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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE INDUSTRIAL TRIBUNAL AND THE FAIR EMPLOYMENT TRIBUNAL

Between:

CHRISTINE McELROY

Claimant/Appellant

and

NORTHERN HEALTH AND SOCIAL CARE TRUST

Respondent

_____

The appellant appeared in person
Mr M Quigley (instructed by the Department of Legal Services) for the Respondent

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Before: Colton LJ, McBride LJ and M Smyth J

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COLTON LJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal against an Industrial Tribunal determination dated 20 March 2026 in which the Tribunal dismissed all of the appellant's claims.

Factual background

[2] The appellant was employed by the respondent from 15 April 1995 until the termination of her employment on 16 August 2024. At the material time she was employed as a day care worker at Gloucester Park Day Centre, Larne, and acted as officer in charge of the day-to-day operation of the centre.

[3] In March 2023, concerns arose regarding the care and handling of a service user, anonymised as RM. The concerns related to incidents on 2 March 2023 and 9 March 2023 involving the use of a sling during moving and handling procedures. On 23 March 2023, the appellant emailed the respondent's area manager,

Charlene Wright, stating that she wished to invoke the respondent's "whistleblowing" policy. She expressed concerns regarding alleged malpractice and potential risk to service user safety.

[4] Following receipt of the disclosure, Ms Wright discussed the matter with the appellant. Arrangements were made for the concerns to be examined under the respondent's "concern in the public interest" policy. The respondent subsequently undertook enquiries into the matters raised and concluded that no patient safety concerns requiring formal public interest investigation had been established. The concern was therefore dealt with under the informal stage of the policy.

[5] The appellant subsequently contended that the confidentiality of her protected disclosure had been compromised. In particular, she alleged that her identity as a whistleblower had been disclosed to colleagues during a staff meeting on 28 March 2023 and that her line manager, Glenda Garrett, had been informed of the disclosure without her consent. The respondent disputed both these allegations. The Industrial Tribunal ("the Tribunal") accepted the respondent's account at the hearing. This was based on the "largely uncontroverted evidence" given by Ms Wright alleging that the appellant gave explicit consent for her whistleblowing to be shared with Ms Garrett and her senior management team. In addition, the Tribunal held that there was no evidence of direct disclosure identifying the appellant at the 28 March 2023 meeting. At the meeting the appellant was requested to make a statement regarding the issue of concern that had been raised, as were others. The Tribunal did not accept this amounted to an implicit/indirect identification of the appellant.

[6] The appellant later pursued a series of grievances concerning the handling of her disclosure, the alleged breach of confidentiality, and the respondent's decision to address the matter informally rather than through a formal investigation. The respondent carried out a desktop review and subsequent grievance appeal hearing, both of which concluded that the concerns had been appropriately investigated and there had been no improper disclosure of the appellant's identity as a whistleblower.

[7] Separately, the appellant was absent from work on long-term sickness leave from April 2023 onwards. During that period, the respondent conducted a number of attendance management meetings, explored redeployment options, and considered medical evidence concerning the appellant's capacity to return to work. The appellant maintained that she could not return to her substantive role. Ultimately, she indicated on the final review of 7 May 2024, that she would be applying for ill-health retirement. The appellant claimed that she was a disabled person under the Disability Discrimination Act 1995 ("DDA 1995") and that the respondent failed to make reasonable adjustments to her employment.

[8] Following a capability process conducted under the respondent's Managing Attendance Protocol, an absence hearing took place on 16 August 2024. The panel concluded that the criteria for termination on capability grounds had been met,

having regard to the appellant's prolonged absence, inability to explore redeployment or alternative employment options, and her stated inability to return to work. The appellant's employment was consequently terminated on that date. An internal appeal was subsequently arranged but was not pursued by the appellant, and the original decision was upheld.

The appellant's claim

[9] The appellant brought proceedings before the Tribunal on 31 October 2024 alleging that she had suffered:

(i) Detriment on grounds of having made a protected disclosure.

(ii) Automatic unfair dismissal on grounds of having made a protected disclosure.

(iii) Disability discrimination by failure to make reasonable adjustments.

(iv) Unfair dismissal.

[10] The appellant appeared in person before the Tribunal as she did before this court. Case management procedure hearings took place in front of the employment judge on 6 August 2025, 26 November 2025 and 27 January 2026.

