EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100110/2016 Hearing at Edinburgh on 16, 17, 18, 20, 23, 24, and 25 January 2017

Employment Judge: M A Macleod
Ms M Perrett
Mr I Drysdale

Jacqueline Brown — Claimant, In Person

West Lothian Council — Respondents, Represented by Ms M Sutherland, Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims all fail and are dismissed.

REASONS

Introduction

1. In this case, the claimant presented a claim to the Employment Tribunal on 15 January 2016, in which she complained that she had been unfairly constructively dismissed by the respondent, and that following the making of qualifying disclosures within the meaning of sections 43A and 43B of the Employment Rights Act 1996 she had been both unfairly dismissed and subjected to detriments by the respondent.

2. The respondent resisted all claims by the claimant.

3. A hearing was fixed to take place on 16 January 2017. The claimant appeared on her own behalf, and the respondent was represented by Ms Sutherland.

4. At the outset of the hearing, the sitting Employment Judge heard an application for reconsideration of an earlier decision, and issued a decision in respect of that application, before the commencement of the full hearing on the merits. A note of the decision in respect of the reconsideration application is set out below.

5. The claimant gave evidence on her own behalf. The respondent called the following witnesses:

- Susan Johnstone, Team Manager, Social Policy;
- Sarah Michelle Summers, Group Manager for Early Intervention and Looked After Children Services;
- Roberta Louise Irvine, Benefit Fraud Investigator;
- Daniel Easton, Retired Group Manager for Older People; and
- Timothy Ward, Senior Manager for Young People and Public Protection.

6. The parties presented a joint bundle of productions, to which reference was made throughout the hearing.

Reconsideration

7. The decision for reconsideration was that the claim made by the claimant that she was subjected to detriments on account of having made protected disclosures was dismissed following a closed Preliminary Hearing conducted by telephone on Thursday 12 January 2017 by the sitting Employment Judge.

8. The claimant explained that she was confused by the fact that part of her case could be dismissed at such a late stage in the proceedings, very shortly before the commencement of the hearing on the merits, in a case raised initially in 2015. She also considered that the date of the last detriment was not 7 August 2015 but an email of 12 August and then 25 August on the basis that that was the date of the disciplinary hearing

which the respondent insisted should go ahead, despite the unavailability of the claimant's trade union representative.

9. Ms Sutherland opposed the application on the basis that the claimant's explanation does not add to her case. She suggested that 12 August was the date of detriment by an email from the nominated officer but that that still left her out of time. She noted that if the reconsideration revoked the decision and reinstated the detriment claim that would lengthen the hearing.

10. She also pointed out that the original strike out application was lodged shortly before an earlier hearing, which was subsequently postponed.

11. In my judgment, this was a matter requiring careful consideration. The claimant is unrepresented and has no legal qualifications. The decision was taken following a telephone conference call which was convened as a closed Preliminary Hearing to deal with the "purpose of case management", according to the Notice of Hearing dated 28 February 2016. The matters to be discussed at that hearing were "the two previous postponements, and the outstanding applications for strike out and additional information".

12. Rule 54 of the Employment Tribunals Rules of Procedure 2013 requires that the Tribunal shall specify the preliminary issues which may be decided at the Preliminary Hearing, in the Notice of Hearing.

13. The Employment Judge advised the parties that, after due reflection, he had a number of concerns about the decision to dismiss the detriments claim in those circumstances, as follows:

- The claim was dismissed on time bar grounds in effect two working days prior to the commencement of the full hearing in this case. The claim commenced in early 2016 and had proceeded to a hearing on the merits. The issue of strike out had been raised prior to an earlier hearing but had been refused, due to the proximity of the hearing.

- No evidence was heard from the claimant, particularly in relation to the issue of reasonable practicability. She was able to give an explanation on the telephone conference Preliminary Hearing, but not under oath or affirmation and with little detail available.

- It is clear that the claimant argues that the last date of the detrimental treatment was 25 August. Ms Sutherland opposes this on the basis that no detrimental act was alleged to have taken place on that date. The Employment Judge was satisfied, however, that while the claimant has been vague about this matter the dates remained in factual dispute (notwithstanding the terms of the agreed statement of facts) and therefore the issue of time bar may have required evidence to be heard before it could be conclusively determined.

- There appeared to be little prejudice to the respondent in revoking the decision to dismiss the detriments claim.

14. Accordingly, it is the judgment of the Employment Judge that the decision to dismiss the detriments claim taken on 12 January 2017 should be revoked, in the interests of justice, and that the time bar issue should be reserved in order to be dealt with at the conclusion of the evidence in the full hearing. The misgivings which the Employment Judge had about the fairness of the decision were not allayed by the representations made by the parties at the reconsideration hearing.

15. Following a short adjournment, the hearing commenced at 12 noon on 16 January.

16. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

17. The claimant, whose date of birth is 26 March 1962, commenced employment with the respondent as a Counsellor on 1 March 2010. She

was employed in the Social Policy department to provide counselling services to children and young people. The respondent is a local authority with responsibility for West Lothian.

18. The claimant's first line manager, on commencement with the respondent, was Sonia de Ryk. When she commenced employment, the counselling service was a stand-alone service. The claimant operated a counselling database with Ms de Ryk and Chris McLaughlin, an administrative worker. She also managed her own administration, screened cases, managed referrals, maintained her own clinical notes and frequently worked from home.

19. In November 2012, the claimant was transferred to the Children and Young People's Team (CYPT) in November 2012, a team which comprised social workers, family workers and another counsellor, Mike Moss.

20. Prior to the transfer, the claimant maintained clinical notes within which she would make a record of what the child said during the course of counselling sessions, including telephone calls, follow up work, issues which emerged and details of any child protection concerns arising. Those were kept on an activity sheet which would be retained in an expanding envelope, and could be identified by the claimant from a reference number and initials, as well as a note indicating where they had been seen. Ms de Ryk and Mr McLaughlin were aware of the abbreviations and reference numbers and could identify children from that information, and Mr McLaughlin would enter some of the data on to the database.

21. The claimant also made "process note", which were for her use only, and amounted to a reflection on each session and the identification of significant themes.

22. The claimant kept her clinical notes in the Civic Centre in Livingston, where she was based, in a cabinet in Ms de Ryk's office, or in the "Chillout Zone" or in her own home.

23. Prior to the transfer, the database operated by the counselling service kept a log of all clients who had used the counselling service from 2011, when the database was initiated. It would record a unique client reference number, the date of their referral, who referred them, core details about the client (which included the client's name), dates of sessions and the details of the closure of the case if appropriate. The claimant would ask clients to complete a form consenting to the retention of their details on the counselling database.

24. After the transfer to the CYPT, the claimant did not keep any notes other than brief process notes. She had a concern that other professionals may have access to what she regarded as highly sensitive and confidential information, and therefore sought to maintain that confidentiality as far as possible.

25. The CYPT entered data on to a national social work database, called SWIFT, to which access was granted to relevant professionals within the respondent's employment by way of an access code. Only professionals employed by the respondent could have access to the part of SWIFT on which was recorded the details of clients in the West Lothian area.

26. The claimant's Job Outline, dated 9 October 2012, provided that one of the seven key tasks of the claimant in her role was to maintain confidential records about the counselling service, including client notes (24).

27. The claimant was given training on SWIFT in 2010. SWIFT records information regarding clients who use social services, including the name, address, age, gender, ethnic origin, key worker or team of each client. The dates and reasons for contact, periods of assessment, services utilised, case notes and care plans are also recorded on SWIFT, and contain sensitive data relating to children and young people.

28. On 4 October 2012, the claimant met with Ms de Ryk to discuss her transfer to CYPT. Notes of that meeting (36) disclose that the administration of the counselling service was discussed:

"There is a database operating at present, which Jakki manages, Lisa will discuss with CYPT admin that the database will become managed by them. Jakki is responsible for all her own admin, she chooses her own case load and priorities (sic) them as she sees fit. Lisa comments that this would not be the case within CYPT. As it is proposed that there will be an introduction of a screening group, with all referrals coming into cypt@westlothian.gov.uk initially."

29. On 24 October 2012, the claimant met with Lisa McFarlane to discuss integration of the counselling service into the team. On 24 October 2012, the claimant raised issues regarding use of a dedicated vehicle, the referral process and discussion of cases and concerns she had about the future delivery of the counselling service. In that email, addressed to Ms de Ryk (38), the claimant stated that it was her understanding that the counselling service would remain as a stand alone service, and that she was "not being absorbed into the CYPT per se".

30. She concluded the email by saying: *"I am not averse to changes and really welcome the fact that the service is being extended as it is a testament to the work that we have both put in over the last 3 years. I am aware from my initial discussion with Lisa that she has a limited understanding of Counselling, the BACP and the service and I felt that she wants to make changes, in particular to worksmart and the identity of the service that will have an adverse effect on the number of clients I am able to counsel and the outcomes focussed approach the service has taken up to this point."*

31. When the claimant moved to the CYPT, she was initially managed by Lisa McFarlane.

32. The claimant was absent from work on the grounds of ill health between 27 November 2012 and 7 January 2013, which the claimant asserted was due to personal and mental health issues. The claimant's GP had attributed her absence to anxiety.

