Reserved judgment

Between

Claimant: **Ms A Want**

Respondent: **Hounslow and Richmond Community Healthcare NHS Trust**

Heard at London South Employment Tribunal on 14 – 18 & 21 - 25 August 2017 and in chambers 16 & 17 October 2017

Before Employment Judge Baron

Lay Members: **Mrs J S Muir & Mrs C Upshall**

Representation:

Claimant: **Timothy Yarnell – The Claimant's husband**

Respondent: **Ben Cooper QC**

JUDGMENT

It is the unanimous judgment of the Tribunal that the claims are dismissed.

REASONS

Introduction

1 I must first of all apologise for the delay in the issuing of this judgment. This has been caused by a combination of the large number of factual allegations being made, the substantial volume of documents to be considered, the significant shortage of judicial resources, and the availability of the lay members to meet in chambers to deliberate.

2 The Claimant was employed by the Respondent from 27 July 2015 until 25 April 2016. On 4 August 2016 she presented a claim to the Tribunal. Her principal claims are that she was subjected to detriments on the ground of having made protected disclosures. She is further claiming that she was constructively unfairly dismissed, the reason or principal reason being the making of the disclosures. The Claimant had not been employed for two years and did not therefore have the 'ordinary' right not to be unfairly dismissed.

3 The Claimant gave evidence herself and did not call any other witnesses. Evidence for the Respondent was given by the following:[1]

[1] The names are in alphabetical order and the job title shown is the one at the relevant time.

Dawn Barnett – Operational Support Services and Primary Care Manager[2]
Louise Brem-Wilson – Voluntary Services Coordinator
Pauline Chacksfield – Operational Support Services and Systems Team Leader
Stuart Cornish – Emergency Planning Manager
Siobhan Gregory – Director of Quality and Clinical Excellence
Kulvinder Jhita – Business Support Manager
Richard Jones – Interim HR Advisor 24.02.16 - 30.05.16
Ross Lambdon – Operational Support Services Team Leader
Martyn Schofield – Head of Quality and Patient Safety.

4 This case involves a great number of documents and much detail. The particulars of claim attached to the claim form ET1 was 40 pages long of single spaced printing, consisting of 212 paragraphs. The Claimant's witness statement consisted of 273 paragraphs. We were provided with a trial bundle of documents containing over 1,200 pages. There was also another lever arch file of policy documents. We have only taken into account the documents, or parts of documents, which were either referred to in the witness statements or mentioned at the hearing.

The claims and the issues

5 The nature of the claims being made is summarised in paragraph numbered 1 above. There is a list of issues which we set out below insofar as they relate to the merits of the claims as opposed to any remedies for the Claimant. We understand that the list is agreed save for the two points highlighted as not being agreed.

A. JURISDICTION

Time Limits

1. Does the Claimant complain of any acts, or deliberate failures to act, that occurred more than three months prior to the date on which she presented her complaint to the employment tribunal (4 August 2016), subject to any extension of time afforded by the ACAS EC process, such that are they *prima facie* out of time? In determining this question the tribunal will consider whether any act or failure to act is part of a series of similar acts or failures, such that the relevant date should be determined by reference to the last of them.

2. If so, was it reasonably practicable for the Claimant to present her complaint before the end of that period of three months?

3. If not, did she present her complaint within a further reasonable period?

B. AUTOMATIC UNFAIR DISMISSAL

Dismissal

4. Was the Claimant dismissed? The Claimant says that she was constructively dismissed whereas the Respondent says that the Claimant voluntarily resigned. In particular:

[2] That is how Ms Barnett described herself in her witness statement but we note that in emails she signed herself as 'Operational Support Services & Health & Well Being Manager'. No doubt nothing turns on the point.

a. Did the Respondent commit a fundamental breach of the Claimant's contract of employment?

b. The Claimant alleges the following specific breaches of contract of employment:

    i. failing to conduct a DBS check for the Claimant's role during her temporary redeployment (breach of section 14.4 of the Claimant's contract of employment);

    ii. failing to afford the Claimant an appropriate, timely and suitably independent grievance procedure (breach of section 20.1 of the Claimant's contract of employment);

c. The Claimant further alleges that the Respondent breached (i) the implied term of trust and confidence and/or (ii) the implied term to provide a safe system of work. The Claimant relies on the following alleged acts or omissions as individual breaches of contract:

    i. failing to implement actions arising from an Occupational Health Assessment completed on 29 December 2015 either at all or in a timely manner;

    ii. failing to implement actions arising from a Stress Risk Assessment completed on 23 March 2016 either at all or in a timely manner;

    iii. not considering the Claimant for redeployment to potential roles that the Claimant should have been considered for;

    iv. failing to investigate the Claimant's allegations that she was being subjected to detriment as a direct result of making a Protected Disclosure; and

    v. failing to support the Claimant, both prior to, and following a diagnosis of stress and depression, in respect of the matters identified at paragraph 9 below.

d. If the Respondent committed a fundamental breach of the Claimant's contract of employment, did the Claimant waive the breach and affirm the contract in response to any of those alleged breaches?

e. Further, and in the alternative, did the Respondent commit a series of breaches of the implied term of trust and confidence and/or the implied term to provide a safe system of work (detailed in section 4b-c above and section 9 below) such that, in combination, those breaches amounted to a fundamental breach of contract?

f. The Claimant relies on the e-mail sent from Richard Jones on 20 April 2016 as the last straw, which she believes evidenced two simultaneous issues: firstly, the Respondent's failure to consider the Claimant's offer of paid or unpaid leave, instead requiring her to take indefinite sick leave, pending resolution of her work situation, namely the unresolved investigations and redeployment; and secondly, that the absence of any specified actions in this e-mail demonstrated that the Respondent planned no imminent action to address the ongoing failure to act to resolve the investigations and redeployment.

g. If so, did the Claimant resign in response to that fundamental breach of contract?

h. Alternatively, did the Claimant waive the breach and/or affirm the contract?

Unfair Dismissal

5. If the Claimant was dismissed, was she dismissed by reason (or by principal reason) of making a protected disclosure? The Claimant relies on the protected disclosures set out in the ET1 and outlined in the Appendix to this List of Issues.

6. If so, the Claimant's dismissal is automatically unfair.

7. If the Claimant was dismissed for a reason unconnected to any protected disclosure, the Claimant lacks the requisite two years' service to claim ordinary unfair dismissal and her claim must fail.

C. DETRIMENT ON THE GROUND OF MAKING PROTECTED DISCLOSURE

Protected Disclosure

8. With reference to each of the alleged disclosures D1 to D7 identified in the Appendix of Protected Disclosures:[3]

   a. Did the Claimant make a disclosure of information?

   b. If so, was that disclosure made to a prescribed person?

   c. If so, did the Claimant have a reasonable belief that that information tended to show either that:

      i. A criminal offence had been committed or was likely to be committed and/or

      ii. A person had failed, or was likely to fail, to comply with a legal obligation; and/or

      iii. Any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed?

   d. If so, was that disclosure made in the public interest?

Detriment

9. If the Claimant made a qualifying disclosure, was she subjected to the following acts or failures to act:

   a. At all?

   b. On the ground that she made a protected disclosure?

The specific acts and/or failures alleged by the Claimant are:

   a. failing to complete investigations into the Claimant's complaints in a timely manner;

   b. failing to update or communicate with the Claimant either at all or in a timely manner;

   c. informing the Claimant that actions would be delivered by a specified date and failing to deliver or adequately explain the reason for any delay;

[3] That Appendix is the table below.

d. removing the Claimant from her permanent substantive position on 25 November 2015;[4]

e. Not informing the Claimant until 22 March 2016 that she would not be permanently redeployed until various investigations were concluded;

f. retaining the Claimant in a temporary redeployment after the Claimant had expressed that she considered the temporary role to be inferior to her substantive role;

g. failing to consider the Claimant for redeployment to roles across the Respondent's organisation and/or failing to permanently redeploy the Claimant;

h. failing to provide a suitable explanation when the Claimant asked why she had been subjected to detriment of not being considered for roles that she should have been considered for;

i. failing to offer the Claimant standard inductions, mandatory training and supervision in the SPA team role;

j. failing to follow the advice that was issued by the Occupational Health Department either at all, or in a timely manner, following the Claimant's appointment with Occupational Health on 29 December 2015;

k. failing to address the issues that were discussed at the Stress Risk Assessment of 23 March 2016 and failing to complete the actions arising from this assessment either at all or in a timely manner;

l. failing to support the Claimant or resolve the outstanding detriments cited in this list after the Claimant informed the Respondent that the situation she was being subjected to had caused depression requiring treatment with antidepressants;

m. failing to complete a DBS check for the Claimant;

n. giving the Claimant differing advice as to which policies and procedures applied to her disclosures and subsequently changing the Respondent's stated approach to how those issues would be addressed;

o. failing to provide up-to-date policies;[5]

p. providing the Claimant with inconsistent and conflicting information regarding her redeployment status, throughout the period of the Claimant's temporary redeployment;

q. failing to appoint a suitably independent investigator to investigate the Claimant's allegations of experiencing detriment as a direct result of making a Protected Disclosure;

r. refusing to consider the Claimant's Negative Impact Statement submitted on 29 February 2016, alleging detriments arising from making a Protected Disclosure, as a separate grievance as requested by the Claimant;

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[4] The Claimant accepted at the hearing that this was not a detriment, and we will not consider it further in that context.

[5] This matter was also withdrawn by the Claimant during the hearing.

s. Dawn Barnett asking the Claimant on 24 March 2016 not to submit e-mails on the matters of this case;

t. Dawn Barnett treating the Claimant with hostility in meetings on 24 March and 5 April 2016;

u. Acting inconsistently by allowing the Claimant to be accompanied by an external friend for the Speaking Up Whistle Blowing investigation meeting on 22 February 2016, but refusing the Claimant to be accompanied by an external friend for support to the Grievance investigation meeting on 22 March 2016;

v. failing to provide a record of the meetings held on 25 November 2015 and 5 April 2016;

w. failing to record or note that the Claimant had challenged the accuracy of the notes of the meeting with Dawn Barnett of 17 March 2016;

x. Nina Parmar inaccurately documented that the Claimant had stated that she did not feel able to return to her substantive role and this inaccuracy remained unresolved when challenged by the Claimant;

y. failing to meet the Claimant's requests to Richard Jones and Linda Thomas to discuss her reference status and/or potential exit arrangements;

z. refusing to acknowledge or discuss the Claimant's requests to take either paid or unpaid leave to protect her mental health from further deterioration;

aa. setting a term of reference in Dawn Barnett's commissioning letters of 4 March and 18 April 2016, in respect of three investigations under the (i) Information Governance policy, (ii) Bullying and Harassment policy and (iii) Grievance policy "To advise on whether Anna Want's allegations under the *[relevant policy]* are prompted by action taken under the Disciplinary Policy" when there was no such Disciplinary action;

bb. providing an inadequate and/or delayed response to the Claimant's FOI request; [6]

cc. **[The Respondent does not agree to this as an issue in the case]** failing to provide the Claimant with a safe working environment by not taking remedial action to address the Claimant's allegation that it was the ongoing inaction of the Respondent to conclude various investigations that was the direct cause of the Claimant's worsening mental health condition; and

dd. **[The Respondent does not agree to this as an issue in the case]** failing to take any steps to recognise or identify those staff responsible, when the Claimant submitted evidence to the Respondent (most notably on 29 February 2016) that she was being subjected to a detriment as a direct result of having made a Protected Disclosure.

10. If so, did each or any of those acts amount to a detriment?

[6] This allegation was withdrawn by Mr Yarnell during the making of closing submissions.

6 Set out in the table below is the list of alleged protected disclosures. As can be seen they are grouped by the nature of the information said to have been conveyed, rather than by date. For example, the information concerning the absence of a DBS check is alleged to have been disclosed on three separate occasions. The references to 'Claimant's Witness Statements' are references to the documents sent to Ms Chacksfield and Ms Parmar under cover of an email from the Claimant dated 9 December 2015 which we mention below.

Item No.	**Nature of the information conveyed**	**What the information tended to show**	**Date of disclosure**	**To whom and how disclosure made**
D1	The Claimant was not subject to a DBS check	A criminal offence had been committed and/or the Respondent had failed to comply with a legal obligation	19.11.15	Conversation with Jo Manley
			25.11.15	Meeting with Pauline Chacksfield, Nina Parmar and Chris Hall
			9.12.15	Claimant's Witness Statements
D2	Inadequate and inappropriate storage and security of sensitive patient record data within Outpatients reception	A criminal offence had been committed and/or the Respondent had failed to comply with a legal obligation	19.11.15	Conversation with Jo Manley
			25.11.15	Meeting with Pauline Chacksfield, Nina Parmar and Chris Hall
			9.12.15	Claimant's Witness Statements
D3	Poor behaviour of staff towards and about patients	A criminal offence had been committed and/or the Respondent had failed to comply with a legal obligation	9.12.15	Claimant's Witness Statements
D4	Staff were illegally accessing electronic patient files (of the Kingston Hospital database)	A criminal offence had been committed and/or the Respondent had failed to comply with a legal obligation	25.11.15	Meeting with Pauline Chacksfield, Nina Parmar and Chris Hall
			9.12.15	Claimant's Witness Statements
			8.4.16	Meeting with Martyn Schofield

D5	Misplacement of patient notes and a Dictaphone on 13 November 2015 (relating to the system and process that allowed this incident to occur)	A criminal offence had been committed and/or the Respondent had failed to comply with a legal obligation	9.12.15	Claimant's Witness Statements
D6	D4 was being deliberately concealed, in part, to protect the Respondent's contract with Kingston Hospital and to protect staff and the reputation of the department	A criminal offence had been committed and/or the Respondent had failed to comply with a legal obligation and/or that information tending to show any matter subject of a Protected Disclosure was being or was likely to be deliberately concealed (section 43B, ERA 1996)	8.4.16	Meeting with Martyn Schofield
			14.4.16	Meeting with Kulvinder Jhita
D7	Complaint that the Respondent had failed to address concerns raised in D1 to D5 above	A criminal offence had been committed and/or the Respondent had failed to comply with a legal obligation	14.3.16	Email to the CQC

7 Some of these matters are admitted by the Respondent as being protected disclosures, and some are what might be described loosely as partially admitted. The issues as to the extent of there having been any protected disclosures is dealt with below.