[11] The case was heard by a panel chaired by Employment Judge Leonard ("the judge") over a six-day period between 16 February 2026 and 25 February 2026. The Tribunal heard evidence from the appellant and seven witnesses on behalf of the respondent. On 30 March 2026, the judge issued a judgment dismissing the claims in their entirety.

The Tribunal's judgment

[12] It was an agreed fact between the parties that the appellant made a protected disclosure on 23 March 2023, in that she disclosed facts which tended to show that a service user may have been injured while being hoisted on 2 March 2023. The appellant alleged she suffered a series of detriments as a result of having made that protective disclosure. In the judgment these are described as follows:

(i) Her identity as a whistleblower was disclosed to her line manager without her consent and further disclosed at a team meeting of 28 March 2023;

(ii) She was ignored by staff and given the cold shoulder;

(iii) Her disclosure was not investigated;

(iv) She was subject to attendance management;

(v) She was required to repay a salary overpayment; and

(vi) She was dismissed.

The description of the detriments differed slightly from those set out in an agreed document between the parties in the course of the hearing, but not in a material way.

[13] In opposing this claim, the respondent accepted that the disclosure was made but asserted that it conducted a proportionate informal investigation of the matter raised. Ms Wright gave evidence that any disclosure of the appellant's identity had been with her consent. The respondent contended that there was no evidence of disclosure to the wider team or any evidence in relation to alleged acts of the appellant being "cold shouldered" by team members. The respondent's evidence and arguments were accepted by the Tribunal.

[14] The Tribunal concluded that the attendance management dismissal process was fair, proper and in no way connected to any disclosures.

[15] In relation to the disability/reasonable adjustments issue, the Tribunal held that the appellant had failed to establish that she was a disabled person within the meaning of section 1 of the DDA 1995 and, therefore, her unlawful discrimination and failure of reasonable adjustments claim could not succeed.

[16] In doing so, the Tribunal accepted the respondent's case that the appellant was not, in fact, a disabled person and that the respondent had no knowledge of same. Having made that determination, the Tribunal says at para 34 of its judgment:

> "Further assessments do not need to be made regarding the issue of reasonable adjustments and other connected matters which would have been required had a contrary determination been made by the Tribunal. It might be worthwhile mentioning that, even if the Tribunal had not reached the foregoing conclusion, the Tribunal, indeed, has observed considerable difficulties with the claimant's case concerning the asserted failure to make reasonable adjustments. However, the Tribunal does not need to deal with that, in the light of the foregoing conclusion and judgment concerning the disability issue."

[17] The respondent asserted, and the Tribunal accepted, that the appellant was fairly dismissed on grounds of capability after being absent from work for over a year with no return to work anticipated for the foreseeable future.

[18] Accordingly, all the appellant's claims were dismissed.

The appellant's grounds of appeal

[19] The appellant appeals on the following points of law:

(i) The Tribunal erred in law in its approach to disability by applying an unduly exacting evidential standard and by treating the absence of a formal diagnosis or fuller expert medical report as effectively decisive, rather than applying the statutory test.

(ii) The Tribunal failed to give adequate reasons for rejecting material detriments forming part of the appellant's whistleblowing detriment case.

(iii) The Tribunal's treatment of the respondent's whistleblowing policy was legally inadequate because it reduced the policy to a broad permission for informal handling without engaging properly with the operative provisions.

The appropriate test on appeal

[20] Article 22 of the Industrial Tribunals (Northern Ireland) Order 1996 ("the 1996 Order") provides for an appeal by a party dissatisfied in point of law with a decision of an Industrial Tribunal. It provides:

> "**Appeals from industrial tribunals**
>
> 22.—(1) A party to proceedings before an industrial tribunal who is dissatisfied in point of law with a decision of the tribunal may, according as rules of court may provide, either—
>
> (a) appeal therefrom to the Court of Appeal, or
>
> (b) require the tribunal to state and sign a case for the opinion of the Court of Appeal, …"

[21] The role of the Court of Appeal in relation to appeals from Industrial Tribunals has been set out in *Nesbitt v The Pallet Centre Ltd* [2019] NICA 67, where the court said:

> "[60] A valuable formulation of the governing principles is contained in the judgment of Carswell LCJ in *Chief Constable of the Royal Ulster Constabulary v Sergeant A* [2000] NI 261 at 273:
>
> > 'Before we turn to the evidence, we wish to make a number of observations about the way

in which Tribunals should approach their task of evaluating evidence in the present type of case and how an appellate court treat their conclusions.

