EMPLOYMENT TRIBUNALS

Claimant: **Miss S Abbott**

Respondent: **B Braun Medical Limited**

HELD AT: **Sheffield** **ON: 1 & 2 April 2019**

BEFORE: Employment Judge Little

REPRESENTATION:

Claimant: **Miss L Abbott (Claimant's sister)**
Respondent: **Mr M Warren-Jones, Solicitor (EEF)**

JUDGMENT having been sent to the parties on 24 April 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These reasons are given at the request of the respondent's representative. The request was made at the conclusion of the hearing.

2. **The complaint**

   In a claim form presented on 16 November 2018 Miss Abbott complained that she had been unfairly constructively dismissed by the respondent. I have treated the complaint as one brought under general unfair dismissal principles and also under the provisions of the Employment Rights Act 1996 section 103A which renders a dismissal automatically unfair if the reason or principal reason for the dismissal was that the employee made a protected disclosure. The claimant has not received any legal advice about her claim and the case had not benefited from a preliminary hearing for case management.

At the beginning of this hearing I noted that there appeared to be a public interest disclosure element. Mr Warren-Jones for the respondent disputed this. He said that the claimant had not pleaded such a case. It is correct that the claimant has not in terms indicated that she made a qualifying protected disclosure, or that she was bringing a complaint under the provisions of section 103A. However it is abundantly clear from the particulars of her complaint that she was alleging that she had raised concerns with her line manager about what she believed was a reduction in the standards of the clean room which the claimant thought could have serious consequences for the products which the respondent made. The claimant also made reference to her belief that she was being encouraged to lower her standards and to turn a blind eye to standard operating procedures (SOPs) not being followed. Further the claimant's resignation letter included the following:

"*I have repeatedly raised concerns regarding patient safety to the management about procedures not being followed. Whilst I have been assured at the time of those conversations that something will be done about it, nothing has changed in more than 12 months. I cannot have the death of someone on my conscience just because managers are too busy/scared/worried about upsetting their friends to properly manage the people in the unit".*

The respondent subsequently treated the resignation letter as both a grievance and as the claimant whistle-blowing. There was a discrete investigation and hearing in respect of the whistle-blowing aspect of the matter, albeit that that was conducted post the claimant's resignation.

In these circumstances I considered that it was abundantly clear that the claimant was contending that a substantial reason for her resigning (or being constructively dismissed) was that concerns she had raised had fallen on deaf ears. Moreover, it was clear that the respondent knew that to be the case.

3. **The issues**

These were agreed at the beginning of the hearing to be as follows:-

3.1. Did the respondent commit a fundamental breach of the contract of employment?

3.2. In particular, was there a breach of the implied term of trust and confidence because of what, for present purposes can be summarised as:-

- The 'Hannah Lowe issue'.
- The 'Callum Wilson issue'.
- Failure to support the claimant when she was bullied whilst attempting to maintain and enforce standards.
- Because numerous concerns which the claimant had allegedly notified to management about non-compliance with SOPs were ignored.

3.3. Did the claimant make one or more qualifying protected disclosures?

3.4. If there was one or more fundamental breaches of contract, did the claimant affirm (forgive) any such breach prior to the date of resignation?

(Mr Warren-Jones confirmed at the beginning of the hearing that the respondent only pursued an affirmation argument with regard to the Hannah Lowe incident in 2017).

3.5. Was the claimant's resignation in response to any fundamental breach which had occurred. It was confirmed that the respondent did not contend that the claimant had resigned for any other reason than that which she contended to be the breach of contract.

3.6. If the claimant was constructively dismissed, was that a fair dismissal?

(At the beginning of the hearing I asked Mr Warren-Jones whether the respondent contended that any dismissal that might be found was fair. I noted that paragraph 22 of the grounds of resistance provided that if a dismissal was found "it is averred that the respondent acted reasonably in all the circumstances and that consequently the dismissal was fair". However the grounds of resistance did not indicate what the potentially fair reason for dismissal might be. Mr Warren-Jones was able to confirm that the respondent's defence to these proceedings was limited to there being no dismissal and there was no alternative case being pursued.