8 The material statutory provisions relating to protected disclosures are as follows:

> **43A Meaning of 'protected disclosure'**
> In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any sections 43C to 43H.
>
> **43B Disclosures qualifying for protection**
> (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, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.
(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

47B Protected disclosures

(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.
(2) This section does not apply where—
(a) the worker is an employee, and
(b) the detriment in question amounts to dismissal (within the meaning of Part X).
(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.

48 Complaints to employment tribunals

. . .
(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
. . . .
(2) On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
(3) An employment tribunal shall not consider a complaint under this section unless it is presented—
(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(b) 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.
(4) For the purposes of subsection (3)—
(a) where an act extends over a period, the "date of the act" means the last day of that period, and
(b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a 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 been expected do the failed act if it was to be done.
> . . . .

9 The statutory provisions relating to the claim of constructive unfair dismissal in the 1996 Act are as follows:

> **95 Circumstances in which an employee is dismissed**
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) and section 96, only if)—
> (a) – (b) . . . ,or
> (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.
>
> **103A Protected disclosure**
> 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.

The facts

10 We make it clear at the outset that it is not appropriate or necessary to recite the very large volume of evidence presented to us either orally or in documents. Further, it is not appropriate or necessary to make findings of fact on every issue raised before us. However, because of the nature of the allegations we have to set out the procedural history in some detail. We make our findings in the light of the issues to be decided as set out above, including material background matters. We make further findings relating to individual allegations when coming to our conclusions below.

11 The Respondent had various policies. The first was a Grievance and Disputes Policy.[7] It was issued in December 2010 and is marked as having been due for review in August 2012. It contains provisions and procedures which are normal for such a policy.

12 The second policy was the Employment Checks Policy dated August 2012, marked to be reviewed in August 2014.[8] We heard a considerable amount of evidence concerning this policy. The relevant provision in the document in the bundle is as follows:

> **4.4 Criminal Record Checks**
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> The Criminal Records Bureau (CRB) provides employers and others with access to information about criminal convictions and other police records to help make an informed decision when recruiting staff. ***Checks are mandatory in the NHS for all staff (including volunteers, agency staff and other workers) who, as part of their appointment, will have regular contact with patients in the course of their normal duties. This also applies to existing staff that change their employment or duties to a position that would merit a standard or enhanced CRB check (see below).***

13 The third policy was entitled 'Speaking Up – (How to Raise Concerns at Work and why it is important).[9] It relates to the making of protected disclosures or whistleblowing and it sets out the importance of making

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[7] Commencing at **[106]**
[8] Commencing at **[140]**
[9] Commencing at **[144].** We refer to it as the 'SUP'.

disclosures, and the protection afforded to those who make them. It was dated June 2014 and marked as due for review in June 2016.

14 The Respondent also had a Bullying and Harassment Policy[10] dated October 2015, due for review in November 2018, and a Disciplinary Policy dated February 2016 and due for review in February 2019. The Respondent also had a Probationary Period Policy and Procedure to which further reference is made below.[11]

15 The Respondent, as is clear from its name, is responsible for the provision of community health services in the south west of London. The Claimant was employed by the Respondent as a Receptionist in the Operational Support Services and Systems Department of the Respondent at the Centralised Reception at Teddington Memorial Hospital dealing with outpatients.

16 The terms of employment of the Claimant included provision for a three month probationary period.[12] The Respondent had the right to extend that period for up to a further three months. The performance and suitability for the continued employment of the Claimant was to be monitored during the probationary period. It was specifically stated in the contract that the Respondent would write to the Claimant at the end of the probationary period informing her whether she had successfully completed her probationary period.

17 The probationary policy had only been introduced with effect from late April 2015 and managers had not been given any training on the application of the policy.[13] We were not referred to the copy of the policy which is in the bundle, but we note that it is very detailed consisting of 37 pages setting out procedures which were to be followed. This is clearly a policy upon which training should have been given. Further mention of the conclusion of the probationary period (or otherwise) is made below.

18 The Claimant's immediate line manager was initially Lorraine Rochford. The Claimant's second line manager was Barbara Read-Sak, Operational Support Services & Systems Officer. Ms Read-Sak was covering for Angie Moles who was on maternity leave until about the end of September 2015. On 18 September 2015 the Claimant sent an email to Barbara Read-Sak, following a meeting with her of the previous day. From that email and the substantive reply of 29 September 2015 it is clear that a few points were of concern to the Claimant.[14] The Claimant referred to her performance and her integration within the team, and she asked for more regular one-to-one meetings. In her reply it was made clear to the Claimant by Ms Read-Sak that Ms Rochford was her line manager.

19 On 31 July 2015 Ms Read-Sak had sent an email to the Claimant about induction.[15] The email said that the Claimant had been booked for the induction process on 6 and 7 October. It had not been possible for her to

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[10] Commencing at **[174]** and **[178]** respectively.
[11] Commencing at **[153]**
[12] **[245]**
[13] **[153]**
[14] **[306, 309]**
[15] **[293]**

attend a month earlier because she was to be away on holiday. The programme simply referred to “Induction” and “Core skills all staff”. The Claimant attended those sessions.

20 The Claimant met Angela Moles on 8 October 2015. Ms Moles had just returned from maternity leave and had taken over as second line manager of the Claimant from Ms Read-Sak. At that meeting the Claimant expressed some concerns about the behaviour of some of her colleagues, and also about procedures in the Department. Ms Moles said that it would be difficult for any action to be taken without it becoming obvious that it was the Claimant who had raised those concerns. It was suggested that the Claimant drew a line under what had happened. The Claimant therefore decided not to refer to specific incidents or names at that time.

21 On 20 October 2015 the Claimant sent an email of two pages to Ms Moles.[16] In the first part of the email the Claimant referred to the probationary policy and the fact that she should have had supervision meetings. She said she had realised how little training she had had, and that had caused her to make a mistake. The Claimant then stated that on the preceding Friday a colleague had said loudly in the reception area in front of patients that it would be better if a patient with mental health issues were to die. The Claimant said she was adversely affected by this unacceptable behaviour. She added that this was the culture of the department. She added that if a three month notice period were to apply to her at the end of her probationary period she was not certain whether she could serve that length of notice.

22 The Claimant met Ms Moles again on 22 October. The Claimant raised her concerns again, saying that the culture was unacceptable, and saying that the Respondent should have suitable measures in place to ensure that complainants could not be identified. The Claimant then asked to speak to Ms Chacksfield. Ms Moles sent an email to Ms Chacksfield on the same day summarising what had been said and asking for support.[17] Ms Moles specifically said that ‘the inappropriate language and behaviour is not acceptable and needs addressing.’

23 We were provided with the brief notes of the meeting between the Claimant and Ms Chacksfield which had been made by Ms Chacksfield.[18] There is reference to a lack of training and objectives not having been set, and the probationary policy not having been followed. There is also mention of comments said to have been made by other members of staff. The Claimant did not wish to give the names of those individuals. The suggestion of redeployment to another department was mentioned, and the notes specifically record that the Claimant said she would ‘need to whistle blow’. The Claimant said that she was finding it difficult to work in Outpatients. The Claimant’s notes of that meeting also record that she mentioned that she had not by then been provided with a uniform. The Claimant did not mention any issue about the making of a DBS check at

[16] **[319]**
[17] **[330]**
[18] **[321]**

that meeting. The Claimant agreed to think about the position and revisit it in a week's time.

24 The Claimant and Ms Chacksfield met again on 28 October. The outcome of that meeting was that it was agreed that there would be a meeting with an HR representative, and also with Chris Hall, the Speaking Up Guardian.

25 On 5 November the Claimant sent an email to Ms Chacksfield asking whether there had been any progress in arranging a meeting with HR. Ms Chacksfield replied on the following day apologising for the delay saying that the HR representative, who we now know to be Ms Parmar, had been on leave.[19] She also said that she would meet with Ms Moles to discuss training for the Claimant and also the lack of uniform. We go back in time to record that on 23 July 2015, before the Claimant had started work, Ms Read-Sak had asked the Claimant to wear her own clothes pending the ordering of a uniform for her.

26 On 19 November 2015 Ms Jo Manley, Director of Operations, visited the Outpatients Department. We did not hear from Ms Manley as she had left the Respondent, and we have to rely on the Claimant's detailed notes, her oral evidence, and the email from Ms Manley following that meeting.[20] The Claimant referred to her lack of supervision and training, and also the lack of a uniform. The Claimant also referred to a DBS check not having been completed. In Ms Manley's email she said as follows:

> As noted a DBS was not expected to be completed due to your role (not required) but we will review if this is correct.

27 We find that the Claimant did not on that occasion inform Ms Manley about any concerns as to the inadequate and inappropriate storage and security of patient records.[21]

28 The meeting planned with Mr Hall took place on 25 November 2015. Present also were the Claimant, Ms Chacksfield and Ms Parmar. Ms Parmar was a HR Adviser, who from now on has a significant role in the matter. We have notes made by Ms Chacksfield and a letter from Ms Parmar of 20 January 2016 expressed to be a record of the meeting. The Claimant had prepared notes for the meeting.[22] The 'headings' were 'Uniform', 'Supervision', 'Training', 'Shouted at', 'Stress' and 'Dealing with these points'. Under the final heading the Claimant noted as follows:

> These points have been raised again and again – but to no avail.

29 The Claimant alleges that at that meeting she raised the issues relating to the absence of a DBS check, the storage and security of patient data, and also that staff were accessing records relating to appointments for patients of Kingston Hospital. We find that there was no mention of any of those three matters. What was mentioned were four incidents of unacceptable comments alleged to have been made by the Claimant's colleagues. Ms Chacksfield and Ms Parmar both considered these to fall within the SUP,

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[19] **[325]**
[20] [**355], [328]**
[21] **D2**
[22] **[331], [357], [412]**

and that thus the allegations would remain confidential. The Claimant was asked to write a detailed statement and it was agreed that she should go home for the afternoon for that purpose. That was a Wednesday.

30 There was a discussion about the redeployment of the Claimant away from the Outpatients Department. This was in the context of the Claimant saying she was feeling undermined and abandoned, and also of being shouted at. The notes record that she said she felt devalued. It was agreed that she would be referred for an occupational health report to be prepared. Various suggestions of redeployment were mentioned, but the notes record that the Claimant did not want to work shifts, nor in East Sheen because of the distance from home. The initiative to redeploy the Claimant came from Ms Chacksfield.

31 It was agreed that contact would be made with the Claimant on the Friday of that week, but that did not occur. On Sunday 29 November the Claimant sent an email to Ms Chacksfield making reference to the lack of contact. She said that she had been to see her GP who had confirmed that she was affected by stress. She said that in the absence of any contact she assumed that she was not expected to be present for work on the following Monday morning. Ms Chacksfield replied on 2 December apologising and saying that she had instructed Ms Parmar to contact the Claimant, and that she (Miss Chacksfield) was continuing to chase Ms Parmar and would update the Claimant as soon as possible.[23]

32 The Claimant then sent an important email to Ms Chacksfield on 9 December 2015.[24] Attached were three documents. The first was a copy of the notes which the Claimant had prepared for the meeting on 25 November 2015. The second was in effect a chronology of her contacts with Ms Read-Sak, Ms Moles and Ms Rochford, together with copy emails. The other document is described as the Claimant's 'witness statement'. In cross-examination the Claimant referred to the witness statement as being a 'stream of consciousness'. The Respondent accepts that the information referred to in the alleged disclosures D1-D5 inclusive was contained within one or more of those documents.

33 On 11 December 2015 Ms Chacksfield replied to the Claimant acknowledging receipt of the documents. She said that she had been seeking redeployment for the Claimant and as an interim arrangement the Claimant was to be temporarily redeployed to the Single Point of Access Team (SPA) in another building from 16 December 2015.[25] The Claimant agreed.

34 The Claimant then became supervised in the SPA by Seema Dhir and Ms Jhita. One of the detriments which the Claimant alleges is that she did not receive a full induction in the SPA team. Ms Jhita's evidence that the Claimant had a four week induction period run by Ms Dhir, and that she received one-to-one training was not challenged on behalf of the Claimant. The point at issue is that normally whenever possible members of staff are taken to the various clinics with which the SPA dealt. That was not

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[23] **[338]**
[24] **[350-376]**
[25] **[377]**

done on this occasion. We accept Ms Jhita's explanation that that was simply not possible in December because it was winter and the SPA Team was very busy. The same would have applied to any new person joining the Team.

35 Ms Jhita had previously raised with Ms Parmar the question as to whether new employees needed to have a DBS check. She had been advised that it was not necessary for Administrator roles in the Respondent. The Claimant raised the issue with Ms Jhita, and the Claimant was informed that a check was not necessary.

