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## **EMPLOYMENT TRIBUNALS**

**Claimant:** Mrs G Osae

**Respondent:** North Essex Partnership University NHS Foundation Trust

**Heard at:** East London Hearing Centre

**On:** 2, 3, 5, 9 February; 11, 12, 13, 19, 20, 21 July; 25 July; 19, 20, 21 December 2016 (in chambers)

**Before:** Employment Judge Houghton

**Members:** Ms L Conwell-Tillotson  
Mr M Rowe

### **Representation**

**Claimant:** Miss H Platt, Counsel  
**Respondent:** Miss G de Cordova, Counsel

### **RESERVED JUDGMENT**

**UPON HEARING Miss H Platt of Counsel on behalf of the Claimant and Miss G de Cordova on behalf of the Respondent, the UNANIMOUS JUDGMENT OF THE EMPLOYMENT TRIBUNAL is that:**

- (1) The Claimant was not unfairly dismissed by the Respondent.**
- (2) The Claimant's complaints of being subjected to detriments for making public interest disclosures are not well-founded.**

### **REASONS**

1 By a Claim Form received by the Tribunal on 20 July 2015, the Claimant, Mrs Georgina Osae, brought complaints of unfair dismissal, disability, race and sex discrimination and detriments/dismissal for making public interest

disclosures. Many of these claims fell away during the course of the hearing of these complaints, leaving for the Tribunal's determination complaints of constructive unfair dismissal under sections 94 and 98 of the Employment Rights Act 1996, automatically constructive unfair dismissal on account of making public interest disclosures under section 103A of the 1996 Act and detriments for making public interest disclosures under section 47B of the 1996 Act.

- 2 The Tribunal heard evidence from the Claimant on her own behalf. On behalf of the Claimant the Tribunal also heard evidence from Ms Raina O'Farrell (a nurse formerly employed by the Respondent) and Mrs Margaret Dowsett (Associate Director of Nursing for the Respondent until 2013). Ms O'Farrell and Mrs Dowsett attended the Tribunal to give evidence under witness orders made on the Claimant's application. On behalf of the Respondent the Tribunal heard evidence from Ms Audrey Joslin (Respondent's Clinical Manager/Matron), Ms Stephanie Rea (Claimant's line manager from 2012), Mrs Toni Scales (Respondent's Area Director Children's and Young People Services) and Mr David Olive (Respondent's Director of Psychological Services and Area Director). The Tribunal also had before it exhibit R1 (general bundle of documents) running to some 670 pages and to which additional documents were introduced during the course of the hearing. From the evidence it heard and the documents before it the Tribunal made the following findings of fact.

### **The facts**

- 3 The complaints upon which this Tribunal is required to adjudicate are relatively straightforward and narrow in scope. The Tribunal was, however, over the 10 days of this hearing presented with evidence in minute detail on matters largely amounting to factual background. Further, a number of the factual areas canvassed both in examination in chief and cross-examination go, in our judgment, to matters of collateral relevance. For example, the witnesses for both the Claimant (including the Claimant herself) and the Respondent were cross-examined at length and in great detail over whether a number of the work incidents which began to occur, particularly from 2013, were matters for which the Claimant bore sole or any responsibility. But the central issues for this Tribunal are whether the Claimant was constructively unfairly dismissed (whether on general principles or under section 103A) and whether any of the treatment she received from the Respondent was on account of the making of public interest disclosures. We do not, therefore, regard it as either proportionate or necessary to rehearse the facts set out below in the minute detail in which they were presented to us. Our findings of fact are accordingly restricted to those strictly necessary for the determination of the complaints before us.
- 4 The Claimant's employment by the Respondent as a Staff Nurse commenced on 1 December 1996. She subsequently progressed through the grades of Staff Nurse, Senior Staff Nurse and Deputy Ward Manager, becoming a Ward Manager in 2003.

- 5 The Kitwood ward at the Respondent's St Margaret's Hospital in Epping is a Specialist Acute Dementia Assessment ward which in 2008 was the subject of concerns that patients' needs were not being properly met on account, partly, of staff not being appropriately skilled. A decision was taken by the Respondent to replace, as part of the remedial measures, the then ward manager who was duly moved.
- 6 The Director Nursing, Ms Harriet Carr-West, approached the Claimant with a request that she take over the ward manager role. The Claimant was informed of the serious management issues on the ward and of the removal of the previous ward manager. Although the Claimant reminded Ms Carr-West that her previous experience was limited to acute adult care Ms Carr-West assured the Claimant that she had "every confidence" in the Claimant's ability to manage the ward and that she would be appropriately supported by senior management. The Claimant's clinical manager upon accepting that role was Ms Lynda Jellis.
- 7 Ms Jellis remained the Claimant's clinical manager from 2008 through to 2012. The Claimant eloquently sets out in great detail over pages 4 to 8 of her witness statement the various difficulties which existed in relation to staff, work practices, supervision and other matters on the ward. The Claimant had observed the wide range of problems and issues from the beginning of her time on the Kitwood ward in 2008 as a temporary ward manager (being made permanent in 2010). The Claimant attempted to raise these matters with Ms Jellis who appears to have taken a more relaxed stance than the Claimant. According to the Claimant, Ms Jellis advised the Claimant that so long as there were no complaints the Trust was happy for Kitwood staff to carry on as they always had.
- 8 In November 2012, Ms Jellis began a period of sickness absence (and later left the Respondent Trust) leaving a vacancy as Clinical Manager which was filled by Ms Stephanie Rea, who duly became the Claimant's line manager at that time (but not the Claimant's clinical manager because Ms Rea's background was social work as opposed to nursing).
- 9 We have described Ms Jellis's relaxed style of management. Ms Rea's arrival marked the advent of a more interventionist management style. In May 2013 (on a day when the Claimant was not working on the ward) what is known as a "safeguarding incident" occurred, when an inpatient on the Kitwood ward suffered unexplained bruising. The inability (or unwillingness) of the staff on duty to provide a satisfactory explanation as to how the patient had suffered the bruising in question generated investigations, disciplinary action against the five members of staff involved and the commissioning of a report by external investigators known as "Enable East" (R1, pages 217-226). The report concluded that the Kitwood ward appeared to lack purpose, direction and was one in which the professional staff had not fully discharged their professional duties to ensure the ward was working to high standards of practice. Of the Claimant the report observed (R1, page 220):

**While there was personal regard for the ward manager, there appeared to be no effective management of the culture and direction of the ward by her or her two deputies. This undoubtedly undermined confidence in the ward and the review process and many either felt apprehensive when working with the ward or tried to work around what they saw as the failings. This weakness in leadership then allowed frustrations and the potential for minor disagreements or demarcation among staff when they should be curtailed with clear management and direction.**

- 10 At a meeting attended by the Claimant, Ms Carr-West and Ms Stephanie Rea in September 2013 the contents of the Enable East report were shared with the Claimant. The Claimant did not agree with the criticisms made of her but nevertheless over the weeks which followed various action plans were put in place to address the shortcomings identified in the report, including any shortcomings in the performance of the Claimant. It is also material to note that at the time the Respondent's management's position was that it was not appropriate to take disciplinary action against the Claimant in relation to the injuries sustained by the patient subject to the safeguarding investigation but that instead the Claimant should be given the opportunity to address the shortcomings on the ward by accessing the additional support to be provided under the action plans. The Claimant's original action plan (prepared by the Claimant) (R1, pages 635-639) was rejected by Ms Carr-West and Ms Rea, resulting in the imposition of their own action plan (R1, pages 441A-441F and 112-115).
- 11 On 21 February 2014, in the wake of emailed correspondence between doctors and Dr Zuzana Walker (Consultant) about problems arising at St Margaret's Hospital generally and the Kitwood ward in particular Dr Kallur Suresh (Consultant in Old Age Psychiatry and West Area Medical Director) wrote to Ms Rea and Mr David Olive (Director of Psychological Services and Area Director) raising concerns which had been generated from those emails. We consider this email worth reproducing in full (R1, pages 232-233):

**Dear Steph and David**

**As you can see from the email trail below, there are several ongoing concerns about the nursing care on Kitwood ward, many of them very serious. I have had more concerns brought to me in another email last week from one of the trainees on the ward.**

**My ward round this week was rather chaotic as well. Irene did not know if there were any CPAs, who were invited and who were attending. This has happened many, many times when staff do not know (and I am not sure even take it seriously), if a family has been invited to the ward review. The communication between them is appallingly poor. On some days, I have finished ward reviews and walking out when family members have cornered me to see them. Staff do not know they are coming. Often there is confusion about timings of CPA.**

**The laptop, which I use to record reviews on Remedy, I was told was**

missing this week. I asked Georgina [*the Claimant*] if this has been reported as missing as it could have patient-identifiable, confidential data on it. Five minutes later, the laptop turns up as it was apparently found on Roding ward. In the past, it had been locked up in Georgina's office and no one else had the key. Georgina is frequently off on some kind of leave, including sick leave. I have made it clear that it is unacceptable that we do not have access to the laptop just because someone is away.