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33. Ms McFarlane contacted the claimant by telephone on 10 January 2013 to welcome her back to work following her sickness absence. Notes of the conversation (48ff) confirm that the discussion was longer than anticipated. The claimant, in her evidence to the Tribunal, denied that this conversation took place, or that it took place on this date and in this form.

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34. With regard to the claimant's transfer to the CYPT, it is noted: *"Jakki informed Lisa that she was happy to be affiliated with the Children and Young People team, 'but did not want to be part of it in any shape or form'. Lisa reassured Jakki that both she and Sarah Summers wanted to maintain the integrity of the work undertaken by the Counsellors and building a separate screening group as part of other therapeutic services would help to maintain this. Jakki stated that this was something else she was not consulted on."*

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35. On 16 January 2013, the claimant met with Ms McFarlane and Susan Johnstone, who was to take over as Team Manager (51ff).

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36. On the issue of notes, it was recorded:

"At present Jakki states that she records on SWIFT to say that a child or young person is receiving a service, but no other details about the case is recorded on SWIFT.

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Lisa explained that all notes that Jakki has should be transferred from the Civic Centre to the Bathgate Partnership Centre. Lisa explained that she had consulted with both Catherine Robertson and Vera Muir from HR and they had both stated that no notes or files should be kept at home by any worker, no matter how unidentifiable they were to the identity of the young person…"

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37. Ms McFarlane then asked the claimant what would be the process if she had any child protection concerns regarding a child or a young person. She was advised that the process within Social Policy would be for the claimant to go straight to her line manager in the first instance. She questioned why this was necessary, but agreed that she would do this. She went on to explain *"…that she would decide what the risk was before she took any action and if she felt 'that there was a low risk of self harm or suicide' she would continue to monitor. Both Lisa and Susan raised concerns over this and stated that all concerns should be discussed with line management and that Jakki alone should not be making that judgement."*

38. The claimant reiterated that she considered that there were issues upon which she had not been consulted, and raised concerns about the pool car.

39. On 18 January 2013, the claimant sent an email to the Information Commissioner's Office (56) in which she sought guidance on Data Protection procedures in relation to the clinical session notes:

"I have been advised by a new Line Manager that my session notes must be locked in a cabinet and it is being called into question who these clinical notes actually belong to.

My notes relate to the process of counselling session and are a reflective tool for my practice and are considered to be good practice by my professional body BACP.

I do not record any identifiable information relating to clients and if notes were lost or misplaced there is no opportunity for the identity or any personal information of the client that might be disclosed.

I have attached a blank copy of my clinical session note form and would welcome your guidance on whether I am breaching Data protection by keeping them at home and carrying them about during my working day."

40. On 22 January 2013, the claimant emailed Ms McFarlane (58) to express her concerns about the use of a dedicated vehicle, working from home, and the retention of counselling notes, all of which she considered would have an adverse impact upon service delivery and cost effectiveness.

41. On 24 January 2013, Ms McFarlane emailed the claimant setting out what was required of her, including the transfer of all information, files, databases and materials to the administration team (111).

42. As part of her ongoing responsibilities to the BACP to have professional supervision, the claimant had a clinical supervisor, Jenny Pearson. Ms Pearson, having been alerted by the claimant to the concerns she was raising, wrote to the respondent on 28 January 2013 (61).

43. In the course of that letter, Ms Pearson stated:

"As Jacqueline's supervisor I am extremely concerned about the practices she is now being told will be required of her. Some, such as the storage of personal reflective notes and discussion of clients with colleagues in her team, would be in breach of her professional body's (British Association of Counselling and Psychotherapy) Ethical Framework for Good Practice in Counselling and Psychotherapy, and as such, is a most situation to which I cannot agree. Others such as the withdrawal of the agreement to do administrative work from home at times in the week that we together have deemed to be most strategically beneficial to the balance of tasks and effect of the work, are severely detrimental."

44. Ms Pearson expressed concerns about the changes to the service being proposed, and the possible impact on the claimant's health of the changes to her working conditions.

45. On 13 February, the claimant submitted a grievance (65) in which she made complaints about working from home, the need to have a

dedicated vehicle allocated to her, changes in her working practices and issues relating to her core hours.

46. A typed and extended version of the grievance was also produced (68ff). In that grievance, the claimant referred to Session Process Notes, and stated: *"I have been informed that process notes are to be kept locked at the Bathgate Partnership Centre. I have tried to explain that no information is identifiable on the process notes and that I use them as a reflective tool to inform my clinical practice. Young people have a right to see these notes but they are confidential and belong to me. I have contacted Information Office Commissioner to raise an enquiry regarding this issue although they stated that as long as there is no identifiable information its unlikely I am breaching Data Protection."*

47. A grievance hearing was fixed to take place on 15 March 2013, before Jane Kellock, Senior Manager, Children and Early Intervention. In the meantime, the claimant was advised by Sarah Summers that she should not attend the Mental Health Mental Wellbeing (MHMW) screening group until after her grievance was resolved. On 6 March, the claimant emailed Jane Kellock to amend her grievance to include a complaint about this decision (75).

48. On 13 March 2013, Susan Johnstone met with the claimant (a note of which is set out on 111) to ask why she had stopped using SWIFT in 2010. The claimant responded by saying that she had been advised that only looked after children (LAC) should be recorded on SWIFT, but did not disclose who had adviser her of this. Ms Johnstone asked the claimant to provide dates of birth and addresses of all of her current caseload, and recorded that the claimant agreed to do so.

49. Following the grievance meeting on 15 March, the claimant attended a meeting on 20 March with Ms Johnstone, and following this the claimant emailed Ms Kellock to say that Ms Summers and Ms Johnstone were creating an intolerable working environment and had rendered her unfit to carry out clinical work (98).

50. Ms Kellock wrote to the claimant (92ff) to confirm that her grievance had not been upheld. With regard to the issue of process notes, Ms Kellock accepted that keeping session process notes was part of the way that the claimant worked with her clients, and commended her for her vigilance in checking as to her data protection responsibilities.

51. However, she went on: *"As the senior manager with responsibility for your service area, I have some residual concern that even without personal details, there may be some risk that a description of personal circumstances may render the notes identifiable to a third party who knows the young person. I would ask that you be aware of this and ensure on an ongoing basis that your process notes are not identifiable in this way. I also ask that you describe to your line manager the sort of detail – without divulging the content – that you record in your process notes, so that she can be reassured that there is no risk to data security."*

52. Ms Kellock confirmed that the claimant had no contractual entitlement to a dedicated pool car, that her work base was to be Bathgate Partnership Centre with the other counsellor and the CYPT, and that her cases were to be recorded on SWIFT in line with other Social Policy employees.

53. On 3 April 2013, the claimant appealed against the grievance outcome, including an assertion that she was suffering from work related stress. That appeal was acknowledged by Jennifer Scott, then Head of Social Policy on 5 April 2013. An appeal hearing was fixed to take place on 22 April.

54. The claimant was absent from work on the grounds of ill health for 2 weeks in April 2013, which she attributed to work related stress. On 29 April 2013, the claimant attended an absence review meeting with Ms Johnstone due to her absences from work. Ms Johnstone advised the claimant that she understood that the claimant continued to offer young people initial appointments without having been considered by the

MHMW screening group. She requested that the claimant attend the screening groups as she had not been doing so.

55. On 1 May 2013, the claimant advised Ms Johnstone that recording children and young people's sensitive and non-sensitive data on SWIFT could have consequences for her with her professional body, BACP.

56. Following a referral by management, Occupational Health advised on 14 May 2013 that the claimant was fit to perform her substantive role (114).

57. On 27 May 2013, the claimant was advised by the respondent that her grievance appeal had been upheld in part (116). Ms Scott confirmed that she wished to see a discussion taking place between the claimant, her colleague and management to find the most efficient way to record a client's details which would satisfy both management and the need to protect the individuals concerned. The claimant agreed to a mediation session between herself, Ms Summers and Ms Johnstone, and this was to be arranged by Gillian Cairney. The individuals involved all met with Ms Cairney in advance in order to prepare for the mediation.

58. On 5 August 2013, the claimant met with Ms Johnstone for a supervision meeting (117ff). It was noted, with regard to SWIFT: *"Jakki is still not recording clients on SWIFT but both she and Susan acknowledged that this will form part of the discussion on mediation. Jakki has not contacted Eagle Brae for SWIFT training as agreed at the last support and supervision session. She has not altered case notes for the two young people she inputted data on as requested. Susan asked Jakki to priorities this and to arrange training for herself ASAP and to input the case notes for the vulnerable young people involved. Jakki advised that WLC should have written permission from all service users before inputting their details on SWIFT. Susan advised that having checked this out with other 'like' services as part of her benchmarking exercise she is aware that verbal consent is all that is required."*

59. On 28 August 2013, the mediation meeting took place between the claimant, Ms Johnstone and Ms Summers. Ms Cairney, who had convened the mediation, emailed those involved with a summary of the agreed outcomes (121). These included:

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- *"Supervision meetings with Jakki and Susan to be arranged in advance at 6 weekly intervals which can be reviewed at anytime.*
- *Both Jakki and Mike to attend the Mental Health & Wellbeing meetings.*
- *Record client details on SWIFT following consent from clients. Details to include themes.*
- *Jakki will send Susan an update on cases on a regular basis…"*

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60. On 14 January 2014, Ms Johnstone emailed the claimant to ask her to update some case notes on SWIFT (122).

