EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Ms S Sheils	**AND**	**Northern Doctors Urgent Care Ltd**

REASONS OF THE EMPLOYMENT TRIBUNAL

Heard at: **North Shields** **On: 20,21,22 February 2017 and 21, 22 and 23 March 2017**

Before: **Employment Judge Shepherd** **Members: Mr D Cartwright Mr S Wykes**

Appearances

For the Claimant: **In person**

For the Respondent: **Mr Van Zyl**

Judgment having been given to the parties on 23 March 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant represented herself and the respondent was represented by Mr Van Zyl

2. The Tribunal heard evidence from:

   Sheleen Sheils, the claimant;
   Marianne Donnelly, Regional Clinical Services Manager;
   Jacquiline McLoughlin, Clinical Services Manager;
   Sam Oldfield, Clinical Development Manager;
   Nicola Brown Practice Service Manager;

Helen Davies, Nurse Practitioner;
Bronwen Gilliland, Senior HR Advisor;
Marie Field, Regional Director;
Julian Saul, Assistant Regional Director;
Alan Maguire, Deputy Organisational Medical Director;

The Tribunal also had sight of written statements from Taikchan Karan, Advanced Nurse Practitioner, Jean McIvor, Advanced Nurse Practitioner, on behalf of the claimant and David Wood, Governance Administrator, on behalf of the respondent. In respect of each of these witnesses it was accepted by the claimant, in respect of the respondent's witness and by Mr Van Zyl, in respect of the claimant's witnesses, that they did not wish to ask any questions and the written evidence within the statements was considered on the basis that it was not challenged.

3 The causes of action on which the claimant seeks a determination by a Tribunal relate to detriments said to have been suffered as a result of protected disclosures under section 47B of the Employment Rights Act 1996.

4 Issues identified during a Private Preliminary Hearing before Employment Judge Reed on 8 December 2016 were as follows :

"Protected disclosure section 47B of Employment Rights Act 1996

<u>Jurisdictional Issues:</u>

Time Limits:

1 Did the Claimant bring her claim within a period of three months starting with the date of the detriment ?

2 If not, was it reasonably practicable for the claim to be presented within three months ? Should time be extended ?

Qualifying Disclosure:

3 Did the Claimant make a protected disclosure for the purposes of Section 47B Employment Rights Act 1996 ?

4 What was each disclosure ?

5 Were the disclosures qualifying disclosures within the meaning of Section 47B Employment Rights Act 1996 ?

6 Did the Claimant have a reasonable belief that the information disclosed was substantially true ?

7 Was any disclosure made in the public interest ?

8 In all of the circumstances was it reasonable for the Claimant to make any disclosure ?

9 What detriment does the claimant allege to have suffered as a result of making the disclosures or any of them ?

10 Has there been a detriment suffered as a result of making a disclosure ?

11 If one or more of the disclosures was or were protected has the Claimant proved on the balance of probabilities that the reason that she was subjected to a detriment was the fact that she has made the protected disclosure(s) ?

Employment Judge Reed included the following note:

> **Note: In recording issue 11 as above, I have simply followed the wording agreed between the parties. It may be an over simplification. Section 48(2) means that once all of the other necessary elements of a claim have been proved on the balance of probabilities by the claimant – ie that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment – the burden will shift to the respondent to prove that the claimant was not subjected to the detriment on the ground that he or she had made the protected disclosure. Provided that the parties accept my analysis, nothing further in relation to the recording of issues is required. If either does not then the Tribunal should be informed by 15 December 2016 and further consideration can be given and possibly another telephone preliminary hearing arranged.*

5. At the start of this hearing the issues were discussed and agreed as those identified above. However, it was also agreed that the appropriate consideration was whether the claimant had made a protected disclosure and had been subjected to a detriment, if the burden then shifted to the respondent, it would be for the respondent to show that the disclosure did not have a material influence on the imposition of the detriment.

6. There was a considerable element of confusion with regard to the detriments alleged. The particulars of claim are annexed to the claim form presented by the claimant and had been prepared by the legal representatives acting on behalf of the claimant at that time.

