EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Miss G Makkos**

Respondent: **Spire Healthcare Limited**

HELD AT: London South

ON: 02, 03, 04, 05, 08, 09, 10, and 11 April 2019
In chambers on 12 April & 13, 14, 15 & 17 May 2019

Before: Employment Judge Freer
Members: Ms J Forecast
Ms H Edwards

Appearances
For the Claimant: Ms C Casserley, Counsel
For the Respondent: Mr A Allen, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1) The Claimant's claim of unfair constructive dismissal is successful;

2) The Claimant's claims of discrimination arising from disability and a failure to make a reasonable adjustment are successful in part;

3) The Claimant's claim of a detriment in employment on the ground of having made a protected disclosure is successful in part but that part was presented to the Tribunal out of time such that the Tribunal does not have jurisdiction to consider it, the remaining claims are unsuccessful;

4) The Claimant's claims of dismissal by reason of having made a protected disclosure; discriminatory dismissal; harassment; and victimisation are unsuccessful;

4) This matter will be listed for a remedy hearing as soon as possible.

REASONS

1. By a claim presented to the Tribunal on 14 April 2018 the Claimant claimed detriments in employment on the ground of having made a protected disclosure; dismissal by reason of having made a protected disclosure; direct disability discrimination; discrimination arising from disability; a failure to make reasonable adjustment; harassment; victimisation; discriminatory constructive dismissal; ordinary constructive dismissal; notice pay and holiday pay.

2. The Respondent resists the claims.

3. The Claimant gave evidence on her own behalf together with Ms Luisa Silva and Ms Filomena Durao, both former Housekeepers for the Respondent.

4. The Respondent gave evidence by:

   - Mrs Sarah Dimond, Head Chef;
   - Mr John Crisp, Director;
   - Ms Evelyn Hagger, Head of Operations;
   - Mr Ed Neville-Towle, Finance and Commercial Manager;
   - Ms Lynette Awdry, Matron; and
   - Ms Ellie Harrison, former HR Consultant.

5. The Tribunal was presented with a bundle of documents comprising 1287 pages and further documents during the course of the hearing as agreed by the Tribunal.

The Issues for determination by the Tribunal

6. At the outset of the hearing the Claimant pursued a significant number of claims and certainly too many to receive proper consideration in evidence in the time available for the hearing. The Claimant voluntarily reduced the number of claims and withdrew the claims for notice pay and annual leave pay.

7. A final agreed list of issues was provided to the Tribunal by the parties on the final day of the hearing. The list was still substantial and has resulted in these reasons being necessarily lengthy and requiring a significant amount of time to complete. The Tribunal has considered all the evidence and if a particular piece of evidence is not expressly referred to in these reasons it should not be taken that the Tribunal has failed to take it into account.

8. The findings of fact and associated conclusion set out below are made with reference to the agreed list of issues.

The law

Protected disclosures

9. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate

failure to act, by his employer done on the ground that the worker has made a protected disclosure. This section does not apply where the worker is an employee and the detriment in question amounts to a dismissal.

10. Section 103A of the Employment Rights Act 1996 provides that an employee will be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

11. Part IVA of the Employment Rights Act 1996 contains provisions relating to protected disclosures.

12. Section 43A states that a protected disclosure means a 'qualifying disclosure' as defined by section 43B which is made by a worker in accordance with any of sections 43C to 43H.

13. Sections 43B, as amended from 25 June 2013 and applicable in this case, provides that a 'qualifying disclosure' means "any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of" prescribed circumstances set out in the subsections in s43B(1)(a) to (f) of the Employment Rights Act 1996.

14. It is irrelevant whether or not the information is correct, provided the worker reasonably believes it to tend to show one or more of the prescribed circumstances (**Darnton –v- University of Surrey** [2003] IRLR 133, EAT and also see **Babula –v- Waltham Forest College** [2007] ICR 1024, CA and **Korashi –v- Abertawe Bro Morannwg University** [2010] IRLR 4, EAT on reasonable belief – it is objective reasonableness).

15. Mere allegations are not enough, the disclosure must convey facts It can be sufficient where there is mixed allegation and fact (see for example **Cavendish Munro Professional Risks Management Ltd –v- Geduld** [2010] IRLR 38, EAT and **Kilrane –v- London Borough of Wandsworth** [2016] IRLR 442, EAT).

16. By virtue of section 43L(3), a disclosure of information shall have effect where the person receiving it is already aware of it.

17. Sections 43C to 43H provide the circumstances when a qualifying disclosure may be made sufficient to make it a protected disclosure.

18. In **Chesterton Global Ltd –v- Nurmohamed** [2015] IRLR 614 the EAT held that there was no bright line between what is personal and public interest and the criterion of what is in the public interest does not lend itself to absolute rules:

> "The words 'in the public interest' were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. . .

> In the present case . . . Whilst recognising that the person the respondent was most concerned about was himself, the tribunal was satisfied that he did have the other office managers in mind. . . All this led the tribunal to conclude that a section of the public would be affected and the public interest test was satisfied".

19. Factors for consideration include: (a) the numbers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; (c) the nature of the wrongdoing disclosed; (d) the identity of the alleged wrongdoer.

20. A detriment is an objective consideration of whether a reasonable worker in the circumstances would consider that the treatment was to their detriment. A detriment includes a disadvantage or deprivation of a benefit.

21. The EAT in **Blackbay Ventures Ltd -v- Gahir** [2014] IRLR 416 gave guidance on the general approach to be taken by Tribunals in explaining its conclusions once a protected disclosure has been found.

22. A detriment for the purposes of the legislation can occur even after the relevant relationship with the employer has ended or been terminated (see **Woodward -v- Abbey National plc** [2006] IRLR 677, CA)

23. Pursuant to section 48 of the Employment Rights Act 1996, "it is for the employer to show the ground on which any act, or deliberate failure to act, was done".

