claimant's proposals and to consider the best way to use his skills.

47. The claimant began a period of annual leave on 12 July 2019. Shortly after that, the claimant's partner entered the Milton shop and handed in the claimant's keys. She stated that the claimant was not coming back.

<u>The termination of volunteers</u>

48. Amongst the volunteers that the claimant had recruited to work in the

respondent's Wilton shop, were Mrs Pope's daughter, who was then 14, and two twins who were aged approximately 14 or 15. The engagement raised a number of problems for the respondent, firstly the question of safeguarding, and secondly the fact that they were not covered under the terms of the respondent's public liability insurance. Mrs Lonsdale raised her concerns in relation to those matters with the Trustees, and with their agreement Mrs Lonsdale informed the young volunteers that they could no longer work in the shop.

Events following the claimant's return to work on 20 July 2019

49. On 24th July 2019, the claimant was offered the role of a Volunteer Coordinator Level III-home-based by Leonard Cheshire, commencing on 12 August 2019. The claimant's contractual hours were 21 hours per week.

50. The claimant's annual leave ended on 20 July, and the claimant returned to the Shop. He was asked whether he still proposed to work for the respondent and replied that he had posted his letter of resignation by first class post on the 11th, but that he could not remember to whom he had addressed it. The claimant subsequently sent an email to Mrs O'Leary on 30th July 2019 which contained what the claimant said was the wording of his earlier resignation letter.

51. The letter recorded the circumstances in which the claimant had been recruited to Leonard Cheshire, complained about the number of days and hours the claimant had worked for the respondent, and the delay in paying his expenses. In relation to the new role, the claimant stated that it was a role for three days a week, and he was willing to continue to work for the respondent in either of his existing roles on two days a week.

52. In addition to the purported wording of the resignation, the claimant also sent a three-page discursive document, recording the claimant's frustrations with the respondent and its organisation. The claimant made many complaints, including his sense of grievance not being offered the role of the Milton Shop manager, following the resignation of the incumbent, Simon Mercer. He was later to describe it to Mrs Hinton as 'a bit of a rant.'

53. At about the same time, as a consequence of the claimant's resignation, Mrs O'Leary caused a poster to be placed in the Milton Shop Window, seeking a replacement for his role. It was a template poster used by the respondent which stated that the respondent sought a new manager for the shop to improve its performance; a statement which could easily and reasonably have been understood to have been critical of the claimant's management and performance, but was not intended to be. The claimant was incensed by it.

The meeting of 8 August 2019

54. As a consequence of the claimant's email, the claimant met with Mrs O'Leary and Mrs Rita Hinton. The meeting was recorded and a transcript was provided to the Tribunal.

55. The claimant's case at the Tribunal was that during the meeting on 8 August Mrs O'Leary had agreed that the claimant could relinquish his contract as the Relief Manager and reduce his hours, freeing him to work two days a week as the Milton Shop manager and permitting him to work three days a week for

Leonard Cheshire. I reject that argument, there is no reference whatsoever to such an agreement in the transcript of the meeting, and in any event at the time of the meeting the claimant was still uncertain of what days or hours he would be required to work for Leonard Cheshire. Secondly, the nature of the claimant's role as Relief Manager required flexibility of days, because the respondent could not know when and where cover would be needed. The nature of the role therefore necessitated that the post-holder was able to perform a set number of hours across the week, without specifying the days which they were to be worked. I accept the respondent's argument that they would not have agreed to the Relief Manager role being performed on set days. Finally, the claimant's case is entirely inconsistent with the respondent repeated attempts after the meeting to seek clarification from the claimant as to whether he could fulfil his contractual duties of 20 hours.

56. At one stage during his evidence, the claimant suggested that the agreement had been reached during his meeting with Mrs O'Leary on 8 July 2019. I reject that argument as the email from Mrs Hinton to the claimant of 11 July demonstrates that there was no agreement at that stage of the sort the claimant suggests. The claimant's argument is, I find, a deliberately false construct for the purpose of these claims. There is not an iota of evidence to support it and not an iota of truth in it.

57. Rather, at the meeting on 8 August 2019, the claimant was asked whether he would be continuing to work for the respondent, and if so, what his availability was and what hours he would be able to offer. The claimant explained that he had yet to have his induction with Leonard Cheshire and so he was uncertain of the demands of the role or the days of work that would be required of him at that time. The claimant raised the fact that his expenses had only been paid on one occasion, and in consequence he had stopped completing the expenses forms in March, although he had been paid twice, by mistake, in respect of the claim that he had submitted, and therefore he had simply kept a record of his receipts intending to ensure that the receipts were of equal value to the cheque that he had been paid in error.

58. The discussion was wide-ranging, the claimant was able to air all of his grievances. Mrs Hinton and Mrs O'Leary were supportive of and attentive to the claimant's concerns. They apologised for the wording of the poster which had been put in the Milton Shop window.

The claimant's grievance

59. Regrettably, that good work was undone when it was reported to the claimant that Mrs Bartlett had made remarks that were critical of the claimant. Consequently, he emailed Mrs Hinton on 10 August to complain.

60. The respondent determined that his complaint should be investigated in accordance with its grievance policy.

61. On 11 August, Mrs Hinton emailed the claimant asking whether he had started work for Leonard Cheshire and, if so, when he might be available to work for the respondent. The claimant replied, stating that he was due to meet the Leonard Cheshire's area manager soon and would know more at that stage.

62. On 12th August, Mrs Hinton emailed the claimant requesting details of the

volunteers he would wish to be interviewed in relation to his grievance.

63. The claimant replied by email on the 13th, indicating that all of the volunteers should be interviewed. The claimant responded to Mrs Hinton's enquiry in relation to his new role only by stating that he had completed his training, he did not identify which days or hours he would be available to work. He also expanded his complaints to suggest that Mrs Bartlett had been discussing him and his salary, and the volunteers he had recruited, openly in the shop in Worle in front of other volunteers.

The claimant's sickness absence

64. On 13 August, Mrs Hinton asked the claimant whether he would be able to work on the 15th and 16th of August. The claimant simply replied "no." The following day, he emailed Mrs Hinton a fit note covering the period the 14 to 28 August, the condition diagnosed was "workplace stress".

65. The claimant sent a further email on 14 August 2019 to Mrs Hinton. It was an inflammatory email: the claimant complained that Mrs Bartlett's behaviour, in allegedly discrediting and defaming him, was a direct result of the Trustees having disclosed private and confidential information about his new work contract. He suggested that if that belief were accurate, the Trustees should compensate him. He was particularly critical of Mrs Hinton's attitude towards him and scathing about her knowledge and understanding of the requirements of the Milton shop. The email was replete with sections in block capitals. He ended by stating,

> "*I am now signed off with work-related stress. Thank you for all you did to contribute to it. I will drop the not of [sic] tomorrow along with the paperwork for the banking*.
>
> *YOU DO NOT HAVE MY PERMISSON TO DISCUSS MY ABSENCE WITH ANY VOLUNTEERS, DRIVERS OR OTHER SUPERVISORS. This is NON NEGOTABLE."*

66. Mrs Hinton replied on 15 August. She expressed her shock at the tone and content of the claimant's email, and her unhappiness with his use of block capitals. She stated that the claimant's complaints about the conduct of the Trustees would be investigated as new complaints as part of his wider grievance. However, she asked for clarity as to the detail of the claimant's complaints against the Trustees, in particular asking what private and confidential information he suggested had been disclosed and to whom, and who he alleged had revealed information about his employment contract and to whom they had made that revelation. As the claimant had requested, he was told where he could find the grievance procedure.

67. In relation to the claimant's hours, Mrs Hinton explained that her previous understanding from her discussions with the claimant was that he would be available to work on a Thursday, Friday or Saturday, and she sought clarity as to whether the claimant's email of 14 August should correctly be understood as indicating that he could be available on weekday mornings.

68. The claimant replied on 15 August, stating that he believed that Mrs Hinton and Mrs O'Leary had discussed his contract and hours with all of the supervisors.

He ended by stating, "*Again. I blame you directly now that I know you were behind sparks that led to all this abuse."* On the same day the claimant visited the Milton Shop.