The detriments were set out in the particulars of claim as follows:

i) Suspension from practice following disclosure;

ii) Disciplinary action for non-proven allegations of gross misconduct;

iii) Victimisation – introduction of an historic Datix raised following a complaint against the claimant in April 2016;

iv) Unable to attend the final sessions of her course by the respondent withdrawing its support of her course leading to potential loss of course accreditation;

v) Reputational damage;

vi) Threat of losing practising licence as a result of disciplinary action for gross misconduct;

vii) Financial loss due to being suspended and loss of overtime payments; and

viii) Deterioration of physical and mental health and well-being.

These alleged detriments were discussed on a number of occasions during the hearing in order to clarify the issues to be determined by the Tribunal.

7. It was clear that the allegation in respect of the claimant's suspension was an alleged detriment. The claimant accepted that this was not disciplinary action. The investigation had not been concluded and, in those circumstances, the alleged detriment of disciplinary action was not relied upon.

8. The investigation was completed and the claimant was provided with the outcome on the penultimate day of the tribunal hearing. She was required to attend a disciplinary hearing. However, this was not an element in the claim before the Tribunal.

9. With regard to the introduction of the historic Datix, this related to a complaint against the claimant by a patient with regard to a referral for an x-ray. The claimant indicated that she no longer pursued this allegation and accepted that David Wood had not continued with the investigation of that complaint because the claimant had made a protected disclosure.

10. The allegation in respect of the claimant being unable to complete her prescribing course at Teesside University was pursued as an alleged detriment.

11. It was agreed that the detriments referred to in respect of reputational damage, threat of losing practising licence, financial loss and issues in relation to the claimant's physical and mental health were consequences of the alleged detriments rather than detriments as such.

12. The claimant also indicated that there was a reference to a failure to properly deal with her grievance under the terms of the respondent's Whistleblowing Policy within the particulars of claim, although it had not been specified as a detriment.

13. In addition, the claimant also raised the issue of the respondent's treatment of a request for a reference and the claimant's loss of opportunity to take up alternative employment. Mr Van Zyl, on behalf of the respondent, submitted that this was not an issue that had been raised within the pleadings and was not an issue that the Tribunal could consider. The evidence in this regard was considered with regard to the findings of fact and was relevant with regard to how it reflected on the respondent's treatment of the claimant in respect of the alleged detriments that had been identified as issues for the Tribunal to determine. It was relevant as background information.

14. The Tribunal had sight of a bundle of documents which, including documents added during the course of the hearing, were numbered up to page 587.

Findings of fact

15. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions:

15.1. The claimant is employed by the respondent as a Nurse Practitioner. Her employment commenced on 3 November 2014 and she is employed at the Houghton Primary Care Centre.

15.2. The respondent provides urgent care services on behalf of the National Health Service. These services are GP led with Nurse Practitioner support. The respondent operates a number of NHS Out of Hours clinical service centres throughout the UK including three centres in the North East, Houghton, Bunny Hill and Washington.

15.3. The claimant had a history of suffering from depression prior to her employment with the respondent. In her job application she referred to the death of her mother and some periods of absence as result of grief/depression.

15.4. The claimant, and indeed other members of staff, had raised concerns with regard to staffing levels. The Tribunal had sight of an email from the claimant dated 11 March 2016 to Jacquiline McLoughlin raising concerns about staffing levels at the Hougton centre. The claimant was concerned about being "automatically asked to move prior to other staff". She said that Hougton was "depleted from minimal staff numbers to cushion other centres". She referred to "shortness in permanent staff is an ongoing issue". Whilst the claimant said that working short staffed was unfair she also said she wanted to continue to work for the respondent but that that it was affecting her general health and well-being.

