Case Numbers: 1304537/2017; 1304538/2017; 1304539/2017; 1304540/2017
1300322/2018; 1300324/2018; 130325/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Janette Parsons	**v**	(1) Birmingham City Council; (2) Birmingham Children's Trust

Heard at: Bury St Edmunds

On: 23 – 26 April 2019; 29 April – 3 May 2019; 7 – 9 May 2019

Before: Employment Judge Tynan

Members: Ms Sarah Stones and Ms Lorraine Gaywood

Appearances
For the Claimant: In person
For the Respondent: Ms Hodgetts, Counsel

RESERVED JUDGMENT

1. The Claimant's various claims against the Respondents that she was harassed, directly discriminated against and/or victimised contrary to sections 26, 13 and 27 of the Equality Act 2010 are not well founded and are dismissed.

2. The Tribunal declares that the Claimant's complaint under section 48(1A) of the Employment Rights Act 1996 that the First Respondent subjected her to detriment by its failure to investigate and reach a conclusion on her protected disclosure, and that it did so on the ground that she had made a protected disclosure, is well founded.

3. The Claimant's various other complaints against the Respondents pursuant to section 48(1A) of the Employment Rights Act 1996 that they subjected her to detriments on the ground that she had made a protected disclosure are not well founded and are dismissed.

RESERVED REASONS

4. The Claimant brings this claim in her own right, though her services were provided to Birmingham City Council through a personal services company, Janette Parsons Ltd. For the sake of simplicity, the references to the Claimant in this judgment cover both the Claimant in her personal capacity as the person bringing claims in these proceedings and as the director, owner and controlling mind of Janette Parsons Limited. Where it is important to make the distinction we shall do so. Likewise, for the sake of simplicity, we refer to the Second Respondent as the Trust, including during the period when it was operating in shadow form (and was not therefore a discrete legal entity) and before that when it was essentially a small grouping of individuals working at or for Birmingham City Council who were tasked with establishing a shadow Trust. Finally, we shall largely refer to Birmingham City Council as the Council.

5. The Claimant complains that she suffered harassment related to the protected characteristics of age, disability and sex, alternatively that the facts and matters which she says constituted harassment amounted to less favourable treatment because of the same protected characteristics. She further complains that she was subjected to various detriments because she did a number of protected acts and because she made a number of protected disclosures. Her claims are denied in their entirety by the Respondents. Neither Respondent seeks to run the statutory defence available to it under section 109 of the Equality Act 2010.

6. It is not necessary for us to go into detail regarding the history of these proceeding. The Claimant issued three separate sets of proceedings, in her own right and on behalf of Janette Parsons Ltd, against multiple Respondents. These were consolidated and the matters which have eventually come before us are those brought by the Claimant in her personal capacity against the Council and the Trust.

7. It is important we record that following a hearing on 11 December 2018 Employment Judge Harris determined as a preliminary issue that the Claimant was, at the material time, a disabled person within the meaning of section 6 of the Equality Act 2010. Later in this Judgment we return to the relevant findings by Employment Judge Harris.

8. We heard evidence from the Claimant in support of her Claims. She provided written submissions at the conclusion of the evidence and spoke to these. We have considered those submissions throughout our discussions and in coming to a Judgment.

9. For the Respondent we heard evidence from:

    9.1 Mr Andrew Christie, Chair of the Trust. Mr Christie chaired the appointment panel that interviewed the Claimant on 17 May 2017 and decided that she should be offered an engagement.

9.2 Mr Alastair Gibbons. Mr Gibbons was the Executive Director of Children's Services at the Council, though transferred to the Trust on 1 April 2018 and remained there until he retired on 30 September 2018. Mr Gibbons was the Claimant's line manager during her first two months at the Council and later acted as the commissioning officer of an investigation into grievances raised by her on her own behalf and in relation to her company. In so far as it may be relevant to do so, we note that Mr Gibbons has a visible disability.

9.3 Ms Rebecca Ellis. Ms Ellis was an interim Senior HR Business Partner at the Council.

9.4 Mr Andy Couldrick. Mr Couldrick is the Chief Executive of the Trust. He joined the Trust on 14 August 2017.

9.5 Mr John Harrison. Mr Harrison was the Interim Director of Resources at the Trust from 21 August 2017 to September 2018. He initially took over responsibility for managing the Claimant from Mr Gibbons when he joined the organisation, though he subsequently stepped back from his responsibilities in this regard when the Claimant raised concerns about his conduct on 29 September 2017.

9.6 Ms Dawn Hewins. Ms Hewins is the Council's HR Director. She initially handled the Claimant's concerns when these arose in late September/early October 2017, before they were then referred for external investigation.

9.7 Ms Sarah Sinclair. Ms Sinclair is the Interim Assistant Director Children's Services (Commissioning) at the Council. Her evidence largely addressed the question of whether she had experienced sex discrimination or harassment at the Council. Her evidence was that she had not.

9.8 Mr Peter Featherstone. Mr Featherstone joined the Trust on 18 September 2017 as Interim Implementation Manager.

9.9 Mr David Johnson. Mr Johnson provides HR consultancy services and was appointed in 2018 to undertake an investigation into the Claimant's concerns, reporting his findings in June 2018.

We also had written statements from Ms Debbie Husler and Mr Colin Diamond.

The Issues

10. Regrettably, there was no agreed List of Issues. In arriving at our Judgment, we have worked within the framework of the fourth iteration of the Claimant's List of Issues which she submitted on the final day of the hearing as part of

her submissions to the Tribunal. We have cross referenced this against the Scott Schedule prepared by the Claimant, albeit this was prepared before the Claimant presented her third Claim. The List of Issues comprises 56 discreet allegations of harassment. The Claimant asserts, in the alternative, that each of the matters about which she complains also constituted direct discrimination. In addition, the Claimant relies upon 23 separate acts as protected acts for the purposes of section 27 of the Equality Act 2010, and six of those acts as qualifying disclosures for the purposes of section 43B of the Employment Rights Act 1996; she asserts, respectively, that 43 and 28 of the 56 matters were also detriments because of her protected acts and qualifying disclosures.

11. As regards the Claimant's protected characteristics, her claimed comparators and the 'reasons why' she claims she was treated as she was, we return to this later.

12. For the reasons we set out below, a number of the Claimant's complaints cannot succeed as she has failed to prove, on the balance of probabilities, that she was treated by the Respondents as she alleges. We deal with those complaints in the Findings section below rather than in our Conclusions.

The Findings of Fact

13. For more than a decade, Birmingham City Council's children's services were judged by Ofsted to be inadequate. The decision was taken to establish a Children's Trust, a separate arm's length entity which would be commissioned by Birmingham City Council to deliver its children's services. This would involve the TUPE transfer of nearly two thousand staff from the Council to the Trust. The Tribunal was told that there are only two other such Trusts in the country. The first was in Doncaster, established when Doncaster Borough Council's children's services had also given cause for concern. The Claimant was brought in as an HR Consultant at Doncaster to lead on the HR aspects of the establishment of Doncaster Children's Services Trust. Her evidence was that the Trust was established and operational within the space of four months, clearly a significant achievement even if it was not on the same scale as the arrangements being proposed by Birmingham City Council.

14. Paul Moffat, Chief Executive of Doncaster Children's Services Trust, wrote a glowing reference in relation to the Claimant on 7 January 2015 (page 245). In his reference he refers to the Claimant having carried out her duties in an *"exemplary fashion"* and *"to a very high standard"*. His reference refers to her demonstrable adaptability and that she worked through a range of complex organisational arrangements *"often on her own with few resources at her disposal"* and concludes that he would have no hesitation in employing her again.

15. In his witness statement, Mr Christie states that he spoke with Doncaster's Chief Executive (we understood him to be referring to Mr Moffat), who described the transfer as *"bloody"* and that *"they got it wrong".* It was not suggested this had anything to do with the Claimant. Mr Couldrick gave similar evidence following a more recent conversation he had had with Mr Moffat, during which Mr Moffat had apparently expressed regret that Doncaster has been unable to achieve a similar working relationship to the one that Birmingham Children's Trust enjoys with Birmingham City Council. The transition from Birmingham City Council to the Trust was planned and executed over a longer period, with a particular focus on ensuring that staff and unions were engaged and on side. Mr Christie said they were conscious of the need to adopt a collaborative approach or, in the words of Mr Harrison, that they should work towards a "*soft transition and landing*".

16. As her CV (pages 250 – 253) attests, the Claimant is an experienced HR / Organisational Development Interim. Perhaps not surprisingly given there were then just two Children's Trusts in existence, when the Claimant began consulting at Birmingham City Council she was the only person working on the project with direct experience of establishing a Children's Trust.

17. We note that the Claimant's CV evidences that she has no, or at least no recent, Employee Relations experience. Her skills and experience are in strategic HR and Organisational Development, rather than operational HR and employment disputes, though she evidently has a detailed understanding of the legal risks and potential for Employment Tribunal claims in TUPE situations. She is intelligent, articulate, organised and was unfailingly polite in her dealings with the Tribunal. Nevertheless, as we shall explain, we are critical of how she has conducted and expressed herself at times.

<u>The Claimant's speculative approach to Birmingham City Council</u>

18. On 30 April 2017, the Claimant made a speculative approach to Mr Christie, offering interim support. She provided him with a copy of her CV. By 17 May 2017 an interview had been arranged with him. There is a transcript of some limited handwritten notes kept during the interview at pages 253A and 253B of the hearing bundle. These refer to the interview being for the post of 'Interim Head of HR'. For reasons we come to later in this Judgment, we find that they had in mind different things, in the sense that the services the Claimant believed she might usefully make available to the first Respondent were not fully aligned with what it was looking for (to the extent it had in fact clearly identified what it was looking for). The Claimant was not an Interim Head of HR. That was not her skill-set. This misalignment was not necessarily the 'fault' of either party; certainly, the Claimant is not to be criticised for it. She had direct experience of providing interim support in the context of the establishment of a Children's Trust, whereas the first Respondent did not and it is little surprising therefore that whilst the Claimant was perhaps clear in her own mind as to what she might contribute to the process, and also clear as to the limitations that can arise under IR35,

the first Respondent was simply glad to secure the services of someone with relevant experience without, in our judgment, giving close thought to what was actually required. Indeed, it seems to us that in his desire to secure the Claimant's services Mr Christie potentially overlooked that the two individuals who were due to be appointed as Chief Executive and Director of Resources of the Trust would inevitably have their own ideas as to what HR resource was required. We accept Mr Christie's evidence that, as confirmation of the Claimant's willingness to 'roll her sleeves up' and 'can do' approach, she had recounted to him at interview that during her time at Doncaster she had personally collected the personnel files of transferring staff on the eve of the transfer. As a result, and in the words of Mr Christie, "*I made the assumption that the Claimant would work how we wanted her to work.*" Whether or not that accords with how the Claimant presented at interview, we are clear that the Claimant embarked upon the role with a different, potentially more fixed, view of her role.

19. The meeting notes from 17 May 2017 suggest, not surprisingly, that the Claimant's experience at Doncaster was the focus of the interview.

20. The Respondent evidently moved swiftly to secure the Claimant's services because by 22 May 2017 (three working days later) Shaune Loughlin, HR Business Partner – People, was in contact with the Claimant. She sent her a completed IR35 determination and also wrote, *"Please do come back to me on rates".* In response to a question from the Tribunal at the conclusion of cross-examination, the Claimant confirmed that the daily rate for her services had been suggested by herself rather than proposed by the Council. That is significant in the context of the complaint she now makes in relation to Peter Featherstone's daily rate. We return to this.

21. The Council's initial determination (pages 255 – 259) was that the Claimant would fall within the ambit of IR35. This was not the parties' intention. A further assessment seems to have been undertaken the following day, 23 May 2017 (pages 311 – 316). This time the determination was that the intermediary's legislation would not apply to the engagement. Comparing the two completed assessments, question 7 was answered differently in the second assessment. The relevant question was:

> *"Once the worker starts the engagement, does the end client have the right to decide how the work is done?"* (page 257)

In the first submission the answer was,

> *"Yes – the end client decides how the work needs to be done without input from the worker"* (page 258);

whereas, in the second submission the answer was,

> *"No – the end client can't decide how the work needs to be done because it is a highly skilled role"* (page 315).

We find that the initial submission more closely reflected Mr Christie's expectation that the Claimant would undertake whatever work was required of her.

22. The question above went to the heart of the Claimant's autonomy. It seems to the Tribunal that the answer was changed in order to achieve the desired result in terms of the Claimant's IR35 status rather than because careful thought was being given to the level of her independence and autonomy. Whether or not an element of 'buyer's remorse' set in later on, Mr Christie, Mr Couldrick and Mr Harrison all accepted that the contractual arrangements with the Claimant were freely entered into and needed to be honoured.

23. There was evidently some further discussion between the Claimant and Ms Loughlin because in an email dated 5 June 2017 to Seamus Gaynor, Head of Strategic Management at the Council, the Claimant referred to a day rate of £650 plus VAT if the assignment was within IR35, or a higher rate of £750 plus VAT if it was outside IR35 (page 318). Again, this was her proposed fee structure not the Council's.

The Claimant's engagement by the Council

24. The Claimant commenced work with the Council on 5 June 2017. Her contract (or more correctly, the contract to be entered into between the First Respondent and the Claimant's personal services company, Janette Parsons Limited (which we refer to hereafter as the 'Consultancy Agreement')) had not been finalised. Her emails of 5 June 2017 to Mr Gaynor suggest that she had not then even seen a draft of it. In which case the parties embarked upon the relationship without first agreeing and documenting the services that the Claimant was to provide.

25. On her first day at the Council the Claimant attended a staff engagement session, met with Mr Christie and in the afternoon attended a Chair's briefing, described by Mr Gaynor as *"a kind of programme group for the Trust".* For the avoidance of doubt, we find that the Chair's briefing was very different from, and cannot reasonably be compared with, the Leadership Team meetings established by Mr Couldrick on joining the organisation in August 2017 as putative Chief Executive of the Trust. We return to this.

26. On 27 June 2017, Ms Husler, Head of Procurement at the Council, sent the Claimant the contractual documentation in relation to her engagement and requested that she sign and return this. In fact, the Consultancy Agreement was not then in its final form. There seems to have been some ongoing dialogue as to certain *'work packages'*, namely four objectives which were to be included at Schedule 1 of the proposed Agreement and which defined the services that were to be provided by Janette Parsons Limited to the Council. In an email to Ms Husler dated 2 July 2017, the Claimant raised four discrete issues, including the documented objectives (pages 327 and 328). Again, she referred to the objectives as '*work packages'*, a term that

has been used extensively in the course of these proceedings even though it was not included or defined in the Consultancy Agreement. However, the fact that a task-based label, namely 'work packages' has come to be used to refer to four objectives (which term denotes a focus on outcomes), reinforces our firm impression that the parties approached their relationship with different expectations. Nevertheless, for convenience, we refer to the objectives as the 'work packages' throughout the rest of this judgment.

27. In her email to Ms Husler of 2 July 2017, the Claimant referred to an end date of 5 December 2017, which reflected her clear understanding of the contract duration. She was explicit in this regard (page 327). Her comments then are at odds with her position in these proceedings, namely that she expected to be retained beyond 5 December 2017. We find that there was no such expectation on either side. There are other emails that confirm the Claimant's expectation and understanding, including at page 451A of the hearing bundle.

28. The Claimant's proposed amendment to Schedule 1 of the Consultancy Agreement was approved by Mr Christie on 5 July 2017. The Agreement itself was signed by Mr Gibbons. With the benefit of hindsight, it seems to us that neither individual paid sufficient attention to the detail of the Consultancy Agreement, certainly in circumstances where the Claimant approached the relationship (or within a relatively short time came to view it) strictly in accordance with her understanding of the contractual arrangements in place between them. Mr Christie's expectation was that the contractual arrangements would be designed to ensure the Claimant would undertake all the work required of the person leading on the HR work programme for the Council, "working hand in glove with the Council's HR service". In fact, the Claimant's contractual obligations were more narrowly defined in the Consultancy Agreement. For his part, Mr Gibbons did not read the Agreement before signing it and, in his evidence at Tribunal, said he blamed himself for not doing so. In their respective ways, Mr Christie and Mr Gibbons placed too much reliance upon others to deal with the contractual formalities and trusted that it would all work out.

<u>The period 5 June 2017 to 14 August 2017</u>

29. There is relatively limited documentation in the hearing bundle in respect of the period 5 June 2017 to 14 August 2017, when Mr Couldrick joined the Council/Trust. Likewise, the witness evidence does not focus greatly on this period in time. However, we note the following matters:

    29.1 By early July 2017, the Claimant had evidently spoken to Mr Christie about the Council's recruitment team; on 6 July Mr Christie wrote referring to her *"account of [her] travails"* (page 332).

    29.2 On 3 July 2017, the Claimant emailed the Building Manager at the Council House to request a lift pass. She wrote, *"I have a knee problem which means that using stairs can damage the joint and*

causes me significant ongoing pain, particularly when carrying a significant load…" (page 333). We note that she did not elaborate as to whether it was a long-term condition. She did not copy her email to anyone else. Elsewhere in the email she refers to being on a 6-month assignment at the Council, which is at odds with her evidence at Tribunal that she expected to be retained through to April 2018 when the Trust 'went live. It further supports that she fully understood the contract would be for 6 months.

29.3 The Claimant attended Design Authority meetings. The Design Authority was a programme established at the Council to identify, plan and manage all aspects of the establishment of the Trust (see for example the detailed report at pages 336 – 342).

29.4 On 7 July 2017, the Claimant contacted Mr Gaynor to ensure that there was an induction programme for Mr Couldrick when he joined the Council/Trust on 14 August 2017 and also that arrangements for the appointment of his PA were progressing. Mr Gaynor advised her that Julie Bartram was sorting out all matters relating to Mr Couldrick. The Claimant followed the matter up again on 20 July 2017, additionally identifying a need for immediate administrative support for herself. Denise Wilson, Head of City Finance, became involved and noted that the costs of such support were not reflected in the relevant Department for Education Financial Plan, but confirmed that she was reviewing all work related programmes to assess the potential capacity to create funding. This email exchange continued with an email from the Claimant in which she made further implicit criticisms of the Council's recruitment team, referring to the need for *"high quality"* (emphasised in italics) support from them (page 350) and that she had briefed Mr Christie once again in this regard. The emails evidence that Mr Gibbons offered the Claimant administrative support from within his own team.

29.5 On 19 July 2017, the Claimant met with Ms Ellis and Chandra Quarshie to discuss some of the challenges in bringing the shadow Trust structure to life and the communications that would be required around this. Ms Ellis was an Interim HR Business Partner, effectively the Claimant's opposite number on the 'transferor side' at the Council. On 20 July 2017, the Claimant emailed Ms Ellis and wrote, *"Good to spend time yesterday getting on the same page and I am looking forward to working together"* (page 347a). That was at 10:14am. However, at 10:28am she emailed Mr Christie, copying in Mr Couldrick, seemingly copying them in on her exchange with Ms Ellis even though Ms Ellis had marked her email to the Claimant *"personal"* and had requested that the Claimant delete it once she had read it and / or provided feedback (page 347a). In her email to Mr Christie, the Claimant described Ms Ellis' email as *"confirming understanding (a small cry for help) rather than any obstructiveness".* We find, by those comments, the Claimant was communicating her view that Ms Ellis was potentially a little out of her depth. It is also

revealing that the Claimant was suggesting that one potential interpretation of Ms Ellis' email was that she was being obstructive, even if her own communicated view was that it was simply a small cry for help. Her comments were reasonably subtle but clear nevertheless. It is noteworthy in the Tribunal's view that she was willing to share a private communication from an HR colleague and, further, that she thought it appropriate to volunteer implicit criticism of Ms Ellis seemingly following a single interaction with Ms Ellis at a very early stage in the establishment of the Trust. Giving her prior experience at Doncaster Children's Services Trust, we think it is hardly surprising that the Claimant may have been more advanced in her thinking and understanding of the issues than Ms Ellis. The Claimant's email to Mr Christie sets the scene in terms of how the Claimant came to regard Ms Ellis and how quickly she came to the views which she did.

29.6 Mr Christie responded later that day suggesting that they discuss some of the issues and expressing his preference that they talk *"rather than transact by email"*. Again, we consider that very early on Mr Christie had identified in the Claimant a tendency towards (detailed) written email communications. The further context here is that they sat next to one another.

29.7 The following day, 21 July 2017, the Claimant sent the relevant HR team at the Council an Acas Guide on TUPE and forwarded it to Ms Ellis on the basis *"you may find it helpful too".* It is not suggested that Ms Ellis had asked her to do so.

29.8 Through July 2017, there was ongoing action to recruit the Head of HR for the Trust. Background checks on a potential candidate had proved unsatisfactory and so the search process had continued.

29.9 On the evening of Sunday 23 July 2017, the Claimant emailed Ms Ellis. The email subject was *"Confidential, Service Complaint being considered as a grievance?"* It reflects a particular communication style we saw in other emails. Amongst other things, she wrote in her email,

> *"As a representative of BCT / The Trust (Organisation 1), I have raised concerns re: the recruitment service being provided to the Trust by BCC (Organisation 2). I have not (and it would not be appropriate for me to do so) raised any related grievance. I have detailed my concern in emails (i.e. written) and addressed these to Glen. Glen has been very responsive and I understand he has been taking improvements forward. I understand that this is part of a wider improvement agenda that Glen [Knott] and Tracey are working on."*

> *"… I have already provided extensive written (email) and oral feedback to Glen. One of the issues is the time it is taking to do this and resolve the problems caused."* (page 363)

29.10 Ms Ellis responded to the Claimant's email at 11:27am on Monday 24 July 2017,

> *"I think we have agreed that we don't need a list of issues as we are already aware of what they are and we don't need to manage this through any formal grievance / complaints process"* (page 362).

By *"we"* Ms Ellis was evidently referring to herself and Mr Knott. She went on to say,

> *"In the meantime, I would recommend phone calls or meetings rather than emails, wherever possible, if issues are anticipated by the receiving party and to prevent emails being misinterpreted".*

Mr Christie had essentially made the same request of the Claimant on 20 July 2017, seemingly without generating any reaction or response from the Claimant. However, at 9:17am on 27 July 2017, the Claimant responded to Ms Ellis. We consider her response unfriendly and somewhat contentious (or, to borrow Mr Couldrick's expression, 'conflictual'). Her email began,

> *"…Glen is aware that I am responding as below and that my intent is not to escalate issues further. However, whilst recognising the positive intent behind the statement "I would recommend phone calls or meetings rather than emails, wherever possible, if issues are anticipated by the receiving party and to prevent emails being misinterpreted", I respond as follows…*

Having then responded to Ms Ellis' suggestion that they speak and meet wherever possible, she went on to say, somewhat caustically:

> *"In a triumph of hope over the above experience, I responded to your advice and have twice this week followed it. However, the experience is below…"*

She evidently thought Ms Ellis' advice was misguided. She went on to say:

> *"More fundamentally, and as the* many *sources of evidence I have provided to Glen, it is clear that, whether requests / instructions are verbal or written, they are ignored or misinterpreted. …"*

Her email concluded,

> *"I think it is advisable that I continue to use emails as and when appropriate."* (page 361)

29.11 In short, by 27 July 2017 i.e., within 7 weeks of starting at the Council, the Claimant had formed an adverse view of Ms Ellis and was willing to engage in relatively unfriendly, indeed conflictual, communications with her. In contrast, we accept Ms Ellis' evidence at Tribunal that she had hoped to establish a friendly and informal working relationship with the Claimant, albeit this had not proved possible and that she had eventually resorted to written communications with the Claimant in order to protect her position.

29.12 Towards the end of July 2017, John Harrison was identified as a potential candidate for the role of Interim Director of Resources at the Trust. Both Mr Christie and Mark Bean, a Business Director at the recruitment firm Hays, had taken soundings from their contacts and received positive feedback regarding Mr Harrison. Mr Bean's recommendation was to move straight to panel interview (rather than to require a technical assessment), an approach which he said had been discussed with the Claimant and which she supported. Mr Bean said that the Claimant had been able *"to share some of her own insights into John, further to her time at Peterborough…"* There is no evidence that these insights included concerns in relation to Mr Harrison's communication style or treatment of colleagues. It seems that the Claimant had undertaken some due diligence enquiries of her own, as she emailed Mr Christie and Mr Couldrick (who had yet to formally commence at the Council) on 31 July 2017 with a copy of a local newspaper report regarding Mr Harrison. The report is at page 368 of the hearing bundle and refers to Mr Harrison's resignation as Chief Finance Officer of Peterborough City Council. The newspaper report included the following,

> *"A Council spokeswoman said it could not add any more on the reasons behind Mr Harrison's departure after it had reached a legal agreement with him on what it could say…"* (page 368).