There is a whole catalogue of much more serious errors and omissions including missing insulin doses (which is life-threatening), meds not signed for on the cards, lack of equipment and a many others (please see below).

These problems have been going on for years and not a lot has changed [substantially]. We are still failing to provide basic, safe care for the most vulnerable group of patients that we look after. I no longer feel I can safely admit patients to the ward as I have serious concerns about competency of some staff, their ability to recognise seriousness of some issues, leadership on the ward from the ward manager, communication and hand-offs and the general atmosphere on the ward.

I am aware that staff are very busy, filling our loads of social care paperwork etc. but this is not and cannot be an excuse for substandard care.

*I am calling for Kitwood ward to be closed for a period, I am aware this is a drastic action but in my view nothing short of this will contain the risks or enable us to undertake a review of some of the fundamental, deep-seated and long-standing problems on the ward.*

I look forward to discussing this with you on Monday in more detail.

Many thanks and best wishes

Kallur

- 12 On Sunday 23 February 2014 Ms Rea replied to Dr Suresh suggesting a discussion before taking the step of closing the Kitwood ward to new admissions and requesting Ms Audrey Joslin to base herself on the Kitwood ward in an attempt to ameliorate the risks identified by Dr Suresh (R1, page 232):

Dear Kallur

Thank you for your E-mail – I concur with your view that there has not been sustained improvement – however I contest that the trajectory is as you have described as there have been periods of improvement including that which occurred following the external review last year, at the time of the review part of the terms of references was for the reviewers to consider the option for the ward to be closed – the conclusion of the review was that the closure action was not indicated and a number of recommendations were formulated into an action plan which has been

monitored through RGE. The actions as identified as identified have been but in place and have included the involvement of the chief nurse and dementia nurse specialist in reviewing competencies and practices on the ward – my view has always been that if the actions identified did not bring about the level of change required then more radical action is required of the type that you have indicated in your E-mail. As you are now of the view that events of recent weeks have indicated that we have now reached this stage this of course requires serious immediate action – I have copied Paul Keedwell, Margaret Dowsett, Mary Kennedy and Audrey Joslin into this response as the comments in your E-mail require immediate action. Is it possible for those of us attending the pressure testing day tomorrow to meet at an earlier time to agree what immediate actions are required?

Audrey in the light of this E-mail can you please base yourself on Kitwood ward until further notice and take immediate action to ameliorate the risks as described by Dr Suresh.

Regards  
Stephanie Rea  
Area Deputy Director West and substance Misuse

- 13 Mr Paul Keedwell (the Director of Nursing) who had been copied in to the above email replied later that day to Ms Rea indicating that he would support a temporary closure of the Kitwood ward to new admissions (R1, page 232). A few minutes later Ms Rea circulated an email to all those concerned requesting the closure of the Kitwood ward from that date (23 February 2014) to further admissions. On 25 February 2014, Dr Suresh responded by email thanking Ms Rea for her prompt action and stating that he was satisfied that the closure of the Kitwood ward to new entrants would tide them over what he described as the “immediate crisis situation”.
- 14 On 24 February 2014, Ms Joslin who, it will be remembered, had only the day before been requested to base herself on the Kitwood ward, held a meeting with the Claimant to explain to her that medical staff had raised various concerns about the Kitwood ward. Ms Joslin further informed the Claimant that despite the action plans matters had been escalated over the weekend and the decision had been taken based upon Dr Suresh’s concerns (together with those of other medical staff) to close the Kitwood ward to new admissions. It appears that this decision had been taken at an 8:30am meeting that day between Ms Rae, Dr Suresh and Mr David Olive. What was also decided at that meeting (and was now conveyed to the Claimant by Ms Joslin) was that as part of the measures to be taken the Claimant was to be moved to a different ward, the Brian Roycroft Unit. Part of their reasoning was that the Claimant should be moved to a ward which was generally less demanding and had a more stable patient population. Ms Joslin’s contemporaneous file note of that meeting (R1, pages 227-228) records that she advised the Claimant that the decision had been taken to move her from the Kitwood ward to the Brian Roycroft Unit. The file note goes on to describe Ms Joslin’s perception that the Claimant was clearly upset and even angry (although the Claimant was later to dispute the latter). It is worth

reproducing the relevant paragraphs from that file note in full (R1, pages 227-228):

...Gina was clearly upset and angry. She said 'I don't know what you want me to say. I am feeling very angry right now.' Gina, whilst composed, raised her voice stating 'you are all scape goating me. This is a conspiracy' she went on to express the opinion that no-one had ever told her she was doing a bad job. She said that no Consultant had ever approached her to say there were problems with the running of the ward and that management were in 'cahoots' with the Consultants to 'gang up' on her. Gina expressed the thoughts that this entire situation was unfair and unreasonable. I explained to Gina that whilst I appreciated she was angry and upset, I did not want to get into this conversation as I felt there was no conspiracy. Gina then accused myself and Nese of not supporting her as her peers saying 'why didn't you tell me if there were problems'. I explained that as her peer at the time, I would not necessarily have been aware of the problems and it would not have been my place to intervene. I also commented that I had offered to help her on many occasions which she refused. I advised that I would be willing to work with her now but was not certain she would allow this. She said 'no'. Gina continued to express her anger and hurt, quite naturally, but blaming others. She argued that her background was in adult and she was never interested in dementia but was asked to do the job but not supported or taught about dementia – 'how was I supposed to manage?' I informed her that I felt management skills were transferable, further advising that my background was in adult and PICU, but it was more about the managing and leading a workforce. Gina turned her back on me whilst saying 'do you know what? – it's fine. I could be suspended or sacked but that's fine. I'll go the Brian Roycroft.' Turning to face me again she said 'so you're saying I'm rubbish at my job yet your moving me from here to manage another unit?' I informed her that I never at any point said she was rubbish at her job but that there were issues on Kitwood Ward that needed to be addressed as a priority. The move to the Brian Roycroft Unit was being made due to the fact that it is a less demanding area to work, the turnover of patients is minimal, ward reviews are monthly as opposed to four in one week and the environment is generally calmer. Gina said 'so I go there Monday'. I informed her yes and that I would meet her there to introduce her and provide induction. I assured Gina that the move would be communicated as a positive with the staff on all units.

Acknowledging again her upset I gave Gina the option of going home if she wished, saying I would support this. I knew she was off the rest of the week and so felt this may help. Gina said she would go home after finishing up a few things.

Early afternoon, Gina met with Margaret Dowsett, Area Chief Nurse (Interim) who had visited to provide support after hearing the news regarding Kitwood Ward.

Following her meeting with Margaret – around 2pm – Gina came to my office to hand in her keys. She appeared calmer and I said I would see her Monday. She then left the unit.

**Audrey Joslin  
Clinical Manager/Matron**

- 15 It was during the course of the above meeting that the Claimant contends that she made the first of her protected disclosures to Ms Joslin. The Claimant's unchallenged evidence is that she verbally raised with Ms Joslin on 24 February 2014:
- (i) Longstanding issues of malpractice on Kitwood ward and risks to patients' health and safety and duty of care;
  - (ii) Expressing concerns about her relocation to the Brian Roycroft Unit;
  - (iii) Not being given the opportunity to comment on the email chain from Dr Suresh.
- 16 On 26 February 2014, Ms Joslin wrote to the Claimant (R1, pages 119-120) a letter under the heading "Temporary Relocation" confirming the discussion they had had at the meeting on Monday 24 February 2014. In that letter (which the Claimant appears not to have received until 14 March 2014) Ms Joslin confirms the decision made temporarily to close Kitwood ward to further admissions and the decision to redeploy the Claimant to the Brian Roycroft Unit at Harlow. One of the closing paragraphs of that letter states:
- I understand your [*sic*] upset in respect to this and acknowledge the anger that you felt at the time of our discussion. I wish to impress upon you that, despite your vocalisation at the time, this decision was based purely on the need to act swiftly and view/consider with 'fresh eyes' the necessary way forward and whilst you made it very clear that you do view this personally, I would hope that upon reflection you will be able to see the support that is being put in place for you.**
- 17 The next significant event (of which the Claimant was at the time entirely unaware) is that following a meeting with consultants on 25 February 2014, Mr Olive and Ms Rae sought HR advice as a result of which it was decided that the Claimant's redeployment to the Brian Roycroft Unit would be implemented alongside the "supportive measure of a capability plan". It is curious that this important decision slipped the memory of both Mr Olive and Ms Rae in their original witness statements prepared for these proceedings and is set out only in supplementary witness statements provided to the Claimant and the Tribunal at the commencement of the hearing of this case. But be that as it may, this decision to implement a formal capability process in relation to the Claimant was not communicated to her until several weeks later, by which time the Claimant was absent on what was to become long-term sickness leave. The evidence before us is that this decision to move additionally to implement a capability procedure was advised by Augusta Wickenden of HR. There is no evidence before us as to the reason for that advice but it may, possibly, have been on



account of a perceived difficulty in imposing a non-consensual redeployment in the absence of a corresponding capability procedure. Neither the meeting at which the decision was taken to redeploy the Claimant at 8:30am on Monday 24 February 2014, nor the meeting later that week at which with the advice of HR a further decision was taken to link the redeployment with a capability procedure, was noted or minuted.

