EMPLOYMENT TRIBUNALS

Claimant:	**Mrs K Lovell**
Respondent (1):	**NHS Professionals Ltd**
Respondent (2):	**Doncaster & Bassetlaw NHS Teaching Hospital Foundation Trust**
Heard at:	**Sheffield** **On: 25 to 28 February 2019**
Before:	**Employment Judge Brain** **Mr D Fell** **Mr T Fox**

Representation

Claimant:	In person
Respondents:	Mr J Boyd, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was not subjected to any detriment by the second respondent upon the grounds that she made protected disclosures contrary to section 47B of the Employment Rights Act 1996.
2. The second respondent did not indirectly discriminate against the claimant in relation to the protected characteristic of age contrary to the Equality Act 2010.
3. The Tribunal does not have jurisdiction to consider the claimant's complaint against the second respondent of disability discrimination brought under section 20 and section 39(5) of the 2010 Act (that the respondent failed to comply with the duty upon it to make reasonable adjustments). This is because the claim was brought outside the time limit provided for by section 123 of the 2010 Act and it is not just and equitable to extend time to enable the Tribunal to consider it. Further, the second respondent was not in breach of the duty to make reasonable adjustments in any event.

4. The complaints against the first respondent are dismissed following withdrawal.

REASONS

1. The Tribunal heard evidence over three days on 25, 26 and 27 February 2019. We then received helpful written and verbal submissions during the morning of 28 February 2019. The Tribunal deliberated in chambers on the afternoon of 28 February 2019. As Judgment was reserved, we now set out the reasons for the Judgment that we have reached.

2. In a claim form presented to the Employment Tribunal on 30 April 2018 the claimant brought complaints against both respondents of discrimination related to the protected characteristics of disability and age. She also complained that she had been subjected to a detriment for having made public interest disclosures. Prior to the presentation of her claim form she had pursued mandatory early conciliation as required by the Employment Tribunals Act 1996. She entered mandatory early conciliation on 16 February 2018. The ACAS certificate confirming compliance and the end of the early conciliation period was issued on 30 March 2018.

3. The claimant pursued her complaints against both respondents. The respondents' solicitors presented a response form on 7 June 2018. The response form said, about the first respondent, that it *"is an employment business specialising in the provision of healthcare professionals ('flexible workers') to NHS Trust organisations that are clients of the first respondent. Flexible workers provide services for the first respondent directly by working shifts or assignments at the premises of Trust clients (such as the second respondent). Assignments are booked through the first respondent's automated online booking system. There are approximately 60,000 flexible workers who are registered on the first respondent's staff bank. The vast majority of those who work for the first respondent are flexible workers undertaking casual assignments".*

4. A case management private preliminary hearing came before the Employment Judge on 25 September 2018. A copy of the case management summary is in the hearing bundle at pages 51 to 57.

5. Following the case management hearing, the claimant withdrew her complaints against the first respondent. Therefore, her complaints are pursued only against the second respondent. For convenience therefore, we shall refer to the second respondent simply as 'the respondent' from now on. The complaints against the first respondent stand dismissed following withdrawal.

6. As recorded at paragraph 3 of the case management summary there is no issue that the claimant has status to bring her complaints against the respondent. The complaint of detriment for having made a public interest disclosure is one brought pursuant to section 47B of the Employment Rights Act 1996. The disability and age discrimination claims are brought under the Equality Act 2010. It is not an issue that the claimant is a worker

for the purposes of the 1996 Act. It is also not in dispute that when working for the respondent she has the status of a contract worker for the purposes of section 41 of the 2010 Act and is thus able to pursue complaints of discrimination against it.

7. The respondent concedes the claimant to be a disabled person for the purposes of the 2010 Act. The claimant advanced two disabling conditions: arthritis affecting her knees and feet; and an eye condition. The respondent's concession of disability is limited to the arthritis only. The claimant's eye condition in fact appears to be of no relevance to the case in any event. However, notwithstanding the respondent's concession as to the claimant's status as a disabled person the respondent has put in issue its actual or constructive knowledge of the claimant's condition and that her condition substantially disadvantaged her in the workplace. We shall consider this issue in due course.

8. We shall firstly set out our findings of fact. We shall then set out the relevant issues in the case and the relevant law before going on to our conclusions. It is however helpful, we think, at this stage to summarise the issues in the case.

9. The first issue is that the claimant contends that she was subjected to detriment contrary to the 1996 Act for having provided the respondent with information which she says amounts to the making of protected disclosures. The information concerned a shortage of skilled midwives and patient safety concerns around the implementation of a computer system (known as 'K2'). The claimant says that she was subjected to the detriments of being barred altogether from working for the respondent for a short time and thereafter being excluded from two of the three wards upon which she would normally work at the material time. The claimant says that the provision of the information on the one hand was causally linked to these detriments on the other.

10. The second issue is a disability discrimination complaint which centres upon a shift undertaken by her on 1 September 2017. She says that she was required to work that day without the assistance of a support worker and that this therefore created a substantial disadvantage for her as a disabled person engaging the respondent's duty to make reasonable adjustments.

11. The indirect age discrimination complaint centres upon the respondent's requirement for the claimant to use the K2 computer system. The claimant says that this requirement created a group disadvantage for those of her age or age group and subjected her to an individual disadvantage.

12. The Tribunal heard evidence from the claimant. We also heard evidence from the following witnesses whom she called:

    12.1. Petrina Ryan. She is employed by the respondent as a senior midwife.

    12.2. Susan Bell. She too is employed by the respondent as a senior midwife.

    12.3. Alexandra Goss. She is employed by the respondent as a band 6 midwife.

13. The Tribunal heard evidence from the following witnesses on behalf of the respondent:

    13.1. Sharon Dickinson. At the material time she was employed by the respondent as head of midwifery. She is currently director of midwifery at Nottingham University Hospital.

    13.2. Hannah Tarling. She is employed by the respondent as ward manager of the ante natal triage unit and the ante natal assessment unit. These are two of the three areas where the claimant principally worked at the material time with which we are concerned. For convenience we shall refer to them now as 'triage' and 'ANAU' respectively.

    13.3. Joanne Hadley. She is employed by the respondent as matron. She has held that position from 10 July 2017. She was the K2 project lead from May 2015 to July 2017.

    13.4. Andrea Harrison. She is employed by the respondent as professional midwifery advocate.

14. All of the witnesses (including the claimant) from whom we heard were most impressive. Inevitably, there were different recollections about some of the events of which we heard and we shall come on to the factual disputes in due course. It is the Tribunal's task to resolve those one way or the other but preferring one party's account over another's is in no way an imputation against the other's honesty. The Tribunal was struck by the professionalism of all of those from whom we heard evidence. All are a credit to the respondent and the NHS.

15. The claimant is a midwife. She worked for the respondent from 16 April 1990 until she retired on 31 December 2016. Her letter of appointment confirming the commencement date in April 1990 is at pages 313 and 314. Her letter of resignation dated 18 December 2016 is at page 378.

16. The letter of resignation was addressed to Debra Boardman, ward manager. The claimant said in her letter of resignation that, *"I will be taking my pension due to some health problems but intend to continue to support the trust by continuing with my NHS Professionals' contract".* The letter was acknowledged by Mrs Boardman on 14 November 2016. She said, *"Whilst I fully acknowledge the reasons for you leaving our service I would like you to know that you will be a great loss to our service. Throughout your time at Doncaster you have shown yourself to be a fully professional, knowledgeable and caring midwife who has consistently provided a high standard of quality care to all women and their babies".* Mrs Boardman's letter is at page 379.

17. A letter in a similar vein was sent to the claimant by Ms Dickinson on 23 January 2017 (page 382). She concluded her letter by saying, *"On a personal note I can imagine what a huge decision this has been for you".*

18. Ms Dickinson offered the claimant help and support for the future. It wasn't long before the claimant sought Ms Dickinson's help. This was in connection with travel arrangements to attend a conference with counsel about a legal case in which the claimant was involved. At pages 383 and 384 we see emails between the claimant and Ms Dickinson concerning arrangements for the claimant's travel to London for this purpose. The

claimant was seeking authorisation to drive to London and break the journey by deferring the return journey home until the following day, staying overnight at her daughter's. The claimant said that otherwise the day would be too long for her. She said, *"As I am sure you are aware, I am working with NHS Professionals because of physical health problems so that I can manage my workload, having been advised to reduce my stress levels".* Ms Dickinson was sympathetic to the claimant's position and agreed that she could proceed as she had suggested.

