EMPLOYMENT TRIBUNALS

Claimant: Miss Gillian Wright

Respondent: Mid Yorkshire Hospitals NHS Trust

HELD AT: Leeds **ON:** 27 March - 31 March 2017
6 April 2017
9 May 2017
10 May 2017
(In Chambers)

BEFORE: Employment Judge D N Jones
Ms L Fawcett
Mr K Lannaman

REPRESENTATION:

Claimant: Mr M Rudd, Counsel
Respondent: Mr J Boyd, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant resigned as a consequence of a fundamental breach of contract on behalf of the respondent and was constructively dismissed;

2. The dismissal was unfair;

3. The claimant was subjected to a detriment for having made protected disclosures at a meeting on 9 October 2015 when Ms Jennings implied the claimant might be the problem in her relations with three of her interim managers. That complaint was presented out of time and is therefore dismissed.

4. The complaints that the claimant was subject to a series of other detriments for having made protected disclosures are not well founded and are dismissed.

REASONS

Introduction

1. By a claim form presented to the Tribunal on the 11th July 2016 Miss Gillian Wright, the claimant, complained that she had been unfairly dismissed (constructively) by her employer, the respondent and subjected to detriments by their employees, for whom they are legally liable, because she had made a number of protected disclosures.

2. At a Case Management Hearing before Employment Judge Lancaster on 1st September 2016 the issues in the respective claims were identified. Those remain germane. At the commencement of this hearing Mr Rudd, on behalf of the claimant, clarified that the complaint of unfair dismissal was not one which was said to fall within Section 103A of the Employment Rights Act 1996 (ERA).

3. The structure of these reasons is to record what evidence was adduced, summarise the applicable law, set out the background to the claims and address firstly the separate detriment claims and then the complaint of constructive dismissal. Although, for explanatory purposes, it has been necessary to list and address each detriment complaint individually, we emphasise that in reaching our conclusion we considered the evidence collectively. Evidence in respect of one or more allegations may be material and informative of another. We have had regard to the materials holistically in making our findings and reaching our conclusions.

Evidence

4. The Tribunal heard evidence from the claimant. The respondent called Mrs J Bancroft, Clinical Governors Manager, Ms Emma Jennings, Human Resources Team Manager, Mr David Melia, Deputy Chief Executive and a Director of Nursing and Quality, Mrs Elizabeth Wood, Head of Occupational Health and Wellbeing Service and Ms Angela Wilkinson, Director of Human Resources (Operations). It had proposed to call Mrs Deirdre Linnane, Head of Clinical Services - Therapy who had dealt with a number of the claimant's grievances. As these determinations post dated the claimant's resignation they did not appear to be of any real relevance to the issues which arose in the case and, after further reflection, Mr Boyd did not call Mrs Linnane. The parties adduced bundles of documents including 1,640 pages.

The Law

<u>Protected Disclosure Detriments</u>

5. By Section 47B of the ERA a worker has the right not to be subjected to any detriment where any act or any deliberate failure to act by his employer is done on the ground that the worker has made a protected disclosure.

6. Under Section 48(2) of the ERA it is for the employer to show the ground on which any act or deliberate failure to act was done.

7. By Section 48(3) of the ERA a Tribunal shall not consider a complaint unless it is brought before the end of the period of three months beginning with the date of the act or failure to act or whether that act or failure is part of a series of similar acts or failures, the last of them or, within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. By Section 48(4) of the ERA where an act extends over a period the date of the act means the last date of that period and a deliberate failure to act should be treated as done when it was decided on; and, in absence of evidence establishing the contrary, an employer shall be taken to decide on the failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have expected to do the failed act if it had to be done.

8. In **Fecitt and Others -v- NHS Manchester (Public Concern at Work Intervening) [2012] ICR 372** the Court of Appeal held that if a Tribunal is satisfied that the protected disclosure materially influenced the employer's detrimental treatment of the complainant the claim would be made out; the protected disclosure need not be the principal or sole cause of the detriment but it is sufficient if it influences the doing of the act or failure to act in a more than trivial way.

Unfair Dismissal

9. What has become known as a "constructive" dismissal falls within Section 95(1)(c) of the ERA. In **Western Excavating (ECC) Limited -v- Sharp [1978] ICR 221** the Court of Appeal held a constructive dismissal is established in circumstances in which an employee resigns in consequence of a fundamental breach of contract and the employee does not otherwise affirm the contract. In **Malik -v- BCCI [1998] AC 20** the House of Lords held that in every contract of employment there is an implied term whereby neither party shall, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. In **Lewis -v- Motor World Garages Limited [1986] ICR 157** it was held that a series of events or acts may cumulatively amount to a breach of contract notwithstanding individually they would not amount to a breach. In **Omilaju -v- Waltham Forest London Borough Council [2005] ICR 481** the Court of Appeal held that in determining whether the last event which led to the resignation amounted to a last straw the Tribunal must consider whether it added anything to the other events complained of. As such it need not constitute unreasonable or blameworthy conduct although in most cases will do so. An entirely innocuous act on the part of the employer cannot be a last straw but it would be an unusual case where conduct which was reasonable and justifiable could have the quality of such an act.

Background

10. The respondent is a public health trust providing medical services in the geographical area of Mid Yorkshire. The claimant commenced employment with the respondent in its Occupational Health Department in June 2006. She worked as a Service Co-Ordinator. She became a Band 7 Service Performance Manager on the 1st April 2013. That grading had not been formally evaluated for the purpose of the Agenda for Change programme. Her role was to support the Associate Director of Occupational Health by monitoring performance targets and activity, preparing reports and making recommendations. She had line management responsibility for 14 to 16 clinical and non-clinical staff.