- 18 It will be recalled that at the conclusion of the meeting between the Claimant and Ms Joslin on 24 February 2014 Ms Joslin gave the Claimant the opportunity not to remain at work for the rest of that day. The Claimant was also not due to be at work for the remainder of that week but was due to be absent on ordinary leave. Arrangements had been made to see the Claimant on her return to work at the Brian Roycroft Unit on Monday 3 March 2014. The Claimant did not, however, materialise for work, instead providing a medical certificate citing "stress" covering a period of two weeks from the date she was due to return. In fact, the Claimant never returned to work but remained on sick leave until her resignation on 16 February 2015. It is worth explicitly recording therefore that the Claimant's period of sick leave from which she was never to return to work commenced on 3 March 2014 when she was aware of her redeployment to the Brian Roycroft Unit but was wholly unaware of the decision taken a few days earlier to link that redeployment with the commencement of a formal capability process.
- 19 On 16 March 2014, the Claimant replied to Ms Joslin (R1, page 121) requesting a copy of the complaints and concerns which had been raised by the medical staff in relation to Kitwood ward of which the Claimant stated she remained unaware. The Claimant also in that letter took issue with the suggestion that she had been angry and vocal during the meeting on 24 February 2014, stating that she was distraught and devastated at the decision to move her to the Brian Roycroft Unit.
- 20 On 24 March 2014, Ms Joslin wrote to the Claimant (R1, pages 124-127) providing further details of the concerns raised by medical staff which the Claimant had requested in her letter of 16 March 2014. Although we think it is worth reproducing that letter in full, which we do below, it is also worth highlighting that this was the first occasion on which the Claimant was made aware that a formal capability process was to be linked to the redeployment to the Brian Roycroft Unit and that she was to remain on that unit throughout that capability process. It is also noteworthy that in addition to providing particulars of the concerns which the Claimant had requested, Ms Joslin reminded the Claimant of the criticisms contained in the Enable East report, a range of historical concerns dating back several years and the Claimant's failure to act upon the action plan emerging in consequence of the Enable East report. The concluding paragraphs also go on to inform the Claimant that as a result of her ongoing sickness absence a formal sickness absence meeting would need to be held. The full text of that letter is as follows:

Dear Georgina,

Thank you for your letter dated 16 March 2014 which I received on the 20 March 2014. I am writing to confirm the concerns I previously discussed with you on 24 February following receipt of an email from the Responsible Medical Officer (RMO), which prompted the decision to close Kitwood to new admissions and your temporary relocation to the Brian Roycroft Unit, Harlow.

As you are aware, there have been a number of situations relating to Kitwood prior to the medical staff raising their serious concerns by email on 23 February 2014, and I feel it would be beneficial to recap these for context.

Following the safeguarding concern raised last year in relation to Mrs CM, five members of staff on Kitwood underwent a disciplinary process which has concluded with each member receiving a formal disciplinary sanction via a pre-hearing settlement 'agreed outcome'. In addition to this, an external review was commissioned and completed by representatives from Enable East. As you are aware from having access to the report completed by Enable East, several concerns were raised in relation to the leadership on the ward at that time and the team from Enable East stated that 'the ward management team seems to exist only in theory. There is no evidence of individual or collective leadership. We found a general lack of confidence in their ability to overcome the professional nursing inertia on the ward and no faith that they will be able to take the remedial actions that are needed both in the short and long term.'

Five recommendations were made from this review which formed the basis of the action plan subsequently devised which was to be embedded on Kitwood. The key actions were specific, identified who was responsible and gave clear time frames. However, whilst arrangements were made for various actions to be met, these were not completed as they were not facilitated by you as the Ward Manager. An example of this would be the training sessions other staff agreed to deliver on the ward. Dates and times were set and agreed but you failed to facilitate staff attendance and those that did were either student nurses or bank staff, many of whom chose to leave before the training was completed. A team away day was held and facilitated by senior management, but the themes from this away day were not embedded in practice and so staff, upon returning to the ward, continued in the same vein they had previously. The supervision and appraisal of staff cited in the action plan does not appear to have been embedded in practice and many records of same are sparse. Where they have occurred, some significant points in relation to poor practice have been raised with some staff but there is no evidence of this having been addressed in terms of action planning with them, areas for development identified and so forth leaving these issues then unmanaged. Monthly auditing of care plans and safeguarding reports were also not embedded in practice and therefore not achieved. Coaching was suggested as a way of developing the skills required to implement the devised action plan but was not acted upon by you. As a result therefore, three of the five recommendations from the external review have not been achieved.

In January 2014 we underwent the usual rotation of medical staffing on the unit. The staffs came into post following a placement in the acute hospital and so were very up to date in their practice of medical ill health. This brought about some very good and useful discussion following a series of queries they raised in an email to Dr Walker, but the email also contained some concerns regarding the practice on Kitwood Ward in particular. In the main this stemmed around medication errors and missed doses, but also highlighted the level of injury our patients were sustaining without known cause and the seemingly lack of appropriate intervention from staff in relation to same. As a result of this email I met with both of the medical staff involved, as you were off at the time, and we agreed an action plan to address some of these issues. The following week another email was sent through by the medical juniors highlighting other concerns on the ward; these were in relation to a gentleman with unstable diabetes not being managed correctly and missed dosages of medication. During this same week I attended one of the ward reviews and was very concerned to be informed that one of the patients ended up in Accident & Emergency the previous night due to escalating blood glucose levels because the ward had run out of his prescribed medication. As a result it took the emergency department several hours to effectively manage his condition, all of which could have been avoided. It was this incident that prompted the email from the RMO sent on Sunday 23 February 2014.

The email contained many issues dating back over several years. It cited that staff were unable to provide even basic care and the content of information being delivered was 'appallingly poor'. It contained the thought that whilst there were peaks and troughs of improvement, nothing was sustained and therefore there was a lack of confidence in the management and leadership of the ward. Concerns raised were felt to be 'longstanding and deep seated' and it was felt by the author of the email that the only way forward was to close the ward temporarily to allow some time to address these concerns relating to management. This view was shared with and supported by the Director of Nursing & Operations, Paul Keedwell who ultimately made the decision to close Kitwood to new admissions with immediate effect.

I met with you on Monday 24 February 2014 to inform you of the above decision following the RMO email. The decision at the time we met, and as shared with you when we met, was to temporarily relocate you to the Brian Roycroft Unit to allow time for me to go into Kitwood ward and try to identify the areas of difficulty and how to address these. We also considered your previous comments to managers that you felt you had inherited a difficult ward, and so this move was intended to further support you.

Within a week of Kitwood Ward being closed we were able to devise and implement an action plan which looked at short and long term interventions which would assist in moving the ward forward with the intention to re-open as soon as possible. I am pleased to be able to inform you that the ward re-opened the following week and progress continues to be made in relation to practice issues, team identity, objectives and

expectations. This work is being closely monitored by senior management and the Trust directorate.

Although we recognise that the issues highlighted are not the sole responsibility of one person, all of the above has highlighted concerns relating to your management and leadership skills, which will need to be addressed. In terms of supporting you with these skills, I believe the most appropriate process available to us to ensure this occurs is the Trust Capability Policy; a copy of which I enclose for your reference. As you will see from the policy, this will allow us to devise an action plan specific to you as a manager and identify ways in which we can support you with your leadership and management practice. To further enable this process, I have decided that it would be appropriate for you to remain on the Brian Roycroft Unit whilst we follow the capability process, as whilst challenging, the unit does not afford the same pressures, work load or demands as an admission assessment unit, and so your time can be more easily spent achieving the objectives to be set on your return to work.

Of course, in the first instance we need to facilitate and support your return to work. We will then be able to deal with these matters and agree an action plan with you. To try and facilitate a return to work for you at the earliest opportunity and in addition to the recent Occupational Health referral, a formal sickness absence meeting will need to be held with you. I will write to you separately regarding the arrangements for this meeting.

I do recognise that this may be a difficult time for you, but I am hopeful that you will view this in the positive way that it is meant to provide you with the support to help you improve and develop your skills in leadership and management.

I would like to remind you of the support available through the Trust's Workplace Options (EAP) on 0800 243458.

Please do not hesitate to contact me should you have any further queries in relation to any of the above.