69. On 16 August, Mrs Hinton emailed the claimant instructing him not to attend the respondent's shops to work until his GP had certified him as being fit to work. She sought for clarification of the claimant's allegations that she and Mrs O'Leary had discussed the claimant's contract with his supervisors but stated that in light of the claimant's allegations against her, she would absent herself from the grievance process going forward.

70. On 19 August, the claimant emailed to Mrs Hinton, entitling his email "Disappointed", stating that Mrs Lonsdale, an employee of the respondent, had informed the volunteers at the Milton Sharp that the claimant was off sick. He accused Mrs Hinton of ignoring his request not to discuss his absence and stated that he would now be expecting an explanation and compensation.

71. On 22 August 2019 the claimant again attended the Milton shop. Mrs Hinton emailed the claimant directing him not to do so and advising him that Mrs Lonsdale would discuss the claimant's availability to work with him. She requested that the claimant identify which days he would be available to work for the respondent.

72. In the same email Mrs Hinton informed the claimant that Mr Harris-West would consider the grievance, but, as she was clearly frustrated and upset by the claimant's allegations against her, she expressed her frustration that the claimant had made allegations against her but failed to that point to provide any detail of them as requested.

73. At this juncture, the relationship between the claimant and Mrs Hinton had been very significantly damaged, if it had not collapsed altogether.

74. On the same day, 22 August, the claimant replied to Mrs Hinton by email, complaining that he had been vilified and treated appallingly since he had raised a grievance, and that Mrs Hinton had singled him out and been "*unbelievably awful*." He suggested that Mrs Hinton's approach, even when he was clearly distressed, had continued to add to the pressure and stress that he was experiencing. The claimant also texted Mrs O'Leary, complaining of the response from Mrs Hinton and his treatment by Mrs Lonsdale, stating "*if you want me to leave. Offer me A settlement And I will walk* [sic]"

75. Mrs Hinton replied in an email the same day, referencing the claimant's text message to Mrs O'Leary. She instructed the claimant in firm and robust terms that the Trustees would not be discussing the reasons why Mrs Pope was not appointed shop manager with the claimant as "it is none of your business and your interference is unwelcome." She reminded the claimant that his grievances against her would be addressed by Mr Harris-West, and he should provide the details of the complaints to him. She again instructed him not to attend the Milton shop whilst he was under the care of his doctor and/or was off work with sickness. She ended by instructing him to set out clearly which days he would be available to work for the respondent when he was fit enough to return to work.

76. On 27 August, Mrs Hinton emailed the claimant, noting that his fit note was due

to expire the following day, the 28th, and seeking clarification of the days and times that the claimant was scheduled to work for Leonard Cheshire, and consequently which days and hours he was available to work the respondent. She reminded him of the terms of his contract to work 20 hours over six days as required by the respondent.

77. On 27th August, Mr Harris-West, a Trustee of the respondent, invited the claimant to a grievance meeting on 21 September and requested clarification of the allegations he made against Mrs Hinton and Mrs Lonsdale. He also requested that the claimant identify each allegation that wished him to investigate, and the details of those allegations, by 30 August 2019.

78. The claimant did not respond to either email directly. Consequently, on 31 August, Mrs Hinton requested that the claimant provide the respondent with a fit note and, on 4 September 2019, Mr Harris-West extended the deadline for the claimant to provide details of his allegations to 30 September 2019.

79. In the event, the claimant's payslip from London Cheshire reveals that in August 2019, the claimant worked 63 hours for Leonard Cheshire, a fact which the claimant accepted in cross-examination.

80. The claimant provided the respondent with a backdated fit note on 3 September 2019 approximately, for the period 29 August to 12 September, identifying work-related stress.

Mrs Hinton's email of 7 September 2019 (7.1.1)

81. On 7 September 2019, Mrs Hinton emailed the claimant. In the email she stated as follows:

> *I understand that you are sick, suffering from what has been described as "workplace stress". Leaving aside causation, which of course I do question, I have to accept that you are suffering from stress, as that is what the doctor has diagnosed when you have described your symptoms. I accept that due to your condition you would not wish to be overly burdened with work issues. However, I made a very simple request of you regarding what days of the week you would be available to work when you are recovered. I have no medical training, but intuitively it seems to me that if you are well enough to involve yourself in the recruitment of your replacement as Manager for the Milton shop while you were suffering from stress, you should be able to let me know your availability for work.*
>
> *You are contracted to work 20 hours over the following days Monday, Tuesday, Wednesday, Thursday, Friday and Saturday. Which of these days are you able to work, please? It is not idle curiosity that prompts my question: the Trustees need to know so we can plan staffing. I should be most grateful if you could let me know."*

82. The email was intemperate and ill-judged in its wording in so far as it alluded to questioning whether the claimant's stress was work-related, but was justified insofar as it sought clarification from the claimant as to which days and hours he would be available to work the respondent, and whether that would enable him to comply with his contractual duties.

83. On 14 September 2019, the claimant emailed Mr Harris-West providing the details of his allegations. He advised Mr Harris-West that he was then heavily medicated and prone to sleeping for 2 hours during the day as a result. He set out his complaints that Mrs Hinton, Mrs Lonsdale and Mr Mercer had discussed his role, salary hours and private life in an open meeting with other supervisors, and therefore had breached his confidentiality. He made no complaint about he dismissal of disabled volunteers by the respondent.

84. He also complained of bullying by Mrs Bartlett, and Mrs Bartlett's unprofessional and unreasonable behaviour more generally. He complained that the respondent failed to offer him a fair or reasonable opportunity to apply for Mr Mercer's job, and that the responsibility of that role has been divided, without consultation or affair process, between Mrs Hinton and Mrs Lonsdale. He also complained of being victimised and discriminated against because he had made a complaint (without giving specifics), asked what actions would be taken at the conclusion of the grievance, depending on whether he was found to have told the truth or to have lied, and if Mrs Hinton and/or Mrs Lonsdale were found to have breached confidentiality, and ended by stating "*Finally what compensation will the RSPCA be offering me as a victim of bullying and disability discrimination?*" He did not however identify the discrimination he suggested he had been subjected to.

85. On 16 September the claimant messaged Mrs Hinton stating "*did you need me to work tomorrow. I am available on Saturday if needed*." He did not however answer the more general enquiry he had been asked about his availability in terms of days and hours of work. Consequently, on 17 September, Mrs Hinton emailed the claimant requesting a copy of the fit note and again requesting details of his availability for work and ability to fulfil his contractual duties.

86. On 18 September the claimant informed Mr Harris-West that he had been signed off sick by his GP until 23 September. On 20 September, the claimant emailed Mr Harris-West to advise him that three volunteers had resigned from the Milton shop. He stated "*shame… As they would have been witnesses to Nikki's* [Mrs Bartlett] *bullying. Where does that leave me now*?" Mr Harris West replied on 24 September, advising him that the resignations would not prevent him interviewing the volunteers, again requested details of the names of the volunteers the claimant wished him to interview as part of the grievance investigation and again requested a date on which the claimant might be available to meet to discuss his grievance.

87. In the event, the claimant's payslip from Leonard Cheshire, reveals that the claimant worked 91 hours for Leonard Cheshire in September 2019. The claimant was paid £339.30 in SSP for September.

88. On 1 October 2019 the claimant emailed Mrs Hinton advising her that "*the time has come to return to work*" and that he had ceased taking medication and had the capacity to return to work with the respondent and with Leonard Cheshire. He advised Mrs Hinton that he had training with Leonard Cheshire on Thursday and Fridays for the next four weeks, but after that period would either be able to work 4 mornings or any two days a week that would suit the branch. He confirmed that he would be available to work Saturdays.

89. On the same day the claimant sent a further email to Mr Harris-West,

forwarding the email that the claimant had sent to Mrs Hinton on 1 October (above).

90. On 2 October Mr Harris-West acknowledged the claimant's email, advised him that there would still a need to meet to discuss the claimant's grievance in more detail, requesting dates for that purpose, and repeating his request for the names of the volunteers whom the claimant alleged had resigned and whom the claimant wanted to be interviewed as part of the grievance process.