36 A short Occupational Health report was provided in the form of an email dated 6 January 2016 to Ms Chacksfield.[26] It is simplest to reproduce the email:

> I saw Anna on 29th of December and have her consent to write to you. She discussed the work-related issues of which you are aware. I understand a meeting was held in November and as a result, Anna was temporarily redeployed until a permanent position could be found for her. She is not unfit to undertake her substantive post from a medical point of view, but I feel there would have to be many adaptations, support measures and resolution of team issues in order to resolve matters before she could return.
>
> With regards to locating a new post, I would recommend you send any posts which you feel will be suitable and I will discuss these with Anna. Once in post, she will require a stress risk assessment, supportive management e.g. regular 1-1 meetings, plan of supervision and objectives etc.
>
> The situation is linked to work issues and she has not been unwell medically. The longer the process is taking to support her into a new role, the more her anxiety is increasing.

37 The Claimant then wrote to Ms Chacksfield on 11 January 2016 asking if there had been any progress about her permanent redeployment.[27] She also pointed out that she had not received a copy of the OH report set out above. Ms Chacksfield and the Claimant met briefly later that day. Ms Chacksfield told the Claimant that she (Ms Chacksfield) was being seconded elsewhere, and that Ms Barnett would take over her responsibilities, including the seeking of a permanent redeployment for the Claimant.

38 The Claimant then raised those matters with Ms Parmar on the same day.[28] They met on 13 January 2016.[29] The general tenor of the discussion was about the delays which had occurred in investigating the complaints which the Claimant had made, and that she had been placed in a temporary role which she was not enjoying.

39 Ms Parmar then sent an email to the Claimant on 13 January 2016 asking if she wished for the issues raised to be dealt with in accordance with the grievance policy.[30] The Claimant replied on the same day.[31] She expressed concern about the delays, and said that she understood that Ms Chacksfield was treating it as a formal grievance.

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[26] **[391]**
[27] **[393]**
[28] **[395]**
[29] **[400]**
[30] **[398]**
[31] **[404]**

40 The Claimant raised an issue concerning a Band 3 administrative position. The Claimant said she had seen an advertisement in early December 2015 for the post which could effectively have been a direct replacement for her substantive role. It was a different post, but in the same building. The Claimant said she had considered applying through a formal process but had decided not to do so because she had been assured that all potential redeployment opportunities would be considered for her as soon as possible. She therefore assumed that she was being considered for the role.

41 It is convenient to interpose into the chronology reference to a standard letter from Ms Downey to the Claimant of 18 January 2016. It stated that six different training modules had not been undertaken by her. We deal with this matter separately below.

42 Ms Parmar then took action. On 18 January she sent an email to Jill Downey, the Associate Director Support Services, saying that a formal grievance investigation needed to be undertaken, and asked if an investigator could be identified. Ms Downey in turn referred that to Ms Barnett. Ms Barnett replied that she expected her 'HR colleagues to manage the grievance as agreed previously' and suggested a manager from Children's Services be appointed.[32] Ms Barnett also said that she intended to meet the Claimant for the purpose of discussing a permanent transfer of her into the redeployed role in which she was working.

43 The Claimant contacted Mr Hall on 19 January 2016 expressing disappointment about the delays. She said specifically that she was 'struggling to have any kind of dialogue with' Ms Parmar, and said she was thinking of escalating her concerns. Mr Hall replied the following day saying he would discuss her concerns with senior colleagues at a meeting on 21 January 2016.[33] That he did, and wrote to the Claimant again on 21 January 2016 saying that a formal investigation under the SUP would commence early the following week.[34]

44 There was also email correspondence between Ms Parmar and Ms Barnett on 20 and 21 January 2016.[35] Ms Parmar's email referred to an email from Ms Parmar to Mr Hall, a copy of which was not in the bundle. Ms Parmar said that part of the Claimant's complaints would be dealt with under the SUP, and part as a formal grievance in accordance with the grievance procedure. Ms Parmar referred to the complaint about comments being made about patients and the treatment of patients, and also complaints being made by the Claimant concerning her probationary period, induction and training. Those latter matters were to be dealt with under the grievance policy, said Ms Parmar. Ms Parmar said that normally a manager from the department would consider the grievance, and that Ms Barnett should not contact the Claimant so as to remain impartial.

45 The reply from Ms Barnett demonstrates that procedural confusion was now arising. She said to Ms Parmar that she had understood that the Claimant's complaints relating to her probationary period, training and

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[32] **[419c]**
[33] **[409]**
[34] **[415]**
[35] **[419a/b]**

induction had already been informally investigated by Ms Chacksfield, and Ms Barnett could not understand why it was considered that a grievance hearing be held. Ms Parmar was asked to establish whether the Claimant wished to resurrect the training and induction issues.

46 We have mentioned the letter from Ms Parmar of 20 January 2016 above.[36] The first part of that letter summarised what had occurred at the meeting on 25 November 2015. Ms Parmar then referred to a meeting which had taken place between the Claimant and her on 14 January 2016. Ms Parmar had said that she had told the Claimant that grievances could be taken forward on an informal or formal basis, and that a copy of the relevant policies had been supplied to the Claimant. Ms Parmar apologised for the 'delay in taking this matter forward in accordance with the Trust policies' which, she said, had been due to staff annual leave and a member of staff leaving. Ms Parmar said that she would arrange a meeting of the Claimant and 'the relevant manager', being Ms Barnett.

47 The Claimant replied on the following day.[37] She reminded Ms Parmar that she had started raising issues in September 2015, and said they had been ignored initially. She asked why it had taken until 14 January 2016 to be asked whether she wanted the matters dealt with dealt with formally or informally. She said she was disappointed to learn that no action had been taken in respect of any of the matters which had been raised, and specifically said that the 'issues become less about the original case and more about the Trust's ongoing failure to address it.' She also asked why she had not been given an explanation as to why she had not been placed in the permanent role advertised at the time when she was being redeployed, which role has been mentioned above.

48 There was a case conference on 25 January 2016 involving Ms Barnett, Ms Parmar, Ms Jhita and Mr Lambdon. No notes of the meeting were made. The following matters arose. Firstly, it was agreed that Ms Jhita would undertake a stress risk assessment following the recommendation made by occupational health and Ms Barnett expressed disappointment that it had not been previously undertaken. Secondly, Ms Parmar said that the allegations concerning comments about patients would be dealt with under the SUP. Thirdly, other concerns were to be dealt with on a formal basis at the request of the Claimant. Ms Barnett again expressed surprise that issues relating to training, uniform, induction and the probationary period were still being investigated, as she thought they had been dealt with by Ms Chacksfield previously. Finally, Ms Barnett suggested that the Claimant be offered the permanent post in SPA in which she was at that time temporarily redeployed. Ms Parmar then told Ms Barnett that she understood that the Claimant was unhappy in that role as it did not suit her skill set. Ms Barnett was not aware of the Claimant's discontent previously and she had believed the contrary to be the case.

49 Following that case conference Ms Barnett wrote to Ms Brem-Wilson on 2 February 2016 asking if she would investigate the grievance on a formal basis. Ms Brem-Wilson replied saying that she would do so, although she

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[36] **[412]**
[37] **[411]**

had not undertaken such an investigation before, but that she was familiar with the policy.[38] Ms Barnett then wrote to Ms Parmar and Ms Jhita confirming that Ms Brem-Wilson would undertake the grievance investigation. She also asked for information concerning the stress risk assessment, and whether the Claimant had said she wished to be permanently redeployed to the SPA role or not. No reply was received to that email and on 11 February Ms Barnett sent a further email to Ms Parmar. She reported that Ms Brem-Wilson had told her that nobody from HR had contacted her concerning the investigation, and she asked Ms Parmar to update her urgently. She wished to know what was the reason for the delay. Ms Parmar did reply on 17 February with apologies, and said that a meeting had been arranged with the Claimant in connection with occupational health and redeployment matters for 23 February. No mention was made by her of the investigation.[39]

50 Progress had been made concerning the SUP investigation, and on 3 February 2016 Ms Schofield wrote to the Claimant saying that an investigator would be appointed under the SUP by the end of the week.[40] There was then further correspondence about the delays which had occurred. Professor Gregory was informed by Martyn Schofield, Head of Quality and Patient Safety, that the Claimant had raised concerns about patient safety, and Professor Gregory asked to meet the Claimant. They met on 9 February, and at the outset of that meeting Professor Gregory was not aware of the Claimant's concerns. Those concerns encompassed the original issues raised by the Claimant and also importantly the delays which had occurred in dealing with them. The outcome was that Professor Gregory agreed to appoint an independent investigator under the SUP to investigate potential patient safety issues, and also that she would chase up HR to check the status of the other investigations.

51 The Claimant then wrote to Professor Gregory on 10 February, thanking her for the time taken at the meeting.[41] She said that "it was good to hear that these issues will now finally be investigated using the appropriate policies and guidelines." The remainder of that email principally relates to issues concerning the Claimant's redeployment. She said that she had been placed temporarily into a role which did not match her skill set. The Claimant stated that Ms Parmar was not replying to her communications about redeployment. She added as follows:

> It really feels to me as though much of this problem stems from one HR officer who is, for whatever reason, not meeting the requirements of the role. It also feels as though this could be swiftly resolved by somebody of sufficient seniority and competence taking on these issues in HR. Is there anything that you could do to simply escalate this to a more appropriate level in HR to ensure this gets resolved?

52 She also expressed concerns about the delays saying as follows:

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[38] **[419e/f]**
[39] **[442b/c]**
[40] **[424]**
[41] **[426]**

> Unfortunately, the personal impact on me of the situation is less and less about the original misconduct and problems that I reported, and more and more about the failure to deal with it at each level it's been escalated to, most significantly, within HR.

53 Professor Gregory then met Ms Parmar and Ms Thomas. Professor Gregory wrote to the Claimant on 11 February saying that Ms Parmar remained the Claimant's primary contact in HR.[42] Professor Gregory also appears to have been saying that allegations of comments about, and poor behaviour towards, patients would be investigated under the SUP. Issues relating to the Claimant's induction and the management of her would be dealt with as a grievance. She then said that issues relating to poor practice amongst the staff towards each other and breaches in information governance would be dealt with under the 'disciplinary/dignity at work policy.' It appears to us that Professor Gregory was slightly confused at this point, as there is no single 'disciplinary/dignity at work policy', but rather two separate policies. As will appear, Mr Lambdon produced two separate reports.

54 Mr Cornish was asked to undertake the SUP investigation and the Claimant was told of that in the letter of 11 February 2016. There were then discussions amongst Professor Gregory, Ms Schofield and Mr Cornish concerning the investigation. Mr Cornish contacted the Claimant by email on 18 February concerning arrangements for a meeting to be held. It was agreed that the meeting take place on 22 February 2016. There was some correspondence concerning the Claimant being accompanied. Mr Cornish said that Claimant could bring anyone with her for moral support, and that he did not mind who it was, or where they were from.[43] The Claimant did not in fact bring a companion with her for the meeting.

55 Mr Cornish and the Claimant met as planned. Mr Cornish told the Claimant that the investigation he was undertaking related to patient safety concerns, and that any issues relating to information governance were not part of his investigation. A draft of his report was sent by Mr Cornish to the Claimant on the same day, and she replied saying that it was "perfectly fair and balanced." She also said that she was pleased that the matters were finally being addressed and she was relieved that they were being taken seriously.[44]

56 The final report was produced on 10 March 2016.[45] The findings and conclusions of Mr Cornish were as follows:

> The three criteria below have been assessed against each separate allegation.
>
> - Did any patients come to harm
> - Could they have come to harm
> - Is patient care being compromised/delayed/affected by pattern of behaviour, culture or attitude that is contrary to our mission, vision and values.

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[42] **[430]**
[43] **[437]**
[44] **[449], [451]**
[45] **[561]**

> Overall there is no evidence to suggest that any patient actually came to harm, but it is entirely possible that they could have come to harm in certain circumstances, had they been aware of the behaviour, culture or attitude of the relevant staff members towards them.
>
> The allegations in the statement suggest that some members of staff may not have afforded the appropriate level of respect towards some patients. It would be easy to draw an inference that, in those circumstances, we cannot be confident that those members of staff would deliver the high levels of service and patient care set out within the HRCH Mission.

57 Mr Cornish added at the end of his report that it appeared that the probationary policy had not been adhered to, and further that the SUP had not been adhered to when the Claimant raised issues of concern. That latter comment referred to the delay which had occurred.

58 Mr Cornish made one specific point in the body of his report relating to the absence of a DBS check on the Claimant. He said that as she had access to confidential patient information and data she should have had such a check.

59 Although out of chronological sequence we record here that Professor Gregory wrote a letter to the Claimant dated 7 April concerning the report by Mr Cornish.[46] She stated that she agreed with his conclusions, and as there had not been any actual harm to any patients she was satisfied that the matter could be dealt with under the Disciplinary Policy. It appears that no such action was taken. That report was discussed between Ms Schofield and the Claimant on 8 April 2016, to which we refer further below.

60 It will be recalled that at the case conference on 25 January 2016 Ms Barnett had said that Ms Jhita would undertake a stress risk assessment. An attempt was made to do that on 23 February 2016. On 21 February the Claimant sent a long email to Ms Parmar which she said contained a recap of points previously raised, and set out her expectations from the meeting which was to include the risk assessment.[47] On the morning of 23 February Ms Parmar sent an email to the Claimant saying that she would not be attending the meeting because it was an informal meeting.[48] Because Ms Parmar was not present it was agreed that the stress risk aspect of the meeting could not take place as the stress from which the Claimant was by then suffering was linked to lack of progress concerning her complaints. A representative from HR therefore needed to be present.