4. The Court of Appeal, which is not conducting a rehearing as on an appeal, is confined to considering questions of law arising from the case.

5. A Tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless—

(a) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the Tribunal (*Fire Brigades Union v Fraser* [1998] IRLR 697 at 699, per Lord Sutherland); or

(b) the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse: *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, per Viscount Simonds at 29 and Lord Radcliffe at 36.'

This approach is of long standing, being traceable to decisions of this court such as *McConnell v Police Authority for Northern Ireland* [1997] NI 253.

[61] Thus, in appeals to this court in which the *Edwards v Bairstow* principles apply, the threshold to be overcome is an elevated one. It reflects the distinctive roles of first instance Tribunal and appellate court. It is also harmonious with another, discrete stream of jurisprudence involving the well-established principle noted in the recent judgment of this court in *Kerr v Jamison* [2019] NICA 48 at [35]:

> 'Where invited to review findings of primary fact or inferences, the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility … the appellate court will not overturn the judge's findings and conclusions merely because it might have decided differently …'

Next the judgment refers to *Heaney v McAvoy* [2018] NICA 4 at [17]-[19], as applied in another recent decision of this court, *Herron v Bank of Scotland* [2018] NICA 11, at [24] concluding at [37]:

> 'To paraphrase, reticence on the part of an appellate court will normally be at its strongest in cases where the appeal is based to a material extent on first instance findings based on the oral evidence of parties and witnesses.'"

Consideration of the grounds of appeal

Ground 1

[22] The Tribunal dealt with the disability issue in paragraphs 13-34 of its judgment. Prior to its consideration, it set out the appropriate statutory provision defining disability, namely section 1 of the DDA 1995 which provides:

> "**Disability**
>
> **1. Meaning of "disability" and "disabled person."**
>
> (1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act and Part III of the 2005 Order, if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities."

[23] Schedule 1 to the DDA 1995 provides that:

> "2(1) The effect of an impairment is a long-term effect if—

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

(c) it is likely to last for the rest of the life of the person affected.

(2) Where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

[24] The judgment also referred to the decision in *Kelly v Department for Communities and another* [2023] NICA 91, which sets out the approach a court should take in determining whether the statutory test has been met in a particular case.

[25] Although referring to the case, the judgment does not quote from the *Kelly* judgment. Importantly for this appeal, the judgment of Treacy LJ contains the following:

"[20] It is established that a tribunal's approach in determining whether a person has a disability is to consider:

(a) whether the person has a physical or mental impairment;

(b) whether the impairment affects the person's ability to carry out normal day to day activities;

(c) the effect on such activities must be 'substantial' meaning '<u>more than minor or trivial</u>'); [see *Goodwin v The Patent Office* [1999] ICR 302; *Vicary v BT PLC* [1999] IRLR 680];

(d) the effects must be 'long-term.' [see *Goodwin v The Patent Office*].

[21] Thus:

(a) the disabled person must have a physical or mental impairment which can include mental ill health. The term 'impairment' is to be given its ordinary and natural meaning [see *McNicholl v Balfour Beatty* [2002] IRLR 711];

(b) the impairment must have an adverse impact on the individual's ability to carry out day to day activities and must affect one of the specified areas set out in Schedule 1 of the DDA;

(c) the effect of the impairment must be substantial. In the cases of *Vicary v BT PLC* [1999] IRLR 680 and *Leonard v South Derbyshire CC* [2000] UKEAT 789 the EAT clarified that the term 'substantial' in this context means simply 'more than minor or trivial';

(d) the effect of the impairment must be long term, meaning that it is an impairment which has lasted at least 12 months or is likely to do so or is likely to recur. The effect of treatment in addressing the symptoms of the impairment is not to be considered."

[26] Treacy LJ goes on to describe the functional approach that should be taken in a disability assessment at para [42] stating:

> "[42] In the field of disability discrimination the jurisprudence could not be clearer, one has to look to the symptoms of the disability and not focus on the label. The job of the Tribunal is to look at the effects of the impairment on the ability to carry out the day-to-day activities listed in the Act. It is a legal and not a medical test."

[27] In similar vein at para [44] he confirms:

> "[44] The DDA 1995 takes a 'functional approach' and it does not matter whether the impairment is an illness, or results from an illness, and nor is it necessary to examine its cause."

[28] Therefore, the Tribunal was aware of the appropriate legal test. The issue is whether it has, in fact, applied the test in the correct way.