In fact, Mr Couldrick had already seen the reports. He wrote,

> *"I imagine that we would, without John having to breach the terms on what I assume is a compromised agreement, want to understand something of the context of his departure. That could be picked up by Mark or by Andrew, or by myself when we speak to John".*

29.13 On 4 August 2017, Angela Wight, HR Practitioner - People Resources and Insource, emailed Ms Hewins,

> *"Melissa and I had a formal meeting with Rebecca [Ellis] yesterday.*
>
> *We were wondering if we could meet with you to discuss a few issues of concern. I am on annual leave next week, but I am quite happy to come in to meet up with you for an hour or so if that would* help." (page 374A)

We accept Ms Ellis' evidence that the issues of concern were the recruitment team's relationship with the Claimant, albeit Ms Ellis stated that she was aware that there were issues within the team.

29.14 The Claimant sent a detailed email to Ms Ellis on 9 August 2017 and requested, amongst other things, that they discuss the interface between Ms Ellis / Birmingham City Council HR and the Claimant (and her assistant, Sonia Williams).

<u>Mr Couldrick's first week at the Trust, the establishment of his Leadership Team and the Claimant's ongoing issues with Ms Ellis</u>

30. That brings us to the week commencing 14 August 2017, when Mr Couldrick took up his position at the Trust.

31. The Claimant alleges that Mr Couldrick referred to Mr Harrison as a 'big beast' on 16 August and that she would need to keep an eye on him.

32. At the end of Mr Couldrick's first week in post there was a further email from the Claimant to Ms Ellis. The email, sent at 10.18am on Friday 18 August 2017, was entitled, *"Trust HR BAU and Organisational design and development activity"* (pages 385 and 386). The email followed a discussion between them earlier in the week. They were scheduled to meet the following Monday, 21 August 2017. The Claimant proposed four additional agenda items for that meeting, namely,

> *"Staff engagement and related responsibilities …*
>
> *Your additional BCC resources and whether the proposed skills set meets your TUPE and transition support needs"*
>
> *Clarifying who leads Trust recruitment.*
>
> *BCC / BCT HR roles and responsibilities"*

These themes/issues are at the heart of the Claimant's claims in these proceedings. Given her complaints, and that she identifies Mr Couldrick's and then Mr Harrison's arrival at the Trust as heralding the start of an extended period of discriminatory treatment, it is significant that she was in fact identifying these matters as potential issues of concern just as Mr

Couldrick was taking up his post and before Mr Harrison had joined the organisation.

33. In her email to Ms Ellis of 18 August, the Claimant set out verbatim the objectives from the Consultancy Agreement. Again, we consider this a somewhat unusual communication with a colleague. She was framing her working relationship with Ms Ellis by reference to a written contract. She went on to say,

> *"I have been briefed that you led a BCC meeting to progress how the gaps in Shadow Trust HR could be overcome / mitigated. This is something that would fall in John (as Sonia's Trust lead) / Sonia's and my brief / leadership and links to the Trust organisational design work I am supporting the Trust Senior Leadership on. It is disappointing that I was not invited to and involved in this meeting and in setting the related agenda…"* (pages 385 and 386).

34. Ms Ellis' evidence was that she had no recollection of leading any such meeting, certainly not a meeting for the shadow Trust. It seems to us the Claimant had no direct knowledge of the matter as her note implies that the information had come to her from an unidentified third party. She did not put forward any further evidence in relation to the matter at Tribunal; for example, we were not told the date, time and place of the alleged meeting, who the attendees were, the detailed subject matter of the meeting or in what way the Claimant had led the meeting. Likewise, she barely cross examined Ms Ellis on the matter and did not put any specific details to her. There are no documents in the hearing bundle to further assist us in this regard. This is effectively the first allegation in time, albeit there is no evidence to substantiate it. We consider that the Claimant has failed to discharge the burden of proof upon her to establish even basic facts in support of her complaint. We cannot sensibly or properly make primary findings of fact on the strength of the Claimant's bare assertion. In the circumstances the complaint at paragraph A.1(b) of the List of Issues is not well founded.

35. The Claimant's email to Ms Ellis of 18 August 2017 was not a friendly communication yet the Claimant thought fit to write to Ms Ellis in those terms seemingly without any direct evidence in support of her position. She made known her displeasure that Ms Ellis had allegedly led and not included the Claimant in a meeting whose focus was an issue which the Claimant said was within her own and Mr Harrison's brief / leadership. Notwithstanding her displeasure, the second bullet point in her email evidences a willingness on the Claimant's part to involve herself in Ms Ellis' team and to question whether the team had the TUPE related skills required of it.

36. Notwithstanding the unhelpful tone of the Claimant's email to Ms Ellis, Ms Ellis responded in friendly and conciliatory terms the same day (page 385). Her email concluded,

> *"Sounds like we are on the same page at the moment".*

Yet at Item 2 of her Scott Schedule the Claimant identifies Ms Ellis' response (or what she describes as her lack of response to her objections) as an act of harassment, alternatively direct discrimination on the specific grounds of age and / or disability. We cannot discern in Ms Ellis' response anything that would or might have caused the Claimant to feel intimidated or humiliated or that she was in a hostile or offensive environment. On the contrary, if anything it was the Claimant's email to Ms Ellis that might have given rise to some sense of hostility.

37. Separately, and without awaiting Ms Ellis' response to her email of 18 August or indeed the outcome of their scheduled meeting at which they were to discuss their respective roles and responsibilities, the Claimant immediately sought to escalate the issues to Dawn Hewins. This is in the context of an unsubstantiated allegation that Ms Ellis had led a meeting within the Claimant's remit. In an email to Ms Hewins timed at 10:27am on 18 August 2017 she wrote,

> *"Apologies for escalating this to you but there appears to be a pattern of my clarifying roles with Rebecca without re-alignment in who is doing what. This is creating confusion. I am also concerned that resources are not being directed by the appropriate leads. I stress that I really enjoy working with Rebecca and love her enthusiasm for all her work."* (page 395)

We question the sincerity of her concluding sentiments.

38. The Claimant was seemingly aware that Ms Hewins was on leave as she asked to discuss the matter with her on her return from leave. She went on to write,

> *"As the email below, I recognise that Rebecca was under resourced for the above work and encouraged her to obtain addition resources. I am continuing to provide her with advice and guidance re: TUPE and the TU engagement. I am happy to do this as, the better we all are, the better the outcome for the Trust."*

Her reference to "the better we all are' conveyed to Ms Hewins her belief that Ms Ellis could 'do better'. It was undermining of Ms Ellis. The Claimant went on,

> *"I need adequate notice going forward. Despite my requests and yesterday, Rebecca's unilateral response re: a briefing for Councillor Jones was inadequate and again could have exposed us both."*

39. Ms Hewins, and indeed anyone reading that email, could only have understood it to be critical of Ms Ellis and to be questioning her competence. We conclude that the Claimant's comments about enjoying working with Ms Ellis were less a positive comment about Ms Ellis, more a case of the

Claimant seeking to position herself as a fair and reasonable minded observer in terms of the pointed criticisms that were to follow.

40. A short while later the Claimant was in email contact with Mr Couldrick regarding draft budget proposals she had prepared but which had been on hold pending him joining the Trust. Mr Couldrick responded at 4.33pm (copying in Denise Wilson and Mr Gaynor) with what he referred to as his *"emerging (end of week 1) thinking".* He referred to a number of strands across HR, Organisational Design, ICT, Finance, Contract, Board Establishment, Process Review etc. that needed to be pulled together by the newly forming Trust leadership. He wrote,

> *"John [Harrison], Alistair [Gibbons] and I will be the core of that leadership, aided and abetted by Denise [Wilson] and Seamus [Gaynor], we will start to plan, over the next two weeks, the mechanism for pulling this new Trust Leadership forum together."* (page 387)

41. The Claimant alleges that she was *"removed"* from the Leadership Team (Item 3 of the Scott Schedule) and that Mr Harrison was given responsibility for specific areas that she had been contracted to do. In her evidence at Tribunal she complained that this was done very publicly. She identifies this as the moment when Mr Couldrick began to discriminate against her on grounds of her disability and age, though not explicitly on grounds of her sex. There is no obvious logic to this distinction that we can discern. We return to this.

42. The Claimant is misconceived in referring to Mr Couldrick as having 'removed' her from the Leadership Team. At the point in his first week that he was assembling his Leadership Team, there was no Leadership Team from which the Claimant or anyone else might have been removed. The Claimant's choice of terminology reflects what we observed at various points in the course of the hearing to be a pattern of deploying conflictual language. By way of a further example, she described a report by Mr Johnson in 2018 as denying her access to ADR and the Courts. Only following persistent questioning by Ms Hodgetts did she concede that this was not the effect of Mr Johnson's report, only to then repeat the allegation in the fourth iteration of her List of Issues (at paragraph A.1(ggg)). In the course of her evidence at Tribunal the Claimant sought to suggest that Mr Christie's *"Chair's briefing"* was the equivalent of a Leadership Team. We have no hesitation in rejecting that suggestion. Firstly, the Chair's briefing continued after Mr Couldrick had been appointed and the Claimant continued to attend those briefings. In any event it is abundantly clear that following Mr Couldrick's appointment the organisational structure developed and matured in anticipation of the move to a formal shadow Trust within the Council ahead of the formal outsourcing of its children's services to the Trust on 2 April 2018. In the view of the Tribunal, the Claimant's non-inclusion on the Leadership Team was unexceptional and entirely explicable. On her own case she was not the Interim Head of HR. Mr Harrison was the Interim Director of Resources, with ultimate leadership responsibility for HR

(amongst other things). We have no difficulty in accepting Mr Couldrick's explanation for his Leadership Team including that the Claimant would have been invited to attend from time to time to address issues where the Leadership Team wished to secure her direct input rather than through Mr Harrison.

43. We further note in this regard that the Claimant's evidence at Tribunal was that earlier that week (the week commencing 14 August 2017), Mr Couldrick had informed the Claimant that she would be part of his Leadership Team. In response to questions from Ms Hodgetts, the Claimant could not explain why, on her own case, her age and / or disability had not influenced Mr Couldrick when he allegedly initially suggested she might be part of his Leadership Team and why they became a factor in his thinking to the contrary just two or three days later. She did not pursue this further with Mr Couldrick when cross-examining him. Indeed, notwithstanding Mr Couldrick is identified in the Scott Schedule as the perpetrator of seven acts of discrimination against the Claimant, she did not question Mr Couldrick about his mental processes or motivations more generally or why her age and / or disability and / or sex may have been a conscious or sub-conscious factor in any of his decisions, actions and treatment of her. We return to this later in this judgment. We further note that the Scott Schedule explicitly identifies sex as a specific relevant protected characteristic in terms of Mr Couldrick's treatment of the Claimant on 29 September 2017, but not before that date.

44. There is no evidence before the Tribunal that the Claimant raised any concerns at this time that she would not be part of Mr Couldrick's Leadership Team or that his *"end of week 1"* thinking may have been influenced by discriminatory considerations. Given that we find the Claimant was not removed from the Leadership Team, the complaint at paragraph A.1(c) of the List of Issues cannot succeed, though as we indicate above and set out in our conclusions below we do not consider that the Claimant has established primary facts from which it could properly be inferred that Mr Couldrick was influenced by her age, sex or disability in his treatment of her.

<u>The measures letter</u>

45. Mr Harrison joined the Trust on Monday 21 August 2017. We note that the Claimant was pro-active in ensuring there was a structured induction for him (pages 377 and 378).

46. That week there were discussions regarding the draft 'measures' letter, i.e. as required by Regulation 13(2) of the TUPE Regulations 2006. The Trust was not then operating as a shadow Trust, let alone as a discrete legal entity. Staff did not transfer to the Trust until April 2018, so the discussions about the measures letter commenced at a very early stage in the process. However, approximately 2,000 employees were potentially affected and the Council was under pressure early in the process from its trade union(s) who wanted to understand the future Trust's intentions. It seems that the discussions that took place at this time in relation to the draft measures letter

included some debate as to the status of any collective negotiations (and agreements) between the Council and the trade union(s) that might take place following any transfer of staff to the Trust. In an email to Ms Ellis dated 24 August 2017, a senior solicitor from within the Council's Employment Team had confirmed his understanding of the 'static' interpretation given to collective bargaining arrangements in the context of a TUPE transfer, namely that employees who transfer under TUPE do not take the benefit of collective arrangements subsequently negotiated with the transferor after they have transferred out of its employment, where the transferee is not a party to and has not agreed to be bound by the collective negotiations in question. In the experience of the Tribunal the question of whether collective agreements are 'static' or 'dynamic' is an issue that many HR professionals, and even legal professionals, find difficult. It is also the Tribunal's experience that the 'static' interpretation is often not understood by employees who may, particularly in an outsourcing situation, have an ongoing expectation to parity of treatment with their former colleagues. This 'political' reality was recognised within the Council, including an identified equal pay risk should Trust employees seek to compare themselves with their former colleagues at the Council. Notwithstanding the Claimant's greater understanding of the strict legal position, her emails with Claire Ward, Assistant Director Workforce Strategy at this time indicate she was perhaps more narrowly focused on the legal position rather than the practical / political implications should the two organisations' pay policies begin to diverge, something which Ms Ellis and Ms Ward rightly identified as requiring careful thought in case it was raised during the TUPE consultation process. In our judgment, this supports Mr Gibbons' evidence at Tribunal that the Claimant could, at times, be technical rather than practical. She was not necessarily grasping the bigger picture. As Mr Harrison said in the course of giving evidence, "*We had to live with ambiguity*", something we think the Claimant found less easy as she had a more prescriptive approach.

47. Ms Ellis thanked the solicitor for his email stating, *"this isn't really my area of expertise"* (page 398). Unlike the Claimant, we attach no particular significance to that comment and certainly do not consider that it evidences on Ms Ellis' part that she was acknowledging a wider lack of knowledge. We think it an observation that many experienced HR professionals might volunteer in the context of the particular issue then under discussion.

48. Just after midday on Tuesday 29 August 2017, Ms Ellis circulated a four-page draft measures letter. She said that she would like to issue it to the union(s) ahead of a scheduled meeting on Monday 2 September 2017. We note that this was not a formal consultation meeting rather a pre-consultation meeting at which the Council was keen to provide the union(s) with at least some preliminary information to consider and take away. The draft letter identified four potential measures which were envisaged to be taken by the Trust (the Council envisaged taking no measures itself). The copy in the bundle (page 404A) is annotated by the Claimant to the effect that the fifth measure regarding the static / dynamic interpretation of TUPE

was missing. The relevant measure which had been removed from the draft letter was as follows:

> *"In line with recent case law and amendments with the TUPE Regulations, the Trust would not be bound by changes agreed after the transfer as part of the national collective negotiations, such as negotiations with the National Joint Council for Local Government Services, or collective negotiations carried out by BCC. However, the Trust intends to take into consideration any pay rises or changes in conditions resulting from such negotiations when reviewing pay and conditions for Trust employees."*

49. On 30 August 2017, Ms Ellis emailed three colleagues on the Council 'transferor' side regarding the draft measures letter and copied in Mr Couldrick. She wrote,

> *"I think Andy Couldrick and I have just debated and decided that point four should just stay out of the measures altogether as there is no intention by the Trust to change the pay policy anyway"* (page 405A).

50. The Claimant complains that Mr Couldrick took advice from Ms Ellis when in fact the Claimant was contracted to provide that advice and, further, that it was an issue outside Ms Ellis' area of expertise (Item 5 of her Scott Schedule). It is abundantly clear on the face of Ms Ellis' email that Mr Couldrick was not taking advice from Ms Ellis, rather they had engaged in an entirely appropriate discussion (as part of a wider debate) as to whether or not the particular point should be included in the draft measures letter. In any event, the Claimant's complaint misses the point; whilst Regulation 11(4) of the TUPE Regulations requires a transferee to notify information to the transferor, the measures letter itself is the responsibility of the transferor, in this case the Council. Not least because legal liability for any breach of the information and consultation obligations can transfer to a transferee by virtue of the TUPE Regulations, a transferor and transferee will often collaborate as to the content of any measures letter. It seems to the Tribunal, as a matter of common sense, that a collaborative approach is much more likely where, as here, the transferee is being carved out of the transferor. We think it entirely unremarkable that a discussion took place between Ms Ellis and Mr Couldrick as the culmination of various discussions and interactions to which the Claimant was a party. They were colleagues at the same organisation even if they were on other 'sides' of the proposed transfer. They were working collaboratively. Moreover, given the measures letter was the Council's responsibility, it was Ms Ellis as the relevant HR Lead who was canvassing views, including from Mr Couldrick. The Claimant is misconceived in seeking to characterise the email as evidencing that Mr Couldrick was seeking advice from Ms Ellis. Likewise, it is entirely unclear to the Tribunal why the 'debate' between Mr Couldrick and Ms Ellis, which was evidently part of a wider debate amongst a number of individuals including the Claimant, evidences collusion between Ms Ellis and Mr Couldrick to take work away from the Claimant and to exclude her (Item 5 of the Scott Schedule). In our judgment there was no collusion whatever

and the Claimant's allegation in this regard is unfounded, albeit revealing in terms of the Claimant's mindset both now and then. An entirely innocuous exchange between Ms Ellis and Mr Couldrick during Mr Couldrick's third week at the Trust had become collusion in the Claimant's mind. The fact that the Claimant's stated work packages included providing technical support to the Trust in relation to the transfer of staff to the Trust did not in our judgment preclude discussion and collaboration between the Trust's Chief Executive and the HR Lead for the Council. The Claimant did not have exclusivity on the issue and was not a gate-keeper in terms of access to Mr Couldrick. In the circumstances the complaints at paragraphs A.1(f) and (g) of the List of Issues are not well founded and cannot succeed. In our judgment this particular issue provides essential context for much of what followed. Ms Ellis, whom the Claimant considered to be much less able than herself, had, in the Claimant's eyes, prevailed on a TUPE related issue and had been supported in her views and approach by Mr Couldrick.

51. There was no intention to stifle ongoing discussion of the issue. We note that the email exchange culminated in Mr Couldrick stating,

> *"…the place for these issues to be resolved is in the negotiations around the service delivery contract and the governance arrangements between the Council and the Trust, not in the TUPE process with staff"* (page 405).

Mr Harrison

52. The first written interactions between Mr Harrison and the Claimant included in the bundle are at pages 409 – 412, namely an email from Mr Harrison to the Claimant on 23 August 2017 (his third day at the Trust) and her very detailed response dated 31 August 2017. According to the Claimant, by 29 August 2017 Mr Harrison was discriminating against her (on the grounds of her age and disability, though not explicitly on the grounds of her sex). At paragraphs 69 to 72 of her witness statement the Claimant refers to Mr Harrison's alleged treatment of other women, and when questioning Mr Harrison, she also questioned him about an historic complaint from approximately 9 years ago which is not referred to in her statement. Otherwise, she did not question Mr Harrison at Tribunal as to why her age and / or disability may have been a factor in his thinking.

53. The first alleged act of discrimination by Mr Harrison is said to have occurred at a Design Authority meeting on 29 August 2017 when Mr Harrison said in front of others, "Let's keep Janette out of staff engagement". Mr Harrison had no recollection of making any such comment. The allegation is not supported by the minutes of the meeting (pages 400 and 401). The minutes were not kept by Mr Harrison. There are no other contemporaneous documents or evidence that the statement was made, and the Claimant herself has provided no further context. We note that on 23 August 2017 Mr Harrison had identified "Internal comms/engagement" as one of eight items in a proposed high-level work plan for the Claimant; in which case it

seems odd that six days later he would have publicly stated that she was to be kept out of staff engagement. We are not satisfied, on the balance of probabilities, that the alleged statement was made, even if there was discussion around this time within the Trust as to who might attend a forthcoming planned staff engagement session. In the circumstances the complaint at paragraph A.1(d) of the List of Issues is not well founded.

54. The Claimant complains that she was omitted from email circulations (paragraph A.1(h) of the List of Issues). This in fact refers to a single email on 30 August 2017 from Ms Ellis to colleagues on the 'transferor' side, copied to Mr Couldrick on the Trust side, regarding her 'debate' with Mr Couldrick about the measures letter. We have already set out why it was entirely appropriate for Ms Ellis and Mr Couldrick to have engaged directly on this issue. We attach no significance to the fact the Claimant and, indeed, Mr Harrison and Mr Gibbons were not copied in. Mr Couldrick brought them into copy subsequently, which itself further undermines the Claimant's unfounded complaint that Mr Couldrick was colluding with Ms Ellis. The complaint is not well founded.

55. The Claimant alleges that she highlighted to Mr Harrison on 31 August 2017 that her advice and requests were not being given appropriate consideration. We have set out above in some detail the chronology of events from the outset of the Claimant's consultancy. There is no evidence in the contemporaneous documents from this time that her advice and requests were not receiving appropriate consideration. Yet, by 31 August 2017, namely within eight working days of Mr Harrison starting at the Council, the Claimant was expressing herself in a reasonably detailed email in terms of her contractual objectives / work packages (pages 409 to 411). This, as we say, was in the context of an unexceptional interaction between Mr Couldrick and Ms Ellis. Whilst the email refers to her involvement in engagement work, there is certainly no suggestion that she considered she was being discriminated against on grounds of her age and / or disability and / or sex or that Mr Harrison was somehow responsible for any issues in her email.

56. The email certainly does not support that Mr Harrison was excluding the Claimant from development discussions and meetings or compromising and frustrating her ability to deliver her contracted work packages (as she alleges in item 6 of her Scott Schedule). Instead it evidences, for example, her ongoing involvement in the engagement work on the Trust side even if tensions with Ms Ellis had then arisen. In the circumstances the complaint at paragraph A.1(i) of the List of Issues is not well founded. Perhaps more fundamentally, the Claimant's comments on 31 August provide further evidence in this case that any concerns had arisen in her mind prior to Mr Harrison joining the organisation, even if they became more pronounced in her thinking after he joined.

57. What the email exchange of 23 and 31 August 2017 does starkly illustrate to the Tribunal is that the Claimant and Mr Harrison had very different communication styles. Mr Harrison provided a high-level work plan

comprising eleven brief bullet points. The Claimant's response runs to three pages and recites each of her contracted work packages. In his evidence at Tribunal Mr Harrison said he has "*a tendency to ignore the niceties i.e, my emails are short*" and that he can be "*forthright*". He said it is not about anyone in particular but about delivering objectives. This was in fact borne out by the Claimant's questions of him about two men she believed he had offended. The Claimant described a fairly robust interaction with the first individual, a partner at a law firm, and that Mr Harrison had been obliged to issue a personal apology to the second individual as a result of a message he had sent him on Linked-In. It is slightly odd that the Claimant should have questioned Mr Harrison in such detail about what she believed to have been his unacceptable behaviour towards two men. The underlying premise was that Mr Harrison is rude to everyone. It does not particularly assist the Claimant in her complaint of discrimination if she effectively claims that Mr Harrison was indiscriminately rude to all.

58. The Claimant alleges that Mr Harrison instructed her on 31 August 2017 that she was to do non-contracted work that was outside IR35. As Mr Harrison did at Tribunal, we have struggled to understand this particular complaint. Mr Harrison could not identify anything in the bundle or the Claimant's witness statement that spoke to this issue. His request of the Claimant at Tribunal for clarification went unaddressed and the questioning moved on. We find ourselves in the same position as Mr Harrison. We have reviewed the Claimant's detailed email to Mr Harrison dated 21 September 2017, including her comments on his updated proposed workplan. There is no suggestion by the Claimant in that email that she was being instructed to do non-contracted work or that it was work that may be outside IR35. The Claimant has the burden of establishing, on the balance of probabilities, primary facts from which the Tribunal could, in the absence of an explanation, infer that there has been discrimination. She has failed to discharge that burden of proof. We cannot sensibly conclude that she was instructed by Mr Harrison on 31 August 2017 to do work outside IR35. In the circumstances the complaint at paragraph A.1(j) of the List of Issues is not well founded.

59. Over the course of 31 August 2017, there was a separate but related exchange of emails between Mr Harrison and the Claimant regarding Burges Salmon (a firm of solicitors with whom the Claimant had worked whilst at Doncaster Children's Services Trust). She referred to emails earlier that day regarding the measures letter, TUPE and collective bargaining. Her email brought together a number of earlier strands, including that *"BCC is not providing adequate legal (or HR / OD) advice, including in relation to their and now the Trust, activity. Although such advice has demonstrably been taken and followed by the Trust".* These comments are evidently a reference, amongst other things, to Ms Ellis' competence and the 'debate' between Ms Ellis and Mr Couldrick the previous day. We pause here to observe that a 'narrative' was taking hold around Ms Ellis' competence and to the effect that Mr Couldrick was taking advice from Ms Ellis. There was no justification for the email. The Claimant

was expressing herself in somewhat tendentious terms (or again, adopting Mr Couldrick's terminology, conflictual terms). She wrote,

> *"As my advice and requests are not being given appropriate consideration and that this compromises me in delivering the work packages that BCC have contracted me to deliver. The need to constantly be managing this (and in very [and often unnecessarily] tight timescales) potentially puts me at risk in relation to my negligence insurance now going forward." (*page 414*).*

60. We pause here to observe that at this point in time the Claimant's focus and expressed concern was her own exposure rather than the Respondents'.