15.5. On 10 May 2016 the claimant was rostered to work a 13 hour shift. At 9.47 she sent an email to Jacquiline McLoughlin as follows:

> "This morning on rota there is myself from 09.30 - 22.30, Dr Uday from 10 till 3pm, your down to work from 3pm till 5.30pm with Dr Matia from 6 pm till 10.
> Is this correct-there is a note saying that despatcher will be in Houghton from 5.30 till 6pm when I am a lone clinician. If this is correct I am unhappy to see any patients between 5.30 and 6, also Dr Matia is always late for his shift as it tends to be approx. 15 minutes later that he arrives. A despatcher would be unable to assist me for clinical issues.
> Have 111 and the team leaders been informed that there will only be one nurse and one doctor on. With only one nurse on duty that leaves on me to see to all trauma and injury patients-this needs to be reflected in the booking of patients as trauma patients take increasing longer to see that illness patients.

> On my lunch break I will also be leaving the building for lunch. I seem to work many shifts as the lone nurse is there any reason why this happens.
> As I have discussed this with you numerous times working short staffed without safe numbers does cause me stress."

15.6. Also on 10 May 2016 the claimant completed an incident reporting form on the respondent's Datix reporting tool. This stated:

> "Staffing levels - below minimum - throughout the day, one nurse and one doctor, also between 15.00 till 18.30 no doctor on site and 17.30 and 18.30 no doctor and only one nurse on duty, lone practitioner, rota states that a non-clinical employee will be in the Department from 17.30 till the Dr arrives unsuitable as non-clinical is unable to offer any support to clinical lone worker."

In the box for immediate action taken it was stated:

> "Escalated concerns to line manager – concerned that this staffing levels considered acceptable to put in a non-clinical person to support clinician- which places both lone practitioner and patient at risk."

15.7. At approximately 3:30pm a patient arrived at the Houghton urgent care centre. She was reported to be suffering from abdominal pain which was getting worse. The Receptionist provided the patient with an appointment at 5pm.

15.8. The patient returned at approximately 4:40pm.

15.9. The patient complained that she had not been seen and was spoken to by Genna Bulley, the administrator on site. The patient was placated and indicated that she did not want to pursue the complaint further at that point.

15.10. Genna Bulley spoke to her team Leader Andrew Griffiths, Assistant Operations Manager, and he telephoned the claimant at around 6pm. He informed the claimant that he had a patient who was complaining that she had not been seen. The claimant explained that she was only a nurse on her own, it was a doctor led service and they were waiting for the doctor to arrive. Andrew Griffiths asked if the patient needed to be seen by a GP. The claimant said that the patient needed to be seen by a nurse but that she was uncomfortable with the situation. During that telephone call the GP arrived and the claimant indicated to Andrew Griffiths that the patient would then be seen.

15.11. The claimant then saw the patient, she referred the patient to the GP and the patient was then referred to Accident and Emergency.

15.12. Marie Field, Regional Director, spoke to the claimant over telephone. The claimant told Marie Field that she wished to raise an official complaint in respect of unsafe staffing and stated that she would telephone the Care Quality Commission in order to discuss whether it was standard to work alone. Marie Field arranged for Dr Marc Herscovitz , the on-call Clinical Manager, to discuss matters with the claimant.

15.13. On 11 May 2016 Marie Field discussed the situation with Marianne Donnelly, Regional Clinical Services Manager. Marie Field was told by Marianne Donnelly that the claimant had refused to see the patient. Marianne Donnelly told Marie Field that, in her opinion, the behaviour of the claimant was clinically unsafe. She told Marie Field that refusing to see a patient in those circumstances would be considered negligent and in breach of the Nursing and Midwifery Council's code of conduct. It was concluded that the risk posed to patients was sufficiently serious to warrant suspension while the investigation was ongoing. Marie Field said that she discussed the position with HR and was advised that suspension was appropriate if the clinical concern was sufficient.

15.14. Marie Field and Marianne Donnelly, attended the Houghton premises on 11 May 2016 and suspended the claimant at approximately 1pm. The claimant was told that the suspension was because of clinical concerns and that it was a neutral act.

15.15. The claimant said that, when she got home, she spoke to the Care Quality Commission and told them of her concerns. She was informed that they would investigate and keep her informed.