4. **The evidence**

The claimant has given evidence and I have also heard evidence from Mrs Linda Abbott who, at the material time was also employed by the respondent. She was employed as a production manager in the CAPS unit. She is also the claimant's mother. The respondent's evidence has been given by Mr J Wilson, production shift supervisor in the CAPS unit and by Mr P Bradley, general manager.

5. **The documents**

I have had before me a bundle running to 120 pages. It transpired that some documents within that bundle had not been seen by the claimant until the hearing. The respondent maintained that they had been sent to the claimant in January 2019. Fortunately the two unseen documents in question were relatively brief and I have allowed time when it was required for the claimant or other witness to consider those documents. The claimant had also prepared an additional document bundle. Mr Warren-Jones objected to that bundle on the grounds of relevance. It transpired that it exclusively contained documents which related to a claim in the Employment Tribunal which I was told Mrs Linda Abbott was now bringing, she having been dismissed in the meantime. I expressed the view that I thought that it was unlikely that any of this additional documentation was likely to be relevant to the claimant's case. Not least because most of it seemed to have come into being after the date the claimant resigned. However I said that I would keep an open mind and if it transpired that there were documents in there that I needed to look at I would. In the event I have not looked at any documents in that additional bundle.

6. **The facts**

6.1. The claimant's employment commenced on 4 November 2013 and at that point her job title was production technician. Subsequently the claimant was promoted to be production team leader.

6.2. The respondent company's business is the supply of medical products and the unit within which the claimant worked was known as the CAPS unit. That supplied aseptically produced pharmaceuticals to the NHS.

6.3. The claimant's mother, Linda Abbott, had been employed by the respondent since 2009. When the claimant's employment began her mother's role was as production manager in the CAPS unit. At the material time the claimant's line manager was Jamie Wilson. Mr Wilson reported to Mrs Linda Abbott. Mrs Linda Abbott reported to Mr Bradley the general manager. Because mother and daughter worked within the same unit ground rules were established at the beginning of the claimant's employment that there would, as far as possible, be separation so that Mrs Abbott did not have a management role in respect of her daughter.

6.4. In or about June 2017 an employee named Hannah Lowe left the respondent's employment. Apparently Ms Lowe made a complaint about the claimant during the course of her exit interview. I have not been provided with very much information about this matter and in fact no documentation. Accordingly I have not seen the exit interview notes, nor any notes of the subsequent investigation which included an investigation meeting with the claimant's herself on an unknown date in July 2017. It appears that the complaint was that the claimant had been calling Ms Lowe names behind her back, or perhaps had invented a nickname for her. For the reasons explained above I do not know the details.

6.5. The claimant was not informed whether the investigation was being undertaken on a formal or informal basis. In fact she says that she only learnt that it was a formal investigation when the respondent's witness statements for these proceedings were served on her. The claimant was not suspended and in the event the respondent concluded that there was no case to answer and so no disciplinary proceedings were taken against the claimant or, as far as I am aware, anybody else. The claimant was simply told that no action was to be taken. It was not confirmed in writing. The claimant's case is that Ms Lowe was encouraged to make this complaint by various employees within the claimant's team and their motivation for doing this was dislike for the claimant because she sought to enforce the respondent's rigorous safety procedures and standard operating procedures. I have not been shown any of these procedures.

6.6. On learning that no action was to be taken against her, the claimant and a colleague approached Mr Bradley complaining that they felt they had not had "closure" and that they felt uncomfortable going back to work because people's attitudes had changed towards them because of these allegations. The claimant's case is that she asked Mr Bradley to make an announcement at the next training session that no further action was being taken so that the claimant and her colleagues' names could be cleared. She says that Mr Bradley agreed to do this but in the event there was no announcement.