19. When giving evidence before the Tribunal Ms Dickinson said that she did not perceive the claimant to have a disability. While we accept the sincerity of what Ms Dickinson said, the fact remains that the respondent has conceded the claimant to be a disabled person for the purposes of the 2010 Act.

20. Following her retirement as an employee of the respondent, the claimant continued to work there in her capacity as a flexible worker registered on the first respondent's staff bank. In that capacity, the claimant worked shifts in triage, ANAU and the maternity ward known as M2. These are all in the same location within the respondent's Women's and Children's Hospital. The M2 ward has 18 beds which are mainly occupied by those attending by appointment. In contrast ANAU and triage are faster paced and more dynamic environments. Miss Tarling compared them to being *"like an A&E department".*

21. It was suggested to the claimant by Mr Boyd that the claimant's choice of working in these three areas was dictated by her health. Mr Boyd suggested to the claimant that her decision to retire and then work as a bank worker in the areas of her choice was tantamount to the claimant making her own reasonable adjustments to accommodate her physical condition. The claimant fairly agreed that this was an accurate description of her situation. She said that around the time of her retirement she had been suffering from an increase of pain in both of her knees and was struggling with high levels of activity. She felt able to cope in any of the three areas that we have described.

22. There was an issue between Miss Tarling and the claimant as to the claimant's preferred areas of work. Miss Tarling was of the opinion that the claimant preferred to work in ANAU. With this the claimant disagreed. She said that the majority of her shifts had been in triage. Upon this issue we prefer the evidence of the claimant who is more likely to know her work pattern than Miss Tarling who has a number of members of staff to manage. The Tribunal was not presented with any statistical breakdown of the claimant's shift pattern. Further, when the claimant challenged Miss Tarling to the effect that the majority of her shifts had been in triage (when working as a bank worker) Miss Tarling said that she "*did not know that".*

23. Miss Tarling's evidence was that ANAU and triage are in a small geographical area and have comfortable seating. The claimant did not disagree with Miss Tarling's evidence upon this issue. Miss Tarling also observed that ANAU and triage were around a third the size of the M2 ward. That said, Miss Tarling fairly acknowledged that the real issue in the claimant's case was not so much the geographical size of the areas within

the hospital so much as the volume of patients which the claimant was required to see and the physical demands that this placed upon her.

24. As we have already said, of relevance to the claimant's claim is issues around the K2 computer system. To give the context, it is worth setting out paragraph 2 of Mrs Hadley's witness statement in full. She said:

"The K2 system is an electronic patient record system for maternity units. The system was introduced in two parts with the labour and delivery part, known as Guardian, going live in November 2014. The ante-natal, post-natal and out-patients part of the system, known as Athena, went live in April 2015. The system has therefore been in place for some time and replaced the previous electronic maternity record system, and runs alongside, other computerised recording keeping systems at the Trust. The K2 system was introduced to meet national record keeping and reporting requirements identified by the government as part of the Maternity, Transformation and NHS Digital agenda. It retains information in one place so that it is accessible to clinicians in real time, as well as providing access to patients allowing them to be involved in care planning. It requires clinicians to complete drop down boxes and text fields to record clinical care and management. The electronic interface supports and prompts clinicians to record required information to ensure patient safety, whilst also meeting local, regional and national data reporting requirements. If a clinician records information incorrectly, or not at all, incomplete or inaccessible information can delay or inhibit patient care and treatment planning which is a potential safety risk for the patient. The system is designed to reduce this risk and improve patient care by ensuring that data is recorded contemporaneously and within specified fields, increasing accessibility of clinicians and patients. Pages 268 to 276 describes the implementation process".

25. Plainly, Mrs Hadley took up her role as K2 project lead after the two component parts of the K2 system had gone live. She says in paragraph 3 of her witness statement that, *"Prior to my appointment, on implementation of the system, I understand that all staff had initial training on its introduction and use. The initial training was followed with monthly or quarterly additional training for groups of clinicians or one to one training was offered if it was felt necessary. This training is continuing at the Trust. Take up extra training was good as it allowed a hands on session so staff could get used to the system in a test environment".*

26. Mrs Hadley fairly acknowledges, in paragraph 4 of her witness statement, that while some staff took to the system others found it cumbersome. That said, her evidence is that the respondent *"did not identify anyone who had major difficulties with its implementation and the vast majority of clinicians find it a good system. The staff within the maternity unit are from a range of age groups (see page 277 to 278) and include many workers who are in the same age bracket as Mrs Lovell. Many of these clinicians within this same age bracket did not report any issues with the implementation and use of K2. Equally we had younger workers who did struggle and needed more support. I do not consider the system disadvantaged older workers as compared to younger workers".*

27. When she had the opportunity to cross-examine Mrs Hadley, the claimant fairly acknowledged her agreement with the evidence given by Mrs Hadley at paragraph 4 of her witness statement. Mrs Hadley commented that whether or not difficulties were experienced with K2 was very much down to each individual. At paragraph 5 of her witness statement Mrs Hadley said that the respondent established a reporting system (known as Datix) upon which concerns could be raised by members of staff. Further, the respondent instituted a system whereby suggestion sheets were made available around the ward upon which members of staff could record concerns.

28. The claimant was familiar with the Datix system. Indeed, during the course of the hearing she described herself as *"the Datix Queen"* by reference to the number of times that she had availed herself of it when an employee of the respondent.

29. From this, we conclude that the respondent had a culture of openness and was receptive to constructive criticism from staff about K2. The claimant, realistically and fairly, did not seek to suggest otherwise and it formed no part of her case that the respondent was unduly sensitive to criticism of the system.

30. The claimant had a particular concern about the recording of the patients' blood pressure upon K2. She emailed Mrs Hadley about this on 31 July 2017 (page 70). This was, in fact, a complaint raised by the claimant about matters of concern to her and also to concerns of Paula Gray, a support worker. Paula Gray's issue appears to have been around losing information on the blood pressure series section of the system. The claimant's issue was about having blood pressure series information in two places. She complained that this was not time efficient.

31. Mrs Hadley makes some observations about the email of 31 July 2017 in paragraph 7 of her witness statement. Her view was that the email was *"raising a development issue or an idea about how to improve the system".* She did not interpret it as a concern on the part of the claimant that the K2 system was unsafe. Mrs Hadley fairly acknowledged that the claimant was making a fair point but did not consider it one that called for an immediate change.

32. It was suggested to the claimant by Mr Boyd during cross-examination that it was in fact safer to have blood pressure readings in two places rather than one as that made it more likely for a system user to be able to locate the information. The claimant took issue with that suggestion upon the basis that different things were being recorded in different places. There is some merit in what the claimant said based upon what emerged from Joanne Hadley's cross-examination. She said that the blood pressure readings for low-risk and high-risk women were in different places and different things were being recorded accordingly.

33. It is not necessary for the Tribunal to make a determination as to whether the claimant or the respondent is correct upon their assessment of the safety or otherwise of the way in which blood pressure readings are recorded upon the K2 system. It is sufficient for the claimant to establish a reasonable belief in what she says and based upon Joanne Hadley's concession in cross-examination we find that the claimant did entertain a

reasonable belief that the way in which blood pressure readings were being recorded was unsafe. It is not necessary for the claimant to demonstrate or for the Tribunal to determine that her belief is correct.

34. The claimant is a registrant with the Nursing and Midwifery Council. It is necessary for all registrants to undergo a revalidation process every three years in order that the NMC is reassured that the registered midwives are meeting their professional requirements. This process is described in Andrea Harrison's witness statement.

35. Mrs Harrison told us that Hannah Tarling was meant to undertake the claimant's revalidation which was due at the end of 2017. However, Miss Tarling was unable so to do and therefore Mrs Harrison was given the task. The claimant met with Mrs Harrison on 26 October 2017. The claimant presented her with written reflections. As Mrs Harrison explains, *"midwives are required to present five reflective accounts as part of the revalidation process".* The claimant told us that the reflective accounts must be around issues or difficulties that have arisen in the course of their duties. The claimant told us that with this in mind she makes notes of incidents as she goes along in anticipation of her revalidation process from time to time.

36. Amongst her reflective accounts were issues arising out of a night duty which the claimant undertook on 22 December 2016 and her use generally of the K2 computer system. The former is at pages 380 and 381. A draft of the latter is at pages 78 and 79 with the final version at pages 76 and 77.