61 The Claimant and Ms Jhita did have a substantial discussion principally concerning redeployment. Ms Jhita said that she had been asked to offer to the Claimant the SPA role as permanent. The Claimant said that she did not wish to continue in the role and asked whether other permanent roles were available. Ms Jhita said that a search would be made within the Operations Department under Ms Barnett, but that it would not be possible to search more widely because the Claimant was not being redeployed as a result of a restructuring exercise.

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[46] **[805]**
[47] **[463]**
[48] **[460]**

62 The Claimant then on the same day spoke to Ms Zerroud, HR Business Partner and Ms Parmar's line manager. The Claimant sent a long email to Ms Zerroud summarising the position as the Claimant saw it.[49] Ms Zerroud replied promptly at 20:59 saying that an urgent case conference would be convened with Richard Jones, 'the new HR Advisor'. An action plan with defined timescales was to be prepared.

63 On 25 February 2016 Ms Parmar sent an email to the Claimant saying that she was leaving the Respondent that day.[50] That email makes for interesting reading. Ms Parmar starts off by apologising for the delay in responding to the Claimant. She then referred to the meeting of 25 November 2015, and referred to another meeting 'some weeks later'. That presumably was on 13 January 2016. Ms Parmar said that at that meeting it had been agreed that a further meeting would be convened, and again she apologised for the delay in arranging it. Ms Parmar further apologised for not responding to the Claimant's emails earlier and for any distress caused. The conclusion we draw from all the evidence we heard, and as admitted by Ms Parmar in this email, is that she was simply not capable of fulfilling her role adequately.

64 Mr Jones sent an email to the Claimant on 26 February introducing himself, and on 29 February the Claimant sent a short email with an attachment which she described as a 'Statement of Negative Impact'.[51] That document is of 15 pages. At the beginning, the Claimant said that that document was not about her original complaints, but about the way that those complaints had been handled, and the impact that had had on her. She said she 'had felt negatively impacted and discriminated against as a result of having spoken out' against what she believed to be poor management, and breaches of principles and unacceptable staff behaviours.

65 Ms Zerroud replied to the Claimant on 25 February. It appears to us that the material point in that email is that Ms Zerroud said that she would ask Mr Jones to liaise with the Claimant's managers so that an answer to each of her queries could be provided within five working days.[52]

66 A case conference was arranged for 1 March 2016. This was a handover meeting for all the cases to be transferred from Ms Parmar to Mr Jones. Present were Ms Barnett, Ms Jhita and Mr Jones. It was agreed that in respect of the various matters raised by the Claimant in addition to the SUP investigation three further investigations needed to be undertaken. The first was the investigation which it was believed was already being dealt with by Ms Brem-Wilson under the Grievance and Disputes Policy relating to the personal matters raised by the Claimant. The second concerned the allegations of bullying which were to be dealt with under the Bullying and Harassment policy. The final procedure related to allegations of breach of information governance which were to be investigated under the Disciplinary Policy. That is in fact what occurred

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[49] **[463]**
[50] **[491]**
[51] **[508], [510]** We will refer to that statement as the 'NIS'.
[52] **[577]**

subsequently. There were exchanges of emails between Mr Jones and the Claimant at the beginning of March in which Mr Jones informed the Claimant of the different investigations to be undertaken.[53]

67 There was also a discussion concerning the redeployment of the Claimant. Ms Jhita informed the meeting that she had met the Claimant on 23 February, and the Claimant had declined to accept a permanent redeployment to the temporary post which she was then occupying. Mr Jones then advised that Ms Parmar had been incorrect in supporting that proposed permanent redeployment, and that it was only possible to consider temporary redeployment until the outcome of the investigations was known.[54] It was agreed that Ms Barnett and Mr Jones would have a further meeting with the Claimant to discuss redeployment.

68 Mr Jones asked Ms Brem-Wilson on 2 March for an update into the grievance investigation. Ms Brem-Wilson replied saying that she was meant to have had a meeting with Ms Parmar, but Ms Parmar had not contacted her for the meeting to be arranged. Ms Brem-Wilson said she had not even seen the Claimant's grievance. Mr Jones told Ms Brem-Wilson he would meet Ms Barnett to finalise the terms of reference and then meet her.[55] When Ms Barnett was informed by Mr Jones of the lack of progress she responded saying that it was "incredibly frustrating".[56] Terms of reference were then agreed between Ms Barnett and Mr Jones and sent to Ms Brem-Wilson on 4 March 2016. The letter set out the eight allegations which Ms Brem-Wilson was to investigate. The terms of reference were set out separately as follows:

- To investigate the circumstances surrounding the allegations
- To advise on whether [the Claimant's] allegations under the Grievance Policy are prompted by action taken under the Disciplinary Policy
- To advise on whether formal action is required
- To make suggestions for future management action

69 The issue arose at this hearing as to the meaning of the second bullet point and in particular whether there was an implication that the Claimant had previously been the subject of disciplinary action.[57] The wording was taken by Mr Jones from a template he had used in a previous employment.[58] Similar wording was repeated as mentioned below. We agree that the wording is at the very least ambiguous but find that none of the individuals involved interpreted that wording as meaning that the Claimant had had any disciplinary action against her.

70 In her instructions to Ms Brem-Wilson Ms Barnett asked for the report to be completed by 31 March 2016.

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[53] **[550/2]**
[54] Mr Jones subsequently received informal advice from the Respondent's solicitors that generally that was the appropriate course of action.
[55] **[545/6]**
[56] **[554]**
[57] This is detriment 'aa'
[58] That template is at **[103n]** and relates to allegations of bullying and harassment following a capability procedure.

71 The Claimant was away on holiday at the beginning of March 2016. On her return she sent an email to Mr Jones on 10 March in reply to an email of 3 March from him concerning the investigations. This email from the Claimant principally concerned redeployment. She also asked for updates regarding the investigations. The Claimant then sent a further email to Mr Jones on the same day with a copy of Ms Zerroud's email of 25 February 2016.[59] The Claimant sent another email to Mr Jones on 11 March 2015 saying that she was 'eagerly awaiting a response' to the emails sent on the preceding day. This is of 2.5 pages and is very detailed. The areas mentioned were the investigations, the stress risk assessment, and her redeployment.[60]

72 On 14 March 2016 the Claimant sent another email to Ms Zerroud of nearly three pages.[61] She referred to there being several investigations, and the impact on her of delays. She referred to the stress on her and asked to have a discussion about possible options, including unpaid leave. She went into the possibility of making a claim to an Employment Tribunal 'for negative impact as a result of whistle-blowing' at some length.

73 On the same day the Claimant contacted the Care Quality Commission. This is protected disclosure D7. This was not copied to the Respondent and nobody in the Respondent was aware of it.

74 Ms Barnett then took the initiative and wrote to the Claimant on 15 March at 11:15 inviting her to a meeting with her and Mr Jones on 17 March 2016 at 2 pm to discuss redeployment.[62] The Claimant replied at 11:45 saying that she would prefer to meet earlier. That was not possible and they met as originally planned. We mention that meeting below. In the meantime the Claimant set out in an email of 16 March 2016 to Ms Barnett (copied to Mr Jones) the issues which were 'currently on my mind'.[63] She referred to roles which she believed to have been suitable which had not been offered to her. She also said that she was not able to remain in the SPA role and if necessary would have to take unpaid leave. Mention was also made of the fact that a stress risk assessment had still not been carried out.

75 Ms Zerroud met Mr Jones and wrote to the Claimant on 17 March 2016 in reply to her email of 14 March.[64] Ms Zerroud said that there was to be an investigation meeting with Ms Brem-Wilson on 22 March concerning the Claimant's grievances, to include the issues raised in the NIS of 29 February 2016. Ms Zerroud said that investigators had yet to be found for each of the investigations under the Bullying and Harrassment policy and the Disciplinary policy. Ms Zerroud then mentioned the meeting to take place later that day concerning redeployment. Finally Ms Zerroud said that it was proposed that the Claimant meet with Mr Jones on 18 March to discuss the questions which the Claimant had asked of Ms Parmar. Ms

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[59] **[572], [577]**
[60] **[586/9]**
[61] **[583/6]**
[62] **[597]**
[63] **[595/6]**
[64] **[612/3]**

Zerroud also offered to meet the Claimant on one of three specified days in the subsequent week as being a person at a more senior level in HR.

76 The meeting concerning the possibility of the Claimant being redeployed took place on 17 March. Present were the Claimant, Ms Barnett and Mr Jones. There were discussions about the difficulties which had been caused by Mr Jones having to take over from Ms Parmar. There was then a discussion concerning redeployment. In particular mention was made of the Band 3 post which had been available in early December 2015 and mentioned above. Ms Barnett explained that she had not offered the post to the Claimant because it would have involved her working in the same building and in relatively close proximity to those members of staff about whom she had expressed concerns. The Claimant was not informed of that decision at the time. There was also discussion about the possibility of another post in the West Middlesex Hospital, but that was not suitable for the Claimant because it involved shift work. Mr Jones agreed to ascertain if that post could be changed to fixed hours, but that was not possible. The Claimant expressed a preference to remain on 'this side of the borough'. Ms Barnett considered that there were two other options for the Claimant in addition to redeployment. The first was to continue in her current temporary role, and the second was to return to her substantive post. It was agreed that Mr Jones would look for alternative roles across the whole of the Trust. The Claimant also mentioned the possibility of 'moving on' and Ms Barnett said that she would be happy to provide a reference. It was agreed there would be weekly review meetings.

77 Ms Barnett wrote to the Claimant on 23 March summarising the contents of the meeting.[65] We accept that letter as being an accurate summary of the meeting, although the Claimant said in her witness statement that she did not accept that it was accurate but did not give details. If that had been the case then we would have expected the Claimant to have sent an email to that effect. Five action points were agreed.

78 One of the points agreed at the meeting on 17 March 2016 was that Mr Jones would look for alternative posts. He wrote to the Claimant on 18 and 22 March with three alternative posts saying in the latter email that any redeployment "would be a temporary redeployment subject to the completion and outcome of the ongoing investigations processes."[66] The Claimant queried the meaning of that phrase. The Claimant then sent an email to Mr Jones on 29 March 2016.[67] The Claimant declined to accept any of the roles. One of them involved shift work, but the general point was that they would also all be temporary pending completion of the investigations.

79 We interrupt the main chronology to record that a letter was sent to the Claimant dated 18 January 2016 stating that a report had disclosed that she had not undertaken six mandatory training modules.[68] As we understand the point, the Claimant had not been provided with what was referred to as an 'ESR log-in' to enable her to obtain access to at least

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[65] **[719]**
[66] **[632], [722]**
[67] **[735/7]**
[68] **[407]**

some of the on-line training courses. When Ms Jhita became aware of the difficulty she referred the matter to the Respondent's IT Department.

80 Ms Brem-Wilson wrote to the Claimant on 17 March 2016 confirming that she had been asked to investigate the allegations listed below. She set out the proposed arrangements for a meeting on 22 March 2016.

1 AW was not supplied with a uniform
2 AW was not provided with training
3 Aw was not met with towards the end of her probation
4 No objectives were set for AW
5 There was lack of clarification in the reporting line
6 AW did not receive an appropriate induction
7 Aw was left alone to cover the desk whilst being new in post
8 Why the investigation process has taken so long and has led to there being a negative impact on AW

81 The Claimant and Mr Jones met on 18 March to discuss the terms of reference for the grievance investigation to be carried out by Ms Brem-Wilson and to answer the questions the Claimant had raised with Ms Parmar. In fact the meeting was much more limited. The Claimant raised an issue concerning the independence of Ms Brem-Wilson. In the NIS the Claimant had said that Ms Parmar had told her that Ms Brem-Wilson would contact her within a week, and she had not done that. The Claimant therefore believed that Ms Brem-Wilson was partly responsible for the delay, and it was therefore inappropriate that she should investigate the issues raised in the NIS. It was agreed that Mr Jones would consider whether Ms Brem-Wilson was an appropriate investigator, and also whether the NIS should be investigated as a separate investigation.

82 Ms Brem-Wilson wrote to the Claimant on 17 March 2016 inviting her to a meeting on 22 March.[69] An issue then arose as to whether the Claimant could be accompanied at that meeting, and if so by whom. The letter stated that the Claimant could be accompanied, but only by a trade union representative or a work colleague. The Claimant asked for a friend who did not work for the Respondent to be with her for support. Mr Jones advised Ms Brem-Wilson that that was not possible, and that she could only be accompanied by a trade union representative or a work colleague.[70]

83 The Claimant wrote to Mr Jones on 21 March in advance of the meeting with Ms Brem-Wilson.[71] She again raised the question of being accompanied by a friend at that meeting. Further, she sent with that letter a matrix which she said listed all the individual concerns she had raised in the documents sent on 9 December 2015 and in the NIS. She again raised the question of the impartiality of Ms Brem-Wilson. The matrix listed 45 issues or items of complaint.[72]

84 Mr Jones sent to Ms Barnett a copy of the email referred to in the preceding paragraph. Ms Barnett wrote to Mr Jones by email on 22

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[69] **[602]**
[70] **[625]**
[71] **[657]**
[72] **[644/7]**

March.[73] We consider this an important email in that it sets out clearly the view of the position taken by Ms Barnett at this time.