24. This requires an analysis of the mental processes (conscious or unconscious) which caused the employer to act. It is not a 'but for' test (see **Harrow London Borough -v- Knight** [2003] IRLR 140, EAT). The employer must prove on the balance of probabilities that the act, or deliberate failure, complained of was not on the grounds that the employee had done the protected act.

> The Court of Appeal held in **NHS Manchester –v- Fecitt** [2012] IRLR 64 **"**section 47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."

25. Unlike under discrimination law, if the employer fails to show an innocent ground or purpose, the tribunal *may* draw an adverse inference and find liability but is not legally bound to do so. This applies equally to detriment and dismissal cases (see ***Serco Ltd -v- Dahou*** *[2016] EWCA 832, CA and* ***Kuzel****, below)*.

26. The Court of Appeal in **Kuzel –v- Roche Products Ltd** [2008] ICR 799, confirmed the approach to the burden of proof in dismissal cases. As confirmed in **Serco Ltd –v- Dahou** [2015] IRLR 30:

> "The identification of the reason will depend on the findings of fact and

> inferences drawn from those facts. Depending on those findings, it remains open to it to conclude that the real reason was not one advanced by either side".

27. In **Reynolds -v- CLFIS UK Ltd** [2015] IRLR 562, the Court of Appeal held that a tribunal must look at the motivation of the manager imposing the detriment. Only if that person is motivated by the whistleblowing can the employer be liable. This was further confirmed in **Royal Mail –v- Jhuti** [2018] IRLR 251 where the Court of Appeal added that what the employer reasonably believes when dismissing the employee has to be determined by reference to what the decision maker actually knew, not what knowledge ought to be attributed to them.

Direct discrimination

28. Section 13 of the Equality Act 2010 provides:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

29. On comparison between the Claimant and the case of the appropriate comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23).

30. A Tribunal may not make findings of direct discrimination save in respect of matters found in the originating application. A Tribunal should not extend the range of complaints of its own motion (**Chapman –v- Simon** [1994] IRLR 124, CA, per Peter Gibson LJ at para 42).

Discrimination arising from disability

31. Section 15 of the Equality Act 2010 provides:

> "(1) A person (A) discriminates against a disabled person (B) if -
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

32. In **Williams –v- Trustees of Swansea University Pension & Assurance Scheme** [2017] EWCA 1008 (Civ) the Court of Appeal endorsed the decision of the EAT, which confirmed that 'unfavourable treatment' was different from 'less favourable treatment' and is to be measured in an objective sense.

33. When considering a proportionate means of achieving a legitimate aim, the Tribunal will assess whether the aim is legal and non-discriminatory, and one

that represents a real, objective consideration and if the aim is legitimate, whether the means of achieving it is proportionate including whether it is appropriate and necessary in all the circumstances.

34. As confirmed in the Supreme Court in **Homer –v- Chief Constable of West Yorkshire Police** [2012] UKSC 15:

> ". . . 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. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. . . . First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

Reasonable adjustments

35. Sections 20 to 21 of the Equality Act 2010 set out provisions relating to the duty to make reasonable adjustments:

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
>
> 21 **Failure to comply with duty**
>
> A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

> A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
>
> A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

36. The applicable schedule is Schedule 8,

37. The Equality and Human Rights Commission has produced a Code of Practice on Employment (2011) ("the Equality Code"). The Code of Practice does not impose legal obligations, but provides instructive guidance. The Tribunal has referred itself to the Code as appropriate. This has been taken into account by the Tribunal. For example, the Equality Act 2010 no longer lists factors to be considered when determining reasonableness, but these factors appear in the Code of Practice (paragraph 6.28). However, it will not be an error of law to fail to consider any of those factors. All the relevant circumstances should be considered.

38. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination (**Archibald v Fife Council** [2004] IRLR 651, HL).

39. The test of reasonableness is an objective one.

40. A failure to consult is not of itself a failure to make a reasonable adjustment. It is necessary to identify the adjustment step/s that should be taken. (see **Tarbuck -v- Sainsburys Supermarkets** [2006] IRLR 664 and **H M Prison Service & Johnson** [2007] IRLR 951, EAT).

41. The correct approach to assessing reasonable adjustments is addressed in **Smith –v- Churchills Stairlifts plc** [2006] IRLR 41; **Project Management Institute –v- Latif** [2007] IRLR 579; and **Environment Agency –v- Rowan** [2008] IRLR 20;.

42. In **Smith**, the comparative exercise required by s.6(1) of the DDA was considered by the Court of Appeal having regard to the speeches contained in the judgment of the House of Lords in **Archibald**. Maurice Kay LJ stated:

> ". . . Notwithstanding the differences of language, it would be inappropriate to discern a significant difference of approach in these speeches. . . it is apparent from each of the speeches in **Archibald** that the proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements".

43. The EAT in **Leeds Teaching Hospital NHS Trust –v- Foster** [2011] EqLR 1075 emphasised that when considering whether an adjustment is 'reasonable', it is sufficient for a Tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage and that there does not have to be a 'good' or 'real' prospect of that occurring.

44. With regard to knowledge the EAT in **Secretary of State for the Department of Work and Pensions v Alam** [2009] UKEAT 0242/09 held that the correct statutory construction of s 4A(3)(b) involved asking two questions: (1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then (2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is also 'no', there is no duty to make reasonable adjustments.

45. The Court of Appeal in **Matuszowicz –V- Kingston Upon Hull City Council** [2009] IRLR 288 held that there may breaches of the duty to make reasonable adjustments "due to lack of diligence, or competence, or any reason other than conscious refusal".