Yours sincerely,

**Audrey Joslin**  
**Clinical Manager/Matron**  
Cc File  
**Nicola Hewlett, HR Officer**

- 21 Between June and July 2014, correspondence passed between the Respondent, Occupational Health and the Claimant relating to the formal sickness review process. It is not necessary to rehearse that correspondence here but it is significant to note that the first sickness absence meeting was due to be held on 21 July 2014, although the Claimant did not attend it.
- 22 The Claimant had received Ms Joslin's letter informing her of the intended capability and formal sickness procedure towards the end of March 2014. As

we have already stated, the Claimant remained absent on sick leave throughout the period from 3 March 2014 to the termination of her employment by resignation the following year. It is for this reason, says the Claimant, that it was not until 23 July 2014 that the Claimant submitted a grievance which had been largely prompted by Ms Joslin's letter. We do not think it is necessary to reproduce that grievance in full but it largely focuses on the Claimant's perceived unfairness of being subjected to a capability procedure against the background of difficulties outside her control on Kitwood ward and the events which triggered the decision to redeploy her and place her on a formal capability procedure (R1, pages 208-214). It is also relevant to note that this grievance letter is said by the Claimant to contain three further protected disclosures:

- (i) That the Claimant was not given an opportunity to comment on Dr Suresh's email chain;
- (ii) The widespread movement of staff and loss of skilled and experienced staff with replacements lacking the required skills for the ward and creating problems; and
- (iii) The Claimant had been "scapegoated" for wider problems.

23 The first sickness absence meeting proceeded in the Claimant's absence on 21 July 2014. In the outcome letter dated 30 July 2014 (R1, pages 141-142) Ms Joslin explains in a postscript that the reason the meeting proceeded in the Claimant's absence is that letters indicating that the Claimant had been signed off for further period of six weeks and another stating that she was unable to attend the meeting on 21 July without support (which was not available) had not been posted until 17 July 2014 and so were not in Ms Joslin's possession as at the date of the rescheduled 21 July 2014 meeting. Ms Joslin restated the Respondent's belief that the Brian Roycroft unit was the most supportive environment in which to follow the capability process as set out in the letter of 24 March 2014. The outcome letter also states that under the Respondent's Managing Occupational Stress policy it would be necessary to carry out a stress risk assessment with the Claimant at the earliest opportunity. A further occupational health review meeting was scheduled for 21 August 2014. The letter also indicated that the final formal sickness absence meeting would be held on 29 August 2014 at which a possible outcome could be the termination of the Claimant's contract of employment.

24 On 20 August 2014, Mr David Olive wrote to the Claimant (R1, pages 205-206) informing her that having carefully and fully considered her grievance letter of 23 July 2014 he believed the next appropriate step was to meet to discuss the grievance. He informed her that she was entitled to be accompanied at that meeting and that Augusta Wickenden, HR Manager, would also be in attendance. It is at this point salutary to recall that the decision taken to place the Claimant on a formal capability process (which formed the substantial part of the Claimant's grievance) had occurred at the meeting held between 26 and 28

February 2014 by Mr Olive, Ms Rae and Ms Wickenden. There having, as we have already stated, been no minutes of that meeting and no indication provided to the Claimant by Ms Joslin as to who in fact had taken that decision, the Claimant remained in ignorance that, in effect, her grievance was now going to be considered by two of the people whose decision in relation to the capability process she was grieving about. While Ms Platt on behalf of the Claimant seeks now to submit that it appeared to the Claimant at the time that Mr Olive had failed to carry out a fair and impartial investigation, there is no credible evidence to suggest that the Claimant was aware or inferred that Mr Olive must have been a participant in the decision of which she was complaining. Had she suspected that this was the case there can be little doubt that she would (and not without some justification) at the time have objected to Mr Olive dealing with her grievance.

- 25 We depart from the strict chronology at this point to describe other events taking place (but of which the Claimant was unaware) broadly in parallel with the events concerning the Claimant's redeployment from the Kitwood ward. The Tribunal has before it copies of the Respondent's Risk and Governance Executive meetings. At such a meeting on 9 October 2013 Stephanie Rea presented a report stating under the heading "highlights" (R1, page 451):

**...Management and staffing of the ward needs to be reviewed in terms of managerial abilities and nursing skills.**

**Effective implementation of the trust's supervision and appraisal policy on the ward to identify needs for skill development particularly in the basic nursing requirements of report writing and planning as well as in dementia and organic care.**

- 26 At the 9 October meeting itself the minutes record (R1, page 460):

**...John Gardner has just completed disciplinary hearings with 5 members of staff...**

**...Historically, there have been management issues on the ward...**

- 27 At the Risk and Governance meeting of 8 January 2014 the minutes (R1, page 477) record in relation to the Kitwood Ward action plan:

- **David Olive presented the action plan to RGE. The action plan is a working document and early evidence suggest that the plan has supported improved care on the ward. David is not sure presently if there will be any disciplinary actions as a result of the review. In the meantime, a CQC inspection has been carried out and no major concerns were identified.**
- **David and Steph Rea have concerns about the capability of the clinical leadership. The matron position has been vacant for 9 months and has only very recently been filled. There are contingency**

plans in place to address this issue.

- **DO advised RGE that Kitwood had improved on the barometer. The ward had also recently received positive feedback from relatives of a service user who had received end of life care.**
- **Some staff have been on the ward for many years and cultural changes are needed. Penny Rogers is also concerned about Brian Roycroft as this is an isolated unit.**

28 Neither Mr Olive nor Ms Rea appear to have attended the Risk and Governance Executive meeting of 5 March 2014 and the minutes make only a passing reference to the Kitwood ward (R1, pages 479 and 486).

29 By 2 April 2014 the Claimant had been informed that she was to be moved from the Kitwood Ward to the Brian Roycroft Unit. It will also be recalled that in her letter to the Claimant of 24 March 2014 Ms Joslin had stated that "I am pleased to be able to inform you that the ward re-opened the following week and progress continues to be made in relation to practice issues, team identity, objectives and expectations." Under the section of the minutes of the Risk and Governance Executive meeting of 2 April 2014 headed "Kitwood Ward Review Action Plan" the following entries appear (R1, page 496):

- **There were concerns about the leadership of the ward; the action plan was being delivered by the manager but it was not being embedded. Historically, there have been problems on the ward but Steph is drawing a line under that and moving forward.**
- **The ward manager has been moved and the Clinical Manager is now overseeing it. Other staff are also being moved to change the culture.**
- **This plan builds on the Enable East report and it ensures regular auditing. The view is that things are moving forward and Steph and David are confident things are turning around. All professions are involved and no one person is to blame...**
- **JG affirmed that Kitwood has been on the radar for over a year and the CQC result should not have come as a surprise.**
- **The recruitment process is going to be strengthened to ensure the correct person is appointed as the new ward manager, and the Area Chief Nurse will be involved in this...**

30 The minutes of the Risk and Governance meeting of 4 June 2014 record (R1, page 504):

- **... A ward manager from the North East is going to manage the ward and it is hoped by the end of this week the situation will have been resolved.**

- **The five staff that were disciplined have all received a final written warning and the registered staff reported to the NMC. None of these staff are working on the ward and the previous manager has also moved onto another ward...**
- **There is only one green action on the action plan but Steph will provide an updated plan for the August meeting and will embed the evidence in the plan.**
- **Staffing continues to present problems as it is difficult to get NATSS and Agency staff as they prefer to work on other wards...**

31 By the date of the meeting of 6 August 2014 the Claimant had lodged her formal grievance. The minutes relating to Kitwood ward record (R1, page 512):

- **Brave decisions were made about the leadership on the ward and it feels very different now and feedback from carers is very positive. PK reiterated this; when he visited recently, staff were interacting with the patients, it was clean and the office was organised.**
- **Although there are newly qualified staff on the ward, they feel confident because the leadership is so good...**

32 The minutes of the Risk and Governance Executive however as late as 4 March 2015 continue to show the presence of management problems on the Kitwood ward (R1, page 520):

- **A major issue is with the leadership. There has been a problem with the ward manager and clinical manager. Enable East are carrying out an investigation. The ward manager is currently looking for a position in Mid...**

33 We now return to the main narrative of events in relation to the Claimant's grievance.

34 On 20 August 2014, Mr Olive wrote to the Claimant (R1, pages 205 - 206) informing her that Ms Lisa Anastasiou, the Director of HR, had forwarded her grievance to him for consideration. The letter goes on to tell the Claimant that Mr Olive believes that the appropriate next step would be to meet her to discuss her grievance. He also stated that Ms Wickenden (who it will be remembered was party to the decision along Mr Olive to commence a formal capability procedure against the Claimant) would also be in attendance. The letter concludes:

**Following our meeting, I will confirm my decision as to whether or not your grievance is upheld. Please note that it is probable that I will not be able to make a decision on the day itself.**

35 The grievance meeting with Mr Olive took place on 5 September 2014. The



Claimant was accompanied by Mr Charles Taylor-Keane, her RCN trades union representative. Mr Olive was accompanied by Ms Wickenden, the HR Manager. Towards the end of the meeting (R1, pages 162 - 165) the Claimant's representative set out the essence of the Claimant's grievance:

**What she really wants to know is why the letter of 24 March was written and why no investigation was carried out. If that incompetent and poor a manager, why not suspend her. Why move her to another ward with similar vulnerable patients. Feels that this letter implies that she is totally unfit to practice.**

The Claimant also indicated that what she really wanted to find out from Dr Suresh was the evidence for all the issues he had raised. The Claimant stated that she wanted to see what had been written about her that had led to her being moved and deemed incapable to do her job. She also stated that the preferred outcome to the grievance was that she would prefer not to return to the Kitwood ward. The meeting concluded with Mr Olive stating that he needed to do fact finding from the management side in order to understand the full picture.