11. On 12th July 2016 the claimant resigned. She wrote to the Chief Executive of the respondent and explained that she no longer had trust and confidence in the organisation. She set out the relevant history which she said led to that state of affairs. She believed she had been subjected to a series of detriments for having made three 'whistle blowing' complaints in the public interest. She believed she had been bullied and harassed by three Interim Managers, targeted by the Human Resources Advisor, had her emails covertly accessed, been denied a phased return to work by her latest manager as well as being embarrassed and belittled by her in a meeting when she had made remarks about her hysterectomy, learning that she was to lose her banding and was omitted from the proposed new occupational health job structure. The last straw was said to be an appeal against her grievance against Ms Jennings in respect of which the claimant had not been provided with the evidence. She also referred to a failure to deal with a number of her grievances in accordance with the respondent's policies.

12. The claimant had made four disclosures which fall within the provisions of Part IV (A) of the ERA. They were both qualified and protected.

Protected Disclosure 1

(i) On 20th November 2013 the claimant reported a concern that her interim manager (X)[1] had acted fraudulently. X had appointed her daughter to work in the department for one day and failed to comply with the respondent's recruitment policy. She asked the claimant to approve an invoice for the payment for her daughter's services raised by her own employment agency.

(ii) X was an Interim Manager who worked for the respondent between April 2013 and November 2013. An investigation into the claimant's complaint against X, the then Assistant Director of OH and Wellbeing, concluded that X had seriously undermined the position by her lack of understanding of the responsibilities the role entailed. It concluded X had submitted an invoice for the use of an agency worker which was of direct benefit to herself and her company and against best interest policies and an abuse of position. It recommended that consideration

[1] The identity of this individual has been anonymised given the nature of the subject matter, the findings of the investigator and the fact the individual has had no opportunity to respond. The Tribunal was satisfied that, having regard to the issues raised by Articles 6, 8 and 10 of the European Convention, such a measure was necessary. The same combination of circumstances did not arise in respect of other employees, albeit for different reasons the employee G's identity was anonymised.

be given to removing her from her responsibilities with immediate effect and that the agency which provided her should be informed that due to her committing an act which could render her liable to summary dismissal they would terminate the engagement forthwith.

(iii) X ceased working for the respondent at about this time and the implication was that it was a consequence of the investigation albeit it was unclear precisely when her fixed term would otherwise have ended.

(iv) The claimant was given no feedback or information in respect of this complaint at all. She first learnt of its outcome upon disclosure of the investigation report upon order of this Tribunal.

(v) Under the respondent's policies [paragraph 7.3 and 7.4] the investigators should give as much feed back as they properly can to the individual raising a whistle blowing complaint. This will be confirmed in writing to the complainant's home address. The policy indicates that the precise action taken may not be fed back if it would involve an infringement of a duty of confidence owed to someone else.

Protected Disclosure 2

On 4th September 2015 the claimant sent an email to her then line manager, Ms Yee Lee Wright. She informed her that G[2], a nursing colleague in the department who had a disability, was struggling with her health. She had asked for reasonable adjustments to accommodate her disability but had not been given any. The claimant expressed the view that there was a legal obligation under the Equality Act 2010 to be complied with. She had had discussions about what duties could have been removed to alleviate G's problems when Ms Y L Wright had, at an earlier discussion, suggested ill health retirement as a possibility.

Protected Disclosure 3

[i] On 30th September 2015 the claimant submitted a Datix incident report and sent an email to her colleagues and Y L Wright. It concerned 20 flu vaccinations which had been administered to staff without there being the duly signed authorisation, the Patient Group Directive (PGD). The claimant believed this was contrary to the Medicines Act.

[ii] This matter was then taken up with the Chair of the PGD sub-committee. He said that vaccinations could continue by using the existing previous year's PGD and the current one was to be signed off on 1st or 2nd October 2015.

[iii] The investigative team sent a report through the Datix Website to the claimant on 19th February 2016 thanking her for reporting the incident, informing her that the investigation had been approved for closure and that advice was awaited from the new interim Head of Occupational

[2] The factors which warranted the anonymising of G were that she had a disability and her circumstances concerning reasonable adjustments engaged her Article 8 rights to such an extent they outweighed the other considerations within Articles 6 and 10

Health. In respect of what lessons had been learned, it stated 'no comment'.

[iv] The claimant had also reported this concern to Mr Melia in a meeting on 9th October 2015.

Protected Disclosure 4

[i] On 24th October 2015 the claimant wrote to Heather Cook, Director of IT, and complained that there had been covert monitoring of her emails by her then interim manager, Y L Wright. She had been off work sick for a period of two weeks.

[ii] On 5th November 2015 the claimant submitted a further associated complaint by way of a formal grievance against Emma Jennings. She said that Miss Jennings had obtained permission from Y L Wright to have full access to her private email account and was abusing her position with Ms Y L Wright to get rid of her. This was sent to Ms Wilkinson. The Head of IT had passed the complaint to the HR department to investigate.

[iii] An investigation by Miss Bancroft into the grievance against Ms Jennings considered access to the emails. In respect of that grievance, in an outcome letter of the 18th May 2016, Mr White drew attention to a provision of the respondent's policy whereby it reserved the right to enable third parties to access email accounts in exceptional circumstances, for example to make arrangements to cover long term sickness leave. Mr White concluded that Ms Jennings had not acted illegally as alleged but had gone to some lengths to safeguard the claimant's confidentiality and trust.

The detriment claims

13. The detriments were set out in the resignation letter. The last, the appeal meeting, was acknowledged in the hearing as not amounting to a detriment as such but was connected to the penultimate allegation whereby no documentary evidence was provided to the claimant in respect of the appeal of the Jennings' grievance.

14. The claimant also withdrew another alleged detriment. There was no letter of 4 July 2016 concerning the future plan for the department from which her role was omitted. That left eleven detriments.