15 16. Later on 11 May 2016 Dr Herscovitz, at 6.52pm, sent an email to Marie Field, Marianne Donnelly and Jaqui McLaughlin copied to others. In that email it was stated;

> "I was clinical on call on Tuesday and Marie called me to say that one of our nurses at Houghton was really upset.
> I called the nurse, Shaleen, and she gave it to me.
> She said she was left alone, without any clinical staff in the UCC earlier in the day. She felt that this was unsafe as any kind of patient can walk into a UCC and she felt that it was imperative for Vocare to have at least 2 clinicians (2 nurses or a GP and a nurse) at a UCC site in order for the site to be open to the public and be safe. She feels that, as a nurse, she is not competent to be alone in an UCC without another clinician.
>
> She threatened to report us to the commissioners, the nursing Council and anyone else that will listen.
> She told me she was recently involved in a resuscitation of a baby and that resuscitation was only successful as she had other clinicians to support her.
>
> She also complained a few times being bullied by non-clinical team leaders about needing to see patients and work in these conditions.
>
> I acknowledged her concerns on the phone and validated her feelings. She agreed that she would not raise any concerns with outside bodies and she would give us a chance to sort this out internally. I said I would revert to her in a week and Marie and I are hoping to meet her face to face.

It would be useful for us to know what the minimal clinical staffing level of a UCC is considered safe and what is expected of our UCC nurses. Do the commissioners have any criteria? Any views would be welcome."

15.17. On 13 May 2016 Jaqui McLoughlin contacted the University of Teesside to inform them of the claimant's suspension and that she had deferred the respondent's support for a prescribing course that the claimant was undertaking whilst the investigation was being carried out. It was indicated in an email dated 16 May 2016 that, if the allegations were unfounded, the respondent would continue to support the claimant to complete this course.

15.18. On 16 May 2016 the claimant sent an email to Penny Needham, Head of Human Resources lodging a grievance. In that email the claimant referred to contacting Marie Field on 10 May 2016 by telephone in line with the Whistleblowing Policy raising issues with regard to staffing levels. She referred to being suspended and not being given any reason. In that email the claimant also referred to speaking to Marie Field informally in December 2015 or January 2016 when she raised a concern and the claimant said that Marie Field had replied with a comment "oh you're not going to whistleblow are you" and when the claimant said no she had an issue concerning Marianne Donnelly, the claimant said that Marie Field then stated "that's okay then, as you do know I would have to find a reason to sack you." The claimant referred to having evidence of this conversation and the comments that had taken place.

15.19. On 17 May 2016 Marie Field wrote to the claimant confirming her suspension whilst the respondent undertook an investigation into the allegations of potential gross misconduct. It was confirmed that the claimant was suspended for concerns regarding unsafe clinical practice. The allegations were set out as follows:

- "Negligent behaviour: any action or failure to act which seriously threatens the health, safety or welfare of a patient, employee or member of the public.

  More specifically it is alleged that:

- On Tuesday, 10 May 2016, you initially refused to see a patient who presented with RIF pain and subsequently delayed assessment of the patient. In doing so you fell significantly short of the NMC standard to prioritise people, specifically point 1.4 to make sure that any treatment, assistance of care for which you are responsible is delivered without undue delay.

- The undue delay in carrying out an assessment of the patient exposed her to risk of harm and late referral to A & E.

- Your examination notes did not comply with the NMC professional standards point 10 – to keep clear and accurate records relevant to your practice. The history of the patient's health was incomplete and failed to make an adequate assessment of the patient's needs."

15.20. The claimant attended a grievance hearing on 27th of May 2016. This was before Alan Maguire, Deputy Organisational Medical Director, who was accompanied by Bronwen Gilliland, Senior HR Advisor.

15.21. On 2 June 2016 Alan Maguire wrote to the claimant with the outcome of her grievance in that letter it was stated:

> "In conclusion, I have found no evidence of any bullying towards you by Marianne Donnelly or Marie Field. I also found no evidence that the suspension was in direct relation to your telephone call with Marie on 10th May but that it was a result of an allegation of negligent behaviour that is currently undergoing investigation. As a result of these findings, I propose to take no further action."