36 On 8 September, 9 September and 16 September respectively Mr Olive met with Stephanie Rea, Dr Suresh and Audrey Joslin (R1, pages 216, 215 and 214). In the meeting with Dr Suresh Mr Olive was told that Dr Suresh had: "*lost confidence in the claimant*" saying that: "*Actions not taken, loops not completed*", and that the claimant would follow up in ward rounds rather than arrange and prepare (R1, page 215). Dr Suresh also agreed that his email of 21 February 2014 could be shared with the Claimant.

37 On 30 September 2014, Mr Olive wrote to the Claimant (R1, pages 167 - 170) setting out the outcome of the Claimant's grievance. We think it fair to observe that Mr Olive devoted much of that letter highlighting various deficiencies in the Claimant's abilities. For example, Mr Olive relies (for the first time) on the safeguarding incident which had prompted the Enable East report as part of the justification for moving her to the Brian Roycroft Unit and the decision communicated to her in the letter of 24 March 2014 to subject her to a capability process (R1, page 167). Another example of the grievance process being turned back on the Claimant with criticism of her capability appears on page 168:

**In your submission, Georgina, you highlighted the capability concerns you identified in your band 6 charge nurses during this period. I acknowledged that this would have made the management actions indicted [*sic*] above, more difficult to progress. In such circumstances I would expect the Ward Manager to progress towards formal capability processes with those band 6 nurses – with the support of senior management. I am satisfied that during the period under question (Summer 2013 to Winter 2014) you had adequate management support to follow such a route.**

**Furthermore, having reviewed your supervision records with Stephanie Rea for this period, there was regular advice and guidance offered regarding the numerous staffing capability issues that you did raise – but little evidence of proactive or preventative action by you with your team.**

Towards the end of the letter (R1, page 169) Mr Olive states:

**Gina, you have stated that you feel scapegoated for both other individuals and systemic failings in relation to Kitwood. I fully acknowledge you cannot be responsible for individual staffs' specific actions or omissions. I do not believe the Trust is saying this. The Trust has taken disciplinary action against specific staff where appropriate. However, I consider it reasonable to conclude that you were not able to satisfactorily lead the improvements required on Kitwood, both in terms of scope and pace. I therefore accept that the decision to transfer you to the Brian Roycroft Unit and instigate a capability process is reasonable, and therefore your grievance is *not upheld*.**

- 38 The Tribunal would make two observations on the contents of the outcome letter quoted above. First, in relation to the paragraph quoted immediately above we consider it both striking and surprising that in the letter setting out the outcome to a grievance brought by the Claimant about the decision to instigate a capability procedure Mr Olive saw fit to make adverse findings in respect of the Claimant's capabilities in circumstances in which the substance of the Claimant's grievance was that the very commencement of such a process had been unfair. The second point is that Mr Olive went on to inform the Claimant that the decision to transfer her and instigate a capability process was reasonable when the decision in question had been one in which Mr Olive (still unknown to the Claimant) had personally been heavily involved. In our judgment the tone of Mr Olive's language on this issue is such that it misleadingly suggests that Mr Olive is expressing his agreement with a decision made by others, rather than one to which he had been a party.
- 39 On 14 October 2014, the Claimant wrote to the HR Director (R1, pages 158 - 160) lodging an appeal against Mr Olive's grievance outcome. The Claimant stated that the Respondent had failed through Mr Olive to make a thorough investigation and to address her concerns properly although there is no direct complaint (unsurprisingly because the Claimant was unaware of it) more generally of any procedural failings or specifically of Mr Olive's involvement in determining a grievance about a decision to which he had been party. The Claimant addresses the bulk of that grievance appeal letter to disputing Mr Olive's conclusions in relation to a range of incidents which had occurred prior to February 2014 but which had now resurfaced as partial justification for the contents of Ms Joslin's letter to the Claimant of 24 March 2014.
- 40 The other point which needs to be recorded in relation to the Claimant's grievance appeal letter is that the Claimant stated that she was aware of the incident concerning insulin stock when the Claimant was off on sick leave which,

through a failure to conduct an investigation, had not prevented the nurse involved from subsequently obtaining a senior position elsewhere. This statement, made in this letter of 14 October 2014, is advanced as the seventh and final disclosure of information in support of the Claimant's public interest disclosure complaints.

- 41 Around this time the Respondent's sickness absence process was proceeding but a decision was taken and communicated to the Claimant that no further sickness absence meetings would take place until the conclusion of the Claimant's grievance appeal.
- 42 On 10 November 2014, Toni Scales wrote to the Claimant (R1, page 155) informing her that she would be conducting the Claimant's grievance appeal on 24 November 2014. The meeting duly took place on Monday 24 November 2014. The Claimant was again accompanied by Mr Charles Taylor-Keane and Ms Scales (who chaired the grievance appeal) was accompanied by Debbie Prentice an HR Officer. The notes of that meeting (R1, pages 253 - 264) show that again the focus of the issues under discussion was the extent to which the Claimant had been unjustifiably blamed for a series of incidents which had occurred prior to February 2014. We think it is fair to observe that the grievance appeal receded even further from the original issue raised by the Claimant in her grievance concerning her redeployment and being subjected to a capability procedure. But we consider that perhaps this is not so surprising given that Mr Olive had concentrated so heavily in his grievance outcome letter on what he perceived to have been performance failings on the Claimant's part.
- 43 At the conclusion of the meeting Ms Scales identified a number of outstanding queries which she needed to resolve before reaching any conclusion. The Claimant indicated that if this process took Ms Scales over the prescribed 10 working day timescale she would be happy with an extension to those timescales being granted.
- 44 In order to obtain the further information she required Ms Scales interviewed Mr Olive, Ms Rea and Ms Wickenden on 2 January 2015. Ms Rea also prepared a table containing further information which she had compiled (R1, pages 247 - 252). The Claimant also provided further information (R1, pages 289 - 290) which also focused on providing further information on the historical incidents.
- 45 On 16 January 2015, Ms Scales wrote to the Claimant (R1, pages 291 - 293) setting out her findings on the grievance appeal. That letter, on which the Claimant relies as the "last straw" in support of her complaint of unfair constructive dismissal, is one which we think is worth setting out in full:

**Dear Georgina,**

**Thank you for your recent letter.**

Further to Debbie's letter to you dated 2 December 2014, I am writing to advise you that I have now concluded my review of your grievance appeal detailed in your letter to Lisa Anastasiou (Director of Workforce & Development) dated 14 October 2014.

In reviewing the decision reached by David Olive (Area Director) which was confirmed in writing to you on 30 September 2014, I have considered the following:

1. All of the issues raised in both your grievance letter dated 23 July 2014 and your subsequent grievance appeal letter dated 14 October 2014.
2. Grievance Appeal Documentation provided by David Olive, a list of these documents is attached.
3. Your verbal presentation of the issues to which you remain dissatisfied and our discussion of these at our meeting on 24 November 2014 at which you were accompanied by Charles Taylor-Keane (RCN). My notes of these meeting are attached.
4. Additional documents provided at my request following our meeting. These included:
  - Correspondence between yourself and Audrey Joslin (Acting Clinical Manager/Matron) dated 16 and 24 March 2014.
  - Ward Barometers for Kitwood Ward between January 2013 and December 2014.
  - SETSAF Reports and Action Plan regarding patient CM from May 2013.
  - Mandatory training compliance reports for Kitwood Ward.
5. The Trust's Grievance and Capability Policy and Procedures.
6. I held a meeting with David Olive, Stephanie Rae (Area Deputy Director) and Augusta Wickenden (HR Manager, West) on 2 January 2015 during which they responded to a series of questions relating to the issues you have raised.

In conducting a full and thorough review of the issues presented to me I have reached the decision that your grievance appeal is upheld in part.

In upholding your appeal in part I find that there is no evidence to support your assertion that matters to which you are aggrieved are in any way racially motivated or that you have been treated unfairly by reason of a protected characteristic, race or otherwise.

My reasons for these decisions are detailed below.

In respect of some of the specific issues raised by your medical colleagues by email in February 2014 I find that these may not all have been factually accurate and there is indication that they were not robustly investigated at the time. It is my view that too much time has now passed for any further investigation of these specific issues to be appropriate.