First Detriment - ***September 13/January 2014 - 3 1/2 hours of extremely harassing interviews targeting me, with only one question about the fraud.***

15. In an appendix to her statement the claimant said that she believed no one was taking her complaint seriously. The failure to comply with the whistle blowing policy by provision of feedback would understandably lead the claimant to have suspicions and be sceptical about the handling of the matter. Ms Jennings had not perceived this to have been a whistleblowing case. It is apparent from a report

conducted by Mr Melia that the processing of complaints generally took many forms and would frequently not be characterised as to engage the respondent's whistleblowing policy. Regardless of how the complaint was categorised, we would expect any complainant to receive some feedback about concerns raised. That is an important ingredient in engendering trust and good working relations. It was singularly absent in this instance.

16. The concern that the claimant was only once asked about the fraud takes on a different context in the light of the evidence of Ms Jennings. She had said that the claimant had raised a broad range of concerns. She had felt it necessary to escalate them to a more senior manager. They included issues the claimant had with X as a manager, her frequent checking up on the claimant and concerns about whether X's daughter had mental health issues such that she should not be working within an environment where drugs were used. There concerns would take some significant time to explore, in interview with the claimant and X. We have no idea how long the interviews with X took place, nor what she was asked about. Three and a half hours of interviews does not seem excessive for a variety of concerns raised by one manager against a head of department.

17. The report which was finally produced, under order of the Tribunal, upheld the complaint relating to the first protected disclosure. It did so in trenchant terms. It is apparent, contrary to the claimant's belief, it had been taken seriously.

18. The claimant's recollection of the interview and the process is not assisted by the availability of any contemporaneous documentation. The Tribunal had to evaluate this complaint largely on the basis of the claimant's recollection of events of more than three years ago. Whilst we accept that the interviews were lengthy and the claimant perceived in her evidence that she had been targeted, we could not find any satisfactory causative connection between the form the investigation took and the fact that the claimant had raised a public interest disclosure. The fact the complaint was withheld militates against, rather than in favour, of the proposition there was such negative treatment of the claimant for that reason.

19. The withholding of feedback was attributable to a misguided priority given to confidentiality. This was a common theme. The respondent breached an order of the Tribunal to produce the investigative report, by redacting large sections of it. This was only corrected at the beginning of the hearing, after Mr Boyd had been able to provide legal advice as to the litigation process. It illustrated a belief held by a number of senior members of the respondent that confidentialities overrode all interests in the supply of information, including the giving of feedback. That is perhaps understandable in the clinical field within which the respondent operates. Patient confidentiality is a significant issue. Nevertheless, it would, and could, have been possible for the claimant to have been provided with some feedback, balancing that with X's right to privacy. For example she could have been informed that the concern she had raised was entirely appropriate and responsible, it had proved helpful to the respondent leading to action having been taken upon it.

20. Regardless of our criticisms of the failure to give feedback, we were not satisfied that it provided grounds for drawing an inference that the casual link between the detriment and protected disclosure was made out. Rather, we found

that it was a consequence of the attitudes held about the paramountcy of anything considered as confidential.

Second detriment *2014 to 2016* managerial duties being taken off me without explanation.

21. In the appendix to her statement the claimant clarifies that this concerned managerial responsibilities which were removed in a departmental restructure in December 2014. This was communicated to the claimant upon her return to work after a period of sickness absence by J Hartley, the interim head of the department, on 11th December 2014. By March 2015 a further review, following the report of Mr Greenwood, had proposed a restructure whereupon the claimant's managerial responsibility changed again.

22. There was no evidence to establish any causal connection between these changes and the protected disclosure complaint the claimant had raised a year before. There was no reason to suppose Miss Hartley knew anything about that complaint. The respondent had taken great steps to ensure X's confidentiality was respected.

Third detriment - *July 2014 targeting by Saras Kissun (former Interim Director) and Emma Jennings (HR) which resulted in apologies from the Trust and from Emma Jennings*

23. On the 16th July 2014 the claimant attended a meeting with Ms Kissun and Ms Jennings. This was in response to a letter concerning 'ongoing issues'. The claimant was offered the opportunity to be accompanied by a staff representative or colleague.

24. The first part of this meeting explored the claimant's working relationship with Cathy Clowes who had been acting as Interim Leader of the department. Ms Clowes had raised concerns in respect of working with the claimant and feeling unsupported by her. The claimant's view was that there were communication difficulties. It was agreed that some form of mediation could be attempted to move matters forward. That part of the discussion was recorded in a letter which Ms Jennings drafted and was sent by Ms Kissun to the claimant on 21st July 2014.

25. The letter did not record the second part of the meeting. Ms Kissun had challenged the claimant about her own performance. Raising those issues in this manner was not in accordance with the respondent's policies. Miss Jennings recognised that but did not intervene. The claimant was distressed and upset. She was taken by the surprise at these unexpected allegations about her performance.

26. After the meeting the claimant spoke to Miss Jennings privately. We are satisfied that Ms Jennings acknowledged that she should have intervened and apologised to the claimant for failing to do so. She advised the claimant to see her GP if she was feeling stressed. The claimant took that advice and obtained a three week sick note for work related stress.

27. There was no evidence from which to infer Ms Kissun knew anything about the first protected disclosure. It is not possible to attribute any improper conduct on her part in this meeting to the claimant having made an earlier protected disclosure.

28. The claimant also complained that the minutes of Ms Jennings were inaccurate. The meetings took the form of the draft letter that Ms Jennings prepared for Ms Kissun and which was sent on 21 July 2014. She had specifically excluded reference to the discussion relating to performance because she had regarded it as inappropriate. In so doing she was attempting to assist the claimant and not undermine her. We are not satisfied therefore that this was a detriment. In any event we are not satisfied in so doing it had anything whatsoever to do with the protected disclosure complaint the claimant had made the previous year to Miss Jennings about X. We accept the submission of Mr Boyd, that if Ms Jennings was seeking to treat the claimant detrimentally because of this earlier protected disclosure it is unlikely that she would have agreed with her that the conduct of Ms Kissun had been improper.