6.7. On 26 January 2018 the claimant had her annual appraisal or 'Acorn review' as the respondent calls it. A copy of this document is at pages 29 to 33(3) in the bundle. The claimant contends that during the course

of this review meeting she raised issues about standards within the clean room. The claimant also alleges that part of the document which appears on page 32 of the bundle – "Feedback for your manager for Sarah Abbott" has not been expressed in her words. That part of the document includes the following:

"*I do feel that if any issues arise I am able to come and discuss this with you and seek out the best possible outcome when required, I also feel we have regular updates".*

In fact the claimant contends that these comments, not being her own, were added by somebody else and she suspects that that somebody else was Mr Jamie Wilson. The claimant believed that he would have the facility to do this because, ostensibly for another reason, he had obtained the claimant's password which would have given him access to this document. The respondent points out that the dates of sign off and the times of sign off on pages 33(2) and 33(3) indicate that this could not be the case. In any event Mr Wilson denies that he added anything which purported to be from the claimant.

6.8. On 22 February 2018 the claimant had an encounter with one of her team, Mr Callum Wilson (who is no relation to Mr Jamie Wilson). This resulted from the claimant advising Mr Wilson that the cabinet he was using was too full and Mr Callum Wilson responded in an aggressive way to that instruction or guidance. I have not heard from Mr Callum Wilson, but understand that his position was that the claimant had annoyed him by saying that she would only check something he had set up if he said please. Although it is not referred to in the claimant's witness statement, in her ET1 the claimant says that there was a further interaction with Mr Callum Wilson at around about this time when the claimant says that Mr Callum Wilson was extremely aggressive towards her and made threats towards one of the claimant's colleagues Sarah Nixon on the issue of the enforcement of standards.

6.9. I have been given little information as to how these incidents were investigated, but the upshot was that it was agreed that at least in the short term the claimant would be relieved of supervisory duties for Mr Callum Wilson and indeed that they should not work in the same room at the same time.

6.10. Accordingly the claimant was then concerned on 23 February 2018 when she saw that the rota for her next day in work, 26 February, would involve her working with Mr Callum Wilson. The claimant discussed this matter with Mr Bradley before leaving work on 23 February 2018 and was told that she would not in fact be required to work with Mr Callum Wilson and it looked as though a mistake had been made. Nevertheless the claimant remained upset and worried over the intervening weekend. On 26 February 2018 Mr Jamie Wilson telephoned the claimant to explain that there had been an error and he had apologised for that. On page 34 in the bundle the claimant's mother sent a text to Mr Jamie Wilson on 27 February thanking him for ringing her daughter the previous day and saying that she had appreciated that.

6.11. At around this time the claimant was signed off work by her GP with a diagnosis of stress at work and depressive disorder. She was signed off for four weeks.

Towards the end of the that four week period the claimant requested a meeting with Mr Bradley and that took place in the café at the respondent's premises on 20 March 2018. Although it is not recorded in Mr Bradley's note (see below) he agrees that during the course of this meeting the claimant asked if she could relinquish her duties as team leader. The claimant's evidence is that Mr Bradley said that she could not do this.

6.12. Mr Bradley made a brief note for some of the matters discussed and a copy appears at page 35(c) in the bundle. This is one of the documents which the claimant says she had not seen until receipt of the bundle. The note records the following:

"*Concerned coming back to work, anxiety and worried about bringing things forward, not being listened to.*

Discussed that she would be supported. As a TL (team leader) bringing things forward is the right thing to do and I would support the right things. SA (the claimant) is good at this.

Expectation of TLs is to bring forward issues so keep doing.

Discussed if she was uncomfortable taking to LA (the claimant's mother) that ok to bring to me directly".

6.13. On 23 March 2018 a formal return to work meeting was conducted by Mr Jamie Wilson with the claimant and a record of that interview is at pages 37 to 38 in the bundle. At the end Mr Wilson has written the comment ("Discussed with Sarah that she has our full support and as long as she is on board with us to rectify any problems together".