However, there is a clear indication from a number of sources, including the (thematic) review conducted by Enable East and the SETSAF investigation of the care of Mrs M, that the standard of care provided to patients on Kitwood Ward was below the quality of experience expected and that the health, safety and welfare of patients was or could have been compromised as a result.

Whilst, as David also recognises, these deficits in care standards cannot be the sole responsibility of the Ward Manager, it is of concern to me that even after time for reflection you do not appear to be able to recognise your own areas of personal accountability and responsibility or how you could have maybe done things differently at the time to help improve the situation.

In respect of the instigation of capability procedures and your proposed move to Brian Roycroft Unit discussed with you by Audrey Joslin on 24 February 2014 and later confirmed in writing on 24 March 2014, I can understand how you may have perceived these to be a direct reaction to the concerns raised by your medical colleagues between 21 and 23 February 2014, some of which you felt to be unjust.

However, as you discussed with me during our meeting, it is clear there were work and personal related stressors for you at that time and you had only recently returned from a period of sickness absence.

Instigation of the Trust's capability procedures is not intended as a punitive measure but is to ensure that the Trust fulfils its obligation to provide all the necessary support and guidance available to employees to ensure them to achieve good performance. With regards to the proposed move to Brian Roycroft Unit, the reasons for this are clear from Audrey's letter to you of 24 March 2014 in which it is also evident that this was intended only as a temporary measure to support you. During my review, and in meeting with David, I have ascertained that these decisions were not made in isolation by managers in West but undertaken after appropriate consultation with the Director of Nursing and Operations.

I consider that the instigation of capability procedures and temporary redeployment was a fair and proportionate decision in the circumstances.

I do find, however, that there was also opportunity before February 2014 during which being more explicit with you about areas of your performance which were, at that time, considered to be failing to meet the required standards and addressing these informally with you in the first instance may have been beneficial.

In now moving forward, I understand that you remain off sick from work and I sincerely hope that your recovery is progressing well and that the conclusion of these proceedings will enable you to return to work at the earliest opportunity.

You advised me during our meeting on 24 November 2014 that you felt returning to your substantive post at Kitwood Ward would be untenable for you and I would suggest that, with support from Occupational Health, options for suitable alternative roles are explored with you at the earliest opportunity.

In support your return to work, and in recognition that you have been absent for a significant period, I would recommend that a full and thorough induction programme is put in place for you which includes clear expectations of your performance and with support provided to you through regular management and clinical supervision as well as coaching. If you do not currently have a clinical supervisor Angie Butcher (Area Chief Nurse) will be able to assist you in securing this.

Finally, I would like to apologise that it has taken some time for me to conclude your grievance appeal but hope that you will acknowledge the additional time has provided me with the opportunity to ensure my review to the issues you have raised was a full and thorough one.

These matters are now concluded and I can confirm there is no further right of appeal.

I do hope that you will be able to return to work very soon and I send you my best wishes for the future.

Yours sincerely

**Toni Scales**  
Area Director  
NE & CAMHS Directorate

c.c. Charles Taylor-Keane – RCN  
David Olive – Area Director, West  
Debbie Prentice – HR Manager

**Enclosures: Grievance Appeal Documentation List (1-27)**  
**Notes of Grievance Appeal Meeting 24 November 2014**

- 46 It can be seen from the above letter that Ms Scales upheld the Claimant's grievance appeal to the limited extent that Ms Scales accepted that the Respondent could have been more explicit with the Claimant about areas of her performance which were at the time considered to be failing to meet the required standards. The letter also records that the Claimant felt a return to the Kitwood ward would be untenable and that suitable alternative roles should be explored at the earliest opportunity. But as regards the instigation of the capability

procedure and redeployment which had been the subject of the Claimant's original grievance determined by Mr Olive Ms Scales concluded that it was a "fair and proportionate decision in the circumstances".

- 47 On 26 January 2015, Ms Joslin wrote to the Claimant (R1, pages 294 - 295) stating that initially the only option available was for the Claimant to return to work at the Brian Roycroft Unit.
- 48 On 16 February 2015, the Claimant wrote to Edetola Adetunji of Human Resources resigning from her employment by the Respondent (R1, pages 301 - 314). The Claimant's resignation letter (running to some 14 pages) is too long to reproduce in full. Most of the letter is dedicated to a further rehearsal of the disputed incidents which had been canvassed in the grievance and grievance appeal. We consider that the opening and closing paragraphs of the Claimant's letter capture the flavour of her reasons for deciding to terminate her own employment:

**I have worked at North Essex Partnership Foundation NHS Trust for over 16 years. I believe that I have been treated unfairly in relation to recent issues raised against me by the Trust. I have raised my grievance as per the Trust procedures. However, I am not satisfied with the outcome of the grievance carried out by the Trust as I believe that it failed to look (sic) into my concerns and support me appropriately to return to work. I am extremely worried and frightened to work with my line management team and the medics. The Trust gives me no choice but to resign from my current position as Ward Manager. Please could you ensure that all my entitlement, including annual leave, unpaid on-call in February 2014 and others are fully reimbursed. ...**

**In light of all the above issues which had remained unresolved since February 2014 and responsible for my current health. I am suffering with ill health due to work related stress as a result of the way the Trust has treated me. I have had to receive Counselling and more recently started on anti-depressants. The Trust through these actions has completely destroyed my confidence and self-esteem and my domestic life. I have lost out financially through these actions. The letter dated 16 January 2015 and what it contains is the last straw. The conducts towards me over the last year has left me with a diagnosed medical condition, which I never had before. I believe this to be unlawful and amounts to a fundamental breach of my contract of employment with the Trust. The decision confirmed in the letter dated 16 January 2015 is beyond what I am prepared or can be expected to tolerate.**

- 49 Ms Adetunji replied to the Claimant acknowledging her resignation letter by letter dated 27 February 2015 (R1, page 315). Ms Adetunji included in that letter an invitation to the Claimant to apply for a band 7 vacancy as Ward Manager on Galleywood Ward in Chelmsford.
- 50 On 2 March 2015 (R1, page 316), the Claimant replied saying that it would be

difficult for her to return to work in the Trust as her confidence had been “totally shattered” due to the manner in which she had been treated.

- 51 On 17 March 2015, Ms Rea wrote to the Claimant (R1, pages 318 - 319), formally accepting the Claimant’s resignation but pointing out that under the terms of her contract she was required to give two months notice of termination. The Claimant’s employment accordingly terminated on 17 April 2015. The Claim Form commencing these proceedings was received by the Tribunal on 20 July 2015.

### **The law**

#### *Unfair Dismissal*

- 52 Section 95(1) of the Employment Rights Act 1996 so far as material provides:

**For the purposes of this Part an employee is dismissed by the employer if (and, subject to subsection (2) and section 96, only if)-**

- (a) the contract under which he is employed is terminated by the employer (whether with or without notice)...**
- (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.**

- 53 In relation to so-called ‘constructive dismissal’ under section 95(1)(c) of the Employment Rights Act 1996, where the employee claims to have resigned in circumstances such that he is entitled to resign by reason of the employer’s conduct it is well established law that the Applicant must show that his resignation was in response to a repudiatory breach of contract on the part of the employer – see *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221. For this purpose, whether an employer’s conduct is repudiatory depends on whether the conduct, viewed objectively, shows an intention on the part of the employer no longer to be bound by the contract. The question is not whether the employer intended the conduct to be repudiatory, nor that the employee genuinely believed he could not remain in employment. The Tribunal must consider, on an objective basis, whether the conduct in question was sufficiently serious to entitle the employee to leave at once. Although any repudiatory breach of contract by the employer does not have to be the sole cause of the employee’s resignation, it must be the effective cause.

- 54 It is also established law that if the Tribunal concludes that an employee was constructively dismissed under section 95(1)(c) it is not automatically unfair. It is open to the employer to seek to show a potentially fair reason for dismissal under section 98(2) of the 1996 Act. If the employer succeeds in so doing, the Tribunal must go on to consider whether the employer acted reasonably or unreasonably under section 98(4).



*"Automatic" unfair constructive dismissal*

55 Section 103A of the Employment Rights Act 1996 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.**

56 It is established law that the above provision applies equally to dismissals under section 95(1)(c) of the 1996 Act ("constructive" dismissal). The provisions dealing with protected disclosures are set out below.