15.22. The claimant appealed against the grievance outcome.

15.23. Sam Oldfield, Clinical Development Manager was appointed to conduct the investigation into the claimant's alleged refusal see a patient. The claimant attended a meeting with Sam Oldfield, who was accompanied by Bronwen Gilliland, on 9 June 2016. There was some discussion with regard to the events of 10 May 2016. The claimant did not accept that she had refused to see the patient. She said that she had been feeling unwell. The meeting was suspended due to the claimant indicating that she was unwell and unable to continue with the meeting.

15.24. On 14 June 2016 Bronwen Gilliland referred the claimant to the Occupational Health Department. On 5 July 2016 a report was provided by the Occupational Health nurse who indicated that she was of the opinion that the claimant was not fit to be at work but, with the right interventions and support, she was sure that her health would improve for her to be able to return to work. It was also indicated that it was felt that it would be in the claimant's interests to attend the investigation meeting "to get closure".

15.25. The claimant attended a return from sickness absence meeting with Julian Saul, Assistant Regional Director, on 21 July 2016. Following that meeting Julian Saul wrote to the claimant in respect of her outstanding grievance appeal and indicated that he would be holding an appeal meeting in accordance with the procedure. The claimant attended a grievance appeal meeting with Julian Saul on 21 July 2016 and on 8 August 2016 he wrote to the claimant providing the outcome of her grievance appeal. In this letter Julian Saul indicated that he was unable to uphold any part of the grievance appeal.

15.26. The Tribunal had sight of a report from the Care Quality Commission in respect of the Houghton Primary Care Centre. This was dated 22 July 2016 and followed an unannounced visit on 24 May 2016 and was said to have been carried out in response to concerns raised about systems and processes. The report indicated that the Clinical Services Manager had told them that the minimum staffing level for the centre was 2 clinicians. In the summary of the report it was stated that they found the provider had

arrangements in place for planning and monitoring the number of staff and the mix of staff needed to meet patient's needs.

> "However, we found on a small number of occasions the minimum number of staff the provider had assessed as being required were not present"

15.27. A further Occupational Health report was provided on 20 September 2016. This report indicated that the claimant was not currently fit to return to work and recommended that conducting the remaining parts of the investigation in writing was probably the best way forward.

15.28. The claimant presented a claim to the Employment Tribunal on 12 October 2016. The claim was for detriment as a result of making a protected disclosure under S.47B of the Employment Rights Act 1996.

15.29. The claimant applied for alternative employment at Newcastle upon Tyne hospital and was offered a position. On 16 November 2016 Newcastle upon Tyne hospitals wrote to the respondent indicating that the claimant had been offered a job and requesting a reference. On 7 December 2016 the respondent provided its standard reference which, in common with a number of employers, merely indicated the claimant's position and the start date of her employment. It was also stated that, in accordance with their corporate policy, the respondent was not in a position to release any further information

15.30. The claimant said that she had spoken to Newcastle hospitals and was told that they were withdrawing their offer of employment due to the reluctance of the respondent to provide a reference. The claimant received a letter dated 28 December 2016 from Newcastle hospitals indicating that the offer of employment had been withdrawn as the claimant had failed to meet the requirements of the conditional offer of employment.

15.31. The claimant had a period when she was off sick as she had to undergo emergency surgery.

15.32. The claimant attended a return to work meeting on 20 December 2016 with Julian Saul. The claimant indicated that she was fit to return from the surgical point of view, but she needed the investigation concluding.

15.33. The claimant was sent outstanding investigation questions in writing in January 2016 and has provided responses.

15.34. The investigation was only completed on the penultimate day of this Tribunal hearing and the claimant was provided with a letter on 22 March 2017 indicating that the claimant was to attend a disciplinary hearing.

16. **The Law**

Protected Disclosure Claim

Section 43B(1) of the Employment Rights Act 1996

"(1) In this part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

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

(b) obligation to which he is subject;

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

(d) that the health or safety of an 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 the preceding paragraphs has been or is likely to be deliberately concealed".

