EMPLOYMENT TRIBUNALS

Claimants:	**1. Miss C Southwell ("CS")** **2. Mrs A Monk ("AM")**
Respondent:	**Dudley Metropolitan Borough Council**
Heard at:	**Birmingham**
On:	**12, 13, 14, 15, 16 & 19 September and (in chambers) 7 October 2022**
Before:	**Employment Judge Flood** **Mr P Davis** **Mrs W Ellis**

Representation

Claimant:	In person
Respondent:	Mr Baran (Counsel)

RESERVED JUDGMENT

The complaints against the respondent of unfair dismissal (contrary to sections 94, 100 & 103A Employment Rights Act 1996 ("ERA")), wrongful dismissal (notice pay); detriment on the grounds of having made a protected disclosure (contrary to sections 47B and 48 ERA); detriment on the grounds of having raised health and safety concerns (contrary to sections 44 and 48 ERA); direct discrimination on the grounds of race (in respect of the first claimant) and disability (in respect of the second claimant) (contrary to ss 13 of the Equality Act 2010 ("EQA")) do not succeed and are dismissed.

REASONS

The Complaints and preliminary matters

1. By claim forms presented on 31 March 2021, the claimants brought complaints of unfair dismissal (both 'ordinary' unfair dismissal and automatically unfair dismissal on the grounds of making a protected disclosure/raising a health and safety concern); breach of contract (notice pay); unlawful detriment on the grounds of making a protected disclosure/raising a health and safety concern,

direct race discrimination (in the case of CS) and direct disability discrimination (in respect of AM).

2. There was a preliminary hearing for case management before Employment Judge Coghlin on 1 September 2021 where the issues were identified and recorded. At this hearing both claimants were ordered to provide details of the occasions when they raised health and safety concerns. CS provided these (set out at page C33-34). AM did not provide any further details. An agreed bundle of documents was produced for the hearing and where page numbers are referred to below, these are references to page numbers in the bundle. We also had a Chronology prepared by the respondent.

3. The list of issues was set out at pages B20-B23. Changes were subsequently made to that list of issues when CS produced further details as above and an updated list of issues was produced. At the outset of the hearing Mr Baran confirmed that the respondent accepted that CS had made qualifying protected disclosures from March 2020 onwards, before the respondent made the decision to reduce hours with effect from 31 October 2020. It did not accept that such disclosures were made by AM and was of the view that AM had still failed to set out clearly when she said she made protected disclosures. AM was ordered to provid a list of the occasions when she said health and safety concerns were raised by 4pm on the first day, so that these could be considered by the respondent and would be clear by the time the Tribunal started to hear live evidence the following day. AM sent a document by e mail as ordered and Mr Baran confirmed on the morning of Day 2 that the respondent did not accept that any of the instances set out amounted to protected disclosures so this was still a live issue for the Tribunal to determine.

4. The respondent accepted that the claimants raised health and safety concern. However it was still in issue whether the requirements of section 44 ERA had been met, given that the respondent did have an appointed health and safety representative.

5. Mr Baran informed the Tribunal on the first day, that one of the respondent's planned witnesses, Mrs W Grizzle ("WG"), Service Manager at the respondent, would not be attending to give evidence due to absence from work. He did not seek a postponement of the hearing and invited the Tribunal to admit her unsworn statement, giving the weight that it felt was appropriate to it. The claimants were concerned about the absence of this witness and the Tribunal informed them that they could make an application for a witness order to require her attendance although it was likely that this would involve the hearing being postponed. No such application was made. The statement was admitted as a written unsworn document and was treated as such by the Tribunal.

6. There was also some discussion about requests that had been made by CS for information from the respondent. It was acknowledged that much of this information related to the period after March 2021 when the claim form was submitted. The respondent contended that this was of little relevance. CS stated that this was to show that the issues she was having and concerns being raised were still taking place in the workplace. In particular this related to an incident in October 2021 when CS says that a service user presented with Covid 19 symptoms and was allowed to stay on the premises. CS referred to

a conversation she had with Mr K Carter ("KC") of the respondent at this time and comments he made about things that had happened in the past. As KC attended as a witness, the claimant had the opportunity to ask him questions in cross examination about any such conversations to the extent that they were relevant to the issues the Tribunal had to decide.

7. During the cross examination of one of the witnesses, Ms J Locke ("JL"), an issue arose as to whether all the e mails sent by JL in August 2020 had been disclosed and CS said she was concerned that information was being deliberately withheld. All relevant e mails were then voluntarily disclosed by the respondent on 15 September 2022 (with an apology for the error in not disclosing such e mails earlier) and we have referred to the information contained in such e mails in our findings of fact below. Given the content of those e mails we did not consider that any deliberate withholding of disclosure was taking place but we were grateful to have the full context of e mails sent at this time which provided some clarity about which individuals were copied into which e mails at the relevant time. The claimants were given the opportunity to apply to have JL recalled to answer questions about the new documents but decided that they would not make such an application

8. The issues to be determined by the Tribunal were as follows:

<u>List of Issues</u>

1. **Unfair dismissal**

1.1 Was the claimant dismissed?

1.2 What was the reason or principal reason for dismissal?

1.3 Was it because the claimant had made a protected disclosure or raised a health and safety concern in accordance with section 100 (1) (c) of the ERA? If so the dismissal is automatically unfair.

1.4 If not, was it a potentially fair reason? The reason relied on by the respondent is "some other substantial reason" namely a business reorganisation.

1.5 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

1.5.1 The respondent adequately warned and consulted the claimant;
1.5.2 The respondent adopted a reasonable selection decision, including its approach to a selection pool;
1.5.3 The respondent took reasonable steps to find the claimant suitable alternative employment; and
1.5.4 Dismissal was within the range of reasonable responses.

2. Wrongful dismissal / Notice pay

2.1 What was the claimant's notice period?

2.2 Was the claimant paid for that notice period?

2.3 If not, what loss has the claimant suffered by reason of the failure to give her contractual notice?

3. **Protected disclosure**

3.1 Did the claimant make one or more qualifying disclosures as defined in section 43B ERA? The Tribunal will decide:

3.1.1 What did the claimant say or write? When? To whom?

3.1.2 CS says she made disclosures on these occasions:

3.1.2.1 Emails of 17th March 2020, 11:54AM and 12:08PM
3.1.2.2 Email of 20th March 2020 12:17PM
3.1.2.3 Email of 23rd March 2020, 11:21AM
3.1.2.4 Email of 10th August 2020, 10:51AM
3.1.2.5 Email of 24th August 2020, 10:38AM
3.1.2.6 Protests raised on 10th September 2020
3.1.2.7 Email by union representative 15th September 2020 14:28PM reporting CS's concerns
3.1.2.8 Email by union representative 29th September 2020 reporting CS's concerns;

3.1.3 The respondent accepts that on these occasions, CS disclosed information which she reasonably believed was in the public interest and tended to show that the health or safety of any individual had been, was being or was likely to be endangered and so was a protected disclosure because it was made to the respondent.

3.1.4 AM says she made disclosures on these occasions:

3.1.4.1 Date 17th March 2020
N Griffiths ("NG") received an email stating that people with health conditions should not have contact so I asked if I fall into that category. She said that she would seek guidance but I didn't hear anything so I approached her again the same morning as I was anxious about my health she rolled her eyes at me and told me to go and sit in my car and ring 111 I was told by the 111 advisor to go home and shield.

3.1.4.2 June 23rd 2020

Email from KC stating centres are due to open but I'm unlikely to be able to return.

3.1.4.3 June 2020
Risk assessment completed by KC had to stay working from home. I sent my NHS shielding letter to WG which stated I need to shield. My union representative reminds them I need a new risk assessment due to being told to shield

3.1.4.4 9th September 2020
I received an email asking me to go into work saying they could update my risk assessment and cover tea time contacts, this went against government advice due to shielding and went against my risk assessment. I called NG and asked for the risk assessment to be done over the phone.

3.1.4.5 September 10th 2020

Email from NG saying she will call me at 10/00 am to go through risk assessment and she will be available to do my reintroduction at the work place the following day going against government guidelines. I wasn't supposed to have any face to face contacts with anybody unless it was in an emergency. I felt NG had little understanding of the consequences this could have to my health and felt she ignored Covid guidelines.

3.1.4.6 December 2020
Occupational health call to arrange face to face appointment in Birmingham due my disability and then being in tier 4 restrictions they advise a telephone appointment would be better but they would need my management to agree.

3.1.4.7 January 2021
I call KC to chase my appointment he is unsupportive and says I should have got a taxi to the appointment I feel all the above demonstrates my management team despite knowing all about covid and the risks were prepared to put the service needs over my health and ignored government advice and guidelines.;

3.1.5 Did she disclose information?
3.1.6 Did she believe the disclosure of information was made in the public interest?
3.1.7 Was that belief reasonable?

3.1.8 Did she believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered;

3.1.9 Was that belief reasonable?

3.1.10 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

4. Health and Safety Disclosures

4.1 Did the claimant bring to the respondent's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety?

4.2 Was the claimant employed at a place where there was no representative of workers on matters of health and safety at work or no safety committee? If not, was it not reasonably practicable for the claimant to raise matters by those means?

5. **Detriment (Employment Rights Act 1996 section 48)**

5.1 Did the respondent do the following things:

5.1.1 In late October 2020 reduce CS and AM's hours from 30 to 18 per week?

5.1.2 Thereafter and up to 31st March 2021 (the date of the ET1) did R fail to offer CS and/or AM additional hours or alternative positions?

5.1.3 Make a remark to D Todd ("DT") that CS and AM did not deserve 30 hour contracts for sitting at home?

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

5.3 If so, was it done on the ground that she made a protected disclosure / raised a health and safety concern?

6. **Direct discrimination (Equality Act 2010 section 13)**

6.1 Did the respondent do the following things:

6.1.1 In late October 2020 reduce CS and AM's hours from 30 to 18 per week?

6.1.2 Thereafter and up to 31st March 2021 (the date of the ET1) did the respondent fail to offer CS and/or AM additional hours or alternative positions?

6.1.3 Make a remark to DT that CS and AM did not deserve 30 hour contracts for sitting at home?

6.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

Each claimant says s/he was treated worse than DT and B Harwood ("BH")who are both white and not disabled.

6.3 If so, was a material reason for that less favourable treatment:

6.3.1 In the case of CS race? CS describes her own race as mixed White/Black African Carribbean.

6.3.2 In the case of AM, disability?

6.4 Did this treatment amount to a detriment?

7. Remedy

NB: Some of these elements of remedy apply only if the claimant succeeds with a particular kind of claim (for example the remedies of reinstatement and re-engagement only apply in the case of unfair dismissal).

7.1 Should the tribunal order that she be reinstated and/or re-engaged and if so on what terms?

7.2 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

7.3 What financial losses has the discrimination caused the claimant?

7.4 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.5 If not, for what period of loss should the claimant be compensated?

7.6 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

7.7 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

7.8 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.9 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.10 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

7.11 If so is it just and equitable to increase or decrease any award payable to the claimant?

7.12 By what proportion, up to 25%?

7.13 Should interest be awarded? How much?

7.14 (Whistleblowing only) Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

8. Unauthorised deductions

8.1 Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?

Findings of Fact

9. The claimants both attended to give evidence by CVP video link. The claimants also called Mr P Quigley ("PQ"), their trade union representative and employee of the respondent who was giving evidence in a personal capacity and submitted a written witness statement from Mr K Whiting ("KW"), a former colleague who did not attend as the respondent confirmed it had no questions to ask him. JL, Principal Health and Safety Officer, NG, Senior Family Time Coordinator at the relevant time, KC, Senior Coordinator, Connecting Families and Ms A Stone ("AS""), Service Director, all of the respondent gave evidence for the respondent. Two witness statements had been prepared by Ms E Wilkes ("EW"), Connecting Families and Home Linking Team Manager at the respondent but the respondent chose not to call this witness. We also heard from DT, Contact Worker at the respondent who attended subject to a Witness Order and was asked questions by both parties and the Tribunal. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to questioning from the Tribunal. We considered the ET1 and the ET3 together with relevant numbered documents referred to below that were pointed out to us in the Bundle.