> I have now had an opportunity to read the endless emails going back and forth. I do have to ask the question does she have any time to actually do her work? The first email was sent 9.02 am, busiest time in SPA.
>
> I really do think we need to manage Anna's expectations carefully. The constant lengthy emails, the repeated demands and lists of questions are becoming time-consuming beyond words for us all. Neither you or I can change what has gone before we can only, as I explained to Anna last week, move things forward. However as we push forward she seems to keep pulling everything back and going over old history in every single communication.
>
> I do not agree with Stuart [Cornish] allowing Anna to bring anybody she wanted into the meeting he had with her, and we do not actually know that he did say that, do we? It is very clear in our policies about being accompanied at formal meetings and given that Anna alleges the trust has failed to follow and adhere to any policy then I am not about to start relaxing the rules because it suits her now.
>
> I also cannot ban every member of staff from Thames House that Anna has either come across or worked with. I shall be asking her the question did Angie act inappropriately when she saw her in SPA? I suspect the answer will be no, she probably just came in and got on with her work. Anna is most definitely angling to stay at home and not come in to work and that is what the "uncomfortable" statement is leading to.[74]
>
> Also can I have clarity on what statement was made on the 29th February naming Louise, which is why she says she is questioning her integrity to undertake the grievance investigation? To my knowledge Louise does not even know Anna hence the reason I appointed her to the investigation, not sure what she has been named against?

85 The grievance investigation meeting of the Claimant with Ms Brem-Wilson took place on 22 March as arranged. There was discussion about the eight points listed in the letter of 17 March 2016,[75] and also about points set out in the NIS. Mr Jones said that a further meeting could be arranged to discuss the issues relating to the delays if necessary. The notes of the meeting do not make any reference to any alleged delay by Ms Brem-Wilson.[76] On 2 April 2016 the Claimant prepared an amended version of the minutes of the meeting.[77] They were not included as an Appendix to the final report. It is not clear from the bundle whether they were sent to anyone in the Respondent.

86 Ms Brem-Wilson also interviewed Ms Chacksfield, Ms Read-Sak, Ms Rochford and Ms Tonkin.[78] Ms Brem-Wilson considered that there were anomalies in the evidence she had received and she prepared a list of questions for the Claimant to be asked at a further interview. That did not take place as the Claimant resigned on 25 April 2016. The report was finalised on 16 June 2016.[79]

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[73] **[666]**
[74] That refers to an email from the Claimant to Mr Jones mentioning Ms Moles 'hot-desking' behind her which made her feel uncomfortable. **[667]**
[75] **[602]**
[76] **[671]**
[77] **[771/786]**
[78] Ms Tonkin was alleged to have shouted at the Claimant.
[79] **[1072]**

87 The stress risk assessment finally took place on 23 March 2016 with Ms Jhita and Mr Jones.[80] Eight actions were agreed. It was agreed that the Claimant should have additional breaks during the day. The only other points mentioned during this hearing were that there would be weekly one-to-one meetings with Ms Jhita, and objectives would be planned for the SPA role.

88 The Claimant has complained that the first meeting with Ms Jhita was not until 14 April 2016. As a fact that is correct. We accept Ms Jhita's explanation for the delay that there was a combination of the Easter weekend, the launching of a project on 1 April 2016 for which Ms Jhita was responsible, and her then having a week's leave. That was explained to the Claimant at the meeting on 23 March 2016.

89 There was a further meeting of the Claimant, Ms Barnett and Mr Jones on 24 March 2016. This was the first of the weekly review meetings following the meeting on 17 March 2016, principally at least to discuss redeployment. It was a long meeting and was unsatisfactory. The matters noted related to further investigation into the three alternative roles suggested to her by Mr Jones, the obtaining of clarity about the supervision of the Claimant, the holding of further meetings and the signing-off of the risk assessment.[81] There were further matters discussed and points raised. Ms Barnett raised with the Claimant the length and number of emails being sent, and said that she was not able to respond to such emails. They were causing a distraction from progressing the investigation of the complaints which the Claimant had made.

90 At the meeting on 24 March the Claimant had been asked for a response to the offers of redeployment by 29 March. She sent an email to Mr Jones on that day complaining about the pressure being placed on her to come to a decision.[82] She declined to consider the roles further because she said that they would only be temporary pending the conclusion of the investigations. The Claimant said that she would continue in her temporary role. On 1 April Mr Jones said to the Claimant that the issues raised were to be addressed at the next meeting on 5 April.

91 Mr Jones copied the email from the Claimant to Ms Barnett. Ms Barnett replied to Mr Jones with comment inserted into the email and said as follows:[83]

> She is wasting our time – needs to get her into a role asap, I am not having her backtrack on the SPA role, she was offered permanent redeployment into that post back in January by Nina [Parmar] and it was firmly declined. She constantly complains that she was only offered this role but now indicates she will stay in it!

92 The Claimant's evidence was that she was diagnosed with depression on this day. It was not in dispute that the Claimant's mental health deteriorated around this time. The Claimant told Mr Jones on 5 April that she had been diagnosed with depression.[84]

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[80] **[698a-702]** The Claimant provided her own comments at **[743/5]**
[81] **[730], [732]**
[82] **[735]**
[83] **[748]**
[84] **[789]**

93 The next review meeting took place on 5 April 2016. This was another difficult meeting for different reasons. Ms Barnett described the Claimant as being 'uptight and confrontational', and the Claimant described Ms Barnett as 'angry and intimidating in her behaviour.' Mr Jones described the atmosphere as strained, the Claimant was not engaging with the wish to move forward, and Ms Barnett was 'direct but not hostile'. The meeting broke down, although we cannot find exactly why that was the case. No further such meetings took place.

94 On 6 April the Claimant sent an email to Mr Jones asking for 'a chat'.[85] She again complained about the delays which were taking place in connection with the various investigations. She referred to Ms Barnett having acted in a hostile and intimidating manner on the preceding day at the meeting. She said that it appeared 'clear that there has been a breach of contract, trust, confidence and duty of care in term of the [Respondent] not following its own policies, and breach of employment law . . . .' She said that she could not continue indefinitely in those circumstances especially as there was serious damage to her health.

95 Ms Schofield and the Claimant met on 8 April 2016 to discuss the report prepared by Mr Cornish under the SUP. The Respondent accepts that at that meeting the Claimant told Ms Schofield that staff were illegally accessing Kingston Hospital patient files. The Claimant also alleges that she told Ms Schofield that that her earlier complaint was being deliberately concealed from Kingston Hospital in order to protect the contract between the Respondent and Kingston Hospital. That was denied by Ms Schofield. We consider Ms Schofield to have been a clear and truthful witness and consider that, taking into account her particular role, she would have appreciated if any such allegation were made. We therefore prefer her evidence.

96 The Claimant left a 'Post-It' note for Mr Jones on 12 April saying that she must speak with him urgently. They arranged a meeting for that afternoon.[86] The two issues raised were that the Claimant had no interest in working for the Respondent, and wanted to agree an exit strategy. She said that she did not want to take sick leave as she did not want it in her record as it would adversely affect her future employability. She also said that she was seeking legal advice with a view to making a claim for constructive dismissal. Mr Jones then met Ms Thomas, Assistant Director of Workforce.

97 On that day the Claimant emailed Ms Thomas after having met Mr Jones.[87] In the email the Claimant said that she had blown the whistle, summarised the position from her point of view, and said that it was her 'absolute call for help'.

98 The Claimant had a one-to-one meeting with Ms Jhita on 14 April 2016.[88] The Claimant alleges that she told Ms Jhita that the issues concerning the access to patient data were being concealed. We do not accept that the Claimant made such allegation. Ms Jhita had not previously been made

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[85] **[803]**
[86] The notes made by Mr Jones are at **[731]**
[87] **[807/9]**
[88] Ms Jhita's notes are at **[824a/b]**

aware of any of the details of the Claimant's allegations. The notes of the meeting do not record the Claimant as having gone into any details. It was simply noted that there had been a lack of resolution, and she was waiting for a new investigation and a hearing or hearings.

99 The notes record the Claimant having three choices, being unpaid leave, gardening leave, and sick / stress leave. The final one was the least favourite. The notes also record the Claimant as saying that the SPA work was not a problem. There was a discussion about further training and the agreeing of objectives. We do not accept the Claimant's allegation that she was instructed by Ms Jhita that she had to act up in a Band 4 role, nor the suggestion made by Mr Yarnell in cross-examination that Ms Barnett had instructed Ms Jhita to require her to act up.

100 The Claimant then sent an email to each of Mr Jones, Ms Jhita and Ms Thomas on 14 April 2016 at 22:10. The substance of the email was to report that she had been diagnosed with depression, whereas previously it was stress. She said that she was not able to attend work. She suggested she be signed off on full pay (which we understand to mean 'gardening leave') or take unpaid leave. She said that she was not prepared to take sick leave as it had been the Respondent which had caused her to be ill. She said that she would assume that the first option was agreed unless she heard to the contrary.

101 That email was copied to Ms Barnett who interposed her comments on various of the points made by the Claimant. As far as her absence was concerned Ms Barnett said that she would be recorded as being off sick. There was focus on one comment made by Ms Barnett concerning the delays which had occurred:

> As stated above I have only been involved in this case since 1st March, but yes she is correct I cannot find anybody to investigate these issues. She is also correct that she raised these issues in December therefore I feel too much time has gone by to do so.

102 We do not accept that those final few words meant that there was no intention on the part of Ms Barnett to pursue the investigations. Ms Barnett had been pursuing the appointment of an investigator to consider the allegations of the bullying of the Claimant, and also the allegation of there having been access to patient's files. She had written to Mr Lambdon on 11 April asking if a named person were available.[89] Mr Lambdon volunteered himself, and on 18 April Ms Barnett sent two letters to him in similar terms, one referring to the 'Information Governance Policy', and the other to the Bullying and Harassment Policy.[90] The terms of reference were based upon the precedent previously used by Mr Jones as mentioned above.

103 Ms Barnett made an OH referral for the Claimant also on 18 April 2016.[91] The questions asked were whether the Claimant was fit to return to the SPA role, and also whether she was fit to attend investigation meetings.

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[89] **[805a]**
[90] **[861], [863]** We are not aware of any Information and Governance Policy, and it appears in fact that the investigation was under the Disciplinary Policy.
[91] **[857/860]**

The Claimant resigned two days before the appointment fixed for 27 April 2016.

104 Mr Jones replied to the Claimant's email of 14 April 2016 on 20 April.[92] He informed the Claimant of the OH appointment. He referred to provisions in the Respondent's sickness absence policy. Although not specifically stated the implication is that the Claimant had to provide a self-certification form for the first seven days of her absence and then forms Med3 to cover the remainder. In other words, her absence was to be treated as sick leave.

105 The Claimant resigned by a long email of 25 April 2016.[93] It is not easy to summarise. It reflects the matters raised above, and the issues which we have to determine. On 27 April 2016 Linda Thomas, Assistant Director of Workforce, wrote to the Claimant.[94] She said that a full reply would be sent, and commented that as there were 'numerous, lengthy emails' from the Claimant some patience was required pending a reply. She asked that correspondence from the Claimant be kept succinct.

106 On 4 May 2016 Jill Downey, Associate Director Operational Support Services & Health and Well Being, wrote to the Claimant. Ms Downey said that the Claimant's absence was to be classified as sick leave and she asked the Claimant to supply a form Med3. Ms Downey then expressed regret at the Claimant's resignation and provided a table summarising the position in respect of each of the four investigations arising from the Claimant's complaints. Ms Downey said that the resignation was accepted.[95]

107 On 26 April 2016 Mr Lambdon had carried out pre-arranged investigation meetings relating to the allegations of bullying and breaches of information governance relating to the accessing of patients' records. On 20 May 2016 he wrote to the Claimant inviting her to attend meetings on 27 May 2016 in connection with those investigations.[96] The Claimant declined because she was not allowed her 'own choice of support'.[97]

108 Mr Lambdon issued his two reports on 15 June 2016.[98] Each was detailed, and had appended to it notes of the interviews which had been held and other relevant documents. His conclusion was that there was conflicting evidence concerning the alleged bullying of the Claimant, but that in any event she was left feeling anxious. Further, there was a culture of banter involving comments about patients and staff, and that that should be be dealt with by 'dignity at work awareness' rather than under the Disciplinary Policy.

109 Mr Lambdon's report into the allegation that staff accessed records relating to patients of Kingston Hospital concluded that access had been

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92 **[883]**
93 **[892-896]**
94 **[913]**
95 The Respondent could not of course refuse to accept it.
96 **[979]**
97 **[982]**
98 **[1083]** & **[1091]**

gained to the appointment records of friends or family members, but not to medical information.

110 We summarise the conclusions reached by Ms Brem-Wilson in her report of 16 June 2016.[99] She stated that her report was only in relation to the original grievances and that she had planned to re-interview the Claimant concerning the NIS.

110.1 Uniform. The complaint was that the Claimant had not been supplied with a uniform. The conclusion was that the Respondent had delayed ordering one for her as she had indicated that she was not certain whether she was to stay. One was ordered and obtained but ultimately not provided to the Claimant.

110.2 Training. It was acknowledged that there was a delay in providing her with an ESR access to enable her to undertake the mandatory online training referred to in the letter of 18 March 2016.[100]

110.3 Probationary period. The Claimant complained that there had not been any meetings as required by the new Probationary Period Policy and Procedure. Ms Brem-Wilson concluded that no part of the policy had been carried out, but also that the probationary period had been extended.[101]

110.4 Lack of objectives. Ms Brem-Wilson concluded that no objectives were set before the Claimant left her original post for the SPA but that the Claimant was aware of her role.

110.5 Reporting line. The conclusion was that there was evidence that the Claimant was aware of her reporting line.

110.6 Induction. There was an induction 'of sorts, this unfortunately was not recorded properly.'

110.7 Covering the desk alone. The Claimant volunteered to cover the front desk alone on a few occasions over the lunch period.