37. A handwritten draft of the reflective account form concerning 2 2 December 2016 at pages 380 and 381 was given to Miss Tarling. However, she found this difficult to read and appears to have not taken much cognisance of its contents before the task of undertaking the claimant's revalidation was passed to Mrs Harrison.

38. The significance of the reflective account form of 22 December 2016 is that it makes reference to the claimant *"being put in agony with my arthritis".* The claimant also makes reference in it to the fact *"that working duties on CDS with a long time standing and other areas with prolonged physical activity was not sustainable for my health, thus preventing me from giving best possible care to clients".* She goes on in the final section of page 380 to say that she had resigned her position and that *"following a lengthy phone and discussion with an occupational health nurse at NHSP, it was advised that I should not work in any areas where my physical condition would be likely to be aggravated or for more than three consecutive shifts".* She observed that heeding that advice had *"helped immensely".*

39. The draft reflective document concerning the K2 system is at pages 78 and 79. Mrs Harrison considered this to be deficient as it was simply a narrative of concerns which the claimant had about the K2 computer system. Therefore, the claimant re-drafted the document. We see the final version at pages 76 and 77. Rather than just being a list of issues, the final version contains the claimant's reflections about her learning and changes or improvements made to her practice as a result. The final

version was therefore in keeping with the philosophy of the revalidation exercise.

40. Mrs Harrison says at paragraph 7 of her witness statement that she recalls that *"Mrs Lovell raising that she felt that there were too many qualified midwives. We had had three new cohorts of about 35 new registered (ie qualified) midwives over a short period of time. It was not ideal to have so many new starters so quickly as it required input from the experienced staff as they had to provide support. Ultimately we needed more substantive midwives due to staff shortages and therefore we all had to work with the situation."* Mrs Harrison goes on to say that, *"There was no safety issue here but one of perhaps extra demands on the existing staff in the short term".*

41. No issue was taken by the respondent that the claimant's concern about the number of newly qualified midwives was anything other than genuine. That the claimant is scrupulous about staffing issues is evidenced by a letter in the bundle at page 315. This is dated as long ago as 30 April 1996. It was addressed to the acting head of midwifery at the time and raised issues about the adequacy of staffing levels. This letter, coupled with the letters addressed to the claimant following her resignation to which we have already referred (at pages 379 and 382) lead us to conclude that the claimant is a conscientious professional who has held consistent concerns for the welfare of her patients and their babies.

42. Andrea Harrison's evidence was that the revalidation exercise is entirely a confidential process. She did not share any of the documentation generated by the revalidation exercise with anybody else. Mrs Harrison impressed us as a conscientious and diligent employee. The claimant fairly did not seek to suggest that Mrs Harrison had in any way breached the confidentiality attendant upon the revalidation exercise.

43. That said, we accept that Sharon Dickinson was aware of the claimant's concerns around the K2 computer system by virtue of the revalidation exercise. Ms Dickinson says at paragraph 8 of her witness statement that she had sight of some handwritten documents to do with concerns about the computer system. Rather like Miss Tarling (in connection with the claimant's handwritten reflections concerning events on 22 December 2016) Ms Dickinson had difficulty reading the claimant's handwritten notes and asked for them to be typed up. It is not clear whether or not Ms Dickinson saw the typed versions. At all events, it is sufficient for our purposes to record that she was aware that the claimant was raising issues around the operation of the K2 computer system and the difficulties which she perceived there to be about it.

44. In the course of these proceedings, the claimant emailed the respondent's solicitor on 2 November 2018 (page 69). The respondent's solicitor was seeking further particulars from the claimant about the disclosures which the claimant contends qualified for protection. The claimant said in the email that she made the respondent aware of her concerns around the K2 computer system in the draft reflection (being the document at page 78 and 79), that that was reviewed by Miss Tarling and Ms Dickinson between July and September 2017 and that the final reflection document (being that at pages 76 and 77) was reviewed by Andrea Harrison in November 2017.

She also refers to verbal conversations with Miss Tarling, Ms Dickinson, Debra Boardman and Mrs Hadley (as well as the email to Mrs Hadley of 31 July 2017 at page 70). As to the latter, Mrs Hadley told us that she did not forward the email or share it with anybody else. She appears to have done nothing with it.

45. From this evidence, we conclude that the claimant did disclose information to her employer (in the personification of Hannah Tarling, Sharon Dickinson and Joanne Hadley) which in the reasonable belief of the claimant raised patient safety issues around the operation of K2. We find it probable that the concerns about K2 would have been seen by Miss Tarling in handwritten form in addition to the issue around the evening of 22 December 2016. It makes little sense for the claimant to have handed them in separately to Miss Tarling and Ms Dickinson as they were both part of the reflections exercise and it was not suggested that she had done so. We also reach a similar conclusion about her disclosure of information concerning the respondent's reliance upon newly qualified midwives with Andrea Harrison.

46. We now turn to the events of 1 September 2017. The claimant had booked herself to work on a late shift on triage that day. It is not in dispute that Miss Tarling contacted her and asked her to change her shifts in order to work in ANAU commencing at 9.30 in the morning. The claimant in fact worked between 9.30 in the morning and 8 o'clock in the evening that day according to the sheet at page 393. The claimant's uncontested account was that when working in ANAU a support worker would be routinely provided. In contrast with the work in triage where the midwife looks after one patient at a time, in ANAU there is a responsibility upon the midwife to look after two patients at the same time hence the need for the assistance of a support worker.

47. It is also not in dispute that no support worker was available to assist the claimant during her shift on ANAU that day. Miss Tarling says this at paragraph 29 of her witness statement:

"*In terms of the shift on 1 September 2017, from which Mrs Lovell alleges that we placed a requirement upon her to work without the assistance of a support worker, I confirm that this was a situation that had arisen due to an unforeseen staff shortage. The vacant shift, that Mrs Lovell accepted, had been advertised as usual via NHS Professionals. The Trust would not have known who was likely to take this shift and we would not know until shortly before hand that Mrs Lovell had booked the shift. It would not be normal to state in advance there was no MSW, even if we are aware, plus we would also hope someone on the day could fill that space, It was usual to have a MSW to assist midwives but at no time was I aware there was a requirement or need for Mrs Lovell to have such support. Mrs Lovell had worked most of her shift on 1 September without raising a concern and when she did speak to me that day she would have already have opportunity to raise it with the manager of the day [Tammy Brown] who routinely contacts each unit. As explained I attempted to see if we could resolve mattes and provide some support. Mrs Lovell did not mention that she needed the support worker due to a disability or as she was struggling with her health that day. I told Mrs Lovell at the time that if she was struggling she could re-escalate it to the manager of the day but I*

understand she did not do so. I note from her comment on the grievance that she did have a maternity support worker for a short period that afternoon. I accept from the time sheet that Mrs Lovell did work longer than her allocated shift but I did not know the reason for this. She was paid for her time".

48. The claimant's account is that she spoke to Miss Tarling upon arrival at work at 9.30 that day to express her concerns that there was no support worker. While acknowledging ANAU to be a small unit, the claimant says it was necessary to have a support worker because of the demands of looking after two patients at the same time and also because of the need to leave the ANAU in order to undertake urine and blood testing and other tasks. As the claimant put it*, "the support worker would do the walking".*

49. The claimant accepted that she had not escalated the matter to Tammy Brown, claiming that she was unaware of Miss Brown's number and that in any event she had raised it with Miss Tarling. Miss Tarling said when giving evidence under cross-examination that it was she (Miss Tarling) who had in fact raised the issue with Miss Brown.

50. Following the events in December 2017 (when the claimant was barred altogether for working for the respondent between 3 and 8 January 2019 and then barred from working upon ANAU and triage, a situation which still pertains so far as we are aware) the claimant raised a grievance. This is dated 19 January 2017. It appears in several places within the bundle (including at pages 443 to 446). In her grievance the claimant says that she raised the absence of a support worker with Miss Tarling. She accepts that she had not raised it with Tammy Brown believing that she had done sufficient by raising it with Miss Tarling. She says that at lunchtime Miss Tarling returned to the ward whereupon the claimant told her that she had not raised the matter an issue with Ms Brown, having taken the view that it was sufficient to leave matters with Miss Tarling. There was no suggestion in the claimant's grievance that the claimant ever raised the matter with Tammy Brown.