61. On 10 March 2014, Ms Johnstone emailed the claimant instructing her to record referrals (125). Referrals were allocated to the claimant by Ms Johnstone.

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62. The claimant was absent from work on grounds of ill health between 23 June 2014 and 12 September 2014 which the claimant attributed to acute stress. The claimant was signed off work by her GP following a serious assault on 11 July 2014.

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63. On 22 September 2014, Ms Johnstone emailed the claimant requesting that she clarify how often she would meet with a young person, record all efforts to engage with a young person and if the case is closed record a closing summary on SWIFT.

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64. On 2 October 2014, Ms Johnstone made reference to the claimant having taken client files home with her, but confirmed that Ms Summers had decided not to take action against her in respect of this (494).

65. On 22 October, 27 October and 11 November 2014, the claimant raised with Ms Johnstone her concerns that young people she had been providing counselling services to had not been contacted by the respondent during her absence.

66. On 27 October, Ms Johnstone raised concerns with the claimant, at a performance review, that case notes and summaries remained outstanding and required to be updated (186).

67. On 20 November 2014, the claimant attended a performance review meeting with Ms Johnstone (203). Ms Johnstone informed the claimant that the young people had been contacted during the claimant's absence, and instructed her that closing summaries needed to be put on SWIFT. The claimant contacted her trade union by telephone for advice as she considered that the meeting had a disciplinary feel to it, and then asked permission to go home as she was upset. Ms Johnstone granted her permission to do so.

68. On 24 November 2014, the claimant made a complaint to the respondent's Disclosure of Information by Employees (Whistleblowing) hotline ("the whistleblowing complaint"). The complaint was received by Gordon Rolland, who recorded it on a Whistleblowing Complaint Record (208).

69. The complaint raised two allegations: firstly, that two young people whom she had been counselling had informed her on her return from sickness absence that the respondent had not contacted them to explain that she was off, or why. She said that they had asked her how to make a complaint, and she advised them. Secondly, she said that around 19 November 2014 the claimant had noticed that retrospective entries had been made on SWIFT in relation to the case files she was concerned about., and was concerned that false entries had been added to SWIFT to cover up the fact that no contact had been made with these young people.

70. On 27 November 2014, one of the young people made a written complaint to the respondent (225). The claimant noted on the bottom of the handwritten note "Client AA9". The complaint said:

"Dear Sir/Madam

5 *I am writing to inform you that from the 23rd of June – 12th of September 2014 I received no contact from Jakki Brown, or management. I am very unhappy about this as it caused me unnecessary worry and confusion. I was confused because I received no reply from Jakki, which is very unlike her and I was worried because I thought something may have*
10 *happened to her. Upon learning that someone was supposed to contact me I was very angry that someone was not doing their job properly and that resulted in the aforementioned feelings for myself and others."*

71. On 4 December 2014, the claimant emailed Ms McFarlane (227) to advise as follows:

15 *"I was contacted by Jamie Bryant who used to be a MCMC worker but now works for Aceess2Employment. Jamie had been contacted by a YP who I worked with over 2 years ago. The YP is called . He is not on SWIFT. Jamie Bryant expressed concerns about and that the YP had specifically asked to see me again. I emailed Susan to see if*
20 *could pick this up for an initial session in order to establish what difficulties the YP was facing. Susan advised me that a referral would need to be put in and then come to MHMW Screening Group.*

I have since been contacted by YP's mother, who has expressed concerns about her son. I have contacted .

25 *When I previously worked with this YP there was a risk of suicide. Neither mum nor previous worker have expressed any current concerns over risk of suicide but I feel that an early intervention is required in this case and I think it is in the best interests of the YP to have an initial session with me as a matter of priority.*

I intend to arrange to see YP at East Calder Medical Practice today if I am able to get a room, failing that I will arrange to carry out a home visit…"

72. The claimant also emailed Ms Summers to advise of the concerns being raised in relation to this young person. Ms Johnstone had told the claimant that this matter should proceed as a normal referral to the MHMW Screening Group. The claimant did not make such a referral but arranged to see the young person on 4 December 2014. The next screening group meeting was due to take place on 9 December 2014.

73. On 5 December 2014 the claimant emailed Ms Johnstone to say that she did not work her diary a week in advance but worked week to week which enabled her to offer her clients times which met her clients' needs. She made those appointments with the young people at the point when she had contact with them.

74. On 8 December 2014, Ms Summers emailed the claimant to state that she had failed to attend a performance review meeting, and that she was concerned that the areas which had been identified in her performance improvement plan had not been addressed. She said that the claimant had failed to comply with a management instruction (230).

75. On 10 December 2014, another young person submitted a complaint to the respondent (232):

"I attend counselling at the Civic Centre on a fortnightly basis and I am writing to complain about the way it was handled when my counsellor was absent for an extended amount of time, 2 and a half months. I received no phone call, letter or any sort of information to inform me she would be off, and when I tried phoning I was given the run around. When I finally made it through to the right person I was asked to leave my number and the person would phone me back. I never received a follow up call. After phoning twice more I finally got to speak to someone and all I was told that a letter should have been sent out, when never arrived.

I was then told that I just had to wait. This entire experience was very stressfull and handled extremely poorly by the council."

76. The complainer was not identified by name but it was noted at the foot of the complaint that he or she was "Client AA8". The claimant assisted the complainer by writing out the letter of complaint.

77. On 18 December 2014, the claimant emailed Ms Cairney advising that she was becoming increasingly anxious and concerned about work related issues (234).

78. In November 2014, a pupil at Armadale Academy passed away, and on 14 November, the claimant emailed Ms Johnstone to advise her of the need for pastoral support to be provided to pupils affected by the death. On 8 January 2015, Ms Johnstone emailed the claimant (236). She said in that email:

"Jakki, As you know you arranged to support Armadale Academy students without first consulting with me. I then agreed that this was appropriate in the short term – 6 weeks is reasonable. You are aware that all young people who work with CYPT have to go on SWIFT so you should have, like all other CYPT employees have made the young people aware at the time of beginning your work with them.

To clarify – yes the expectation is that you close the referrals after 6 weeks and if they require further counselling then they should go on the waiting list like all other young people who access the service, unless of course there are significant risk factors ie suicidal thoughts/plan or other child welfare/protections concerns, which I would have expected you to have shared with me if this is the case. I have allocated the young people who have been referred by the school to you on SWIFT, please ensure that the case records are up to date and please advise me of the dates you started working with them so that I can accurately record this on SWIFT…"

79. On 12 January 2015, the claimant met with Ms Cairney to raise her concerns about Ms Johnstone and the basis of her whistle-blowing complaint.

80. On 14 January 2015, Ms Johnstone held a performance review meeting with the claimant, and at 1905 hours on that day, emailed the claimant to confirm the outcome of the discussion (239). She asked the claimant to keep her online diary up to date. She also acknowledged that the claimant had updated some young people's case notes since the previous occasion when they had met (20 November 2014) but noted that she had asked the claimant why *"…some are only done up until mid-Dec 2014. I also advised that you have some closing summaries outstanding, which I have been asking you to do for some time…"*

81. With regard to case files, Ms Johnstone stated: *"You advised that you have never filled in any details in a case file and that you do not know how to do this. You would like some support in filling in case files front sheet information and details as to what should be included in a file. Again you asked that this be included in an email but I was able to open a new file and advise as to what info areas should be filled in."*

82. With regard to the Armadale Academy referrals, *"I advised you that these young people should, unless there are exceptional circumstances (and in that case I should have already been updated on this) be closed after they have been given six sessions. You said that you refuse to close two cases as you assess that they could be at risk of harm – these young people include . You refused to advise me of the reasons why these young people are at potential risk, except to say that was related to the young woman who tragically died…."*

83. Ms Johnstone asked the claimant to ensure that she completed CYPT evaluation sheets at the end of all work, but that she had refused as she did not know how to use them. She continued: *"I offered to go over this with you before or after the MHMW SG on Tuesday. You then said that you would not be using the forms as you do not agree with the form as*

you feel your colleague Mike Moss took your ideas and is passing them off as his own work… I was clear that the form which I emailed you last week is the one we as a service are currently using and that my expectation is that you use this but you advised that you would not be using it."