110.8 Delay. Ms Brem-Wilson concluded that Ms Chacksfield had considered in October 2015 that concerns previously raised by the Claimant had already been dealt with. As Ms Brem-Wilson was only commissioned to undertake the investigation on 4 March 2016 she had been unable to obtain further information from Ms Parmar.

111 The claim form ET1 was presented to the Tribunal on 4 August 2016.

112 We mentioned above the Employment Checks Policy. The document in the bundle, from which we have reproduced an extract, was dated August 2012. No later version was produced to us. We heard evidence concerning this policy from Professor Gregory, which we accept. We were impressed by her as a witness. One of the roles of Professor Gregory was the Safeguarding Lead, and this policy was therefore of particular relevance to her. The Board of the Respondent took a decision in late 2014 or early 2015 that, having assessed the risks involved in taking the decision, it would not be necessary for administrative staff, such as the Claimant, to have a DBS check carried out. Professor Gregory did not

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[99] [**1072]**
[100] **[407]**
[101] That cannot be an accurate conclusion as it is internally contradictory.

herself approve of that decision, but was bound by it as a decision of the Board.

Submissions

113 Mr Cooper provided written submissions to which he spoke. Mr Yarnell replied and made oral submissions. Mr Cooper referred to the following authorities:

Adeshina v. St George's University Hospital NHS Foundation Trust [2017] EWCA Civ 257
Bahl v. The Law Society [2004] IRLR 799 CA
Chesterton Global Ltd v. Nuromohamed & ors [2017] EWCA Civ 979
Chief Constable of Greater Manchester Police v. Bailey [2017] EWCA Civ 425
Chief Constable of West Yorkshire Police v. Khan [2001] ICR 1065 HL
Fecitt & ors v. NHS Manchester [2012] 372 CA
Kuzel v. Roche Products Ltd [2008] ICR 799 EAT
Martin v. Devonshire Solicitors [2011] ICR 352 EAT
Nagarajan v. London Regional Transport [1999] ICR 877 HL
Parmar & anor v. Southend on Sea Borough Council [1982] ICR 372 CA
Panayiotou v. Chief Constable of Hamshire Police [2014] IRLR 500 EAT
Qureshi v. Victoria University of Manchester [2001] ICR 863 EAT
Western Union Payment Services UK Ltd v. Anastasiou UKEAT/0135/13

Mr Yarnell referred to the following additional authorities:

Arthur v. London Eastern Railway Ltd [2006] EWCA Civ 1358
London Borough of Harrow v. Knight EAT/0790/01

114 Mr Cooper made submissions on the law, and we summarise the law below. His principal point was succinctly set out in paragraph 1 which we reproduce:

> The core of this dispute in this case is whether the manner in which the Respondent attempted to address the Claimant's complaints and redeployment – which the Respondent accepts was deficient and unduly protracted – was itself materially influenced by the fact that she had made any protected disclosures.

We say immediately that we agree with that analysis.

115 Mr Cooper submitted that the admitted deficiencies in process were caused by incompetence (principally that of Ms Parmar) and the overall pressure of work, and not by a series of deliberate actions motivated by protected disclosures (primarily orchestrated by Ms Barnett) which were designed to obstruct the investigation of the Claimant's complaints.

116 Mr Cooper said that the thrust of the cross-examination of most of the Respondent's witnesses by Mr Yarnell was not that such witness had individually been motivated by any protected disclosure, but rather that Ms Barnett was the moving force in the background. He pointed out that when such suggestion had been made each witness had emphatically denied it, and the Tribunal must have very clear evidence to uphold any such allegation, and there was none. Mr Cooper referred in particular to the details of the cross-examination of Mr Lambdon during which Mr Yarnell suggested that there were various omissions and errors in his report relating to the accessing of patient appointments as Ms Barnett was ensuring that the report was a whitewash.

117 Mr Cooper submitted that the outcome of the constructive unfair dismissal claim would almost certainly depend upon our findings in relation to the allegations relating to detriments and protected disclosures. Therefore the Tribunal should concentrate on the detriments and protected disclosures first. We agree that that is the appropriate way to approach the matter.

118 Mr Cooper and Mr Yarnell made submissions concerning jurisdiction and the statutory time limit, and we deal with that point below.

119 Mr Yarnell made detailed submissions about various of the alleged disclosures which we have taken into account. He made the general submission that the Claimant had a reasonable belief in each case that a criminal offence was being committed, or that there was a breach of a legal obligation. Further, he said, there was no suggestion of the provision of the information in question having been for personal gain. In particular, there was no advantage or disadvantage to the Claimant personally in not having had a DBS check carried out.

120 Mr Yarnell said that it was accepted that early delays could be explained by inexperienced staff, but that explanation was less credible from 22 October 2015 when Ms Chacksfield became involved. He said that Ms Parmar had set out clear advice on 20 January 2016 to Ms Barnett, but that advice had not been followed.[102] Further, Ms Parmar had been retained as the relevant HR officer even after Professor Gregory and Ms Thomas had met on 10 or 11 February 2016.

121 Mr Yarnell submitted that the issue of the DBS clearance had deliberately been investigated under the SUP in order to keep the matter confidential, and further that the report had been deliberately delayed to prevent it being seen by the CQC during the inspection in early March 2016. He also said that the failure to carry out a check was because of an error or misunderstanding by the HR department, and created significant risk for the Respondent. Mr Yarnell pointed out that the Tribunal had not been provided with a copy of any Board minutes recording the change of policy, nor indeed the revised policy document itself.

122 Mr Yarnell specifically submitted that Ms Barnett was behind at least the later delays in order to protect the department. He said that some of her evidence was misleading and that she had contradicted herself. She had deliberately not told Kingston Hospital about access having been obtained to patient appointment records. Mr Yarnell submitted that Ms Barnett saw the Claimant as a troublemaker, and had kept her in the SPA role even when Ms Barnett knew that she was not happy in that role. Further, even though any permanent redeployment for the Claimant depended upon the conclusion of the investigations, the progress of such investigations was not speeded up.

123 Mr Yarnell submitted that there was a clear drive to discredit the Claimant. He said that Ms Brem-Wilson had not upheld certain allegations contrary to the evidence before her. He also referred to various (alleged) discrepancies in evidence and documents.

The law, discussion and conclusion

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[102] **[419b]**

124 We start this section by making two comments or points. Firstly, we congratulate Mr Yarnell on the generally very clear and ordered manner in which he has cross-examined the Respondent's witnesses, and how he made the various points on behalf of the Claimant. The second point is really a repeat of a point made towards the beginning of these reasons. There was a very large amount of documentation provided to us, much of which consisted of emails from the Claimant. The fact that we do not mention any particular document in these reasons does not mean we have not noted its contents where that document was referred to in the hearing nor that we have ignored it in coming to our conclusions.

Qualifying and protected disclosures

125 We have set out the statutory provisions above. For there to have been a qualifying disclosure there must be information disclosed. The person making the disclosure must have reasonably believed to it to have been made in the public interest. Finally the person making the disclosure must reasonably have believed that it fell within one or more of the paragraphs in section 43B(1). Whether or not there was a reasonable belief is an objective test. It was conceded by the Respondent that any qualifying disclosure within section 43B was a protected disclosure within section 43A.

126 The latest authority on the meaning of 'public interest' is the Court of Appeal judgment in *Nuromohamed* and we quote the headnote from the report in the Industrial Relations Law Reports:

> In addressing s.43B of ERA 1996, the tribunal has to ask (a) whether the worker believed, at the time he was making it, that the disclosure was in the public interest, and (b) whether, if so, that belief was reasonable. Element (b) requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; that is particularly so given that that question is of its nature so broad-textured. The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. A disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it.
>
> The question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people serving that interest. That is the ordinary meaning of "in the public interest". The criterion does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed so to be. Where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s.43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case. Relevant factors could include: the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer.

Causation

127 The next and most important point is this. The principal exercise which we must undertake is to decide whether the Claimant was subjected to one

or more detriments on the ground of having made one or more protected disclosures. That involves finding the facts as to what occurred, whether the Claimant suffered a detriment, deciding whether the conveying of the information in question was a protected disclosure, and then whether any detriment which was suffered was on the ground of having made a protected disclosure. Mr Cooper (correctly) submitted that the correct test was whether the making of any protected disclosure materially influenced the actions of the Respondent. For there to be such influence then the person responsible for any action in question must necessarily have known of the fact of the making of the disclosure.

128 We have set out the statutory provisions above. We note particularly the provisions of section 48(2) of the 1996 Act. Mr Cooper referred to *Anastasiou* and *Kuzel*, the latter authority being by way of analogy. He accepted that the burden is on the employer to show the ground on which the act (or omission) constituting the detriment was done. He added that nevertheless there was an evidential burden on the employee to lead evidence from which an adverse inference could be drawn. Thus even if the Tribunal rejects the employer's explanation, the employee still had to show evidence from which the inference of causation could be drawn.

129 We do not find *Kuzel* of any assistance in relation to claims of having been caused detriments, as that case concerned the unfair dismissal regime to which different provisions apply. In paragraph 74 of her judgment in *Anastasiou* HHJ Eady referred to the judgment of Elias LJ in *NHS Manchester v. Fecitt* [2012] ICR 372. Paragraph 45 of that judgment is as follows:

> 45 In my judgment, the better view is that s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

That judgment was given in the context again of contrasting the different provisions relating to unfair dismissal and detriment claims.

130 What we draw from those authorities is that the Tribunal must have evidence to enable it to conclude that there was a causal link between the protected disclosure(s) and the detriments(s) in question. The Claimant must show that there are issues capable of establishing that any detriment was on the ground of having made a protected disclosure and so warranting investigation by the Tribunal. Otherwise the Respondent would have the burden of providing an explanation when it is not clear what has to be explained.

<u>Specific alleged disclosures</u>

131 We will deal with each of the alleged disclosures in turn, and whether any of the issues which were raised by the Claimant were mentioned to any other person.

132 <u>D1</u>. This relates to the lack of a DBS check. The Claimant alleges that the information in question was supplied on three separate occasions. We look at each. The first occasion was on 19 November 2015. The fact of an absence of a DBS check was mentioned by the Claimant to Ms Manley when Ms Manley came to speak to Ms Moles and the Claimant. The

Claimant made notes of that meeting.[103] Ms Manley asked the Claimant whether she enjoyed her job. The Claimant then referred to 'a baptism of fire', of a lack of objectives being set, not having any supervision, not having a staff uniform, not having had any local induction and not having had any training away from her desk on certain databases. Her notes then continue as follows:

> I also mention that to my knowledge I do not have a DBS. I do not remember completing any of the paperwork and have not received confirmation to my home. Jo [Manley] looks worried about this though Fran says that as I am on the desk with them it is probably OK. Jo disagrees and I tell her that I also have access to the Spine.

133 Mr Cooper submitted that the Claimant was simply raising the point along with other complaints arising from the commencement of her employment. Further, he said, that there was no evidence that Ms Manley had informed anyone else of the matter.

134 Mr Yarnell submitted that there was no advantage to the Claimant in raising the issue, and that she was being expected to act in breach of the Respondent's governance policy. He pointed out that Ms Manley had not been called as a witness by the Respondent, and he had not been able to cross-examine her. We entirely accept the point that there was no advantage to the Claimant, but not that at the time the Claimant perceived that she was to act in breach of a policy. There was no evidence that the Claimant was aware of the written policy to which we have referred.

135 This is not a case where the question before us relates to a breach of the Claimant's contract of employment. It is also not a case where there was a specific personal interest in the matter. Thus the precise issues in the *Chestertons Global Ltd v. Nurmohamed* litigation are not relevant. The issue we have to decide is simply whether at the time that the alleged disclosure was made, the Claimant reasonably believed that it was being made in the public interest.

136 It is apparent from the large number of documents and the evidence of the Claimant that she takes great care over details. Any omission is therefore of more significance than it would be with someone who took less care. On the evidence before us we do not accept that at the time the reason for the Claimant raising the issue was to inform Ms Manley of an issue of public interest. The Claimant was new in her post, and took the opportunity to raise various matters with Ms Manley. The Claimant obviously expected that she would have to undergo a DBS check, and raised that as one of a number of procedural or administrative omissions. We also accept the submission by Mr Cooper that there was no evidence of Ms Manley having informed anyone else about the point. Therefor nobody else could have been influenced.

137 The second occasion upon which the Claimant says that the matter was raised as a protected disclosure was on 25 November 2015 at the meeting with Ms Chacksfield. In paragraph 52 of the Grounds of Resistance it is stated that there was such a meeting and that the Claimant raised concerns about the lack of the DBS check. However, in paragraph 20 of

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[103] **[355]** They formed part of documents attached to the email of 9 December 2015.

her witness statement Ms Chacksfield stated that the issue was not raised and in cross-examination she said that she could not remember the issue having been raised. The notes she made do not mention the issue.[104] The Claimant made notes in preparation for the meeting. They do not mention the point either.

138 On a balance of probabilities we find that the point was not mentioned at all. However, we also accede to the alternative submission by Mr Cooper that if it had been raised then it was not raised as a matter of public interest. The context of the meeting as set out in the Claimant's preparatory notes was her concern about various matters affecting her personally.

139 The third occasion is when the Claimant sent her email of 9 December 2015 with her 'witness statement' attached. The alleged disclosure consists of the notes the Claimant made of the discussion she had with Ms Manley on 19 November 2015. The same points made above relate to this incident also.