Harassment

46. Section 26 of the Equality Act 2010 provides:

> "(1) A person (A) harasses another (B) if—
> A engages in unwanted conduct related to a relevant protected characteristic, and
> the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. . .
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are - . . . disability"

47. The motive or intention on behalf of the alleged harasser is irrelevant (see **Driskel** above).

48. The Court of Appeal confirmed in **Land Registry –v- Grant (Equality and Human Rights Commission intervening)** [2011] ICR 1390 "when assessing the effect of a remark, the context in which it is given is always highly material".

49. In **Richmond Pharmacology –v- Dhaliwal** [2009] ICR 724 the EAT held that

the Claimant must have felt or perceived his or her dignity to have been violated. The fact that a Claimant is slightly upset or mildly offended is not enough.

Victimisation

50. Section 27 of the Equality Act 2010 provides:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> (4) This section applies only where the person subjected to a detriment is an individual.
>
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

51. Causation is shown where the protected act materially influences (in the sense of being more than a trivial influence) the employer's treatment of the Claimant (see for example **Fecitt -v- NHS Manchester** [2012] ICR 372, CA on protected disclosures which adopted general discrimination principles).

52. The EAT in **The Chief Constable of Kent Constabulary -v- Bowler** [2017] UKEAT/0214/16 gave guidance on detriments in victimisation claims:

> "Determining whether the treatment that B is subjected to amounts to a detriment involves an objective consideration of the complainant's subjective perception that he or she is disadvantaged, so that if a reasonable complainant would or might take the view that the treatment was in all the circumstances to his or her disadvantage, detriment is established. In other words, an unjustified sense of grievance does not amount to a detriment; the grievance must be objectively reasonable as well as perceived as such by the complainant".

Burden of Proof

53. The burden of proof reversal provisions in the Equality Act 2010 are contained in section 136:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision".

54. Guidance is provided in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, on a balance of probabilities there must be facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council** [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If there is a *prima facie* case, then the burden of proof falls upon the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

55. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' (see **Nagarajan –v- London Regional Transport** [1999] IRLR 573, HL; and **Igen Ltd –v- Wong**, as above).

56. The Court of Appeal in **Madarassy** above, held that the burden of proof does not fall upon the employer simply on there being established a difference in status (e.g. sex or race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.

57. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were, and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (*per* Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL).

58. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC confirmed:

> "The points made by the Court of Appeal about the effect of the statute in these two cases [*Igen* and *Madarassy*] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other."

59. The approach set out in **Hewage** was endorsed and applied to the Equality Act 2010 burden of proof reversal provisions by the Court of Appeal in **Ayodele –v- Citylink** [2017] EWCA (Civ) 1913.

Unfair constructive dismissal

60. The law relating to constructive dismissal is well-established and requires generally four conditions to be present:

- There must be a breach of contract by the employer;
- That breach (or series of incidents) must amount to a fundamental breach;
- The employee must leave employment as a consequence of that breach (whether express or repudiatory); and
- The employee must not affirm the breach

(see **Western Excavating (EEC) Ltd –v- Sharp** [1978] IRLR 27, CA)

61. The common law relating to contractual terms and breach of contract is also well-established. A breach of an express or implied term must be considered objectively (see **BG plc –v- Brien** [2001] IRLR 496, EAT).

62. Where a claimant has been constructively dismissed, the Respondent must show that the reason for dismissal is one of a number of permissible reasons.

63. If so demonstrated, the Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4) of the Employment Rights Act 1996. The standard of fairness is achieved by applying the range of reasonable responses test.

64. In the case of **Malik –v- The Bank of Credit and Commerce International SA** [1997] IRLR 462, HL, confirmed that the implied term of mutual trust and confidence is implied into every contract of employment. With regard to a breach of that implied term Lord Steyn stated: "The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" (see also **Omilaju –v- Waltham Forest London Borough Council** [2005] ICR 481, CA).

65. An employee's subjective belief as to how they believe they have been treated is not relevant, even if genuinely held (see **Omilaju**).

66. With regard to a 'final straw' constructive dismissal, the Court of Appeal in **Omilaju** held that a final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. There is no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer.

67. The Court of Appeal in **Cantor Fitzgerald -v- Callaghan** [1999] ICR 639 addressed the issue of pay and constructive dismissal:

> ". . . the question whether non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment, depends on the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration, and his deliberate refusal to do so. Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events. If so, it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the Court might be driven to conclude that the breach or breaches were indeed repudiatory".

68. The Tribunal has also taken fully into account all the authorities cited in the submissions from the parties.

Findings of fact and associated conclusions

69. This case arises out of circumstances where the Claimant raises complaints of whistleblowing detriments and dismissal relating in particular to cleaning services within the Respondent Hospital and also various complaints of disability discrimination and victimisation relating to the Respondent's alleged treatment of the Claimant's Cancer condition and its effects.

70. The essential chronology in this matter was agreed between the parties and is attached to these reasons at Annex 1.

Protected disclosures

71. With regard to the Claimant's claim of detriment in employment and dismissal on the ground and by reason of having made a protected disclosure, the alleged protected disclosures are set out in paragraphs 1(a) to (p) of the agreed final list of issues and the Tribunal refers to the relevant parts of

section 43B of the Employment Rights Act 1996 being relied upon by the Claimant.

(a) *"Sarah Dimond, Evelyn Hagger and John Crisp by email enclosing photographs on 13 September 2016 regarding dirty hospital rooms"* - section 43B (b) and (d).

72. The email of 13 September 2016 states: "This is what I have found. Both Tos and Sophie were gone by 8.40 yet all daycare is dirty and left in a mess. Do you think this is acceptable?" Attached to that email are photographs taken by the Claimant.