*Detriments for making public interest disclosures*

57 Section 43B of the Employment Rights Act 1996 contains the provisions defining qualifying disclosures:

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

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

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

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

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

58 Section 47B of the 1996 Act provides:

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

## Conclusions

- 59 We consider it convenient to deal first with the Claimant's allegations that she was subjected to detriments for making public interest disclosures.
- 60 The Claimant contends that she made three disclosures of information during the course of her meeting with Ms Joslin on 24 February 2014, with a further three disclosures (partly overlapping in their substance) in her written grievance dated 23 July 2014. Finally, it is said that the Claimant made a seventh disclosure of information in her written appeal dated 14 October 2014 against the outcome of her grievance. The Tribunal harbours serious concerns that some of the alleged protected disclosures lack the necessary element of public interest so as to amount to qualifying disclosures. The Tribunal is prepared to assume, however, (but without so finding) that the seven alleged disclosures amounted to qualifying disclosures in that they were disclosures of information which in the Claimant's reasonable belief tended to show either that the health or safety of any individual (hospital patients) was likely to be endangered or that legal obligations (to hospital patients) were not being complied with. The Tribunal also proceeds on the assumption that the qualifying disclosures were made in protected circumstances for the purposes of sections 43C to 43H of the Employment Rights Act 1996. In the Tribunal's judgment the crucial question is (as is so often the case in claims of this nature) whether any treatment of the Claimant was attributable wholly or in part to the making of such protected disclosures.
- 61 We now deal with each of the alleged detriments for making public interest disclosures in turn. The first allegation is that the Respondent repeatedly refused and/or failed to apply the capability and/or performance and/or redeployment policy to the Claimant fairly. This allegation framed as it is in general terms is fleshed out by Ms Platt on behalf of the Claimant with examples. These include unreasonably and unfairly instigating capability proceedings when no performance concerns had been raised previously and reversing the initial decision that her move to the Brian Roycroft Unit was to be only temporary by deciding that the redeployment would continue until a capability procedure was completed. The precise framing of this alleged detriment, however, remains that the Respondent failed or refused *fairly* to apply the capability/performance or redeployment policy.
- 62 In the Tribunal's judgment although, as the Claimant points out, she had not hitherto been placed on any formal performance procedure, the Respondent's actions in deciding to redeploy the Claimant to the Brian Roycroft Unit and subsequently to place her on a complementary capability procedure does not justify a conclusion that the Respondent operated those procedures unfairly when looked at against the background of the Enable East report and the more recent complaints about the Claimant's performance made by the doctors attached to the ward. The Respondent was, we think, entitled to place the

Claimant on a capability procedure which, had it been completed, may have established what the Claimant now contends, ie that it was not reasonable to lay the responsibility for the ward's failings at her door. It is also relevant to note that one of the outcomes of the Claimant's grievance appeal was that Ms Scales acknowledged that the Claimant ought to have been informed of the management's perceived concerns about the Claimant's shortcomings in managing the ward at an earlier stage. We accordingly conclude that the Claimant was not as contended subjected to any detriment as regards the application of the above procedures to her.

- 63 The second allegation of detriment for making public interest disclosures is that the Respondent operated a practice of allowing the Kitwood ward to fail and not adequately supporting it. The Claimant cites examples of this allegation as using the her as a scapegoat for the longstanding failure to put in place adequate provisions to address the difficulties of the underperforming Kitwood ward and failing to acknowledge the difficulties the Claimant was facing in managing such award. It is also said that the Respondent completely ignored the progress made by the Claimant in addressing areas of concern.
- 64 The Tribunal sees a number of difficulties with this allegation of detriment for making public interest disclosures. First, the evidence before us falls far short of supporting a conclusion that the Respondent operated a practice of allowing the Kitwood ward to fail. The very matter which the Claimant complains of in these proceedings, namely her relocation to the Brian Roycroft Unit and the Respondent's decision to place the Claimant on a corresponding capability procedure, of itself militates against any finding that the Respondent was operating a practice of deliberately allowing the ward to fail. It is also clear that this allegation is not limited to the Respondent's actions after the Claimant's first public interest disclosure on 24 February 2014. It therefore follows that the allegation of operating a practice of allowing the ward to fail (if it existed at all) predates the making of public interest disclosures by many months or even years. It would, we think, be wholly illogical to conclude that the Respondent's disposition towards the Kitwood ward was in any respect affected by what the Claimant said at the 24 February 2014 meeting or by any of the subsequent public interest disclosures. We are specifically unable to accept as wholly implausible and fanciful Ms Platt's suggestion that the Respondent's failures regarding the ward changed from "inadvertent" failures to "deliberate" failures with the advent of the Claimant's public interest disclosures. We accordingly conclude that there is on the facts no merit in this allegation which we accordingly find to be not well-founded.
- 65 The third allegation of detriment for making public interest disclosures is that the Respondent repeatedly failed fairly to apply the grievance procedure to the Claimant, specifically by failing properly to investigate the Claimant's grievances. The disclosures relied upon in relation to this allegation of detriment are the matters raised by the Claimant on 24 February 2014 and the Claimant's grievance letter itself of 23 July 2014.

- 66 In the Tribunal's judgment the most glaring unfairness on the part of the Respondent in the application of the grievance procedure was that Mr Olive saw fit with the support of human resources to conduct the hearing of the Claimant's grievance when he had himself been party to the decision of which the Claimant was making a complaint. Further, none of the meetings which led to the decisions to relocate the Claimant and to place her on a capability procedure which would have indicated his involvement were minuted or noted. Neither did Mr Olive or human resources see fit to inform the Claimant or Ms Scales (who dealt with the grievance appeal) that he had effectively disposed of a grievance which had been lodged by the Claimant largely (but unknown to her) about his own actions in relation to the relocation and capability process.
- 67 The Tribunal therefore concludes that the Claimant was, indeed, subjected to a detriment in that the Respondent failed fairly to apply the grievance procedure to the Claimant and, by implication, failed properly or fairly to investigate her grievances. The remaining and crucial question is, therefore, whether the Claimant was subjected to this detriment for making public interest disclosures.
- 68 The Tribunal considers there to be powerful evidence that the failure to inform the Claimant that the decision to relocate her and place her on a capability procedure had been one in which Mr David Olive had been involved was no accident or oversight. This information was not even included in Mr Olive's or Ms Rea's original witness statements in these proceedings, instead being introduced through supplementary witness statements made by Mr Olive and Ms Rea. Had the Claimant known of Mr Olive's involvement it is inconceivable that the Claimant or anyone advising her would have agreed to Mr Olive dealing with the Claimant's grievance. While the handling of the Claimant's grievance as described above can properly be described as unfair and deserving of criticism the real question is whether it was managed in this way because the Claimant had made public interest disclosures. This would involve a finding that Mr Olive's actions in deciding it was appropriate to handle a grievance against decisions in which he had been involved was motivated by disclosures made by the Claimant to Ms Joslin at their meeting on 24 February 2014. In the Tribunal's unanimous judgment no such link has been made out by the Claimant. It is not for us to speculate as to why Mr Olive chose until the first day of this hearing to conceal the fact that he had conducted a grievance hearing into decisions to which he had been a party, but we are not satisfied that either his actions or those of Ms Rea (or human resources) occurred as a result of anything said by the Claimant to Ms Joslin in the 24 February 2014 meeting. If a decision to retaliate against the Claimant for disclosures made to Ms Joslin at the 24 February meeting by proceeding to treat the handling of her grievance unfairly, why, we ask ourselves, was Mr Olive's involvement already being obscured by the failure to note or minute the meetings at which the decisions under complaint were made? In our judgment it is much more plausible on the evidence that Mr Olive felt he could best keep control over the process (he told us he saw no problem with handling the grievance at the time) and that his decision to deal with the grievance without telling the Claimant of his own involvement was made for reasons of expediency rather than as retaliation for protected disclosures (of

which it is not even clear he or Ms Rea were aware). We accordingly conclude that this complaint of detriment for making public interest disclosures is for the above reasons also not well-founded.

- 69 We turn next to the question whether the Claimant was automatically unfairly constructively dismissed for the purposes of section 103A of the Employment Rights Act 1996.
- 70 In relation to the specific complaints of detriment for making public interest disclosures which we have dealt with above, it was only in relation to the third alleged detriment (handling of the grievance procedure) that it was necessary for the Tribunal to determine the question of causation, having concluded that the Claimant had been subjected to that detriment. The Tribunal's finding in relation to that discrete complaint was that the evidence did not support a finding that the Respondent's actions were motivated by any protected disclosures made by the Claimant. In the Tribunal's judgment the evidence before us supports a broader finding that none of the actions taken by the Respondent of which criticism is now made can fairly be attributed to any of the supposed protected disclosures made by the Claimant on 24 February 2014, 23 July 2014 or in the grievance appeal letter of 14 October 2014.
- 71 The gist of the Claimant's case is captured by paragraph 69 of Ms Platt's written closing submissions when she states:

**The Claimant submits that the opaque procedure used to initially relocate her and then to put her on a formal capability procedure was flawed and grossly unfair in the circumstances and it was done because the Claimant had been repeatedly raising concerns, including those raised with Audrey Joslin verbally as set out above and throughout the grievance process.**

- 72 The Tribunal has identified in its reasons above unfairnesses in the manner in which the Claimant's grievance was handled, specifically that Mr Olive had been involved in the original decision. But the Claimant's case as quoted above is that the Respondent's procedure used to relocate the Claimant and then put her on a formal capability procedure was flawed and grossly unfair. The Tribunal is unable to accept that the relocation or the implementation of the formal capability procedure in themselves or the manner in which it was done was influenced by any concerns raised by the Claimant amounting to public interest disclosures. The Respondent has satisfied us on the balance of probabilities that notwithstanding the procedural failures we have identified the Respondent's actions were motivated by and occurred entirely on account of its concerns about the ongoing failures of the Kitwood ward. Accordingly, even if the Claimant's resignation was justified by the Respondent's conduct any such conduct was unrelated to public interest disclosures and accordingly we conclude that the Claimant was not automatically unfairly dismissed under section 103A of the Employment Rights Act 1996.