10. In order to determine the issues set out above, it was not necessary to make detailed findings on all the matters heard in evidence. We have made findings not only on allegations made as specific discrimination complaints but on other relevant matters raised as background. These findings may be relevant to drawing inferences and conclusions. We made the following findings of fact:

10.1. Both claimants are employed by the respondent as Contact Workers in its Connecting Families team, which is part of the Children's Services provision. They worked primarily from two premises, in Brierley Hill and Blowers Green, and run and supervise family contact visits for looked after children in the borough. This involves holding contact sessions and then writing reports about each session for reference by by social workers, parents, courts and other professionals. The Connecting Families team and management structure changed frequently during the period in question and appeared to be under constant review from a budgetary and staffing perspective. In addition to Contact Workers (like the claimants, DT, KW and (at least initially) BH) the respondent employed Senior Co-ordinators one level up in the structure ("Seniors") whose role is to co-ordinate and manage the sessions conducted by the Contact Workers and run the day to day service (KC and NG were both Seniors at the relevant time as was Ms E Burke ("EB") and later BH). There is then a team manager one level above. This role had been carried out by a manager called J Heath ("JH") until 2018 and then was largely vacant until EW took on the position in March 2021. Above this role was the Service Manager (which role had been carried out by Mr P Tomlinson ("PT"), later Mr J Shaw ("JS") and then WG). The Service Managers reported to a Head of Service (which was Ms H Henderson ("HH") at the relevant time of her involvement, who was one of 3 Heads of Service who ultimately reported to a Service Director (AS at the relevant time). CS had been employed since 8 September 2018 and AM since 12 December 1994 and had clean employment records. CS is mixed race, White/African Caribbean. AM has a number of health conditions (see para 10.13 below) and at all relevant times was a disabled person for the purposes of section 6 EQA.

10.2. Both claimants had initially been employed on a 'zero hours' contract but had their working hours increased to 15 per week with effect from 1 September 2016 (with internal paperwork implementing this change at pages C55-C67). CS's most recent contract of employment was shown at pages C42-C48. AM's current contract of employment was shown at pages C34-C41. Both contracts were issued on 3 October 2016. They set out both claimant's working hours at clause 2 as "*15.0 per week*" and made further reference to clause 7 which stated:

"Hours of Work
Your normal working week and work/shift pattern will be confirmed by your line manager and will vary dependent upon the needs of the Service/Centre. The Council reserves the right to vary your working pattern following consultation with you and by giving reasonable notice.
The provisions of the Council's Flexible Working Scheme Policy and Procedure apply where an arrangement of flexible working hours exists. Line managers will ensure that there is no detriment to efficiency and service delivery due to the operation of the Scheme, and that adequate

staffing cover is maintained.
You may be requested to work hours in addition to those specified in Clause 2 of this Principal Statement. Where this is agreed by your line manager, you will be remunerated in accordance with the relevant Council policy."

10.3. In November 2017, AM agreed with the respondent to increase her weekly working hours to 18 per week and at page C69 we saw the letter that was sent to AM confirming this change. This stated as follows:

*"**Permanent Change in Hours***

I am writing to confirm that with effect from 01/11/2017 your hours of work will change to 18 hours per week.

This is a permanent change to your terms and conditions of employment. All other terms and conditions of employment remain the same."

and further,

"As a result of this contractual change and taking into account current pension legislation, if you are not already a member of an occupational pension scheme, you may meet the criteria to now automatically be enrolled into one. if this situation arises you will be notified by the HR Transactional team. You do have the right to decide not to join the Scheme if this situation applies.

By receipt of this correspondence you are signifying your understanding and acceptance of this variation to your contract of employment. You should keep this for your records. If you have any queries regarding these changes please contact your line manager."

10.4. CS's hours were increased to 18 hours per week with effect from 9 July 2018. At page C85, we saw an e mail from P Tomlinson, the Service Manager at that time to CS on 5 July 2018 confirming the change, stating:

"In regards to our conversation this afternoon, thank you for confirming you are happy to increase your hour from 15hrs to 18hrs per week, to commence Monday 9th July 2018.

As I shared we will need to arrange for a contract variation to be completed by our HR team.

I have CC'd Jacqui and her seniors, so they are aware of your increased hours."

It is not clear if CS was ever issued with a change of hours letter as was sent to AM, but her increase in hours was implemented from this date.

10.5. Around the time of this change, there were a number of employee relations issues within the Connecting Families team with regards to hours and other matters which involved the previous Service Manager, JH, including allegations of bullying. We saw minutes of a staff meeting held on 22 March

2018 (pages C77-C83) where various issues were raised including working hours, management style and behaviour and rules around taking holidays (pages C87-C93). We also saw minutes of a meeting attended by CS on 17 July 2018 where a grievance raised by JH was discussed. During that meeting there was a discussion about changes to hours in the past and difficulties with these changes. This also referenced a collective grievance raised against JH. CS and AM told the Tribunal that on 2 July 2018 they were both interviewed for a "new 30 hour contract" by JH along with other employees, but due to irregularities with the interview process, they and other staff were informed by their Senior, EB, that the interviews should never have taken place at all. It appears that an investigation was then commenced about this matter.

Increase in hours August 2018

10.6. Around this time, both claimants along with two other employees who had been interviewed in July 2018, BH and DT, were informed that their working hours would be increased to 30 hours on a temporary basis, which they agreed to. CS said that she and other staff *"were told this was temporary while the investigation was underway but not to worry because there were plenty of hours & they didn't think they would need reducing".* AM said that she was informed that the interviews should not have taken place and that the respondent *"would give everybody who attended a 30 hr contract while the investigation was under way"* and that she was *"reassured by my seniors that I had nothing to worry about the contracts were safe".* We accepted the evidence of both claimants on these matters. It is clear that there was a degree of confusion in the workplace at this time around these interviews and the outcomes of them. The claimants and others were routinely working beyond the 18 hours they were contracted to work as the service was busy. We find that the claimants were informed that increase to their working hours to 30 hours per week was on a temporary basis pending the outcome of the service review and understood that this was linked to the investigation into what had taken place with interviews held by JH. We also find that the claimants were informed verbally that their hours were not likely to be reduced at that time (presumably because the service was busy and hours were available). The claimants may have understood this to be some form of promise or guarantee of working hours, but our finding was that it was an indication of the hours that were likely to be available rather than anything more concrete at this time.

10.7. Following the discussions around increase to working hours, the claimants were both sent a letter confirming the change (pages C101 and C106). The letter sent to each claimant was almost identical and stated the following:

*"**Temporary Change in Hours***

I am writing to confirm that with effect from 01/08/2018 your hours of work will temporarily change 30 hours per week until otherwise stated.

This is a temporary arrangement until 31/10/2018 and will be reviewed prior to its end date.
All other terms and conditions of employment remain unchanged

Please log on to employee self service to review your revised annual leave entitlement for the current financial year.
As a result of this contractual change and taking into account current pension legislation, if you are not already a member of an occupational pension scheme, you may meet the criteria to now: automatically be enrolled into one If this situation arises you will be notified by the HR Transactional team. You do have the right to decide not to join the Scheme if this situation applies.
By receipt of this correspondence you are signifying your understanding and acceptance of this variation to your contract of employment. You should keep this for your records if you have any queries regarding these changes please contact your line manager"

Neither of the claimants recall receiving these letters. However we saw an email from HR Transactions to CS on 14 August 2018 attaching this letter (page C100) which referred to the "*temporary change in hours attached*". There was a copy of a further e mail sent to AM on 8 August 2018 from HR Transactions attaching the "*confirmation letter*" (page C105). We were satisfied that the claimants were sent and received these letters.

10.8. We also saw a Change in Hours form completed on 14 August 2020 by B Poxon (page C94) for CS which had "*TEMP INC 15-30 hrs 1.8.18*" written on it. There was also a screen shot from the respondent's HR system showing the implementation of this change to CS at page C98 which in the box for 'Contractual Hours' showed '30.0' and for the drop down box for 'Change Reason' showed 'Change in Hours – Temporary'.

10.9. We find that at the time of the change in August 2018 the respondents and claimants agreed, and both claimants knew, that the increase of their working hours from 18 to 30 was being done on a temporary basis, 'until otherwise stated'. The initial period of increase was until a fixed end date, namely 31 October 2018. The letters sent to the claimants were headed "*Temporary Change in Hours*" and stated that the arrangement would "*temporarily change 30 hours per week until otherwise stated*" and would "*last until 31 October 2018 and will be reviewed prior to its end date*". The form of letter used although very similar to the one sent to AM when her hours were changed back in 2017 differed in terms of the heading used, which indicated that this was a 'Temporary' change in hours, rather than the previous heading indicating a 'Permanent' change. We were directed to a notes of a supervision held with AM with NG on 2 August 2018 which noted that *"[AM] is pleased to have received a temporary increase in her hours".*

10.10. The service remained very busy with the staff working these increased hours (and sometimes more by way of overtime). On 4 October 2018, an e mail was sent to staff asking them whether they would be prepared to offer availability to work to allow the contact centres to open later (page C110). A further supervision record with AM and NG noted a discussion about the increased hours at page C114 as follows:

"[AM] advises she is loving having the 30 hrs at the moment, advised [AM] we are waiting confirmation from senior management in regards to

extending the 30hrs for a further 3 months – [AM] say this has taken much of her stresses away"

There was also an exchange of e mails between NG, KC and senior management about the extension of the 30hrs increase in hours at pages C117-C120. On 15 October 2018, NG e mailed the impacted staff (including the claimants) to inform them, noting:

"I have received confirmation that the temporary increase to 30hrs is being extended for a further 3months. [EB] is contacting HR to confirm."

Other than this e mail to staff, no further communication took place in writing around this temporary increase in hours or how long it would go on for. The claimants were not issued with any further letters, nor did we see any written confirmation about the status of these temporary increases or how long they were expected to last. This was highly unfortunate and had this been picked up correctly, some of the issues that subsequently came to light may have been able to have been avoided.

10.11. NG and KC gave evidence that this process of extension of the additional hours for a short term period continued after this point. We accepted their evidence that the contracts were extended on a rolling basis, at intervals of between 3 and 6 months with approval being received from the Service Manager and the relevant end date being extended on the respondent's HR system (PIMMS) to ensure that the employees continued to be paid for working the increased hours. At page C126-127, we saw in a note of a supervision held between AM and NG on 23 January 2019 again reference to the *"temporary increase of 30hrs, this is continuing at the moment until the end of March".* However this supervision also notes that the claimant raised the issue about the continuation of her hours where it notes as follows:

"AM states that she has seeked advice and that as she had been doing 30hrs for more than 26 weeks then she is automatically entitled to keep this contract, explained to AM I will have to see clarification from senior management."

It is clear that AM at least is under the impression in January 2019 that her 30 hours has become permanent, but no indication is given that this is the case from NG at least in this meeting. It does not appear that anything was fed back to AM in response to this question being raised.