73. The Respondent accepts that this was information that in the reasonable belief of the Claimant tended to show a breach of a legal obligation. The Tribunal also concludes that the Claimant reasonably believed that this was information that tended to show that the health or safety of any individual has been, is being or is likely to be endangered.

74. Also, given that it was a hospital environment and about the cleanliness of its Daycare, the Tribunal also concludes that the Claimant reasonably believed that the information was in the public interest.

(b) *"Evelyn Hagger by email of 14 September 2016 regarding fraudulent claims made by staff for time that had not been worked by them"* - section 43B (a) and (b).

75. This email states: "Following yet another incident regarding staff leaving early without completing their work I propose for the late shift to start at 12.00 and finish at 20:00. It is costing the hospital thousands of pounds each year to pay enhanced rate after 20:00 hours, not to mention the fact that it is literally fraud".

76. The Respondent accepts that this was information that in the reasonable belief of the Claimant tended to show a breach of a legal obligation and that a criminal offence has been, is being, or is likely to be committed. The Tribunal concludes that the Claimant reasonably believed that the information was in the public interest as it related to potential fraud within a hospital providing services to the public and for which the public pays to receive its services.

(c) *"Sarah Dimond, Evelyn Hagger and John Crisp by email of 15 September 2016 regarding staff not cleaning properly and making fraudulent claims by leaving early"* - section 43B (a) (b) and (d).

77. This is an email written in intemperate terms (which was not untypical for the Claimant) but it concludes: "I have emailed Evelyn asking for their hours to be changed from 12.00 – 20.00 as this is costing the company £5,300 a year each person and it is considered fraud, bear that in mind. They need to be here until their time is up, do their job properly, that is the bottom line. Can you imagine if every single person did this in the hospital or in any other workplace? How do you think it is acceptable?".

78. The Respondent accepts that this was information that in the reasonable belief of the Claimant tended to show a breach of a legal obligation and a

criminal offence has been, is being, or is likely to be committed. The Tribunal concludes that the Claimant did not reasonably believe that the information in this particular e-mail tended to show that the health or safety of any individual has been, is being or is likely to be endangered. The issues raised in this e-mail related to the hours of workers and potential false timekeeping.

79. The Tribunal concludes that the Claimant reasonably believed that the information was in the public interest as she contested that it related to potential fraud within a hospital providing services for which the public pay.

(d) *"Evelyn Hagger by email of 17 September 2017 regarding Sarah Dimond's breach of the Data Protection Act 1998 in disclosing details of the Claimant's health"* - section 43 (b).

80. This email is at page 415 of the bundle and the Tribunal finds as fact that this email is solely about the Claimant's own circumstances. The Tribunal concludes the Claimant did not reasonably believe the content of this email tended to show facts that were in the public interest.

(e) *"Evelyn Hagger by email of 14 November 2017 regarding unacceptable cleaning standards in daycare and staff still claiming for time that they had not worked"* - section 43B (a) (b) (d) and (f).

81. In this email the Claimant complains that, for example: "Daycare is in a condition that is not acceptable for hospital standards" and "these issues need urgent attention because until it is sorted I will not be willing to take on the responsibility of daycare".

82. The Tribunal concludes that having regard to the content of this e-mail the Claimant did not reasonably believe that it tended to show a criminal offence has been, is being, or is likely to be committed. The focus of this e-mail was on the standard of cleanliness and the timing and division of labour

83. Also, the Tribunal concludes that the e-mail and the Claimant's evidence do not demonstrate that the Claimant reasonably believed that information tending to show any matter falling within any one of the other section 43B categories has been, is being or is likely to be deliberately concealed.

84. The Respondent accepts that this was information that in the reasonable belief of the Claimant tended to show a breach of a legal obligation.

85. The Tribunal also concludes that the Claimant reasonably believed that this was information that tended to show that the health or safety of any individual has been, is being or is likely to be endangered.

86. As stated above, the Tribunal concludes that the Claimant reasonably believed that the information was in the public interest as she considered it related to the potential cleanliness of a hospital providing services for the public.

(f) *"Evelyn Hagger by e-mail enclosing photographs on 20 November 2017"* – section 43B (b) (d) and (e).

87. This email states: "The lack of compliance from Sarah, Will and her staff to follow health and safety infection control guides with a lack of timekeeping to carry out all necessary cleaning schedules that are absolutely vital during construction works, put patients and staff at risk".

88. The Respondent accepts that this e-mail amounts to a protected disclosure on the basis of health and safety. The Tribunal also concludes that the Claimant reasonably believed that the information tended to show the breach of a legal obligation with regard to health and safety compliance. The Tribunal concludes that the e-mail and the Claimant's evidence do not demonstrate that the Claimant reasonably believed that this information tended to show any matter falling within any one of the other section 43B categories has been, is being or is likely to be deliberately concealed.

89. For the reasons stated above, the Tribunal concludes that the Claimant reasonably believed that the information was in the public interest.

(j) *"Evelyn Hagger by e-mail of 26 November 2017"* - section 43B (b) (d) and (e).

90. This email is at page 577 of the bundle. The Respondent accepts that it discloses information that the Claimant reasonably believed tended to show that the health or safety of any individual has been, is being or is likely to be endangered.

91. The Tribunal concludes that coupled with previous emails relating to allegations of cleaning standards, "time and again daycare remains filthy", the Claimant is referring to cleaning standards within the hospital. When placed in the context of the previous e-mails and the Claimant's evidence the Tribunal concludes that the Claimant did reasonably believe that the disclosed information was in the public interest.

(m) *"John Crisp by grievance letter dated 18th of December 2017"* - section 43B (a) (b) (d) (e) and (f).