61. Mr Harrison replied as follows,

> *"Can you set out the total request for advice in an email please?"*

62. In response to a further email from the Claimant, Mr Harrison clarified that he wished to know the cost of Burges Salmon advising on the measures letter issue in addition to another piece of work that the Claimant had secured a quote from them to do. In other words, Mr Harrison was content to seek further legal input on the issue given the Claimant's stated concern that she was personally exposed. The Claimant was about to leave for a medical appointment and confirmed she would deal with the matter on Tuesday 5 September 2017. There was no indication then that she was unhappy with Mr Harrison's suggestion that external legal advice should be sought from Burges Salmon or that this might still leave her at risk personally, i.e. because that advice would be provided to the Trust rather than to the Claimant or to her company. In any event, we are unclear why the Claimant might be at risk. She had made her professional views known. If the Trust did not act on her views and advice, it is unclear to us what recourse it might then have against her.

63. On 5 September 2017, the Claimant emailed Mr Harrison a copy of the Consultancy Agreement. It is not entirely clear to the Tribunal why she did so; it was an unusual step for a contractor to take, not least given Mr Harrison was himself contracting his services to the Council.

<u>The first consultation and engagement session and related matters</u>

64. Staff consultation and engagement sessions were arranged for 19 September 2017. The Council was advised by its own legal department that it was important that staff should understand that these were discrete matters and that the second session was not part of any staff consultation process.

65. On 7 September 2017, the Claimant emailed Mr Harrison to request whether she should be in attendance for just the first part of the session, namely the

Council led consultation meeting with its staff. Mr Harrison responded, copying in Mr Couldrick, Mr Gibbons and Mr Gaynor,

> *"Sounds a sensible idea – but silence is golden. You say nothing… and listen only."*

Even allowing for Mr Harrison's direct communication style, his comments were unhelpful. Mr Harrison accepted at Tribunal that the Claimant had not done anything to cause him concern around engagement. Yet his comments could imply that he did not trust her judgment or that he had concerns she might say something inappropriate.

66. The Claimant responded one hour later,

> *"There is nothing I am anticipating needing to say, at the moment, but BCC did ask that I attend to respond to any questions that arose. What is the concern re: me saying something? As earlier emails and discussions, I am degree and professionally qualified and professionally indemnified for this work, have taken a successful Children's Trust through this process, and my related contractual work stream requires me to provide technical support to the Trust in relation to the transfer of staff to the Trust. Why the gagging order?"* (page 424)

67. Mr Harrison might have paused and reflected on his earlier choice of words. Indeed, he might have recognised from the Claimant's response the potential offence that may have been caused and acknowledged this. Instead, he replied,

> *"It's a BCC meeting and not ours.*
>
> *It's to protect the Trust position – u can take any questions back.*
>
> *My worry is not your competence but perception that we are a joint party to that half of the meeting."* (page 424)

We appreciate that it would be a Council led meeting and that any attendees from the Trust 'side' would be there as observers only. It was entirely appropriate that Mr Harrison should convey this to the Claimant; however, he could have conveyed his views in a more professional manner, particularly given the potential offence occasioned by his initial response.

68. There was a separate email exchange at this time regarding a proposed email to staff inviting them to the consultation and engagement sessions (pages 426 – 429). An initial draft was circulated by Chandra Quarshie in her capacity as Children's Services Communications Manager. Ms Ellis and the Claimant were two of five recipients. The Claimant responded first, then Ms Ellis. We note the following brief response from the Claimant,

> *"Thanks for this. My advice remains as below and I understand the Trust is considering the focus and timing of Engagement events"* (page 427)

69. Some minutes later the Claimant emailed Mr Harrison (pages 426 and 427). Her comments in that email are unnecessarily critical and divisive. Once again adopting Mr Couldrick's phrase, it was conflictual. In particular, she said,

> *"Rebecca (it's who elsewhere states, in writing, that TUPE / contractual issues are not her area of 'expertise') seems to continue to be confused"* (page 427).

We consider that the comment was uncalled for, though it fits with the Claimant's comments to others about Ms Ellis referred to above. It is noteworthy that she claimed Ms Ellis had written that TUPE / contractual issues were not her area of expertise. That is not in fact what Ms Ellis said (see paragraph 47 above). As we observed a number of times during the hearing there is a tendency on the Claimant's part to re-frame or re-interpret what people have said.

70. The Claimant's email of 7 September 2017 further evidences that she did not have a positive view of Ms Ellis and in spite of professing to enjoy working with her and *"loving her enthusiasm for all her work",* that she considered herself to be the more experienced and competent HR professional and also that she thought it appropriate to share her views as to Ms Ellis' perceived shortcomings with a wider audience. Mr Harrison avoided engaging further with the Claimant on the matter. His advice on 7 September 2017 was,

> *"Let's just go with how it is at the moment and see if anything needs to change in future".*

71. The Claimant returned to the issue of the draft measures letter. On 11 September 2017, she emailed Mr Harrison as follows,

> *"The Trust knows that to date, BCC has* "failed to inform and consult" *re: the full measures we provided, further BCC have given the Trust no confidence that they intend to fully inform and consult in the future."* (page 434)

We note that email concluded with the Claimant seemingly acknowledging, as Mr Couldrick had proposed (see paragraph 51 above), that pay determination issues could be taken forward as part of the SDC/governance arrangements. This was also Burges Salmon's advice, as the Claimant later confirmed.

72. In a separate email to Ms Ellis that day (copied to Dawn Hewins) (page 438), the Claimant responded to an email from Ms Ellis asking about the redundancy modification order. Ms Ellis had asked,

> *"I can't remember where we got to with it! Can you remind me please?"*

73. There was a business like but polite exchange between them, concluding with Ms Ellis expressing the hope that the Claimant had enjoyed her recent days off.

74. Later that day the Claimant raised an issue regarding an item in the agenda for a forthcoming Design Authority meeting on 14 September 2017. Specifically, she queried whether agreement had been reached as to the process for the appointment of an Interim Director of Resources, i.e. the role being performed by Mr Harrison on a consultancy basis. She emailed Sarah Sinclair, copying in Ms Ellis and Ms Hewins. Ms Hewins emailed Ms Ellis (without copying in Ms Sinclair or the Claimant), asking her recollection of the meeting discussion. Ms Ellis responded the same day,

> *"It was agreed at the Design Authority the MOU was quite clear and that we would use an appointment panel to make appointments and include the Trust Board of Directors rather than the BCC JNC panel"* (page 440C)

<u>The Claimant's discussion with Mr Couldrick and Mr Harrison on 12 September 2017</u>

75. There was a brief discussion between the Claimant, Mr Couldrick and Mr Harrison on 12 September 2017 regarding the Head of HR recruitment panel. The Claimant's handwritten note of that discussion is at pages 441A and 441B of the hearing bundle. We were not told by the Claimant whether she kept the note during their discussion or afterwards, though nothing turns on this. Having previously misrepresented Ms Ellis' comments to suggest a wider lack of expertise on her part, the Claimant's note evidences that she went yet further in her criticism of Ms Ellis. She referred to Ms Ellis as "not competent across HR" and, in a particularly barbed comment, described her as "V nice woman and good at some things". Challenged by Mr Couldrick during their discussion to justify her claim that Ms Ellis was not competent, she cited that Ms Ellis had written and confirmed her lack of expertise. That was to seriously misrepresent Ms Ellis' email of 24 August 2017. The Claimant went on to assert that she had "shored Ms Ellis up", relying amongst other things upon the fact she had sent Ms Ellis the Acas TUPE Code of Practice. We have noted already that she did so without any request from Ms Ellis. It was a gross exaggeration on the Claimant's part to suggest that she was shoring up Ms Ellis. The Claimant's own notes suggest that Mr Couldrick and Mr Harrison were angered by her comments. In our judgment they had every reason to be angered. Her comments were unattractive and unprofessional, as well as unwarranted. Her note evidences that she asked Mr Harrison why Mr Couldrick thought Ms Ellis was more competent than herself. We think that comment is revealing.

The Claimant's meeting with Ms Ellis

76. At or around this time the Claimant met with Ms Ellis. We find, on the balance of probabilities, that they met on 12 September 2017 after the Claimant's discussion above with Mr Couldrick and Mr Harrison. The meeting took place in the Council's Lancaster House building. The meeting itself can only be viewed in the context of the Claimant's escalating criticisms of Ms Ellis. We accept Ms Ellis' evidence that the Claimant said to her during this meeting that she was "*incompetent*" and that Ms Ellis had been shocked by the comment, which came out of the blue and with no build up to it. Ms Ellis described the comment as being etched in her mind. We understand why such a comment would be remembered. It understandably caused her to doubt her own competence and it led her to speak to Ms Hewins and the Legal Department to understand whether they had any concerns. They were able to reassure her that they did not have any concerns, though Ms Hewins offered to speak with Mr Couldrick and subsequently fed back to the Claimant that he too had no concerns regarding her competence.

77. The Claimant denies that she called Ms Ellis incompetent. We have no hesitation in rejecting her evidence on this point. Her own handwritten notes document that she described Ms Ellis on 12 September to Mr Couldrick and Mr Harrison as "not competent across HR". That was as close as she might have got to calling the Claimant incompetent. Even more so than her comments to Mr Couldrick and Mr Harrison, we consider her comment on 12 September to Ms Ellis to have been a deeply unpleasant and unwarranted attack upon Ms Ellis. We find that it violated Ms Ellis' dignity and created a hostile working environment for her.

The Claimant's meeting with Ms Hewins on 13 September 2017 and other matters

78. On 13 September 2017 the Claimant met with Ms Hewins. Again, the Claimant has produced a handwritten note of the meeting. We accept Ms Hewins' evidence that the Claimant kept only a very brief scribbled note during their meeting and accordingly that the note in the hearing bundle was compiled or completed after the event. The Claimant raised with Ms Hewins that she was not undertaking the full range of work that she believed she had been contracted to deliver. Her note reads that she,

> *"Highlighted concerns to DH that RE was out of her depth and creating risk including RE responded to…"* (page 444)

Given this is the Claimant's own note, it reinforces our finding above that the Claimant told Ms Ellis that she was incompetent. Her note further records,

> *"DH said that the Trust was like a 'Boy's Club'"*

79. Ms Hewins' evidence is that it was the Claimant, not she, who referred to the Trust as being like a 'Boy's Club'. She provided a descriptive account of the meeting, namely that the Claimant had referred to her peers and how she was feeling. Ms Hewins had asked her what she meant, to which the Claimant had responded that it felt like a Boys' Club. The Claimant's account of the meeting was much less precise; she did not provide any context for Ms Hewins' alleged comments. We prefer Ms Hewins' evidence and that as the senior most HR professional at the Council she would not have casually tolerated a 'clubby' male environment within the Trust. Given that we prefer Ms Hewins' account, the complaint at paragraph A.1(n) of the List of Issues is not well founded and cannot succeed. Though, for the reasons we set out in our conclusions below, it does mean that the Claimant did a 'protected act' on 13 September 2017 (which is not disputed by the Respondents).

80. There is a separate handwritten note dated 13 September 2017 in the hearing bundle (page 446) in which the Claimant documents asking Mr Harrison whether she should help Ms Quarshie with a staff engagement paper, but receiving no response. She did not ask Mr Harrison about this at Tribunal and accordingly did not challenge his evidence in paragraph 24 of his witness statement, including that he was not responsible for Ms Quarshie who reported to Mr Gaynor. He was, however, responsible for resourcing within his wider corporate leadership role and, as a result of his discussion with Ms Quarshie identified a need for additional resource for external communications so that Ms Quarshie could remain focused on internal communications. Given that we have not accepted various of the Claimant's accounts from that week and have noted her tendency to frame the discussions in adversarial terms, we approach this further allegation with a degree of caution. We understand the Claimant to be alleging that she was ignored by Mr Harrison, albeit she did not put this to him during cross examination. His evidence is that he gave careful thought to the issue of resourcing and that subsequently the matter was discussed at TLT and resource agreed. If, as we accept, the matter was escalated to TLT, that evidences that Mr Harrison did give careful thought to the matter and that he was not dismissive of the Claimant or brusque with Ms Quarshie as the handwritten note would suggest. In the circumstances the complaint at paragraph A.1(o) of the Claimant's List of Issues is not well founded.

81. Later on 13 September 2017, the Claimant emailed Mr Harrison with a draft HR / OD work plan. It identified activity to be completed by 5 December 2017 (the Claimant's contract end date) and beyond through to the Trust going live in April 2018.

<u>Emails on 14, 15 and 18 September 2017</u>

82. On 14 September 2017, Ms Ellis emailed an HR highlight report to Mr Harrison and the Claimant, copying in Sarah Sinclair. The Claimant responded and rightly corrected an error in the email. However, she seems to have drawn attention to the error by her comment, *"as stressed many*

times" and also by copying in Ms Williams, Ms Quarshie and Ms Hewins on her response. She seemed to be escalating the matter.

83. On 15 September 2017, the Claimant emailed Mr Harrison (page 451E) following a call with Ms Ellis and in anticipation of Mr Harrison's planned call with Ms Ellis. She identified certain matters that "*I have asked that she also get a view from you [about]*". Mr Harrison forwarded the email to Ms Ellis with some immediate brief comments in the body of the Claimant's email. He also copied in the Claimant, Mr Couldrick, Mr Gibbons, Ms Wilson, Mr Valvona and Mr Gaynor. Ms Ellis was evidently angered by the Claimant's original email as she immediately forwarded the email to a solicitor within the Council's Legal Team for advice. This was, of course, in the immediate aftermath of having been called incompetent to her face by the Claimant. She wrote,

> *"I have just called Janette and we agreed that I would send a note confirming our conversation this afternoon and within minutes I have received this and she has clearly twisted my words!"* (page 451D).

84. A few moments later, she forwarded her email to Ms Hewins and Ms Ward,

> *"I just want to share with you my challenges given our conversations yesterday! [Name] has just kindly rang me and I won't be replying to JP until Monday, she has advised me to have all my contact now in writing as she is twisting what I am saying and then putting it in writing immediately – trying, in my view, to paint a bad picture."*

It will be clear from our findings above that Ms Ellis was right to think that the Claimant was seeking to paint her in a poor light.

85. Ms Hewins' immediate response was,

> *"I have experienced this with my first meeting with JP and her interpretation in her notes of that meeting – which I quickly amended and commented on, and returned.*
>
> *I am sorry that this is happening. I can raise with Andy [Couldrick] if you would like me to pursue?"* (page 415B)

86. Ms Ellis responded,

> *"Thanks Dawn. I think there are a lot of people who think she is a difficult character. My worry is that it doesn't make doing business together very easy. If I am honest I don't know what value she is adding now as they have legal advisers and so do we and it sounds like they have taken quite a bit of work away from her."* (page 415C)

87. The Claimant was unaware of Ms Ellis' comments at the time. We were not told when the Claimant became aware of them except that it must be assumed this was either in response to a Data Subject Access Request or

in the course of disclosure in these proceedings. In her evidence at Tribunal the Claimant described Ms Ellis' comments as "*outrageous and unjustified*".

88. Whilst Ms Ellis' comments will have been very difficult for the Claimant to read, there was no reflection on the Claimant's part that Ms Ellis' observation that she was a difficult character was at a time when the Claimant had herself already written a number of emails which the recipients would clearly have understood as calling into question Ms Ellis' competence, and after she had called Ms Ellis incompetent to her face and had told Ms Hewins that Ms Ellis was out of her depth and creating risk. Indeed, as further emails on 18 September 2017 (page 452) evidence, the Claimant was not willing to let matters lie when Ms Ellis emailed those who had been copied in on the 15 September email and had clarified two issues. Notwithstanding, we and the Claimant know that Ms Ellis felt the Claimant was twisting her words, at least publicly her response was low key. Nevertheless, the Claimant responded to the recipients on 18 September 2017, taking Ms Ellis out of copy,

> *"Hello all, I do not wish to get into a debate re: Rebecca on what was said, but I cannot let Rebecca's assertion that I have misrepresented her stand unchallenged."* (page 452)

89. At paragraph A.1(p) of her List of Issues (Item 13 of her Scott Schedule), the Claimant complains that Ms Ellis asserted that the Claimant had misrepresented her. In fact, it was the Claimant who complained of having been misrepresented. In the circumstances the complaint at paragraph A.1(p) of the List of Issues is not well founded. We further note that as certain as the Claimant was in her email of 18 September 2017 that her account of her conversation with Ms Ellis was accurate, she was plainly wrong when she said that Ms Ellis had forwarded her statement to a wider audience (page 452). As the email chain clearly evidences (page 451D) it was in fact Mr Harrison who had copied others in.

90. Even then, the Claimant still would not let the matter rest. At 12.16pm on 18 September 2017 she copied in Ms Hewins on the exchange and wrote,

> *"Hi Dawn*
>
> *As our conversation last week, I do have concerns in relation to Rebecca.*
>
> *Kind regards"* (page 454)

Ms Hodgetts was right to highlight this incident as just one example of the Claimant's tendency to propagate conflict.

Mr Featherstone

91. On 18 September 2017 Mr Featherstone joined the Trust as Trust Implementation Manager. We accept his unchallenged evidence that he met briefly with the senior leadership before going on holiday from 21 September to 29 September 2017. He was briefly introduced to the Claimant but had no further dealings with her during September. We also accept Mr Featherstone's evidence that their roles did not overlap. Mr Featherstone was the Programme Manager and his job was to collate activities and agree who would be responsible, chasing people up as appropriate to ensure that tasks were completed and reporting progress to the senior management team. His only responsibility for developing an operational product was in regard to the Trust's Risk Management policy and strategy, Health and Safety policy and strategy, and updating its Business Continuity and Emergency Planning Guidance. As regards HR matters, it was Mr Featherstone's responsibility to collate the totality of the Council's HR policies that would need to be reviewed by the Trust's HR resource/function for potential adoption by the Trust and to identify those which were a priority in terms of a 're-fresh' before the Trust went live. This was not technical HR work. Mr Featherstone did not have line management responsibility and could not assign or remove work from others, including the Claimant. When Mr Featherstone left the Trust early in 2019 he handed over to a newly appointed Head of Business Management.

Ongoing issues during the week commencing 18 September 2017

92. On 19 September 2017, Mr Harrison emailed the Claimant, Hana Begum, Ms Ellis, Ms Sinclair and Ms Quarshie following the TUPE Consultation and Trust Engagement session. His email was entitled, 'Trust Engagement Sessions'. He wrote,

> *"Really good today – either*
>
> *Andy and / or me will be there for Part 1 sessions. It worked well today.*
>
> *Janette – you can stand down from going now…"* (page 457)

93. Mr Couldrick and Mr Harrison addressed this at some length in their evidence. We can deal with the matter briefly. The engagement session was felt to have gone well. It was an opportunity for staff to see and hear from Mr Couldrick as Chief Executive. It was in the nature of a 'roadshow' event. His intention was to reassure them during what was inevitably an uncertain period and to communicate progress towards 'go-live'. As he later described it in an October 2017 newsletter to staff, "I say something about my hopes, ambition and priorities for the Trust once it is established". Mr Couldrick was leading the organisation they would be joining. We accept there was simply no need or reason for the Claimant to be there.

94. Mr Harrison's email was at 5.24pm. At 6.35pm the Claimant emailed Mr Harrison, copying in Mr Christie, Mr Couldrick and Mr Gibbons (page 458). It is evident that the working relationship was under strain and indeed in our judgment either had broken down, or was on the cusp of breaking down, irretrievably. The Claimant was evidently upset about being stood down from attending the engagement sessions, though as we set out above there was no reason for her to be upset or aggrieved about the matter. Her upset has to be seen in the context of the wider events and interactions described above. And regardless of whether or not her concerns were well-founded, as we return to below, Mr Harrison sought to address her concern that she had insufficient work by providing a high level workplan which they then met and discussed.

95. On 20 September 2017, the Claimant provided a critical analysis of the meetings on 19 September (page 464). Referring to the first part of the session, namely that concerned with TUPE consultation, responsibility for which lay with the Council as transferor, the Claimant expressed concerns in three numbered paragraphs. She introduced those concerns on the basis that she had *"concerns re: the specific input on TUPE and HR matters…"* We regard that as a further implicit criticism of Ms Ellis and, again, that she was content to share her comments to a wider audience and to embarrass and undermine Ms Ellis in the process.

96. Again, we observe that Ms Ellis' response to that email was measured and professional. She wrote on 21 September 2017,

> *"Jo and I have discussed your feedback and are comfortable with how the session went and what was said. The feedback so far, including from TU reps, has been very positive. I reacted in accordance with legal advice and our next round of sessions will focus on the measures. Getting into debate around draft measures during these sessions, we feel, would have been unhelpful."* (page 463)

She was referring to the fact that the proposed transfer was still over six months away and that 'formal' consultation had not commenced.

97. The Claimant's somewhat curt response (copied to six recipients) was,

> *"Thank you for your response and views"*

98. On 20 September 2017 the Claimant sent Mr Harrison a two-page email in response to his eight-point work plan that they were due to discuss later that day. The email is at pages 461 and 462 of the hearing bundle; it includes the Claimant's contracted work packages. Once again, the exchange illustrates their very different communication styles, not least that the Claimant sent Mr Harrison a detailed email notwithstanding they were due to discuss the work plan later that day. The Claimant expressed her view that Mr Harrison's proposed tasks required very little of her time; were primarily others' work, requiring at most limited input from her; and included

activities that weren't related to her contracted work packages. For the first time that we can see, she requested his proposed SMART deliverable/outcomes. She copied in Mr Couldrick, Mr Gibbons and Mr Christie on her response.

99. There is some evidence in the hearing bundle from this time that the Claimant was continuing to work on a paper regarding facilities and time off for trade union duties, but the tensions are evident for example in an email exchange on 21 and 22 September 2017 at pages 477A – 477C of the hearing bundle.

100. Later on 21 September 2017, there was an exchange of emails regarding the proposed interview panel for the role of Head of HR at the Trust (pages 467 and 468). This linked to the Claimant's earlier discussion with Mr Couldrick and Mr Harrison on 12 September 2017 referred to at paragraph 75 above. The Claimant complains that she was replaced by Ms Ellis on the selection panel (paragraph A.1(m) of her List of Issues). There was no evidence before the Tribunal that the Claimant had been identified to sit on the panel or that she was 'removed' (she does not dispute that she was involved in other substantive aspects of the recruitment process). We note that the Claimant's documented objection on 12 September 2017 to Ms Ellis being on the panel was that she was "*not competent across HR*" (page 441A); it was not that the Claimant herself should be on the panel or that she was unfairly having to make way for Ms Ellis. Furthermore, the Claimant's own handwritten note is that she agreed that the person who was on the Panel should be a 'permanent employee', in the sense of someone who would be with the Trust in the longer term (page 441B). She seems to have accepted that as she would only be with the Trust until early December 2017 she should not be on the interview panel. Be that as it may, we accept Mr Couldrick's evidence at paragraph 20 of his witness statement as to his reasons for including Ms Ellis on the panel and note that the Claimant did not cross-examine him on this, but instead on peripheral matters. As Mr Couldrick noted, he is an experienced Chief Executive and was capable of making a sound appointment to the post. Ms Ellis' involvement was consistent with the Trust's collaborative and partnership approach in its dealings and relationship with the Council. We consider that the Claimant was incapable of remaining objective in matters relating to Ms Ellis and her view of Ms Ellis' involvement in the recruitment process reflects that lack of objectivity. In all the circumstances the complaint at paragraph A.1(m) is not well founded and cannot succeed.

101. At paragraph A.1(r) of the List of Issues the Claimant identifies as one of her complaints that Mr Harrison told her on 21 September 2017 "*to leave*". She refers to this very briefly in paragraph 57 of her witness statement. She referred in her two-page email to Mr Harrison of 21 September to Mr Harrison having suggested she "*could leave*". Her email does not identify when the comment is alleged to have been made. As we have observed already, the Claimant was prone to re-frame both her own and others' words and comments in ways that gave them a different meaning. This is a further example. In her List of Issues an alleged comment that she "could" leave

becomes an instruction "to" leave. Her evidence in her witness statement is different again; there she states that Mr Harrison said that "*I should look for other work*". The inconsistency is terminology inevitably means that we approach the Claimant's evidence with a degree of caution. She did not put this particular allegation to Mr Harrison when she cross-examined him and there are scant details in the Claimant's witness statement. We return to this issue below.

The Claimant's use of a walking stick

102. In his judgment of 11 December 2018, Employment Judge Harris found that by 7 August 2017 the Claimant was experiencing sufficient knee pain that it gave rise to a substantial adverse effect on her ability to carry out normal day-to-day activities. He further noted that on 22 September 2017 it was recorded in the Claimant's GP records that she was then mobilising with a walking stick, and again on 3 October 2017.