10.12. Both claimants acknowledge that no manager told them expressly at any stage that the increase in hours was, or had become, a permanent change to their contract and similarly no manager told them expressly that it was not a permanent change. Both claimants talked about being reassured that their hours were "safe" and we accept that they were under the impression that the hours would continue. The claimants and other staff continued to work at least 30 hours per week and in many cases worked more than this. We saw an e mail from CS on 13 February 2019 informing NG and KC that she no longer wanted to work more than 30 hours (page C123a). It is also clear that as at 30 July 2019 the arrangement was still in place, as we saw

minutes of a staff meeting held on this date at page C138-C139 where it is noted:

"*Contracts – Iona confirmed that the staff who have agreed to additional hours will have the contracts renewed on a rolling basis until either staff want to request changes or it is established what the Contact Team service will be going forward*."

CS was not present at this particular meeting as she had been off sick between 13 May and 21 October 2019 and AM was also off sick from 29 April until 5 August 2019. Whilst off sick, both were paid sick pay based on a 30 hour working week. The service remained busy throughout this time. We did not see any further supervision notes which indicated that the increase in hours was discussed further.

AM health issues

10.13. AM had a number of health issues during this period. She was diagnosed with Parkinson's disease in 2017. She recounted a conversation she had with KC just after her diagnosis where he asked her whether she would put this on Facebook (which upset her) and also said that she was prevented from driving because HR had googled the side effects of medication she mentioned she had been prescribed. AM felt very upset about the way she felt she had been treated since becoming ill. Ultimately these allegations are not part of the claim before the Tribunal so we have not considered them further but it is clear that AM has a very strong perception of being treated unfairly (she says cruelly) since she has been ill. At page C135 we saw an occupational health report dated 29 May 2019 which set out some of the detail around AM's health. This reported noted that she was suffering from Femoral Osteoarthritis, Fibromyalgia, Type 2 Diabetes, Hypertension, Asthma and that she had been diagnosed with Parkinson's disease (although that condition was described as stable at the time). It also referred to the claimant having suffered from periods of Depression. The report went on to recommend adjustments to working practices (primarily it seems related to her Osteoarthritis symptoms) including that she should try to avoid activities with prolonged periods of walking and should try and avoid carrying children over the age of 1 (but could still carry younger children). It also recommended an ergonomic assessment be carried out and that a car parking space be provided nearby. In October 2019 some of the adjustments appeared to be in place and during a supervision with NG on 4 October 2019 (notes at pages C144-C145). This notes:

"AM does not have many contacts to cover for babies due to carrying, advise AM that she needs to be asking carers and staff to support her with carrying as sometimes we have no choice but to allocate these contacts or AM would have no work -— AM understands this."

This supervision also notes discussion of workload and concerns being raised by AM, namely:

"AM finding her workload ok as she is only doing 30hrs. AM worries that HR are trying to get rid of her, I explain to AM that we have implemented the

adjustments as part of the Occ health recommendation and we will review this to see how this suits AM's needs and the service - AM says she understands."

AM also reported to NG during this meeting that she was feeling down and worrying about financial problems, that she had been to the doctor about a trapped nerve in her back and she was not sleeping well. She also mentioned seeking OH support as she was struggling to get in and out of the bath. She mentioned attending counselling and a diabetes course.

10.14. In January 2020, KC was off sick for surgery (and remained on long term sick until July 2020) and on 31 January 2020 NG e mailed staff (page C155-156) to see if they would like to apply to "*act up into the senior role temporarily*" to cover his absence. The e mail noted that the applicant had to cover 37 hours per week and be on duty on alternate Saturdays. The claimants were included in this message but neither applied for this position. BH applied for and took up this act up Senior role.

10.15. By January 2020, it appears that the duties that AM was carrying out were still different from her full duties. She was not doing any contact sessions with families. At page C160 on 14 February 2020, PQ wrote to the then service manager about a meeting that had been due to take place about the claimant's work and duties which referenced that AM felt she had "*been prevented from carrying out her job for reasons that she does not understand*". AM became concerned about not carrying out full contacts and instead spending her time in the centres cleaning and tidying. AM explained that during this time, she did what was asked of her and was completing and being paid for 30 hours of work, although was not carrying out her usual duties. There was some correspondence about this issue between PQ and the respondent's managers during February and early March 2020. The claimant had also previously raised a grievance about how her absence was being treated in terms of counting to her Bradford score and being used in the absence management process.

10.16. A meeting took place attended by AM and PQ with NG and a HR advisor on 9 March 2020 (minutes shown at pages C192-198). During this meeting AM's various health conditions were discussed and it was pointed out by PQ that her Parkinson's put her at risk of other infections. AM's absence record was discussed and whether all previous absences would count against her (as it was claimed that some of this was caused by bullying by a previous manager and some by her disabilities). PQ raised that AM felt discriminated against and victimised as she was unable to carry out her full duties. NG made the point that there was a safeguarding issue as the respondent was concerned that an injury would be caused if AM was unable to carry a child. AM was informed at the meeting that occupational health advice would now be sought and in the meantime, she should continue with her reduced duties. The claimant stated that she felt she was being "*stopped from doing her job*" and that if she were to be cleaning for 6 hours each day it would be boring. AM also raised a complaint that she was being stopped from doing overtime. NG informed her and PQ that AM was not being stopped from doing overtime and had done 7 hours the previous month, but stated that AM was struggling to fulfill her current duties and it

was difficult to fill 30 hours of time with the claimant's adjusted duties. NG suggested that AM could do some training or admin. The claimant was then referred for another occupational health appointment on 10 March 2020 (see page C182). PQ wrote on 13 March 2020 to NG complaining about some of the matters that had been included in that referral and asking for a meeting to discuss this issue (page C179). The complaints centered on inaccurate information being sent to the occupational health providers. There was further correspondence other matters discussed in the meeting during April and May 2020 with a response was provided on 3 June 2020 about which absence would be counted towards AM's Bradford score (page C210). It is clear that even before the onset of the Covid 19 pandemic, AM was having difficulties at work and had enlisted the assistance of PQ to represent her. The matters which PQ was raising at this time were not part of the claim before the Tribunal and it appears that some of the matters being complained about were still causing AM concerns to present. However we have only considered the matters raised to the extent that they were able to assist the Tribunal in determining the complaints before it in this claim.

Covid 19 concerns 2020

10.17. In March 2020, the respondent like many other employers was starting to consider the impact that the onset of Covid 19 might have on the service. At page C181a we saw an e mail circulated around various managers headed "*Contact and Corona*" on 16 March 2020 which stated that the current view was that whilst schools remained open, then contact should go ahead as normal and that this would be reviewed if schools closed. This was forwarded to NG on 17 March 2020 by J Gregory, a Service Manager (page C181d) stating that this was a "*moving picture*". NG responded later that day setting out what the centre was doing regarding any child or parent who attending presenting with symptoms and asking for advice as to what would be done if the country went into lockdown. Advice was circulated by the Interim Head of Children in Care and Placement Resources, Mr A Osei later that morning (page C181h) and this was forwarded to staff members (including both claimants) at 10.27 am on 17 March 2020 (page C181j). On that same day, AM asked NG what she should do and told the Tribunal that she felt concerned about her health but was still in work. AM said that NG told her to sit in her car and call 111 and rolled her eyes at AM making her feel like a burden. When AM spoke to 111 she was advised to go home and start shielding which she did and was later provided with a letter informing her to do so. We accepted this unchallenged evidence about what took place this day.

10.18. On 20 March 2020, CS sent an e mail to the then service manager, JS raising concerns and querying how she and staff generally were being safeguarded at work, when working at two different centres and coming into contact with many people (page C185). This was responded to by JS that day stating that guidance was being followed and that the service was classed as an 'essential service' and so would be maintained (page C186). After the weekend, on 23 March 2020, CS e mailed again (page C187) stating that she felt "*extremely vulnerable*" and that she disagreed that staff were safe at work. She raised the issue of lack of PPE and that she could

not safely distance and also said she would be e mailing her MP as she was "*scared that Dudley council are not taking this as seriously as it should be*". The claimant also e mailed her MP on this day informing him that she was "*concerned about my health and safety at work*" and setting out specific issues she was concerned about including working at different locations, in close proximity to many people, handling different items, lack of cleaning services and facilities and protective clothing. Later that evening the UK Prime Minister announced that the country would be going into full lockdown.

10.19. The service and the two centres the claimants worked at closed to the public on 24 March 2020. AM was shielding at this time and initially CS was at home. Both claimants continued to be paid 30 hours per week during that period of shutdown as did DT (who had been given the temporary increase in hours in 2018). BH at this time was acting up as a Senior and so was assigned 37 hours per week. Some of the service's activities continued during the first national lockdown. Some staff were able to carry out their duties by logging on from home and others were undertaking tasks such as delivering laptops to children in the area and making telephone calls. CS and AM were not able to undertake any of the work being carried out online as they did not have access to internet at home to allow this. At some point during her time shielding, AM was making telephone calls to support one of the young people the service worked with. Attempts were made to arrange for IT assistance, but notification of this was initially sent to the claimants' work e mail which they were unable to access, and this delayed their ability to work in this way. It was acknowledged by the claimants that this was a time of some uncertainty generally in the country and that there was not a great deal of guidance as to what should be done, particularly at the start of the pandemic. It was also acknowledged that there was a shortage of PPE available nationally.

10.20. The Covid 19 restrictions began to be eased in early June 2020 and the service started to consider how it could re-open. Both buildings were subject to a building risk assessment and had to be signed off following an assessment by JL, after which time she issued a Covid assurance notice. This was then updated on a regular basis. The risk assessment and quality assurance visit was carried out by JL on the Blowers Green site on 3 July 2020 and the certificate was issued as at 17 July 2020 (shown at pages C225af-bd). The quality assurance for the Brierley Hill site was carried out on 3 August 2020 with the notice being issued on 18 August 2020. JL visited all sites on a regular basis to check on compliance with Covid 19 safety protocols and to give advice. In addition individual staff risk assessments were being carried out, and we saw copies of paperwork completed in respect of both claimants in the bundle.

10.21. KC wrote to PQ about AM on 23 June 2020 (page C213) regarding a possible return to work of staff and in this e mail stated:

"*I have advised [AM] we are opening our centres on the 29th June however due to her underlying health conditions it is very unlikely she will be able to return at present.*"

AM sent an e mail to PQ on 25 June 2020 attaching a copy of a risk assessment template and stating to PQ that KC had asked her to fill it in. PQ then wrote to KC on 29 June 2020 on AM's behalf (e mail at page C220) asking why the claimant was being asked to complete the risk assessment herself, rather than this being done with the manager over the phone as originally planned. This e mail went on to ask whether any previous risk assessments had been done and queried what virtual arrangements had been made to discuss these matters with AM, as he understood had been done with other staff. KC explained in evidence that it was not the case that the claimant had been asked to complete her own risk assessment but had been asked to complete as much as it as possible in advance of an online meeting where it would be discussed. We accepted this explanation.

10.22. The centres reopened in part on 29 June 2020. A risk assessment was carried out in relation to CS on 1 July 2020 (see e mails between CS and KC at pages C224a-n). The risk assessment identified that CS was in a high risk category because she was from a Black Asian and Minority Ethnic (BAME) background. It noted that CS had concerns about working and noted control measures including guidance being given to staff and visitors, PPE being available, questions being asked about symptoms and processes for self-isolation being in place. It noted at page C224K:

"*It is understandable that [CS] has raised anxiety in particular as she has an increased risk being in the BAME category. Wherever possible virtual contact calls will be in place thus reducing the need for face to face contact. In the event of direct contact [CS] will be given a consistent family/ies to work with along with the same staff members thus keeping in the same social bubble."*

10.23. The respondent had also sent some communications about the increased risk of Covid 19 in BAME communities. Online engagement sessions were provided and updates were circulated to staff (see pages C215 and C226).