91. The claimant did not respond to Mr Harris-West, and therefore on 9 October Mr Harris-West chased the claimant for a reply. On the same day Mrs Hinton emailed the claimant to remind him that the last fit note he had submitted expired on the 23 September 2019 and sought clarification as to whether he was therefore fit to return to work.

92. The claimant eventually replied to Mr Harris-West on 11 October. He suggested the delay in his reply was because he had damaged his personal laptop. He did not directly respond to any of the enquiries; specifically, he did not provide a date to meet Mr Harris West, and he did not name the volunteers who he wished to be interviewed, but rather posed a series of questions asking about the scope of the grievance investigation.

93. Mr Harris West responded on 14 October, clarifying that he was tasked with investigating all aspects of the claimant's grievance. He again asked for a date on which the claimant was available to meet with him to discuss the grievances.

The return to work meeting of 22 October 2019

94. The claimant returned to work on 22 October 2019. He attended a return to work meeting with Mrs Lonsdale. The meeting was recorded. The claimant was asked whether there were any restrictions which were necessary to his normal duties, but stated there were not. He was asked whether he was ready to return to work and replied, *"I'm just waiting for the grievance to be done and then I'll feel much happier*." He clarified that he was "fine" to return to work in the shop. Mrs Lonsdale asked whether there was "*anything you'd like us to put into place to make life easier or anything is going to help you with your return to work basically?*" The claimant replied "*no, all fine*."

95. There was a discussion of the claimant's availability to work. Mrs Lonsdale asked whether the claimant was available for 20 hours over six days, and the claimant replied, "no because I work three days a week in the other job." The claimant suggested that he had agreed with Mrs O'Leary that he would only work two days a week, but had agreed that he would help on Saturdays following Mr Mercer resignation. That was untrue, there was never any agreement that the claimant would only work two days a week for the respondent. The claimant confirmed that he could not work Thursdays or Fridays in October.

96. Mrs Lonsdale was professional and supportive during the meeting. Towards the end of the meeting, she again asked the claimant whether he had any concerns about returning to work, or any issues that he wanted to raise. He replied no.

The grievance interview of 26 October 2019 (PD 1)

97. Mr Harris-West and the claimant met to discuss the claimant's grievance on 26 October 2019. The meeting was recorded and a transcript of the relevant section of the meeting was provided to the Tribunal.

98. The claimant stated that he had informed the respondent that he was disabled on his application form, that Mr Mercer was aware of that and had been prepared to make reasonable adjustments if required, and that the two men had agreed that the claimant would inform Mr Mercer if he required any adjustments, but in the event, none were needed. He did not suggest that he had been specifically discriminated against, but rather in a fit of pique said that a disabled volunteer had been sacked in response to Mr Harris-West's suggestion that the respondent would have made adjustments if they had been aware that the claimant was disabled and had needed them. The precise exchange was as follows:

> *"DHW - In one of your emails to me you mentioned around disability discrimination can you elaborate a little bit more around how anybody's actions has contravened that act*
>
> *KB - well, I made it really clear when I applied for the job that I have a mental health issue*
>
> *DHW - OK how did you make that clear*
>
> *KB - it's in the application*
>
> *DHW - so you didn't say? Sorry, I've not seen your application*
>
> *KB - it asks on the application, and I put yes. I spoke to Simon after the interview we chatted about it as it's fine I'm not medicated as just I have a history of mental health hallucinations. He said well just keep me on let me know how you're feeling but I never needed to phone him to say I was stressed never.*
>
> *DHW - OK*
>
> *KB …*
>
> *DHW - No it's fine. So Simon was aware of your history*
>
> *KB - yeah. It was an informal conversation after the interview.*
>
> *DHW - Was anyone else aware of your disability*
>
> *KB - Why does that matter?*
>
> *DHW - because I'm just trying to establish how we kind of contravened that if they didn't know that you had a disability*
>
> *KB - it's on my application*
>
> *DHW - so I thought it wasn't detailed*
>
> *KB - it's in my application, what more do you need. I had a conversation with the senior paid member of staff, what more do we need to talk about.*

DHW - I'm just trying to work out if obviously we know someone got disability we obviously appreciate…

KB (interjects) What happens is you sack them. Coz that's what happened, that poor lad working Milton got sacked because we weren't insured and we couldn't support him so that's what happens. We've got a history of sacking disabled people now. I hope that when people first come knocking on the door you guys have got your answer Cos they're going to be supporting him same I think it's a real shame. So back to me, so the organisation of known since since I joined that I had a disability. I've really upfront about it okay."

99. The claimant was asked to provide an expense claim in respect of the expenses that he wanted to claim.

100. Mr Harris-West made notes, in bullet point form, of the key points of the discussion and his subsequent investigation. The notes detailed that Mrs Hinton and Mrs O'Leary were unaware of the claimant's disability.

101. In the event, the claimant's payslip reveals that in October 2019 the claimant worked 91 hours for Leonard Cheshire, covering 228 miles.

102. On 31 October, the claimant emailed Mrs Hinton advising her that he had become unwell walking to work at the respondent's Burnham shop, and had subsequently been taken to the Western Hospital where he had been diagnosed as having had a panic attack. He advised that he was being referred to mental health services and it was unlikely he would be in work the following day. It was that reference that prompted Mrs Hinton and Mrs O'Leary to look at the claimant's personnel file where they discovered the Disabled Applicants Monitoring Form. That was the first occasion on which either was aware that the claimant regarded himself as being a person with a disability.

103. On 11 November 2019, the claimant sent the respondent a photo of a fit note, covering the period the 11th until 18 November, citing depression.

104. On 18 November 2019 the claimant's fit note expired.

105. On 19 November 2019, Mr Harris-West wrote to the claimant to provide him with the outcome of his grievance investigation and notes of the interviews that he conducted. Those included interviews with Mrs Hinton, Mrs O'Leary, and Mrs Bartlett. He rejected the claimant's complaints: in particular, where the claimant alleged that certain conduct had been witnessed by a volunteer, despite several efforts to arrange a meeting, the volunteer did not respond to Mr Harris-West's requests for an interview. The claimant was offered the right of appeal. Mr Harris-Whilst repeated his request that the claimant should provide him with details of any outstanding expenses which the claimant believed were owed to him.

106. The claimant was unhappy with the outcome, which he appeared to have received on 21 November, as on that day he wrote to Mr Harris-West stating,

"*Thank you. What a waste of time all that was.*

Pathetic that you did not interview ANY of the witnesses. Denial of disability is clear breach of disability discrimination legislation. It like speeding and

saying you do not see the sign [sic].

See you all at the Tribunal."

107. On 21 November, Mrs Hinton wrote to the claimant asking whether he was fit for work, as his fit note had expired on 18 November. The claimant did not respond to that request, but rather sent a further email alleging that a former customer had reported to the claimant that Mrs Lonsdale had told everyone in the respondent's Whitecross shop that the claimant had been suspended for theft, and making other allegations. The claimant also alleged that a volunteer had said that Mrs Hinton had told her that she would not be able to volunteer any longer as she had made a complaint against the respondent.

108. The relationship between the claimant and Mrs Hinton subsequently became irretrievably damaged; Mrs Hinton was incensed that the claimant was once again making accusation against her which were based on nothing but thirdhand hearsay.

Mrs Hinton's email of 21 November 2023 (Detriment 1)

109. Mrs Hinton emailed the claimant on 21st November giving vent to her frustrations. The email demonstrates the degree of frustration that Mrs Hinton felt towards the manner in which the claimant repeatedly made allegations which had been "reported" to him by third parties. She wrote,

"Let me tell you bluntly that I am absolutely wearied with you involving yourself and issues that are none of your business."

And later,

"Please desist from involving yourself in the business of others or face disciplinary action."

110. Mrs Hinton suggested that had the claimant made the allegations directly (rather than reporting concerns raised by third parties), which the investigation had proven to be unsubstantiated, she would have initiated disciplinary proceedings against him. She said that she did not believe a word of the allegations made against Mrs Lonsdale and put no credence in the volunteer's allegations. She suggested that if the claimant continued to act as a conduit for complaints from third parties, and (by implication) to make offensive, malicious, and untrue remarks about her, she would initiate disciplinary action against him. Finally, she instructed the claimant to confirm in writing whether he was available to comply with his contractual hours of 20 hours per week.