[29] Having considered how this issue was treated, the court has a number of concerns.

[30] Primarily, our concern is that the Tribunal applied a diagnostic test as opposed to a functional test in assessing whether the appellant met the statutory test for disability.

[31] Thus, the first question the Tribunal asked itself at paragraph 14 was:

> "What then is the medical evidence to support the proposition that, at the material time, the claimant had a qualifying disability?"

[32] The Tribunal went on to record the relevant documentary evidence it had in relation to the appellant's medical condition. The evidence consisted of the following:

(i) An Occupational Health report relating to the appellant dated 23 August 2023;

(ii) A communication from the appellant's GP dated 16 October 2023;

(iii) A further letter from the appellant's GP dated 8 December 2023;

(iv) A letter from a psychologist relating to the appellant dated 4 January 2024;

(v) An email from Occupational Health concerning the appellant dated 4 March 2024;

(vi) An Occupational Health report relating to the appellant dated 10 June 2024; and

(vii) A letter from CMHT dated 12 June 2024.

[33] Without going into the detail of this evidence, essentially the reports related to the appellant's complaints in relation to stress and anxiety.

[34] Having referred to the material, the Tribunal went on to analyse it in significant detail.

[35] It then asks itself the question at paragraph 25:

> "What then do these various pieces of documentary evidence confirm in terms of the claimant attaining the statutory definition of a person with a disability at the material time?"

[36] Continuing this theme at paragraph 26, the Tribunal asks the question:

> "What information may be gleaned from our scrutiny of all of these letters and reports, taken individually and together?"

[37] The Tribunal then considered the definition or the concept of "stress at work" referring to the well-known decision in *Hatton v Southerland* [2002] ICR 613.

[38] At paragraph 27, the Tribunal says:

> "If "*stress*" *per se*, is not an illness, without more, the foregoing corroborative medical documentation, aside from the issue of "*stress*", also mentions "*anxiety*", that is to say in two places, 16 October 2023 from Corran Surgery … and then, expressly but briefly, from Dr Howe, dated 8 December 2023. … The Tribunal notes that there is no medical evidence linking "*anxiety*" to any period longer than that quite short and defined period of time. This "*anxiety*" referred to may have existed for longer than the brief period, but to say, indeed, that it did would amount to an entirely speculative assessment on the part of the Tribunal and that would not be permissible, without further evidence. The burden in these cases to attain the statutory target rests with the claimant and if the claimant had wished to advance her case that a clinically diagnosable "*anxiety*" (in addition to "*stress*") was severe in extent and that such a condition subsisted for a lengthy period of time (as opposed to "*stress*") from whatever cause or specifically "*work-related stress*" it was quite within the claimant's gift to have endeavoured to obtain a medical report providing both specific evidence of this or for medical records to have been produced, perhaps GP notes and records, sustaining that proposition."

[39] At paragraph 28, the Tribunal says:

> ""*Anxiety*" as has been observed, is a broad and rather generic term. Further to that and, notably, there is no recorded mention of depression or depressive illness in any of the documentation, which might otherwise fall within one of the categories protected under DDA. Often in such cases there might be references to the connection between matters of anxiety and stress and depression. However, it is up to medical professionals to make diagnoses in a way that provides proper and compelling evidence of a qualifying disability to the Tribunal. So, the Tribunal is left with nothing other than "*stress*" and a brief mention of "*anxiety*" and here the onus very clearly

> is upon the claimant to connect that with the statutory definition."

[40] Leaving aside for the moment whether the medical evidence produced by the appellant was sufficient to establish the definition of disability, it is abundantly clear from these extracts that the Tribunal was approaching the question of disability through a diagnostic prism. This is evident from the unnecessary digression into the concept of whether work related stress was an illness for the purposes of a personal injury claim as discussed in the *Hatton* decision.

[41] This digression, in our view, is compounded by the discussion as to whether the medical evidence which was disclosed was "caused" by her work. Thus, the following appears at para [25]:

> "25. Before making further observations upon this and the matter of any possible causal connection to the workplace (and specifically concerning the protected disclosure), the Tribunal did note from the documentary evidence that there was a recorded absence from work for the claimant between 15 August 2022 and 21 November 2022 with the reason for that absence over approximately three months being "*stress*." The claimant did not seek to challenge this recording of matters present in the documentation and therefore, the Tribunal must conclude that, as a matter of fact, the claimant did have a lengthy absence of three months due to "*stress*" well before the public interest disclosure events which are under specific scrutiny in this case. That may be a matter of background, but the conclusion cannot be ignored there appeared to be stressors and issues in the claimant's life causing long-term absence from work "*for stress reasons*" prior to and seemingly unconnected with the specific matter of protected disclosure and any adverse consequence that the claimant would assert arose from that disclosure."