The Claimant's meeting with Mr Harrison on 28 September 2017

103. During the week commencing 25 September 2017, the Claimant was working putting together bench marking information for the Trust and also providing input to a draft Service Delivery Contract to be entered into between the Trust and the Council. The Claimant emailed Mr Harrison ahead of a scheduled work plan / activity meeting on Thursday 28 September 2017. She wrote,

> *"The below confirms that I have a few short tasks to do. I have received no SMART objectives relating to my contracted work packages. The below equates to C5 days, some of this activity / time is dependent on the receipt of information from others."*

104. Schedule 1 of the Consultancy Agreement had provided that the work packages would be developed into SMART deliverables/outcomes. We think that Mr Harrison would have been frustrated by the Claimant's request for SMART objectives as they are not something that inform his own approach. His evidence and perspective was that they were in a challenging and fast-moving environment, and that one had to live with ambiguity and be agile and responsive to the evolving situation. Furthermore, that the Claimant was a senior level consultant who did not require SMART objectives and, in any event, that certain of her work packages did not require detailed objectives as it was evident what was required to be done. However, and as his emails of 21 September evidence, we find that he was committed to identifying meaningful work that the Claimant could do.

105. The Claimant's account of their meeting on 28 September 2017 is set out in her email of 29 September 2017 referred to below and also at paragraphs 57 to 59 of her witness statement. In addition to the four concerns raised in her subsequent email of 29 September 2017 she claims that Mr Harrison

described her first two work packages as 'dead in the water' and that he said additional resource would be appointed to undertake the staff engagement work.

106. Mr Harrison's account of the meeting is at paragraphs 26 to 31 of his witness statement. We prefer his account of the meeting, which is more detailed and nuanced. He was measured and consistent in his evidence at Tribunal. He had identified that some of her work packages were not a priority and had suggested that she might wish to explore working on other HR matters within her skill set. We think it is quite possible that he used the expression 'dead in the water' as regards those matters that he did not see as a priority. However, we accept, notwithstanding his often brief and sometimes brusque style of communication, that he envisaged and communicated to the Claimant that any move away from her contracted work packages would need to be jointly agreed and not unilaterally imposed as the Claimant alleges. Mr Harrison did not seek to suggest that it was an easy or convivial conversation. He acknowledged that the Claimant was unhappy. It is evident from our findings above that she was indeed unhappy and Mr Harrison was plainly alive to this. In those circumstances it is entirely understandable why he said that he would understand if she wanted to look for work elsewhere. We conclude that any comments by him on 21 September were to the same effect. Mr Harrison's evidence was that he was trying to support the Claimant as he could tell she was no longer enjoying her job. We are not necessarily persuaded that it was an entirely altruistic response on his part. However, given, as we find, that the relationship was already on the cusp of breaking down, we think it was a pragmatic suggestion on his part, one that we think anyone in his position would have proposed. He acknowledged that the Trust did not want to pay the Claimant while she was doing nothing at home. However, that is very different from threatening the Claimant that she would not be paid, as she alleges. We think this was another example of the Claimant misinterpreting or re-framing what was said. We do not uphold her complaint that such a threat was made.

107. Save that Mr Harrison may have described aspects of her work as potentially 'dead in the water' the complaints at paragraphs A.1(r), (s) and (t) of the List of Issues are not well founded.

<u>The Claimant's complaint</u>

108. On Friday 29 September 2017 the Claimant emailed Mr Harrison, copying in Mr Couldrick, Mr Gibbons and Mr Christie. The subject matter of her email was "CONTRACT, INTIMIDATION AND HARASSMENT". Her email commenced,

> "*I confirm my objection to the ongoing intimidation and harassment I am (and thereby Janette Parsons Ltd is) being subjected to by yourself" – personally and, as a Director of Resources, as an agent of the Trust and BCC.*" (page 494)

109. Referring to their meeting the previous day, the Claimant raised four specific concerns, namely:

109.1 Mr Harrison had threatened she would not be paid if he did not provide her with her contracted work;

109.1 Mr Harrison intended to impose a unilateral variation to her contract;

109.3 Mr Harrison proposed that the Claimant would undertake unspecified non-HR related activity;

109.4 Mr Harrison had told her to start looking for alternative work.

110. The Claimant also stated in her email that she had "repeatedly highlighted these concerns to the Trust". Whilst the email is ambiguous as to the concerns she was referring to as having been repeatedly highlighted, we conclude that she was referring to her lack of work (something she had raised in her emails of 21 and 27 September 2017 - pages 461 and 487). However, she certainly had not "repeatedly highlighted" concerns that she had been experiencing intimidation and harassment. On the contrary, we find that this was the first time she alleged that she was being intimidated and harassed. Her expressed concerns were directed at Mr Harrison. The Claimant's email concluded with her request to Mr Harrison to "please send any reply to" her personal email address. At that point in time at least, she was seemingly looking to Mr Harrison to act upon the email.

111. The Claimant's email of 29 September 2017 did not identify any specific protected characteristic of hers or state that the intimidation and harassment about which she was complaining was because of any protected characteristic.

112. Moments later, at 3.40pm, the Claimant emailed Ms Hewins,

"Please find attached the email I have sent to the Trust re: intent to breach the contract I have with BCC and re: ongoing intimidation and harassment. I understand that related concerns have been raised by other female employees and contractors…" (page 495)

113. The Claimant did not name the female employees and contractors in question, but it is reasonable to infer from her email that she was intending to convey that the intimidation and harassment referred to was related to her sex. She attached a limited number of emails relating to her work packages and workplan. However, we consider that until such time as Ms Hewins was able to discuss her concerns and those emails with the Claimant, it would not have been apparent to Ms Hewins on the face of the emails what the Claimant's specific concerns were. Yet the Claimant expected Ms Hewins to distil her concerns from the materials attached to her email. Indeed, the Claimant requested, amongst other things, by midday on 3 October 2017 *"that BCC will take steps to stop the intimidation*

and harassment I am being subjected to". That, of course, assumed that she had been subjected to intimidation and harassment, and that Ms Hewins or someone else at the Council would be able to come to a view on the matter within one and a half working days.

114. Mr Harrison's immediate response to Mr Couldrick, Mr Gibbons and Mr Christie at 4.29pm was,

> *"This is a bolt out of the blue, as I thought when the meeting I had finished with Janette yesterday that we had an amicable way forward for another few weeks." (page 496)*

Given our findings above regarding their meeting, we find that those comments were genuinely expressed.

115. In a short email at 8.29pm Mr Couldrick stated,

> *"This was not expected or anticipated this week"*

Mr Harrison's ongoing management of the Claimant

116. In the immediate aftermath of the Claimant's complaint Mr Harrison at least notionally continued to be the Claimant's work manager, though in reality whilst he continued to work with the Claimant he stepped away from all further management of her, deferring any decisions to others so that he did not prejudice his own or the Respondents' position. He continued to work with the Claimant and, as appropriate, to communicate decisions taken by others. In our experience that is a fairly standard response where a person raises concerns about their immediate manager. Mr Harrison gave extensive, detailed and credible evidence as to the extent to which he withdrew from managing the Claimant and involvement in any decisions which might affect her. We accept his evidence.

The Respondents' handling of the Claimant's 29 September 2017 complaint

117. The Claimant and Mr Harrison were due to meet on Monday 2 October 2017, the subject of their meeting being 'Top Tier Recruitment'. At 9.59am that morning the Claimant emailed him,

> *"Given the ongoing intimidation and harassment experienced, when we meet 1:1, I will not be meeting with you when it is just us two in the room. Given I only have the below meeting and the phone conversation meeting this afternoon, I will be working from home this afternoon, and, as is the practice of other Trust colleagues, I will phone you for our meeting".* (page 498)

118. It is unclear to the Tribunal what "ongoing" intimidation and harassment the Claimant was referring to as nothing had happened since her email at

3.37pm on the Friday. Her email was at most three or four working hours later, with no evidence of any interactions between the Claimant and Mr Harrison in the meantime.

119. The Claimant forwarded her email to Ms Hewins who in turn emailed her a few minutes later in response to her email of the previous Friday afternoon. Ms Hewins wrote,

> *"I can confirm receipt of your email below and associated attachments, and I will look into this matter. I cannot guarantee a response by your specified deadline though, due to current work commitments and urgent business".* (page 500)

120. At Item 16 of her Scott Schedule, the Claimant identifies the following failings by Ms Hewins,

120.1 she did not investigate;
120.2 she refused the Claimant to be appropriately represented; and
120.3 she refused to allow her to escalate her complaints.

The date of the acts complained of is 29 September 2017. In fact, that was the date of the Claimant's email to Ms Hewins. It cannot, even set against the Claimant's expectation of a response by midday on Tuesday 4 October 2017, have been the date of the alleged failures by Ms Hewins to act. Moreover, as at 29 September 2017 and also as at midday on 4 October 2017, there had in fact been no request by the Claimant to be represented and no request by the Claimant to escalate her concerns under ADR (Alternative Dispute Resolution).

121. At 2.49pm on 2 October 2017 the Claimant resumed her previous email exchange with Mr Harrison regarding her attendance or otherwise at the consultation and engagement sessions. She wrote,

> *"Just to confirm 'my position' and the advice referred to below was that this was a BCC led consultation. It was not that I should not be present at this or the Engagement Sessions. Or that I should not speak at any of them."*

122. She forwarded this email to Ms Hewins stating,

> *"Some recent email traffic has led me to confirming the position below".*

123. At 3.59pm on 2 October 2017, the Claimant received the first response on the Trust's part, from Mr Couldrick. He wrote,

> *"I was concerned to read this note and I will discuss the issues you have raised with HR colleagues in BCC. As soon as I have done this I will get back to you in an attempt to agree a process of resolution regarding your concerns".* (page 506)

124. The Claimant takes exception to Mr Couldrick's reference to her complaint as *"this note"*. We attach no significance to this. It was an expression he had used before in a communication with the Claimant (p308). In any event, read objectively and further, having heard Mr Couldrick's evidence, we are satisfied that it was, and was intended as, a polite and appropriate acknowledgement of the complaint. It was inevitably a holding response. Mr Couldrick copied his email to Mr Harrison, Mr Gibbons and Mr Christie as the recipients of the Claimant's original email. Again, the Claimant takes exception to this. We disagree. It is understandable why he would have copied in those to whom the original email had been sent or copied. We do not accept that the Claimant would reasonably have experienced a hostile or intimidating working environment by reason that the other recipients of her email were made aware that Mr Couldrick had, in his capacity as Chief Executive of the Trust, acknowledged the complaint, expressed concern, and resolved to discuss the matter with HR colleagues so that he might get back to the Claimant promptly to agree a process of resolution. We conclude that it was appropriate that he let all concerned know that the matter was in hand. The Claimant's criticisms are misplaced and evidence hypersensitivity on her part, yet generated a detailed email of concern to Ms Hewins at 7.15pm on Wednesday 4 October 2017 (page 508 and 509). The Claimant alleged that Mr Couldrick's email was inappropriate (we disagree), that it alerted Mr Harrison to how the Trust intended to take the complaint forward (he did not in any real sense, it was merely a holding email) and that it demonstrated a lack of care, respect and confidentiality towards her (it did none of those things, on the contrary it was polite and respectful, clearly communicating Mr Couldrick's intention to progress her concerns on a timely basis through an agreed process of resolution). We consider that it was an unreasonable, indeed emotive, response on the Claimant's part. In our judgment there is, and was, no basis for the Claimant to claim, as she does, that the response evidenced Mr Harrison's involvement in the ongoing process or the Respondent's *"ongoing and responding intimidation and harassment of [her]".* The language deployed by the Claimant.

125. demonstrates the increasingly adversarial nature of her responses. Having already made certain requests of Ms Hewins on 29 September 2017, the Claimant made a further request for *"full and comprehensive"* details of

125.1 the process of resolution;
125.2 related time scales;
125.3 who would be involved *"in definition of the implementation of this process"*; and
125.4 how confidentiality would be maintained.

126. Within approximately 20 minutes Mr Couldrick emailed the Claimant again, this time restricting his email to the Claimant, Ms Hewins and Hana Begum. He wrote,

> *"I am writing to invite you to meet with Dawn and myself to discuss the issues with you in order that Dawn and I can agree an appropriate*

course of action in response to the issues you have raised". (page 508)

127. This email was sent to the Claimant's Trust email account rather than, as had been requested by her, to her personal business email account. Ms Hewins seems to have spotted this and forwarded the email some moments later to the Claimant.

128. The Claimant alleges that on 5 October 2017 she was instructed by Harrison to 'just decline' invitation to consultation and engagement events. We cannot find any evidence in the hearing bundle that such an instruction was issued, or certainly not in writing. But if Mr Harrison did ask her to decline any invitations, this was because she had been stood down from attending. We refer to our findings at paragraph 93 above. The complaint is not well founded.

129. The Claimant emailed Ms Hewins at 3.28pm on Friday 6 October 2017 in response to Mr Couldrick's email of 4 October inviting her to meet with himself and Ms Hewins. She said she *"objected"* to two aspects of Mr Couldrick's email. She complained that he had not referred specifically to Birmingham City Council being the entity with whom she was contracted, but instead that he had described her concerns as relating to conduct within Birmingham Children's Trust (albeit in shadow form). It was a pedantic point, not least given she had herself referred to the Trust in her original complaint. Mr Couldrick was not seeking by his email to redefine the contractual relationship or limit the Claimant's contractual rights or redress. He was simply seeking to convey that she had expressed concerns about matters within the Trust, specifically the actions of Mr Harrison. The Claimant further complained that there was no reference by Mr Couldrick to her concerns that her contract had been breached. Again, that entirely misses the point of Mr Couldrick's brief email. It was no more than an invitation to a meeting to discuss the issues and agree an appropriate course of action. Yet the Claimant interpreted it as seeking to limit the scope of any investigation and to close down her concerns. She claimed that there was *"a demonstrated intent by BCC and the Trust to not address these concerns"* (page 516). That plainly was not the case. We find ourselves driven to describe her comment and her perception of Mr Couldrick's email as unfounded and irrational.

130. The Claimant then expressed that she wished to be accompanied at any meeting and said she had been advised *"that it would be reasonable to be accompanied by a friend who is not a solicitor or employee of BCC or the Trust. Please confirm your acceptance of this reasonable request".* (page 516). This was her first request to be accompanied.

131. Given her subsequent complaint that she was denied the opportunity to be legally represented, to which we refer below, it is particularly noteworthy that at the outset the Claimant herself identified and accepted that if she was to be accompanied the person should not in fact be a solicitor.

132. By the end of the day on Tuesday 10 October 2017, the Claimant had not heard back from Ms Hewins following her email of Friday 6 October 2017. Rather than prompt Ms Hewins, she instead sent a lengthier email reiterating her request to be accompanied and why it should be acceded to, repeating the request in her email of 4 October 2017 (notwithstanding Mr Couldrick's subsequent invitation to her to attend a meeting to discuss the issues and agree an appropriate course of action) and rehearsing the objections in relation to Mr Couldrick's email of 4 October 2017 (which were, as we find, irrational). Her email concluded,

> "*In my email to you of 29 September 2017, I highlighted that I understand that related concerns had been raised by other female employees and contractors. Could you please confirm, before the 18 October 2017 meeting, what investigation you have taken in relation to these other female employees and contractors*" (page 534A).

133. In making that request the Claimant was, of course, aware that Mr Couldrick had invited her to a meeting to discuss her concerns. In our judgment it would have been entirely premature for Ms Hewins to have embarked upon further enquiries pending that meeting. In any event, the Claimant had not identified the female employees and contractors to whom she was referring or the "related concerns" (this information seems to have been disclosed for the first time in the Claimant's witness statement in these proceedings). As we have noted already, Ms Hewins could not have been expected to understand the Claimant's specific concerns on the strength of the materials provided to her, let alone any "related concerns". We find that the Claimant was seeking to dictate the process when she knew that a meeting with Ms Hewins and Mr Couldrick was scheduled for 18 October 2017. She was being unreasonable.

134. Nevertheless, and subject to our further observations below regarding the Claimant's request to be accompanied, Ms Hewins sent what we consider was, in the circumstances, an entirely appropriate response at 22:04 on 10 October 2017, including that she was not prepared to answer any questions by email prior to the meeting with the Claimant. We find that was a reasonable position for her to take in the circumstances.

135. The Claimant was not satisfied with Ms Hewins' response and embarked upon a lengthy and tendentious response. Her email sent at 11.03am on Saturday 14 October 2017, runs to two and a half pages. It continues to complain about the lack of investigation, a complaint that is misconceived for the reasons above. Ms Hewins had said in her email of 10 October 2017 that *"the purpose of the meeting is confidential and informal".* The words *"the purpose of"* were otiose and that would (or should) have been understood. Ms Hewins was evidently responding to the Claimant's earlier specific request on 4 October 2017 (repeated by her on 12 October 2017) that confidentiality should be maintained, by providing a specific assurance in that regard. The Claimant re-framed Ms Hewins' comments as follows,

> *"Your keeping the purpose of the 18 October 2017 meeting 'confidential', prevents me from preparing for this meeting. I consider that this is victimisation for the complaint I have made as is your refusal of a reasonable request to be accompanied to this meeting."*

136. In our judgment the Claimant had lost her perspective and objectivity, and was misrepresenting what Ms Hewins had said. Ms Hewins' assurance in relation to confidentiality was plainly a response to two requests from the Claimant for such an assurance, rather than as the Claimant was now suggesting in response to her complaint and request to be accompanied. The Claimant's comments are illustrative of what we observe is her tendency to re-frame comments by others.

137. The Claimant suggested in her email of 14 October 2017 that Ms Hewins speak to Ms Ellis and Ms Sinclair. She wrote,

> *"Rebecca Ellis (RE), who is your report, in relation to distress I understand has been caused by John Harrison and complains that she is aware of. Also, re: information I understand that RE provided to Sarah Sinclair (SS).*
>
> *SS in regard to the information that I understand she subsequently provided to Andy Couldrick and his response"* (page 544)

Whilst we understand the Claimant to have been saying that Ms Ellis had been harassed by Mr Harrison and that Ms Sinclair may have some awareness of harassment issues involving Mr Harrison, equally we fully understand why Ms Hewins thought that the Claimant was saying that both Ms Ellis and Ms Sinclair had been harassed by Mr Harrison. If there was any confusion we consider that the Claimant was responsible for this given how she worded her email and the very limited information she had provided. As noted above, we think the information was only finally provided in the Claimant's witness statement in these proceedings.

138. The Claimant went on to assert that Ms Hewins' statement that she was not covered by the Council's internal policies was an act of victimisation. She then requested that Ms Hewins provide the Council's internal policies that applied to her and to confirm those policies that were said not to apply. She requested a response by the end of Wednesday 18 October 2017. She then wrote,

> *"I am not required to meet with you in relation to my complaints. You were provided with evidence to support you to 'look into this matter' two weeks ago, on 29 September 2017. Given your intention to keep the purpose of the meeting confidential, that you have not complied with my reasonable requests and that I have, therefore, been unable to prepare, I will not be joining you and Andy on 18 October 2017. I do, however, recognise that this is an opportunity for Andy and yourself to consider the evidence I have provided to both of you, including in relation to the above, and any additional information from*

> *investigations that you have undertaken. I look forward to receiving the outcomes of this consideration by Tuesday 24 October 2017."* (page 545)

139. We consider that this was an entirely unreasonable position for the Claimant to take. She could and should have met with Ms Hewins and Mr Couldrick. As we have already made clear the limited emails that had been provided by the Claimant to Ms Hewins on 29 September 2017 did not enable Ms Hewins (or Mr Couldrick) to look into the matter in an informed and meaningful way. It will also be apparent from our findings above that we do not agree that, as she claimed, the Claimant had made "reasonable requests" of Ms Hewins.

140. The Claimant went on to set out the circumstance in which and conditions under which she would agree to meet with Ms Hewins and Mr Couldrick. Given her refusal in the preceding paragraph to agree to meet with Ms Hewins and Mr Couldrick and her stated expectation that they investigate her concerns and provide the outcome from their considerations, it is difficult to understand what she was agreeing to and the purpose of any meeting. Her position was, at best, contrary. If there was to be a meeting, she said she reserved the right to be represented and/or accompanied by a member of the legal profession. That is the first such reference to legal representation we find in the bundle. As noted already, the Claimant had herself volunteered on 6 October 2017 that any companion should not be a member of the legal profession. We are unclear why her position had changed.

141. The same day, 14 October 2017, the Claimant made a written submission to the City Solicitor using the Council's Whistleblowing Procedure. We return to this below.

142. At 19:23 on 14 October 2017, the Claimant emailed Ms Husler asking how she would begin ADR in accordance with paragraph 19.3 of the Consultancy Agreement. The request was premature and misconceived. It evidences that the Claimant had resolved to further escalate the dispute without waiting to hear what Ms Hewins had to say in response to her email earlier in the day. Putting aside for a moment that we are critical of the position taken by the Claimant in her email to Ms Hewins, she had given Ms Hewins and Mr Couldrick until 24 October 2017 to provide her with the outcome of their consideration of the evidence she had provided to them. Yet within a few hours of that email she was seeking to invoke ADR.

143. Ms Husler escalated the matter to Mr Gibbons and Mr Couldrick. The latter replied directly to the Claimant at 08.51 on Monday 16 October 2017. He was evidently unaware of her two-page email to Ms Hewins over the weekend as he referred to their scheduled meeting that Wednesday. He asked,

> *"Would it make sense to discuss the issues you have raised in advance of planning the next steps?"* (page 565)

The Claimant's alleged exclusion from emails

144. Later that day the Claimant asked Ms Ellis by email why she had *"excluded"* her from emails regarding her work packages. This followed an email some minutes earlier when the Claimant had asked Ms Ellis to ensure she was included "in emails relating to my BCC contracted work packages". Ms Ellis responded just over an hour later to both emails. As regards the first email, she wrote,

> *"Yes, no problem. I had John in my mind for this as it was him who asked for emails as part of his audit trail."* (page 571)

In response to the second email she wrote:

> *"Apologies. The original email was to Glen (I hadn't been included myself) so he has helpfully drafted me a response and who to send it to, so that is what I did.*
>
> *Thanks for raising it though – hopefully you realise there was no reason for not including you."* (page 569)

145. The explanation in each case was straightforward and credible, and we accept, genuine. The Claimant did not challenge either explanation at the time. We do not consider that Ms Ellis was motivated by ill-will, let alone that the Claimant's sex, age or disability were in any way a factor in her actions. The complaint is not well founded.

The Claimant's ongoing correspondence with Ms Hewins

146. Rather than await Ms Ellis' response (which was forthcoming within an hour or so), the Claimant instead escalated the matter to Ms Hewins in an email sent at 16:03. Having done so, there is no evidence that the Claimant subsequently provided a copy of Ms Ellis' explanations or apology to Ms Hewins. It strongly suggests that the Claimant was not in fact interested in whatever explanation might be put forward; instead she was more interested to promote her narrative of events and escalate the dispute, and perhaps above all use this as a further opportunity to criticise Ms Ellis. In her email to Ms Hewins, the Claimant identified Ms Ellis' actions as victimisation though did not at the time, or in the course of the Tribunal hearing, suggest to Ms Ellis or other witnesses that Ms Ellis was in fact aware of her complaint of 29 September 2017 or that she had expressed to Ms Hewins on 13 September that the Trust operated as a 'Boy's Club'. Given that the Claimant has not asserted that Ms Ellis was aware of any protected act by her, we are unclear why she was saying that Ms Ellis had victimised her. The allegation seems to have been made without any or much thought being given by the Claimant to whether it was justified. However, as we set out at paragraph 36 above, early in their working relationship the Claimant had been prepared to level an unsubstantiated accusation against Ms Ellis and

to escalate the matter to Ms Hewins without waiting to hear what Ms Ellis had to say on the matter.

147. Referring to earlier emails with Ms Hewins and Ms Ellis on 18 August 2017 about clarifying their respective roles, the Claimant expressed her disappointment to Ms Hewins that,

> *"…this has not been addressed with Rebecca, [by] either Andy, John or yourself".* (page 566)

However, in her email of 22 August 2017 to Ms Hewins (page 395) the Claimant had expressed the view that she and Ms Ellis were clear on their respective roles. In which case Ms Hewins may well have wondered what it was that the Claimant was therefore complaining of in her email of 18 October 2017, or indeed why it was said by the Claimant to be *"an ongoing act of victimisation".* If there was no protected act until 13 September 2017 it is unclear to the Tribunal how Ms Hewins' alleged failure to act on the 22 August 2018 email was *"ongoing"* victimisation.

148. It seems to us that the Claimant made a number of assertions at this time that she was being victimised without any obvious reflection on her part as to whether the allegation was warranted in the particular circumstances.