111. On 23 November 2019, Mr Harris-West responded to the claimant's criticism of the grievance outcome, reminded him of his right to appeal, and suggested that the claimant set out in any appeal basis on which he said that the decision was flawed and that the evidence demonstrated that alternative outcomes were more appropriate, rather than launching into a vituperative and offensive tirade.

112. On 25 November 2019, Mrs Hinton again requested the claimant to confirm whether he was fit for work, and if not to provide a fit note covering the period of his absence. She repeated her request for the claimant to confirm whether

he was able to comply with his contractual duties to work 20 hours a week.

113. She received no response to that email, and so repeated her request on 29 November in a further email to the claimant. She advised the claimant that as he had provided no fit note the respondent was unable to pay him statutory sick pay from 19 November.

114. In the event, the claimant's payslip for Leonard Cheshire reveals that the claimant worked 91 hours for Leonard Cheshire in October 2019 and travelled 140 miles working for them.

115. The claimant finally provided a response in an email sent to Mrs Hinton on 6 December 2019. He did not respond to the questions asked of him, but rather alleged that Mrs Hinton had refused to investigate his complaints in relation to Mrs Bartlett, had conducted a personal vendetta against him because he had blown the whistle, and (by application) that her decision not pay the claimant sick pay was because of her discriminatory views about disabled people. He suggested that it was "abundantly clear that I have been off work unwell and likely will be off for some time." That suggestion was entirely erroneous because the claimant had failed to respond to repeated requests to clarify whether he was fit for work or if not, to provide a fit note covering his period of absence, and had in fact been working for Leornard Chesire for three days each week.

116. In addition, he suggested that Mrs Hinton had lied insofar as she had told him that there had been no complaints from volunteers, because he had seen the complaints and Mrs Hinton's responses to them; and ended by writing.

> *"The first time I ment you you told me you volunteered for the RSPCA because people were unkind and horrible. You have cleary forgotten it is the kind and generous people that support and champion the work of the organisation. People like me and all those lovey former volunteers. You on the other hand fall into the unkind and horrible category. I can not express how awful and un-respected you are. You are unprofessional, a bully, discriminatory and untimely, authoritarian.*
>
> *I look forward to my payments and seeing you in at the tribunal."*

117. Mrs Hinton was deeply angered by the personal attack in the email and replied by email on the 9 December 2019. In that email she informed the claimant that she was referring the claimant's comments to another trustee with a recommendation that disciplinary proceeding should be commenced in respect of them and the claimant's continued failure to provide footnotes as requested, and/or to confirm that he was available for work and if so to work his contractual hours. She responded directly to the claimant's accusation that she had "chosen to stop paying" him sick pay, stating,

> *"you have clarified that you are ill but I have had to send you three emails to get that information, but you have provided no proof. It is not that we have "chosen" not pay you. Without evidence of incapacity we are not able to pay you. Your right to be paid SSP is a right contingent upon your compliance with SSP regulations. Until you act upon my request and, as a consequence, meet statutory rules for payment of SSP you will not be paid it."*

118. On or about 20 December, the respondent received a photo of a fit note from the claimant covering the period from 9 December until 24 December 2019. Mrs Hinton wrote to the claimant that day requesting that he forward the original document, and advising that he would not be paid statutory sick pay until such time as it was received. She observed that the fitnote did not cover claimant's absence between 19 November and 9 December 2019, and asked for a fit note covering that period. Finally, Mrs Hinton asked the claimant to confirm whether he was available to work for the respondent 20 hours a week, or whether he maintained the argument he had raised Mr Harris-West that he had reduced his working week to 2 days a week. She asked the claimant to confirm whether he had worked for Leonard Cheshire between 19 November 2019 and 9 December 2019.

119. The claimant did not respond to those requests. The respondent therefore did not pay the claimant statutory sick pay for the period.

120. In the event, the claimant's payslip for Leonard Cheshire reveals that in December 2019 the claimant worked 91 hours for Leonard Cheshire, and travelled 148 miles in that employment.

The disciplinary and the claimant's dismissal

121. Consequently, on 2 January 2020, Mr John Whitlow, a Trustee of the respondent, wrote to the claimant advising him that the respondent would initiate disciplinary proceedings against him in relation to allegations that he had failed to respond to reasonable managerial instructions to clarify:

121.1. whether he was able to fulfil his contractual hours with the respondent;

121.2. whether he had worked for Leonard Cheshire during the period 19 November until 9 December 2019, at which time he was absent from work for the respondent without a fit note demonstrating that he was unfit to hold his contractual duties; and

121.3. he had failed to provide the original fit note covering the period of absence between 9 and 24 December 2019.

122. Further Mr Whitlow identified that the claimant's email to Mrs Hinton in November 2019 was so rude as to be incompatible with a continuing employer employee relationship (the date was an error, Mr Whitlow was referring to the email sent on the 6 December. The claimant was requested to attend a disciplinary hearing on 9 January 2020. He was advised of his right to representation.

123. The claimant neither attended the hearing nor notified the respondent that he was unable or unfit to do so. In consequence Mr Wicklow emailed the claimant on 10 January 2020 advising him that he would be prepared to reschedule the disciplinary hearing the following week. He advised the claimant that the failure to attend the hearing would also be considered in the context of the ongoing relationship between the claimant and the respondent. The claimant was warned by Mr Whitlow that if he failed to attend, the hearing would be conducted in his absence.

124. The claimant replied on 13 January. He suggested he had found Mr Whitlow's email in his junk email folder. He did not respond to the request to identify a new date for the hearing, but rather, entirely disingenuously and deliberately provocatively, suggested that he believed that Mr Whitlow would now conduct an investigation in relation to his complaints about the behaviour of Mrs Hinton, Mrs O'Leary and Mrs Lonsdale behaviour. The email was both disingenuous and provocative because the claimant knew that his grievances had been investigated by Mr Harris-West, that he had been offered the right to appeal against the outcome, that he had been instructed to identify any basis on which he said that Mr Harris-West's conclusions were wrong, and that he had done none of those things. He was equally clear that Mr Whitlow was not investigating the grievances but was conducting the disciplinary. The claimant's email was therefore deliberately inflammatory and disrespectful.

125. The claimant suggested that Mr Whitlow's email had "added to [his] mental Health due to the RSPCA's dreadfully inadequate humman resources and support. [Sic]"

126. On 22 January 2020 Mr Whitlow emailed the claimant notifying him that he had been dismissed with immediate effect. The reasons for dismissal given in the letter were as follows:

126.1. a failure to comply with reasonable managerial instructions in that:

126.1.1. the claimant had failed to comply with requests to provide any fit notes in relation to his sickness absence since 24 December 2019;

126.1.2. he had failed to provide the original copy of the sick note covering his absence between 9 and 24 December 2019;

126.1.3. he had failed to respond to for requests to confirm that he was able to work his contracted weekly hours of 20 hours a week;

126.1.4. he had failed to respond to questions about the work he was undertaking for Leonard Cheshire;

126.1.5. he had failed to attend a disciplinary hearing as directed; and

126.1.6. he had failed to provide an alternative date to attend a disciplinary hearing as directed.

126.2. He had sent an incredibly rude and unwarranted email to a Trustee, namely Mrs Hinton.

127. Mr Whitlow reminded the claimant of his right to appeal and encouraged him to exercise that right so that he could provide explanations for the matters above.

128. In the event, the claimant's payslip for Leonard Cheshire reveals that in January 2020 the claimant worked 91 hours for Leonard Cheshire, and travelled 148 miles in that employment.