140 We therefore conclude that the first alleged disclosure D1 does not fall within section 43A of the 1996 Act.

141 D2. The information alleged to have been disclosed is that there was inadequate and inappropriate storage of patient records in the reception area. The Claimant alleges that this matter was raised on the same three occasions as set out above in relation to D1. It was the Respondent's contention that the matter was not raised with Ms Manley nor Ms Chackfield, but that if it had been raised it would have constituted a protected disclosure. It is therefore a question of fact.

142 We have already referred to the documents relating to the meetings of 19 and 25 November 2015. This matter was not mentioned in the notes prepared by the Claimant in her 'witness statement' relating to the first meeting, nor in her notes, made in preparation for the second meeting. On a balance of probabilities we find that the Claimant did not raise any issue concerning the storage of patient records on either occasion.

143 The third occasion is ultimately more straightforward although confusion was caused. In her witness statement the Claimant referred to an incident on 13 November 2015 when a patient's notes[105] and a dictating machine were missing. That is the same allegation as D5. The Respondent, through Mr Cooper, accepted that this amounted to a protected disclosure on 9 December 2015, but pointed out that in terms of volume of text this incident occupied a relatively small part of the 'witness statement', and there was no evidence of any hostility or antipathy caused as a consequence. That is relevant to the question of the cause of any detriments.

144 D3. In the Claimant's 'witness statement' of 9 December 2015 she made reference to incidents on 8 and 12 October 2015 on which occasions she said that members of staff had made inappropriate comments to and about patients. The Respondent accepts that that constituted a protected

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[104] **[331]**

[105] Or notes for several patients.

disclosure, but again Mr Cooper submitted that there was no evidence of any link to any alleged detriment.

145 D4. This matter relates to the allegation that staff were accessing medical records of patients from Kingston Hospital. The Claimant again relies on three instances. The first instance was at the meeting on 25 November 2015. We find that the matter was not mentioned. The second instance is in the Claimant's 'witness statement' of 9 December 2015. The matter was mentioned in that document.[106] The Claimant noted in the document that she knew that 'this would be the wrong thing to do' and mentioned confidentiality. The Respondent accepts that this was a protected disclosure, but not that any detriments were caused by it. The third occasion was at the meeting with Ms Schofield on 8 April 2016. That is again admitted as having been a protected disclosure but Mr Cooper submitted that there was no evidence of Ms Schofield having mentioned the matter to anyone else. We deal with detriments below.

146 D5 relates to the misplacement of patient's notes, and we have dealt with that point under D2 above.

147 D6. This follows on from D4, and it is an allegation that the fact that staff had accessed some data relating to Kingston Hospital was being hidden to protect the contractual relationship with that hospital. The Claimant alleges the allegation was made to Ms Schofield on 8 April 2016. We accept the evidence of Ms Schofield that at that meeting the Claimant raised the issue in relation to access being obtained to records, as mentioned above, but that she did not go further and say that there was (or was likely to be) any deliberate concealment of the matter. The second occasion relied upon by the Claimant is the meeting with Ms Jhita on 14 April 2016.[107] We have found above that this matter was not raised. We therefore find that this was not a protected disclosure.

148 D7. This is the final alleged protected disclosure and is the email to the Care Quality Commission of 14 March 2016. The Respondent accepts that this was a protected disclosure, but Mr Cooper pointed out that the Claimant did not send a copy to anyone in the Respondent, and that there was no evidence that at any material time anyone in the Respondent was aware of the disclosure.

149 Therefore our overall conclusions are that the Claimant made protected disclosures as follows:

149.1 On 9 December 2015 the Claimant referred in her 'witness statement' to the misplacement of some patients' notes and a Dictaphone on 13 November 2015. [D2]

149.2 In the same statement the Claimant referred to the poor behaviour of staff towards and about patients. [D3]

149.3 On 9 December 2015 and 8 April 2016 the Claimant referred to staff having access to appointment booking system in her witness statement and at a meeting with Ms Schofield. [D4]

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[106] **[352]**

[107] The notes made by Ms Jhita are at **[824a]**

149.4 On 14 March 2016 the Claimant referred certain matters to the Care Quality Commission. [D7]

Detriments

150 There is a major preliminary point and that is of limitation. The principal statutory provision is in section 48(3). That is subject to an extension to allow for the ACAS early conciliation procedure. In this case Day A for the purposes of the early conciliation procedure was 31 May 2016, and the certificate was issued on 15 July 2016. The claim form ET1 was presented on 4 August 2016. The last date therefore which falls within the limitation period was 1 March 2016. Time is to be extended where it was not reasonably practicable for the claim to have been presented in time, and it was presented within a reasonable time thereafter

151 Mr Yarnell made two material submissions. The first was that detriment (h) occurred on 17 March 2016 and that thus all the alleged detriments were within time in accordance with the concept of 'a series of similar acts or failures' in section 48(3)(a). Secondly he said effectively that if had not been reasonably practicable for the claim to have been presented within any relevant time limit.

152 Mr Yarnell submitted that the Claimant had not been able to identify any detriments before 4 April 2016 as her mental condition was deteriorating, and she only realised the full impact of the detriments when depression was diagnosed at that date.

153 The burden is fairly and squarely on the Claimant to demonstrate that it was not reasonably practicable for her to have presented the claim earlier than she did, and that it was presented within a reasonable time after it did become reasonably practicable. The Claimant relied on medical reasons, but we simply do not have the medical information before us to enable us to conclude that for any particular period, or up to any particular date, it was not reasonably practicable for the Claimant to have contacted ACAS as the preliminary to the making of a claim. Indeed, the Claimant demonstrated that she was quite capable of corresponding in detail with various individuals in the Respondent concerning the matters now before us. We cannot therefore extend the limitation date back beyond 1 March 2016.

154 There is a distinction between acts and omissions for these purposes. The limitation date in respect of acts alleged to have caused a detriment is 1 March 2016. In respect of omissions, that is the date by which the action which it is alleged should have been taken should reasonably have been done.

155 The alleged detriments listed in the schedule are often very vague, and the schedule also does not on many occasions identify the dates or periods in question. Further most of the allegations are somewhat vague. That has not assisted us in our deliberations. Mr Cooper sought clarification in cross-examination and helpfully included in his written submissions some references to dates and documents. Mr Cooper submitted that alleged detriments (h), (i), (j), (m), (n), (x) and also (v) insofar as it relates to the meeting on 25 November 2016 are outside the time limit and provided the dates in question. Mr Cooper suggested that

we should consider that jurisdictional point, then whether any of the Claimant's complaints relating to the period from 1 March 2016 succeed, and then consider the issue as to whether there was a series of similar acts or failures. We have decided that the most appropriate way of deciding the case is to consider the merits of each of the alleged detriments, and then analyse the dates or periods in question if it becomes necessary to do so.

156 Detriments (i) and (m). These both relate to the Claimant's role in the SPA. The allegations are that the Claimant did not undergo appropriate induction procedures (including a DBS check) and training on joining the SPA team. This is largely a vague allegation. We are satisfied that Ms Jhita did provide proper training to the Claimant on her joining the SPA team, and that any delay in not being able to undertake on-line courses was because she (and others) had not been provided with the necessary log-in details. This was not linked to any of the protected disclosures which had been made. The Claimant specifically relied upon the absence of visits to the Respondent's sites. The reason was fully explained by Ms Jhita in her evidence, and it had nothing to do with any disclosure.

157 Although there have been many references above to a lack of a DBS check on the Claimant first joining the Respondent, she confirmed in cross-examination that this alleged detriment applied to her position in the SPA team. We have accepted the evidence of Professor Gregory that the Respondent had decided that it was not necessary for administrative staff to have such a check. The Claimant was not treated any differently from anyone else in her position, and in any event we fail to understand what detriment the Claimant alleges she suffered.

158 Detriments (f) (g) and (h). These alleged detriments all relate to the Claimant remaining in her temporary SPA role, and not being considered for other roles. They are also linked to alleged detriments (e) and (p) with which we deal next. Chronologically the first element, as we understand it, is that insufficient steps were taken in late 2015 to find an alternative role. The point about redeployment was first raised at the meeting on 25 November 2015. There was evidence about a Band 3 role at Teddington Health & Social Care Centre. This was discussed between Ms Barnett and Ms Chacksfield in December 2015. Ms Barnett did not consider it suitable because the Claimant would be working in close proximity to staff about whom she had complained. The SPA role was then identified and the Claimant was notified of it on 14 December 2015.[108]

159 As far as we can tell the first time that the Claimant raised an issue about the suitability of the SPA role (as opposed to whether it was to be temporary or permanent) was at the meeting with Ms Parmar on 13 January 2016.[109] Ms Parmar had understood from Ms Jhita that the Claimant was content in her new role.[110] Ms Barnett then took over the role of managing the Claimant from Ms Chacksfield. She chased Ms

[108] **[377]**
[109] **[400]**
[110] **[400]**

Parmar, but to no avail. Mr Jones then replaced Ms Parmar, and we mention below what then occurred.

160 Mr Cooper accepted in his submissions that Ms Parmar had had not responded adequately to the Claimant's concerns about her SPA role. We have recorded the various apologies given by Ms Parmar in her email to the Claimant of 25 February 2016.[111] It is apparent she was simply not up to the job. That was not in any way related to any disclosure.

161 Detriments (e) and (p). These both relate to the information supplied to the Claimant about the question of permanent redeployment. It is correct that there was some confusion concerning the position of the Claimant consequent upon the decision that she should cease to work in her original role. In December 2015 Mrs Chacksfield, together with Ms Parmar, were seeking a permanent role to which the Claimant could be redeployed.[112] The redeployment to the SPA role was said to be temporary. After Ms Parmar left, Mr Jones took the position that it was not possible for there to be a permanent redeployment until the investigations into the issues raised by the Claimant had been completed. That was after having taken informal legal advice. The original view of Ms Chacksfield and the subsequent different decision by Mr Jones have nothing to do with any disclosure made by the Claimant.

162 Detriment (n). This is a general allegation that the Respondent gave the Claimant different advice concerning the relevant policies and changing the policies to be applied. It is apparent from the overview of the facts above that there was confusion, and Mr Cooper accepted that that had been the case. That confusion was almost finally resolved by Professor Gregory in 11 February 2016, although her email to the Claimant of that date is not entirely clear.[113] It was finally settled by Mr Jones in his email of 2 March 2016.[114] We agree with the submission by Mr Cooper that this was simply confusion caused by different individuals having different views as to which policy or policies should be used to investigate the different issues raised by the Claimant. None of what occurred was because of the disclosures, although of course investigations would not have been necessary if the Claimant had not raised issues. That is not the same as saying that the confusion over the policies was on the ground of the Claimant having made a disclosure.

163 Detriment (q). This relates to the appointment of Ms Brem-Wilson to carry out the investigation under the Grievance Policy. The point being made by the Claimant is that in her NIS she complained that she had been told by Ms Parmar on 18 February 2016 that Ms Brem-Wilson would contact her within a week, and that she had not done so by 27 February 2016. That was one of the complaints of delays set out in the NIS. It was therefore inappropriate, says the Claimant, for Ms Brem-Wilson to investigate her grievances, as one of them concerned delay.

164 There is no merit in this allegation. Again the problem was caused by Ms Parmar's inefficiency. She did not make contact with Ms Brem-Wilson as

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[111] **[491]**
[112] See **[377]**
[113] **[430]**
[114] **[551]**

she was supposed to do. There was no delay on the part of Ms Brem-Wilson.

165 Detriment (r). Under this heading we become mired again in the multiplicity of documents produced by the Claimant, and the complexity of the procedures adopted by the Respondent. The detriment claimed is that the Respondent refused to consider the NIS as a separate grievance. The NIS was sent to Mr Jones on 29 February 2016.[115] On 14 March 2016 the Claimant sent a substantial email to Ms Zerroud raising various matters, one of which was that she wanted the NIS to be considered separately.[116] Mr Jones had said on 2 March 2016 that he had provided the NIS to Ms Brem-Wilson.[117]. We cannot trace in the large number of emails sent around this time any specific refusal by the Respondent to consider the NIS separately, but it was not so considered.[118]

166 The Claimant did not demonstrate to us that she had in fact suffered a detriment. Quite apart from that point, we find that the failure to hold yet another investigation into the matters raised by the Claimant had absolutely nothing to do with the making of the disclosures. Mr Jones had inherited an unsatisfactory situation from Ms Parmar and was in our view taking proper steps to deal with the outstanding issues, along principally with Ms Barnett.

167 Detriment (u). This complaint is that the Claimant was not allowed to be accompanied by a friend on 22 March 2016 at the meeting with Ms Brem-Wilson, whereas she had been on 22 February 2016 at the meeting with Mr Cornish, although she did not avail herself of that opportunity. We find it difficult to understand why the Claimant should consider that she suffered a detriment on the second occasion when she did not take a friend with her on the first occasion, but that is by the way. We find that the decision not to allow the Claimant to be accompanied by a friend was simply because that was the Respondent's policy. Mr Cornish had departed from it on 22 February 2016, and Ms Barnett did not approve.[119].

168 Detriment (v). The Claimant complains that there were no records of the meetings of 25 November 2015 and 5 April 2016. In cross-examination the Claimant confirmed that the complaint was that she was not provided with minutes of the meetings, as opposed to summaries by letter or email. She also confirmed that she did not as a matter of course receive minutes of meetings other than the two upon which she relies.

169 This is again a simple matter. For us to be able to find that the failure to provide minutes was because of any disclosure, we would have to have had evidence of minutes being produced in similar situations. The Respondent did not as a matter of course produce minutes of every meeting held with every employee, and then not produce them in respect of these two meetings.