149. In the penultimate paragraph of her email to Ms Hewins of 16 October 2017 the Claimant wrote,

> *"The ongoing stress being caused to me by this, and the wider situation complained of, is making me unwell. This includes the aggravation of a muscular linked knee problem that has led to my having to revert to the use of a walking stick over the past few weeks."* (page 566)

Those comments are consistent with the Claimant's GP records that she was mobilising with a walking stick from around mid-September 2017.

150. This is the first documented reference we find to the Claimant's disability in an email with any of the alleged perpetrators of discrimination, albeit the Claimant does not refer to the condition as being long term or a disability, nor does she refer to the condition as being a factor in or connected to her alleged treatment. We find that particularly surprising given the claims that are now brought and her allegation either that she was discriminated against on the grounds of her disability from the outset of her employment, or at the latest from 18 August 2017. Ms Hewins was not questioned by the Claimant about this email at Tribunal. On the face of the email no one else was copied in on it.

151. The Claimant's handwritten notes of a subsequent conversation with Ms Hewins on 19 October 2017 document that she told Ms Hewins,

> *"I do have some medical conditions but so would you if you were under the pressure I have been"* (page 612)

152. The Claimant referred again to the impact upon her health in a subsequent letter to Ms Hewins dated 30 October 2017, (pages 674 – 680) in which she wrote,

> *"I have explained that the knee disability I suffer from has been further aggravated by the stress caused by the treatment that I have been subjected to. Given the problems I have accessing meetings at the Council House, to attend Trust and BCC meetings, and my use of a walking stick, those subjecting me to discriminatory and detrimental treatment are, as with my gender and age, aware of my disability."* (page 676)

153. This was the first time she referred to the medical condition as a disability. The Claimant did not state in terms that she was being discriminated against on grounds of her disability. There is no evidence that Mr Hewins shared this information with others; the Claimant certainly did not ask her at Tribunal whether she had done so. We consider there is no basis upon which we might infer that she shared this information more widely outside of the subsequent investigation later in the year and into 2018.

154. Given that the Claimant's original complaint on 29 September 2017 was, and was understood to be, that she was being discriminated against as a woman and victimised for raising her concerns, her letter of 30 October 2017 does not identify when, how or why she came to the view that her age and, if it was the case, her disability might also be factors in her colleagues' decisions, actions and treatment of her. Her witness statement does not address this. It is not the case, as she wrote on 30 October 2017, that she had specifically complained about other male, younger and non-disabled people doing contracted work, or at least she had not done so with reference to their characteristics.

<u>The request to commence ADR</u>

155. On 17 October 2017, the Claimant exchanged emails with Ms Husler following her request of Ms Husler the previous day to commence ADR. The Claimant pushed back when Ms Husler initially said she had passed the matter on to Mr Couldrick. Ms Husler explained,

> *"In line with the contract if you have a dispute of any kind these should, in the first instance, be discussed with your reporting manager. If issues are not resolved then it is escalated to the next level of Senior Management.*

> *I believe that a meeting was arranged with Andy Couldrick and Dawn Hewins to discuss the issues that you have raised but unfortunately you cancelled the meeting. This would have been the opportunity to discuss your issues.*
>
> *I suggest that we reschedule this meeting as possible. Please advise me if this is acceptable."* (page 576A)

156. Ms Husler reiterated this when the Claimant continued to press the issue.

157. The Claimant categorises the email of 17 October as Ms Husler refusing to escalate the complaint. Firstly, Ms Husler's statement was entirely consistent with clause 19.2 of the contract (page 281), namely,

> *"The parties shall attempt to resolve any dispute relating to this agreement through negotiations between Senior Executives of the parties who have the authority to settle the dispute."*

We pause to observe that as the Senior Executive of Janette Parsons Ltd with authority to settle any dispute, the Claimant had, in refusing to meet with Mr Couldrick and Ms Hewins, failed to attempt to resolve the dispute through negotiation. Her emails to Ms Husler evidence that she was seeking to dictate rather than negotiate the outcome. It seems to us that it is the Claimant who could be said to be failing to comply with the Consultancy Agreement.

Secondly, as a matter of obvious common sense and regardless of the contractual position, Ms Husler was acknowledging that a potential route to resolution was for the Claimant to meet with the Trust's Chief Executive and the Council's Head of HR.

Thirdly, and notwithstanding she might have insisted on clause 19.2 being observed, Ms Husler instead asked,

> *"Please advise me if this is acceptable".*

158. On any sensible view, Ms Husler was not, *"refusing"* to escalate the matter. The Claimant led no evidence at Tribunal that Ms Husler was then aware that the Claimant had done a protected act under the Equality Act 2010. Her emails to Ms Husler would obviously have indicated the existence of a potential legal dispute but there was nothing in her emails to indicate the nature of that dispute or that she had asserted discrimination. Yet at 10.48am on 17 October 2017 the Claimant stated to Ms Husler that,

> *"I… view this continuing obstruction, of my asserting my contractual rights, as victimisation for the complaints I have made."* (page 576B)

159. As with her email to Ms Ellis of 16 October 2017, this evidences the Claimant's continued imprecise use of terminology such as "victimisation". The Claimant also asserts that Ms Husler's actions were harassment and /

or direct discrimination on the grounds of her age, disability and sex. She has not put forward evidence or offered any explanation as to why she believes Ms Husler was consciously, or subconsciously, influenced by her age, disability or sex. She has simply asserted them as factors in her treatment without more.

160. The Claimant conceded at Tribunal, as we believe she was bound to do, that she had not made out a case against Ms Husler (and accordingly that the complaints at paragraph A.1(bb) of the List of Issues cannot succeed). Nevertheless, her emails are a clear example of the Claimant attributing discriminatory motives without reflection or seemingly any much thought being given by her as to why the person was acting as they were. They evidence her tendency at this time to regard innocuous correspondence as detrimental treatment and victimisation.

Events during the second half of October 2017

161. The measures letter issue re-surfaced again on 18 October 2017 when Mr Harrison requested details for a Leadership Team meeting the following day. He also asked if Burges Salmon could be available. The Claimant was to attend the meeting. By an email dated 18 October 2018, she briefed Mr Couldrick, Mr Gibbons, Mr Gaynor, Mr Valvona and Ms Wilson on the issues, copying in Mr Harrison and a Mr Martin. They were to discuss a second draft measures letter at the Leadership Team meeting. As to the status of any existing collective bargaining arrangements at the Council, we note the Claimant recorded that the Trust Leadership had identified the following for inclusion in the second measures letter,

> *"(e) there will be no BCC collective bargaining lock in for the Trust;*
> *(f) we will consult BCC on any staffing matters that may have equal pay implications"*

The Claimant also confirmed that Adrian Martin, a partner at Burges Salmon would be phoning in to the meeting.

162. The proposed meeting between the Claimant, Mr Couldrick and Ms Hewins did not go ahead on 18 October 2017. The following day Ms Hewins emailed the Claimant to say that she was sorry she was unwell. She said that she and Mr Couldrick would still like to meet with the Claimant. Later that day there was a SDC HR meeting. We find that the Claimant had her walking stick with her at this meeting. Mr Featherstone and Ms Hewins recall seeing the Claimant with a walking stick at the meeting, though Ms Ellis does not. We return to this.

163. The Claimant and Ms Hewins spoke briefly following the meeting on 19 October 2017. This was at Ms Hewins' instigation. The Claimant's notes of that meeting at page 612 of the hearing bundle document that Ms Hewins said she wanted to check how the Claimant was. This was when the Claimant referred to having "some medical conditions".

164. Around this time the Claimant and Mr Harrison also exchanged quite a number of emails regarding time off for trade union duties (pages 602 – 606).

165. On Monday 23 October 2017, the Claimant emailed Mr Harrison (copying in Ms Hewins, Mr Couldrick, Mr Gibbons and Ms Husler) informing him that she had no work requirements relating to her contracted work packages. She stated that she expected the Council to honour the Consultancy Agreement. She also reiterated her 21 September request for SMART objectives. Her email concluded,

> *"Please also confirm to [private email address], by noon tomorrow given the meetings this Wednesday and Thursday, if you wish me to continue to attend Trust related meetings. Also, for each meeting, the reasons for this and how this relates to my contracted work."* (page 616)

166. Mr Harrison did what we consider was the only thing he could reasonably do in the circumstances, namely he emailed Ms Hewins, Mr Couldrick and Mr Gibbons to say,

> *"I do not intend to reply until advised of an appropriate response".* (page 615)

167. Otherwise he continued to interact with the Claimant appropriately on work related matters, for example exchanging emails with her regarding the job evaluation of the planned Director of Commissioning role and on the subject of facilities and time off for trade union duties.

168. On 23 October the Claimant sent Mr Gaynor a first draft job description and person specification for the proposed Head of Communications role. She was asked by Mr Gaynor to put the work on hold as the previous week's Executive Team meeting had resolved to explore other potential options.

<u>The Claimant's continued attendance at Trust related meetings</u>

169. Mr Couldrick, Mr Harrison, Ms Hewins and Mr Gibbons were evidently grappling with how best to manage what was a challenging situation. There was an exchange of emails between them on 23 and 24 October 2017 following the Claimant's email of 23 October referred to above. Having offered what we think was entirely constructive input in response to Mr Couldrick's efforts to identify a potential way forward, including a number of potential work packages, Mr Harrison made clear that any decision on whether or not the Claimant would continue to attend Trust related meetings should be a matter for Mr Couldrick. He said, "*I suspect that she is happy not to do them as she is not stopping over at night …*" Mr Couldrick's view was that her attendance at such meetings was non-essential. He wrote,

> *"As an alleged victim of bullying, there would seem to be some merit in allowing / inviting her to stay away and work remotely on some set piece tasks in support of the Trust and its operational readiness around HR systems and processes. I am mindful, however, that this might be perceived as further harassment of some sort, so I await Dawn's advice."*

170. It was a perfectly reasonable assessment of the dilemma facing the Respondents given the Claimant's escalating complaints. It is relevant to note that their discussion and Mr Couldrick's decision as to whether the Claimant should attend Trust related meetings was directly in response to the Claimant asking whether she should continue to attend such meetings (see page 627). We do not understand on what basis the Claimant can reasonably seek to criticise the Respondents for responding to her specific request regarding her future attendance at meetings. For the same reason, the Claimant's complaint that she was not invited to attend a Leadership/Executive Team meeting on 25 October 2017 is misconceived.

171. Ms Hewins told Mr Harrison, Mr Couldrick and Mr Gibbons that she would draft a response on all their behalf (page 625).

172. Mr Couldrick flagged to Ms Hewins in their email exchange that given the criticisms that had been directed by the Claimant at him, he was now unsure whether he should in fact meet with the Claimant and Ms Hewins as had been proposed. He sought Ms Hewins' view.

173. There is no evidence in the hearing bundle that Ms Hewins did craft a response to the Claimant as she said she would. On the limited evidence available to us on this issue, we find that she overlooked the matter. She was dealing with a significant volume of communications from the Claimant at this time and was, of course, the HR Director of a large Local Authority, with all the challenges and demands on her time that brings. In any event, the Claimant's complaint is that Mr Couldrick and Mr Harrison failed to give her work on potential work packages, whereas the matter sat with Ms Hewins. As he had endeavoured to do over the preceding weeks, Mr Harrison had sought to identify meaningful work that the Claimant could do within the ambit of the work packages. Page 625 of the hearing bundle evidences that Mr Harrison suggested that the Claimant should do precisely the work that she complains he failed to give her. In so far as the Claimant identifies Mr Harrison and Mr Couldrick as perpetrators of the acts of discrimination referred to at paragraphs A.1(gg) and (hh), her claims cannot succeed. In so far as Ms Hewins failed to progress the matter, we find that was an oversight on her part. We return to the matter of Ms Hewins thinking and motivations in our Conclusions below.

174. The Claimant additionally complains (at paragraph A.1(ii) of her List of Issues) that Mr Harrison misrepresented her that she was 'not happy to do (the normal meetings she attended)'. It is a further example of the Claimant re-framing what was said. His comment, set out above, was that he suspected the claimant would be happy not to attend Trust meetings. That

is different from saying that she was not happy to attend them. Her complaint is not well founded. In any event, it was an innocuous observation on Mr Harrison's part.

175. On 25 October 2017, Mr Harrison sought the Claimant's confirmation whether she would be available to mark the written exercises for five individuals being interviewed for the role of Head of HR.

The Claimant's ongoing correspondence with Ms Hewins

176. On 26 October 2017, Ms Hewins wrote to the Claimant formally in light of her various emails. In our judgment she correctly stated that as the relationship was outside the ambit of IR35,

> *"…any complaints arising from that contract are not subject to the Council's Employment Policies or Procedures"* (page 69).

177. Nevertheless, (and in answer to the Claimant's various requests) Ms Hewins committed on the Council's behalf to ensure the Claimant was treated fairly, not discriminated against, able to work in a safe environment and able to raise public interest or other concerns. Ms Hewins reiterated the invitation to meet with the Claimant,

> *"to discuss the complaints in detail, clarify how you would like the complaints resolved and explore the options for doing so".*

178. Ms Hewins expressed the view that this would accord with the Council's internal policies and also paragraph 19.2 of the Consultancy Agreement. She went on to say that until they had met to discuss the complaints, she did not consider that it would be appropriate to escalate the matter to external ADR pursuant to clause 19.3 of the Consultancy Agreement. Although there was in our judgment no need for her to do so, she then apologised to the Claimant that Mr Couldrick's email of 2 October 2017 had been copied to Mr Harrison. Addressing the Claimant's request to be accompanied to any meeting by a legal representative, Ms Hewins wrote,

> *"There is no contractual right for either party to do so and further the statutory right to a companion does not apply to you in your capacity as Contract Worker."*

179. Ms Hewins' statement in that regard was both factually and legally correct. However, she went on to say that in the circumstances the Council would allow the Claimant to bring a work colleague, trade union representative or family member to the meeting. Ms Hewins went on to address the Claimant's working arrangements given that she had been diagnosed with a stress related condition and also given the nature of the complaints she had raised. She made certain constructive proposals and equally made clear that she was receptive to any suggestions the Claimant wished to put forward. She specifically asked the Claimant if she would find it helpful to

have a temporary change to her reporting line. Her letter concluded with an invitation to the Claimant to a meeting on 3 November 2017 at a venue of her choice, alternatively that they could have a conference call. She also invited the Claimant to contact her if she wished to discuss any points in her letter. It was a professional and entirely appropriate letter for her to write in the circumstances, and it demonstrates a sensitivity to any health issues.

180. The Claimant responded to Ms Hewins letter of 26 October 2017 on 30 October 2017 (pages 674 to 680). The letter runs to some seven pages. We consider it to have been an intemperate, unhelpful and ill-advised response. The Claimant essentially took issue with the whole of Ms Hewins' letter of 26 October 2017. We do not attempt to précis her seven-page letter in this Judgment. However, by way of illustration of her attitude and approach, the Claimant accused Ms Hewins of *"continuing to misrepresent my contractual position"* and suggested, quite wrongly, that she intended "*to hide who will be joining you at the meeting and their expertise*." She asserted that there was no contractual requirement for herself or her company to meet with the Council to raise complaints or concerns, or as a pre-condition of an investigation. She wrote,

> *"As a business I can 'bring' whoever I and my business think is appropriate to any of my / Janette Parsons Ltd. business meetings and intend to do so".*

She continued,

> *"Can you please confirm, by end of Thursday, 2 November 2017, businesses that BCC / The Trust have permitted to have their legal advisers at meetings with them. I note that both BCC (Bevan Brittan) and Trust (Burgess Salmon) are legal representatives at BCC and Trust SDC business meetings. I am aware of the protected characteristics, presented at SDC meetings, in relation to these organisations (younger than me and male with no visible disability). Please also confirm the protected characteristics of other businesses that BCC / Trust have permitted to have their legal advisers at meetings with them."*

181. The Claimant's letter concluded with a request for,

> *"…all outstanding and requested information by the end of Thursday, 2 November 2017 including your proposed resolution to the complaints made and concerns raised by Janette Parson Limited / myself. If you do not do so I will presume this to be harassment, intimidation and victimisation together with the complaints that I have made and the concerns that I have raised".*

The Claimant wanted to dictate the next steps and timescale and, having sought to impose her requirements, "presumed" harassment, intimidation and victimisation in the event the Respondents failed to comply with them.

182. Having regard to our detailed findings above regarding Ms Hewins' interactions with the Claimant, the complaints at paragraphs A.1(u), (v), (w), (aa), (nn) and (pp) of the List of Issues are plainly not well founded.

HR Policy and Procedure work

183. The Claimant's complaint at Item 29 of her Scott Schedule is somewhat imprecise, though her allegations are more clearly set out at paragraphs 95 to 99 of her witness statement. We deal with the matter relatively briefly. The Claimant is mistaken in her analysis and her complaints at paragraphs A.1(ff), (mm) and (qq) of her List of Issues are not well founded. She interprets Mr Featherstone's comment in a meeting invitation that "We need to review the various policies and procedures that will relate to the Trust" as Mr Featherstone stating that he would be undertaking that review. That is not what he was saying, though we think the fact the Claimant believed he was seeking to deny her work that she was contracted to do informed her view of both that meeting and his subsequent actions. Mr Featherstone was unaware of the Consultancy Agreement or her contracted work packages. Consistent with his role as Programme Manager, he was simply identifying a task that would need to be undertaken, namely a review of Council policies to determine if they should be adopted. He was aware that the senior management team had agreed that the revision of HR policies and procedures would be limited to the minimum necessary to support 'go-live' (work which was, in the event, undertaken in the first two months of 2018 after the Claimant had left the Trust). The first step in that process was to locate the relevant policies and collate them. Understandably, Mr Featherstone believed that this was an administrative task rather than technical HR work. It would involve a trawl of the Council's systems and files. It was part of a larger exercise to identify and collate policies. He arranged a meeting for 1 November but did not involve the Claimant (or Mr Harrison or Mr Gibbons) for that reason. When the planned attendee, Ms Williams could not attend, the Claimant was brought into copy. She informed Mr Featherstone that she had a personal health related appointment and would be working from home, though offered to dial in. He didn't presume to ask her about the appointment. As there were other immediate pressing concerns he said it could wait until a later date. That is precisely what happened. He arranged to meet with Ms Williams some weeks later on 22 November 2017. The Claimant deploys conflictual and emotive language in relation to a straightforward matter; she claims she was denied work, that Mr Featherstone failed to invite her to the meeting (and to the rescheduled meeting on 22 November 2017) and that he removed work from her and allocated it to others. We attach no significance to the fact Mr Featherstone did not initially include her (or others at her level) in the 1 November, 22 November or any subsequent meetings. He had identified a need for low-grade work well beneath her skills and experience and level of remuneration. As he said, and we accept, "*It really genuinely didn't need you there.*" The Claimant has not offered any explanation as to why she should have been at the planned meetings rather than Ms Williams (and there was no suggestion by her on 31 October 2017 that Mr Featherstone

had been wrong to invite Ms Williams rather than herself to that meeting). Nor does she explain why she believes Mr Featherstone was consciously, or subconsciously, influenced by her age, disability or sex in how he handled the matter. Mr Featherstone is a year or so younger than the Claimant. She did not question him at Tribunal as to his thinking and she did not challenge him when he stated that they had a "*great working relationship*".

November 2017

184. On 4 November 2017 Ms Ellis cancelled a scheduled lunch with the Claimant on 9 November 2017 stating,

> *"I am afraid I will be at HRIT at this time"*

This then led to a somewhat unfriendly response from the Claimant on 7 November 2017,

> *"Hello Rebecca*
>
> *It is down to you to share the information with me. I will leave it to you to do this.*
>
> *Kind Regards"*

185. On 7 November 2017, the Claimant emailed Ms Hewins complaining of the lack of response to her lengthy letter of 30 October 2017. The same day she also asked Ms Hewins to arrange for her time sheet to be approved and *"passed to Marion".* Ms Hewins immediately forwarded her email to Marian Tinley, a Professional Support Officer requesting that she arrange for it to be signed off by *"the appropriate person".* By turns the email found its way to Mr Harrison who immediately approved it. The Claimant complains that Ms Hewins sent the invoice to Mr Harrison. In fact she did not, she sent it to Marian Tinley as requested. Ms Hewins is not responsible for the fact it found its way to Mr Harrison, who in any event approved it immediately. Given that Ms Hewins did as the Claimant had requested of her, the complaint at paragraph A.1(oo) of the List of Issues is not well founded and cannot succeed.

186. There was a scheduled HR Support service specification meeting on 9 November 2017. Mr Featherstone issued a calendar invitation to the meeting to the Claimant on 2 November 2017. The fact he did so somewhat undermines the Claimant's complaint that Mr Featherstone, amongst others, excluded her from the meeting. Be that as it may, once again the Claimant asked whether she should attend the meeting, though questioned what she might contribute. For the reasons we have already set out we have difficulty in understanding the Claimant's complaint at paragraph A.1(rr) and (tt) of her List of Issues that she was prevented from attending and excluded from the meeting. The emails at pages 716 and 717 evidence that the decision that she should not attend was Mr Couldrick's and that Mr

Harrison, Mr Featherstone and Ms Ellis were not involved in that decision. In our judgment Mr Couldrick cannot be criticised for his decision that there was no need for her to attend a meeting which she herself had indicated she might be unable to contribute to. He was not seeking to prevent her attendance at a meeting that she wished to attend or to which she could contribute. The Claimant deferred any decision to the Trust and in our judgment cannot now complain that Mr Couldrick took a decision. Ms Hewins asked whether the Trust might obtain value from her attendance and Mr Couldrick evidently concluded that it would not. That was consistent with the Claimant's own questioning of what value she might bring.

187. On 10 November 2017, Ms Hewins emailed the Claimant in response to her chasing email of 7 November 2017 to advise her that she was sourcing an independent person to take the Claimant's concerns forward and that she would come back to her in this regard as soon as she could. That independent person was Colin Diamond CBE, Corporate Director Children and Young People at the Council.

188. Ms Hewins' email also evidences that she was then aware that the Claimant had purported to blow the whistle. The Claimant did not ask Ms Hewins at Tribunal what she knew. We accept Ms Hewins' evidence that she did not disclose to anyone else that she was aware the Claimant had made a disclosure.

189. On 14 November 2017 Ms Hewins agreed with Mr Diamond that Mr Gibbons would assume the role of the Claimant's role manager (for the purposes of authorising invoices and day to day contact etc), but that Mr Gibbons could not act as the commissioning officer of the investigation into the Claimant's concerns, as he had been copied into various emails.

190. The Claimant complains that on 7 and 15 November 2017 Mr Harrison failed to invite the Claimant respectively to a 'Measures' and 'Task & Finish Group TU Engagement' meeting (paragraphs A.1(ss) and (uu) of her List of Issues). These were not in fact new alleged acts of discrimination, they reflected the earlier decision by Mr Couldrick on 24 October 2017, in response to the Claimant's specific request, that there was no need for her to attend Trust related meetings. In any event, we accept Mr Harrison's evidence at paragraph 40 of his witness statement that Mr Harrison did not run the 'Task & Finish Group TU Engagement' meeting so did not send the invite. Accordingly, the specific complaint that Mr Harrison excluded the Claimant from meetings is not well founded.

191. On 17 November 2017, Ms Ellis emailed Mr Harrison and Jo Kenning on the subject of fortnightly trade union meetings, copying in the Claimant, Mr Couldrick and Ms Sinclair. She confirmed that the Trust's intended measures would be discussed by the Council with the trade unions. She also acknowledged that the fortnightly meetings between the Trust and the trade unions would continue, albeit with the Council in attendance and acting as a gatekeeper; the meetings required the Council's agreement as the Trust was not then a separate legal entity and the relevant employees

and trade union representatives were still Council employees. Ms Ellis's email was in our judgment entirely uncontroversial. However, the claimant replied on 20 November 2017, copying in the other recipients. She wrote,

> *"As I have highlighted previously and BS have confirmed in recent emails, it is important that the Trust doesn't continue to request (see below), or act on, BCC (a separate legal entity), advice on such legal matters. Such advice is also my / Janette Parsons Limited, working with BS, contracted work responsibility. I have previously objected and continue to object, to the denial and removal of responsibilities from Janette Parsons / Janette Parsons Limited including in relation to my / Janette Parsons Limited protected characteristics under the Equality Act 2010. This ongoing action against me / Janette Parsons Limited, and by BCC and the Trust, is causing severe reputational damage. In addition, there has been significant misunderstanding and fundamental legal issues previously by BCC in concerns that have related expertise as highlighted by email from Rebecca."*

As with Ms Ellis' email of 30 August 2017, her email of 17 November did not evidence that the Trust was seeking advice from her. It was an entirely appropriate communication between the Council and the Trust on a practical matter.

192. Ms Ellis, Ms Sinclair, and Ms Kenning were thereby made aware for the first time that the Claimant was potentially asserting that her rights under the Equality Act 2010 had been infringed, albeit no specific details were included. They would also have understood that the Claimant was questioning Ms Ellis' expertise in the context of what she claimed had been a "*significant misunderstanding of fundamental legal issues*".