<u>The claimant's letter of 29 January 2020 (PD 2)</u>

129. On 29 January 2020 the claimant wrote to the respondent's trustees. The letter was not an appeal against his dismissal. In the letter the claimant complained of bullying and harassment, stating that he was a "victim of inherent organisational bullying and poor management, due to one complaint[1]. The bullying has been targeted at me intentionally… Often offensive to my capacity as a disabled man." He then wrote,

> *"I have stated time and time again that I am off work with the RSPCA with mental health issues which were exacerbated by the behavior of RSPCA staff and trustees. As you will know from reading correspondence between Rita and myself, I was treated appallingly by the RSPCA after I complained about Rita and Carol sharing my personal data with paid staff, who then shared that information with volunteers. I asked time and time again about a safe return to work. Further accusations of theft, recruiting the wrong sort of volunteers and even challenging my disability lead to further distress.*
>
> *The dismissal of disabled staff, was disgusting and shameful. The abuse the trusted and committed volunteers endured is clearly against the ethos and ambitions of the RSPCA. Dismissing volunteers for questioning the theft of stock by a paid worker rather than investigating the allegations shows how authoritarian the organiation really is. It disgusts me to think how much I enjoyed and championed the work of the organsiation, recruiting, training and retaining over 20 volunteers into such an abusive organiation." [sic]*

130. He ended by stating "I now have my Industrial Tribunal reference, having passed the ACAS conciliation period."

The Relevant Law

I: Protected Disclosure

131. The concept of "protected disclosure" is defined by section 43A of the 1996 Act:

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

132. A qualifying disclosure is in turn defined by section 43B which provides, insofar as is relevant to the current claim:

> "In this Part a qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> > (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."

133. The disclosure must be a disclosure of information. In practice, many whistle-blowing disclosures raise concerns, or complaints, or make allegations. This does not, however, prevent them from falling within the terms of the section.

[1] about the claimant, rather than one made by him.

As Sales LJ observed in Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; [2019] ICR 1850 at para. 35, the question is whether the statement or disclosure in question has "a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in the subsection". He added that whether this is so "will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case" (para. 36). A bare statement such as a wholly unparticularised assertion that the employer has infringed health and safety law will plainly not suffice; by contrast, one which also explains the basis for this assertion is likely to do so.

134. Whether such words are to be regarded as “disclosure of information” within the meanings of ERA section 43B(1) depends on the context and the circumstances in which they are spoken. The decision as to whether such words which include some allegations cross the statutory threshold of disclosure of information is essentially a question of fact for the Employment Tribunal which has heard evidence (see Eiger Securities LLP v Miss E Korshunova [2017] ICR 561 EAT at para 35)

135. Where a Claimant argues that the information tended to show a breach of legal obligation “Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. …” (see Blackbay Ventures Ltd v Gahir [2014] IRLR 416 per HHJ Serota QC at paragraph 98).

136. The identification of the legal obligation “does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation.” The decision of the Tribunal as to the nature of the legal obligation the claimant believed to have been breached is a necessary precursor to the decision as to the reasonableness of the Claimant's belief that a legal obligation has not been complied with” (see Eiger at paras 46 to 47 respecticely).

137. In Twist DX v Armes UKEAT/0030/20/JOJ (V) Linden J returned to the issue of disclosures of information. He concluded that it is not necessary that a disclosure of information specifies the precise legal basis of the wrongdoing asserted.

138. The worker does not have to show that the information did in fact disclose wrongdoing of the kind enumerated in the section; it is enough that he reasonably believes that the information tends to show this to be the case. As Underhill LJ pointed out in Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979; [2017] IRLR 837 at para.8, if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable.

139. Having reviewed the law I conclude that the following propositions apply when considering whether a claimant has made a protected disclosure;

139.1. First there must be a disclosure of information. That may include allegations, complaints and allegations, provided the combined effect has a “sufficient factual content and specificity” (Cavendish Munro Professional

Risk Management Ltd v Geduld [2010] ICR per Sales LJ at para 35);

139.2. Secondly, that information must objectively tend to show, in the claimant's reasonable belief that one of the qualifying grounds exists. The Tribunal's task is to assess the information in context and against the prevailing circumstances. Those circumstances:

139.2.1. Permit a higher objective test where the individual is a professional (see Korashi v Abertawe Morgannwg University Local Health Board [2012] IRLR 4 per HHJ McMullen at para 62);

139.2.2. Permit the Tribunal to read across documents and consider statements to create an objective picture of what would reasonably have been believed to have been understood from a written or verbal statement.

139.3. Thirdly, where the qualifying ground relied upon is a breach of legal obligation:-

139.3.1. *Either* the information must identify the legal obligation, although the "identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong" (Eiger at paras 46-47; Twist DX).

139.3.2. *Or*, if the obligation is not identified it must be objectively "obvious" from the information disclosed (Blackbay per HHJ Serota QC at para 98);

139.4. Fourthly, it does not matter whether the claimant's belief is wrong, if objectively his/her belief that he/she has identified a breach as detailed above is reasonable (Babula per Wall LJ at para 79 and Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73 per Elias LJ at para 21.)

139.5. Finally, the articulation of the breach of legal obligation in that sense is a "necessary precursor" for a claimant to establish a *reasonable* belief that the information tends to show that there had been such breach.

Public interest

140. In Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731, CA, the following factors were identified by the Court of Appeal as being relevant to the degree of public interest:

140.1. the numbers in the group whose interests the disclosure served

140.2. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed

140.3. the nature of the wrongdoing disclosed, and

140.4. the identity of the alleged wrongdoer.

Detriment

141. In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the viewpoint of the worker (See Jesudason). There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases. In Derbyshire v St. Helens MBC [2007] UKHL 16; [2007] ICR 841 paras. 67-68 Lord Neuberger described the position thus:

> "67. … In that connection, Brightman LJ said in Ministry of Defence v Jeremiah [1980] ICR 13 at 31A that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".
>
> 68. That observation was cited with apparent approval by Lord Hoffmann in Khan [2001] ICR 1065 , para 53. More recently it has been cited with approved in your Lordships' House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"."

142. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective.

"On the ground that"

143. There must be a link between the protected disclosure or disclosures and the act, or failure to act, which results in the detriment. Section 47B requires that the act should be "on the ground that" the worker has made the protected disclosure. The leading authority is the decision of the Court of Appeal in Manchester NHS Trust v Fecitt [2011] EWCA 1190; [2012] ICR 372 where the meaning of this phrase was considered by Elias LJ (atpara.45):

> "In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower."

144. As Lord Nicholls pointed out in Chief Constable of West Yorkshire v Khan [2001] UKHL 48; [2001] ICR 1065 para.28, in the similar context of discrimination on racial grounds, this is not strictly a causation test within the usual meaning of that term; it can more aptly be described as a "reason why" test:

> "Contrary to views sometimes stated, the third ingredient ('by reason that')

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

145. Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B.

S.103A

146. Section 103A provides:

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

147. "This creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, it seems to me that it is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law" see Kuzel v Roche Products Ltd [2008] ICR 799 per Elias J at para 44.

148. The principle reason for the dismissal is "a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee" (see Abernethy v Mott, Hay and Anderson [1974] ICR 323).

149. The focus must be on the knowledge, or state of mind, of the person who actually took the decision to dismiss, as, "by S.103A, Parliament clearly intended to provide that, where the real reason for dismissal was whistleblowing, the automatic consequence should be a finding of unfair dismissal. In searching for the reason for a dismissal, courts need generally look no further than at the reasons given by the appointed decision-maker. …[however] If a person in the hierarchy of responsibility above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination." Royal Mail Group Ltd v Jhuti [2019] UKSC 55, SC.

II: Discrimination

150. The claimant brings two claims under the Equality Act 2010. The first that the respondent failed to make reasonable adjustments (contrary to s.20 EQA 2010), and secondly that he was harassed (contrary to section 26 EQA 2010).

151. The relevant law is contained in sections 39, 20, and 26 EQA 2010 which provide respectively (in so far as is relevant) as follows:

39 – Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) as to B's terms of employment;
(d) by subjecting B to any other detriment.

s. 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

s.26 Harassment

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

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

<u>The reverse burden of proof</u>

152. The statutory tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

(2) If there are facts on which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene

the provision.

153. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration. In every case the Tribunal has to determine the "reason why" the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question."

154. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA), i.e., that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why it did so was on the grounds of (or related to if the claim is under s.26) the protected characteristic. That requires the Tribunal to consider the mental processes of the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

155. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

156. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. That requires the Tribunal to assess not merely whether the respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the reason for the treatment was not the protected characteristic the claim will fail.

157. The explanation for the less favourable treatment advanced by the respondent does not have to be a 'reasonable' one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

158. Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e. that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination (see Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.)