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[115] **[510]**
[116] **[583]**
[117] **[552]**
[118] See also the email from Mr Jones at **[550]**
[119] See **[666]**

170 Detriment (w). This relates to the meeting between the Claimant and Ms Barnett on 17 March 2016. Ms Barnett wrote to the Claimant following that meeting on 23 March 2016 summarising the meeting and setting out what she said were the agreed action points.[120] The alleged detriment is that the Respondent failed to record that the Claimant challenged the accuracy of that letter at the further meeting on 24 March 2016. Ms Barnett accepted in cross-examination that the Claimant had raised the issue about the accuracy of her letter. The documented outcome of the meeting was an email from Mr Jones of 24 March 2016 listing the agreed action points.[121] The Claimant did not comment further.

171 We do not know exactly what the alleged inaccuracy was. The Claimant's witness statement simply referred to 'particularly regarding discussions about redeployment'. When asked about this alleged detriment in cross-examination the Claimant replied that it was part of an ongoing pattern of not recording caused by the protected disclosures. We disagree entirely. As is apparent from the comments relating to detriment (v), the Respondent did not as a matter of course produce full minutes. The omission to record any comment which the Claimant had made about the contents of the letter of 23 March 2016 had absolutely nothing to do with any protected disclosure.

172 Detriment (s). This also relates to the meeting on 24 March 2016. It is agreed that at that meeting Ms Barnett asked the Claimant to desist from sending so many long emails. Ms Barnett gave the following explanation in her witness statement:[122]

> She was disappointed by the lack of progress on the investigations into her various complaints but she did not appear to appreciate that each time she sent another lengthy email (which she did on a frequent basis), it required considerable time and resources to sift through the email to ascertain what was a repeat of previous concerns and what was new. It also did not allow us time to deal with existing matters before having to embark on new ones. I did not consider this a productive way to address her concerns.

173 We have no hesitation in accepting that explanation. The Claimant did produce a large number of substantial emails, very often one following very quickly on from the previous one. That caused difficulties in being able to fix the allegations that the Claimant was making and then investigate them. The request by Ms Barnett was not because of the fact of any matter raised by the Claimant having been a protected disclosure.

174 Detriment (t). The complaints are that the Claimant was treated with hostility by Ms Barnett on 24 March and 4 April 2016. By the very nature of the allegation it is difficult for a Tribunal to find specific facts. We can make some general findings. The first, and most important, is that by this time the Claimant was 'quite closed down' and 'at a low ebb', to use her words. It was on 4 April 2016 that her GP noted that the Claimant was 'feeling down', although there was no diagnosis of clinical depression. Ms Barnett did not know that the Claimant was unwell.

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120 **[719]**
121 **[732]**
122 Paragraph 46

175 Ms Barnett gave specific evidence as to the Claimant's attitude at the two meetings. On the first occasion the Claimant was unresponsive and uninterested in engaging in discussion. On the second occasion she was uptight and confrontational and said that she did not wish to accept any alternative role. Ms Barnett admitted to being frustrated about that decision.

176 We conclude that, as is so often the case, Ms Barnett and the Claimant had different perceptions of the atmosphere of the meetings. We are not able to find that Ms Barnett treated the Claimant with hostility. Our impression of Ms Barnett is that she was seeking to do the best for the Claimant and understandably became frustrated with the circumstances. It was that frustration which caused any shortness by Ms Barnett and not because of the fact that the Claimant had made nay protected disclosure.

177 Detriment (aa). This alleged detriment relates to the terms of reference set out by Ms Barnett in her letters of 4 March and 18 April 2016.[123] The wording in each case is the same save for the title of the policy to which reference is made. The objection being made is to there being reference to 'action taken under the Disciplinary Policy' on the basis that the natural meaning of that phrase is that such action had been taken against the Claimant. Mr Cooper accepted that that was the natural meaning, and we agree with him.

178 We have accepted the explanation given by Mr Jones, but quire frankly we would have expected him to be more precise. As many lawyers have learned to their cost, the use of precedents has potential dangers as well as potential advantages. The document upon which Mr Jones based the letters set out five points as examples of terms of reference. His choice of this item is explicable as being simple carelessness. It was sloppy. It was certainly not caused by any disclosure. We are also unable to find that there was in fact any detriment caused to the Claimant. None of those involved were misled.

179 Detriment (x). This point relates to the following statement in the letter from Ms Parmar to the Claimant of 20 January 2016 referring to the meeting on 25 November 2015:[124]

> You stated that you did not feel able to return to your existing team and were anxious at having to do so and did not feel you were able to.

180 The Claimant says that that was inaccurate and also that the inaccuracy was not corrected after it had been challenged. There are other material documents. The Claimant's notes of the meeting with Ms Chacksfield of 22 October 2015 contain the following passage:[125]

> I feel I cannot go on working within the environment I am currently placed it is not going to work for me. I say that I am keen to work for the trust. I feel that my time with Outpatients has come to an end.

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[123] **[556], [861]** & **[863]**
[124] **[412]**
[125] **[374]**

181 Later on in the same document the Claimant states that she said that she was interested in redeployment. Further, the Claimant replied to Ms Parmar's letter on 21 January 2016 saying that her letter contained some inaccuracies.[126] She stated:

> For example towards the end of the meeting, I questioned whether you or Pauline thought it appropriate for me to return to my workplace, given what you had been told about my experiences. It was at that point that you agreed that it was not viable for me to return to that environment.

182 From our reading of that letter from the Claimant it does not call for any reply. It was put to the Claimant that she had been too sensitive to the terms of the letter from Ms Parmar, and she replied that she was 'open to that suggestion'. Our conclusion is that this is a very trivial matter of nuances. However wide an interpretation we give to the meaning of 'detriment' we entirely fail to see what detriment the Claimant has suffered. Further, we entirely fail to see how there is any connection between the two elements of this allegation and any protected disclosure.

183 Detriment (z). The Claimant relies on requests made on 16 and 23 March and 14 and 21 April 2016 relating to leave. The first is an email to Ms Barnett and Mr Jones in which the Claimant asked for 'unpaid leave until a conclusion is reached.'[127] The second occasion, says the Claimant, was during the risk assessment on 23 March 2016. We accept that there was a discussion, but the evidence is thin. The third occasion is the email from the Claimant to Mr Jones and others.[128] In that email the Claimant suggested, in effect, that she take 'garden leave' on full pay, or unpaid leave. She said that she was not willing to take sick leave. Mr Jones then wrote to the Claimant drawing her attention to the Sickness Absence Policy, and the Claimant responded on 21 April again referring to the point as to the categorisation of her absence.[129] We have further noted that the Claimant raised the matter with Ms Jhita at the one-to-one meeting on 14 April 2016.[130]

184 The other document of relevance is a letter from Ms Downey to the Claimant of 4 May 2016.[131] In that letter Ms Downey stated that as the Claimant had said that her GP had diagnosed stress / depression as the reason for absence then she must either take sick leave in accordance with the policy or be on unauthorised and unpaid leave.

185 We conclude that all the Respondent was doing was insisting that the Claimant comply with its standard policy. That was quite proper and it is apparent that it had absolutely nothing to do with any protected disclosure. We fail to see why the Respondent should have agreed treating the Respondent's absence in any other way.

186 Detriment (y). This relates to the Claimant's requests for a reference and discussions about exit arrangements. We think that this aspect starts with

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126 **[418]**
127 **[595]**
128 **[833]**
129 **[879]**
130 **[824a]**
131 **[938]**

the meeting with Ms Barnett on 17 March 2016. The Claimant's notes of that meeting record that she raised the issue of a reference and that Ms Barnett said that any of she, Ms Jhita or Seema Dhir would be able to provide one, and that Ms Barnett had had nothing but positive comments about the Claimant's performance.[132] Next there is an email of 12 April 2016 from the Claimant to Linda Thomas in which the Claimant said that she needed to talk to someone about exit negotiations immediately.[133] The Claimant also left a note for Mr Jones on that day asking to speak to him urgently.[134] They did meet, and then the Claimant sent another email on 21 April 2016 mentioning 'exit arrangements'.[135]

187 We find that the first element under this heading fails on the facts. Ms Barnett had said that a reference would be available, and that it would be a positive one. The second element as to a meeting to discuss 'exit arrangements' is true as a fact. There were requests for such a meeting and no meeting took place. We make two points. We entirely fail to understand why anyone in the Respondent should agree to meet the Claimant as requested by the Claimant. Secondly, and connected with that point, there is no relationship to the making of any protected disclosure.

188 Detriments (j) & (k). This relates initially to the OH report of 6 January 2016.[136] It was a short email from the OH Manager to Ms Chacksfield. The Claimant clarified that her complaint related to the second paragraph:

> With regards to locating a new post, I would recommend you send any posts which you feel will be suitable and I will discuss these with Anna. Once in post, she will require a stress risk assessment, supportive management e.g. regular 1-1 meetings, plan of supervision and objectives etc.

189 The allegation is that the recommendations were not put into place or at all. We accept that Ms Chacksfield genuinely and also quite reasonably interpreted that advice as relating to any new permanent post which may be found for the Claimant, rather any temporary redeployment. What then occurred was the proposed risk assessment on 23 February 2016 which Ms Parmar then declined to attend. As Mr Cooper put it, this was an aspect of Ms Parmar's poor performance which had nothing to do with any disclosures. Eventually there was a risk assessment in connection with the temporary role on 23 March 2016.[137]

190 The Claimant criticises Ms Jhita for failing to address the issues resulting from the risk assessment. She focussed at this hearing on not having a meeting with Ms Jhita until 14 April 2016. We accept the explanation of Ms Jhita that she was very busy on a special project to be completed by the end of March, and then she went on leave. The disclosures had no relevance to these matters.

191 Detriments (a), (b), (c) and (l). These are general allegations of not acting quickly and/or by an agreed date, and not keeping the Claimant informed.

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[132] **[648]**
[133] **[807]**
[134] **[731]**
[135] **[879]**
[136] **[391]**
[137] **[701]**

As we have already stated, they are very vague. What is clear, and accepted by the Respondent, is that it did not act as swiftly or as competently in dealing with the issues raised by the Claimant as should have been the case. There was also considerable confusion about the correct procedure to be adopted in respect of the different points raised by the Claimant.

192 Mr Cooper submitted that at least until about February or March 2016 there was no evidence of any adverse reaction or hostility towards the Claimant arising from the issues which she had raised, and we agree with that submission. Ms Barnett did later on become frustrated by the volume of emails being produced by the Claimant and we have sympathy with her position. Ms Barnett had a full time job to do, and was in addition seeking to resolve the difficulties which had arisen. It is not possible easily to deal with a matter if there are frequent new documents arriving which have the consequence of diverting attention from the task in hand.

193 Detriments (cc) and (dd). Mr Cooper submitted that these were not separate allegations of detriment and were effectively repeats of allegations (l) and (r). As far as we can tell these matters were not the subject of any specific evidence from the Claimant, nor of cross-examination. We do not propose to comment on the further.

194 Limitation. We return to the issue to which reference has already been made. We have found that all of the Claimant's claims of having been subjected to detriments on the ground of having made one or more protected disclosures fail on the facts. The question as to whether any of the factual allegations is outside of the statutory time limit, and the further potentially difficult question as to whether or not any of the alleged detriments formed part of what is usually referred to as a continuing act for the purposes of section 48(3)(a) of the 1996 Act. To do so would only involve more deliberation time and extend this lengthy document further.

Unfair dismissal

195 It is not in dispute that the Claimant had not been employed by the Respondent for the qualifying period of two years so as to entitle her to the 'ordinary' right not to be unfairly dismissed. The Claimant relies upon the provisions of section 103A of the Employment Rights Act 1996 to which the qualifying period does not apply. It is also not in dispute that the Claimant resigned, and therefore for there to have been a dismissal the provisions of section 95(1)(c) of the Act must apply. That is a 'constructive' dismissal.

196 For there to have been a constructive dismissal the employer must have been in fundamental breach of contract. In the list of issues above various matters are set out as either singly or collectively constituting a breach of contract be the Respondent. We accept the submission of Mr Cooper on behalf of the Respondent that 'the Tribunal will need to consider whether the reason or principal reason for the Respondent's acts or omissions which comprise the repudiatory breach of contract was the fact that the Claimant had made protected disclosures.'

197 Mr Cooper accepted that there had been unjustifiable delays in the handling of the Claimant's complaints between 9 December 2015 and 1

March 2016, and also that 'the Claimant resigned in response to what she perceived as deficiencies in the handling of her complaints and redeployment.' What he did not accept was that the making of the protected disclosures was the reason or principal reason for any act of the Respondent or of any failure to act. He pointed out the distinction between the provisions as to causation in relation to detriment claims on the one hand and dismissal claims on the other. In the case of a dismissal the making of the protected disclosure(s) must have been the reason, or protected reason, for the dismissal.

198 We have made findings above as to the lack of any detriments having been caused by the protected disclosures in question. We also conclude that the making of those disclosures was not the reason, or principal reason, for the Claimant's resignation. The claim of unfair dismissal is therefore dismissed.

Final comments

199 This has had to be a long document because of the large amount of detail contained in evidence and the documents in the bundle. We have stood back from the detail and looked at the overall picture. We see the history of the Claimant's employment by the Respondent falling into various phases. Initially the Claimant quite properly raised concerns about her own position and some incidents or practices which concerned her. The Respondent did not at that time fully get to grips with those matters. That caused further concern to the Claimant, and the delays then became at least as important as the original concerns. Eventually it was decided how the various matters were to be investigated, although that involved four different inquiries. The Claimant was not well treated by the Respondent, but the failures of the Respondent had nothing to do with the fact that some of the issues raised by the Claimant were protected disclosures.

Employment Judge Baron
Dated 05 March 2018