51. Miss Tarling was asked to comment upon the claimant's grievance. Her response is at pages 480 to 485. Miss Tarling said that she was aware of *"Karen's disappointment about the lack of MSW."* She says that she made the manager of the day aware of the staff deficit "*but I can only assume that if no MSW was provided there was not one available to move"*. She went on to say that, *"the lack of MSW is inconvenient and I did provide an apology, however it was not seen to be affecting patient safety and therefore the need was prioritised with this in mind. It is the expectation that the midwives themselves escalate to the manager of the day, rather than to the manager of the area who then escalates on. This has been in place for more than a year now".*

52. Miss Tarling then went on to say (at page 483) that, "*Karen has mentioned her physical limitations to me. When we have discussed it I understand it to be predominantly arthritis in the knee joint. I am aware she finds excessive walking or prolonged standing painful. This is why she prefers to work in this clinical area. ANAU would appear the most suitable clinical area and since it is geographically small and with comfortable seating,*

Karen should be able to be comfortable. The additional absence of an MSW from this perspective should not impact on this".

53. In evidence before us, Miss Tarling said that she had a discussion with the claimant about the lack of provision of a support worker in the morning upon the claimant's arrival but then not again until the late afternoon. There was no dispute between the claimant and Miss Tarling that there was a discussion about the lack of a support worker upon the claimant's arrival on the ward. There appeared however to be a dispute between them as to when the subsequent discussion had taken place. However, that difference appeared to be more illusory than real in the light of Miss Tarling's view that 1 o'clock pm was 'late afternoon'.

54. Miss Tarling said that 1 o'clock pm felt like late afternoon given that she had been at work from 7 o'clock in the morning. While we can sympathise with that sentiment, on any sensible view 1 o'clock pm cannot reasonably be considered to be 'late afternoon' regardless of the time upon which one has commenced work earlier in the day. We therefore accept the claimant's account that she and Hannah Tarling discussed the absence of a support worker at around 1 o'clock pm on 1 September 2017.

55. Miss Tarling's account of the events of that day was unsatisfactory in a number of additional respects. Firstly, paragraph 29 of her witness statement cited above is at odds with her acceptance of the claimant's account that the claimant had been asked to swap shifts at Miss Tarling's request. It was not the case therefore that the respondent was not aware that it was Mrs Lovell who would be taking the ANAU shift that day. Secondly, the contemporaneous documentation (in particular at page 402) is at odds with Miss Tarling's suggestion of unexpected staff shortage. Page 402 is a record of the staff scheduled to be on duty upon the various shifts for the areas in question. Unsurprisingly, there are handwritten annotations to the roster recording late changes to it. We can see that there was no Band 2 support worker scheduled to work on 1 September 2017 in ANAU. Had a support worker been rostered to work that day one would have expected to see a name (as there was for the four prior days that week) and for that name to be struck through if unable to attend through illness or some other unforeseen eventuality.

56. Miss Tarling, sensibly, keeps a record of significant conversations with members of her staff. Her note of 1 September 2017 is at page 405. In this note she refers to a discussion with the claimant about the absence of a support worker in the late afternoon. We have already made our determination upon this issue that in fact the conversation took place at about 1 o'clock pm. In the note Miss Tarling says that, "*it is always in my plan to provide [a MSW] for every shift, however due to sickness/absence or annual leave, sometimes this is not possible".* There was no specific record in this note as to the precise reason why a support worker was unavailable as one would expect had one been rostered to work that day. Further, Miss Tarling gives no specific reason for the *"unforeseen staff shortage"* to which she refers in paragraph 29 of her witness statement.

57. From all of this, we conclude that Miss Tarling asked the claimant to work in ANAU on 1 September 2017 knowing that the claimant would be without a support worker. We also conclude from the note at page 483 cited at

paragraph 52 that Miss Tarling was aware of the claimant's disability (being her arthritis in her knee joints). It cannot sensibly be suggested that Miss Tarling would not be alive to the fact that a support worker would be of benefit to the claimant given the claimant's arthritic condition and that requiring the claimant to work in ANAU alone would present difficulties to her by reason of the absence of support. Indeed, that a support worker is made available to all midwives who work on ANAU demonstrates the need for assistance for all midwives working in that ward.

58. At paragraph 13 of her witness statement Miss Tarling makes reference to the 'bed state for maternity and gynaecology' record for 1 September 2017. We see from this that no support worker was provided upon the relevant shift in ANAU. There was in fact only one support worker between M2, triage and ANAU that day and the support worker was working alongside two midwives in M2. The document goes on at page 404 to record the fact of there being no support worker in ANAU. This record appears to have been made by Tammy Brown who noted that the support worker in M2 could potentially help the claimant.

59. The claimant's unchallenged account was that she stayed until 8 o'clock pm on 1 September 2017 in order to complete her notes upon K2. The lack of support worker provision had necessitated her working late to do this. That this was the reason she worked so late appears to be uncontested by the respondent. Hannah Tarling says in paragraph 29 of her witness statement that, *"I accept from the time sheet Mrs Lovell did work longer than her allocated shift but I did not know the reason for this. She was paid for her time".* There is no reference in Miss Tarling's note at page 405 of any concerns on Miss Tarling's part about the claimant staying behind to complete her notes that day.

60. That said, Miss Tarling says at paragraph 12 of her witness statement that "*Mrs Lovell stated to me that she had found it hard to keep up with her record keeping without an MSW. I explained to her that whilst it is helpful to have a MSW, one cannot be provided for every shift and, for example, they may be absent if they are ill or on annual leave. I also explained to her that simply because she did not have a MSW did not mean she was unable to document, this was the role of the registered midwife. The MSW was there to assist with observations, urine analysis, taking bloods and booking appointments".*

61. 1 September 2017 was not in fact the first occasion upon which an issue had arisen about the claimant's record keeping on K2. Miss Tarling made a note of a conversation that she had with the claimant about this on 4 August 2017 (page 401). She refers to this in paragraph 9 of her witness statement.

62. Miss Tarling says in paragraph 9 that, *"I met with Mrs Lovell on 4 August 2017 and discussed with her the feedback I had been given by other staff and what I had seen in relation to her note keeping. She explained that her notes were sparse as she only recorded something that is abnormal or if there was a change to the patient plan. She went on to say that she was too busy and there was not time to document plus she stated she disliked computers in general. I explained to her the process that she was expected to follow in terms of documentation and that she should, like*

other staff, provide details as to a situation, background, assessment and recommendation ("SBAR"). SBAR is expected as standard for every patient and used nationally so that we do not miss out details when handing over care. It is a national standard which was developed following incidents and investigations. The SBAR information is recorded in the free text box in the patient's management plan. Mrs Lovell felt that as long as she made an entry somewhere on the system then this was fine. I noted that she was including some SBAR information in the incorrect format or detail on a free text box on the admissions page in the system but not in the management plan. The reason this was a problem is that the management plan is used by all other midwives and doctors at the Trust and the management plan information transfers across whenever the patient is in hospital. It is therefore very important that this information is kept up to date".

63. The context of the discussion of 4 August 2017 was, according to Miss Tarling at paragraph 8 of her witness statement, concerns raised with her by substantive midwifery staff about the claimant's note keeping. She says that as a consequence she did a spot check and noted that the claimant's notekeeping was very sparse.

64. According to the note at page 401 Miss Tarling discussed the matter with the claimant. She also resolved to monitor the claimant's progress and continue to spot check the records to ensure a change in practice.

65. In evidence given under cross-examination the claimant said that she could not recall having a meeting with Miss Tarling on 4 August 2017. She said that she thought it was after 1 September 2017.

66. Upon this issue we prefer the evidence of Miss Tarling. Firstly, we accept that Miss Tarling records significant conversations with members of staff. We have already made reference to the record of 1 September 2017 at page 405 and will shortly come on to the record of 12 and 13 December 2017 at page 406. The existence of those records is therefore consistent with Miss Tarling's evidence of her recording significant conversations. Secondly, the claimant did not dispute that there had been a conversation between her and Miss Tarling about her record keeping. This conversation did not actually take place on 1 September 2017. Neither the claimant nor Miss Tarling said so. The claimant's belief is that it was after 1 September 2017. In our judgment, she is simply mistaken about this. There is a contemporaneous record prepared by Miss Tarling consistent with her practice evidenced elsewhere in the bundle. Although some aspects of Miss Tarling's evidence around the events of 1 September 2017 were unsatisfactory we found her generally to be an honest and impressive witness. Such an impression and finding is inconsistent with a suggestion that she would create a note long after the event. Indeed, the claimant did not make any such suggestion to her (quite properly).