17. Section 47B (1) provides

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

18. In the case of **Eiger Securities LLP v Korshunova** UKEAT/0149/16/DM Slade J referred to the distinction between automatically unfair dismissal by reason of making a protected disclosure and detriment on the ground of making a protected disclosure as follows

> "The Claimant's claim for "ordinary" unfair dismissal under ERA section 98 had been struck out as she did not have the necessary qualifying period of employment to bring such a claim. A claim for unfair dismissal for making a protected disclosure requires no qualifying period of employment and is brought under ERA section 103A. Section 103A provides:
>
> > "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."
>
> Section 103A, automatic unfair dismissal by reason of making a protected disclosure, and section 47B(1), a right not to be subjected to a detriment on the ground of making a protected disclosure, are in different Parts of the ERA, Part IX and IV respectively and use different language. The consequences of these differences for the tests in establishing claims for unfair dismissal under ERA section 103A and being subjected to detriment under ERA section 47B(1)

were authoritatively determined by the Court of Appeal in ***Fecitt v NHS Manchester*** [2012] IRLR 64 , a claim under ERA section 47B(1). These differences were explained by Elias LJ in paragraph 44 in which he held:

> " I accept, as Mr Linden argues, that this creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, it seems to me that it is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law. As Mummery LJ cautioned in *Kuzel v Roche Products Ltd* [2008] ICR 799, para 48, in the context of a protected disclosure claim:
>
> > "Unfair dismissal and discrimination on specific prohibited grounds are, however, different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs a risk of complicating rather than clarifying the legal concepts."

19. In ***Fecitt***, it was provided by the Court of Appeal that

> "…s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower…"

20. In the present case, it is not a question of dismissal and the Tribunal must be satisfied that the protected disclosure materially influences the detrimental treatment of the claimant. It is for a respondent to establish, to the satisfaction of the Tribunal, the ground on which any act was done pursuant to s.48(2) ERA. The respondent must prove, on the balance of probabilities, that the act complained of was not on the ground that the claimant had made a protected disclosure.

In the case of **Bolton School v Evans [2007] ICR 641,** the Court of Appeal recognised a distinction between disclosing information – in that case, that the school's computer system was not secure - and the fact that the employee hacked into the computer system in order to demonstrate that the system was not secure. Disciplining the employee on the ground that he had engaged in unauthorised misconduct by hacking into the computer system did not involve subjecting the employee to a detriment on the grounds that he had made a protected disclosure. The conduct, although related to the disclosure, was separable from it. The Court of Appeal noted, however, that a

> "Tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure itself, in this case there is no reason to attribute ulterior motives to the employer. Although not seized of this point, the EAT made observations that are very pertinent to it in paragraph 62 of determination:

> 'In this case the employee had not been subject to any discipline proceedings when he had earlier forcibly express views about the security system that should be adopted, nor is there any reason to suppose that he would have been disciplined if he had simply informed the school that someone else had hacked into the system. The employers acted because of their belief that it was irresponsible for him to have done so even if the purpose was to demonstrate the force of his concerns. '
>
> We were urged to look at the whole of Mr Evans' activities, and not just at his verbal encounters with Mr Edmondson and Mr Booker. If that is done, it becomes plain, as both tribunal is below found, that the warning given for Mr Evans's irresponsible conduct, and not for telling his employers, by whatever means, that their system was insecure. "

21. An important aspect of causation in this context is that it is not controlled by notions of reasonableness. This is not a claim for 'ordinary' unfair dismissal. The test is a simple one of causation. The reason found for the respondent's act must, if the claim is to fail, not be the claimant's protected disclosure.

22. It is clear that it must be shown that any detriment was caused by some act, or deliberate failure to act, by the employer. Also, that there must be a causal connection between the protected disclosure and the detriment, specifically that the act was done on the ground that the claimant had made a protected disclosure. It is for a claimant to show that she has made a protected disclosure, and suffered a detriment as a result of an act done by the employer.

23. The question will then be whether the respondent has established the reason for the respondent's act or deliberate failure to act and that the protected disclosure was not a material influence on that act.