- 73 We turn finally to the question of whether the Claimant was unfairly constructively dismissed by the Respondent under sections 94 and 98 of the Employment Rights Act 1996.
- 74 The Claimant's proposition that the Respondent placed itself in breach of the implied obligation to maintain trust and confidence is founded on a number of acts or omissions on the Respondent's part which are advanced either individually or cumulatively as amounting to a breach of the implied obligation not to do anything calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent. We now deal with each of those in turn.
- 75 It is said that the Respondent placed itself in breach of the implied obligation by informing the Claimant on 24 February 2014 that she was to be relocated from the Kitwood ward without any consultation or warning. There is no question that the Claimant was aware of this action but we do not accept that either the action itself or any lack of consultation or warning placed the Respondent in breach of the implied obligation. The Respondent was doing what it considered expedient at the time to protect the welfare of patients and falls far short of a repudiatory breach of the Claimant's contract of employment.
- 76 The complaints of the consultants in February 2014 galvanised the Respondent into closing the Kitwood ward to new admissions and relocating the Claimant to the Brian Roycroft Unit. It is said on behalf of the Claimant that the Respondent's failure to carry out an investigation into the merit of the doctors' allegations amounted to a breach of the implied obligation, not least because Ms Scales acknowledged that there may have been factual inaccuracies which were not robustly investigated. Against that, however, there were clear indications (as also acknowledged by Ms Scales) from a number of sources including the Enable East report that the standard of care provided to two patients on Kitwood ward fell below the quality expected and that health, safety and welfare of patients could have been compromised. In other words, there were wider concerns quite apart from the specific complaints contained in the doctors' emails (which may or may not have been merited) justifying the Respondent actions. As a freestanding allegation it is incapable in our judgment of amounting to action constituting a repudiatory breach of the implied term and accordingly the Claimant's contract of employment.
- 77 In the Tribunal's judgment the same reasoning applies to the decision made by Mr Olive, Ms Rea and human resources to instigate a formal capability process. Without more, the commencement of such a procedure does not and cannot constitute a repudiatory breach of contract. There is no credible evidence that the process was embarked upon in bad faith or for any improper motive as we have found in relation to the complaints of detriment for making public interest disclosures.
- 78 The Claimant next says that the Respondent's apparent shift of position by

making the initial temporary relocation to the Brian Roycroft Unit conditional on the completion of the capability procedure placed the Respondent in breach of the implied obligation to maintain trust and confidence. While the introduction of the capability procedure apparently as an afterthought was not, we think, an ideal way for the Respondent to deal with the matter we are not satisfied that it was sufficient to amount of itself to a breach of the implied obligation to maintain trust and confidence. It cannot, we think, be sufficient to amount to a breach of the implied term on the facts before us that the Respondent adopted a graduated response to the management of the problem and failed to make all the decisions they considered necessary on the very first occasions that decisions were taken in relation to the Kitwood ward.

- 79 The Claimant next alleges that the Respondent failed to provide the Claimant with any reasonable support. Again, while the support provided to the Claimant may not have been ideal it is quite impossible to conclude on the evidence that the support provided was so unreasonable as to amount to a breach of the implied obligation. Although patchy in parts, the Claimant was provided with supervision. The Claimant was encouraged by Ms Rea to obtain the support of a clinical supervisor. Disciplinary action was commenced by Ms Rea against five members of the Claimant's staff. Other support included suggestions that the Claimant obtained access to coaching and the provision of study leave for the Claimant to complete her master's degree. It is not possible to conclude from the evidence before us that the level of support provided to the Claimant placed it in breach of the implied obligation to maintain trust and confidence.
- 80 So far as the Tribunal understands it the next allegation of repudiatory breach is that Ms Rea, by using the word "scapegoat" in a document prepared for the grievance appeal, proves that the Respondent had "used the Claimant as a scapegoat". So, the argument appears to go, by anticipating an allegation from the Claimant Ms Rea is tacitly accepting that it was true. The Tribunal is unable to accept the logic of that tortuous submission. It is not supported by the evidence and we reject it as an example of any repudiation of contract on the Respondent's part.
- 81 It is said that the Respondent failed to acknowledge the difficulties faced by the Claimant in managing such a complex ward and ignored her progress in addressing areas of concern. In our judgment this allegation fails on the facts. The Respondent did not fail to acknowledge the difficulties faced by the Claimant but, rather, considered that the Claimant could do more to assist herself in leading the ward. It does not we think constitute a breach of any term of the Claimant's contract of employment.
- 82 We turn now in relation to the specific allegations of breach of contract the contention that the Respondent failed properly or fairly to investigate the Claimant's grievances. In the Tribunal's judgment the most viable of the criticisms of the Respondent's handling of the grievance is that set out at paragraph 35gviii of the written closing submissions prepared on behalf of the Claimant by Ms Platt. It is that Mr Olive was not an appropriate person to hear

the Claimant's grievance as he was intimately involved with the decisions which the Claimant was challenging. The Tribunal accepts that this conflict of interest may have affected the way in which Mr Olive carried out his investigation into the Claimant's grievance. What we do not accept, however, is the suggestion made by Ms Platt that the conflict of interest was apparent to the Claimant at the material time. The overwhelming weight of the evidence before us is that the Claimant was wholly unaware of Mr Olive's involvement in the decisions to relocate her and commence a capability procedure which was the subject of the Claimant's grievance, but which Mr Olive thought fit nevertheless to investigate himself. There is not any hint of a suggestion made by the Claimant either in her grievance appeal letter, the grievance meetings, her letter of resignation or the Claim Form to this Tribunal that her resignation had been prompted by knowledge of Mr Olive's involvement in both the decisions and the hearing of the grievance. It therefore follows that to the extent to which this failure (which may very well have been regarded by the Tribunal as placing the Respondent in breach of the implied obligation to maintain trust and confidence) occurred, it was not one which could have prompted the Claimant's resignation when it came, because she was unaware of it at the time of her resignation.

83 We turn finally to whether the above individual matters said to amount to a repudiation of the Claimant's contract can be regarded as having that effect when viewed cumulatively. In the Tribunal's unanimous judgment they do not. The Tribunal has concluded that individually or cumulatively all the matters within the Claimant's knowledge at the time she resigned from her employment are insufficient to amount to a breach of the implied obligation to maintain trust and confidence. The thrust of the Claimant's reasons for resigning are that her original grievance had not been upheld and the appeal had been only partially successful. Had she been aware of Mr Olive's involvement in the decisions about which she had raised a grievance the position may have been very different, but in this Tribunal's unanimous judgment the matters that lay within her knowledge fell short of what would be sufficient to amount to a repudiation of her contract on the part of the Respondent. For these reasons we conclude that the Claimant was not constructively dismissed by the Respondent.

84 We have alluded in the paragraphs above to matters which, had they been within the Claimant's knowledge, may well have amounted to matters constituting a breach of the implied obligation, thereby entitling her to resign. Other matters which have emerged in evidence before us may well also have fallen into the same category. For example, Mr Olive and Ms Rea were in April 2014 reporting upwards at the Risk and Governance Executive meeting that the ward manager (the Claimant) had been moved and that:

**the recruitment process is going to be strengthened to ensure the correct person is appointed as the new ward manager.**

85 This, too, had the Claimant been aware of it, might have been a matter undermining the relationship of trust and confidence between the Claimant and the Respondent, showing as it does that any suggestion made to her that the



Claimant's move to the Brian Roycroft unit was only temporary did not fully reflect management's plans. But this was another matter of which at the time the Claimant was entirely unaware. It may be of no comfort to the Claimant to be told that there may have been matters giving rise to a complaint of unfair constructive dismissal had her state of knowledge been different. But unfortunately the Tribunal's understanding of the legal principles is that the Claimant's resignation cannot as a matter of logic have been triggered by matters which fell outside her own knowledge. In other words, there are matters before us which are capable of supporting an allegation that the Respondent placed itself in breach of the implied obligation to maintain trust and confidence but unless the Claimant can establish that those matters were part of the reason for her resignation it is insufficient to support a conclusion that she was unfairly constructively dismissed by the Respondent.

Employment Judge Houghton

20 June 2017