[42] We fully accept that a Tribunal assessing the question of disability in this context is entitled to and invariably will look for medical evidence to support the claim. The issue we have with the Tribunal's analysis is the way in which it dealt with that evidence. We consider that the emphasis on whether the medical evidence met the test for a personal injury, together with a consideration as to whether it was caused by issues at work was the wrong approach and constitutes a material misdirection by the Tribunal.

[43] The Tribunal did look to the appellant's own evidence on the basis that it was looking for "objective or corroborative evidence, documentary or otherwise,

concerning the specific impact upon the claimant's day-to-day activities which latter is required under DDA." (Para 29 of the Tribunal's judgment.)

[44] This approach appears to be infected by the Tribunal's decision that the appellant had been untruthful in relation to the way in which clinical records had been obtained by her in an unauthorised fashion according to the respondent. (Para 11.10 of the Tribunal's judgment.) It appears to us, reading the judgment fairly, that having found she had been dishonest on that issue, the Tribunal then went on to treat all her evidence on separate matters as requiring corroboration before they could be accepted.

[45] This approach, we consider to be an overarching problem about the way in which the Tribunal dealt with the appellant's claim.

[46] A further concern about the way the medical evidence was dealt with was the approach the Tribunal took to the date at which it took into account the medical information provided by the appellant. At paragraph 15 of the judgment, the Tribunal selected 8 December 2023 as the starting point for assessing disability on the grounds that that was the first occasion on which the respondent would have been aware of the appellant's medical issues.

[47] This is the wrong test for assessing disability. It would be relevant, of course, for determining whether the respondent had made reasonable adjustments, assuming that disability was established, but was clearly not the appropriate commencement date for assessment of the appellant's medical complaints.

[48] We are therefore satisfied that the Tribunal did not properly consider the question of whether the appellant met the statutory test for establishing disability under the DDA 1995 and she therefore succeeds on ground 1.

Ground 2

[49] Essentially, the appellant's complaint is that there was an inadequacy of reasons provided as to why her claim of protected disclosure detriments and protected disclosure dismissal were unsuccessful.

[50] The duty on a Tribunal to provide reasons was considered by this court in *Wright v Belfast Bible College Ltd* [2024] NICA 17, in which McCloskey LJ at para [32] stated:

> "Stated succinctly the essence of the legal test is whether the judicial text conveys adequately to the parties why they have won or lost and includes a sufficient statement of the reasoning to enable an appellate court or tribunal to determine whether the first instance court/tribunal has made an error of law."

[51] McCloskey LJ goes on to describe how the Court of Appeal should assess if the Tribunal discharged its duty to give reasons at para [33]:

> "[33] This court, in its appellate role, undertakes an objective audit of whether this duty has been discharged. It does so in particular by examining the case made by the claimant, the respondent's defence, the issues to be determined and the terms in which the Tribunal's determination is expressed."

[52] The starting point on this issue is to establish what the claimed detriments were. In this regard, we have considerable sympathy for the Tribunal. It appears that the detriments asserted by the appellant shifted throughout the course of the hearing.

[53] In order to deal with this, during the hearing, at the Tribunal's direction, a document was drafted by the respondent's counsel and was agreed by the appellant. That document identified the alleged detriments in the following way:

(i) Her identity as a whistleblower being disclosed to Glenda Garrett without her consent.

(ii) Her identity as a whistleblower being disclosed at the Team meeting of 28 March 2023.

(iii) Being ignored by staff, then giving her the cold shoulder.

(iv) Her disclosure not being investigated.

(v) Her being subject to attendance management.

(vi) Her being required to repay a salary overpayment.

(vii) Her being dismissed.

[54] It will be seen that with one exception, these mirror the detriments referred to in the Tribunal's judgment (see para [12] above).

[55] The Tribunal's task was to consider each of these issues and explain its decision in relation to each of them. It would have been better had the Tribunal listed each of the above detriments seriatim and set out its determination on each issue.