29. During the claimant's sickness absence Ms Kissun had made a referral to the occupational health advisors in which she had said that there had been significant change in the department and that conflict with a previous manager the previous year had resulted in stress and a grievance being lodged. In contravention of the respondent's policies this referral had never been shown to the claimant before it was submitted. It was factually incorrect because the claimant had not submitted a grievance, but rather a complaint about X's fraudulent conduct. The occupational health doctor refused to report and recommended management discuss with the claimant the correct referral information.

30. On the 14th October 2014 the claimant submitted a grievance in respect of the inaccurate record of the meeting of 16th July 2014, recorded in Ms Kissun's letter to the claimant of 22nd July 2014 and the inaccurate referral to the occupational health advisor which had not been shown to the claimant in advance and its reference to the claimant's job description and communication issues/conflict with line manager. That grievance was ultimately resolved informally and it was agreed by Ms Hartley that Ms Jennings would remove any reference to the grievance from the claimant's personnel file.

31. There was a dispute between the claimant, on the one hand, and Ms Jennings and Ms Wilkinson, on the other, as to whether or not the claimant's absence would be ignored for the purpose of the respondent's policies, but nothing turns upon this dispute. There is no doubt that the handling of the referral to the occupational health department was well short of good practice. The informal attempts to resolve this dispute undermine any suggestion Ms Jennings and Ms Hartley were subjecting the claimant to detriments because of the earlier protected disclosure.

Fourth detriment ***2015 - bullying and harassment by Y L Wright, ten hours of one to one meetings with no written outcomes of reasons, who I am told by a grievance investigation team, was told to secretly look at my performance.***

32. Y L Wright was the subject of two of the claimant's protected disclosures, both in respect of a failure to have regard to the duty to make adjustments in respect of G and in respect of having involvement in authorising or instructing nurses to undertake flu vaccinations without the PGD compliance. She knew about them and it might be assumed, as in common with most people, she did not enjoy being criticised. There is no evidence that she knew of the disclosure about X.

33. Y L Wright's conduct as a manager was criticised by both the claimant and five of her colleagues in a meeting with Mr Melia and Ms Jennings in August. The others had not made protected disclosures. It is not possible, easily, to single out unwanted detrimental treatment because of the public interest disclosures from objectionable conduct raised by the claimant and others. It would appear to be the case that the claimant would say that Ms Y L Wright would have treated her poorly, in her managerial capacity, regardless of her having made protected disclosures, because others were poorly treated too; but the protected disclosures made matters worse. There is no satisfactory evidential foundation for this proposition.

34. There is no evidence about how Y L Wright appraised others. Different treatment of the claimant to them, in the appraisal process, would have provided some material from which to draw an inference that Ms Y L Wright had taken adversely to the claimant having made the complaints. There was no such material. Indeed Mr Boyd made the valid point that some of the meetings arose before the protected disclosures concerning Ms Y L Wright arose. This underscored the shortcomings in this allegation. The behaviour of Ms Y L Wright has not been identified with sufficient particularity to enable this complaint to be made out. No doubt this is in part because of the age of these matters. To bring such old complaints involves, inevitably, evidential gaps and deficiencies which cannot be substituted by generalisations and impressions.

Fifth detriment *24th August to 9th October 2015 - not supported on two occasions by David Melia when asked for help relating to bullying and harassment and work related stress.*

35. On 24th August 2015 Mr Melia agreed to speak to staff from the occupational health department about their concerns. He had not expected to see so many staff, six, and this took him aback. The claimant had made a note of the meeting and we accept it is accurate.

36. The claimant was the most senior staff member present. The staff collectively complained about the conduct of Y L Wright, the Interim Manager. They complained about the amount of work she was expecting them to undertake and that she was not following recommendations in the Greenwood report. They complained about a lack of communication. Mr Melia said that there was to be a new appointment as Head of Department commencing in January. The claimant reported aggressive behaviour on the part of Y L Wright whereby she would bang the desk with her hand and use profane language.

37. Mr Melia discussed stresses among staff more generally, alluding to specific pressure staff had on the shop floor, the wards, which were busier than the occupational health department. He also said that if further savings were needed

the Trust Development Authority (the respondent's regulator) would not hesitate to outsource the occupational health department. He referred to Capita as a potential service provider. The claimant's note records that he said that this could be done by the strike of a pen. In his evidence Mr Melia denied that he used the term which he thought would be pejorative. He did recall there being discussion about Capita and outsourcing although he could not recall who raised the topic. We preferred the recollection of the claimant supported as it was by her note. The discussion progressed from complaints about the interim manager to a review of the performance of the department as a whole and the stresses it was facing. Mr Melia had discussed a change in working practices in the number of cases handled. This shifted focus was, we are satisfied, instigated by him and deflected from the specific complaints being made about the interim manager.

38. As such we are satisfied that there was not the support the claimant had hoped for in this meeting. Mr Melia did say he would speak to Y L Wright about the concerns and we are satisfied he did. Unfortunately he did not report back to any of the staff about the discussions he had with Ms Y L Wright. That fed the impression that he had done nothing. It would be reasonable of the staff to expect the meeting to be followed up in some way with feedback.

39. Mr Melia knew of the second and third protected disclosures but not the first. We are not satisfied that the manner in which he conducted this meeting and his failure to provide feedback was because of the claimant's protected disclosures. His conduct with staff was consistent whether they had made protected disclosures or not.

40. On 9th October 2015 Mr Melia had a meeting with the claimant, Laura Wakefield, her colleague, and Ms Jennings. This meeting had been convened at the suggestion of Ms Jennings. She had had a discussion with Ms Wakefield who had conveyed the belief that Y L Wright was checking up on her and the claimant. She said they dreaded coming into work and had not found the first meeting with Mr Melia helpful. The purpose of the meeting was therefore to take this matter forward and address these concerns.

41. Before the meeting commenced Mr Melia received a letter from Maria Thompson, the GMB representative. She referred to having been contacted by a member[3] who had raised concerns about how the service was being run and the long term plans for it as a whole. Ms Thompson referred to a decision by the Trust to maintain an in house service. She referred to the forthcoming meeting to discuss the current interim manager who was unwilling or unable to provide information and reassurance. Ms Thompson asked if it would be possible to provide clarity as to the long term strategic approach to the provision of occupational health services and whether any decision had been made in relation to outsourcing.