84. Finally, Ms Johnstone addressed a point under "Suicidal thoughts": *"You advised that if a young person tells you in a session that they have suicidal thoughts you do not automatically tell relevant line managers and CP reps in school as you use your 'professional judgement' as to whether they are at risk of doing this. Again I pointed out that this is unacceptable and not in keeping with West Lothian Child Protection Policy and that all staff have to pass this information on to their line managers or duty manager. You said that as a counsellor you have safe guard client confidentiality and, as an experienced worker you make an assessment of risk. I advised that this was unacceptable and pointed out that you had already been advised of this at a meeting with myself and Lisa McFarlane in January 2013. I advised that I was very concerned and would be passing this information on to Sarah Summers…"*

85. On 15 January, Ms Summers met with the claimant and suspended her with immediate effect. She wrote to the claimant on 16 January to confirm her suspension (247):

I refer to …your Performance Review meeting with Susan Johnstone, Team Manager, on 14 January 2015 during which you advised that you were aware of two young people at risk but were at that time unwilling to share the details. Given the potentially serious repercussions that can arise from a failure of an officer to disclose such information in these circumstances, your failure to cooperate with your manager is viewed as totally unacceptable and a breach of your duty of care as a professional officer.

Furthermore you have also failed to follow the established recording practices for your clients and refused to follow a reasonable instruction from your manager in that regard.

5 *In view of the serious nature of these matters, I must confirm your temporary suspension from duty on full pay with immediate effect pending the outcome of a disciplinary investigation.*

May I however reassure you that the purpose of your suspension is to enable a proper investigation of the allegations to be undertaken and in no way should be taken as inferring any pre-judgement of the matter on
10 *the part of the council.*

Whilst on suspension you should not attempt to access or contact any individuals at your place of work or visit your place of work except by prior arrangement with your Line Manager. You should however remain available at all times during your normal working hours to assist the
15 *investigations as required…"*

86. The letter went on to identify Jane Kellock as the Nominated Officer and an unidentified person as the investigating officer.

87. On 22 January 2015, Ms Kellock wrote to the claimant (248) to confirm the commencement of the formal investigation, to be carried out by Dan
20 Easton.

88. In January and February 2015, the respondent conducted an investigation into the claimant's whistleblowing complaint. A report was produced by Kenneth Ribbons, Audit and Risk Manager, dated 13 February 2015, following an investigation by Roberta Irvine (261).

25 89. The report noted that Jane Kellock confirmed to Ms Irvine that she was aware that letters had been issued to the children being counselled by the claimant. The report went on: *"At a meeting held with Susan Johnstone and Jane Ridgeway, Susan Johnstone's trade union representative, Susan Johnstone confirmed that she issued letters to the*
30 *children on 4th July 2014. She stated that at the time she did not add*

notes to the SWIFT system as she was out of office. However, when it was pointed out to her by Jacqueline Brown the notes were absent, on 19th November 2014 they were promptly added. Susan Johnstone stated she instructed Beth Sime, Administrative Assistance, Children & Young People Team to issue the letters. She couldn't remember if this was done via email or verbally however did confirm they were issued…

Following discussion held with Susan Johnstone a meeting was held with Beth Sime, Administrative Assistant with the Children & Young People's Team. Beth confirmed that Susan Johnstone had emailed her with a list of people who required a letter to be sent out. Beth advised that the letters were issued and she used one as a template and cut and pasted the names and addresses of the people the letters were sent to. No copies were kept. However, one letter was returned as the wrong address was held on SWIFT. Roberta Irvine was given a copy of the returned letter and a redacted version is attached as an appendix. One other letter wasn't' issued as according to SWIFT the case wasn't allocated to a counsellor."

90. The report concluded that the letters were issued to seven of the nine children as stated on the SWIFT system, advising of the claimant's absence, and that two children were not issued with letters owing to issues with the SWIFT system.

91. On 13 February 2015, Donald Forrest, Head of Finance and Estates, wrote to the claimant to advise her that the allegation had been investigated, and that the respondent would not be taking the matter forward, and it was now closed (264).

92. On 18 February, the claimant emailed Kenneth Ribbons (265) to express her disappointment that the concerns raised by her had not been upheld, and asking how she could take matters further. Mr Ribbons replied the same day to say that the respondent was satisfied that letters were sent to 7 of the 9 children in July 2014 advising of her absence, and that of the other 2 children, one letter was returned as the address on SWIFT

was incorrect, and the other child was not written to as according to SWIFT the case was not allocated to a counsellor. He reiterated that the case was now closed.

93. On 4 March 2015, the claimant made a complaint to the SSSC (Scottish Social Services Council) in the same terms as the whistleblowing complaint, against Susan Johnstone as her professional body.

94. Dan Easton completed his investigation report in March 2015 (the date is unclear from the report) and presented it to Ms Kellock (270ff).

95. Under “Key Findings”, Mr Easton noted the following:

“JB has indicated some general concerns. The first is that the Counselling Service was transferred to the CYP without any consultation with herself and, in her view, had been operating perfectly well prior to the transfer. JB appears to have a continuing dissatisfaction about this transfer and it is clear that the relationship with both managers since this transfer has been a fraught one. The dissatisfaction has manifested itself in repeated disputes about the referral system/Time Management System/home working/car pool arrangements.

Secondly, she has expressed repeated concerns about the inability of SWIFT to offer adequate levels of confidentiality. She does not consider it secure enough for her purposes.

Thirdly, JB has made repeated references to the constraints that she feels are placed on her in her role as a Counsellor. She feels that her function must exempt her from at least some of the normal requirements placed on council employees in Social Policy.

Even within the bounds of the agreement struck in the mediation process, there are discrepancies in the expectation about what actions would be delivered. JB feels that her actions have been consistent with that agreement, her managers and line manager have consistently told her they do not agree.”

96. Mr Easton went on to outline the evidence which had emerged from the investigation in relation to each of the allegations to which the claimant was subject. He then set out conclusions in respect of each of those allegations, which, again, largely consisted of a narrative of the assertions made by management and the claimant respectively.

97. On 12 April 2015, Tim Ward wrote to the claimant (437) to invite her attend a disciplinary hearing on 8 May 2015 at the Civic Centre in Livingston. He confirmed that he had considered the conclusions of the investigation report and concluded that there were grounds to convene a disciplinary hearing in terms of the respondent's Disciplinary Procedure.

98. The claimant was unable to attend a hearing on 8 May, and accordingly it was rescheduled to 19 May 2015 (439).

99. The hearing convened on that date. No notes were taken of the hearing, which was adjourned. The claimant attended with the support of her trade union representative, Derek Ormiston, of the union UNITE. The hearing was chaired by Tim Ward. Mr Easton was present as the investigating officer, and Gillian Cairney attended to take notes and provide Human Resources advice.

100. The hearing lasted less than an hour before it was adjourned. Ms Johnstone had attended as a witness, and had completed her evidence to the hearing. Subsequently, the claimant produced some documentation which she had emailed to herself at her home email address. That documentation included sensitive personal data relating to clients whom she had counselled. Mr Ward immediately expressed concerns that this may have amounted to a breach of the respondent's security and confidentiality standards. The claimant described everyone present, including herself, as "stunned" when it was stated that she had committed a potential security breach.

101. Mr Ward took the decision to adjourn the hearing in order to allow Mr Easton to carry out a supplementary investigation into the potential security breach which had arisen. He wrote to the claimant on 19 May

2015 (442) and said: *"I would confirm the disciplinary hearing you attended today was adjourned to investigate an information security breach you admitted to carrying out, whilst collating the information you supplied at your hearing."* He went on to explain that Mr Easton would carry out the investigation and that the disciplinary hearing would reconvene and the allegation would be heard at the same time as the original allegations.

102. Mr Easton also wrote to the claimant on 21 May 2015 (444) advising that "a further disciplinary matter will now be considered in relation to your recent Hearing", and that the disciplinary matter related to "an information security breach you admitted to carrying out, whilst collating the information you supplied at your hearing."

103. Mr Easton indicated that he would arrange a meeting to discuss the allegation and that he would contact IT staff in order to seek information about the management of the claimant's IT accounts. He also stated:

"You may or may not be aware that the Information Commissioners Office (ICO) has substantial powers in relation to penalising organisations who are guilty of data breaches. These fines regularly run to six figures. I should advise you that West Lothian Council has an obligation to take steps in terms of notification about data breaches and undertaking remedial action, including risk assessments.

On this basis I must inform you that I require as a matter of urgency that you return to me all paper copies of confidential information that you have regarding WLC operations and that you confirm that you have deleted all emails containing confidential information…"

104. The supplementary investigation was concluded in June 2015, and the report dated 19 June was provided to the claimant (446ff). The conclusions were set out on the final page of the report:

i. *"The fact that JB has breached the policy and guidance on the secure management of information is not contested.*

ii. *There have been numerous incidents where it has been demonstrated that JB has emailed confidential information about service users to herself at her personal email account.*

iii. *The evidence to support this conclusion has been provided by JB herself (App, A & J), as well as by IT staff who have undertaken a trawl of JB's work email account (App. E, F, G).*

iv. *IT staff have also been able to confirm that JB has successfully completed the Council's mandatory training in Data Protection, Records Management and Security. This successful completion is supported by the fact that the email account had remained open until JB's precautionary suspension; failure to complete the courses satisfactorily would have resulted in a suspension of the account and this had not happened.*

v. *JB has variously indicated at interview that:*

- *She had initially failed to realise that she was breaching the guidance on information security.*
- *She felt at the tie she was sending herself confidential information, she was compliant with the guidance because she understood her personal account and her iPhone to be secure.*
- *She was clear that she had been instructed at supervision not to take case files home*
- *Confidential information in emails is different from confidential information in case files*
- *She felt she need to retain her own copies of the confidential information because there was a managerial intent to discredit her."*

105. On 25 June 2015, the claimant submitted a formal grievance against Ms Johnstone, Ms Summers and Mr Moss (525). She said it was her belief that she had been the recipient of ongoing harassment, intimidation, victimisation and bullying from her direct managers and colleague as a result of raising an initial grievance on 13 February 2013 and her subsequent whistleblowing allegations.