[56] Essentially, this involved determination of factual issues and whilst we repeat our overarching concern about how the Tribunal approached the appellant's

evidence, we do not consider for the most part that it could be said the Tribunal failed to deal with these issues and explain its decision.

[57] The appellant argued that the Tribunal did not deal with item (iii). In our view, it is arguable the Tribunal did deal with this issue at para 11.8 of its judgment and we do not consider this issue alone would merit a finding in favour of the appellant.

[58] It is clear, however, from the judgment that the Tribunal did not deal with the complaint at (vi), that is her assertion that she was required to repay a salary overpayment.

[59] In response to this the respondent says that the appellant was given the opportunity to make both written and oral submissions at the end of the hearing. Those submissions did not include this assertion. Mr Quigley points out that she was cross-examined on this issue during the hearing and it was reasonable for the Tribunal to conclude that this was not an issue that required to be determined. The only reference to the detriment was her bare assertion at paragraph 37 of her initial statement.

[60] That said, it was agreed between the parties that this was a complaint. Had the appellant sufficiently established any of her grounds of detriment that would at the very least have given rise to a potential cause of action. We consider that this matter should have been dealt with in the judgment, but as a stand-alone issue, we are not persuaded that it would merit interfering with the Tribunal's decision.

Ground 3

[61] The appellant's core complaint is that the respondent chose to investigate her disclosure informally rather than formally. We agree with Mr Quigley's submission that how the complaint was to be investigated is essentially a matter for the employer and not something that is relevant to the Tribunal.

[62] Nonetheless, the court retains some reservations about how this matter was dealt with.

[63] At the hearing, the appellant made much of the fact that her complaint was investigated under the respondent's policy "Raising a concern in the public interest (formerly referred to as Whistleblowing) Regional Policy" – 24/19/45. As is apparent this policy was introduced in 2024 and was not, therefore, the relevant policy at the time of the investigation.

[64] The relevant policy was, in fact, the 2018 policy – 18/1194.

[65] The appellant complained that there was a greater obligation under the 2018 policy to ensure that it was carried out by someone suitably independent. However,

having now received the 2018 policy, there is no significant difference between the two. In the 2018 policy "investigation" includes the following statement:

> "Where you have been unable to resolve the matter quickly (usually within a few days) with your Line Manager, who will carry out a proportionate investigation – using someone suitably independent (usually from a different part of the organisation) and properly trained – and we will reach a conclusion within a reasonable timescale (of which we will notify you)."

[66] The 2024 policy, and the one relied upon at the Tribunal hearing is worded differently. However, it still states, "someone suitably independent and trained" will carry out a proportionate investigation. We, therefore, do not consider that the difference in the relevant policies is material in this appeal.

[67] The policy is relevant in relation to the appellant's complaint that the investigation, be it formal or informal, was not carried out independently. Glenda Garrett was asked to take the relevant statements to investigate the appellant's complaint. The appellant complains that she was someone with whom she had a disagreement and was not truly independent.

[68] The evidence clearly establishes that there had been a pre-existing conflict between the appellant and Ms Garrett and in those circumstances a question arises as to whether she was the appropriate person to collate information about the appellant's complaint.

[69] In considering this issue it is also important to understand that the appellant claims that the way in which the matter was dealt with constituted a detriment and it is not clear that this was fully appreciated by the Tribunal.

[70] It also emerged in the course of the hearing that at the time the appellant was dismissed, there remained an outstanding grievance procedure related to her complaints. An issue may well arise as to whether this was appropriate.

Conclusion

[71] Our determination is that the appellant succeeds on ground 1. We do have some overall concerns about the way in which the appellant's evidence was treated and this does impact in relation to ground 2. We have also raised some concerns in relation to ground 3.

[72] However, given our conclusion below, we do not consider it appropriate to say anything further about grounds 2 and 3.

[73] Mr Quigley argued that if we are against the respondent on ground 1, the matter should be referred back to the same Tribunal to consider whether reasonable adjustments had been made if the court is satisfied that the appellant met the disability test. We do not consider this to be the appropriate remedy. It is not for this court to determine whether, in fact, the appellant met the disability test. We consider this to be a matter for the Tribunal, properly applying the statutory test in accordance with *Kelly*.

[74] Further, we have already commented on the clearly adverse view that the Tribunal has taken in relation to the appellant and we consider that the appropriate option is to refer the entire matter back to a differently constituted panel to consider all issues afresh.

[75] We will hear the parties on costs.