Failure to make reasonable adjustments

159. A tribunal must consider: (1) the Provision, Criterion or Practice ("PCP") applied by or on behalf of the employer, or the relevant physical feature of the premises occupied by the employer, (2) the identity of non-disabled comparators (where appropriate), and (3) the nature and extent of the substantial disadvantage suffered by the claimant (Environment Agency v Rowan [2008] ICR 218, EAT.)

160. The burden of proving the PCP, the substantial disadvantage and the steps necessary to remove them rests on the claimant (see HM Prison Service v Johnson [2007] IRLR 951, confirmed in Project Management Institute v Latiff [2007] 579). What a claimant must do is raise the issue as to whether a specific adjustment should have been made, not prove a prima facie case of breach (see Jennings v Barts and the London NHS Trust EAT 0056/12) and the adjustment can be identified, in exceptional circumstances, during the hearing (PMI v Latiff). The Tribunal must, therefore, identify with some particularity the step which an employment should take to remove the disadvantage (HM Prison Service v Johnson)

Provisions, Criterions and Practices

161. The purpose of the PCP is to identify what it is about the employer's operation that causes disadvantage to the employee: General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, EAT.

162. In most cases where an employee contends that an employer failed to make reasonable adjustments to a PCP, the employee will be contending that the relevant PCP was applied to him or her. Technically, however, it is not a requirement of the EqA 2010 that the PCP be applied to the disabled employee, as long as the PCP is applied to some employees and that places the disabled employee at a substantial disadvantage when compared with persons who are not disabled: Roberts v North West Ambulance Service [2012] ICR D14, [2012] EqLR 196, EAT.

163. A policy, criterion or practice must have an air of repetition about it, and cannot be a one off (see Nottingham City Transport Ltd v Harvey EAT 0032/12, confirmed in Fox v British Airways plc EAT 0315/14), unless there is an indication that it will be repeated, in which case a one off event may be sufficient (Ishola v Transport for London [2020] EWCA Civ 112, CA.).

164. If the substantial disadvantage complained of is not because of the disability, then the duty to make reasonable adjustments will not arise: Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley UKEAT/0417/11, [2012] EqLR 634.

165. Tribunals should "set out what it was about the disability of the [claimant] which gave rise to the problems or effects which put him at the substantial disadvantage identified": Chief Constable of West Midlands Police v Gardner EAT 0174/11, para. 53.

166. The duty to comply with the reasonable adjustments requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage (Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA). However, the duty is not 'triggered'

unless and until the claimant indicates that he or she was intending or wishing to return to work NCH Scotland v McHugh EATS 0010/06 approved in Doran v Department for Work and Pensions EAT 0017/14. However, where the absence is caused by the respondent's conduct (which is discriminatory) the duty may arise London Underground Ltd v Vuoto EAT 0123/09.

Harassment

167. The words 'related to' in S.26(1)(a) have a broad meaning; conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it, what is required is some connection even if not directly causal between the conduct and the protected characteristic — Hartley v Foreign and Commonwealth Office Services 2016 ICR D17, EAT.

168. The context in which unwanted conduct takes place is an important factor in determining whether it is related to a relevant protected characteristic— particularly in cases where the conduct cannot be described as 'inherently' discriminatory (see Warby v Wunda Group plc EAT 0434/11). It is not enough however that the conduct complained occurs 'in the circumstances of' a disability, it must be related to it.

169. Some key concepts set out in Dhaliwal and Grant v Land Registry [2011] ICR 1390 are as follows:

169.1. when assessing the effect of a remark, the context is always highly material. Context will also be relevant to deciding whether the response of the alleged victim is reasonable (Grant, para. 13);

169.2. tribunals must not "cheapen the significance" of the meaning of the words used in the statute (i.e. intimidating, hostile, degrading, etc.). They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. Being "upset" is far from attracting the epithets required to constitute harassment (Grant, para. 47);

169.3. it is not enough for an individual to feel uncomfortable for them to be said to have had their dignity violated, or the necessary environment created (Grant, para. 51);

169.4. if a tribunal finds that a claimant was unreasonably prone to take offence, then, even if he did genuinely feel his dignity to have been violated, there will be no harassment (Dhaliwal, para. 15).

Discussion and Conclusions

I: Protected disclosure

The letter of 29 January 2020

170. Given that the alleged protected disclosure occurred on 29 January 2020 which was after each of the detriments which the claimant alleges it caused or influenced (which are alleged to have occurred in the period July 2019 until 22 January 2020), as a matter of fact and logic the letter cannot have caused any of the detriments about which the claimant complains.

171. For the sake of completeness, I consider whether the words the claimant relies upon, namely "the dismissal of disabled staff, was disgusting and shameful" are capable in context of amounting to a protected disclosure. Whilst there is a clear complaint of dismissing disabled staff, there is nothing within the letter itself that identifies that the reason for their dismissal was the fact of their disability. Had the letter made express that connection, it could be argued that in the current age such a dismissal was so obvious a breach of section 13 of the Equality act 2010 as not to require a clear exposition of its unlawfulness. In that way, it might have been open to the claimant argue that the allegation in his letter fell within the category identified in Blackbay and Eiger; i.e. that it did not matter that the claimant did not openly state that the dismissal of disabled staff was unlawful because the reason for the dismissal was the fact that the staff were disabled.

172. However, within the ensuing paragraph, the claimant identifies an alternative reason for the volunteers' dismissal which has nothing whatsoever to do with the fact of their disability, specifically that they had been "questioning the theft of stock by a paid worker." That allegation is made in the context of the claimant's broader complaints that the respondent had a "history of bullying and intimidating both paid staff and volunteers." Again, when making that allegation the claimant did not suggest that the reason that they were bullied was in any way connected to disability.

173. The words the claimant relies on amount to no more than a broad allegation, which lack the specificity of information connecting them to the legal obligation in question (for the purposes of Kilraine) and fall squarely into the category identified in Blackbay of matters that the claimant "considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation."

174. In my judgment, therefore, the letter of 29 January 2020 was not a protected disclosure.

The claimant's verbal disclosure to Mr Harris-West 26 October 2020

175. The claimant's case is he told Mr Harris-West that the respondent had a history of dismissing people who were disabled, transgender or whose dismissal was age-related. It is worth recapping the relevant evidence upon which the claimant relies in support of that allegation. Mr Harris-West's notes of the grievance interview record as follows:

> *"Kieran suggests that a disabled volunteer had been sacked. When questioned, both Rita and Carol are not aware that any volunteers had been sacked."*

176. The claimant's evidence was that the volunteer in question was a young male volunteer who was disabled and attended with a support worker. In his evidence the claimant did not suggest that he informed Mr Harris-West of the identity of the volunteer during the interview. The fuller and better record of the discussion that led to that note is provided in the transcript of the meeting. It is worthy of note that the initial discussion in relation to disability concerned the claimant's belief that the respondent knew of his disability because he had stated that he was in the Disabled Applicants Monitoring Form. That discussion

led to the following exchange which I repeat for ease of reference:

> *"DHW - I'm just trying to work out if obviously we know someone got disability we obviously appreciate*
>
> *KB (interjects) What happens is you sack them. Coz that's what happened, that poor lad working Milton got sacked because we weren't insured and we couldn't support him so that's what happens I If we've got a history of sacking disabled people now. I hope that when people first come knocking on the door you guys have got your answer Cos they're going to be supporting him same I think it's a real shame. So back to me, so the organisation of known since since I joined that I had a disability. I've really upfront about it okay."*

177. There are a number of key points that arise from the claimant's statement here: first, there is a broad allegation that the respondent dismisses those that it knows are disabled; however, the claimant provided no specific detail of that broader point; it is a bare allegation without information. Secondly, where the claimant does provide detail, it relates to the young volunteer not the clamant. Thirdly, in the same breath as referencing the volunteer's dismissal, the claimant provides the reason for that dismissal, namely he was "*sacked because we weren't insured and we couldn't support him*." That reason is one entirely unconnected to the issue of disability, it is the issue of insurance. One aspect of that issue was volunteer's age, just as their ages was an issue for the other young volunteers whom the respondent told they could no longer work in its shops. Lastly, there is insufficient detail in the reference to the respondent's inability to support the young volunteer to identify that the respondent's inability to support him was because of his disability rather than because the respondent's insurance did not cover him to work.