106. The claimant was invited to a Stage 1 grievance hearing on 9 July 2015 by Vivian Spencer (529). Following that meeting, Jo Macpherson wrote to her (531) on 20 July 2015 to confirm the scope of the investigation to be conducted, and to advise her that a number of the matters raised had already been investigated by the previous grievance and the whistleblowing investigation, and therefore were treated as dealt with. A new investigating officer was to be appointed to investigate the new grievances.

107. The claimant was invited to a disciplinary hearing on 2 July 2015. She replied to Ms Cairney by email dated 25 June 2015 (532), in which she stated that her trade union representative was due to be on annual leave during the week of the proposed continued hearing. She proposed the date of the hearing should be rescheduled to 13 July when she and her union representative would be available.

108. On 2 July 2015, Ms Cairney emailed the claimant (534) proposing 3 new dates for the continued hearing, namely 7, 10 or 13 August. The claimant replied expressing confusion, as she had proposed a hearing for 13 July (533), to which Ms Cairney responded by advising that due to the holiday period the hearing would now have to take place in August. The claimant replied on 16 July asking that any important communications be sent to her by letter in future, and confirming that "I have since received your letter dated 10 July 2015 regarding the hearing date which I have duly noted".

109. That letter of 10 July 2015 (543) nominated 7 September 2015 as the date of the continued hearing. It stated, inter alia, "Please note that this

hearing will not be rescheduled and failure to attend may result in a decision being taken in your absence".

110. On 27 July 2015, the respondent issued a further letter inviting the claimant to the continued disciplinary hearing (544) on 7 August 2015. The claimant emailed Ms Cairney on 30 July 2015 saying that it had seemed to her that the respondent had made an error in sending out the letter instructing her to attend the hearing on 7 September, and pointing out that it was unacceptable to be given 5 working days' notice to attend the hearing (on 7 August). The letter had been sent out in error, and therefore a further letter, scheduling the hearing for 7 August, had required to be issued to the claimant.

111. Having received the claimant's email the respondent decided to issue a further hearing notice date, and did so by letter of 5 August 2015 (545). Again, that letter stated that the hearing would not be rescheduled and that failure to attend may result in a decision being taken in her absence.

112. On 10 August 2015, the claimant emailed Ms Cairney (542):

"…I am disappointed that WLC has not honoured the hearing scheduled for 7th September. I had arranged union representation for that date well in advance.

My rep is unable to attend on the 25th August and I will gladly provide their contact number to enable you to confirm this with them.

I note that the letters state that the hearing 'will not be rescheduled' and yet WLC has in fact rescheduled the hearing due to an error being made in the dates and a letter being sent out to me with September 7th date.

Through no fault of my own I potentially face having no representation at the hearing on the 25th and seek to have the date on September 7th confirmed."

113. On approximately 12 August 2015 the claimant had a short exchange, by email, with Mr Ward, in which he indicated that the hearing would proceed on 25 August as scheduled.

114. The claimant did not make application to the respondent to reschedule the hearing of 25 August but simply asked them to "honour" their commitment to the hearing of 7 September. The respondent advised that they were unable to do so as that hearing had been issued in error, and was not scheduled for a date when the necessary personnel were available.

115. The claimant decided to resign on 25 August 2015. The hearing was due to take place at 2pm, and she sent Mr Ward an email at 10.32am (549).

116. The email stated:

"Dear Tim,

I wish to tender my resignation with immediate effect. My employment is untenable with WLC due to the behaviour of my Line Manager, Susan Johnstone and her line manager, Sarah Summers.

I apologise in advance for the length of this email but I send it in the hope that WLC will consider the concerns that I have tried to raise and that in future it might inform practices relating to children and young people's rights.

I appreciate that the issue of my Line Manager falsifying SWIFT entries was investigated and the matter was concluded.

My concern was, and still is that my Line Manager's actions were covered up.

I can only hope that the complaints that I raised against my line manager with the SSSC are robustly investigated.

Children and young people's rights are being routinely breached as a result of their data being entered onto SWIFT without being advised how that personal information will be used. It was and still is my ethical duty to ensure that children and young people are aware of their rights.

I have always carried out my duties as a council employee with the utmost integrity and professionalism and I am devastated that my line manager can blatantly falsify information on SWIFT and compromise the well-being of vulnerable young people and yet I am the one who has lost a job that I loved.

I would be grateful if I can arrange a time to collect belongings from my locker. I would prefer if this is done when other CYPT staff have left the office for the day to avoid causing me distress.

Kind regards,

Jacqueline Brown"

117. Mr Ward responded at 11.34am that day (549) to acknowledge receipt of the email and of her resignation from the respondent's employment with immediate effect.

118. Ms Macpherson then wrote to the claimant on 31 August to advise that the formal grievance had been brought to an end, as the investigation could not fully address the issues raised. She stated that the investigating officer had arranged to meet the claimant on 14 August and also on 28 August, but that she did not attend either appointment and tendered her resignation on 25 August.

119. Following the termination of the claimant's employment, she has been unable to find alternative employment within her chosen field of counselling. She has registered with online recruitment agencies such as S1 Jobs and checked with her professional body, BACP, for vacancies advertised by them.

120. The claimant applied for Job Seekers' Allowance, and received regular payments in this regard.

121. She looked for full time counselling posts, but described them as "like gold dust", being extremely rare in central Scotland. She could have chosen to relocate to London in search of work but she was not prepared to do so as her son is 16 and in the process of taking national examinations, and therefore she regarded such a move as being impractical in light of her family circumstances.

122. The claimant applied for casual work in a call centre, operated by British Gas, which she estimated earned her £400 a month, and which lasted for approximately 6 months. She then started a business in self employment under the Department of Work and Pensions New Enterprise Allowance, in April 2016. She has a small private practice where she counsels "one or two" clients per week. One client pays her £10 a week; the other pays £25 a session for a maximum of 6 sessions.

123. The claimant stopped receiving Job Seekers' Allowance on entry to the New Enterprise Allowance, which paid her the same amount, that is £67 per week, until July 2016 when she stopped receiving any benefits at all.

124. Her employment tribunal fees were paid by her trade union.

125. Following the termination of her employment, the claimant first sought legal advice in November 2015 from Messrs Allan McDougall & Co, solicitors. Prior to that time she had had advice from her trade union, who were considering whether or not to grant funding to her for legal support for her case. She estimates that she was first in touch with her solicitor on 2 November 2015.

126. Her evidence was that when she resigned her solicitor was clear about the time limits within which she required to present her claim to the Employment Tribunal. She knew that her claim had to be submitted by no later than 3 months minus one day, which would be 24 November. The ECC was dates 18 November 2015, and accordingly in her mind

she presented the claim in time. She was aware that she was working to a tight timescale but wanted to wait until the last minute in order to obtain copies of the minutes of the appeal hearing, which were never provided to her by the respondent.

5 127. The claimant described the impact of these events upon her as "devastating". She was prescribed anti-depressants by her GP, she thinks after 25 August 2015, though she was unable to recall precisely when. She described herself as having suicidal thoughts, worries about the future and concerns about her financial circumstances, which have 10 been reduced considerably by the loss of her income.

Submissions

128. The parties made submissions to the Tribunal at the conclusion of the evidence. What follows is a brief summary of those submissions.

129. For the respondent, Ms Sutherland presented a written submission, to 15 which she spoke.

130. She denied that the claimant made a qualifying disclosure in terms of section 43B of the Employment Rights Act 1996 (ERA). She accepted that the claimant had made a disclosure of information, that none of her clients had been contacted in her absence and that false entries had 20 been made on SWIFT to state retrospectively that they had been contacted.

131. Ms Sutherland said that the disclosure did not fulfil the definitions within section 43B. She argued that there was no legal obligation which required Ms Johnstone to contact the claimant's clients during her 25 absence, and the "mere falsification" of SWIFT would be insufficient for fraud. She did accept that it is possible that Ms Johnstone was under an obligation under her employment contract not to falsify records (though she asserted that Ms Johnstone had complied with that obligation).

132. Ms Sutherland also confirmed that the respondent denies that the 30 claimant had a reasonable belief that the allegations made showed or

tended to show relevant malpractice under section 43B. It is also denied that the claimant made the disclosures in the public interest: in fact, she said, the claimant made the disclosures in her private interest. She was not seeking to further the interests of young people but to discredit her line manager.