92. This was a formal grievance raised by the Claimant against Ms Hagger. In particular the Tribunal refers to the final paragraph of this long letter which states: "I will also be exercising my statutory rights to bring these issues to the attention of the Chief Executive Officer of Spire, outlining the ongoing cleaning issues at Gatwick Park, discrimination, the bullying, and the failure of compliance".

93. The Respondent accepts that this was information that in the reasonable belief of the Claimant tended to show a breach of a legal obligation and that the health or safety of any individual has been, is being or is likely to be endangered.

94. Although most of the letter addressed only the Claimant's personal circumstances, the Tribunal concludes that the issues raised were broad and that the Claimant did reasonably consider that these complaints were also in the public interest.

(p) *"John Crisp by letter dated 5 January 2018"* – section 43B (a) (b) (d) (e) and (f).

95. This is the Claimant's resignation letter. Again the Claimant raises a number of complaints and states: "Brushing internal matters under the carpet is your forte and because of that people don't trust you to do the right thing for them, just the same I don't trust you either. You allow malpractice to take place which have been ongoing ever since my arrival, turning a blind eye for fraud by Sarah's staff leaving 2 to 3 hours early, forging timesheets, that is costing the company thousands of pounds each year, which I raised concerns about on many occasions. You ignore patient safety, health and safety and infection control, that has always been a great concern of mine".

96. The Respondent accepts that this was information that in the reasonable belief of the Claimant tended to show a breach of a legal obligation and that the health or safety of any individual has been, is being or is likely to be endangered.

97. The Tribunal concludes that in the reasonable belief of the Claimant tended to show a breach of a legal obligation and a criminal offence has been committed and that information tending to show any matter falling within any one of the other section 43B categories has been, is being or is likely to be deliberately concealed.

98. The Tribunal concludes that the Claimant reasonably believed that the information was in the public interest in raising her perceived issues of potential fraud, health and safety concerns within a hospital environment.

99. Accordingly, the Tribunal finds that all of the alleged protected disclosures argued by the Claimant amounted to protected disclosures, save for (d).

Protected acts

100. With regard to the Claimant's victimisation claim the Claimant alleges that her protected acts were making complaints of disability discrimination in emails sent on 20 November, 26 November and 27 November 2017; in her grievance letter dated 18 December 2017 and in the letter of resignation dated 5 January 2018.

101. The Respondent accepts that the grievance and resignations letters did amount to protected acts.

102. Tribunal concludes that all of these documents amount to protected acts. The email of 20 November 2017 complains that the Claimant had no risk assessment carried out upon return to work and considered that she was still immune compromised and it was not safe being at work (see page 531). The email of 26 November again complains of the risk assessment having not been carried out to protect her from inhaling construction dust and that she been told to remove her PPE facemask (see page 577). The email of the 27 November raises the risk of disease and infection as reasonable adjustment issues (see page 583). The Tribunal concludes that in these e-mails the Claimant is alleging that the Respondent has contravened the Equality Act

2010. The grievance and resignation letters expressly raise claims under the Equality Act.

<u>The claims of protected disclosure detriments in employment; direct disability discrimination; discrimination arising from disability; harassment; and victimisation</u>

103. The Tribunal will address the allegations made in the list of issues and the respective heads of claim pursued in respect of each allegation.

104. It was accepted by the Respondent that the Claimant was a disabled person pursuant to section 6 of the Equality Act 2010 by reason of her Cancer condition, which is a specified disability under Schedule 1 of the Act.

(A) *"Throughout the Claimant's absence from October 2016 to 9 October 2017, Evelyn Hagger asked the Claimant if it would be best for her to give up her job".*

105. Further and better particulars were provided by the Claimant on this issue in which the Claimant confirmed that the dates upon which Ms Hagger was alleged to have made the comments were January 2017 and 27 June 2017

106. However, the Claimant in her witness statement argues that Ms Hagger asked her "on many occasions" during telephone conversations if the Claimant wanted to give up her job, or perhaps wanted to do something part-time nearer to home because of her condition. The Claimant contended in her oral evidence that it was said to her more than twice, but that she could not state the exact dates. The Claimant in oral evidence considered that it would be inappropriate for Ms Hagger to ask her if she was fit enough to return to work.

107. Ms Hagger had very little cross-examination on this issue. She had kept in regular contact with the Claimant during her absence from work. She had conversations about the Claimant's return to work generally, in order to arrange cover on a six-month fixed-term contract and beyond and therefore needed information on the Claimant's time out and return date, and there was a conversation about possible flexible working.

108. Ms Hagger stated that there had been conversations when she was unsure whether the Claimant was progressing to treatment and also later after the Claimant had completed treatment, when the Claimant had expressed that she was unsure what to do. Ms Hagger advised her to come and see her about choices she wished to make and suggested and arranged for the Claimant come into the work place to meet her work colleagues whilst still on sick leave.

109. The Tribunal has considered all the circumstances and concludes that enquiries regarding the Claimant's view about returning to work are likely to have been made, but that it would have been reasonable to ask in the circumstances having regard both to Ms Hagger's general conduct toward the Claimant at those times and the need to plan staffing cover.

110. The Claimant did not raise this matter in her grievances or resignation letter.

111. No questions on causation were put to Ms Hagger in cross-examination, save

for a broad point of Ms Hagger not wanting the Claimant back at work.

112. The Tribunal concludes on balance that a conversation as alleged was not said and in particular with the suggested undertone that the Claimant was not wanted back at work.

113. Further, the Tribunal concludes that comments made by Ms Hagger were done for the reasons she expressed above and were not to any extent influenced by the Claimant's protected disclosures.

114. The Tribunal also concludes when objectively considered that the comments made by Ms Hagger did not amount to a detriment for direct discrimination purposes as they were enquiries into the Claimant's condition with a view to helping the Claimant and organising cover for her position in her absence. An objective reasonable employee would not consider such comments to be a detriment. Further the Tribunal concludes that they were not said because of the Claimant's disability. The Tribunal concludes that Ms Hagger would have made those comments regarding the welfare and work cover of any employee on long-term absence, whether or not they were disabled.