Conclusions

24. An identified issue to be determined by the Tribunal was that of jurisdiction. This was identified at the Preliminary Hearing. It was mentioned at the start of the substantive hearing Mr Van Zyl was asked whether this was still an issue. He indicated that he was not sure and would consider the point but that we should press on in the meantime and he would let us know whether there was a jurisdiction point to be considered. The claimant presented no evidence and was not cross-examined on the reason why the claim appeared to have been submitted out of time. The Employment Judge raised the issue with the claimant who indicated that there had been a reference to ACAS on 1 August 2016. However, the early conciliation certificate indicated that the date of the referral to ACAS was 12 October 2016 and the early conciliation certificate was dated 12 October 2016. The claimant indicated that she had been told that the claim was in time by ACAS and her solicitors. Mr Van Zyl did not raise the point again during the hearing or in his oral submissions.

25. It was submitted by Mr Van Zyl in his written skeleton argument that the claimant referred her complaint to ACAS on 1 August 2016 the last of the detriments complained of was on 13 May 2016. The early conciliation certificate states that the

date of receipt of the EC notification was 12 October 2016 and the date of the conciliation certificate is 12 October 2016. The claimant submitted her claim to the Tribunal on 12 October 2016. It was submitted that there was a query about the length of the conciliation period. It may be that the dates are incorrect and the early conciliation certificate should have been dated 12 September 2016. The claim was then issued on 12 October 2016 and appeared to be in time. It may be that the claimant could give further evidence with regard to reasonable practicability but this was not pursued. The Tribunal has dealt with this claim on its merits in any event.

26. The Tribunal has considered whether the claimant made disclosures that were protected disclosures pursuant to section 47B of the Employment Rights Act 1996.

27. The alleged disclosures are set out at paragraph 31 of the grounds of claim presented on behalf of the claimant. There were four disclosures on 10 May 2016, the first being to the claimant's line manager, Jacqui McLaughlin. The second disclosure referred to was a datix incident report. Also, a verbal complaint to Gemma Bulley and further verbal complaints to Marie Field and Dr Herscovitz. The fifth alleged disclosure was to the Care Quality Commission on 11 May 2016.

28. All the disclosures were, essentially in respect of the same issue, the claimant's concern that there were staff shortages and that these were below the minimum requirement.

29. The Tribunal is satisfied, having considered all the evidence, that the claimant had a reasonable belief that the health and safety of staff and patients had been and was being endangered.

30. The claimant's concern had been heightened as a result of an incident in which she had needed to resuscitate a baby and for which she had been commended by her line manager.

31. The issue of short staffing had been raised by the claimant and other clinicians in the past. Gemma Bulley indicated in an email that she was hearing from both nurses and doctors who had said it was clinically unsafe to work on their own.

32. This was a disclosure which the Tribunal is satisfied was, in the reasonable belief of the claimant, in the public interest and it tended to show that the health and safety of an individual is likely to be endangered. The Tribunal is satisfied that this disclosure was in the public interest and was, therefore, a protected disclosure pursuant to section 43B

33. The Tribunal is satisfied that the claimant was subject to a detriment when she was suspended. The Tribunal has gone on to consider the question of causation. The reason why the claimant was subject to the detriment.

34. The evidence of Marie Field was credible and consistent. The claimant was suspended as a result of Marie Field's concern that the claimant had refused to see a patient and that this could happen again in the future. Marie Field had been orally informed by Marianne Donnelly that the claimant had refused to see a patient and that the behaviour of the claimant was clinically unsafe. The Tribunal is satisfied that Marie Field had a genuine concern in this regard and that was the reason why the

claimant was suspended pending the investigation. The evidence was clear and the Tribunal accepts that was the reason for the suspension.

35. In the circumstances, the burden of proof had shifted to the respondent and it had satisfied the Tribunal that the detriment was not materially influenced by the protected disclosure.