6.14. The claimant returned to work on 26 March 2018. She had been allowed to change her working hours. She had explained to Mr Bradley that the reason for this request was so that would not have to go into the tearoom at work in the morning because when she went in that room people stopped talking. Nor did she want to go into the production office because Mr Jamie Wilson and others sat there gossiping about other employees. The claimant says that she felt very isolated at this time because people would not talk to her. Further some employees, she says, made derogatory comments about children who had the same type of disability which her children had. The claimant also complains that her name would often be removed from her locker. The claimant says that, contrary to what may have been written or said, the respondent failed to provide her support in these circumstances, or to take any action when the claimant made informal complaints to Mr Jamie Wilson.

6.15. On 2 July 2018 the claimant was concerned when she saw that a colleague, Liam Carr had busily set about cleaning his cabinet having heard over the tannoy that Mr Bradley was on his way to that room. The claimant felt that this typified the approach to standards that she was trying to confront.

6.16. On 6 July 2018 the claimant submitted her resignation letter. A copy of that appears at pages 40 to 41. It reads as follows:

"I'm writing to confirm my resignation from my role at B Braun as team leader within the CAPS unit. I say confirm as this can hardly come as a surprise given the events over the last 12 months, which I feel have made my position untenable to the point where I can no longer continue to work for the company.

I have repeatedly raised concerns regarding patient safety to the management about procedures not being followed. Whilst I have been assured at the time of those conversations that something will be done about it, nothing has changed in more than 12 months. I cannot have the death of someone on my conscience just because managers are too busy/scared/worried about upsetting their friends to properly manage the people in the unit.

A complaint was raised against myself and other team leaders last year (the Hannah Lowe issue) *because we did not accept poor standards of work. The company has failed to support the few people who were prepared to tackle poor performance and has instead targeted us. I did not feel supported at the time of this "investigation" and have received little or no support since, despite protestations that I would.*

As you are already aware, my mental health has been affected by the situation and it continues to get worse. My doctor has again increased the dosage of my medication as a direct result of things that have happened at work and the work related stress, which I have been absent with.

I understand that I am required to provide you with one months notice in accordance with my contract of employment, therefore my last day with the company will be 5 August 2018. Please let me know if there is anything further you require from me at this time".

In the event the claimant was unable to work the notice period due to ill health.

6.17. The respondent chose to treat the claimant's resignation letter as both a grievance and a whistle blowing notification. To that end there was what the respondent describes as a whistle blowing meeting on 13 July 2018 and that was conducted by Karen Jackson the chair and head of regulatory affairs for the respondent. A copy of the notes of that meeting are at pages 44 to 52. The claimant was asked whether she had reported her concerns to Jamie Wilson and the claimant said that she had. She was asked whether she had raised matters with Mr Bradley and said no it had just been Mr Wilson. She went on to say (page 48) -

6.18. "I felt like Paul really listened when I spoke to him in March (the 20 March 2018 meeting) but he hasn't spoke to me since. It is why I went on the evening shift to avoid the atmosphere".

6.19. The claimant contended that Mr Wilson had not been informing Linda Abbott (who because she was the production manager was named as licensee of the relevant product) and that Mr Wilson wanted to manage it all himself. She alleged that Mr Wilson was sitting on information and

not passing it on. The claimant said that if her mum knew what was going on she wouldn't be very happy. The claimant could not provide dates of when matters had been raised but confirmed that she had raised matters. At the foot of page 49 Ms Jackson was in a position to summarise the various matters which the claimant contended were not being done in breach of procedures.

6.20. There was then a separate meeting described as a grievance hearing, also conducted on 13 July 2018. That was also chaired by Ms Jackson. The notes of that appear at pages 70 to 79. During the course of this meeting Ms Jackson said that in the earlier interview about whistle blowing "we have put together a list of recommendations which will address these concerns. Things are not going to change overnight". Miss Scott who was the claimant's employee representative at the grievance hearing expressed the view that being at work was like being in a playground. The new people had no respect for the older people. If you pulled someone up for not doing the job right they did not speak to you. Ms Jackson also explained that she had written a report in respect of the whistle blowing matter which was being discussed with the management team and there were actions and recommendations in the report which would be shared with the claimant. Ms Jackson was confident that things would improve.