10.24. On 8 July 2020 sent an e mail to NG and KC (page C225ac) raising an issue about using a shared computer and suggesting she use her laptop. She also asked about the locking up process and cleaning the alarm keypad and door handles etc. and also shared use of pens. NG responded the same day and suggested some solutions also noting in her e mail (page 225ad):

"Thanks for your suggestions [CS], risk assessment review meetings will be held every Friday morning, so any thoughts/ideas are welcomed"

NG also forwarded this e mail on to JL asking for her advice (page C225ae). CS acknowledged in cross examination that the respondent was responsive to her input raised in this e mail. CS was back doing face to face contacts by 13 July 2020.

10.25. On 10 August 2020, CS wrote to JL by e mail (page C230-232) stating that she was e mailing JL direct as she would not be around when JL was due to visit (due to being on annual leave). In this email, CS stated:

"I'm very concerned how my workplace is operating and the measures put in place for covid 19".

The e mail went on to list various issues in particular that the staff and family bubbles that were supposed to be operating as noted in her risk assessment were not being adhered to. She also mentioned the size of rooms and lack of social distancing in contact rooms. JL responded on 11 August 2021 (see e mail at C234) stating that she had been working closely with the contact centre Seniors and was due to visit the following Monday to quality assure the risk assessment. She asked CS whether she was happy for her concerns to be shared to try and resolve some of the points raised. CS responded on 14 August 2020 (e mail at C235) stating that she was happy for this to be shared, stating that her managers were already aware of her concerns as she had spoken to them directly every week over the past 5/6 weeks and had contacted JL as her concerns were not being resolved. She stated that KC knew that CS would contact JL about this. Another employee, KW also e mailed KC, NG and JL listing his concerns about Covid compliance in advance of the planned visit of JL the following Monday (page 235a).

10.26. JL visited the contact centre on 17 August 2020 and carried out a review of the risk assessment making a number of changes to it to reflect issues that had arisen. On 18 August 2020 JL e mailed AS (copying NG, KC, S Ashton, JS and BH) with her suggested responses to each of the matters raised in the claimant's e mail shown in blue text (see pages C235f-j). AS advised JL to action in an e mail sent later that day (C235k). JL sent a further e mail to WG on 19 August 2022 asking whether WG was happy for JL to respond to the "*two staff at Blowers Green contact centre*" i.e. CS and KW (which was one of the e mails disclosed during the Tribunal hearing). WG replied to say that was "*great*" and it appeared that a conversation then took place as there was reference to this in a further e mail we saw. It is not clear what was discussed between JL and WG. Later that day, JL sent a response to the claimant (on 19 August 2020) with the responses to each matter raised by CS shown in blue text (pages C235l-o). She then sent a copy of her e mail to NG, KC, BH, JS and WG. JL stated in response to cross examination that she did not believe CS was malicious in raising concerns and that they were valid concerns which led to valid actions being put in place. She also stated that she felt that the control measures that were in place were being implemented as best the managers could, taking into account that some members of the public were not great at following the guidance and were desperate to see their children. JS was of the view that she and the respondent did all they reasonably could to protect employees. Ultimately given concessions made by the respondent, this was not a matter upon which the Tribunal was required to determine.

10.27. On 24 August 2020 CS e mailed AS to further raise her concerns and make a complaint about Covid 19 compliance (page C238-9). She stated that she felt her managers were not aware of what they needed to do to follow risk assessments and that the whole team were being put at risk. She complained about the failure to follow staff bubbles when putting the rota together and mentioned specific examples of problems she had

experienced. She stated that she felt her concerns were being ignored and that she was suffering from anxiety coming into work. AS was on annual leave at the time of the e mail but responded on 26 August 2020 (page C241) asking the claimant to refer her concerns to JS. The e mail was forwarded to JS and AS asked him to look into the issues raised by the claimant so that she could review matters on her return to work on 3 September 2020. JS responded to CS on 26 August 2020 asking her to meet over the phone or teams to discuss the concerns. He pointed out that as a frontline service, they needed to ensure contact continued but that this was challenging. It finished by noting *"It would be good to meet to discuss how you think improvements could be made and the things you have concerns about".* CS replied to this e mail on 28 August 2020 (page C242-3) stating that she would be happy to meet but that answers had still not been provided to her about why the risk assessments that had been carried out were not being followed and that rules were being broken. The claimant also stated that her rota and the building she was to work at had been changed in September and she had not received notice of this. She raised the issue of additional risk as a BAME member of staff and said that she would meet with him but would require PQ to accompany her.

10.28. CS further e mailed JL on 26 August 2020 from her personal e mail stating that "*even though you visited last week rules are still being broken*" and asked her to call CS on her mobile (page C241a). JL replied to this e mail on 2 September 2020 stating that she was *"unable to call*" the claimant as she had been told that *"the Unions are now involved, all communications must be done in a formal manner with them present".*

10.29. On 9 September 2020 NG e mailed AM asking her when she was available that week for her *"reintroduction into the workplace"* and stating that the respondent could update her risk assessment to reflect her returning to work when she returned (page C247). PQ responded to this on AM's behalf by an e mail sent on 11 September 2020. That e mail was to *"raise some issues"* in advance of the meeting that was due to take place. It went on to state:

The fixing of a time for [AM] to visit the centre this afternoon presupposes that the outcome of the risk assessment will be that this will be safe. Unless you have been able to use some other method of assessing risks, I would suggest that this undermines the integrity of the risk assessment process and therefore puts [AM]'s health and safety in jeopardy.

And further referred to an occupational health assessment completed in September which identified AM as at a "*very high vulnerability level*", pointing out that current government guidance advises that such individuals should work at home if possible. When asked in cross examination whether this was something that PQ was raising in relation to AM's personal health only and not in the general public interest, AM said that she believed these were matters not just affecting her health but dealt with the general set up of the respondents and affected other people as well as her, including the general public. We accepted this evidence. Following the sending of that e mail, the planned meeting was cancelled pending HR advice (page C249).

10.30. On 14 September 2020, CS had a conversation with KC where she reported to him that she felt that the Covid processes were not good enough and was concerned about contracting the virus and passing it to vulnerable family members. She mentioned an incident regarding a carer who the claimant had worked with who had subsequently tested positive. CS then became upset and informed KC that she was going on sick leave and left the building.

10.31. PQ told the Tribunal that in his role as Elected Workplace Steward for UNISON at the respondent and UNISON Health and Safety Representative at the respondent he had given advice and represented a number of employees about safety concerns in relation to the respondent's response to the pandemic. He said he was contacted by CS to raise issues on her behalf and on 15 September 2020 PQ e mailed WG, raising concerns on behalf of CS (C259). This stated that CS had *"serious concerns about flaws in the COVID security of the working environment and the protection of the safety of staff and clients".* It requested an urgent meeting to discuss the matter. WG responded the same day offering to meet CS but suggesting that the meeting take place without PQ "*given that she has not formally raised any concerns to myself*" (C261). It asked CS to contact WG to arrange a meeting. PQ responded on 16 September stating that CS had already raised concerns with line management over a number of weeks and felt that they had not been taken seriously. It also informed WG that CS had now gone off sick with stress. He pointed out that CS would still want to attend a meeting (with union support) and that the issues raised were not isolated to her but affected other employees.

Service Review

10.32. The Connecting Families service had been included within the respondent's Medium Term Financial Strategy (MTFS) in 2019 as needing to making savings over a three year period (see e mail at page C367). It had been identified that £250,000 savings would need to be made for 2021/22. WG took over the role of Service Manager on 31 October 2020 but had been working with JS the outgoing manager since August/September 2020. At pages C367-390 we were directed to a number of e mails between WG, JS, T Huntbach in the Financial Services team and J Mupombi. These emails outlined different options to try and reduce staffing costs and one made reference to x2 FTE being made up by additional hours from within the team on a temporary basis. CS suggested that this was a reference to the 2 positions carried out by her and AM and this showed an indication to remove them both. We do not find that this is what was referred to, rather this the more common usage of FTE meaning 'full time equivalent', referencing the total number of hours, rather than individual employees. At page C372 Mr Huntbach provides WG with the financial details to support three possible scenarios as to how to reduce costs, two of which involved reduction in the number of FTE hours for contact workers. This was also to take account that the team manager role (which had been vacant) had been re-graded as grade 11. It is clear that as part of these discussions the removal of the temporary hours given to the claimants and the other two employees were being considered. At page C377 there is an e mail which confirms how the additional hours had been

funded in the past with WG e mailing at C378 confirming that the respondent was not "*in the same fortunate financial position as 2 years ago*".

10.33. On 21 October 2020, WG sent an e mail to the claimants, BH and DT (page C267). The e mail stated as follows:

"I am aware that you are all completing extra hours as part of your temporary additional contracts.

At this a time, we will be reviewing the service requirements for the Contact Service, and as part of this review, we will be considering the need of the additional temporary contracts.

As a result of the review, we will come back you to on Monday 26th October with further details."

WG instructed KC to ensure this was sent to the claimants (who were both off at that time) and he sent this again (including copying it to CS personal e mail) on 23 October 20-20 (page C268). CS responded very shortly after to KC and asked him to clarify whether this meant that any additional hours over 30 were being reviewed or whether the 30 hours themselves were being reviewed (page C269). We did not see a response to this.

10.34. WG wrote to the claimants, BH and DT by a letter dated 27 October 2020 (pages C272 and C273) to inform them of the outcome of the service review. The letter stated as follows:

"**Temporary Additional Hours Contract**

I refer to the recent correspondence sent to you in which I advised you that I would be undertaking a review of the service including the need for the additional temporary hours that you are currently undertaking.

I have now carefully considered to the needs of the service at this time and the current service staffing budgets, and following discussions with HR, I can confirm that your additional temporary hours will be ended on 31st October 2020.

Further considerations will now be given to the future service provisions in consultation with the Service Director for Children's Social Care, and the new incoming Head of Children in Care, and also the relevant Accountant and HR Services.

Can I take this time to thank you all for all your hard-work and support of the Contact Service, whilst you have been working the additional hours."

10.35. We also heard about a telephone conversation between WG and DT which took place on 27 October 2020. CS gave evidence that DT told her about this conversation during a conference call involving the claimants, DT and the union, shortly after it occurred. She stated that DT said that WG had told DT during that phone call that the reason she removed the 30 hour contract from DT was in order to make things look fair, that CS and AM

"*didn't deserve*" the 30 hour contracts for sitting at home and reassured DT that she would still get overtime and her wages would not be affected. AM said she also recalled DT telling her about the conversation stating that DT had said WG rang her up and told her that she would be ok with hours and that CS and AM shouldn't be paid for sitting at home. PQ also recalled DT disclosing that this conversation had taken place during the collective grievance meeting. We had no direct evidence from WG. When asked questions about this during her evidence DT said that she was very upset when she received notification that the additional hours she was working would be removed (and that she only had 4 days' notice of this). She told the Tribunal that she could not remember the details of the conversation now (although she knows there was a conversation) but that what she said about it at the time was her truthful recollection then and she had nothing to add to this. We had this more contemporaneous evidence of what DT said at the time in the note of the collective grievance meeting held where DT recounted her recollection of the conversation (see para 10.45 below) which was:

"On 26th October [KC] had given [WG] my personal mobile number as I was so distressed and upset about the email, I had received from her about cutting my hours that I had to go home and work from home that day. [WG] phoned me in the afternoon and admitted that the hours had been cut because [AM] and [CS] were sitting at home and being paid for 30 hours for doing nothing and therefore their hours were being cut and so they had to be fair so Beth and I had to have our hours cut too."

We also had the account of WG at this time in the response she provided to HH as part of the investigation (see para 10.48 below) where she denied saying this and said it would have been "*highly inappropriate*".