133. The respondents deny in any event that the claimant was subjected to any detriment in respect of having made qualifying disclosures. The claimant asserts that she was subjected to spurious allegations resulting in disciplinary proceedings, being a witch hunt, together with the extremely lengthy period of suspension.

134. Ms Sutherland argued that the allegations made against the claimant in the disciplinary proceedings were not spurious. There was evidence provided by the claimant herself that she had refused to discuss two young people at risk of harm; that she had said that if a young person expressed suicidal thoughts she should carry out her own assessment as to whether there was a risk of suicide which required to be shared with her managers, and that she failed to follow established procedures regarding the recording and storage of data.

135. Mr Easton was objective and balanced in his enquiries and conclusions, and had not conducted a witch hunt.

136. Ms Sutherland went on to assert that the claimant was not subject to an extremely lengthy suspension on unreasonable grounds. She fully accepted that there was a reasonable explanation and basis for the length of the suspension, and that the unavailability of her own representative had played a part in the delays.

137. Ms Sutherland submitted that even if the Tribunal were to conclude that there were any detriments, the protected disclosure did not materially influence the detrimental treatment, in the absence of any causal link between the complaint and the alleged detriments. There was no evidence that the whistleblowing complaint was in the mind of the decision makers at the relevant time. The claimant's own conduct in the

period up to her suspension was the reason why the allegations were made. The decision makers and other managers involved acted in good faith in taking the views which they did.

138. She then argued that the detriments claim should be dismissed on the grounds of time bar. The last act of detriment took place on 12 August 2015, when she was advised that the disciplinary hearing would take place on 25 August. There was no extension by reason for early conciliation because that process only started on 18 November, after the expiry of the time limit. An extension of time may be granted by the Tribunal for such further time as the Tribunal considers reasonable, when it is satisfied that it was not reasonably practicable for the claim to have been submitted on time.

139. Ms Sutherland observed that the claimant had access to trade union and legal advice within the time limit, and therefore it cannot be said that it was not reasonably practicable for the claim to have been submitted within the statutory timescale.

140. She then submitted that the claimant's claim of automatically unfair dismissal should be dismissed on the basis that the whistleblowing complaint was neither the sole nor principal reason for the detriment, and did not materially influence the respondent's decisions in relation to the claimant.

141. Ms Sutherland then denied that the claimant was, in any event, constructively dismissed unfairly in terms of section 95(1)(c) of ERA. It is for the claimant to prove that the respondent was in repudiatory breach of the contract of employment, such as to justify her resignation, that she resigned in response to the breach and that she did not delay too long before accepting the breach.

142. The respondent denies that there was any repudiatory breach of the claimant's contract going to the root of the contract or showing that the respondent no longer intended to be bound by the essential terms. Ms Sutherland submitted that the claimant, whose position on when the

relevant breach or breaches took place was confused, had, at base, to prove that the detriments on which she sought to rely amounted to fundamental breaches of contract, and that they were the sole reason for her resignation. Whether the constructive dismissal claim is made as an ordinary claim or an automatically unfair dismissal claim, it must fail. The respondent has put forward a reasonable explanation for its actions and therefore there was no repudiatory breach of contract.

143. Ms Sutherland went on to argue that the claimant did not resign in response to any breach, in any event. She did not, on the evidence, resign in relation to any detriments but because she had been discovered to have been in breach of security obligations in relation to the documents which she produced at the original disciplinary hearing.

144. She also submitted that the claimant affirmed any breach of contract anyway, given that she was aware over a considerable period of time of the issues to which she referred in her letter of resignation.

145. After setting out her proposed findings in relation to the facts in this case, Ms Sutherland submitted that the respondent's witnesses were open and honest, and should be preferred in the event of any conflict with the evidence of the claimant. She argued, by contrast, that the claimant's evidence was at times vague, hesitant and contradictory, and where panic set in, simply dishonest.

146. Ms Sutherland argued that no award should be made to the claimant even if the Tribunal were to find in her favour. The claimant has, she said, suffered no injury to her feelings. She suffered very significant absences for mental and behavioural anxiety disorder in 2013 and 2014 which she accepted was not attributable to work related stress.

147. In addition, the claimant failed to take reasonable steps to mitigate her losses. She only applied for 2 jobs in the period from 25 August 2015 until the date of the Tribunal hearing.

148. She submitted that the claimant would have been dismissed in any event in light of the other material failures which came to light in the course of the disciplinary process, and therefore any award should be reduced by 100%.

149. Ms Sutherland therefore invited the Tribunal to dismiss the claimant's claims.

150. The claimant spoke briefly on her own behalf. She referred to her evidence during the course of the hearing.

151. She asked that the Tribunal take particular account of the respondent's failure to honour its arrangement to hold the disciplinary hearing on 7 September 2015. She maintained that she had been denied a statutory right, namely the right to be accompanied at a formal disciplinary hearing.

152. She invited the Tribunal to uphold her claims as set out in her ET1 and in the Scott Schedule, and to make an award consistent with the sums set out in the schedule of loss presented by her in the documents.

<u>The Relevant Law</u>

153. Section 43A of the Employment Rights Act 1996 ("ERA") provides:

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

154. A qualifying disclosure is defined in section 43B as *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one ore 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;

5 *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
10 *the preceding paragraphs has been, or is likely to be deliberately concealed."*

155. Section 47B prohibits a worker who has made a protected disclosure from being subjected to any detriment by any act, or any deliberate
15 failure to act, by his employer done on the ground that the worker made a protected disclosure.

156. Helpful guidance is provided in the decision of **Blackbay Ventures Ltd (t/a Chemistree)** **v** **Gahir** **[2014] IRLR 416** at paragraph 98:

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"It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.

25 *1. Each disclosure should be identified by reference to date and content.*

2.. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or
30 *likely to be endangered or as the case may be should be identified.*

3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.

4. Each failure or likely failure should be separately identified.

5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.

6. The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s43B(1) and under the 'old law' whether each disclosure was made in good faith and under the 'new' law whether it was made in the public interest.

7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is

deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

5 *8. The employment tribunal under the 'old law; should then determine whether or not the claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest."*

157. Section 95 of the Employment Rights Act 1996 ("ERA") sets out the circumstances in which an employee is treated as dismissed. This
10 provides, inter alia

"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

…

15 (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."

20 158. Where a claimant argues that there has been constructive dismissal a Tribunal requires to consider whether or not they had discharged the onus on them to show they fall within section 95(1)(c). The principal authority for claims of constructive dismissal is **Western Excavating -v- Sharp [1978] ICR 221**.

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159. In considering the issues the Tribunal had regard to the guidance given in **Western Excavating** and in particular to the speech of Lord Denning which gives the "classic" definition:

30 *"An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances*

is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged."

160. The Western Excavating test was considered by the NICA in **Brown v Merchant Ferries Ltd [1998] IRLR 682** where it was formulated as:

"…whether the employer's conduct so impacted on the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract. Although the correct approach to constructive dismissal is to ask whether the employer was in breach of contract and not did the employer act unreasonably, if the employer's conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract."

161. What the Tribunal required to consider was whether or not there was evidence that the actions of the respondents, viewed objectively, were such that they were calculated or likely to destroy or seriously damage the employment relationship.

162. It is also helpful to consider the judgment of the High Court in **BCCI v Ali (No 3) [1999] IRLR 508 HC**, in which it is stressed that the test (of whether a breach of contract amounts to a breach of the implied term of trust and confidence) is "whether that conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice."

163. In **Jones v Collegiate Academy Trust UKEAT/0011/10/SM**, the EAT stated: *"It is important to note that an objective test is to require whether the conduct complained of is calculated or likely to destroy or seriously damage the relationship; the subconscious of intent of the respondent is*

irrelevant as the Employment Tribunal correctly held… The subjective perception of the employee is also not relevant. The respondents' conduct must be repudiatory in order to establish a breach of the implied term; it must be conduct by the respondent which objectively considered it likely to undermine the necessary trust and confidence in the employment relationship."

164. The Tribunal also took into account the Employment Appeal Tribunal decision in **Wright v North Ayrshire Council UKEATS/0017/13/BS** from June 2013. In that case, having examined the line of authorities relating to claimants who resign for more than one reason, Langstaff J cautioned against seeking to find the "effective cause" of the claimant's resignation, but found that Tribunals should ask whether the repudiatory breach played a part in the dismissal.

Discussion and Decision

165. The issues in this case are as follows:

i. Did the claimant make a protected disclosure to the respondent?

ii. Did the respondent subject the claimant to detriments on the ground that she had made a protected disclosure?

iii. Did the respondent dismiss the claimant on the ground that she had made a protected disclosure?

iv. Was the claimant constructively unfairly dismissed by the respondent?

v. What award should be made to the claimant in the event that the Tribunal has found in her favour?