6.21. On 30 July 2018 Ms Jackson wrote to the claimant in a letter which had the heading "Whistle blowing outcome". (A copy appears at pages 82 to 84). Ms Jackson thanked the claimant for raising her concerns and providing the respondent with an opportunity to investigate the matter. She confirmed that a full investigation had been completed and recommended actions had been identified which would be actioned accordingly. The letter went on to set out nine recommended actions. The letter concluded by expressing the hope that the respondent could now bring closure to the concerns which the claimant had raised. The letter falls short of actually saying that the claimant's whistle blowing complaint has been upheld, but that is the clear implication.

6.22. At some point in the meantime the claimant had made contact with the Medicines and Healthcare Products Regulatory Authority (MHRA) on their whistle blowing helpline. The claimant told me that she had received no documentation from that agency about this matter and so could not recollect precisely when she had made contact.

6.23. The outcome of the claimant's grievance (other than in relation to the whistle blowing aspect) was also communicated to the claimant in a separate letter of 30 July 2018, again written by Ms Jackson. A copy appears at pages 85 to 88. The grievance was not upheld. In reference to the Hannah Lowe incident, Ms Jackson noted that the matter had been closed some time ago and she was confident that the way in which the investigation had been handled was felt to be the most appropriate approach at the time.

6.24. With regard to the allegation of failure to support the claimant, particularly after that investigation and after her return from work related stress absence, Ms Jackson noted that the claimant's January 2018 Acorn review had been really positive and that the claimant had been offered

details of the employee assistance helpline. There had also been the meeting with Mr Bradley on 20 March 2018.

6.25. The claimant lodged an appeal against the grievance outcome on 5 August 2018. Her email appears on pages 89 to 90. Within that email she wrote:

"*I have repeatedly spoken up about what has been going on in the CAPS unit and I have been ignored for over a year. The company has been fully aware of the issues and has not done anything to help with the situation. This has resulted in things getting worse and worse to the point where I feel that I am unable to continue working at the company. As I said in my grievance hearing, I am 37 years old with two children and I am still in shock that I have been bullied at the job I used to love".*

6.26. The grievance appeal hearing took place on 6 September 2018 and it was conducted by Mr Richard Wood, head of operations, from whom I have not heard. The minutes of that hearing are at pages 99 to 113.

6.27. The appeal was not upheld and the claimant was notified of this by Mr Wood's letter of 18 September 2018 (pages 114 to 115).

7. **The parties' submissions**

The claimant prepared a written submission and Mr Warren Jones made oral submissions.

8. **My conclusions**

8.1. Was there a fundamental breach in relation to the Hannah Lowe issue?

I find that the respondent was obliged to investigate the complaint raised by Ms Lowe in her exit interview. As noted above, I have not seen the documentation about that investigation. I have also found that there was a failure to inform the claimant whether the matter was being dealt with on a formal basis or informally. I conclude that it would have been better if this had been made clear to the claimant. Further it would have been preferable for the respondent to confirm at the end of it's investigation that no formal action was being taken by writing to the claimant to that effect, or as seems to have been agreed, but not put into effect, for some announcement to be made at the next training session. However viewed in isolation, despite these shortcomings, I would not have found that the state of affairs in relation to the Hannah Lowe issue to amount to a fundamental breach. Nevertheless the possible motivation of the employees who appear to have encouraged Ms Lowe to complain is a matter which I will return to.

8.2. Was there a fundamental breach in relation to the Callum Wilson rota issue?

On the balance of probability I accept Mr Jamie Wilson's evidence that the rota which wrongly paired the claimant and Mr Callum Wilson was a genuine mistake. I therefore conclude that it was not done, as the claimant alleges, as a deliberate act to force her out of her job. Nevertheless I find that there is significance in this issue in that the claimant says that the reason that she was allowed not to work with Mr Callum Wilson was because of his reaction to the claimant pointing

out that, in breach of the relevant SOP, he had overloaded his cabinet and the claimant believed that that could ultimately endanger patient safety with the end user. As the claimant explained during the course of the grievance appeal hearing (page 101):

"*We had a fire alarm … I came back and his* (Callum Wilson's*) cabinet was overloaded. It was not safe so I took stuff out, following SOPs. He came back and filled it again. I told him we can't have it like that. He said 'I'm not f'ing doing it'. He got in my face slamming cabinets".*

8.3. <u>Was there a fundamental breach in relation to lack of support</u>?