115. The Tribunal also concludes that the comments did not amount to unwanted conduct relating to the Claimant disability. Further that they did not have the purpose of creating a prohibited environment and cannot reasonably be considered to have that effect given all the circumstances including the perception of the Claimant for the same reasons as set out above.

116. Finally, the Tribunal concludes, again for the above reasons, that the comments made, such as they were, did not amount to unfavourable treatment. Further, the something arising in consequence of disability of was argued in submissions to be a long period of absence or the possibility of a phased return to work. However, no questions were put to Ms Hagger in cross-examination on that point or that this was the cause of the alleged comment. There was no evidence to support that contention.

(B) *"In or around September 2017 Sarah Dimond disclosed the Claimant's personal medical information to the Claimant's staff, informing them that the Claimant was not able to do her job and that Will Ford would be replacing her. Thereafter the Respondent failed to act to address Sarah Dimond's alleged breach of data protection and confidentiality".*

117. The Claimant argues that she was told by Ms Durao, Ms Mendez and Ms Silva that during a meeting in which the Claimant was not present, Ms Dimond told them that the Claimant could not return to work full-time and would not be able to do her job so that Mr Ford would assist her.

118. The evidence of Ms Silva and Ms Durao mirrored that of the Claimant. Ms Dimond argued that at the meeting she said that the Claimant was coming back to work soon but that Mr Ford would be supporting the Housekeeping Team as the Claimant would be on a phased return to work.

119. By an email dated 17 September 2017 the Claimant wrote to Ms Hagger

stating: "I would like to ask that Sarah does not discuss my health, my return to work, the conditions in which I return and my ability or disability with members of staff as she has no knowledge or right to do so".

120. The Tribunal was taken to an NVQ report for Ms Dimond which appears to be an account of that meeting and which places the date of that meeting at 31 August 2017. The notes of that meeting record that Ms Dimond updated the team on staff changes, but does not refer to any matter relating to the Claimant. However, it also does not mention any conversation, as accepted by Ms Dimond, about the Claimant's phased return to work.

121. Ms Hagger stated in her evidence that prior to Christmas 2016 the Claimant herself had informed her staff about her medical condition and Ms Hagger had requested and obtained consent from the Claimant to explain to the other support service leads her diagnosis and anticipated time away from the business.

122. Ms Silva confirmed in her oral evidence to the Tribunal that she had already heard murmurs about the Claimant's health condition in the hospital prior to the meeting with Ms Dimond in August 2017.

123. Ms Durao in her evidence stated that: "Sarah even told us that Gyongyi [the Claimant] will be sacked because she refused traditional treatment and had opted for more holistic treatments". However, Ms Durao does not mention this matter in the investigation meeting notes of 25 January 2018. Ms Silva in her evidence did not contend this had happened.

124. In oral evidence when it was put to Ms Durao that at the time of the meeting she already knew of the Claimant's diagnosis, she answered that "the whole hospital was aware of it" and confirmed that it was something people were talking about.

125. The Tribunal finds as fact that the Claimant's condition was widely known before the team meeting in December 2016.

126. The Tribunal found the evidence of Ms Durao and Ms Silva lacking in credibility in a large number of areas. Their witness statements had not been translated for them and their command of English was such that a translation would be necessary for accuracy. They had the use of an interpreter during the Tribunal hearing. Ms Silva, Ms Durao's daughter, had been sacked for cheating on an examination test by taking the place of her mother.

127. On balance the Tribunal prefers the evidence of Ms Dimond and finds that the allegation has not been made out as a matter of fact. Therefore the related claims are unsuccessful.

128. Even if the reference to the Claimant's phased return to work amounts to a detriment, which the Tribunal concludes it does not when objectively considered, the Tribunal concludes that it was not on the ground of the Claimant's protected disclosure. It is almost inevitable that some details of the Claimant's working pattern as Team Leader would necessarily emerge.

The Tribunal concludes that the Respondent has shown that it was done genuinely to appraise staff of the current position regarding Team Leaders and not because of any protected disclosure.

129. The Tribunal accepts that Ms Hagger's failure to reply to the Claimant's e-mail of 17 September 2017 was due to Ms Hagger's immediate absence from work and then oversight. The Claimant did not raise the issue again. Having weighed all the evidence the Tribunal concludes that even if a failure to reply constitutes a detriment, the Tribunal concludes that it was not done on the ground of the Claimant's protected disclosures.

(C) *"From 9 October 2017 Evelyn Hagger failed to support the Claimant's return to work by not arranging and/or ensuring that the handover of her duties took place with Will Ford and not appraising the Claimant of new staff and developments since her year's absence".*

130. A return to work meeting between Ms Hagger and the Claimant took place on 09 October 2017 and a note of that meeting is at pages 420 to 421 of the bundle. It was signed at the time by the Claimant and Ms Hagger to confirm the information provided on the form was accurate and true.

131. The Claimant set out her version of events at paragraph 37 of her witness statement and alleges that the return to work interview was quite brief and did not make any relevant enquiries.

132. The Tribunal finds that the return to work interview note is consistent with Ms Hagger's account of events at paragraph 16 of her witness statement, particularly in that it records that the Claimant was not fit to return to work to normal duties and that Occupational Health advised a phased return.

133. Ms Hagger's witness statement at paragraph 17 is also consistent with the return to work interview and the Tribunal finds that paragraphs 18.1 and 18.2 of her statement are correct as a matter of fact. It was agreed that the Claimant was not expected to clean the rooms of infectious patients or those rooms recently vacated by infectious patients. There were other staff available who could undertake that task and the Respondent had a system of identifying potentially infectious patients. The Claimant would be classed as supernumerary for her first two weeks back at work, would only be working 12 hours a week and would not be carrying out hands on cleaning.