193. Ms Sinclair was evidently confused as to what had prompted the Claimant's email, asking Ms Ellis, Ms Kenning and Ms Hewins,

> *"Does anyone know what Janette's email below is about?"* (page 740A)

<u>Mr Diamond</u>

194. On 20 November 2017, Mr Diamond wrote to the Claimant and introduced himself as dealing with the Claimant's letter of 30 October 2017 to Dawn Hewins. It was a sensible and sensitively worded letter (pages 743 and 744). It correctly identified that the Claimant's original complaints were against Mr Harrison and Ms Ellis and also identified that she had additionally raised complaints against Mr Harrison and Mr Couldrick. Mr Diamond noted that her complaints were in her personal capacity and on behalf of her company, and he identified clauses 19.2 and 19.3 of the Consultancy Agreement as relevant to any dispute in relation to the Agreement. He went on to identify how the Council proposed to deal with the concerns she had raised in her personal capacity which were not strictly within either the ambit of the Consultancy Agreement or the Council's usual Dignity at Work and

Grievance procedures. Nevertheless, he identified that there would be an investigation including meetings with the individuals named in the complaint followed by a meeting between the Council and Janette Parsons Limited to consider her concerns as an individual and by the company, and that should this fail to achieve an agreed resolution to then progress to ADR in accordance with Clause 19.3 of the Consultancy Agreement. He confirmed his understanding that the Claimant did not wish to attend an investigation meeting. We understand why he believed that to be the case, particularly given the confusing terms in which she had expressed her position in her email of 16 October 2017 to Ms Hewins. Mr Diamond set our four questions for the Claimant to address. He went on to commit the Council to consider reasonable adjustments for the sake of the Claimant's health conditions and also confirmed that the Claimant would report to Mr Gibbons in respect of any reporting line commitments. His letter concluded,

> *"For the avoidance of doubt, the Council remains committed to fully investigating all complaints raised by you in your personal capacity and by Janette Parsons Limited."*

195. Mr Diamond's letter certainly did not warrant the response which the Claimant sent him on 27 November 2017. Her letter was in the same vein as her correspondence with Ms Hewins. She complained for example that Mr Diamond had failed to reference her complaints in relation to Ms Husler. Those complaints would not necessarily have been immediately evident from her emails with Ms Hewins, but in any event, we find that Mr Diamond's letter of 20 November 2017 reflected Mr Diamond's initial attempt, acting entirely in good faith, to identify and summarise the focus of her complaints. It would have been a simple matter for the Claimant to point out that her concerns extended to Ms Husler and direct Mr Diamond to the relevant paragraph at the top of the sixth page of her seven-page letter of 30 October 2017. Instead, she accused Mr Diamond of misrepresenting her position when there was no justification for this. She made various requests of Mr Diamond, including:

> *"That the formal investigatory interviews you carry out in your meeting ask all those met with what instructions they have given and received, and by / from whom in relation to:*
>
> - *Janette Parsons Limited;*
> - *BCC contract and contracted work packages.*
>
> *including what those instructions were, who gave those instructions, when those instructions were received, what action was then taken, when and by whom..."* (page 750)

196. Over two pages, she set out at some length her expectations as to who should be interviewed and on what matters. She then asserted that Mr Diamond had no intention to comply with the Consultancy Agreement and, notwithstanding her communicated expectations as to the form the investigation should take, complained that an investigation phase in fact

obstructed Janette Parsons Limited's access to the ADR process and to its contractual and other legal rights (page 753). She described this as detrimental treatment in relation to the complaints she and her company had made. We note here that on 14 October 2017, the Claimant had complained to Ms Hewins about what she said was her failure to confirm what investigation she had taken in relation to the alleged intimidation and harassment of other female employees and contractors. Yet approximately six weeks later she was complaining about the Council's intention to undertake such an investigation. It is further evidence of her contrary mindset and approach. She went on to complain of Mr Normanton's appointment and reiterated again that Mr Diamond had misinterpreted her (which we reject) and accused him of continuing the detrimental treatment about which she had complained. She provided answers to the questions he had raised, complained of the stress caused by her October time sheet having been submitted to Mr Harrison and finally made clear she took issue with the concluding positive statement of intent in Mr Diamond's letter. In summary, we find the Claimant's letter of 27 November 2017 to have been unfriendly, disagreeable and thoroughly ill-advised.

197. Mr Diamond responded to the Claimant on 5 December 2017. He clarified that he was not aware of the allegations made against Ms Husler, and asked if the Claimant could let him know what these were. He explained (reasonably in our view) that resolution through negotiation was best achieved following an investigation into the allegations made. In that regard he informed her that the Investigating Officer would arrange to meet her to go through the allegations. He confirmed that he believed Mr Normanton was independent and impartial.

198. This led to a further immediate email response from the Claimant the same day:

> *"I see your action, and any contact by Timothy Normanton, to be part of the ongoing intimidation and harassment I am being subjected to following the complaints I have made. Should Timothy Normanton contact me, I will contact the appropriate authorities"* (page 774).

199. In some of her more surprising comments at Tribunal, the Claimant explained that she saw the matter as within the civil and criminal law. She said that if Mr Normanton had telephoned her and said he was going to come around she probably would have called the police. If she was seeking to suggest that Mr Normanton might have gone to her house uninvited, the suggestion is fanciful. No such threat had been made. We found her response inexplicable.

Late November/early December 2017

200. Returning to the chronology of events, during the final two weeks of the Claimant's engagement she had a one-to-one with Ms Ellis on 23 November 2017 as her contract end date approached. A week before the contract end

date an issue arose in relation to the redundancy modification order. Mr Couldrick effectively criticises her in respect of this issue at paragraphs 44 and 45 of his witness statement. The criticisms are unfounded. She had highlighted the redundancy modification order at her very first meeting with Mr Couldrick and there is an abundance of evidence in the hearing bundle that she continued to raise it as an issue during her time at the Trust. Mr Couldrick was slow to acknowledge at Tribunal that his criticisms were misplaced though did concede the point. Whilst it lends at least some weight to the Claimant's submissions in respect of Mr Couldrick's evidence and confirms that the Respondents' criticisms of the Claimant should not simply be accepted at face value, ultimately nothing much turns on the matter since there is no specific complaint in respect of the redundancy modification order in the List of Issues or in the Scott Schedule.

201. We have already dealt with the Policies and Procedure meeting on 28 November 2017 at paragraph 186 above.

202. On her last day working for the Council/Trust, the Claimant emailed Peter Featherstone at 17:17 hours. Mr Featherstone had then been at the Council approximately 11 weeks. We accept his evidence that he had had only a relatively limited number of interactions with the Claimant. She accused him of denying work to and removing work from her and her company. For the reasons already set out, her complaints in this regard are not well founded. She made certain requests of Mr Featherstone, including that he,

> *"…confirm the related qualifications, experience expertise for each and every element of allocated / to be allocated work in a relation to 'both himself' and 'others' who have been / will be asked"*

She went on to request details of instructions given and received in relation to herself and her company,

> *"…including what these instructions were, who gave these instructions, when these instructions were received, what action was then taken, when and by whom"*

She also provided him with a copy of her contracted work packages.

203. Mr Featherstone may well have wondered what had prompted such a communication. It was demanding, unpleasant and unwarranted. There were any number of ways the Claimant might have framed enquiries of Mr Featherstone, but her email was not an acceptable way to do so. Indeed, it seems to us that if the Claimant had concerns in relation to Mr Featherstone, then she was aware from Mr Diamond's letter to her that morning that he was proposing to investigate her concerns. She is intelligent and articulate, and an experienced HR professional. Regardless of the fact her experience is not in operational HR, we are satisfied that she would have fully understood that it was not appropriate for her to interrogate a colleague in this manner, yet that is precisely what she resolved to do. And further, she did so knowing that in her letter dated 27 November 2017 to Mr Diamond,

she had identified Mr Featherstone as someone to be interviewed and the issues in respect of which he should be interviewed, something she reiterated to Mr Diamond on 10 December 2017. There was no justification for the Claimant's email and no reason for Mr Featherstone to respond to it. Her complaint at paragraph A.1(ddd) of the List of Issues is not well founded.

204. The Claimant further alleges that Mr Featherstone carried out her work on and after 12 December 2017. As her Consultancy Agreement had ended at the end of its agreed term on 5 December 2017 and she was no longer working for the Respondents the complaint at paragraphs A.1(eee) of the List of Issues is not well founded, albeit the Claimant withdrew the complaint at the conclusion of her evidence as we explain below.

The investigation of the Claimant's concerns

205. The Claimant wrote to Mr Diamond on 10 December 2017. It was similar to her other communications. For example, rather than simply identify her concerns in relation to Ms Husler she instead asserted that the Council already had these. She also complained that Mr Diamond had *"refused"* to confirm that he would interview her identified list of individuals, though there is no evidence he had done any such thing (putting aside her further complaint that her company should not be subject to that step). She stated that Janette Parsons Limited's right to be represented by *"whosoever we choose"* was a condition of the company's participation in any investigation and related meetings and requested confirmation of the Council's position within 7 days. She reiterated that she would contact the appropriate authorities if contacted by Mr Normanton and stated that Mr Diamond's *"threat"* of contact from Mr Normanton was *"part of the ongoing intimidation and harassment she was being subjected to"*.

206. We find that by her conduct the Claimant had created an impossible and intractable situation for the Respondents. Whether consciously or otherwise, she had resolved that each and every interaction with the Respondents was a matter for criticism and complaint, and confirmed, indeed re-enforced, her existing criticisms and complaints. She had ceased to view the Respondents' actions objectively. Nevertheless, the Council endeavoured to continue to engage with her and to address her concerns. To that end Mr Diamond wrote to her again on 12 January 2018 to inform her that the Council had identified an external investigator, David Johnson, to conduct an investigation.

207. Mr Johnson is an experienced HR professional and has undertaken a large number of investigations. He is a Chartered Fellow within the Chartered Institute of Personnel and Development. He is also a Non-Legal Member of the Employment Tribunals and sits in Birmingham. For that reason this case was heard in Bury St Edmunds in front of a foreign panel. For the avoidance of doubt, none of the Tribunal was aware that they had had any previous professional interactions with Mr Johnson. We approached his

evidence as we do any other evidence and without regard to his position as a Non-Legal Member.

208. Mr Johnson's appointment prompted another lengthy communication from the Claimant on 22 January 2017, again in the manner of her other communications. She 'interrogated' Mr Diamond on his letter and made further unfounded, assertions including that Mr Diamond's letter *"underlines your intent to ensure that my / JP Ltd. are denied rights to be fairly and properly investigated"* and asserted this was discriminatory treatment and victimisation. She does not refer to this letter, or any of Mr Diamond's earlier letters, in the Scott Schedule as matters about which complaint is made. Nor are they included in her List of Issues, which begs the question why she asserted herself in such strong terms in her correspondence with Mr Diamond. She demanded of Mr Diamond that the terms of reference include investigation into *"the actions you have taken including discrimination, harassment and victimisation and denial of natural justice"* (page 784). Her letter concluded with the latest in an increasing list of unilaterally imposed time limits for a response. Her demand that Mr Diamond's actions should be investigated meant that Mr Diamond's continued involvement became untenable and he effectively had no choice but to immediately withdraw. Mr Gibbons assumed the role of commissioning officer as we set out below. He too was to be accused of discrimination.

209. Mr Johnson was originally scheduled to meet with Mr Diamond the week commencing 22 January 2018, but when Mr Diamond was forced to withdraw as the Commissioning Officer as a result of the Claimant's complaints against him, the meeting was cancelled. Mr Johnson was contacted again in March and provided with Mr Gibbons' details. They then worked to agree the scope of the investigation, albeit Mr Johnson's leave commitments in April meant that he could not commence the investigation until the end of April/beginning of May.

210. It took until 30 April 2018 for Mr Gibbons to write to the Claimant. He confirmed that Mr Johnson would be in touch. Whilst he can rightly be criticised for not keeping the Claimant updated, his failure to do so does not form part of the Claimant's claim.

211. Mr Johnson was in contact with the Claimant on 1 May 2018 and invited the Claimant to meet with him on 8 May 2018. On 6 May 2018, the Claimant emailed Mr Johnson (page 793). Her email was in keeping with her communications with others. Notwithstanding, Mr Johnson was new to the matter there was no attempt on her part to build a courteous or constructive relationship with Mr Johnson. Her email was terse and unfriendly. Rather than recognising an opportunity to articulate her concerns afresh to Mr Johnson and engage with him, she asserted that her complaints were already extensively set out. She requested certain information from him and specified a time frame for this. Mr Johnson responded to confirm his terms of reference (page 795). Noting the extensive correspondence, he nevertheless sensibly and reasonably confirmed that the proposed investigation meeting was an opportunity for the Claimant to take him

through her complaints. He proposed they meet on 17 May 2018, though this date was not convenient for the Claimant. Then, on 19 May 2018, the Claimant wrote to advise that she would not attend a meeting on the basis it remained the case that she was not being permitted to be *"appropriately represented"* (page 799). She did, however, request a list of witnesses and a draft copy of Mr Johnson's report and findings to facilitate her feedback. Once again she was seeking to dictate the process. We consider that Mr Johnson approached his task in the way one would expect; he invited the Claimant to meet with him to discuss her concerns, failing which he was content to receive her further written submissions. The Claimant's email to Mr Johnson concluded,

> *"…given the ongoing intent to discriminate and victimise against, and deny natural justice, me through the investigation process, I will not be meeting with you"* (page 800).

212. Mr Johnson made the decision to start interviewing the employees named in the Claimant's complaints. His resulting report is dated June 2018 and runs to some 22 pages. Although the Claimant questioned Mr Johnson about his investigation and report, and also questioned his methodology, it is strictly not necessary for us to make detailed findings in respect of the investigation or the report as the Claimant's only direct complaint in relation to Mr Johnson in her Scott Schedule was that Mr Johnson confirmed *"ongoing discrimination, victimisation and harassment through JP Limited / JP not being allowed appropriate (including legal) representation".* Moreover, and in any event, the Claimant confirmed at the conclusion of her evidence that she was no longer pursuing her complaint at Item 42 of the Scott Schedule and accordingly she no longer maintained that Mr Johnson had perpetrated any acts of discrimination against her.

213. Nevertheless, we shall briefly deal with Mr Johnson's investigation and the Claimant's specific complaint (now withdrawn). We find that the investigation was thorough, independent and objective. For reasons we could not understand in the context of her pleaded case, the Claimant sought to go behind the report and to criticise Mr Johnson's handwritten notes, amongst other things for their legibility. Putting aside that her own handwriting is difficult to read, her questions of Mr Johnson miss the point; his report, rather than his handwritten notes, sets out his findings and explains the reasons for his findings. And in that regard, there is no specific complaint by the Claimant about the report itself.

214. It is correct that Mr Johnson informed the Claimant that she would not be permitted to be accompanied by a legal representative. The Consultancy Agreement conferred no contractual right upon Janette Parsons Limited (or the Claimant) to legal representation at meetings or during any dispute resolution process. Instead, Clause 19.2 of the Consultancy Agreement provides for dispute resolution to be by way of negotiation between the senior executives of the parties with authority to settle the dispute. Mr Johnson's investigation was intended to assist that negotiation. The Claimant was de facto the senior most executive of her company. Her

company did not have a board and did not have a lawyer on its board. If she was the person to conduct negotiations it seems to the Tribunal she must logically be the person who would represent the company in any preliminary investigation intended to be available for those negotiations. She was not employed by the Council and as such she had no statutory right to be accompanied, something she herself had initially recognised and acknowledged. Nevertheless, Mr Johnson offered her the opportunity to be accompanied by a work colleague or trade union representative. He was, in effect, putting her and by extension her company, on an equal footing with the Council's employees notwithstanding she had elected to contract with the Council through a personal services company. She was treated consistently with the Council's employees and more favourably than would ordinarily have been the case for a worker or contractor in her situation. It is not the case, as the Claimant alleges, that she was not allowed any representation, she was simply denied the opportunity to bring a legal representative with her to the meeting with Mr Johnson. We find (and in any event the Claimant never challenged Mr Johnson about this during cross examination) that he sought to address her concerns by allowing her to be accompanied when she had no contractual or statutory rights in this regard.

215. Mr Gibbons wrote to the Claimant on 16 July 2018 summarising the results of Mr Johnson's investigation. He enclosed a copy of Mr Johnson's report and advised the Claimant:

> *"The outcome of the investigation is that all of the complaints are dismissed in their entirety."*

His letter concluded:

> *"Please note that this is the final outcome of the investigation and you will not be entitled to any right of appeal.*
>
> *I hope this resolves the matters between the parties and we can move forward."*

The report had been commissioned to support the process of dispute resolution provided for in clause 19.2 of the Consultancy Agreement. It was not an investigation report as part of an employee grievance procedure that would automatically proceed to a grievance hearing. As such Mr Gibbons was quite right that there was no right of appeal, though he did not state in terms that the matter was potentially to go back to Ms Hewins and the Claimant, and if appropriate Mr Couldrick, to attempt to resolve the dispute through negotiation. The Claimant asserts at paragraph A.1(ggg) of her List of Issues that either Mr Gibbons or the report denied her access to ADR and the Courts. Mr Gibbons' report and the letter did no such thing; the complaint is misconceived, as is her further complaint that Mr Gibbons understood the contents of the report to be incorrect. It was not Mr Gibbons function as the commissioning officer to offer detailed comment on Mr Johnson's conclusions or, in effect, to act as arbiter of the report's contents. Both he and Mr Johnson left entirely open the Claimant's next steps, albeit

Mr Gibbons' concluding remarks clearly evidenced his hope that the report might draw a line under matters. Whatever criticisms the Claimant might make of the Trust's failure to engage with her subsequent correspondence (in respect of which there is no complaint by her), save that Mr Gibbons correctly stated that there was no right of appeal against Mr Johnson's report, the other specific complaints in paragraph A.1(ggg) of her List of Issues are not well founded and cannot succeed.

<u>The witnesses and alleged perpetrators' knowledge of the Claimant's health condition, age and complaints</u>

216. Our findings are as follows:

216.1 Mr Christie's evidence is that he was unaware the Claimant had a disability. In response to questions from the Tribunal he said that he could not recall any discussions with the Claimant when they had discussed her health or any disabilities. He thought he had first been made aware of her disability in the course of these proceedings. The Claimant did not question Mr Christie as to his knowledge of her disability and has not put forward a positive case in this regard. In the circumstances we find that he had no knowledge of the Claimant's health issues or her disability at any time during her employment.

Mr Christie's further evidence is that he had no recollection of being informed of any whistleblowing issues having been raised by the Claimant. His evidence was not challenged during cross-examination. In answer to questions from the Tribunal he was doubtful as to whether he had been made aware of the whistleblowing aspect until he became involved in these proceedings.

216.2 As regards Mr Gibbons, he said that in or around August 2017 he had asked the Claimant if she had had an accident, after she talked to him about using a lift following the Trust's relocation to Lancaster Circus. His evidence was that the Claimant had told him her hip 'played up'.

Mr Gibbons was plainly aware of the Claimant's complaints that she had been discriminated against as he was the commissioning officer in respect of Mr Johnson's investigation report. Indeed, Mr Gibbons was copied in on the Claimant's email of 29 September 2017 in which she had asserted that she was experiencing harassment and intimidation. It is reasonable to assume that Mr Gibbons was provided with the correspondence between the Claimant and Ms Hewins and Mr Diamond, and accordingly that he was aware of the Claimant's complaints and of her claimed disability by July 2018 when the Claimant alleges that he discriminated against her and/or victimised her. However, there is no evidence before the Tribunal or

from which it might infer that Mr Gibbons was additionally aware that she had purported to blow the whistle to the Council's Whistleblowing Team.

216.3 Mr Couldrick observed the Claimant using a walking stick in or around September 2017 when there was a fire drill. His evidence, which we accept, is that he did not know why she was using a walking stick, including whether it related to a sprained ankle or a disability. It was not suggested on either side that they had discussed the matter further.

Mr Couldrick was aware from 29 September 2017 that the Claimant was alleging that she had been subjected to intimidation and harassment. We do not think her email was sufficient to put him on notice that she was doing a protected act. We have referred elsewhere in this judgment to the email exchange between Mr Couldrick, Mr Harrison, Mr Gibbons and Ms Hewins on 23 and 24 October 2017. These evidence that it was at this time that they understood the Claimant to be asserting rights and potential claims under the Equality Act 2010. Mr Couldrick's email of 24 October 2017 (page 624) indicates that by then he had a clearer understanding of the legal position following advice from the Council's Legal Department and that he shared that understanding with Mr Harrison and Mr Gibbons.

There is no evidence before the Tribunal or from which it might infer that Mr Couldrick was aware that the Claimant had purported to blow the whistle to the Council's Whistleblowing Team before he and Mr Harrison were contacted by the Team in April 2018 with a request that the Trust meet the costs of an investigation report.

216.4 Mr Harrison only recalls seeing the Claimant with a walking stick on one occasion. We accept his evidence that he did not know whether this was due to a disability. As with Mr Couldrick, it was not suggested on either side that they had discussed the matter further.

Mr Harrison was also aware from 29 September 2017 that the Claimant was alleging that she had been subjected to intimidation and harassment. As with Mr Couldrick we conclude that he only understood she had done a protected act on or around 23/24 October 2017.

As with Mr Couldrick, there is no evidence before the Tribunal or from which it might infer that Mr Harrison was additionally aware before April 2018 that the Claimant had purported to blow the whistle to the Council's Whistleblowing Team.

216.5 The Claimant and Ms Hewins met on 13 September 2017. It was not suggested by the Claimant in her evidence or when she cross-examined Ms Hewins that she had mobilised with a walking stick at

that meeting or that it would otherwise have been apparent to Ms Hewins that she had a physical disability. Ms Hewins did observe the Claimant mobilising with a walking stick on 19 October 2017 at the conclusion of a meeting at the Council's Woodcock Street building. We accept her evidence that this was the first time she had observed the Claimant using a walking stick. Whether or not that should have put her on notice to undertake further enquiries, on 30 October 2017 the Claimant informed Ms Hewins that she had a knee disability. Ms Hewins was not asked by the Claimant whether this was information she had shared with others. There is no other evidence from which we might properly infer that it was communicated to others.

By 10 November 2017 Ms Hewins was aware that the Claimant had purported to blow the whistle to the Council's Whistleblowing Team.

216.6 Although Ms Ellis attended the meeting in Woodcock Street on 19 October 2017, we accept her evidence that she had no recollection of seeing the Claimant with a walking stick at any of the meetings they had attended together or at any other time. They worked in different buildings so Ms Ellis did not have face-to-face interactions with the Claimant on a regular basis, perhaps only every couple of weeks. We found Ms Ellis to be a reliable witness and we accept her evidence that the Claimant had not communicated any health-related issues to her, whether face-to-face, by phone or email.

We proceed on the basis that by her email of 17 November 2017 the Claimant made Ms Ellis aware that she had done a protected act. However, we have not seen or heard any evidence that Ms Ellis was additionally aware before these proceedings that the Claimant had purported to blow the whistle to the Council's Whistleblowing Team.

216.7 Mr Featherstone recalls seeing the Claimant using a walking stick on one occasion but that he "thought nothing of it". It was not suggested on either side that they had discussed the matter further. On 1 November 2017 a meeting had been arranged to discuss HR Policies and Procedures. The Claimant informed Mr Featherstone that she had a personal health related appointment so needed to work from home. We note that she did not volunteer and that he did not ask for further details. We bear in mind that Mr Featherstone only joined the Trust on 18 September, but even then, went on holiday soon after joining and only returned to work around the time the Claimant submitted her first complaint alleging intimidation and harassment, after which she was in the Respondents' offices infrequently.

Mr Featherstone was first made aware that the Claimant believed she was being discriminated against when she wrote to him on her last day at the Trust. This was after the date of all but one of the acts of alleged victimisation by Mr Featherstone.

There is no evidence before the Tribunal or from which it might infer that Mr Featherstone was additionally aware that the Claimant had purported to blow the whistle to the Council's Whistleblowing Team.

216.8 Ms Husler does not address her knowledge of the Claimant's health in her witness statement. The Claimant has not put forward a positive case as regards Ms Husler's alleged knowledge of her disability. The Claimant first disclosed to Ms Hewins that she had a medical condition on 19 October 2017, providing further details to her on 30 October 2017. If indeed Ms Husler was ever made aware of the Claimant's health issues, this would not have been prior to 30 October 2017 and accordingly after the act of alleged discrimination by Ms Husler.

216.9 There is no evidence before the Tribunal that the Whistleblowing Team at the Council was aware of the Claimant's age or that she had a disability. We find no reference or allusion to her age or disability in the Claimant's correspondence with the Team. Likewise, there is no reference in that correspondence to her having done protected acts.