67. In the final analysis there is in any case little difference between the accounts given by the claimant and Miss Tarling. Although Miss Tarling maintained in evidence that she had spoken to the claimant twice about her note keeping before 12 December 2017 we think that she is mistaken about that, there being no evidence of a discussion about note keeping with the claimant on or around 1 September 2017. In fact, the contrary is

the case according to paragraph 29 of Miss Tarling's witness statement. Therefore, the accounts of Miss Tarling and the claimant are consistent in that there was one discussion between them about the claimant's record keeping prior to 12 December 2017. The only difference between them is the date upon which this took place in respect of which we prefer Miss Tarling's evidence for the reasons given.

68. The claimant, realistically and properly, did not take issue with Mr Boyd's proposition that accurate note keeping was critical in her role. The claimant was taken to the respondent's record keeping standards policy commencing at page 251. This says, at paragraph 1.2 on page 254, that *"Any document which records any aspects of the care of a patient can be required as evidence before a coroner's court, a court of law or before the professional conduct committee of the Nursing and Midwifery Council, or other similar regulatory bodies for the health and social care professionals. The legal approach to record keeping tends to be 'if it is not recorded it has not been done'. This is particularly relevant where the patient/client condition is stable and no record is made of care delivered".* The importance of accurate record keeping is then emphasised in paragraph 1.3. The requisite auditable standards are in section 6 commencing at page 256. The standards pertaining to electronic records are in section 7 commencing at page 260.

69. The claimant made a valid point that the policy commencing at page 251 was not in fact in force at the relevant time with which we are concerned. The one with which we have been provided was issued on 4 April 2018. That said, the claimant realistically accepted that the one current in late 2017/early 2018 was unlikely to contain any material differences pertaining to these core standards and principles.

70. Both in evidence and in her closing submissions the claimant accepted that she would only record in the notes if anything abnormal had been identified, particularly where a consultant obstetrician had prepared a management plan. It was clear from the evidence given under cross-examination by Hannah Tarling that this was not an acceptable approach as far as she was concerned. She said that SBAR was *"a tool for everything you've done for the patient. You may just say as 'R'* [recommendation] - *continue per plan".*

71. A further theme that emerged from the claimant's evidence in her cross-examination of Miss Tarling was the claimant's understanding that so long as she documented a record somewhere such as was acceptable. The respondent (and in particular Miss Tarling) fairly accepted that this was the case at the early stages of K2. However, matters had moved on and towards the end of 2017 the respondent's expectation was for accurate record keeping in according with SBAR and in an appropriate place.

72. In her written submissions, the claimant validly pointed out that the respondent had not produced any evidence of allegedly substandard note keeping during the course of the hearing. However, even had the respondent done so the Tribunal would have been in no position to evaluate the adequacy or otherwise of the note keeping without the assistance of experts in midwifery practice (such as all of the witnesses from whom we heard). Further, as was pointed out by Mrs Harrison, it is

for the respondent to determine the standards of note keeping that are to be met by its employees and agency workers.

73. Miss Tarling says at paragraph 15 of her witness statement that *"In December 2017 my deputy, who can approve payments for NHS Professional staff, mentioned to me that Mrs Lovell was on occasion working two to three hours after the time her shift could have finished and was claiming overtime. She had checked the shift times for other staff and could see that other staff were not staying late for some shifts which indicate the units were not overly busy. Obviously there is a cost to the department if overtime is paid regularly. I reviewed Mrs Lovell's shifts and noted that by December 2017 she had worked for over 40 shifts and had finished half of these after the end of her scheduled shift. I noted that on 10 occasions she had worked more than an hour's overtime. I wanted to explore with her why this was the case as the other staff for the same shifts were not staying late. Also around this time it was brought to my attention that there were still some issues with Mrs Lovell's note keeping and staff were becoming increasingly concerned there could be a clinical incident as a result of this. I had noted from further spot checks that her notes still remained quite sparse".*

74. Miss Tarling then discussed the matter with the claimant on 12 December 2017. There is a note of this conversation at page 406. Miss Tarling recorded that the claimant had told her that she was staying late in order to complete her notes after the clinic. Miss Tarling said that it was not acceptable to complete notes after hours for patients that had left. She was concerned about the risk of wrong information being recorded in a patient's records. Miss Tarling was also concerned about the amount of overtime being claimed by the claimant. Miss Tarling detected that the claimant seemed annoyed that Miss Tarling was raising these issues with her.

75. The next day, 13 December 2017, Miss Tarling's evidence is that she was notified by a band 6 experienced midwife who had worked on the late shift on 12 December 2017 that the claimant had only seen two patients and had said that she had not completed the documentation as she was *"not being paid to document anymore".* Miss Tarling was informed that the SBAR documentation for the two patients whom she had seen was very basic. The band 6 nurse said that she had the impression that she (the claimant) wished to finish her shift on time. Miss Tarling was concerned that the claimant appeared to be placing more weight upon the need to finish on time and not claim overtime rather than complete the patient records. Miss Tarling therefore decided to escalate the matter to her then manager Yvonne McGrath.

76. The claimant accepted that she would sometimes stay late in order to complete notes. However, she denied that she was doing anything other than completing the discharge notes and therefore there was no risk of confusing patient information. Miss Tarling said that in that case it was difficult to understand why the claimant was having to leave so late as it would not take long to complete the discharge information.

77. The picture upon this is made a little more complex by the fact that when the night shift takes over then ANAU and triage merge. There is therefore

a need for handover from two departments to one with the consequence that if working upon the department second to handover there would be a significant delay in leaving.

78. The claimant said that there were only three occasions upon which she had stayed for approximately three hours late in the four months preceding the complaint raised in mid-December 2017. These were upon 1 September 2017, 16 November 2017 and 30 November 2017. The respondent accepted the claimant's explanation for staying late on the latter day. We have already considered 1 September 2017 and the reason for her staying late on that occasion. That therefore only leaves 16 November 2017.

79. The grievance outcome letter dated 29 March 2018 (at pages 499 to 504) in answer to the claimant's grievance dated 19 January 2018 says that the first respondent's records evidence her working between one and three hours late upon 10 occasions between January and December 2017 and 21 late finishes out of a total of 43 shifts worked altogether. This account in fact tells us little and we accept the claimant's account that many of the late finishes were attributable to the handover system in operation when the departments merge for the nightshift. Also, we accept the claimant's explanation for the late finish on 1 September 2017 and on 30 November 2017 leaving only one where she had stayed approximately three hours late (that being on 16 November 2017). Of the other seven occasions, we do not know how long the claimant worked overtime. If all or the majority of those seven occasions involved overtime of a little over an hour only this may largely be explained by the handover system.

80. The claimant took issue with Hannah Tarling's account that the band 6 midwife on duty on the late shift on 12 December 2017 was experienced. She contended that she was a newly qualified band 6. We understood the claimant to be contending, therefore, that she harboured unreasonable concerns about the claimant's conduct that evening by reason of her inexperience.

81. Upon this issue we prefer the evidence of Miss Tarling. Miss Tarling was able to name the band 6 nurse in question. When she did so the claimant did not take issue with the accuracy of Miss Tarling's recollection.

82. Miss Tarling escalated the matter. She emailed Bianca Mohamed of the first respondent on 14 December 2017 (page 411). She did so after discussing the matter with Ms McGrath and after canvassing the views of Sharon Dickinson. Ms McGrath emailed Victoria Webdale of the first respondent on 20 December 2017 (pages 407 and 408) to confirm that the lack of documentation was a patient safety issue and it was therefore reasonable to restrict the claimant from working within the respondent as a registered midwife. Yvonne McGrath said that this was an interim decision.

83. When emailing Bianca Mohamed, Miss Tarling had also raised issue about training. In the email of 14 December 2017, she said that the claimant had asked the respondent to pay for mandatory study. The respondent will not pay for mandatory training for agency staff. Bianca Mohamed said that it is not the first respondent's practice to pay for training either and that it is left to the individual agency worker to organise their own training. The

claimant complained that there was an inconsistent practice as some agency workers had their training paid for whereas others did not. Miss Tarling confirmed the position on 15 December 2017 (page 414).

84. Miss Tarling's detailed complaint about the claimant is at pages 421 and 422. This was sent to the first respondent on 18 December 2017. It was copied to the claimant on 8 January 2018.

85. The claimant was restricted from working altogether for the respondent until 9 January 2017. As we have said, she continues to be restricted in that she is not allowed to work in ANAU or triage. With effect from 9 January 2017 she may however work elsewhere within the respondent (including M2).