134. In the meeting of Support Services minutes dated 19 October 2017 at pages 432 to 435 it is recorded under the heading of "People": "Welcome back to Gyongyi who is doing a phased return with a phased handover from Will".

135. Ms Hagger said that she took these notes but her name does not appear on the list of attendees. The Claimant said she had not seen these notes, which were not for general circulation. The Tribunal finds on balance it is highly unlikely these notes have been concocted by Ms Hagger.

136. In an Occupational Health report dated 24 October 2017 it states: "Gyongyi had surgery on her neck lymph nodes 09/17, this set her back more than she

thought it would. She wants to work and be at work, but knows she has to be careful, despite significant concerns she's really pleased with return to work progress".

137. In an email of 14 November 2017 at page 499 the Claimant states: "I believe it will be beneficial for us to have a meeting to arrange a proper handover as I will be back full-time in the next few weeks".

138. At page 510 of the bundle are Ms Hagger's meeting notes between herself and the Claimant on 17 November 2017 in which initial actions were agreed. One of those actions was for "DH to arrange a handover meeting between GM and WF with EH present for 20/11/2017".

139. The Claimant made a covert recording of the meeting and produced an unagreed transcript commencing at page 511. There is a recorded exchange where Ms Hagger says: "In your email you implied to me that you wanted the hand over to happen more immediately" to which the Claimant replied: "not immediately, but because the next week or the week after I will be back full-time, so would have liked this to happen before I am back to full time".

140. Also recorded in the meeting on 17 November 2017 Ms Hagger states: "I might have some concerns that there are some areas that we are not doing well or is not working well, so let's have a joint conversation let's see where we go and to have an understanding of the handover, and that would help all parties, and I am there to understand because it helps me".

141. A handover meeting was arranged for 20 November 2017 but unfortunately the Claimant was off work through illness on that date.

142. Therefore the matter was raised on 14 November, a meeting was arranged on 17 November, and a further meeting was due to go ahead on 20 November, which the Claimant could not attend.

143. The Tribunal concludes that the Respondent does not fail to address the issues as alleged. The Tribunal accepts Ms Hagger's evidence that during the first few weeks of the Claimant's return to work she understood that the Claimant was happy to be back to work and was reintroducing herself to her own team and the other teams in the hospital. She was not aware of any issues with the Claimant's ability to carry out her role and did not receive any reports of any such issues.

144. Further, the Tribunal accepts the Respondent's reasons for the events as set out above and concludes having regard to all the evidence that the situation was not influenced by any of the Claimant's protected disclosures. It was not put to Ms Hagger in cross-examination that the events were on the ground of a having made a protected disclosure.

145. (D) *"From 9 November 2017 the Respondent failed to carry out a risk assessment for the Claimant with regard to infectious disease patients as recommended as a reasonable adjustment by OH in their reports dated 5 September 2017, 24 October 2017 and 27 December 2017 and despite the*

Claimant's requests".

146. The Claimant had been off work through illness from October 2016. The Claimant had an appointment with Occupational Health on 05 September 2017 and under the recommendations produced on the same date it states: "The priority as she returns is risk assessment of her working nearby infectious disease patients; she indicated history of immunity to chickenpox and I have evidence on file of her immunity to measles and rubella".

147. The Claimant had remained off work through sickness after the date of the Occupational Health report and had subsequent surgery. She returned to work on 09 October 2017 and was re-referred to Occupational Health due to the possible effect of the additional surgery. As set out above, at the return to work meeting the Tribunal finds as fact that Ms Hagger agreed with the Claimant that she was not expected to clean the rooms of infectious patients or those rooms recently vacated by infectious patients.

148. In the following Occupational Health report arising from a consultation on 24 October 2017 the Claimant's neck surgery was confirmed which had set her back more than she had thought it would. The Claimant was pleased with return to work progress. The same risk assessment recommendation as the September Report is repeated verbatim.

149. In an email to the Claimant from Ms Hagger dated 27 November 2017 she confirmed: ". . . . a meeting between Will and yourself had been arranged for Monday, 20/11/2017 and a further meeting had been planned for Sarah, you and I. Unfortunately both meetings were then postponed due to you being off sick… The Occupational Health report outlines the risk assessment discussion you have had with the Occupational Health practitioner about your immunisation history and relevant booster vaccinations. We have discussed you not currently cleaning rooms where there is or has been an infectious patient and you agreed that the ward-based housekeepers were fulfilling this role – I am not aware of any problem in this process and suggest we review together.… If you feel that a further risk assessment is required, I have attached the risk assessment template for you. The Occupational Health report advises a follow-up review in 6 to 8 weeks (from 24 October 2017). However this can be arranged sooner. The report states that she is optimistic of further steady recovery and return to full duties in the next few months. If you feel this is not the case, again, I can arrange a review sooner" Attached to that letter is a Spire Healthcare General Risk Assessment document (see page 582), which appears to be a document for completion by the Claimant's line manager rather than the Claimant herself.

150. In an email dated 28 November 2017 from Ms Hagger to Ms Jennifer Day, Hospital Infection Prevention and Control Lead, she states: "Gyongyi has been reviewed by Occupational Health before starting back to work and again on 24th October 2017. As part of this Occupational review the following has been considered/recommended: Risk assessment of her working nearby infectious disease patients - agreed action to date is for Gyongyi not to carry out deep cleans on patient rooms used by infectious patients". Ms Hagger then set out some extracts from emails that the Claimant had sent to her

regarding a number of issues.