10.36. We find that WG did make a comment along these lines to DT during a telephone conversation with her on 27 October 2020. It is not disputed that a conversation took place and it took place after DT had been informed of the removal of her additional hours, no doubt to reassure her about the removal. We find that WG did indicate that the fact that AM and CS were being paid for 30 hours (including temporary hours) and were not working those hours had some relevance to the decision to remove temporary hours and that all employees who had been allocated additional hours would also have them removed. We also find it is likely that WG gave some reassurance to DT about the availability of overtime to maintain her pay. This is a logical conclusion to draw given that at least two Contact Workers were off at this time (the claimants) and the work needed to be covered. However it is not clear that DT felt this was reassuring as she went on to raise a grievance about the removal of the additional hours along with the two claimants (see para 10.41 below).

10.37. We did not have any direct evidence from WG as to the process of making this decision (or her reasons for doing so) and so the Tribunal looked largely at the contemporaneous documents (in particular the e mails referred to at paragraph 10.32 above). We also considered the responses given by WG to the questions she was asked during the investigation of the collective grievance (see para 10.47 below). CS was of the view that the

reason that WG had removed her hours was because she was off work and the reason she was off work was because of her race. She reached this conclusion on the basis that as someone from a BAME background she was at higher risk of developing severe Covid 19 illness than non BAME individuals and because of this (and her view that the respondent had failed to protect her) had become stressed and unable to work. CS agreed that around this time the respondent was undertaking a review of staffing levels and that there was a need to make savings to staff costs. CS believed that WG had used the budgetary review to find a loophole to end hers and CS's contracts and that WG was looking for a way to get rid of her and AM. She felt that JS had taken a disliking to her because she had raised issues around Covid 19 and then WG had also taken a disliking to her because she had not wanted to meet with WG without union representation and that had influenced their decision to cut her hours. AM was of the view that the reason WG removed her hours because she was off work and the reason that she was off work was because she was shielding (as a result of her Parkinsons and other conditions meaning she was classed as clinically extremely vulnerable). AM said that she felt that the respondent had been trying to get rid of her for years and that there was so much favouritism within the team that counted against her. We find that the respondent was undertaking a genuine service review at this time and was examining ways to save staff costs. We accept that the decision to remove the additional temporary hours from the claimants, BH and DT was because the respondent wanted to reduce its budget and was a financial one. We also find that the fact that 2 of the four individuals on these additional temporary hours (the claimants) were not at work, and so were still being paid but not covering these working hours did have some influence on WG's decision. We can anticipate that the absence of two staff on full pay, affected the overall budget of the service. We can speculate that there must have been a calculation that by removing the additional 12 hours (which the respondent regarded as temporary in any event), the wage bill (including sick pay and shielding pay) would decrease, at least in the short term. However we conclude that the decision was a budgetary one and do not accept (as alleged by the claimants) that the whole process was orchestrated by WG as a way to reduce the hours of CS and AM specifically.

10.38. CS sent the respondent an e mail on 28 October 2020 (page C274) stating that she had spoken to ACAS who had advised her that she had been dismissed from her old contract in breach of procedure. She stated her view that after working for "*two years on the 30 hour contract*" that she was protected by law in the same way as a permanent member of staff. She said that if she was not paid for 30 hours, she would bring claims for unfair dismissal and breach of contract. The respondent replied by e mail on 2 November 2020 (C278) stating that CS was employed on a permanent contract for 18 hours per week and the additional 12 hours that had been allocated to her were done so on a temporary basis and were always "*subject to the needs of the service*". It stated that the additional hours were subject to periodic review but that "*owing to the long term absence of the team manager within the supervised contact service, the temporary arrangement was not reviewed periodically and the senior staff of the service did not undertake this task.*" It went on to state that the additional hours should have ended in June 2019 and the need for the hours was not

reviewed at that time and payment continued to be made automatically. It also stated that a further review of the service and its needs would continue. It stated that if CS worked additional hours over and above 18, she would need to submit a claim for overtime. CS replied reiterating her view that she had been unfairly dismissed and stating her view that because she had worked over 2 years on the additional hours, this had become "*fixed in law*". There was further correspondence where CS alleged that she had been dismissed and procedure had not been followed to which WG stated by e mail on 8 November 2020 that the CS "*had not been dismissed from the Council. You continue to be employed in accordance with your permanent contract of employment of 18 hours per week as a Contact Worker*".

10.39. CS submitted a complaint about WG on 9 November 2020 (page C287-8) about the process and the fact that WG had been contacting her at home on a personal e mail which she felt was harassment.

10.40. On 13 November 2020 a meeting was held (virtually) by WG and KC with AM and PQ (minutes of this meeting at pages C295-308). This was held to update AM's risk assessment. During this meeting AM informed WG that she had Parkinson's disease, Fibromyalgia, Type 2 diabetes and Asthma and Arthritis. WG asked AM if she had sent "*proof*" of these illnesses to the respondent and PQ stated that there had been multiple occupational health reports. This was a insensitive comment for WG to have made to AM at this meeting, given there had been a history of illness which the respondent (if not WG herself personally) was well aware of. Later in that meeting AM expressed her concerns about the building she was being asked to return to work in commenting on the size of rooms and the number of families that used the service. She also said that she had heard from colleagues that risk assessments were not being followed. AM noted that she was scared but wanted to be back at work. Later in the meeting she also raised her worries that her hours had been cut and this had caused her financial difficulties. There was also some discussion about alternative roles that might be possible. AM now had access to a laptop and internet at home and could work 18 hours. It was made clear by PQ that AM did not accept that the change to her hours had been made correctly.

Collective grievance and investigation

10.41. The claimants and DT raised a collective grievance about the reduction of their hours by a document submitted by PQ on their behalf on 21 December 2020 (pages C309-311). This complained about the removal of the "*30 hour contracts*" stating that this was an unfair dismissal and breach of contract, stating that having worked the hours for over two years, they became fixed. The grievance also stated that the termination of those contracts was unnecessary as overtime was still being offered to employees. It also raised the issue that of the 4 employees who had the 30 hours, one had been "*protected*" until March 2021 as she was carrying out the temporary role of acting up supervisor i.e. BH. It was suggested that her selection to this role was unfair, as she was the least experienced and she was friends with NG. The grievance also suggested that the hours had been removed because: CS had raised health and safety issues around Covid 19; CS had refused a change in her hours imposed without notice;

CS had gone on stress leave; CS had raised a formal complaint against WG; and AS had disabilities had been advised to shield and had not had adjustments made to allow her to return to work.

10.42. In January 2021, the UK again was under severe Covid 19 restrictions. On 5 January 2021 a letter was issued to all parents and carers advising them of the rules applicable to contact including handwashing, mask wearing, social distancing, risk assessment and being honest about symptoms and not bringing food or drink into the centre (page C202).

10.43. The claimants and DT attended a meeting on 9 February 2021 to discuss their collective grievance (minutes at pages C328-340). They were accompanied by PQ. HH, Head of Children in Care chaired the meeting with R Harris from HR and a notetaker, K Bradley. CS explained the history to the changes in hours she and the others had. HH noted at the increase to 30 hours was put in place in August 2018 and then extended in October 2018. She asked CS what was said at the time to which CS responded "*we have never had a contract*". CS was asked whether she had received anything formal from HR re the change and she said she had received nothing. HH asked whether at any point during the time when the 30 hours continued whether there was ever a discussion with anyone about hours being made permanent to which CS replied:

"I was never not told it wasn't permanent. I was never under the impression it was only temporary"

She went on to discuss the fact that there was no manager in place during that period. HH then asked CS whether she ever asked about how long the extension of hours to 30 hours would last and CS said she did not because she was "*never under the impression it was temporary*" and she thought it was her contract. CS did not say during this meeting that she had been informed by anyone that contracts were "safe" as is now alleged. HH then asked each individual about the appointment of BH to the role of Senior and the claimants both confirmed they did not apply.

10.44. AM was then asked similar questions about the changes to hours and she said she could not remember if a contract was issued for previous hours changes but said it was not for the 30 hours change. She stated that there had never been any discussion about an end date and that she had just carried on. When she was asked whether anyone had ever told the employees that the arrangement was being made permanent or have a discussion about it, AM responded:

"We all took it for granted as no one told us otherwise. I can't recall having anything in writing"

AM did not say that she was informed that her hours or contracts were safe during this meeting.

10.45. The same questions were then asked of DT and she stated:

"I interviewed for a 30 hour post and I got the role which was temporary for

3 months and then it extended again and then we didn't hear anything and so then assumed it was carrying on and that was what we were staying with"

When asked whether anyone had ever told her that the arrangement was being made permanent she stated that as a period of time had passed she had "*always assumed it was now 30 hours*".

DT was then asked to disclose a conversation she had with WG and she stated as follows:

"On 26th October [KC] had given [WG] my personal mobile number as I was so distressed and upset about the email, I had received from her about cutting my hours that I had to go home and work from home that day. [WG] phoned me in the afternoon and admitted that the hours had been cut because [AM] and [CS] were sitting at home and being paid for 30 hours for doing nothing and therefore their hours were being cut and so they had to be fair so Beth and I had to have our hours cut too."

DT also confirmed that she was still working 30 hours a week in practice as she had been working overtime but still wanted her "*30 hour contract*" back.

10.46. AM stated during this meeting that she felt she was being targeted because of her Parkinson's. PQ also stated that the decision to cut AM and CS hours was irrational as they were both at home for specific reasons, and not due to their own doing.

10.47. HH investigated the grievance and as part of this sent a number of questions by e mail to KC, NG and WG for them to respond to. WG's response to this was set out at pages C362-366. WG confirmed that she had become the Service Manager on 1 November 2020 but had worked alongside the outgoing Service Manager, JS from August/September 2020. When asked about the issue of removal of the additional hours she responded as follows:

"[JS] mentioned the additional hours, and how he was looking to now remove these additional hours owing to the need to make a 56K budgetary savings, and to bring into line the Connecting Families FTE, as there was an overspend of salaries occurring - 0.42 over establishment figure (see attachment for evidence of overspend)."

and

"In addition, the finance to fund the additional hours came from budgetary expenses available 2 years ago, that were now not available."

She also went on to explain that the manager post within the team had been vacant and had become available again but had to be sent for job evaluation and the result of this was that it was increased from a Grade 10 to a Grade 11 which would lead to additional wage costs.

10.48. When asked about the conversation with DT she said that she spoke to DT on 27 October 2020 and described it as a 'welfare' call as DT had been

reported to her as distressed. WG was asked whether she told DT that her hours were being cut because AM and CS were at home being paid 30 hours for doing nothing, therefore hers and BH's hours would also be cut to be fair. WG denied saying this and said it would have been "*highly inappropriate*". She was asked why the conversation might have been interpreted by DT in this way and suggested that this had been something gained from discussions with CS and AM as a possible reason why hours were cut. She was asked about what had been done to resolve concerns raised by AM and CS and stated that she felt that OH referrals had been undertaken for AM and support was in place and that she had now gone off sick. She also stated that CS was off sick and being supported with a stress action meeting and plan and said that she was aware that CS had stated that COVID processes were not being followed and there had been a review of these processes and the risk assessments had been updated.

10.49. WG attached a number of documents with her written response. These included the e mails about budgets and planning involving JS and the finance team in September and October 2020 that are referred to at para 10.32 above.

10.50. NG's responses to the questions she was asked was set out at pages C398-402. In response to the questions about how the changes to hours in August 2018 came about, she responded

"There was an increase in the demand for our service in 2018,resulting in us extending our working days (Monday & Wednesday to 7pm to meet service demand) staff had left and many staff were already claiming overtime to meet service need. The Contact Team service has been under service review prior to me becoming a senior in November 2017 and I believe is still ongoing to date."