178. Again, applying the principles in Blackbay and Eiger, in my judgment the claimant has done no more than make a broad allegation of wrongdoing or of morally reprehensible or unattractive behaviour, as he viewed it. There is nothing within the discussion with Mr Harris-West that directly connects the reason for the young volunteer's dismissal with the fact of his disability, and the comment must be viewed in the context of the claimant verbally lashing out at Mr Harris-West as a consequence of his frustration with his stance that the respondent did not know that the claimant was a disabled person. I am entirely satisfied that the reference to "the poor lad working in Milton", was an expression of the claimant's frustrations, intended to score a point, rather than being a serious disclosure that the respondent had a practice of dismissing disabled staff.

179. In reaching that conclusion, I have had regard to the context and the circumstances leading to the grievance interview. The claimant's initial complaints were in relation to his treatment, rather than that of the volunteers or staff. Those complaints became particularly focused upon Mrs Hinton's conduct towards the claimant, which he regarded as 'vile, awful' and offensive to him as a person with a disability. The claimant had been asked repeatedly to write to the respondent setting out the specific complaints that he was making. It formed no part of any complaint that he provided that the respondent had a practice of dismissing disabled employees. Instead, Mr Harris-West had raised the question because of the allegations in the claimant's email to him in

which the claimant had written "*Finally what compensation will the RSPCA be offering me as a victim of bullying and disability discrimination"* without identifying the specifics of the discrimination.

180. Similarly, applying test in Chesterton, I conclude that the claimant did not reasonably believe that the disclosure was in the public interest. I do not find, in the circumstances of the case, that the disclosure related to a broader group of those with disabilities; it only related to young volunteer. The number in the group affected was therefore one, the young volunteer himself. In his written argument, the claimant suggested that the number of those in the group affected was the 26 volunteers whose engagement the claimant alleges were ended. That is misconceived, the claimant identified only one volunteer with a disability in his discussion with Mr Harris-West.

181. Insofar as the nature of interests affected are concerned and the extent to which they were affected by the wrongdoing disclosed, the disclosure related only to the specific circumstances of the individual who had been dismissed which the claimant described. He was dismissed because he was not insured, and the claimant had no basis to reasonably believe by extrapolating from that that the respondent had a practice of dismissing the disabled or that it would continue to do so, or that there was any evidence of further wrongdoing. Lastly, the claimant firmly pointed the finger of blame for the volunteer's dismissal at Mrs Lonsdale. She was in a very junior position within the respondent, and not in a position to create any precedent or practice or policy in relation to the treatment of the disabled. The claimant has never suggested that she did or could create such a practice. It follows that this was not a protected disclosure.

182. The claimant has therefore failed to prove on the balance of probabilities that he made the protected disclosures alleged. The claims of unlawful detriment and automatically unfair dismissal are not well founded and are dismissed.

183. For the sake of completeness, if I am wrong in that conclusion, I address in succinct terms the question of whether the discussion on 26 October 2020 caused the detriments alleged. I address each in turn in the order in which they appear in the list of issues:

The email of Mrs Hinton to the claimant dated 21 November 2020, in which she wrote how he "dare interfere with the operation of the organisation."

183.1. The language used could clearly amount to a detriment. The issue is one of causation. The claimant did not suggest to Mrs Hinton when cross-examining her that she knew of his discussion with Mr Harris-West on 26 October when she wrote the email on 21 November 2020. He did not suggest to her that the reason that she had sent the email was because he had made sent the email or that the email was a protected disclosure.

183.2. In any event, I am entirely satisfied that the reason that Mrs Hinton emailed the claimant in the terms she did on 21 November was because she was utterly exasperated and frustrated by his continued failure to respond to her reasonable questions in relation to his working hours for the respondent and for Leonard Cheshire, and his focus instead upon repeatedly relaying allegations that had been raised with him by third

parties, which he would subsequently suggest the respondent had failed to investigate. The claimant's email of 21 November, which immediately preceded Mrs Hinton's, was the touchpaper that lit her fuse. Mrs Hinton's growing frustration with the claimant is evident from the tone of her emails with him through October and November, and I accept her evidence that that was the reason for the email. The alleged protected disclosure had no influence whatsoever upon her decision to write in the terms she did.

Dismiss everybody who the claimant had engaged; *Specifically, the dismissal of the young disabled volunteer and Chris in July 2019, and Rachel in the last weeks of July, early August 2019.*

183.3. As a matter of logic and chronology, the termination of the engagements of the volunteers between July and August cannot have been caused by an alleged protected disclosure said to have occurred on 26 October 2019. In any event, I accept the respondent's explanation (which was given by Mrs O'Leary and Mrs Hinton) that the volunteers in question ceased to work for the respondent because of safeguarding concerns and that their age would prevent them being covered by the respondent's insurance.

Refuse to pay the claimant sick pay from September 2019; *Specifically, the period 24th September until 22 October 2019, 31 October until 11 November 2019, and 13 November 2019 until 22 January 2020.*

183.4. The failure to pay sick pay is clearly capable of being a detriment. However, as a matter of chronology and logic a failure to pay sick pay for the period 26 September until 22 October 2019 cannot been caused by protected disclosure said to be made on 26 October 2019. However, even if the decision in relation to the payment of sick pay for that period was made after 26 October, I am entirely satisfied on the evidence, given the chronology recited in the factual background above, that the reason the respondent did not pay the claimant's sick pay was because the claimant had failed to provide fit notes covering the periods of that absence.

183.5. Furthermore, I accept Mrs Hinton's evidence that that was the reason that the respondent did not pay the claimant sick pay in relation to the latter periods was firstly because the claimant had failed to provide fit notes, or the original copies of those fit notes when requested, and secondly in relation to the period 9 December onwards, because the claimant had not provided fit notes or indicated that he was unfit for work, and the respondent genuinely believed that the claimant was working for Leonard Cheshire. (In the event that belief was entirely accurate). The alleged protected disclosures had no influence on those decisions whatsoever.

Failure to pay the claimant 10 days of accrued annual leave when he was dismissed; *specifically, in the payment of his salary on 22 January 2020*.

183.6. The respondent's case was it could not calculate the holiday pay owed to the claimant to the point of his termination because of the uncertainty as to whether the claimant had worked for Leonard Cheshire during November, December 2019, and January 2020, when he had failed to provide fit notes and/or to confirm that he was fit and available to fulfil

his contractual hours for the respondent. The claimant adduced no evidence to demonstrate any causal link between the alleged protected disclosure and the decision. He did not suggest to any of the respondent's witnesses in cross-examination that the protected disclosure was the reason for any underpayment to him. On the balance of probabilities, I accept the respondent's explanation.

Dismiss the claimant [on 22 January 2020].

183.7. I address this allegation both under section 47B and section 103A ERA 1996, although I am very conscious of the differing burdens of proof in relation to the two allegations. However, I found Mr Whitlow to be a credible, honest, and compelling witness, particularly in his evidence that, had the claimant attended the disciplinary hearing and provided some form of explanation for his conduct, Mr Whitlow would have sought to find a way to retain him in his post and that the reason he encouraged him to appeal was because he genuinely hoped he would be reinstated. I accept the reasons that he gave for his decision to dismiss the claimant, specifically those matters set out in his email of 2 January 2020. His decisions that the claimant's email of 6 December 2019 to Mrs Hinton was grossly rude and offensive, that his failure to comply with reasonable managerial instructions to provide fit notes and to clarify his availability for work, and to attend a disciplinary hearing had destroyed the relationship of trust and confidence were each entirely reasonable and consistent with the facts as I have found them.

183.8. The claimant did not suggest to Mr Whitlow that he was aware of the claimant's alleged protected disclosure in October 2020 or that it had any influence whatsoever upon the decision that he made in relation to the claimant's dismissal. Mr Whitlow's evidence, which I accept, was that he was aware of the fact of the grievance but not of its content; that is far removed from being aware of a remark made during a meeting to explore the content of the grievance. I find that the alleged protected disclosure had no influence whatsoever upon the reason for the claimant's dismissal.

184. It follows that the claimant's complaints of unlawful detriment contrary to section 47B and automatically unfair dismissal contrary to 103A ERA 1996 are not well founded and are dismissed.