42. It is understandable that the Union had raised these concerns given the discussion which had taken place on the 24th August 2015 and the understanding that a decision had already been made to keep the occupational health service in house. Mr Melia did not take well to the communication. He sent an email to Ms Jennings at 7.59 on the 9th October 2015. With reference to Ms Thompson's letter

[3] Although she was not named, Mr Melia knew that the member referred to was the claimant.

he said, "*If this is the approach that is being taken then I am tempted to say that I'd be happy to continue with formal lines of an approach and that this would necessitate a formal approach to capability and behaviour from all members of the team. However, I think that will be unwise at this stage but I really want to let the two colleagues attending the meeting know today that I am unhappy with the approach they are taking and their lack of professionalism and leadership. Obviously I will remain calm and keep my cool!"*

43. There is a dispute as to the tone in which the meeting was conducted between the claimant on the one hand and Mr Melia and Ms Jennings on the other. Ms Jennings took notes of the meeting and they are similar to a record which the claimant produced. The Tribunal was satisfied that the notes produced by the claimant had been prepared from a recording. The particularity of language, phraseology and sentences were not such as would have been prepared of a meeting from memory. The claimant denied that they had been prepared from a recorded transcript and that did not do her any credit. Nevertheless they were evidentially significant and supported her account as to the way in which the meeting developed.

44. We accept the claimant's evidence that Mr Melia commenced the meeting by making reference to the GMB letter. He said that the occupational health department had not been performing and collecting the appropriate data for some time and there had to be improvement because without that the service was not worth keeping and they would have to look for something different. He said he did not hold either Ms Wakefield or the claimant to blame for that but he said that things should have been done that they would have expected from any service. This remark was made immediately after the claimant had submitted a formal grievance against Y L Wright. That included complaints about her profane language, aggressive behaviour, singling out of the claimant in meetings, failing to provide support to the claimant or G in respect of reasonable adjustments and allowing the flu vaccination to be administered without the PGD authorisation. The claimant said that was having a detrimental impact on her health and ability to undertake her job effectively. She regarded the behaviour as bullying and harassment.

45. The observations of Mr Melia about the departmental failings in direct response to the claimant raising these concerns was undermining. Rather than address her concern he deflected the conversation onto a topic about the performance of the department. We are satisfied that this was a consequence of his annoyance that the trade union had taken up the concern about outsourcing. That was a reaction to his own comment at the August meeting. In line with his message to Ms Jennings earlier that day he was letting both Ms Wakefield and the claimant know he was unhappy with the approach they were taking. In his evidence Mr Melia accepted that his criticism of their 'lack of professionalism and leadership' in the email were ill judged words. .

46. The claimant raised the question of working at a different site to Y L Wright. Mr Melia did not address that immediately but discussed the PGD issue. After some exploration of that, Ms Jennings stated that she had known the claimant as she had looked after the occupational health department staff for some time and questioned the claimant whether there was any difference between the three interim leaders: "*it*

just seems its similar issues again isn't it but it's a third time round". The claimant pointed out that in respect of X she had taken money illegally. Ms Jennings said, in response, "I*s there any common themes [sic], the money issue aside but in terms of their behaviour you know they all increased your workload have they all asked you to do anything extra?*". The claimant said she could not compare the three interim managers. She said that Ms Kissun had left quickly and that she could not work with someone who is rude and aggressive, a reference to Y L Wright. To this Mr Melia said that they would take her formal grievance but they would have to put it to Ms Y L Wright and that she may 'counter argue actually counter report on behaviours to her'. He informed the claimant that she would have to think about that as well as part of the response as that would be part of the investigation. He pointed out that there was a difference between expressing thoughts and submitting a formal grievance in writing. He added that even if the claimant was working in a different building he may not be able to ensure for the whole of his investigation that the two had no communication at all. He said, "*I will accept this as I would from anybody, this grievance, but that would then trigger a series of actions as well, so I am not going to press you for that now, I think there is a difference between writing our notes down and thoughts so that we can articulate what we are going to say and then submitting something as a formal document"*. He asked the claimant to consider how the situation was handled over the weekend.

47. We agree with the claimant that this was an inappropriate and improper way to take and receive a serious complaint about bullying behaviour of a manager. Firstly, deflecting the conversation on to the performance of the department generally was to appear evasive and indifferent to the concern. Then for Ms Jennings to raise a question, twice, of whether there was a common theme between the three managers against whom the claimant had raised concerns was, implicitly, to suggest the problem might be with the claimant and not her managers. Ms Jennings knew of the substance of the complaints and was in a good position to know there was no common theme. Then, to raise the possibility that there might be counter arguments laid against the claimant and others by Y L Wright if she pursued a grievance would inevitably erode the claimant's confidence. She had submitted this written grievance moments before, in the very meeting. She was entitled to have her managers reflect carefully on whether its contents exposed serious managerial misconduct. The conduct of Mr Melia and Ms Jennings was unworthy of the respect the claimant was entitled to have received at a time when she was vulnerable, suffering work related stress and turning to them for support.

48. We are satisfied that the tone of this meeting was adversely affected by Mr Melia's annoyance at the formalisation of concerns in a letter from the Union. His unfounded reference to a lack of professionalism and leadership exposed an attitude and mindset which influenced the entire meeting. Far from accepting the written grievance in an open handed and fair manner he and Ms Jennings left the claimant feeling unsupported and even more vulnerable.

49. However we are not satisfied that Mr Melia (in contrast to Ms Jennings) responded as he did because the claimant had made protected disclosures. It was, for the reason we have set out, that he was angry that the claimant had discussed this matter with her Union and the sensitive topic of outsourcing could have generated embarrassment given that Trust Development Board had already

determined this matter. In the circumstances whilst we accept the criticism that the claimant had been unsupported we do not accept that this was in any way attributable to the fact that she had made protected disclosures.