86. The claimant complains, with some justification, that she did not know the reason why she had been restricted from working until 8 January 2019. That was the first time upon which the claimant was notified by the respondent of the respondent's concerns.

87. The decision to restrict the claimant was taken by Yvonne McGrath. Although Miss Dickinson did not make the decision it is apparent from her witness statement she was supportive of it.

88. Miss Tarling confirmed that she had reported matters to the first respondent and to others within the respondent but did not at any stage canvass the claimant's views about the events of 12 and 13 December 2017. Under questioning from the Employment Judge Miss Dickinson confirmed that ultimately it was a matter for the first respondent albeit that she had said to Miss Tarling that she (Miss Tarling) may have to consider whether it was safe for the claimant to work for the respondent. The Tribunal did not have the benefit of hearing evidence from Yvonne McGrath who has now left the employ of the respondent. The Tribunal was not told of any efforts made to contact her in order to obtain evidence from her.

89. Having made our findings of fact we now move on to a consideration of the relevant law. We shall start with the complaints brought under the 2010 Act.

90. The relevant prohibited conduct for our purposes is the alleged failure by the respondent to comply with the duty upon it to make reasonable adjustments and indirect discrimination. This prohibited conduct is made unlawful in the workplace. In the case of the failure to make reasonable adjustments, section 39(5) of the 2010 Act renders such conduct unlawful in the context of employment. In relation to the complaint of indirect age discrimination, the relevant provision is section 39(2).

91. The complaint of a failure to make reasonable adjustments is of course relevant to the protected characteristic of the claimant's disability. The complaint of indirect discrimination is relevant to the protected characteristic of the claimant's age.

92. In considering a claim that an employer has discriminated against an employee by a failure to comply with the duty to make reasonable adjustments, the Tribunal must firstly identify a provision, criterion or practice applied by or on behalf of the employer, the identity of non-

disabled comparators and the nature and extent of the substantial disadvantage suffered by the employee. This then enables the Tribunal to judge whether any proposed adjustments are reasonable to prevent the provision, criterion or practice in question from placing the disabled person at a substantial disadvantage in comparison to non-disabled comparators.

93. The claimant must establish that the duty of reasonable adjustments has arisen and that there are facts from which it reasonably could be inferred, absent and explanation, that it has been breached. There must be some evidence of apparently reasonable adjustments that could be made with a prospect of alleviating the substantial disadvantage.

94. The duty to make adjustments only arises in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The test of reasonableness in this context is an objective one and it is ultimately the Tribunal's view of what is reasonable that matters. Example of matters that a Tribunal might take into account are listed at paragraph 6.28 of the Equality and Human Rights Commission's Employment Code. It is unlikely to be reasonable for an employer to have to make an adjustment that involves little benefit to the disabled person. The focus of the Tribunal must be on whether the adjustment may be effective by removing or reducing the disadvantage that the employee is experiencing at work as a result of his or her disability and not whether it would advantage the employee generally.

95. An employer is under no duty to make reasonable adjustments unless he knows or unless he ought reasonably to know that both that the employee is disabled and that the employee is disadvantaged by the disability by reason of the application to him or her of the relevant provision, criterion or practice. The question therefore is what objectively the employer could reasonably have known following reasonable enquiry. There is however no remit for a requirement for employers to make every possible enquiry where there is little or no basis for doing so.

96. In summary therefore, the Tribunal must identify the nature of the substantial disadvantage suffered by the employee by reason of the application to him or her of the relevant provision criterion or practice and identify steps which could have reasonably been taken by the employer in order to prevent the disadvantage. The onus is upon the employee and not the employer to identify in broad terms the nature of the adjustment that would ameliorate the disadvantage. Should the claimant do so then the burden will shift to the employer to seek to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make. There need not be a good or real prospective of an adjustment removing a disadvantage for the adjustment to be a reasonable one. It is sufficient for a Tribunal to find that there would have been a prospect of it being alleviated.

97. Upon the reasonable adjustments claim, there is an issue as to whether or not the claimant has presented her claim within the time limit provided for by section 123 of the 2010 Act. This provides that proceedings may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or within such other period

as the Tribunal thinks just and equitable. The limitation issue in this case arises only in connection with the complaint of disability discrimination which concerns a one-off act which occurred on 1 September 2017.

98. If the claim has been presented out of time then the Tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. The Tribunal is entitled to consider anything that it considers relevant. However, time limits are exercised strictly in employment cases. There is no presumption that time should be extended on just and equitable grounds. It is for the claimant to persuade the Tribunal that it is just and equitable to extend time. A good reason needs to be shown. The exercise of discretion is thus the exception rather than the rule.

99. In exercising our discretion we may have regard to the check list contained in section 33 of the Limitation Act 1980. This governs the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all of the circumstances of the case. In particular the following shall be taken into account: the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has corporated with any request for information, the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by him or her to obtain appropriate advice once he or she knew of the possibility of taking action. The relevance of some of these factors depends upon the individual case and Tribunals do not need to consider all of the factors in each and every case.

100. We now turn to the complaint of indirect age discrimination. Again, it is for the claimant to show a *prima facie* case that the respondent applied to her a provision criterion or practice that was indirectly discriminatory upon the grounds of her age.

101. The Tribunal must firstly identify a relevant provision criterion or practice. It must then be shown that that provision criterion or practice puts or would put people with whom the claimant shares the characteristic in question (in this case age) at a particular disadvantage when compared with persons with whom the claimant does not share it. In other words, in this case, the claimant must show that the relevant provision criterion or practice disadvantaged people of her age or age group in comparison with those of a different age or age group. The claimant must then show that she herself was put at that disadvantage.

102. Should the Tribunal be satisfied that the claimant has demonstrated indirect discrimination it is open to the respondent to seek to justify that treatment. The burden is upon the respondent to show justification, that is to say, that the treatment of the claimant is a proportionate means of achieving a legitimate aim. To be proportionate, the measure in question has to be an appropriate means of achieving the aim and reasonably necessary in order to do so. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. This is an objective test. The test is not that which a reasonable employer might think is a proportionate means of achieving the legitimate aim. The

Tribunal has to weigh the real needs of the undertaking against the discriminatory effects of the requirement upon the employee.

103. We now turn to the detriment claim brought under the 1996 Act. By section 47B of the 1996 Act employees and workers (and it is not in dispute that the claimant has worker status) are protected from being subjected to any detriment by any act or deliberate failure to act by his or her employer on the grounds that he or she has made a qualifying protected disclosure.

104. It is for the claimant to satisfy the Tribunal that there has been a disclosure of information which is a qualifying disclosure. This means that she must show that she had a reasonable belief which tended to show one or more of the six relevant failures in section 43B of the 1996 Act and that it was in the public interest for her to make the disclosure. Two of the six relevant failures are pertinent in this case. These are: that a person (the respondent) has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and that the health or safety of any individual has been, is being or is likely to be endangered.

105. As Mr Boyd says in his submissions, the test of reasonable belief is in essence a subjective one although there is an objective element to it. The focus must be upon what the worker in question believed rather than what anyone else believed. However, there has to be some basis for the worker's belief. Rumours, unfounded suspicions, uncorroborated allegations and the like will not be sufficient. A belief may be reasonably held and yet be wrong.

106. Detriment in this context means something that a reasonable person would consider to be to their disadvantage. Mr Boyd pragmatically did not take issue with the claimant's suggestion that being barred altogether from working for the respondent and then being restricted from working upon ANAU and triage may reasonably be considered to be a detriment.

107. If the claimant establishes that there was a protected disclosure, that there was a detriment and that the respondent subjected her to the detriment then the burden will shift to the respondent to prove that she was not subjected to the detriment upon the grounds that she made the protected disclosure.

108. The Tribunal needs to be satisfied that the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the employee or worker. The fact of the whistle blowing therefore need not be the principal reason for the treatment provided that it has a material influence upon it.

109. An employer may be liable for a detriment claim in circumstances where a decision maker has in good faith acted upon wrong or impugned information provided by another employee of his. This is because the employer is vicariously liable for the acts of his employees. Thus, the employer will have a vicarious liability for the acts of the actual wrongdoer who has fed incorrect or impugned information to an innocent decision maker. We observe in passing that this contrasts with the position in an unfair dismissal claim where the focus is upon the state of mind of the decision maker deputed by the employer to carry out the employer's functions. Thus, if the decision maker who decides to dismiss the

employee acts in good faith upon what he or she was told by an informant then generally such will not found the basis of a claim against the employer for the dismissal.