II: Discrimination

Failure to make reasonable adjustments.

185. It is for the claimant to establish on the balance of probabilities that the respondent operated a practice or policy of requiring employees (and here as pleaded, specifically the claimant) to return to normal working hours after a period of sickness absence.

186. That is a difficult task for a number of fundamental reasons. Firstly, the way in which the claimant articulates the practice necessarily suggests that it was applied specifically to him and in a precise timeframe. Consequently, the nature of the allegation is not that there was any general practice of refusing phased returns to those returning from sickness absence, and the circumstances are not suggestive of any potential for repetition as is required following Nottingham

City Transport Ltd and Ishola in order for a one-off event to amount to a practice.

187. Secondly, the claimant alleges that the failure occurred in December 2019. At no stage in December 2019 did the claimant inform the respondent that he was fit and ready for work, quite the opposite was true: the claimant provided fit notes suggesting he was unfit for work (although not as requested and not for the entire period), and did not respond to requests to confirm that he was fit for work and, if so, to identify the hours that he was available to work. Furthermore, insofar as he communicated with the respondent about his willingness to return to work, the persistent line of his communication was that the respondent should pay him a financial settlement to leave. That is entirely inconsistent with any expressed intention to return to work or a willingness to do so. In consequence, following the authorities of McHugh, Dolan, and Vuoto, the duty to make reasonable adjustments did not arise.

188. Thirdly, insofar as the claimant did engage at all with the respondent in relation to his return to work, when he met with Mrs Lonsdale in October 2020, he expressly suggested that he did not need any adjustments. The claimant never advised the respondent that returning on full working hours would cause him addition anxiety or stress. The respondent therefore could not know of the disadvantage allegedly caused by the alleged PCP. In any event, I am not persuaded that the claimant was put to any disadvantage at all, given that the he worked in excess of 90 hours for Leonard Cheshire in December 2019 and January 2020.

189. It follows that this claim is not well founded and is dismissed.

Harassment

The respondent refused to acknowledge that the claimant was disabled. Specifically, the first four lines of the email of 7 September 2019 from Mrs Hinton to the claimant,

190. For ease of reference, I repeat the relevant section of Mrs Hinton's email to the claimant about which the claimant complains.

> *"I understand that you are sick, suffering from what has been described as "workplace stress". Leaving aside causation, which of course I do question, I have to accept that you are suffering from stress, as that is what the doctor has diagnosed when you have described your symptoms."*

191. In my judgment, both subjectively and objectively, Mrs Hinton's implication that the claimant's stress was unconnected to the workplace (which was in direct contradiction of the diagnosis in the fit note itself which had been produced by a medical professional), and that she was begrudgingly accepted the fact that the claimant was in fact suffering from stress, was unwanted conduct which had the effect of undermining the claimant's dignity, and creating a hostile, offensive and degrading atmosphere. Objectively, the reasonable worker could have been offended, humiliated and degraded by such comments and would no doubt find them offensive. Subjectively, the claimant, given his lengthy history of mental ill health was, I find, genuinely distressed by the remarks.

192. The more difficult question is whether the email related to the claimant's disability, namely depression. I remind myself that the test is not one of causation but one requiring some wider, broader connection or nexus. Here, whilst on my findings, Mrs Hinton did not know that the claimant was a person with a disability who had a lengthy history of poor mental health, and specifically anxiety and depression, the question is not whether she made the comment because of the claimant's disability, to which her lack of knowledge would be a complete answer, but rather whether there is some form of nexus between the fact of the disability and the comment that was made. On that analysis, the conduct could potentially relate to the claimant's disability as stress can be connected to anxiety and depression.

193. However, as directed in Warby v Wunda Group plc, I must have regard to the context in which the comment was made. I remind myself that the claimant had first indicated that he would be unable to work on 13 August, and had provided a fit note covering the period the 14 to 28 August on the 14. It was that fit note which identified work-related stress. At that time, the claimant had been in discussions with the respondent in relation to his ability to work for Leonard Cheshire and for the respondent simultaneously. The claimant had sent the rather inflammatory email of 14 August in which he had accused Mrs Hinton of contributing to his work-related stress and of disclosing private and confidential information about his new work contract. For her part Mrs Hinton did not accept that the Trustees had breached any confidentiality and was pressing the claimant for details in respect of what it was said that they had done. The claimant had responded identifying that he was pointing the finger of blame directly at Mrs Hinton. During the same period the claimant twice attended the Milton shop whilst signed off from work, and Mrs Hinton had on two occasions directed him not to do so. As I recorded in my findings, by 22 August the relationship between the claimant and Mrs Hinton had almost entirely broken down.

194. Therefore, it seems to me that the relevant context of the comments were that the fit note identified work-related stress as the reason for absence, not depression, the background of the ongoing efforts to identify when the claimant would be available to work for the respondent as opposed to Leonard Cheshire, and the breakdown of the relationship between the claimant and Mrs Hinton as a consequence of the claimant's very personal allegations against Mrs Hinton. In my judgment, the content and tone of the email that Mrs Hinton sent on 7 September related to the claimant's actions in the preceding period, specifically his repeated attendance at the Milton shop at a time when he was presenting sick notes stating work-related stress. The fact that the claimant had anxiety and depression formed no part whatsoever of Mrs Hinton's choice of words in the email.

Send emails to claimant while he was off sick saying he needed to return to work.

195. The respondent did not send emails to the claimant saying that he needed to return to work. As detailed in the background, it sent emails asking the claimant to confirm whether he was fit for work and whether he was able to fulfil his contractual hours of work given his work for Leonard Chesire. The respondent did not therefore commit the unwanted conduct alleged.

196. Furthermore, the reason for the emails was in no way whatsoever related to the claimant's disability of anxiety and depression. The reason they were sent was the claimant's failure to provide fit notes when requested and to respond to reasonable enquiries about whether he could fulfil his contractual hours for the respondent.

197. The claim is not well founded and is dismissed.

Breach of contract: expenses

198. The legal and evidential burden is on the claimant to demonstrate that he incurred expenses in the course of his employment for the respondent, that he submitted a list of them and supporting evidence to the respondent, and that the respondent failed to pay them (the breach of contract). The claimant was repeatedly encouraged by the respondent during his employment to provide such a list and receipts. He failed to do so. He produced no evidence in the Tribunal to demonstrate that he had incurred expenses in working for the respondent, or what they were, or that they remain unpaid despite the claimant complying with the process to reclaim them.

199. The respondent made the claimant an open offer during the proceedings to pay the claimant £500, less the amount of the cheques paid to the claimant and cashed by him amounting to £380.10. The claimant has argued in his written submissions that that is not enough. The process of settlement negotiations are quite separate and distinct from the requirement to produce evidence to establish a breach of contract as part of a claim in the Tribunal. As stated above, the claimant produce no evidence.

200. The claim is therefore not well founded and is dismissed.

The employer's contract claim

201. The respondent initially indicated that it was not pursuing the employer's contract claim ("ECC") and subsequently clarified that it was not pursuing the claim if the claimant accepted its offer in relation to annual leave and breach of contract. Those were two distinct offers. When first made, the offer in relation to annual leave was for a specific sum to be paid, and on the basis of that offer the claimant withdrew his claim for annual leave. At the reconvened hearing in July it became apparent that the claimant had not received payment as promised, the respondent then appeared to be connecting the payment to the claimant's agreement of a sum in settlement of the breach of contract claim. That, of course, is a different agreement to the one reported to the Tribunal. It may be that the claimant can sue on the original agreement; that is not a matter for me.

202. In the event, the claimant did not accept the respondent's offer in respect of his breach of contract claim. However, the respondent called no evidence and adduced no documents to support its claim that the claimant had been overpaid annual leave. The point was not developed in cross-examination, no payslips were adduced or referred to and the point was to all intents and purposes abandoned. Certainly, the respondent did not demonstrate that there was an overpayment of annual leave as alleged. The ECC is therefore not well founded and is dismissed.

Employment Judge Midgley
Date: 21 October 2022

Judgment & Reasons sent to the Parties: 24 October 2022

FOR THE TRIBUNAL OFFICE