Disclosure six *9th October 2015 - targeted by Emma Jennings in a meeting saying I was the problem*

50. Although Ms Jennings did not explicitly use the words that the claimant was the "problem" we accept that the discussion implicitly suggested that. It must have been undermining.

51. Ms Jennings knew of the protected disclosures. It was to her that the first had been made. She also knew that two protected disclosures had been made which involved criticism of Y L Wright.

52. We are not satisfied that the respondent has established that the reason Ms Jennings raised this question was unrelated to the protected disclosures. Rather we are satisfied that they influenced her in making this remark.

53. Ms Jennings said that the question about a common theme between the claimant's managers was not a criticism of the claimant but a genuine attempt by her to ascertain whether there were shortcomings and failings of the managers. She suggested if the interim managers had common failings they were ones that could be avoided in the future. We rejected that. If that was a course of enquiry Ms Jennings wanted to pursue we would have expected her to explain carefully to the claimant the purpose behind her question. Implicit in the questions posed is a criticism of the claimant that she was unable to work alongside a number of managers such that the problem lay with her.

54. In referring to the common themes we are satisfied that Ms Jennings had in her mind the fact that the claimant had made protected disclosures of a serious nature concerning two of the claimant's managers. Although she had not characterised them as protected disclosures in the legal sense, their content plainly fed into her suggestion that the claimant might be the problem. In addition she had in mind that the claimant had complained about Ms Kissun, albeit that was not in the form of a protected disclosure. As is clear from **Fecitt** (above) it is sufficient for the protected disclosures to contribute or influence the detrimental act and not be the sole or only cause.

55. But for the issue of time limits, which we address below, this complaint would have been established.

Disclosure seven *23rd October 2015 - after submitting a grievance against Y L Wright my work team emails were covertly accessed by her and authorised by Emma Jennings*

56. Any fair reading of the email chain disclosed in these proceedings establishes this allegation is without foundation. We agree with Mr Boyd that they demonstrate that far from Ms Jennings authorising the covert access she sought to protect the claimant's email and took appropriate steps to ensure any access was in accordance

with policy and restricted. On 21st October 2015 she had appropriately contacted the IT department to place an out of office message on the emails to inform any correspondent the claimant was absent. On 28th October she expressed to the senior employee relations adviser her discomfort in viewing emails, preferring simply to have an out of the office reply attached.

57. On 14th October 2015 Y L Wright had emailed Ms Jennings to say she would like the claimant's incoming emails to be forwarded to her so she could respond and action immediately. She said this was a practice she used for any managers who were on holiday or on sick leave but would need HR approval or approval of her manager. Ms Jennings initial response was to email her colleague and express the view that she did not think it was entirely appropriate in the circumstances. Her colleague advised her to contact IT who considered the appropriate practice. In another email Ms Jennings told her colleague that she did not think the claimant would be happy about Ms Celia Wright accessing her emails.

58. It is regrettable that, upon sight of these emails, the claimant did not modify her case in this respect. It is frankly without foundation. Moreover, we do not draw the sinister inference invited concerning Miss Y L Wright's wish to examine the emails. There were clearly business reasons why the claimant's manager would feel she needed to keep track of events. Ms Jennings' response was beyond reproach. Whatever criticisms arose in any other respect, accusing Ms Jennings of acting illegally, and maintaining similar complaints about this topic throughout this hearing did the claimant no credit.

Allegation eight ***February 2016 being told by my manager, Lizzie Wood, that I did not need a phased return to work despite several requests and written medical advice that I should have four weeks. She told me the phased return was over at the end of week one and then at the end of a week two.***

59. The position advanced by Mrs Wood was that a phased return did not necessarily mean reduced hours but could involve reduced duties. Thus she decided to remove managerial responsibilities when the claimant returned.

60. Whilst we accept that a return to work after ill health may involve a reasonable adjustment of the removal of managerial duties, the terminology of a 'phased return' is indicative of reduced hours. That would be the clear understanding of the claimant. The occupational health advisors had recommended a phased return. The claimant's General Practitioner has suggested it be over a period of four weeks. Notwithstanding that, Mrs Wood recorded a phased return which involved the claimant working full hours on the fourth week. Although Mrs Wood made a note on the retrun to work record that this was agreed, we accept the claimant's evidence that this was not so.

61. Mrs Wood had known the claimant had been absent for surgery, a hysterectomy and work related stress. She had suffered anxiety and stress after the meeting on 9th October with Mr Melia and had not returned until the 9th February 2016. Against that background, the claimant's complaint that Mrs Wood had not properly given effect to the phased return is, in our judgment, a legitimate one.

62. The claimant did not confront Mrs Wood when she curtailed the proposed phased return because she felt anxious, she had a new manager with whom she had a personal friendship and did not want to introduce a conflict at that stage.

63. There was no evidence the refusal to implement a phased return was attributable in any way to the fact that the claimant had made protected disclosures. We accepted Mrs Wood's evidence that she did not know of these protected disclosures.

Allegation nine. ***February 2016 - having my hysterectomy referred in an unprofessional and derogatory manner as "anything between the tits and the tail" by my manager embarrassing and belittling me in front of HR and trade union representative in a return to work meeting***

64. The meeting occurred on 1st February 2016. Both Mrs Wood and the claimant recalled her talking about experiencing pain and being tired in the afternoon. This was in connection with the discussion about her return to work. Mrs Wood recalled saying, "*I absolutely understand so please don't worry, anyone who has had major surgery between tits and tail is often very tired and fatigued as they recover, so don't worry we can look at your working hours and phased return to compensate*". She said she recalled the union representative and HR Manager smiling at that point. Mrs Wood said it had been a light hearted remark with no intention to cause any offence. She said in evidence that she regretted making the remark now knowing that the claimant had been upset about it. However she felt it was right at the time to use the term. This sort of language is used, she said, by nurses all the time.