She stated that it had always been her understanding that the increase in hours was a "*temporary arrangement whilst the service was under review (until it was established what could be made permanent within a new structure)"*

She stated that she was not aware how staff were informed of the change or any extensions to this. She said that she had always discussed openly with staff about their hours and that staff would be on the temporary increase until informed otherwise, and staff were always aware that the service and its structures were under review. She was asked whether the claimants or DT had every approached her to discuss their hours and she said they had on many occasions and stated that:

"I have always made clear during discussions that the service was undergoing review. Many times CS & AM have stated that as they have had the temporary increase for a certain period of time that they are entitled to keep these, I have always informed that this is not my understanding as the arrangement is 'temporary'."

NG also explained that the management team in the service have had difficulties since the departure of the previous manager and the issues

arising at this time and that the management team had been short staffed.

10.51. KC's response to the questions he was asked was set out at pages C403-40. KC was asked about the rationale behind the temporary increase. He mentioned the interviews that had been held by JH for new roles which were subsequently cancelled and that following this, the previous service director, PT had decided that all candidates who had applied would be offered an increase to 30 hours. He stated that the contracts were then "*constantly being extended*" and this was done by e mails being sent to HR following approval from PT. KC stated that the four staff affected had been notified that the hours were temporary in e mails and this was discussed in supervisions and staff meetings. He was asked whether the employees had asked him about their hours or contracts and he replied:

"On many occasions they have approached me for updates following service review meetings I and [NG] attended. We would advise that no decisions had been made and they would continue until further notice."

KC went on to state that he felt that there had been "*historical bad practice*" from the previous manager and that staff felt they had been unfairly treated and had been unable to move on. He blamed issues with the service having 3 different service managers in 3 years and stated that prior to the Covid 19 lockdown it was anticipated that the contracts would soon be ending as they *"didn't offer the flexibility the service needed".*

10.52. NG, who had been off sick from 17 September 2020 until 15 December 2020, left the service to take up another role in the respondent on 8 January 2021. BH took over from NG in the Senior Role on her departure. BH had previously been covering KC's Senior role whilst he was off sick and as NG went off sick not long after his return, she then temporarily covered that role in her absence. As a result of the service review that took place in October 2020, the final structure was determined to be two Seniors (BH and KC) and a new Service Manager (EW) who started her post in March 2021.

10.53. On 19 February 2021, an e mail was sent to all the staff with a job advertisement for a permanent role for a Family Time worker for 16 hours (page C402B). Neither claimant applied for this position. DT applied and was successful in obtaining it.

10.54. On 31 March 2021, a further meeting was held with the claimants and DT to discuss the collective grievance. This was chaired by AS (as HH who had conducted the grievance and made the findings was off sick at the time) with PQ and R Harris from HR also attending. AS gave each of the claimants and DT the outcome individually turning down the grievance and concluding that there had been no dismissal, rather that the respondent had made the decision to stop the allocation of additional hours. AS accepted that the respondent should have held a meeting with CS to discuss her Covid concerns before she went of with stress but stated:

"the raised concerns are not the reason your hours were changed, nor do I consider this influenced the decision. As you have stated there were four staff effected. The decision to remove the temporary addition to hours , was

purely budgetary and based on business need".

10.55. AS went on to discuss the grievance raised by DT making similar conclusions and finding that it was highly likely that she knew that the change in hours was temporary. She also considered the allegation that WG had telephoned DT and made the comments about the claimants. She said that WG agreed that she had telephoned on the 17 October but had denied making the comments alleged. AS concluded that she could not find any reason why WG would make the comment and that it seemed an unlikely thing for WG to have said. She went on to state: "*I'm saying that it seems unlikely to me that a manager would say to a worker*". PQ challenged AS on this suggesting that it was just because she was a manager that she was being believed over the employee. Shortly after AS retracted her comment that she felt it was unlikely that WG had said that and stated that it was just her opinion and she was not there (and asked for the notes to be updated). AM was then informed that her grievance was unsuccessful for similar reasons and that the conclusion was that the change of hours was budgetary and were not reduced due to her sickness and disability. AS was asked questions during cross examination on her potential connections with WG and other employees. She said that her daughter was related through marriage to WG but did not consider that a personal connection with herself. She also acknowledged that she had previously worked with JS at a different council but stated that it was purely a professional connection. She made the point that it was very common for people who worked in local authorities in the West Midlands to move around during their careers and as such they were likely to have worked with people in more than one authority. We accepted this evidence.

10.56. DT notified the claimants on 31 March 2021 that she would not be continuing with the grievance and complaint as she had now been offered the additional contract. The claimants submitted their claim form on 31 March 2021.

10.57. The claimants were provided with the written outcome to their grievance on 19 April 2021 (page C484-489). It confirmed that contracts of employment had not been terminated and that the additional hours given in 2018 were temporary. She acknowledged that although not a breach of contract that insufficient notice was given for the change and so offered one month's pay "*as part of an ACAS agreement*". It also found that the change in hours was not because of CS raising health and safety issues or because of AM's disabilities and having to shield during lockdown. It concluded that the decision to change hours was budgetary and due to service changes. In relation to the comments alleged to have been made by WG to DT no conclusion was reached on that.

Events since submission of the claim form

10.58. The witness statements of the claimants and some of the respondent's witnesses contained significant detail about events post dating the submission of the claim form. Much of that evidence was not relevant to the issues that had to be determined by the Tribunal in this claim. CS returned to work on 27 April 2021 when a return to work interview took place (page

C492a) and a risk assessment was carried out on 29 May 2021. She made a complaint on 2 June 2021 about a visit being rescheduled meaning she had to carry out a session with someone who was exempt from wearing a mask (C495). Further concerns were raised during June and July 2021 about families not complying with mask wearing and failing to isolate. The claimant raised a formal complaint to the respondent's chief executive, K O Keefe on 18 June 2021 (page C503-506 on behalf of her and AM). A further complaint was made on 31 August 2021. CS raised a further grievance on 27 September 2021 (page C547a) and continued to raise issues into October and November 2021.

10.59. CS recounted a conversation she says took place with KC on 25 October 2021 when she had become upset by what she saw as a Covid breach the previous week. CS said that KC made a comment along the lines that EW was guided by WG in the way she treated CS and they then went on to discuss the removal of the contracts in October 2020. She said that KC agreed with CS that they should not have taken them away without notice. CS said that KC also agreed with her comment that she was a target because she spoke out. KC does not recall the conversation but in evidence stated that he did believe that the notice given to the four individuals who had the temporary hours removed was insufficient. We accepted that a conversation of the nature alleged did take place but it does not assist the Tribunal in its decision making, in particular as KC was not involved in the decisions that the Tribunal have to consider in this claim.

The Relevant Law

11. The relevant sections of the ERA we considered were as follows:

13. Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

27 Meaning of "wages" etc

(1) In this Part "wages", in relation to a worker, means any sums payable to the *worker* in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

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

43C Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—

(a) to his employer,

44 Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

…

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

47B. Protected disclosures.

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

48. Complaints to employment tribunals

(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section …44 (1).

…

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1) …. (1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

94. The right

(1) An employee has the right not to be unfairly dismissed by his employer.

95. Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……

(4) Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

12. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides at article 3 (c) that any such claim made must be one which 'arises or is outstanding on the termination of the employee's employment'

13. The relevant sections of the EQA applicable to this claim are as follows:

4 The protected characteristics

The following characteristics are protected characteristics: …
disability,…race, …;"

13 Direct discrimination

(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".

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."

136 Burden of proof

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

14. The relevant authorities which we have considered are as follows:

Williams v Michelle Brown AM/UKEAT/0044/19/00 where HHJ Auerbach considered the questions that arose in deciding whether a qualifying disclosure had been made

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

Cavendish Munro Professional Risks Management Ltd v Geduld UKEAT [2010] ICR 325, [2010] IRLR 38 made it clear that to be a disclosure there must be a disclosure of information, not an allegation.

Fincham v HM Prison Service EAT/0925/01 confirmed that the disclosure of information must identify, albeit not in strict legal language, the breach of the legal obligation that the claimant is relying on.

Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436 - paragraphs 31 and 32 on the irrelevance of the distinction between 'allegation' and 'information'

in whistleblowing complaints as this is essentially a question of fact depending on the particular context in which the disclosure is made.

Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] IRLR 64 [2012] ICR **372** – "*section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower".*

International Petroleum Ltd & Ors v Osipov & Ors [2017] the EAT determined that "*the words "on the ground that" were expressly equated with the phrase "by reason that in Nagarajan v. London Regional Transport 1999 ICR 877. So the question for a tribunal is whether the protected disclosure was consciously or unconsciously a more than trivial reason or ground in the mind of the putative victimiser for the impugned treatment. Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but arenot required to, draw an adverse inference*."

Anya v University of Oxford & Another [2001] IRLR 377 **-** it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258.
The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

Madarrassy v Nomura International Ltd 2007 ICR 867 - the bare facts of the difference in protected characteristic and less favourable treatment is not "*without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination*". There must be "something more".

Nagarajan v London Regional Transport [1999] IRLR 572, HL,-The crucial question in every case was, *'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?*'

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for …'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.*'

Bahl v Law Society [2003] IRLR 640 – "*where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.*"

Conclusions

15. The issues between the parties which fell to be determined by the Tribunal were set out above and we set out our conclusion on each matter to be determined below.

Unfair dismissal

16. The first issue to determine is whether the claimants were dismissed. The claimants rely on the letter which was sent to them by WG on 27 October 2020 (see para 10.34 above) and state that the removal of the additional hours that they had been working (the 12 additional hours) with effect from 31 October 2020 was a termination of their contracts of employment by the respondent, as it amounted to an ending of what they saw as a contractual agreement that they would work 30 hours per week. What the claimants seem to be contending is that there were two contracts of employment in place with the respondent: one under which they were employed to work 18 hours and a separate additional contract under which they were employed to work 12 hours a week (entered into in August 2018) when they agreed to increase their hours to 30 hours per week. The claimants seem to be arguing that the first 18 hour contract remains but that the respondent terminated this additional 12 hour contract when those hours were removed. We do not accept that this is the correct analysis of the situation in fact or law. The claimants remain employed by the respondent to date but now under a contract to work 18 hours, as opposed to 30. The claimants have been employed under one contract of employment throughout their employment. However the hours they both worked under that contract of employment have increased (and decreased) over the course of that contract. In August 2018 the claimants agreed to a temporary increase in their working hours (see our findings of fact at paras 10.6-10.9). The temporary increase in their working hours was removed with effect on 31 October 2020. This was not an express termination of a contract but a notification of a change to working hours. There was therefore no termination of a contract under which the claimants were employed by the respondent (within the meaning of section 95(1) (a) ERA.

17. We have considered whether there was a dismissal within the circumstance section 95 (1) (c) ERA i.e whether there was a 'constructive dismissal'. The claimants never suggest that they resigned and we do not find that there are any circumstances in which the claimants could be said to have terminated any

contract under which they were employed. Therefore whether or not the claimant may or may not have been entitled to terminate by reason of the employer's conduct i.e whether there was a fundamental breach of contract entitling them to resign is not a relevant consideration.

18. Because we have concluded that there was no dismissal, we do not need to go on to determine what the reason (or principal reason) for dismissal was, whether it was on a prohibited ground or whether it was otherwise fair, or whether the respondent acted reasonably in dismissing. The complaints of unfair dismissal do not succeed and are dismissed.

Wrongful dismissal / Notice pay

19. The claimants contend that they were dismissed in breach of contract and should be entitled to notice pay. In the first instance, as we have concluded that the claimants were not dismissed and their employment had not been terminated, then the claim is not one which "*arises or is outstanding on the termination of the employee's employment*" (our emphasis underlined) and therefore is not one that the Tribunal has the jurisdiction to consider. The claim for breach of contract is therefore dismissed. We understand that the claimants are alleging that the respondent should have provided them with a period of notice before it removed the additional temporary hours. KC of the respondent indeed stated that he agreed with this suggestion, as part of the collective grievance response, the respondent offered to make a payment to the claimants in respect of 4 weeks's notice pay. However this does not affect the underlying position that there was no termination of a contract of employment to which a period of notice (statutory minimum notice or otherwise) would apply. The claim for breach of contract is discussed.