166. The Tribunal considered these issues in turn.

i. **Did the claimant make a protected disclosure to the respondent?**

167. It is a matter of common ground that the claimant's disclosure consisted of contact with the respondent's whistleblowing hotline on 24 November 2014, in which she raised two issues: firstly, that there was a failure by the respondent to contact the young people previously counselled by the claimant during the course of her lengthy absence from work, to advise them of her absence and the reason for it; and secondly, that a retrospective updating of the SWIFT database had been carried out on 19 November 2014 asserting that letters had been sent to those clients with that purpose. That was, she said, falsification of the system by her line manager, Ms Johnstone.

168. With regard to the first disclosure, the claimant has not, in our judgment, demonstrated that the information provided amounted to a disclosure within the meaning of section 43B of ERA. There is no basis upon which it can be said that the respondent, by not contacting the claimant's clients in her absence, committed a criminal offence, failed to comply with any legal obligation to which they are subject, caused a miscarriage of justice to occur, caused the health and safety of any individual to be endangered, caused the environment to be damaged or sought to conceal any of these issues.

169. It may be suggested by the claimant that she was concerned about the health and safety of the clients, and that her unexplained absence caused them a degree of anxiety that was at least potentially harmful to them. However, in our judgment, there is no evidence which would allow us to reach such a conclusion. The two individual clients who were not contacted were omitted because one had an incorrect address on SWIFT, and the other did not appear to be a client of the counselling service. They wrote to the respondent to complain about having been left without any information as to the claimant's circumstances. However, those letters were not written or sent to the respondent until after the claimant had returned to work following her lengthy absence; in addition, the claimant wrote one of the letters for the complainer, and received in person the other. The language of the letters of complaint suggested to us a degree of professional knowledge which was unusual

for two vulnerable young people. One of the letters of complaint was written in the claimant's hand. She suggested that she had merely written down what the complainer said, but we found that difficult to believe.

5 170. We concluded that the evidence did not demonstrate that the health and safety of either complainer, or indeed of any other client of the counselling service, could be said to have been endangered by the alleged failure to communicate with the clients, and that the concerns which were raised were much more those of the claimant, being put
10 forward as her complaints, rather than those of the individual clients.

171. Accordingly, we were not satisfied that the disclosure which alleged the failure of the respondent to contact the clients of the counselling service during her sickness absence amounted to a qualifying protected disclosure under section 43B.

15 172. With regard to the second disclosure made on 24 November 2014, the Tribunal concluded that this did meet the definition set out in section 47B. The claimant disclosed to the respondent the information that a retrospective entry had been made by Ms Johnstone on 19 November 2014 on the SWIFT database which, in her view, falsely asserted that
20 communication had been made with the claimant's clients during her lengthy absence. The information disclosed was that the entry had been made. It tended to show that the entry had been made falsely, and possibly fraudulently, which in our judgment may amount to a disclosure that a criminal offence had been committed or that Ms Johnstone had
25 failed to comply with a legal obligation, namely the accurate maintenance of the SWIFT database in compliance with the Data Protection legislation. It is acknowledged that the claimant has not clearly indicated which provision she considers has been breached, but in our judgment she has met the basic terms of the test under section
30 43B.

173. In addition, we are persuaded that such a disclosure could have been in the public interest, in that the respondent is a public authority with access and input to the database which is a national social work resource. If false information is being entered on such a database, the impact on clients as well as fellow professionals is likely to be significant, and we consider that to be a matter of considerable public interest.

174. Accordingly, the Tribunal has concluded that the disclosure of information relating to the allegedly false information retrospectively entered on the SWIFT database on 19 November 2014 amounts to a qualifying disclosure.

ii. Did the respondent subject the claimant to detriments on the ground that she had made a protected disclosure?

175. It is necessary to set out the detriments of which the claimant complains before this Tribunal before considering whether or not the Tribunal accepts that she was subjected to such detriments, and if so, on the ground that she had made a protected disclosure; and finally, under this heading, to consider whether it was not reasonably practicable for the claimant to have presented her claim for detriments under this section within three months of the last of the detriments occurring, and if not, whether the claimant presented her claim within such further time as is reasonable.

176. The claimant set out her allegations of detriments in the Scott Schedule presented to the Tribunal at 722ff.

177. The detriments may be summarised as follows:

- Spurious allegations having been made against her, resulting in disciplinary proceedings;
- An investigation which amounted to a “witch hunt”;
- An extremely lengthy period of suspension;

- The continuation of the disciplinary proceedings; and

- The manner in which those disciplinary proceedings were conducted.

178. The Tribunal considered these points in turn, taking the first two points together.

5 179. We were unpersuaded that the allegations amounted to spurious allegations, nor that the investigation amounted to a "witch hunt". What we understood the claimant to be alleging here was that the allegations made by the respondent and subsequently investigated by Dan Easton were without foundation, and in effect made up in order to penalise her – 10 subject her to a detriment – for having made the whistleblowing disclosures. In addition, she appeared to suggest that this was targeted upon her with the desire either to persecute her or to reach the point where dismissal was possible. This is how we have interpreted her suggestion of a witch hunt against her.

15 180. We considered that since the allegations to which the claimant was subject arose out of conversations which the claimant herself had with her managers, and to the information available surrounding those conversations, there was a foundation upon which they were based. This arose from the claimant's performance review meeting on 20 14 January 2015 with Ms Johnstone, in the course of which the claimant was said to have refused to discuss two young people who were at risk of harm; that the claimant had said that if a young person told her in a session that they had suicidal thoughts she would not automatically tell relevant line managers and CP representatives in school as she was 25 using her own professional judgement as to whether or not there is in fact a risk of suicide; and that the claimant had not complied with the respondent's practices, or instructions of management, in relation to the storage of sensitive personal data and its recording.

181. That meeting gave rise to considerable concern on the part of the 30 managers involved, and from that arose the investigation which the claimant regarded as spurious. In our judgment, it was entirely

understandable that the respondent would wish to investigate the issues arising out of this conversation. It cannot be said that there was no foundation for the investigation. In our understanding, the claimant did not deny that she said what she is alleged to have said, but she disputed the right of the respondent to interpret her position as they did. That does not render the investigation spurious: it is very common for the Tribunal to be confronted with disputes between managers and employees as to the interpretation placed upon that employee's actions, in a conduct case.

182. Further, in order to demonstrate that the investigation was spurious and a witch hunt, it would be necessary to show that those involved, and in particular the investigating and nominated officers, to be not only insincere in their evidence to us that they were genuinely investigating matters which they recognised to be of serious import, but also disingenuous and possibly dishonest. In our judgment, both Mr Easton and Mr Ward were impressive witnesses, speaking honestly and forthrightly about their perspective on the allegations and the information which they obtained during the course of the investigation and the hearings. It is quite wrong, in our judgment, to characterise their handling of the disciplinary matters before them as either spurious or a witch hunt. Indeed, it was our conclusion that Mr Easton was fair minded and balanced in his approach to the allegations, and was anxious to ensure that the claimant was given every opportunity to know what was said against her and to respond to it.

183. Accordingly, we cannot conclude that the allegations were spurious nor that the investigation amounted to a witch hunt. The claimant has therefore failed to demonstrate that she was subjected to a detriment in these particular regards.

184. The claimant submitted that the length of the suspension was such as to amount to a detriment against her on the ground of having made a protected disclosure. In our judgment, this may be dealt with shortly. There is simply no evidence upon which we could conclude that the

respondent deliberately protracted the disciplinary investigation nor the hearings which took place. We also accepted the respondent's submission that the claimant accepted that there was a reasonable explanation for the length of the suspension, and that the unavailability of her own representative had played a part in the difficulties in scheduling hearings. Indeed, it appears that the claimant's primary complaint about the final hearing was that it was taking place too soon, as she had wanted it to take place on 7 September 2015. In our judgment, there was simply no substance in this complaint and we did not conclude that in this regard the claimant was subjected to a detriment.

185. The final two points are suitable to consider together. The claimant proposed that the continuation of the disciplinary proceedings and the manner in which the disciplinary proceedings were conducted amounted to detriments visited upon her by the respondent.

186. We found no basis for these assertions. The reason for the continuation of the disciplinary hearing was that the claimant disclosed that she had in her possession confidential data relating to clients, which she had obtained by emailing the information to her own private (insecure) email address, and that the respondent considered this to be a serious matter requiring further investigation.

187. Not only did the Tribunal regard the respondent as eminently justified in seeking to investigate what may have amounted to a serious breach of the security of the personal, sensitive data relating to clients, but it was also our view that the claimant conceded in evidence, and indeed at the time, that they had no alternative but to do so. She said before us that she was "stunned" when this matter was raised, and explained that what had left her stunned was that she should find herself in a situation where she may have committed such a serious breach of security in confidential circumstances, given her previous stance to the respondent that she would not enter details on SWIFT because she was too concerned about the possibility of breaches of confidentiality. She

stated clearly to us in evidence that she did not contest that she had breached the respondent's guidance on the secure management of information.