<u>The Claimant's whistleblowing complaint</u>

217. On 14 October 2017 the Claimant purported to make a protected disclosure to the City Solicitor at the Council alleging *"a failure to comply with a legal obligation, suspected serious and related misconduct and information tending to show that related matters are being deliberately concealed by employees".* (pages 555 to 563)

218. At paragraphs 12 and 13 of her disclosure statement the Claimant refers to legal advice received from Burges Salmon. She also referenced the firm's advice in an email to Mr Couldrick, Mr Harrison and Mr Gibbons on 15 September 2017 (page 582). We return to this in our conclusions below.

219. The Claimant sought confirmation from the Council by the end of Tuesday 17 October 2017 of the *"specific actions you will take to prevent any harassment, victimisation or unfair treatment of me in relation to this"*. The disclosure itself ran to nine pages and was concerned with the measures letter.

220. The Council responded by email on 24 October 2017 (pages 629 and 630). The email was identified as having been sent by the Whistleblowing Team of the City Solicitor of Legal and Governance Department, rather than any identifiable individual. The Whistleblowing Team summarised the essential elements of the Claimant's concerns. They advised the Claimant,

> *"it may be appropriate, in the circumstances, for the Council to seek independent legal advice on these matters. If so, then we would not expect an independent advisor to also correspond with you directly*

> *in the same manner that an ordinary, factual investigator might do. This is because the nature of our advice would be subject to legal and professional privilege and so could not be freely shared with you, but we understand that you have brought these matters to our attention. Therefore, for now and until you are notified otherwise, it seems appropriate that our team remains in contact with you for the purpose of taking this matter forwards."* (page 629)

221. The Whistleblowing Team requested that the Claimant provide it with a copy of the measures letter issued by the Trust and the letter that was first issued to employees by the Council. The email concluded by noting that,

> *"…workers should not be subjected to any detriment on the grounds that they have made a protected disclosure"* (page 630).

This was an entirely appropriate response.

222. The Claimant responded to the Whistleblowing Team on 30 October 2017. Once again, we find ourselves observing that the Claimant was immediately critical of the Whistleblowing Team and that she expressed herself in *"conflictual"* terms. For example, her email included,

> *"if my concerns are not appropriately addressed, I will consider these actions harassment, victimisation and / or unfair treatment for my whistle blowing."*

223. She went on to annotate the Whistleblowing Team's email in red text.

224. The Claimant chased the Whistleblowing Team for a response on 7 November 2017, stating

> *"are you going to give me the curtesy of a reply please?"*

225. The Team responded on 9 November 2017 and sought to assure the Claimant that the matter was being treated seriously. They wrote,

> *"However, due to the nature of your concerns, the decision to appoint an appropriate investigator must be considered".*

226. This prompted a further detailed email from the Claimant a few hours later. She pressed the case for the appointment of an independent investigator, something the Whistleblowing Team had already indicated in its email of 9 November 2017 was being considered as an option. The Whistleblowing Team wrote to the Claimant again on 15 November 2017, apologising for any delay, providing a further assurance that her concerns were being taken seriously and confirming that arrangements were underway to appoint an independent investigator. They wrote,

> *"We hope to be able to confirm the identity of the investigator shortly and the process and timescales around the investigation, which will of course require your input.*
>
> *We note you have indicated that you may refer your concerns to the external auditor, but with respect we consider this is premature. The concerns you have raised relate to internal matters and it is correct that these are considered under the Council's Whistleblowing & Serious Misconduct Policy. We therefore request that you allow the Council to follow that process before taking any further action you may deem appropriate."* (page 732a)

227. There is no further documentation in the hearing bundle evidencing whether and, if so, what further action was taken on the Claimant's concerns. With the brief exception of Mr Couldrick, the Respondents' witnesses do not address the matter in their statements.

The Law and Conclusions

Preliminary Matters

228. On 21 June 2019 the Claimant presented a fourth Claim to the Employment Tribunals alleging age, sex and disability discrimination and victimisation, and detrimental treatment as a whistleblower in respect of the Respondents' alleged failure to comply with the time limit for responding to her Data Subject Access Requests. On 14 February 2019 Employment Judge Woffenden decided not to grant an application by the Claimant to join that claim with the Claimant's other claims. Nevertheless, and notwithstanding we reminded the parties of Employment Judge Woffenden's Case Management Order in the course of the hearing, at paragraph A.1(iii) of her List of Issues the Claimant identified this as an issue in these proceedings. However, that Claim was not before us, is not a matter in respect of which we have made any relevant findings and is plainly not a matter we can determine in these proceedings.

229. Likewise, the complaint at paragraph A.1(hhh) of the List of Issues (namely, that on or after 25 September 2018 Mr Couldrick failed to respond to correspondence from the Claimant) is not a matter we can determine. We were not told whether it is a complaint within the fourth set of proceedings, but it post-dates the three Claims we are considering. The Claimant did not apply to amend the Claims we are considering to include the complaint at paragraph A.1(hhh) of the List of Issues. Indeed, it did not appear in earlier iterations of the List of Issues filed by the Claimant earlier in the course of the hearing.

230. At the conclusion of her evidence, namely before the Respondents' witnesses gave evidence, the Claimant informed us that she was withdrawing the complaints at Items 18, 36, 41 and 42 of her Scott Schedule. Items 18 and 41 correspond to the complaints at paragraphs

A.1(x) and (eee) of the List of Issues. The effect of withdrawing Items 36 and 42 is that the Claimant no longer contends that Mr Diamond and Mr Johnson were responsible for perpetrating acts of discrimination against her. Notwithstanding she withdrew her complaints against Mr Johnson we observe that she proceeded to cross-examine Mr Johnson as if he had nevertheless perpetrated acts of unlawful discrimination against her.

231. For the reasons set out in our detailed findings above, the complaints at paragraphs A.1(b), (c), (d), (e), (f), (g), (i), (j), (m), (n), (p), (r), (s) (save for the comment about aspects of her work packages being 'dead in the water'), (t), (u), (v), (w), (aa), (bb), (ff), (gg), (hh), (ii), (mm), (nn), (oo), (pp), (qq), (uu), (eee) and (ggg) of the Claimant's List of Issues are not well founded and accordingly we dismiss them. We address her remaining complaints below.

The Equality Act Claims

232. Chapter 1 of the Equality Act 2010 identifies nine 'protected characteristics'. The Claimant pursues her complaints by reference to the protected characteristics of sex, age and disability. At the outset of the hearing we encouraged the Claimant to address the 'reasons why' the Respondents may have acted as she alleges they did, both in her evidence and submissions to the Tribunal and when cross-examining the Respondents' witnesses. We explained that other than in cases of obvious discrimination the Tribunals will want to consider the mental processes of the alleged discriminator and that in order to succeed in any claim a Claimant must do more than simply establish that they have a protected characteristic and have been treated unfavourably. We observe that the Claimant did not take our comments on board, notwithstanding they were repeated to her. It is noteworthy that, with the exception of Mr Harrison, she did not explore with the Respondents' witnesses why they may have been influenced in their thinking and in their alleged actions and treatment of her by her sex, age or disability. We found that omission surprising, not least in relation to those witnesses with whom there was at least one shared protected characteristic. The only specific evidence by the Claimant as to the 'reasons why' she believed she was treated as she was, came during exchanges with Ms Hodgetts on the first day of her evidence. She said:

> *"I think male contractors were valued more than female contractors. In fact younger male contractors without disability."*
>
> *"A culture developed that people felt free to act in a discriminatory way and a harassing way. I think people got bolder and were active in their treatment of me."*

It is not a weighty explanation for what the Claimant contends was widespread discriminatory conduct at the Respondents.

233. Section 14 of the Equality Act 2010 deals with 'combined discrimination: dual characteristics'. The section has not been brought into force. However, at the very outset of her evidence the Claimant referred to herself as an older woman with a disability; it was clear that she was seeking to pursue her discrimination complaints by reference to those three protected characteristics in combination (as the comments cited above confirm). There is further evidence in this regard at page 839 of the hearing bundle where the Claimant refers to herself in a letter to Mr Gibbons dated 25 September 2018 as "a professional, but disabled and older, woman". The Scott Schedule describes her claims as including "Direct Discrimination – combination of any, or all, of Direct Age, Disability and / or Sex Discrimination" and "Harassment related to combination of any, or all, of Age, Disability and / or Sex." The Tribunal explained to the Claimant that section 14 is not in force and why therefore it is required to consider each of her protected characteristics in turn rather than in combination. Nevertheless, over the course of at least two days the Claimant persisted in referring to herself as an older woman with a disability (or visible disability) and contrasting her treatment with how younger males without a disability (or visible disability) were, or would have been, treated.

234. The Claimant's case proceeds on the basis that Mr Christie, Mr Couldrick, Mr Gibbons, Mr Harrison, Mr Featherstone and Ms Hewins discriminated against her because of her age notwithstanding they are the same or a similar age to her; that Ms Hewins, Ms Quarshie, Ms Husler, Ms Wilson and Ms Ellis discriminated against her as a woman; and that Mr Gibbons, who has a visible disability, discriminated against her as a disabled person. Whilst we remind ourselves that section 24 of the Equality Act 2010 provides that it is irrelevant that alleged discriminators may share one or more of a Claimant's protected characteristics, nevertheless the fact that the alleged perpetrators in this case shared at least one of the Claimant's protected characteristics makes it all the more surprising that, with the exception of Mr Harrison, she did not explore their thinking, mental processes, and motivations when cross examining them.

<u>The difficulties in the Claimant's case as presented</u>

235. We observe that the way in which the Claimant presents her Claims gives rise to a number of difficulties. In particular:

    235.1 At Item 1 of her Scott Schedule the Claimant identifies Mr Couldrick, Mr Harrison, Mr Featherstone and Ms Ellis as the perpetrators of a range of matters, including the Council and Trust's failure to propose or present SMART objectives. When Ms Hodgetts pointed out to the Claimant that Mr Gibbons had been her line manager until Mr Couldrick and Mr Harrison joined the Trust in August 2017, the Claimant could not explain why she believed Mr Gibbon's failure to provide SMART objectives during her first 10 weeks was not an act of discrimination whereas Mr Couldrick's and Mr Harrison's failure to do so thereafter was discrimination. She initially asserted that Mr

Gibbons' failure to provide SMART objectives was an act of disability discrimination, notwithstanding just a few moments earlier in her evidence she had identified 18 August 2017 as the date when she had first begun to be discriminated against on grounds of her disability. In any event, her assertion that Mr Gibbons had discriminated against her because of her disability in the matter of the SMART objectives was not part of her pleaded case and was not included in either her List of Issues or the Scott Schedule. The Claimant then changed tack; she observed that she would "be happy to add him as a perpetrator". Pressed further by Ms Hodgetts her position became increasingly muddled. She acknowledged, as she was bound to do, Employment Judge Harris' finding at paragraph 31.15 of his Judgment on disability but could not clearly articulate why she was claiming that she had been discriminated against on the grounds of her disability from the outset of her work for the Respondents. Expressing her regret that she had not named Mr Gibbons as a perpetrator of the alleged discrimination, she observed that she had "*not been clear as to Mr Gibbons' mal-intent until [she] saw [his] report*" (we think she was referring to Mr Johnson's report).

235.2 At Item 2 of her Scott Schedule the Claimant identifies Ms Ellis as the alleged perpetrator of the discriminatory treatment complained of. Yet she also identifies Ms Ellis as her comparator for the purposes of her complaint of direct discrimination. She could not explain how Ms Ellis might be said to have treated herself differently in comparable circumstances. All she could say was that she was "*happy for it to be considered in that way*". We have difficulty in making sense of that comment or her logic.

235.3 The Claimant could not satisfactorily explain why her alleged removal from the Leadership Team was identified as potential sex discrimination at Item 1 of her Scott Schedule but seemingly only specifically related to her age and disability at Item 3. She went on to say that she did not allege that Mr Couldrick committed an act of sex discrimination, "*except in combination*". This was notwithstanding our reminders to her that we could not consider her protected characteristics in combination.

235.4 The Claimant alleged that Mr Couldrick's behaviour radically changed immediately he saw her on joining the Trust. Again, she could not satisfactorily explain why Mr Couldrick had not been influenced by her sex in their various interactions before he joined the Trust when he would certainly have been aware that she was a woman. When Ms Hodgetts pursued the matter further with the Claimant she said, "*I've explained and there's nothing I wish to add.*"

235.5 By 31 August 2017 (Item 7 of the Scott Schedule), the Claimant alleges that Mr Harrison was specifically influenced by her sex in his treatment of her. However, at Item 6 of the Scott Schedule sex is not

identified as a specific factor in Mr Harrison's alleged treatment of the Claimant on the same day in relation to a separate matter.

235.6 Likewise, it is unclear to the Tribunal why the Claimant considers (or at least prepared her Scott Schedule on the basis) that only her age and disability, but not her sex, were specific factors in her treatment by Mr Harrison prior to 31 August 2017, or why (except perhaps in combination with other characteristics) her sex was seemingly not a specific factor in Mr Harrison's decisions, actions and / or treatment of her on 7 and 12 September 2017 (Items 8 and 10 of the Scott Schedule), 13 and 28 September 2017 (Item 12 of the Scott Schedule), 19 September 2017 (Item 14 of the Scott Schedule), and 5 October 2017 (Item 20 of the Scott Schedule), yet her sex is identified as a specific factor on other dates. Her logic is difficult to follow.

235.7 At Item 6 of her Scott Schedule the Claimant alleges, amongst other things, that her email of 31 August 2017 was *"followed by… related victimisation and harassment".* In fact, it is the Claimant's case that the first alleged protected act by her was on 13 September 2017 when she met Ms Hewins and reference was made in the course of that meeting to the Trust operating as a 'Boy's Club'. In which case, if her email of 31 August 2017 was not a protected act, it plainly was not followed by victimisation.

235.8 Likewise, on the Claimant's own case and contrary to Items 7, 8, 9 and 10 of the Scott Schedule, none of the various matters arising between 31 August 2017 and 12 September 2017 could have been acts of victimisation if she had yet to do a protected act.

235.9 Questioned by Ms Hodgetts about Item 9 of the Scott Schedule, specifically why she claimed it was an act of age discrimination, the Claimant said, "*my assumption was that Mr Harrison and Mr Couldrick were aware of [mine and Mr Featherstone's] respective ages*". The Claimant was 59 at the date of the hearing and Mr Featherstone told us he was 58. On the specific issue, notwithstanding the Tribunal had taken some care to explain to the Claimant that section 14 is not in force, she resorted to stating that "younger male contractors without disability" were more valued that she was.

235.10 The Claimant asserted that Mr Harrison had discriminated against her in the matter of her daily rate even though he plainly had no involvement in the rate which was agreed (and in fact proposed by the Claimant) at least two months before Mr Harrison started at the Trust and before he had seemingly even been identified as a potential candidate for the role.

235.11 We refer to our observations at paragraphs 41 and 50 above and to our further observations below.

The Claimant's further difficulties

236. We were struck by the Claimant's willingness to attribute discriminatory motives to various individuals without seemingly reflecting or giving particular thought to whether this was warranted. That is particularly the case in relation to Ms Hewins, Mr Diamond, Mr Johnson, Mr Featherstone and the Whistleblowing Team at the Council. We note for example her "assumption" referred to in paragraph 232 above. In fact she made various assumptions about others' motives. In the case of Mr Diamond and Mr Johnson the Claimant accused them of discrimination, intimidation and victimisation almost as soon as she was in contact with them. Indeed, we observe that within days of submitting her complaint about Mr Harrison on 29 September 2017 the Claimant began to assert almost on a daily basis that she was experiencing discrimination, intimidation and victimisation in her interactions with others. We conclude that she was prone to find fault and to assume a discriminatory intent or motivation. Equally we note, notwithstanding the unhelpful terms in which she expressed herself in her communications with Mr Diamond and Mr Johnson that she withdrew her complaints against each of them before they were called to give evidence. It is troubling that the Claimant pursued and then withdrew her complaints in this way.

237. Ms Hodgetts made detailed written submissions on the evidence (pages 8 to 13 of her written submissions). We consider there to be considerable force in many of those submissions.

Harassment Claims

238. Section 26 of the Equality Act 2010 ("EqA") provides,

> (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.

239. In her closing submissions on behalf of the Respondent, Ms Hodgetts reminded the Tribunal of Underhill P's Judgment in Richmond Pharmacology v Dhaliwal [2009] ICR724,

> "A Respondent should not be held liable merely because his conduct has had the effect of producing a prescribed consequence: it should be *reasonable* that that consequence has occurred… overall the criterion is objective because what the

> Tribunal is required to consider is whether, if the Claimant has experienced those feelings or perceptions, and it was reasonable for her to do so. Plus if, for example the Tribunal believes that the Claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for the Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal as to what would important for it to have regard to all the relevant circumstances including the context of the conduct in question. One question that may be material is whether it should reasonably be apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the prescribed consequence): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt…
>
> (22) …dignity is not necessarily violated by what was said or done which was trivial or transitory, which should have been clear but any offence was unintended. But it is very important that employers and Tribunals are sensitive to the hurt which can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

240. Ms Hodgetts also drew our attention to the dicta of Elias LJ in Land Registry v Grant [2011] ICR 1390,CA,

> "It is not importing intent into the concept of effect to say that intent would generally be relevant to assessing effect. It would also be relevant to deciding whether the response of the alleged victim is reasonable".

241. We think it will be apparent from our detailed findings above that we believe the Claimant was unreasonably prone to take offence. In our judgment the Respondents have not unreasonably described the Claimant as conflictual. Whether consciously or otherwise, almost from the outset she was critical of others and generated conflict. It seems to us that all of the witnesses we heard evidence from, including Mr Harrison, went to some effort to accommodate the Claimant and avoid her being upset, but in our judgment those efforts went unreciprocated. By October 2017, if not before, she had lost perspective on the situation and was actively finding fault. In our findings above we have identified those complaints which fail at the first hurdle because the Claimant has failed to satisfy us, on the balance of probabilities, that she was treated as she alleges. In any event, save in respect of one matter, in our judgment it was not reasonable for the Claimant to have felt that her dignity had been violated or that the Respondents' employees and contractors had engaged in unwanted conduct that had created an intimidating, hostile, degrading, humiliating or offensive environment for her. On the contrary, there were occasions when Ms Ellis and Ms Hewins in particular would have experienced a hostile environment as a result of the Claimant's actions or communications.

242. We refer to our findings at paragraphs 65 and 106 above. We consider that Mr Harrison's email of 7 September 2017 did create a humiliating environment for the Claimant. However, we are satisfied that the comments

were wholly unrelated to the Claimant's protected characteristics. As regards her disability, Mr Harrison did not then know she was disabled. As we have noted already, the main focus of the Claimant's cross-examination of Mr Harrison centred upon his interactions with two men. In one case he had been taken to task by his employer when he had offended a male colleague and he had been obliged to apologise to the person concerned. As regards his alleged treatment of women, the Claimant's witness statement was the first time she put forward specific allegations regarding Mr Harrison's alleged treatment of other women. At paragraphs 69 to 72 of her witness statement she refers to his treatment of two women. She alleged that he had thrown a report at one of the women across a table. However, the Claimant volunteered at the outset of her cross examination of Mr Harrison that a case "*had not been made*" regarding his alleged conduct towards her. That left a third-hand, vague allegation that Mr Harrison's conduct had caused another female colleague to cry. In spite of the Claimant's description of Mr Harrison's conduct towards her as "*extreme*" (something she did not allege in her witness statement), we did not see or hear evidence to support that accusation. In our judgment, the email of 7 September 2017 reflected Mr Harrison's sometimes direct or brusque communication style, but it was not related to any protected characteristics. As regards his further comments on 28 September 2017 that aspects of the Claimant's work packages may be 'dead in the water', in our judgment it was not reasonable for the Claimant to view any such comment as violating her dignity or creating a hostile etc working environment for her. In any event, for the same reason we do not consider the comment to have been related to any protected characteristics.

Direct Discrimination Claims

243. Section 13 EqA provides,

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

244. We deal firstly with the alleged perpetrators' knowledge of the Claimant's disability. On the issue of requisite knowledge in disability discrimination cases, Ms Hodgetts drew the Tribunal's attention to Rimer LJ's Judgment in Gallop v Newport City Council [2013] EWCA Civ 1583,

> "(Counsel) were agreed as to the law, namely that-
>
> (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and
>
> (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in s.1(1) of the DDA. Those facts can be regarded as having three elements to them, namely

> (a) a physical or mental impairment, which has
> (b) a substantial and long term adverse effect on
> (c) his ability to carry out normal day to day duties; and
>
> whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1.

Counsel were further agreed that,

> (i) provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in s.1(2)."

245. We consider that by August 2017 Mr Gibbons knew or ought to have known that the Claimant was disabled. She told him that she had a physical impairment (he recollected it as a hip, rather than a knee, condition) and he was aware that the impact was such that she needed to take the lift rather than climb the stairs (a normal day to day activity). The fact that she referred to it as a condition put Mr Gibbons on notice (or should have put him on notice) that it was substantial and long term. It is somewhat academic, since Mr Gibbons was plainly on notice of the Claimant's disability by 16 July 2018 when he is alleged to have discriminated against her. Be that as it may, we are satisfied that the Claimant's disability (and her other protected characteristics) had nothing whatever to do with Mr Gibbons' actions in July 2018. We return to this below.

246. We consider that by 30 October 2017, but not before, Ms Hewins knew or ought to have known that the Claimant was disabled. The last two matters complained of in relation to Ms Hewins are alleged to have occurred on that same day and are referred to at paragraphs A.1(oo) and (pp) of the Claimant's List of Issues. We refer to our extensive findings above and conclusion that the entirety of the Claimant's complaints as they relate to Ms Hewins' alleged treatment of her cannot succeed in the light of our primary findings. For completeness, we simply note that with the exception of the last two acts complained of in relation to Ms Hewins, Ms Hewins had no knowledge (actual or constructive) of the Claimant's disability at the date of the other matters complained of.

247. For the reasons set out at paragraph 232 above, we consider that Mr Christie, Ms Ellis and Ms Husler were unaware of any health issues affecting the Claimant, certainly at the material times of their involvement in relation to the Claimant. In our judgment there is no basis to fix any of them with constructive knowledge of the Claimant's disability.

248. As regards Mr Couldrick, Mr Harrison and Mr Featherstone, the fact each of them observed the Claimant on one occasion to have been using a walking stick does not mean they knew or ought to have known that she was disabled. Even assuming it evidenced that she had a physical impairment

it did not put them on notice that any such impairment had a substantial and long term effect on her normal day to day activities, particularly in circumstances, as we find, that they did not observe her using a walking stick again.

249. In the circumstances the Claimant's complaints that Ms Ellis, Ms Husler, Mr Couldrick, Mr Harrison and Mr Featherstone discriminated against the Claimant because she was disabled cannot succeed as they acted at all material times without knowledge (including constructive knowledge) of her disability.

250. Except in obvious cases, the consideration of any complaint of direct discrimination calls for some consideration of the mental processes of the alleged discriminator: Nagarajan v London Regional Transport [1999] ICR 877. There is nothing controversial in Ms Hodgett's submission that the grounds of any decision often have to be deduced, or inferred, from the surrounding circumstances and that in order to justify an inference one must first make findings of primary fact from which the inference may properly be drawn.

251. The victim who complains of discrimination must satisfy the fact-finding Tribunal that, on a balance of probabilities, he or she has suffered discrimination falling within the statutory definition. This may be done by placing before the Tribunal evidential material from which an inference can be drawn that the victim was treated less favourably than he or she would have been treated if he or she had not been a member of the protected class: Shamoon v RUC [2003] ICR337. Comparators, which for this purpose are bound to be actual comparators, may of course constitute such evidential material. But they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground. The usefulness of the tool will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference.

252. The comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. The comparators that can be of evidential value, sometimes determinative of the case, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim.