The claimant had not during the course of her employment raised a formal, that is to say written, grievance although as I have noted, the respondent treated her resignation letter as including a formal grievance. The claimant says that she frequently raised issues with her line manager Mr Jamie Wilson. As she put it during the course of the grievance appeal hearing (again at page 101):

"*On 10 – 15 occasions I told JW that I did not feel comfortable and people were laughing at me. I told him one morning when I was driving to work that I wish I'd crashed my car. JW's response was "if you don't like your job, then leave". I had done nothing wrong, I loved my job. No SOPs are being followed".*

Both Mr Jamie Wilson and Mr Bradley baldly deny before me that any such concerns were raised with them. As I have noted there is a dispute about one of the entries in the claimant's Acorn review – the comments on page 32. The allegation which the claimant makes against Mr Jamie Wilson is obviously a very serious one. Although the appropriate burden of proof in the Employment Tribunal is the balance of probabilities, having regard to the gravity of this allegation I consider that I do not have sufficient material before me in order to make a proper finding on this issue. However even if that entry was genuinely made by the claimant I do not find that its sentiments were borne out by what was actually happening.

I prefer the claimant's evidence on the lack of support issue. I find the expression of her concerns in the grievance documents, including the appeal minutes, to be highly credible.

On the evidence before me I am satisfied that the claimant was not receiving any proper support from the respondent's management in the face of the unpleasant and at times aggressive behaviour she was experiencing when trying to ensure that the appropriate standards were being observed.

I find that this state of affairs did amount to a fundamental breach of the implied term of trust and confidence.

8.4. <u>Was there a fundamental breach because of the respondent's attitude to concerns raised about non-compliance with SOPs?</u>

There is clearly a relationship between the lack of support issue dealt with above and this issue. The claimant says that the complaints she raised, albeit not in writing, went unheeded. Again there is a stark

contrast in the evidence. Messrs Bradley and Wilson simply say that no such issues were raised with them.

Although nothing was put in writing by the claimant there is no requirement in law for a qualifying protected disclosure to be in writing as long as it otherwise satisfies the requirements of the Employment Rights Act 1996, section 43B. That means that it must be the disclosure of information which in the reasonable belief for worker making the disclosure is made in the public interest and tends to show one or more of the matters set out within that subsection. Those matters include that a person has failed to comply with any legal obligation to which he is subject or that the health or safety of any individual has been, is being or is likely to be endangered.

The claimant has not been challenged on the issue of whether she made protected disclosures during the course of her cross-examination. Although it would be inappropriate to apply the strict legal test to an internal procedure, it is worthy of note that the respondent readily recognised the claimant's resignation letter as including whistle blowing by her. Although of course that was post-resignation, I find the claimant had been disclosing the same information to Mr Jamie Wilson and perhaps to a lesser extent to Mr Bradley during the course of her employment. The absence of documentary confirmation is not an essential ingredient when credibility is being assessed although it usually makes the task easier.

In paragraph 10 of the claimant's witness statement she sets out the particular matters of concern which she had reported both to Mr Wilson and on the occasion of the 20 March 2018 meeting, to Mr Bradley. These are:-

- Manipulation of environmental monitoring by changing gloves before doing finger dabs.
- Operators having others fill their cabinets.
- Bypassing environment monitoring.
- Overfilling of cabinets.
- Operators spraying each other with methylated spirit.
- A person counter-signing for the delivery of training to an operator when that person had not been present at the time of training.