65. The claimant's recollection is similar, but she recalls the remark as being "anything between the tits and tail can make you wobbly". We are satisfied the claimant's recollection is likely to be more accurate. The explanation advanced by Mrs Wood was based upon her recollection some time after the event. The claimant had every reason to remember the terms in which the remark was made, given it had an immediate impact upon her.

66. Mrs Wood failed to handle this return to work meeting appropriately. Her flippant reference to the site of the operation and its impact caused offence. It was foreseeable it would cause offence. The claimant had been suffering from work related stress as well as having undergone a significant operative procedure. Badinage between nursing colleagues in the locker room cannot be professionally repeated with patients. Nor can such language be reproduced in a return to work meeting. By using this language Mrs Wood failed to recognise the appropriate boundary between her as a senior manager and the claimant, herself a manager. Their closeness as colleagues historically could not warrant a departure from the professional standards to be expected. She held a position of authority. The meeting, with third parties present, would form the basis for the circumstances in which the claimant could and would return to the workplace. The claimant was in a position of vulnerability and was still recovering. Care and sensitivity in how this meeting was handled was essential. There was no room for ill placed levity. It is unfortunate that, with the benefit of hindsight, Mrs Wood still felt it was the right thing to say at the time.

67. Nevertheless we are not satisfied it had anything to do with the fact the claimant had made protected disclosures, a matter Mrs Wood was oblivious to.

Allegation ten. ***February and May 2016 - being told my Band 7 substantive post has been down banded then subsequently receiving an email showing the occupational health organisation structure no longer included my name or job effectively showing I no longer had a job and the Trust Board had approved the plan.***

68. The claimant's return to work did not run smoothly. On 18th February 2016 Mrs Wood had met the claimant and set a workload which was beyond the claimant's capability within the time scale. Mrs Wood recognised in evidence and in her witness statement that this was because she had not understood the extent to which data had to be input manually. She wrote to the claimant confirming her understanding of the discussions including a return to full time work, the fourth week, on 22nd February. In addition Mrs Wood commented upon the fact the claimant's role had never been banded and that needed to be done. She recorded there was potential for that to come back at a lower band but any difference would be managed, by which she meant ring fenced.

69. The claimant responded by email to this letter challenging the failure to allow her to have four weeks' phased return. She also pointed out that the work was excessive and could not be achieved given the reports which had been demanded. As for the re-banding of the roles, the claimant commented that it was confusing that Mrs Wood felt the job description would be down graded when she had told her in the meeting that much of the tasks and roles in the claimant's current job were what Mrs Wood did in her role as Head of Occupational Health and "as you said, we can't both do it". The claimant added that she felt that a decision had already been made that she would be re-branded to Grade 6.

70. Mrs Wood authorised the claimant to have three days off for the week commencing 22nd February. On the 19th February 2016 Mrs Wood realised there would be no manager on site the following Friday. Accordingly she texted the claimant and told her she would expect her to cover that date even though she had authorised the leave.

71. Mrs Wood was on leave for the week commencing 22nd February 2016 but had attended early to collect some documents for a meeting she was to attend with Y L Wright in Leicester. She met the claimant who was in a very distressed state. The claimant had sent an email expressing how upset she was that her leave had been cancelled and how she had had difficulty sleeping as a consequence. The claimant said she was on prescribed medication and she also expressed her surprise and upset that she had not been given a phased return. She said the pressure was exacerbating her stress and eroding her confidence and this was impacting upon her health.

72. Mrs Wood spoke briefly with the claimant on the morning of 22nd February and agreed that she could take her leave and have a full phased return.

73. On 23rd February 2016 the claimant sent a further email to Mrs Wood, she repeated many of her concerns including the fact that she had set an unachievable target in respect of the preparation of the report. She posed the rhetoric questions "is it your remit to manage me out of this organisation? Do you want me to resign? I have been honest with you can you give me an honest answer?". Mrs Wood did not reply to that email because when she returned to work the following week the claimant had been signed off sick. The claimant had submitted a grievance against Mrs Wood on 29th February 2016 concerning unprofessional behaviour, lack of support and ignoring clinical advice and setting unachievable targets. Mrs Wood was advised that she should not contact the claimant in the circumstances. She had read the claimant's email.

74. On the 5th May 2016 Mrs Wood sent the whole department a newsletter which contained a departmental restructure. Although Mrs Wood referred to it as having been agreed (a word she had used in relation to the abridged phased return) we are not satisfied it was anything other than a consultative document as she invited representations. Although a number of staff are specifically named within the restructure there was no reference to the claimant nor the Band 7 post she held. The claimant might have expected to see her position under the administrative structure but it was not included there. In evidence Mrs Wood said that the claimant's position was within a column headed Nurse D B7/A8 the new Clinical Operations Manager. The claimant's post fell, according to Mrs Wood, within the description "supported by a performance role". Given that some other staff had been named or many of the posts included their banding and given that the claimant's job description of Service Performance Manager was omitted from any of this structure it was entirely understandable that the claimant drew the inference that her role had been omitted. In answers to questions Mrs Wood recognised that that was a reasonable interpretation but she emphasised that had not been intended.

75. Against the context of the events leading to the claimant's further ill health, her insecurity and rhetoric questions as to whether she should be managed out, we accept the claimant's criticism that she was subjected to a detriment in the presentation of this restructure. Objectively, it gave the impression her role was to be removed. The discussion about rebanding and duplication of duties with the Head of Department set the backcloth to feelings of insecurity and vulnerability.

76. By this stage Mrs Wood did know that the claimant had made the protected disclosure relating to the PGD. She had received the outcome, such that it was. Nevertheless we do not accept the contention of the claimant that Mrs Woods' handling of the restructure and discussions about job evaluation had anything to do with the fact the claimant had made protected disclosures. We accept that the discussions had not been intended to alienate and undermine the claimant albeit they had that effect. Nor had the job structure been specifically designed with the view to undermining the claimant and suggesting she no longer had a job. These discussions and the communication had been carelessly put together without any thought to the delicate situation which had arisen and the claimant's lack of confidence and feeling of insecurity in employment. It was less than a reasonable employee would expect.