36. The other detriment identified was that of Jacqueline McLoughlin contacting Teesside University and informing them that the claimant was suspended and this meant that the claimant was unable to complete the prescribing course. The reason for this detriment was that the claimant was suspended. The Tribunal is satisfied that the respondent has shown that it was not related to or materially influenced by the protected disclosure.

37. During the course of the Tribunal hearing the claimant raised a further detriment. It was not stated to be a detriment within the pleaded case. This alleged detriment was that the claimant's grievance was not dealt with pursuant to the respondent's Whistleblowing policy. The Tribunal finds that the concerns the claimant had raised were dealt with by way of the respondent's grievance procedure and, also by way of the Datix procedure. The respondent's Whistleblowing policy provided for issues to be dealt with under other policies. In any event the respondent established that any failure to deal with the grievance under the policy was not as a result of the protected disclosure and was not materially influenced by it.

38. The claimant referred to the case of Champion v Leicester City Council on a number of occasions during the hearing. She had found a reference to this on the Public Concern at Work website but was unable to provide a reference for this case. Following the judgment and after her request for written reasons, she provided the case number which was 1950119/2010. This was a first instance case and the Employment Judge has considered the extract from the case on the Public Concern at Work website. This was case in which the claimant had been kept in the dark for months regarding whistleblowing investigations which resulted in him becoming ill with work-related stress. The Employment Tribunal ruled in the claimant's favour. His illness was caused by his exclusion from meetings and the removal of his responsibilities as well as the failure of the respondent to deal with concerns he had raised in line with their whistleblowing policy, including their failure to inform the claimant of the outcome of the investigation.

39. This was an issue that had been considered by the Tribunal. The respondent's Whistleblowing policy includes a provision that indicates that if the concern can be handled under any other policy or procedure it would be referred to the appropriate person and that is what occurred in this case. Also, if there had been a failure to deal with the grievance under that policy, then it has been determined that that was not as a result of the protected disclosure or materially influenced by it. The respondent dealt with the claimant's concerns under the Datix system and the grievance procedure. The Whistleblowing policy provided for the concern being handled under other policies or procedures. Consideration of this case would have made no difference to the judgment.

40. The Tribunal has considerable sympathy with the claimant. It is satisfied that the claimant had genuine and serious concerns which she raised. These were, in the claimant's reasonable belief, in the public interest. However, the suspension was not

as a result of, or materially influenced by, the disclosures. It was very clear that the claimant was suspended because of clinical concerns. Marie Field was the person who made the decision with regard to the suspension. Her concerns were made clear to the Tribunal and it was as a result of being told by Marianne Donnelly that the claimant had refused to see a patient and that her behaviour was clinically unsafe. Marie Field was also aware that the claimant had threatened to walk off a shift in the past as a result of a dispute with regard to the amount she should be have been paid. Marie Field said that her overwhelming concern was that a similar situation could occur again where the claimant refused to see a patient. The Tribunal accepted the clear and credible evidence of Marie Field.

41. Whether the claimant had actually refused to see a patient or whether the extent of any such refusal was such that the claimant should be subject to disciplinary action is not a question for this Tribunal on this occasion. It is a question for the employer following a disciplinary hearing.

42. The claimant had genuine concerns about serious issues in respect of the staffing levels and the safety of herself, other members of staff and patients. It was perfectly proper of her to raise these concerns. The Tribunal is satisfied that this was a protected disclosure. The claimant was subject to a detriment of suspension. Also, she alleged detriments in respect of the withdrawal of support for her university course and the failure to investigate her concerns within the respondent's Whistleblowing Policy. None of these actions were taken as a result of the protected disclosure. It was abundantly clear that the reason Marie Field decided to suspend claimant was because of the information she had received in respect of the allegation that the claimant had refused to see the patient. The contact with the University was as a direct result of the suspension. The Tribunal was satisfied that the respondent had shown that there was no failure to deal with the investigations pursuant to the respondent's Whistleblowing policy.

43. In all the circumstances the unanimous judgment of the Tribunal is that the claim is not well founded and is dismissed.

Employment Judge Shepherd

Date 6 April 2017

Sent to the parties on:

6 April 2017

For the Tribunal:

M M Richardson