110. We now turn to our conclusions where we shall apply the relevant law to the facts as we have found in order to determine the issues of which we are seised. As has been said, the issues are we hope conveniently set out in the case management summary in the bundle commencing at page 51.

111. We shall start with the public interest disclosure claims. We find that the claimant made qualifying disclosures to the respondent about concerns over the K2 computer system and the shortage of experienced midwives. We refer to our findings of fact at paragraphs 30 to 45 above.

112. We find that the claimant entertained a reasonable belief as to the factual basis of her concerns and that it was in the public interest to make disclosures about them. Plainly, if the K2 computer system is unsafe to use then this may prejudice patient safety as would the engagement of insufficiently experienced staff members. It is not necessary for us to find the claimant to be factually correct in her beliefs. It is enough for us to find that she had a reasonable belief in the information provided and a reasonable belief that it was in the public interest to make the disclosure of the information.

113. At the case management preliminary hearing held in September 2018, the respondent's solicitor fairly accepted that both of the claimant's concerns had the potential to be qualifying disclosures. Mr Boyd did not seek to depart from that position (but without making any formal concessions that the claimant had in fact made protected disclosures).

114. There is no dispute of course that the claimant was subjected to detriment at the behest of the respondent by the restrictions upon her work activities. In our judgment therefore, she has established that she made disclosures qualifying for protection, that she was subjected to detriment and that the detriment was at the behest of the respondent. It follows therefore that the burden is upon the respondent to satisfy the Tribunal that the claimant was not subjected to the detriment upon the grounds that she made the protected disclosures. The respondent must demonstrate that the fact of her making the protected disclosures did not materially influence the respondent's treatment of her.

115. Upon the crucial issue of causation we prefer the respondent's case. We find that the detriments were caused by the genuinely held concerns upon the part of the respondent about the claimant's conduct (in particular her record keeping) and were not influenced by her having made protected disclosures.

116. It is perhaps unfortunate that the decision maker did not attend the hearing. Had Miss McGrath attended, then plainly her evidence could have been tested as to the reason why she acted as she did in restricting the claimant's work for the respondent. Against that however there is simply no evidence that Yvonne McGrath knew of the fact of the disclosures. The claimant did not suggest that Yvonne McGrath was aware of them in her email at page 69 (or indeed in her evidence).

117. We have found as a fact (at paragraph 45) that Hannah Tarling, Sharon Dickinson, Joanne Hadley and Andrea Harrison all knew of the disclosures. There is no evidence that Joanne Hadley and Andrea Harrison discussed those matters with Yvonne McGrath (or, for that matter, Sharon Dickinson and Hannah Tarling). There is of course evidence that Hannah Tarling and Sharon Dickinson did discuss the claimant's revalidation exercise between them and that both of them were in communication with Yvonne McGrath in December 2017. There is however no evidence that Miss Tarling or Miss Dickinson raised the fact of the claimant making qualifying disclosures with Yvonne McGrath. The contemporaneous emails around page 408 make no reference to the protected disclosures. Joanne Hadley took no action upon the email at page 70 and did not share it with anybody.

118. We accept that Miss Tarling was not the decision maker. That said, the respondent would have had a vicarious liability for her actions had she sought to influence Yvonne McGrath by the fact of the claimant making protected disclosures. However, the fact of the matter is that upon the evidence we find that she did not do so.

119. We also find it inherently unlikely and against the probabilities that the respondent would seek to subject the claimant to detriment because of the qualifying disclosures.

120. It is well known amongst the general public that there is a shortage of qualified and experienced midwives. It would therefore hardly have come as a revelation to the respondent when the claimant raised her well-founded concerns about this with Miss Tarling and Mrs Harrison. The acute shortage of midwives is so well-known as to make it, in our judgment, highly improbable that the respondent would seek to retaliate against the claimant for raising something so well known.

121. As far as the K2 computer system is concerned, we have already commented (at paragraphs 27 and 28) upon the open culture operated by the respondent. The respondent was receptive to constructive criticism of the system and acknowledged that there were bound to be flaws with it in the course of implementation. The respondent went so far as to operate a suggestion sheet system. It would be at odds with that culture of openness to then retaliate against an employee raising well-founded concerns.

122. Further, the respondent has not blocked the claimant entirely from working for the respondent. The claimant has been permitted to work in M2. Miss Tarling explained the reason for this. This is a less frenetic area as it operates to planned medical appointments. This affords the claimant more time to complete her notes and records. That the respondent was prepared to allow the claimant to return to work after a very short period of time (albeit not in ANAU and triage) is at odds with an employer set upon subjecting an employee to detriment for having raised qualifying disclosures.

123. Furthermore, there is good evidence that the respondent held genuine and well-founded concerns about the claimant's note keeping. It was not of course in dispute that accurate and proper note keeping is of critical importance. The claimant fairly acknowledged that she was pursuing a

practice viewed with disfavour by the respondent of only making a note where there was something abnormal to be observed. As was said by Mrs Harrison, it is the respondent's managerial prerogative to require more of its employees and workers than this. The SBAR system eloquently described by Miss Tarling was one which the respondent, acting within the reasonable range of managerial prerogative, was entitled to institute. It was therefore reasonably entitled to expect the claimant to follow it and she was not doing so.

124. We are not entirely satisfied that Miss Tarling was carrying out spot checks as she alleges. It is surprising that if she was undertaking them she did not make a record of them consistent with her practice of recording important conversations with members of staff. Nonetheless, we are satisfied from the evidence that we have heard that she had good cause to speak to the claimant on several occasions (in particular on 4 August 2017 and 13 December 2017) about her record keeping. Given the crucial importance of accurate record keeping (which the claimant fairly acknowledged to be the case) we are satisfied that the cause of Hannah Tarling's actions and the subsequent chain of events leading to the restrictions upon the claimant's work for the respondent was by reason of patient safety concerns attributable to the claimant's note keeping and not because of the qualifying disclosures.

125. The Tribunal has a great deal of sympathy with the claimant. On any view, one-and-a-half to two hours of training upon such a complex system seems inadequate. There was no evidence from the respondent to gain-say the claimant's account that this was the extent of the training that she had received upon the system. We accept Joanne Hadley's account about the help available to members of staff who may be having difficulties. She described in some detail the availability of help from 'superusers', helplines, training sessions and the like. However, the respondent did not produce a training record to show what training the claimant had and we therefore accept what the claimant said about it. The situation appears to be aggravated by the lack of funding available to pay for the training of bank staff. This sympathy notwithstanding however we are satisfied that the respondent has discharged the burden upon it to show that the reason why the claimant was treated as she was is because of concerns about record keeping and the knock-on effect of that upon patient safety.

126. We now turn to the disability discrimination claim. We are satisfied that the respondent's defence of lack of knowledge of the claimant's disability and the impact of it upon her fails. There was ample contemporaneous evidence acknowledging the claimant's health conditions. We have commented already (at paragraphs 16 and 17) upon the letters and emails at pages 379 and 382 which, while not expressly mentioning the claimant's health was in response to a letter from her which contained an unchallenged assertion that she was resigning for health reasons. The claimant referred to her arthritic condition in her emails to Ms Dickinson at pages 383 and 384 (paragraph 18). Further, Hannah Tarling's reply to the grievance (at page 483 cited at paragraph 52) contains a very clear and candid acknowledgement of the claimant's condition.

127. As we have already said, it cannot sensibly be suggested that the respondent would be unaware of the difficulties caused by an individual

with the claimant's disability by reason of the absence of a support worker. In our judgment, there is sufficient material from which we can draw a conclusion that the respondent knew both of the disability and that the disability would disadvantage the claimant in working in ANAU without the assistance of a support worker in comparison with a non-disabled midwife.

128. In our judgment, it is plain that a non-disabled midwife would be better able to walk around and attend to the necessary tasks than would an individual with arthritis in both knees. Plainly, the respondent supplies a support worker to assist a midwife on ANAU because it is necessary to help with such tasks as described by Hannah Tarling at paragraph 60. The respondent would not do so otherwise. Self-evidently, the absence of a support worker would create a difficulty for a non-disabled midwife, all the more so for a disabled midwife who would thus be placed at a substantial disadvantage.