Unauthorised deductions

20. The claimants contend that they are entitled to be paid for the additional 12 hours each week that were removed from 31 October 2020 onwards. In order to determine this complaint, the first question to determine is whether the claimants were entitled to continue to be paid at a rate of 30 hours per week or in otherwise did the respondent correctly and lawfully reduce their hours when this was done in October 2020. The claimant contend that when their hours were increased in August 2018 that this was (either at the time or has subsequently became) a permanent change to their contractual working hours and so could not be removed by the respondent. They submit that it was not clear to them that the increase to their hours was temporary and that they then continued to work those hours to the extent that these became their contractual working hours. The claimant contend that because they both worked these hours for over 2 years and because the respondent never communicated to them that the hours were not permanent, that they became permanent. Therefore they say, the respondent could not lawfully reduce these hours in October 2020. The respondent contends that the claimants were employed on permanent contracts to work 18 hours per week and the additional 12 hours were worked on a temporary basis, initially for a period of 3 months which was then extended on a rolling basis over a 2 year period. They contend there is no evidence to support the fact that the contractual hours have become permanent. We accept the respondents submissions on this point and in doing

so, we refer to our findings of fact at para 10.9-10.12. In particular:

20.1. Both claimants acknowledge that the initial increase in hours to 30 per week was temporary;

20.2. Both claimants were sent and received confirmation in writing that the increase to their hours was temporary;

20.3. AM acknowledged in August and October 2018 that the hours are temporary.

20.4. The extension of the additional hours required approval on each occasion from HR and management.

20.5. Both claimants agree that they were never informed that the increased hours had become permanent.

21. The claimants appear to rely on the fact that they were never told that the hours were not permanent (and indeed were given reassurance that hours were "safe") and the hours were consistently worked for over two years to support their argument that they were contractually entitled to those hours on a permanent basis. It is unhelpful that the claimants were not given clear information throughout the period of working these additional hours as to exactly what was happening. However this does not change the status or those additional hours which remained temporary. There is no basis in law which suggests that a temporary increase in hours becomes permanent simply by the passage of time, or that additional rights are attached because hours have been worked for more than 2 years. In this regard there is perhaps some confusion with the rights to protection from unfair dismissal which accrues after 2 years' service. Ultimately the claimants and the respondent agreed that working hours would temporarily increase but at no point was there any agreement expressly or impliedly that this increase was or would become a permanent one.

22. Therefore when the respondent undertook its service review and decided to remove the hours temporarily allocated to the claimant, this was not a breach of contract as those hours were not hours the claimants were entitled to work on a permanent basis. The claimants (and indeed DT who also worked these additional hours) clearly operated on the assumption that they had become permanently entitled to work 30 hours per week (see paras 10.6, 10.11, 10.12,10.38, 10.41, 10.43, 10.44 and 10.45). The claimants had worked those hours consistently and had been paid for those hours when they were off work due to sickness (or when at home during lockdown) since they had been allocated in August 2018. However none of this changed the position that the hours were always temporary and the only permanent entitlement the claimants had were the 18 hours that were agreed with them back in November 2017 (in the case of AM) and July 2018 (in the case of CS). The decision to remove the hours with only 4 days' notice was harsh and clearly had a significant financial impact on the claimants. Nonetheless as those hours had only been temporarily allocated, from October 2020 when they were removed, there was no ongoing contractual entitlement to work the additional 12 hours. Accordingly when the claimants were not paid for those hours, this did not amount to a deduction of wages as such sums were not payable to the claimants under their contracts of employment or otherwise. The claim for unlawful deduction from wages is dismissed.

Protected disclosure and health and safety detriment complaints (sections 44 (1) (c) and/or 47B ERA)

23. The claimants also contend that they were subject to detrimental treatment on the grounds that they have made protected disclosures and/or raised health and safety issues contrary to sections 44 (1) (c) and/or 47B ERA. The first question to consider is whether each claimant made one or more qualifying disclosures as defined in section 43B ERA. With respect to CS, the respondent accepts that she made protected disclosures on at least one occasion before the first act of alleged detrimental treatment in October 2020. Those disclosures are referred to in our findings of fact set out at paras 10.18 (disclosures made by CS on 20 & 23 March 2020); para 10.25 (disclosure made on 10 August 2020); para 10.27 (disclosure made on 24 August 2020) and para 10.31 (disclosure made on 15 September 2020 by PQ on CS's behalf).

24. With respect to AM, the respondent did not accept that she made one or more qualifying disclosures as defined in section 43B ERA. Therefore in respect of each of the occasions AM contended that she made such a disclosure we have considered each of the questions identified at paras 3.1.5 to 3.1.9 of the List of Issues above, namely whether there was a disclosure of information; whether AM believed that the disclosure was made in the public interest; whether that belief was reasonable; whether she believed what she had disclosed tended to show that the health or safety of any individual had been, was being or was likely to be endangered; and if so whether that belief was reasonable. Dealing with each incident in turn:

24.1. 17 March 2020 during a conversation with NG where AM said she was anxious about her health and asked NG for advice.

Our findings of fact on this matter are set out at para 10.17 above. On this occasion AM asked NG for advice as to what she should do in light of the fast moving situation regarding Covid 19. This was not a disclosure of information at all but an enquiry about what the claimant should do. Therefore this does not constitute a qualifying disclosure.

24.2. 23 June 2020 E mail from KC to AM

Our findings of fact on this matter are set out at para 10.21 above. This is an e mail to PQ (representing the claimant) from KC. There is no disclosure of anything here by AM. This does not constitute a qualifying disclosure.

24.3. June 2020 e mails from PQ to KC re AM's risk assessment

Our findings of fact on this matter are also at para 10.21 above. This e mail poses questions of KC by PQ about AM's risk assessment but does not amount to a disclosure of information by AM at all. Again this does not constitute a qualifying disclosure.

24.4. E mail from NG to PQ on 9 September 2020

Our findings of fact on this matter are at para 10.29. There is no disclosure here by AM as the e mail comes from NG to PQ, so cannot be a qualifying

disclosure by AM.

24.5. E mail from PQ to NG on 10 September 2020

Our findings of fact on this alleged disclosure are at para 10.29. This was a disclosure of information as PQ (on AM's behalf) stated he wanted to raise issues and went on to disclose information about the fact that the respondent was planning to carry out a risk assessment for AM in person (thereby potentially predetermining its outcome as one of the issues that would need to be considered was whether it was safe for AM to attend work in person). We have considered whether AM believed that making the disclosure was in the public interest and of so whether that belief was reasonable, and have concluded that in both cases the answer was yes. We do not accept the submissions of the respondent that because this was an issue solely relating to AM's health, it was not in the public interest. The respondent is a local authority and offers a service to families in the region. PQ who was raising the matter on AM's behalf was raising a matter of general importance and we accepted the evidence of AM that she also felt this was a matter not just affecting her health but the health and safety of the general public who were users of the service (see para 10.29). We also consider that at this particular time of heightened public risk and concern, this was a belief that was reasonable to hold. The email expressly references that what was disclosed "*undermines the integrity*" of the respondent's risk assessment process and this is a matter which is likely to have been of interest to the wider public at this particular time. We have also considered whether AM believed that what PQ had disclosed tended to show that the health or safety of any individual had been, was being or was likely to be endangered and if so whether that belief was reasonable. In respect of both questions we consider that the answer is yes. The e mail itself makes explicit reference to putting AM's health "*in jeopardy*". This was at the particular time a reasonable belief to hold given the very serious health conditions the claimant had, the fact that she had been told to shield and that the respondent was expecting her to attend work to discuss a risk assessment (rather than perhaps to have dealt with this remotely to examine what the risks of actually attending work might be and putting control measures in place for these). We were satisfied that on this occasion PQ's e mail amounted to a qualifying disclosure by AM.

24.6. An OH call in December 2020 where a telephone appointment is recommended

On its face this does not appear to amount to a disclosure of information at all by AM and so cannot be a qualifying disclosure. We did not hear any further evidence which supported any findings that a disclosure was made on this date.

24.7. Call with KC in January 2021 where AM alleges KC was unsupportive and suggested AM should have taken a taxi to her OH appointment

Again, this does not appear to amount to a disclosure of information at all by AM and so cannot be a qualifying disclosure. We did not hear any further evidence which supported any findings that a disclosure was made on this date.

We conclude therefore that CS made qualifying disclosures on a number of occasions between March and September 2020 and AM made one qualifying disclosure on 10 September 2020.

25. We have also gone on to consider whether the claimants made health and safety disclosures and so fall within the circumstances set out in section 44 (1) (c) ERA. On the occasions which we have found CS and AM to have made qualifying disclosures, we firstly conclude that both CS and AM bring to the respondent's attention by email (which must be regarded as reasonable means) circumstances connected with their work which we also conclude they both reasonably believed were harmful or potentially harmful to health and safety. However we have gone on to consider the issue identified at para 4.1 of the List of Issues above and that is whether the claimants were employed at a place where there was no representative of workers on matters of health and safety at work or no safety committee. In the claimants' case this is clearly not so as PQ was by his own evidence the UNISON health and safety representative at the respondent (see our findings of fact at para 10.31). Moreover it was clearly reasonably practicable for the claimants to raise matters by means of their health and safety representative as that is precisely the route that both claimants did in fact take. CS initially raised her concerns personally but then asked PQ to raise concerns on her behalf (which she was perfectly entitled and correct to do so). The one instance on which we concluded that AM raised a health and safety concern (10 September 2020) that concern was raised by PQ (again appropriately) on her behalf. Therefore the matters raised do not fall within the circumstances set out in section 44 (1) (c) as alleged and the claimants' complaints that they were subjected to a detriment in contravention of section 44 (1) ERA do not succeed and are dismissed.

26. As we concluded that the claimants both made qualifying disclosures to their employer and so made protected disclosures, we went on to consider whether they were subjected to any detriment as a result of making those disclosures. Both claimants relied on three separate acts of detriment. We set out our conclusions below on whether the respondent subjected the claimants to detriment and if so, whether it was done on the ground that she made a protected disclosure

26.1. <u>In late October 2020 the respondent reduced CS and AM's hours from 30 to 18 per week</u>

As per our findings of fact at para 10.34 and as conceded by the respondent, both claimants had their hours reduced from 30 to 18 per week on 31 October 2020. The key question the Tribunal had to decide is the reason why those hours were reduced and if the protected disclosures we have found materially influenced the decision to reduce the claimants' hours. We refer to our findings of fact at para 10.37 that the respondent was undertaking a genuine service review at the time the hours were reduced. We accepted the respondent's contention that the decision to remove the temporary hours from the claimants (and DT and BH) was a budgetary one. This decision not only affected the claimants who had made protected disclosures (but DT and BH who presumably had not). We appreciate that in practice both DT and BH were not as financially disadvantaged as the

claimants (as they were both at work and had the opportunity to make up the hours lost with overtime) but the hours were removed from them in the same way as they were removed from the claimants. CS suggests that WG had taken a disliking to her having made disclosures around Covid 19 and in particular her refusal to meet WG without her union representative. However we could find no verifiable evidence to support this view other than CS'a opinion that this was the case. The disclosures initially made by CS were welcomed and taken on board by the respondent. Her later disclosures to JL were also escalated and actioned by changes being made in August 2020. CS may not have been happy with the way the Covid protocols were being implemented but there is no evidence which suggests that her views and opinions about this had any impact on the decision to reduce her hours. AM does not really suggest in her evidence that the fact she had made a disclosure was the reason her hours were reduced. AM focuses more on her disability, and her general view that the respondent was trying to get rid of her and had been for some time because of her health issues. There is no evidence that the one disclosure that AM made via PQ on 9 September 2020 had any influence on the decision to reduce hours. Ultimately the additional hours that had been worked were also intended to be temporary (see para 10.9) and had been extended on a rolling basis perhaps for longer than originally intended. Once the service review took place when WG joined in October 2020, those hours were ultimately removed. The service review was the reason for the removal of hours not the fact that the claimants had made protected disclosures.