188. In our judgment, by the claimant's own version of events, she cannot complain that the continuation of the disciplinary hearing amounted to a detriment. The hearing was continued because she introduced confidential information to the hearing, raising the question of how she had obtained and retained it, and when her answer was given, in breach of the respondent's guidance on the secure management of information, a further investigation was necessitated. The respondent did nothing to bring about this situation, which only arose because of the claimant's own actions. That cannot amount to a detriment by the respondent.

189. Further, we were unimpressed by the claimant's complaint that the disciplinary proceedings were conducted in a manner which amounted to a detriment to her. The investigation, as we have already made clear, we found to be objective and fair. The disciplinary hearing which did proceed, albeit for a relatively short time (on the evidence we heard, we concluded that it lasted about 20 minutes) appears to have been conducted in a straightforward and fair manner. Ms Johnstone had given evidence and been questioned by the claimant. The claimant then sought to refer to documents which she regarded as helpful to her case, which was the point at which the hearing required to be adjourned. There was no basis in evidence for us to conclude that the claimant suffered any detriment in the manner in which the disciplinary proceedings were conducted in this regard.

190. The claimant did complain about the insistence of the respondent on proceeding with the reconvened disciplinary hearing on 25 August 2015 when her trade union representative was not available. That alleged detriment – the decision to proceed when it was known to the respondent that her representative was not available – took place at the latest on 12 August, when Mr Ward informed the claimant that 25 August was the date upon which the hearing would proceed.

191. It is not clear to the Tribunal that the claimant actually requested an adjournment of that hearing. It was open to her to do so at the outset of the hearing but of course she resigned some three hours before it was due to commence, and therefore the respondent was not, in effect, given the opportunity to reflect upon her application to adjourn. They had gone to considerable efforts to find an alternative date, albeit that they had issued a notice for a hearing on 7 September in error.

192. Our conclusion was that the claimant focused upon that date as a proposal on the part of the respondent to much too great a degree. It was an error on the part of the respondent. They made it clear that it was an error. They also made it clear that their witnesses were not available on that date. That the claimant's trade union representative was not available on 25 August was known to the respondent, but it was not known to them – nor do we find it likely – that there was no other trade union representative available to the claimant for that hearing.

193. The letter inviting the claimant to the hearing did say that it would not be postponed, and the claimant appeared to take that as a discouragement to asking for it to be postponed, but she knew that the previous letters of invitation had made the same comment, and yet had been postponed for good reason.

194. In our judgment, the respondent did not act unreasonably in fixing the continued hearing for 25 August, and for persisting with that date in the face of the correspondence from the claimant in the meantime. It was not unreasonable for them not to fix the hearing on 7 September when that was a date outwith the period which had been sought, but also a date upon which the people central to the issue for the respondent were unable to attend.

195. Accordingly, it is our judgment that the respondent did not submit the claimant to any detriment in relation to the continuation of the disciplinary hearing or the conduct of the disciplinary proceedings.

196. We would also say that we were not persuaded that the respondent, even if they had subjected the claimant to the detriments she alleged, did so as a result of her having made whistleblowing claims. Mr Easton and Mr Ward both gave evidence before the Tribunal that the disclosures had no impact at all upon their actions, and we found their evidence to be consistent, candid and straightforward. As a result, we were quite prepared to accept that they took no account of the disclosures in their decisions or actions in relation to the disciplinary investigation or proceedings.

197. Having reached the conclusion that the claimant was not subjected to detriments by the respondent on the ground of having made protected disclosures, it is not necessary for us to consider whether or not the claim was time barred. However, on the evidence, we were forced to the view that it was reasonably practicable for the claimant to have presented the claim within the statutory timescale, having had access to legal advice and support at an early stage in November 2015. The test is a stringent one, and the Tribunal reached the view which was set out in the initial decision issued by the sitting Employment Judge following the closed Preliminary Hearing on 12 January 2017.

iii. Did the respondent dismiss the claimant on the ground that she had made a protected disclosure?

iv. Was the claimant constructively unfairly dismissed by the respondent?

198. These two issues were considered together by the Tribunal. The question of whether or not there was a dismissal at all in this case is fundamental to whether the claimant was dismissed on the ground of having made a protected disclosure.

199. The claimant resigned on 25 August 2015, by an email to Mr Ward in advance of her continued disciplinary hearing.

200. The Tribunal required to consider, therefore, whether the respondent's actions amounted to a repudiatory breach of contract which entitled the claimant to resign, and whether those actions were the sole or principal cause of her resignation.

5 201. The reason for the claimant's resignation is best established, in our judgment, by what she wrote at the time in her resignation email. Under some circumstances, a Tribunal may find that the letter of resignation communicates very little about the reason for departure, or says nothing or little about any breach of contract justifying the resignation, but in this 10 case, the claimant set out a number of points on which she said she had made up her mind to resign. Accordingly, the email of 25 August must be taken to be of considerable importance in betraying the claimant's reasoning in deciding to resign, as at the time when she took that action.

202. It is worth repeating the terms of that email:

15 *"Dear Tim,*

I wish to tender my resignation with immediate effect. My employment is untenable with WLC due to the behaviour of my Line Manager, Susan Johnstone and her line manager, Sarah Summers.

I apologise in advance for the length of this email but I send it in the 20 *hope that WLC will consider the concerns that I have tried to raise and that in future it might inform practices relating to children and young people's rights.*

I appreciate that the issue of my Line Manager falsifying SWIFT entries was investigated and the matter was concluded.

25 *My concern was, and still is that my Line Manager's actions were covered up.*

I can only hope that the complaints that I raised against my line manager with the SSSC are robustly investigated.

Children and young people's rights are being routinely breached as a result of their data being entered onto SWIFT without being advised how that personal information will be used. It was and still is my ethical duty to ensure that children and young people are aware of their rights.

I have always carried out my duties as a council employee with the utmost integrity and professionalism and I am devastated that my line manager can blatantly falsify information on SWIFT and compromise the well-being of vulnerable young people and yet I am the one who has lost a job that I loved.

I would be grateful if I can arrange a time to collect belongings from my locker. I would prefer if this is done when other CYPT staff have left the office for the day to avoid causing me distress.

Kind regards,

Jacqueline Brown"

203. The claimant stated at the outset that her employment was "untenable", due to the behaviour of Ms Johnstone and Ms Summers. Her subsequent references to the routine breaching of children and young people's rights related to the entering of sensitive data on to SWIFT without having the right to consent. She returned to the subject of the allegation that Ms Johnstone had falsified information on SWIFT.

204. However, she did not refer to the alleged detriments upon which she has based her claim to this Tribunal, in her resignation email. Those were:

- Spurious allegations having been made against her, resulting in disciplinary proceedings;
- An investigation which amounted to a "witch hunt";
- An extremely lengthy period of suspension;
- The continuation of the disciplinary proceedings; and

- The manner in which those disciplinary proceedings were conducted.

205. Her email makes no reference to any of these points. Accordingly, it is impossible to conclude that the reason for her resignation was on the ground of having been subjected to detriments for having made protected disclosures.

206. Ms Sutherland urged us to find that the real reason for the claimant's resignation was that she had been discovered to have committed significant breaches of the respondent's security of data provisions. In our judgment, this is a fair conclusion. The claimant well understood that the continued hearing involved the detailed consideration of her own actions, and that those actions were unacceptable to the respondent. In our judgment, the claimant realised that these actions were unacceptable, and that it was inevitable that the respondent would treat them with the utmost seriousness. In that light, she sought to avoid the hearing by resigning in advance of it, in order to preserve the argument which she now seeks to make, that her resignation was provoked by the actions of the respondent.

207. However, her decision to resign cannot be said, in our judgment, to have been caused by the respondent visiting detriments upon her on the grounds of having made protected disclosures, for two main reasons: firstly, that is not included within the rationale which she gave, at the time, while explaining why she felt compelled to resign; and secondly, the respondent did not subject the claimant to any detriments as a result of having made protected disclosures, as we have already found.

208. It is therefore our conclusion that the claimant's claim must fail, on the basis that she has not proved that the sole or principal reason for her resignation was that she had been subjected to detriments following the making of protected disclosures. Indeed, we have been unable to conclude that the claimant was constructively dismissed at all. Her resignation was, in our judgment, caused by her realisation that she had committed an act of gross misconduct, and that this was likely to be

regarded with great seriousness by the respondent. In those circumstances, she chose to resign before facing the consequences of her own actions. The respondent did not dismiss her, nor did they commit any repudiatory breaches of the contract of employment. By contrast, it was our judgment that the respondents acted responsibly and reasonably in investigating and taking the claimant to disciplinary proceedings in light of her continuing failure to comply with what amounted to quite reasonable management instructions, and her statements in the meeting of 14 January 2014 which gave rise to considerable and understandable concern on the part of the respondent.

209. Accordingly, we have reached the conclusion that the claimant has failed to prove her case, and therefore that her claim fails and must be dismissed.

v. What award should be made to the claimant in the event that the Tribunal has found in her favour?

210. It follows from our conclusions that the Tribunal has not found in the claimant's favour, and therefore that no award falls to be made to her.

Employment Judge: Murdo MacLeod
Date of Judgment: 20 March 2017
Entered in Register: 21 March 2017
and Copied to Parties