129. The application by the respondent of the requirement for the claimant to work on ANAU without a support worker on 1 September 2017 thus clearly created a disadvantage for the claimant that was more than minor or trivial. Therefore, the disadvantage was substantial. The respondent knew (or at the very least ought to have known) of the disadvantage and the duty to make reasonable adjustments therefore was engaged.

130. The question that arises therefore is whether the adjustment contended for by the claimant for the provision of a support worker is one that is reasonable. The factors to be taken into account in assessing reasonableness (at section 6.28 of the EHRC Employment Code) include the extent to which the taking of the step would prevent the effect in relation to which the duty was imposed, the practicability of such step and the cost that would be incurred in taking the step and the extent to which it would disrupt any of its activities.

131. We accept that the provision of a support worker would have a reasonable prospect of alleviating the substantial disadvantage caused to the claimant that day. Indeed, that is self-evident as it is the whole purpose of support worker provision. We also accept that the cost (taking into account the resources of the respondent) is not significant.

132. The difficulty for the claimant centres upon the practicability of the taking of the step and the disruption of the respondent's activities on the day in question. While Hannah Tarling's account as to the reason why there was no support worker that day was one that was not accepted by the Tribunal (see paragraph 55), the fact of the matter is that the respondent only had one support worker available to cover five midwives. Consideration appears to have been given to switching that support worker to ANAU that day. That is however a matter of clinical judgment. The decision appears to have been taken that the support worker was best deployed in other areas that day. Moving the support worker to ANAU would have left the midwives in the other areas without support which may have disrupted the respondent's activities in the sense of jeopardising patient care.

133. This is an objective test. It is therefore open to the Tribunal to substitute its view as to what was reasonable for that of the employer. Where we can accept Hannah Tarling's evidence is upon her observation that the provision of a support worker cannot be guaranteed and one is not always

available (albeit that provision will be made where possible). Objectively, it must be a decision for the respondent as to how to best deploy its staff for the benefit of patients. We remind ourselves that this is a high-pressure environment looking after extremely vulnerable patients. It seems to us to go beyond what is objectively reasonable for the Tribunal to be able to say that objectively a support worker must always be provided to the claimant when she works upon ANAU as a reasonable adjustment. Therefore, although a finely balanced decision, we conclude that the reasonable adjustments claim must fail on the merits.

134. That said, the claimant faces a further fundamental hurdle centring upon the jurisdiction of the Tribunal to entertain the reasonable adjustments claim at all. The Tribunal only has jurisdiction to entertain the claim if it is brought in time or the Tribunal considers it just and equitable to extend time to enable it to be considered. As we have said, the reasonable adjustments claim centres upon a one-off act which occurred on 1 September 2017. The claimant therefore needed to enter mandatory early conciliation on or before 30 November 2017 to ensure that her claim was in time. As we said earlier at paragraph 2, she did not do so until 16 February 2018. The claim is therefore out of time.

135. The claimant agreed, when it was put to her by Mr Boyd, that the only reason that she raised the events of 1 September 2017 in her grievance was because of the subsequent actions of the respondent in December 2017 and January 2018. Mr Boyd's observation that this was *'tit for tat'* is therefore well made.

136. The claimant would not of course have known that Hannah Tarling was going to speak to her about her note keeping on 12 December 2017. By that date the time within which to bring the disability discrimination complaint had expired. Raising it as a *tit for tat* response to a legitimate complaint upon the part of the respondent cannot constitute a good reason for an extension of time.

137. Time limits within the Employment Tribunal generally are to be strictly enforced. There is no presumption that time will be extended. The claimant did not advance any good reason for bringing the disability discrimination complaint late. It is for her to satisfy the Tribunal as to why a just and equitable extension should be granted. She has not done so and therefore in the circumstances the Tribunal does not have jurisdiction to consider the complaint which fails upon its merits in any event.

138. We now turn to the age discrimination complaint. The relevant provision criterion or practice is the requirement of the respondent imposed upon the claimant to operate the K2 computer system. The claimant's case is that this puts people of her age or age group at a particular disadvantage in comparison to people of a younger age or age group as the former are less proficient with computers than the latter

139. The claimant's witnesses all confessed to having had difficulties in operating the computer. Mrs Ryan said that she often had to stay late in order to complete her notes. Mrs Goss said that she perceived that younger nurses are twice as fast as she is in typing in the free text. Mrs Bell said that while younger staff members have to stay behind to complete their notes she has to stay behind even longer.

140. Furthermore, the claimant made a commendable effort to obtain evidence from a sample group of people of different ages about computer proficiency. The survey is in the bundle starting at page 525.

141. Based upon the claimant's survey and the evidence that we heard from the claimant's witnesses we are satisfied that those of the claimant's age or age group are less proficient upon computers generally than those of a younger age or age group. This is in relation to both the speed of typing and the ability to navigate around a complex computer system.

142. The disadvantage of which the claimant complained in connection with the K2 computer system was that it took her longer to input information because she cannot type quickly enough. The disadvantage therefore was in relation to the speed of typing as opposed to the design of the K2 system. In submissions, the claimant sought to row back from that position complaining that it was about both functionality in navigating around the computer system and her speed of typing.

143. This is an important distinction in the context of the case because at no stage did Hannah Tarling take action against the claimant because of her speed of typing. Miss Tarling's concerns were about the brevity of the information upon the system and the fact that the claimant was staying late in order to do her note taking. Upon this basis therefore, the age discrimination claim must fail because the particular disadvantage to which the claimant was individually subjected was in reality nothing to do with the computer use at all but rather to do with the claimant's practice of sparse note taking.

144. If we are wrong upon that then we would still hold that the indirect age discrimination claim fails anyway. Upon this, we proceed giving the claimant the benefit of the doubt that not only did the relevant provision criterion or practice of the requirement to use the K2 computer system put people of her age or age group at a substantial disadvantage by a reason of that requirement because of their slow typing speed and inability to navigate around the system but that she also was put to that disadvantage. Upon the premise that the claimant is able to establish such a case (and without finding or determining that she has done so) we would hold that the respondent is able to justify the application of such a requirement as a proportionate means of achieving a legitimate aim.

145. The claimant fairly and realistically did not dispute that the acquisition by the respondent of the K2 computer system was in pursuit of a legitimate aim. The legitimate aim was as described by Joanne Hadley in paragraph 2 of her witness statement which we have cited above at paragraph 24. In our judgment, it is objectively proportionate in pursuit of that aim to ensure that staff are required to operate the computer system safely and to restrict members of staff from working only in areas compatible with the need to record information upon the computer. Therefore, in pursuit of the aim of meeting national record keeping and reporting requirements staff must be deployed to medical areas where they are able to both perform and discharge their clinical duties and attend to their record keeping. It is therefore proportionate to avoid staff working in areas where they cannot safely do both.

146. That being the case, it was proportionate for the respondent to effectively bar the claimant from working in ANAU and triage. This was because, upon the evidence, the respondent was justified in taking the view that while the claimant was of course clinically most able to work in those areas (and there was never any suggestion otherwise) she was unable also to fulfil the requirement of accurate note keeping in accordance with the SBAR principles and the respondent's policies. However, the respondent did not impose a blanket restriction upon the claimant (which would have been disproportionate) but was prepared to allow the claimant to work in areas where she could fulfil both her clinical and record keeping duties. The blanket bar was for a very limited period pending the respondent finding a solution in conjunction with the first respondent and was also proportionate.

147. There has to be a balance struck between the needs of the respondent and the impact of those needs upon the claimant. The respondent's requirement for the claimant to satisfactorily operate the K2 computer system was in pursuit of a real and objective need upon the part of the respondent as part of a national strategy. The imposition of that requirement upon the claimant resulted in her being unable to work in ANAU and triage. That of course is a significant impact upon her but is in our judgment proportionate in that she is still able to work nonetheless within the respondent in M2. This balances the need of the respondent to implement the agenda referred to by Mrs Handley while not disproportionately impacting upon the claimant by refusing her permission to work altogether for the respondent.

148. We therefore conclude that all of the claimant's claims fail and stand dismissed. We shall however conclude with an observation. It is of course for the respondent how best to manage the resources available to it. However, we heard much about the shortage of qualified and experienced midwives. There was no suggestion the claimant is anything other than a

highly competent medical practitioner. At a time of such an acute shortage the Tribunal is of the hope that the parties may find a mutual acceptable way forward in order that the respondent may best utilise the skills of the claimant who plainly has much to offer and in order that the claimant may deploy her skills for the benefit of the respondent's patients and their babies as she has done for many years.

Employment Judge Brain

Date 19 MARCH 2019