253. In this case the Claimant identifies a wide range of potential comparators, including hypothetical comparators. She relies upon different comparators for different purposes. She relies upon comparators who are within the same protected class as herself. She identifies Ms Ellis as both the perpetrator and her identified comparator in respect of a number acts of

alleged discrimination; likewise Mr Harrison. As regards her complaints that her work was given to others, she generally identifies the person to whom the work was given as her comparator rather than identify others in a comparable position to herself who did not have work taken away from them in similar circumstances (see for example paragraphs A.1(e) and B.7(e) of her List of Issues). Her claimed comparators are not fully identified in her Scott Schedule and are not always consistent with the comparators in her List of Issues. A number of her identified comparators are not referred to in her witness statement i.e., Melanie Lawson, Anthony Elliott, Narinder Saggu, Lorraine Donovan, James Gregory and Paul Waites. Accordingly, we simply do not know why, if it is the case, the Claimant says that their circumstances are materially the same as her own, alternatively why she says their treatment is of some evidential value. They are variously cited as comparators in support of the complaints at paragraphs A.1(ff), (gg), (hh), (mm), (qq) and (zz) of the Claimant's List of Issues. This is part of a bigger issue; the Claimant's witness statement provides little, or no, information as to why her treatment in each case is to be contrasted with her identified comparators. As noted above, the identified comparators vary across the individual complaints and in a number of instances she relies upon both an actual and a hypothetical comparator. Where she identifies a named comparator we are still left to try to discern her case from the Scott Schedule, List of Issues and her witness statement. To give just one example; at Item 14 of the Scott Schedule the Claimant refers to her removal from staff consultation and staff engagement sessions, and identifies Ms Quarshie, Ms Ellis and Mr Harrison as comparators (Mr Harrison is also said to be the alleged perpetrator of the act in question). Notwithstanding their respective roles, the Claimant does not identify why their circumstances were materially the same as her own, alternatively why and to what extent their attendance is said to provide evidential material. Ms Quarshie had a communications role and was attending a 'roadshow' event in that capacity; the Claimant did not give evidence as to why their circumstances were the same or similar. In the case of Ms Ellis, the TUPE staff consultation was a Council led process so it seems obvious to us that she would attend as the relevant Council HR lead. Yet we are left to work out for ourselves whether the Claimant asserts that she is an actual comparator (we are satisfied she is not) or someone whose treatment is of evidential value. In the latter respect, as the relevant HR lead on the Council side, her attendance at a Council led meeting is of little or no evidential assistance to us in coming to a view as to the reasons for the Claimant's non-attendance on the Trust side.

254. We agree with Ms Hodgetts' submission at paragraph 24 of her written submissions that the Claimant has failed to identify appropriate actual comparators for *Shamoon* purposes. Further, we agree her identification of the Claimant's relevant circumstances for comparison purposes at paragraph 24(a) to (f) of her submissions. In our judgment, the Claimant has failed to put forward evidence and to establish primary facts from which discrimination could properly be inferred by reference to the Claimant's alleged treatment relative to others in the same, or not materially different, circumstances. She has fallen a long way short in this regard.

255. Having regard to the Claimant's relevant circumstances, we are further satisfied that a hypothetical comparator in the Claimant's situation, whether a man, a younger person (including someone even only slightly younger than the Claimant), or a person without a visible disability, would have been treated in exactly the same way that she was. All other things being equal, we are satisfied that this unhappy episode would have played out in exactly the same way regardless of the Claimant's personal protected characteristics.

256. It is possible for a case of unlawful discrimination to be made good without the assistance of any actual comparator or by reference to a hypothetical comparator. In the absence of comparators of sufficient evidential value some other material must be identified that is capable of supporting the requisite inference of discrimination. Discriminatory comments made by the alleged discriminator about the victim might, in some cases, suffice. There were no such comments in this case. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. We do not agree the Claimant's various submissions in closing. We found the Respondents' witnesses to be convincing and consistent in their accounts and in their explanations for why they acted as they did. Their evidence had substance and we contrast it with the Claimant's tendency to assert intimidation, harassment, discrimination and victimisation without identifying evidence in support of her assertions or otherwise articulating clearly or consistently the reasons why she believed she was being discriminated against.

257. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. We have not identified any material respects in which the Claimant was treated unreasonably by the Respondents or that they have failed to provide explanations for their treatment of and actions in relation to her.

258. In any event we take on board Ms Hodgetts' submission that the utmost care must be taken before drawing inferences from a failure to give a complete explanation or from particular language used, particularly when the acts complained of are only a few among other interactions with the complainant which are not said to be tainted with discrimination.

259. The Claimant has to prove facts from which an Employment Tribunal *"could"* properly conclude that the Respondents had committed an unlawful act of discrimination. This does not prevent the Tribunal at that stage from hearing, accepting or drawing inferences from evidence produced from the Respondent disputing and rebutting the complaint. Once a prima facie case is established, the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, but it does not shift simply on the complainant establishing the facts of a difference in status and a difference in treatment; it is only once the burden has shifted that the

absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ 33. In this case many of the Claimant's complaints are pursued on the basis that she experienced something unfavourable and that there was a difference in status (though in fact in many cases there were often shared characteristics and no difference in status). The fact the Claimant was a woman and/or (at the time) aged 58 and/or disabled and that her engagement did not work out as both parties had hoped and intended and that she experienced things that she felt were unfavourable is not enough to shift the burden of proof. We think the Claimant's approach is illustrated by comments in her letter of 30 October 2017, already cited in this judgment:

> *"I have explained that the knee disability I suffer from has been further aggravated by the stress caused by the treatment that I have been subjected to. Given the problems I have accessing meetings at the Council House, to attend Trust and BCC meetings, and my use of a walking stick, those subjecting me to discriminatory and detrimental treatment are, as with my gender and age, aware of my disability."* (page 676)

If, as we think, that was the basis upon which she came to believe that she was being discriminated against because of her disability it is not enough to shift the burden of proof.

260. The Claimant has made wide-ranging allegations which the Respondents have been able to address. Over the course of a 13 day hearing the Claimant was able to challenge certain statements by the Respondents' witnesses and to secure concessions from them, for example Mr Couldrick had to concede that the Claimant could not be criticised for the Trust's failure to grasp the implications of the redundancy modification order. Ultimately, however, their substantive accounts and explanations held up under cross-examination whereas often the Claimant's evidence did not. In particular, we found the Respondents' witnesses to be detailed, credible and consistent in their evidence. In our discussions we have held in mind that we are ultimately concerned with the reasons why the Respondents (and each of the alleged perpetrators) acted as they did in relation to the Claimant. The Claimant has not proved facts from which we could properly conclude that the Respondents committed any unlawful acts of discrimination. But in any event, we are satisfied that their reasons for acting why they did had nothing whatever to do with her protected characteristics. In summary and as regards the remaining complaints:

260.1 Mr Gibbons' failure to provide SMART objectives was an oversight on his part that seems not to have troubled the Claimant. There was no reason for Mr Harrison to have examined her Consultancy Agreement and to have identified that it was envisaged in the Agreement that SMART objectives would be developed. He sought to agree a meaningful work plan with the Claimant in September 2017. Any failure to respond to her subsequent request for SMART objectives reflected his particular work style and view that the

Claimant did not need direction or SMART objectives but simply needed to get on with the job in hand. That may have overlooked the terms of the Consultancy Agreement, but it had nothing to do with her protected characteristics.

260.2 Ms Ellis did omit the Claimant from three emails. We have dealt with this in our findings above. It was inconsequential. There is no basis whatever to conclude or infer that the Claimant's protected characteristics were a relevant factor in Ms Ellis' actions.

260.3 The Claimant was stood down from attending the engagement sessions for the reasons set out in our findings above. It had nothing to with her protected characteristics. In so far as she was not then invited to later sessions, that was a natural consequence of the non-discriminatory decision to stand her down from attending.

260.4 For the avoidance of doubt, none of Ms Hewins' actions in relation to the Claimant were influenced by considerations of her age, sex or disability. Putting aside that Ms Hewins was not on notice of the Claimant's disability before 30 October, Ms Hewins is the HR Director of a large Local Authority. She is ultimately responsible for the Council's strategy and policy in respect of diversity and inclusion. She is a highly experienced HR professional, with a Degree in Human Resources and Organisational Development. In spite of her position, qualifications and experience the Claimant has never put forward any explanation or hypothesis as to why Ms Hewins' thinking might nevertheless have been influenced by the Claimant's sex, age or disability. That is all the more surprising given they are both women and of a broadly similar age. Ms Hewins' communications with the Claimant speak for themselves. They were courteous, measured and professional, and evidence that she was respectful of the Claimant and of the concerns that she was seeking to raise. There is absolutely no basis for us to infer discrimination.

260.5 We deal with the Claimant's whistleblowing disclosure below. However, there is no evidence that the Whistleblowing Team was aware of the Claimant's age or disability, or that her sex was a relevant consideration in its actions or treatment of her. As with Ms Hewins, the communications were courteous and professional. The Claimant has never put forward any explanation or hypothesis as to why their actions might nevertheless have been tainted by discrimination.

260.6 We have dealt with Mr Couldrick's decision on 24 October 2017 that the Claimant should not be required to attend Trust meetings. This was in response to the Claimant's specific request that the Trust let her know whether she should attend any further meetings. It had nothing to do with the Claimant's protected characteristics rather it was a pragmatic response to the situation and in direct response to the Claimant's specific request whether she should attend. To the

extent the Claimant was not invited to subsequent meetings at the Trust, this was the natural consequence of Mr Couldrick's non-discriminatory decision.

260.7 For all the reasons set out above, Mr Featherstone's dealings with the Claimant, including his failure to respond to her rather unpleasant email of 5 December 2017, had nothing whatever to do with her protected characteristics.

261. In the circumstances the remainder of her complaints at paragraphs A.1(a), (k), (l), (o), (q), (x), (y), (z), (cc), (dd), (ee), (jj), (kk), (ll), (rr), (ss), (tt), (zz), (aaa), (bbb), (ccc), (ddd) of the Claimant's List of issues, in so far as she asserts that she was direct discriminated against, are not well founded and are dismissed.

Victimisation Claims

262. Section 27 of the EqA provides,

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because-
>
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.

263. Section 27(2) goes on to define the protected acts as including,

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

264. For the reasons set out already above, the victimisation complaints pre-dating 13 September 2017 are misconceived since on the Claimant's own case the first protected act by her was on 13 September 2017. Even then, the protected act was to Ms Hewins. Thereafter the next protected act was on 29 September 2017 when the Claimant wrote to Ms Hewins. In the circumstances, none of the matters at paragraphs A.1(o) to (t) of the List of Issues could have been because the Claimant had done a protected act since the alleged perpetrators were unaware of the protected act.

265. In view of our findings at paragraph 214 above:

265.1 none of the matters at paragraphs A.1(bb) to (ff), (mm), (qq), (tt) (in so far as it concerns Mr Featherstone's actions), (zz), and (bbb) to (eee) could have been because the Claimant had done a protected act since the alleged perpetrators, Ms Ellis, Mr Featherstone and the Whistleblowing Team, were unaware that the Claimant had done protected acts; and

265.2 none of Mr Couldrick and Mr Harrison's actions before 23 October 2017 could have been because the Claimant had done a protected act.

266. Having regard to our extensive findings and conclusions above, we do not consider that Ms Hewins subjected the Claimant to any detriments. In any event, her handling of the Claimant's complaints were entirely professional and in accordance with the terms of the Consultancy Agreement and best practice. We do not repeat our observations at paragraph 260 above. In our judgment nothing Ms Hewins did or said gave the slightest indication that she was in any way influenced in her treatment of the Claimant by the fact the Claimant had done protected acts. On the contrary her commitment to trying to find a resolution in the face of challenging communications and correspondence from the Claimant evidence her continued professionalism and focus in addressing the Claimant's stated concerns rather than reacting to them.

267. Likewise, we did not see or hear any evidence from which we might infer that Mr Couldrick, Mr Harrison or Mr Gibbons subjected the Claimant to detriments on or after 23/24 October 2017 because she had done a protected act(s). Indeed, we do not think that she was subjected to detriments in so far as it was confirmed, in response to her specific request, that she need not attend Trust meetings and thereafter invitations to such meetings were not extended to her. In so far as the Claimant asserts there was detriment it was not because she had done a protected act(s). Mr Couldrick had evidently taken legal advice by 24 October 2017 and his email to Mr Harrison on that date (copied to Ms Hewins and Mr Gibbons) evidences that he was fully alive to and made them aware of the need not to subject the Claimant to any form of detriment. In expressing the view that she need not attend further meetings, he noted that she would continue to contribute information to the meetings, which indeed she did. As with Ms Hewins, Mr Couldrick's commitment to trying to find a solution in the face of a challenging situation evidences a desire to address the Claimant's request regarding her attendance at future meetings rather than because of or by way of reaction to her concerns.

For these reasons, the Claimant's various complaints that she was victimised are not well-founded and are dismissed.

Whistleblowing Claims

268. The first issue we must determine is whether the Claimant was a 'worker' within the meaning of section 230(3) of the Employment Rights Act 1996 (and potentially subject to the extended meaning of worker by virtue of section 43K of the 1996 Act). Although Ms Hodgetts did not make any specific submissions on the point, we have no record of the Claimant's status as a worker having been conceded by the Respondents. We consider that whilst the matter potentially does not need to be determined by reference to section 43K of the 1996 Act, the Claimant was a worker

within the meaning of the extended definition, applying section 43K(1)(b). The fact that the Claimant provided her services through the mechanism of a personal services company does not undermine our conclusion in that regard since section 230 does not proscribe that the relevant contract must be between the 'worker' and the 'client'; all that is required is that the Claimant should have worked under a relevant contract. There have been numerous cases in recent years that have considered the circumstances in which an individual will qualify as a worker under section 230(3). The weight of authority suggests that 'mutuality of obligation' will be required in order to support any conclusion that the person has undertaken to personally perform work or services for another party. In Autoclenz Ltd v Belcher and Others [2011] ICR 1157, SC the Supreme Court confirmed that Employment Tribunals should discern the true intentions or expectations of the parties, and therefore their implied agreement and contractual obligations. In Byrne Brothers (Formwork) Ltd v Baird and Others [2002] ICR 667, EAT, the Employment Appeal Tribunal gave guidance on the third limb of section 230(3) of the 1996 Act, namely the profession or business undertaking exception. Factors to consider include the degree of control exercised by the 'client', the exclusivity of the engagement, its duration, the method of payment, what equipment the 'worker' supplied and the level of risk undertaken. While it did not wish to lay down a general rule, the EAT in Byrne Brothers commented that workers often worked for long periods for a single employer as an integrated part of the workforce, using the employer's equipment and undertaking little economic risk. The significance of integration was emphasised by the Court of Appeal in Hospital Medical Group Ltd v Westwood [2012] ICR 415**,** with reference to Mr Justice Langstaff's judgment in Cotswold Developments Ltd v Williams [2006] IRLR 181. This suggests that it may be possible to determine whether a person is providing services to a customer or client by focusing on whether that individual actively markets his or her services as an independent person to the world in general or whether she is recruited for the principal as an integral part of its organisation. As regards the Claimant, we consider it was the latter. In James v Redcats (Brands) Ltd. [2007] ICR 1006, EAT, Mr Justice Elias had identified that there may be cases where the integration test was not appropriate and where, instead, the 'dominant purpose test' (namely, whether the execution of personal work or labour is the dominant purpose) may help identify the nature of the contract in question. We also consider that the Claimant was a worker, applying the dominant purpose test.

269. Under the terms of the Consultancy Agreement the Claimant had the right, with the Council's prior approval, to substitute others to perform the services (clause 5.4). The Agreement was also stated not to be exclusive (clause 5.6). However, the reality was that the Claimant worked exclusively for the Respondents. It was plainly anticipated on both sides that she would be fully engaged over a six-month period. Significantly, there was no right on either side to terminate the agreement. The Claimant was integrated into the organisation, with her own workspace and a Birmingham City Council email address and landline phone number, though she was required to maintain professional indemnity insurance. Until the dispute arose, she

regularly attended Council and Trust meetings as an integrated member of the shadow Trust team and she contributed her thoughts and ideas freely. The hearing bundle evidences that the Claimant was communicating with others widely across the Council and the Trust as a fully integrated part of the organisation. Although the Claimant was under-utilised towards the end of the engagement, she continued to make herself available and the Council continued to pay her daily fee regardless of whether she was fully engaged or work was available for her to do. That evidences mutuality of obligation. Whilst the potential right of substitution points against mutuality of obligation, section 43K(1)(b) of the Employment Rights Act 1996 disapplies the requirement for personal service.

270. Whistleblowing legislation provides protection for those who make qualifying disclosures. A 'qualifying disclosure' is defined at Section 43B of the Employment Rights Act 1996 as:

> "…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,
>
> (f) that information tending to show any matter failing within any one of the preceding paragraphs has been, is being, or is likely to be deliberately concealed."

271. A whistleblower's belief is inevitably subjective, it must be found by the Tribunal to be objectively reasonable. The fact that a belief turns out to be wrong is not sufficient in itself to render the belief unreasonable, as in Babula v Waltham Forest College [2007] EWCA Civ 174.

272. The words 'the reasonable belief' provide a filter for what would otherwise be a fairly low threshold. In Korashi v Abertawe Bro Morgannwg University Local Health Board UK EAT/0424/09, the EAT said this requires consideration of the personal circumstances facing the relevant person at the time. A whistleblower who says that something tends to show a breach of duty is required to demonstrate that such belief is reasonable. What is reasonable in s.43B involves an objective standard and its application to the personal circumstances of the discloser. Many whistleblowers are insiders. Since the test is their 'reasonable' belief, that belief must be subject to what a person in their position would reasonably believe to be wrongdoing.

273. During our discussions we took some time to review the whistleblowing statement that the Claimant submitted to the Council's Whistleblowing Team. We were struck by the more measured tone of the statement, in marked contrast to how the Claimant was communicating with Ms Hewins at this time. In certain respects, it continued and sought to escalate her grievances in relation to Ms Ellis. However, that does not preclude the disclosure from being a disclosure in the public interest. She is not required to demonstrate that she acted in good faith. We have referred elsewhere in

this Judgment to the Claimant's loss of perspective and objectivity. Nevertheless, over eight pages, the Claimant set out clearly and logically why she believed the Council to be in breach of its obligations under the TUPE Regulations to inform and consult its employees and/or their elected representatives on the measures envisaged to be taken by the Trust. She also alleged that during the consultation session on 19 September 2017 an untrue statement had been made that the Council had not received the Trust's intended measures. It is irrelevant whether this Tribunal would or might have come to the same conclusion as the Claimant. In spite of our observations elsewhere in this Judgment, we are satisfied, looked at objectively, that the Claimant did genuinely and reasonably believe that the Council was failing to discharge its obligations under the TUPE Regulations and, further, that it was in the public interest that she bring this to the attention of the Whistleblowing Team. We have given careful consideration to what legal advice was available at the time the disclosure was made. We do not know whether the Council's Legal Department gave advice in the matter, but if it did there is no evidence that this was shared with the Claimant. As far as we are aware Burges Salmon did not confirm their advice in writing. The only available record of their advice is in the Claimant's email to Mr Couldrick, Mr Harrison and Mr Gibbons on 15 September 2017 (page 582), and at paragraphs 12 and 13 of her whistleblowing statement (page 559). These do not evidence that Burges Salmon had advised that there was no need for the relevant paragraph to have been included in the draft measures letter. Instead, they evidence that Burges Salmon advised as to the most appropriate course of action in light of the fact the paragraph had been omitted from the measures letter. In other words, they were advising as to what should be done rather than necessarily offering a particular view as to what had been done, certainly by the Council. The fact they were endorsing Mr Couldrick's proposal that, for want of a better expression, the 'fifth measure' could be dealt with in the SDC process, does not alter that the Claimant reasonably believed that it should properly have featured in the Council's measures letter. At paragraph 12 of the whistleblowing statement, the Claimant noted Burges Salmon's advice that the Trust could be said to have discharged its obligations (under regulation 13(4) of the TUPE Regulations). However, the Claimant's disclosure statement is clear that her disclosure related to the Council's alleged breaches rather than the actions of the Trust. In concluding that the Claimant reasonably believed the disclosure tended to show a failure to comply with a relevant legal duty, we take into account that Mr Couldrick and Ms Ellis had, of course, engaged in a debate on the issue in September 2017; the fact of that debate recognised that there were legitimate opposing views on the issue.

274. Section 47B gives workers the right not to be subjected to a detriment 'by any act, or by any deliberate failure to act'. Whilst a deliberate failure to act necessitates a conscious choice, section 48(4)(b) identifies two limited circumstances in which an employer can be taken to have deliberately failed to act despite the absence of any identifiable conscious decision not to act; namely, where a deliberate decision can be inferred from the employer's other actions or from prolonged indecision. Any alleged deliberate failure to

act must be viewed in the context of the relationship between the parties, which involves a consideration of any contractual powers, duties and discretions.

275. An organisation's failure to investigate, or excessive delays in investigating, a protected disclosure is capable of amounting to a detriment. We conclude that the Council's failure to investigate in this case was a detriment. However, section 47B of the Employment Rights Act 1996 will only be infringed if the protected disclosure materially influences (in a sense of being more than a trivial influence) the employer's treatment of the whistleblower: Fecitt v NHS Manchester [2012] ICR 372. In the case of a failure to deal with a protected disclosure, simple incompetence in dealing with matters promptly may be an effective defence.

276. Where the whistleblower is subject to a detriment without being at fault in any way, the Tribunals will need to look with a critical – indeed sceptical – eye to see whether the innocent explanation by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of a protected disclosure and it cries out for an explanation from the employer.

277. We remind ourselves that in any detriment claim under Part V of the Employment Rights Act 1996, it is for the employer to show the ground on which any act, or deliberate failure to act, was done. However, it is not sufficient for a claimant to simply assert that they have been subjected to a detriment. Claimants must establish the necessary elements of a claim on the balance of probabilities, namely that there was a protected disclosure, there was a detriment and that the respondent subjected the claimant to that detriment. Only then will the burden shift to the respondent to prove that the worker was not subjected to the detriment on the grounds that she made the protected disclosure.

278. Once an employer satisfies the Tribunal that it has acted for a particular reason, that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the Tribunal considers that the reason given is false (whether consciously or unconsciously) or that the Tribunal is being given something less than the whole story, that it is legitimate to infer detriment in accordance with the principles in Igen Ltd. v Wong. That question is essentially one of fact for the employment tribunal. The issue is not whether that reason was a good reason but whether it was genuine.

279. The Claimant's various complaints that she was subjected to detriments by Mr Gibbons, Couldrick, Mr Harrison, Ms Ellis, Ms Hewins, Ms Husler and Mr Featherstone are not well founded and do not succeed. At all material times they were unaware that the Claimant had made a protected disclosure.

280. As regards the complaints at paragraphs A.1(cc) and (dd) of her List of Issues, we conclude that the Claimant has established the necessary

elements of a claim in relation to the First Respondent, namely that she made a protected disclosure, she suffered a detriment and the First Respondent subjected her to that detriment. The Respondents' witnesses alluded to the challenges facing the Council and, of course, the Trust was established precisely because the Council's Children's services were adjudged to be inadequate. However, the First Respondent has not put forward any explanation or evidence as to why it did not progress her disclosure. We can speculate as to whether this was as a result of incompetence on its part. However, ultimately we can only come to a judgment on the strength of the evidence available to us rather than by a process of speculation. The limited available evidence does not in fact support that the First Respondent was incompetent in its handling of the Claimant's disclosure. On the contrary, the Claimant's initial response on 24 October 2017 was thorough and professional. In its subsequent emails it confirmed that arrangements were being made to appoint an independent investigator. The last communication from the Whistleblowing Team seems to have been on 15 November 2017. It is not strictly necessary for us to decide whether there was an identifiable conscious decision not to act on the Claimant's disclosure. Under section 48(4)(b) of the Employment Rights Act 1996 a deliberate decision not to act can be inferred from an employer's other actions or from prolonged indecision. Mr Couldrick's evidence was that in April 2018 he and Mr Harrison received an email request from the Council's Whistleblowing Team to meet the fees of an investigation. In our judgment they reasonably declined to do so as the disclosure had been made to the Council and related to its alleged breach of its legal obligations. If the Council were only dealing with the matter some five months after their last communication with the Claimant, that is evidence of inordinate delay and prolonged indecision on its part. The reasonable inference is that they had previously decided not to take the complaint forward and were only prompted to take further action on the disclosure because the Claimant subsequently brought a claim in the Employment Tribunals for detrimental treatment as a whistleblower.

281. Although the Council's request in April 2018 indicates that it was willing to re-open the matter of the Claimant's disclosure, we infer that it had resolved some time in 2017 not to progress the matter. As Ms Hodgetts herself rightly identified in her written submissions, the detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of a protected disclosure and it cries out for an explanation from the employer. The Claimant does not forfeit her rights and protections under whistleblowing legislation because she was, in other respects, a conflictual individual or because we have formed an adverse view of her evidence in these proceedings. We are critical of the Claimant in many respects, but the First Respondent's failure to investigate and come to a conclusion on her disclosure does cry out for an explanation, yet none has been provided. Ms Hodgetts may have had a point when she asked the Claimant during cross examination why a designated whistleblowing team would subject a complainant to detrimental treatment given that its purpose and remit is to investigate such matters. However, that assumes that the Whistleblowing Team had not escalated the matter

within the Council. Ultimately, it is not for the Claimant to explain or make sense of the First Respondent's failure to act on her disclosure. In our judgment, the burden in that regard has shifted to the First Respondent and it has failed to put forward any particular reason for acting/failing to act as it did. In the circumstances, we conclude that the First Respondent subjected the Claimant to detriment by its failure to investigate and reach a conclusion on her protected disclosure, and it did so on the ground that she had made a protected disclosure.

282. This case will be listed for a remedy hearing. Notice of that hearing together with any case management orders will be notified to the parties separately.

Employment Judge Tynan

Date: 08/10/19