I have referred to Mr Bradley's note of the 20 March meeting. Although that does not include reference to the claimant setting out the concerns above, significantly it does record the claimant telling Mr Bradley that she was worried about bringing things forward and not being listened to. In paragraph 14 of Mr Bradley's witness statement he acknowledges that the claimant was saying that she had previously brought "things" forward to Jamie Wilson. I find that those things were the safety concerns the claimant has referred to. However it is to be noted that Mr Bradley in his witness statement shows a distinct reticence to refer to those matters as anything other than "things". Despite Mr Bradley's invitation that the claimant should bring matters to him if she was uncomfortable taking

matters to her mother, the claimant's evidence is that following this meeting on 20 March Mr Bradley did not speak to her and this was part of the atmosphere which concerned the claimant. She referred to this in the appeal she raised against the grievance (see page 90).

It is also significant that the claimant asked to stand down from her team leader duties because of her concerns. Although this is something else not included in Mr Bradley's note of the 20 March meeting, he nevertheless accepts that the claimant had raised this.

The claimant's efforts to raise her concerns with Mr Jamie Wilson are noted in the minutes of the grievance appeal. At page 104 the claimant is recorded as saying:

"*JW has not took things I've told him to the next level … I've been fobbed off for over a year. JW said "I don't want people bringing me problems". They want people to run the unit, they don't want problems. We made 310 syringes, they take a lot of time. JW was complaining that my team were taking too long. If you follow the SOPs then it takes time … but if you raise problems you are isolated … I'm seen as a trouble causer he (Mr Wilson) said don't bring problems to us. I said a person needs help they then find out and I'm then isolated".*

On page 105 the claimant is recorded as saying:

"*There's no confidentiality. If I go to JW, I get bullied. If I don't go then nobody follows SOPs. I was told by PB (Mr Bradley) not to go to LA (the claimant's mother). I did go to PB. After that I lasted a few weeks then left … they manipulate the monitoring, they don't do the finger dabs. I've told them until I'm blue in the face".*

I find that the claimant has given a plausible reason for not approaching her mother about these concerns. Although theoretically she could have done so it is clear from what the claimant said during the grievance process that she had not done so. The claimant's rationale was that she believed that she needed to observe the ground rules that had been set at the beginning of her employment.

As I have also found, it is significant that although it is not said in so many words, the whistle blowing outcome decision set out in Karen Jackson's letter of 30 July 2018 at page 82 acknowledges that the claimant's concerns were well founded and then sets out the nine recommended actions. I had some concern yesterday during the course of Mr Bradley's evidence when he suggested that some of those recommended actions were to be actioned in any event and did not result from the concerns which the claimant had raised. That is not what Ms Jackson's letter says.

It appears therefore that the matters which, on the balance of probabilities, I find the claimant had been raising with Mr Jamie Wilson over a lengthy period were then swiftly acted on when the respondent's head of regulatory affairs had had the benefit of discussing the claimant's concerns with the claimant during the course of the whistle blowing meeting on 13 July 2018.

8.5. <u>Was there affirmation?</u>

I find that there was a continuing state of affairs prior to and after the claimant's return to work in March 2018. There was not in these circumstances an absence of breach in the latter period of the claimant's employment. There was an ongoing lack of confidence by the claimant in the respondent's ability to take any meaningful action in relation to the concerns that she was raising with them, although it may well have got to a point where the claimant felt that there was little point in raising issues by reason of her lengthy experience of inaction on the respondent's part.

8.6. Had the claimant made qualifying protected disclosures?

As I have noted, although the respondent may have purported to not appreciate that the case before me was intimately concerned with protected disclosures, there has been no real challenge to the proposition that the claimant had made protected disclosures. Having regard to statutory test outlined above and the evidence of the claimant, which I find to be wholly credible, I am satisfied that the claimant was making a series of qualifying protected disclosures which culminated in, but did not begin with, what was said in the resignation letter.