Allegation 11 - ***4th July 2016 - I received a letter from Natalie Pressence (HR) stated I would not be allowed to have any documented evidence relating to my appeal.***

77. This concerned the Emma Jennings' grievance. The claimant had not attended at the meeting to make representations to Mr White having taken advice from her union representative. Having received the outcome however she had written to Ms Wilkinson to whom she had appealed to request the provision of various information in the letter of 26th June 2016. She requested nine items, including the investigation team notes, recommendations, witness statements of those interviewed, extensive email and documentary evidence held by E Jennings and terms of reference about Emma Jennings behaviour. The claimant had made it clear that she would expect to receive this information so she could effectively present her appeal. In response Ms Pleasants, by letter of 4th July 2016, said "*with regards your request for the investigation report and witness statements, this is not within policy and remains a confidential document in relation to another employee. You have received an outcome letter which is in line with process*".

78. Although Ms Pleasants did not give evidence, when asked Ms Wilkinson was not able to refer to any specific policy which protected confidentiality to preclude disclosure of such documentation. She had referred to a common practice of this nature in her letter to the claimant following the aborted grievance appeal. She informed the claimant that the panel had intended to convert the hearing to a stage one consideration of the grievance. In spite of the "custom and practice" of confidentiality she went on, later in the letter, to say that all parties would be provided with relevant documents prior to the hearing.

79. This would have been in accordance with the respondent's grievance policy. The documents the claimant had requested were relevant documents. Nor was there any countervailing confidentiality policy reasons to preclude disclosure of these. In the circumstances the failure of Ms Pleasants to disclose the documents was unreasonable and not in accordance with the respondent's own policies.

80. The claimant attended at the appeal hearing but did not have the strength to stay, having been under great stress. It was not possible to commence immediately as Mr White had not arrived. The claimant entered the room where the appeal panel assembled and read a short passage of her statement after which she left. No real criticism could be made of Ms Wilkinson for not being able to salvage the situation at that time.

81. Ms Pleasants was, in all probability, aware of the protected disclosures the claimant had made, not least because they had been alluded to in her grievances. Nevertheless we accepted the explanation advanced on behalf of the respondent by Mr Boyd that the refusal to provide the documented evidence was down to a belief of the Trust that confidentiality was an overriding consideration in determining what should or should not be provided. Whilst not in accordance with the written policies this seemed to be replicated by the respondent's approach to disclosure in this case, as explained in paragraph 19 above. We are not satisfied that the letter of 4th July 2016 and its content was influenced in any way by the fact the claimant made protected disclosures.

Time Limits

82. In the circumstances the only protected disclosure complaint which has succeeded is that relating to Ms Jennings and the meeting on 9th October 2015. That is not conduct extending over a period nor a series of acts or failure to acts which fell within time. Mr Rudd did not advance an argument that it was not reasonably practicable for a complaint to be raised in respect of that matter within three months. Accordingly none of the complaints under Section 47B of the ERA succeed.

Constructive Dismissal

83. In a series of respects the respondent's managers and employees acted without reasonable and proper cause. The rate of progress of the various grievances fell well outside the respondent's own policy of providing an answer within six weeks. The claimant's grievance against Y L Wright was still outstanding at the time the claimant resigned, as were those concerning Mr Melia and Mrs Wood. We accept Mr Boyd's point that the claimant had declined to attend a meeting to discuss the Y L Wright grievance in early November 2015, at a time she was off sick and so had contributed to the delay at the outset. That excuse could not be used for the later period when the grievance investigators allowed the timeframe to slide. There had been no attempt to meet the claimant when she returned to work in February 2016. The claimant had referred to the failures to follow grievance policy in her resignation letter. They contributed to the reasons she resigned.

84. Our findings in respect of the detriments include a series of acts in which the respondent's managers and employees acted without reasonable or proper cause; questioning the claimant about performance outside policy by Ms Kissun in July 2014, misrepresenting the history in the occupational health referral and failing to follow policy in allowing the claimant to see it before it was submitted, failing to support the claimant on the 24th August and 9th October 2015 at meetings in which she was raising complaints and a grievance in respect of her manager's bullying behaviour, implying that the claimant might be the common theme and therefore the problem, failing to abide with the medical advice to ensure there was a phased return over four weeks, belittling and embarrassing the claimant by alluding to her surgery as being between the tits and the tail, leading the claimant objectively to fear that her job was being eliminated by reason of the dissemination of an occupational health restructure and failing to provide the claimant with appropriate documentation in respect of the grievance appeal in accordance with policy.

85. Having determined that such actions were without reasonable or proper cause, we were satisfied that, objectively, they would have destroyed the relationship of trust and confidence between employer and employee. Taken together these actions amounted to a breach of the implied term. The last, the failure to provide relevant documentation was not a breach in itself, but was a departure from policy and was significant. The grievance handling progressed far outside the proper timeframe. It added to the earlier acts and cumulatively was part of the breach.

86. We acknowledge Mr Boyd's submission that for there to be a breach of the implied term, the impugned action must be of such a serious quality as to be comparable to a rejection of the employment relationship by the employer. The implied term may be by intentional act or acts 'likely' seriously to undermine or destroy trust. There was no intention to destroy trust and confidence but the gravity of the cumulative actions was sufficiently serious and substantial to amount to a repudiation.

87. The claimant resigned within days of the last matter and as a consequence of these cumulative events. She did not affirm the contract. She was dismissed within the meaning of Section 95(1)(c) of the ERA.

88. It has not been suggested that if we found the claimant was constructively dismissed that the dismissal was otherwise fair.

89. Accordingly we are satisfied the claimant was unfairly dismissed.

Employment Judge D N Jones

Date 7 June 2017