26.2. <u>Between 31 October 2020 and 31st March 2021 the respondent failed to offer CS and/or AM additional hours or alternative positions</u>

It is correct that during the period in question, neither of the claimants were "offered" additional hours or alternative positions. Both claimants were off work during that period. CS was absent from work on sick leave between 14 September and 2020 and 27 April 2021. During that period we only heard evidence about one alternative position becoming available and that was the job advertisement for a Family Time worker for 16 hours on 19 February 2021 (see para 10.53) which neither of the claimants applied for. They were not offered this position. Moving on to the question as to the reason why this was the case and whether the fact that the claimants had made protected disclosures had materially influenced the decision, we conclude that this was not the case. In terms of being offered additional hours, CS was off sick throughout this whole period and was not have been in a position to work additional hours. Other employees who were at work, e.g DT did work additional hours during this time and we can anticipate that had CS not been unwell and off work, she may have been able to make up her hours by working overtime too. During this period AM was also away from the service shielding. It is clear that she was carrying out some very limited duties such as making calls to a young person to support them (see para 10.19) but it was already proving difficult for the claimant to fulfil her hours even whilst at work (as she was not carrying out contact visits pending an occupational health assessment - see para 10.16). In terms of the alternative position, then we conclude that the reason that this was not offered to either claimant was that neither of them applied for it and so

was never considered for this role. As both were off for different reasons, it is perfectly explainable why they did not apply. However as they did not apply and another employee, DT, did, that clearly explains why the position was given to DT. We conclude that the fact that the claimants made protected disclosures was not the reason why additional hours or alternative roles were not offered between October 2020 and March 2021.

26.3. On 27 October 2020 WG of the respondent made a remark to DT that CS and AM did not deserve 30 hour contracts for sitting at home?

We refer to our findings of fact at para 10.36 above that WG did make a remark to CS along the lines suggested with the message that the fact that AM and CS were being paid for 30 hours (including temporary hours) and were not working those hours had some relevance to the decision to remove temporary hours and that all employees who had been allocated additional hours would also have them removed. We have considered whether the fact that the claimants made protected disclosures was something that led to or materially influenced WG making this comment and we conclude that it was not. The fact that the claimants were not at work appears to be the basis for the comment, not the fact that they had raised Covid concerns at all. CS absence was because she was suffering from stress related illness (which was related to her perceptions that she was not safe at work) and AM was off because she was shielding. There is no clear connection here between the making of the disclosures themselves and WG making the remark to DT on 27 October 2020.

26.4. As we have concluded that none of the acts of detriment were on the grounds that the claimants had made protected disclosures, the complaints of both claimants under section 47B ERA are dismissed.

Direct discrimination (Equality Act 2010 section 13)

27. Both claimants hold a genuine and strong belief that they has been discriminated against, CS because of her race and AM because of her disability. In particular AM was of the view that the respondent had been out to remove her because of her disability for some time. However in all instances for us to reach the conclusion that the claimants have been subjected to such discrimination, there must be evidence, although it is possible that evidence could be inferences drawn from relevant circumstances. A belief, that there has been unlawful discrimination, however strongly held is not enough.

28. In order to decide the complaints of direct discrimination, we had to determine whether the respondent subjected the claimants to the treatment complained of (which is set out at paragraphs 6.1.1 to 6.1.3 of the List of Issues above and then go on to decide whether any of this was “less favourable treatment”, (i.e. did the respondent treat the claimants as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances). We had to decide whether any such less favourable treatment was in CS’s case, because of her race (mixed White/Black African Caribbean) or because of race more generally, and in AM’s case, because of her disability or because of disability more generally.

29. We applied the two-stage burden of proof referred to in the relevant legal provisions above. We first considered whether the claimants had proved facts from which, if unexplained, we could conclude that the treatment was because of race or disability, as the case may be. The next stage was to consider whether the respondent had proved that the treatment was in no sense whatsoever because of race or disability. We set out below our conclusions on these matters for each allegation listed in the List of Issues above with reference to each claimant:

29.1. <u>In late October 2020 the respondent reduced CS and AM's hours from 30 to 18 per week</u>

29.1.1. <u>Was this because of CS's race?</u>

We refer to our para 26.1 above where we conclude that the facts behind this allegation are shown. However, we conclude that CS has not met the first stage of showing a prima facie case that this was discrimination, nor indeed provided any credible evidence that the respondent treated her less favourably than a hypothetical comparator on the grounds of her race when her hours were reduced from 30 to 19 per week. We conclude this for the following reasons:

29.1.1.1. There is on its face no difference in treatment between CS and other employees who were not mixed White/Black African Caribbean who also had their hours removed. Four employees were notified in October 2020 that their hours would be reduced, three of whom were White. CS points out that BH and DT in practice did not have their hours reduced (as BH was protected as she was carrying out a senior role, and DT worked additional hours as overtime and was subsequently awarded additional hours on a permanent basis) and so were not in exactly her position (and indeed relies on those two employees as comparators). However AM, who is White, was in the same position as CS being someone who was off work at the time and she also had her hours removed.

29.1.1.2. The explanation of WG communicated to CS and others at the time (see para 10.34) and as part of the collective grievance investigation (see para 10.47) was clear, consistent and eminently plausible. The hours were removed as part of the service review for budgetary reasons.

29.1.1.3. CS suggests that her hours were ultimately removed because she was off work at the time on stress related sick leave. She says this is related to her race because the fundamental reason she was off was because she believed that the respondent was not keeping her safe at work as someone of a BAME background who was especially vulnerable to the effects of Covid 19. We did not doubt that CS had real concerns about her safety during this period (and clearly and rationally voiced her concerns). It was even at the beginning of the Covid 19 outbreak, well recognised that there was a heightened risk of severe Covid illness for those from a BAME

background. The respondent itself recognised this increased risk (see findings of fact at paras 10.22 and 10.23). It tried to put in place additional safety measures. Ultimately CS did not feel these were sufficient and became unwell with stress and had to go off sick. We also acknowledge that the fact that CS was off work at the time did factor into the decisions on removal of hours as this impacted directly the respondent's budget (which was under scrutiny at the time as a result of the service review as we found at para 10.32 above) However neither of these matters are sufficiently linked for us to draw any inference that the decision to remove hours from CS was tainted by discrimination or that WG decided to do this because of CS's White/Black African Caribbean background or race more generally.

Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that the complaint was because of race, we do not find that this shifts the burden of proof to explain the reason for the treatment. Even if the burden had shifted it, the respondent would have discharged that burden (see para 29.1.1.2 above). This treatment was not because of the claimant's race pr race more generally. This allegation of direct race discrimination is dismissed.

29.1.2. Was this because of AM's disability?

We refer to our para 26.1 above where we conclude that the facts behind this allegation are shown. However, CS has also not met the first stage of showing a prima facie case that this was discrimination, or provided any credible evidence that the respondent treated her less favourably than a hypothetical comparator on the grounds of her disability when her hours were reduced from 30 to 19 per week. We conclude this because:

29.1.2.1. There is no evidence of any difference in treatment between AM and comparator employees with respect to the removal of hours. Neither DT or BH had a disability but had their hours removed at the same time. CS was in all other respects in a directly comparable situation to AM (other than not being disabled) and also had her hours removed.

29.1.2.2. The reasons of the respondent for the removal of the hours were accepted by the Tribunal and were logical, plausible and consistent.

29.1.2.3. AM relies largely on the fact that the reason she was not at work during this period (which she believes was a factor in the removal of her hours) was because she was shielding due to her disability. AM was shielding at the time and we also acknowledge that the fact that the claimant was not working (but was being paid for 30 hours per week, 12 of which the respondent correctly regarded as temporary hours) played some part in the budgetary reasons involved in the service review and the decision to remove hours. However this is not the same as concluded that the claimant's disability was the reason for the removal of the hours. The Tribunal did not have before it a complaint under section 15 EQA of

discrimination arising from a disability. We were solely dealing with a complaint of direct disability discrimination and there was no evidence, either direct or that we could infer from other matters to suggest that the reason those hours were reduced was because AM was disabled. AM make various allegations about the way her health and absence has been managed by the respondent which we heard something of in her evidence. However these complaints were not before the Tribunal in this claim and we have had to confine our determination to those matters pleaded, identified and heard in the current proceedings.

The burden of proof test at stage one is not met and this allegation of direct disability discrimination does not succeed.

29.2. Between 31 October 2020 and 31st March 2021 the respondent failed to offer CS and/or AM additional hours or alternative positions

29.2.1. Was this because of CS's race or AM's disability?

We refer to our conclusions at paragraph 26.2 above when we considered whether the claimants making protected disclosures was the reason why the claimants were not offered additional hours or alternative positions. The facts behind this allegation are made out but we conclude that neither claimant has proved any facts which firstly show that there was any less favourable treatment or from which, if unexplained, we could conclude that the treatment was because of race or disability. It was clear why neither claimant was offered additional working hours (because they were not at work to carry out extra hours) and why they were not offered an alternative role (because they did not apply for such a role). For very similar reasons to those outlined at paras 29.1.1 and 29.1.2 we could not see anything in our fact finding either directly or by inference which suggests that there was any other reason for the treatment other than the one the respondent provides. This is a clear and cogent explanation and it is not related to the claimants' race or disability, respectively. This complaint therefore does not succeed.

29.3. On 27 October 2020 WG of the respondent made a remark to DT that CS and AM did not deserve 30 hour contracts for sitting at home?

29.3.1. Was this because of CS's race?

We found as a fact that a remark of this nature was made by WG about CS to DT. However we were not satisfied that the reason why such a remark was made was because of CS's mixed White/Black African Caribbean race. CS again makes the point that the reason she was absent from work at this time was related to her race on the basis that her increased vulnerability to severe Covid 19 illness because of her BAME background was the reason she was absent. We again accept the genuineness of CS's worries about her health as someone from a BAME background and that this led her to become stressed and need to be off work with stress related illness. Ultimately though the reason why hours were removed was because of the service review and to reduce the respondent's budget. The connection with

CS's race here to the decision of WG to remove hours is tenuous and make the comment she did to DTis too remote for the Tribunal to be able to validly draw an inference that it was tainted by race. Someone else in almost an identical position to WG, namely AM, who was off because of her particular Covid related issue (namely she was shielding) also had her hours removed. Race was not the reason for the treatment here and so the complaint is dismissed.

29.3.2. Was this because of AM's s disability?

For very similar reasons to those set out in para 29.1.2 above we also conclude that the remark made by WG on 27 October 2020 was not made because of AM's disability. At its highest it was made for a reason connected with the claimant's absence from work (because she shielding as a result of her disability) which she acknowledges had some part to play in the decision to remove hours for budgetary reasons. The Tribunal does not have before it any complaint made under section 15 EQA and this has never been the way the claim has been presented, pursued or defended. AM's disability was ultimately not the reason why her hours were removed and so her complaint of direct disability discrimination under section 13 EQA is dismissed.

30. Accordingly, all the claimants' complaints of unlawful discrimination because of race (in the case of CS) and disability (in the case of AM) made against the respondent under section 13 EQA all fail and are dismissed.

Employment Judge Flood
4 November 2022