9. **Ultimate conclusion**

Whilst Mr Warren-Jones has suggested that what permeates this case is the claimant's concern about the 2017 Hannah Lowe issue, I find that what permeates the case is what the claimant referred to during the course of her grievance appeal (pages 99 and 100). She summarised her position thus:

"*For a year now there has been issues in the unit with patient safety. I feel pushed out. I have complained about patient safety and because of that staff were not talking to me. I raised serious concerns. Nothing coming out of that unit should go to patients. Operators are not following SOPs … I've been up against that (bullying). There are issues in that unit and I don't want that on my conscious* (sic). *I love my job. I was doing my technician course. I have two kids. I couldn't stay there any longer. I was fobbed off."*

I am satisfied that there was a fundamental breach of the implied term of trust and confidence both in relation to the absence of support given to the claimant in the circumstances described above and because of the respondent's dismissive attitude to the safety concerns which the claimant was raising with them. The claimant resigned in consequence of that breach having not affirmed or forgiven it. The claimant was therefore constructively dismissed.

10. Was constructive dismissal fair?

As noted above, ultimately the respondent's case has been limited to one of 'no dismissal'. It follows that they have not sought to show a potentially fair reason for the dismissal which I have now found to have occurred. That in itself makes this dismissal unfair. However over and above that, as the principal reason for the claimant's resignation were the disclosures that she was making and the respondent's reaction to those disclosures, the dismissal would in any event have been automatically unfair under the provisions of the Employment Rights Act 1996 section 103A.

11. **Remedy**

I heard further evidence from the claimant in respect of remedy. I asked her the questions that I felt I needed the answers to in order to determine the appropriate remedy. The claimant had prepared a schedule of loss which is in the bundle at pages 121 to 122. Unfortunately the claimant had neither disclosed voluntarily or been requested by the respondent to disclose any documentation about her new employment. No-one had thought to bring any payslips from the claimant's employment with the respondent and so I have had to try to make an assessment of what the claimant's gross and net weekly pay was for the purposes of the remedy Judgment.

I am satisfied that the claimant has sufficiently mitigated her loss during the 13 weeks that elapsed from the expiry of the notice period to the point where the obtained work via an agency, Manpower, with the Yorkshire Ambulance NHS Trust. The claimant has worked for that Trust since 5 November 2018 and although in her schedule of loss she describes this as a temporary contract, her work as a call advisor continues. She is in fact employed by Manpower and then placed with the Trust by them.

The claimant gave no details of her pay in her claim form and the only information which the respondent gave in it's response was that the claimant's gross annual pay was £11655. I have calculated the claimant's weekly gross pay with the respondent to have been £224.13 and that is the figure that I have used in the calculation of the basic award. By means of an online calculator I have assessed the claimant's net annual pay with the respondent as being £11292, which equates to net weekly pay of £217.15. I have used that figure for the calculation of immediate loss.

The claimant says that she is paid significantly less in the new job than she was paid in the old job. In her schedule of loss she has sought to calculate her hourly rate with the respondent (although that was not the basis on which she was paid-she was salaried.) She has also set out the hourly rate for the new job. Because of the absence of documentation it has been impossible to check this. However on the other hand these figures have not really been challenged by the respondent. The claimant also contends that had she remained in employment with the respondent she would have obtained her NVQ level 3 in pharmacy services and she believes that that would have led to a promotion and a higher rate of pay. As the claimant says that the qualification would have been based upon her course work, for which she was consistently getting distinctions, and there was no examination involved, I consider that it is very likely that the claimant would have got the NVQ qualification. Whether that would have led to her being promoted and if so to what rate of pay must obviously be a matter for speculation, but it certainly cannot be ruled out. Doing the best I can I have increased the differential between old pay and new pay take account of these possibilities, although not quite to the extent sought by the claimant. I considered that a future loss period of 52 weeks was reasonable and again this has not been challenged by the respondent who had the opportunity to cross-examine the claimant on such matters.

Although the claimant has not been able to afford to obtain medical insurance but had this as a fringe benefit from the respondent I have taken the view that she is entitled to be compensated pro rata for this during the immediate loss period. In the event this is a relatively nominal amount. I was also satisfied that £30 was a reasonable figure for expenses incurred whilst seeking work. It covers two trips to Leeds for interviews which ultimately led to the job which the claimant now

undertakes. The calculations for remedy are set out in the schedule which was contained in the Judgment previously issued. The claimant confirmed that during her period of unemployment she did not claim or receive any recoupable benefits.

Employment Judge Little

Date 1st May 2019

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