151. Ms Day replied in an email of the same date stating: "I am very happy to meet with Gyongyi next week and talk through her concerns which are quite valid. Under the circumstances I was quite rightly not privy to the confidential nature of her absence from work and unfortunately we have not considered some of the issues relating to her return".

152. Ms Hagger wrote to the Claimant again on the same date telling her that she had asked Ms Day to contact the Claimant direct to arrange a time to meet and that she had asked for a meeting to be arranged between them on 04 December "so that we have a better understanding when we meet on the Tuesday 5th December".

153. The meeting between the Claimant and Ms Day took place on 04 December as anticipated and there are notes of that meeting at pages 610 to 611 of the bundle. The notes record: "This was an initial meeting to discuss Gyongyi's concerns with regard to her return to work, her health and potential infection risk".

154. The notes record that the Claimant was concerned that she was currently immune-compromised following chemotherapy and may be exposed to potential infection risk while at work. It is recorded: "We discussed that the risk from patients in the ward areas would be minimal as most have been screened for infectious diseases such as MRSA prior to surgery admission. We talked through the fact that we cannot rule out exposure entirely as Spire Policy is that we do not screen: staff, visitors, contractors, etc. However, we did agree it will be no greater risk than to her exposure elsewhere outside the hospital environment (i.e. when shopping, etc.)".

155. The Respondent hospital was not an emergency unit and therefore did not treat a similar wide range of patient conditions. The Tribunal accepts the Respondent's evidence that there were unlikely to be a great number of infectious patients.

156. The note also states: "We reviewed the fact that as the Housekeeping Supervisor, Gyongyi is responsible for ensuring cleanliness of all areas and that she would therefore need to manage the housekeeping team in respect of any rooms highlighted where patients have known infectious risks, especially for terminal cleans. I have advised her to check with clinical staff daily with regard to infection risks and allocate staff accordingly. Any room where there is a known infection risk should be cleaned by a member the housekeeping team prior to Gyongyi inspecting the room. I have also enforced that the use of PPE (gloves and apron) and strict adherence to good hand hygiene are adequate precautions to protect her. I have also stressed that clinical staff must be requested to remove items such as linen and equipment prior to housekeeping entering the rooms; avoiding potentially contaminated items been left in corridors".

157. It is also recorded: "We talked about the refurbishment works which are causing some issues of concern with the amount of dust being created. We

are all aware that pathogens can be harboured in dust and therefore damp dusting should be undertaken in areas where refurbishment is being undertaken, as well as other clinical and non-clinical areas. However, due to the quantity of dust and refurbishment areas, I advise that ALL the housekeeping staff should wear facial protection in these areas when undertaking cleaning tasks as their potential exposure to dust inhalation and infection will be greater. I did not advocate the wearing facial masks continually and suggested that they should be changed regularly (i.e. every 20 mins). We discussed the issue of not wearing masks around patients as this is not entirely appropriate, unless barrier nursing indicates this is necessary".

158. It also records: "We addressed the fact that a risk assessment had not be completed to facilitate Gyongyi's return to work. I have suggested that a meeting with the Occupational Health advisor Joan Mann, Evelyn Hagger, Gyongyi and myself, will be advisable to discuss and implement a strategy for safeguarding Gyongyi's return to work and identify any potential health issues/risks with a view to minimising these accordingly".

159. A meeting took place on 05 December 2017 between the Claimant and Ms Hagger, that the Claimant covertly recorded, during part of which Ms Day was present (see page 625 of the Claimant's transcript). Ultimately after quite a long conversation Ms Hagger states: "So from what I have heard, do you want me to write a risk assessment, and put the actions at the bottom of it and you see if that is what we agreed", to which the Claimant confirmed “Ok”.

160. An Occupational Health report was provided after a consultation on 19 December 2017 in which it states: "The priority now is risk assessment ongoing of Ms Makkos working nearby - construction work; - and as previously mentioned infectious disease patients".

161. The Tribunal concludes, as is accepted by the Respondent and was confirmed in the outcome of the Claimant’s grievance process, that the Claimant did not receive a formal written risk assessment regarding infectious disease patients.

162. Ms Hagger had addressed risk for the Claimant to be removed from contact with known infectious disease patients upon her return to work.

163. Ms Day, with whose actions and comments the Claimant had aligned herself during submissions, considered that general risk regarding exposure to infectious diseases was no greater than her exposure elsewhere outside the hospital environment, with which the Claimant had agreed.

164. The Tribunal concludes that there was a detriment to the Claimant by not being the subject of a formal risk assessment as recommended by Occupational Health, however the Tribunal concludes having regard to the whole factual matrix that these circumstances were not influenced to any extent by the Claimant’s protected disclosures. The Tribunal accepts that Ms Hagger took early steps that she considered were appropriate by removing the Claimant from cleaning rooms of infectious patients or those rooms recently vacated by infectious patients. Ms Hagger enlisted assistance from

Ms Day, Hospital Infection Prevention and Control Lead, and arranged meeting between Ms Day and the Claimant followed up by a meeting with the three of them. The Tribunal concludes that Ms Hagger did not fail to undertake a formal risk assessment because of the Claimant's protected disclosures. The Tribunal concludes that Ms Hagger has proved that the reason for her actions was that she considered that she was dealing with the matter in an appropriate way and sufficiently by taking the steps she did. Although those steps were not influenced by the Claimant's protected disclosures, they are matters to which the Tribunal will return with regard to the ordinary constructive dismissal claim.

(E) *"Evelyn Hagger disregarded the Claimant's GP's recommended working hours of 16 per week over 3 months which have been recommended on 6 October 2017 after the Claimant's further surgery gave the Claimant no option other than to agree the hours suggested by OH on 5 September 2017, even though this was before the Claimant's further surgery"*.

165. In the Occupational Health report from the consultation on 5 September 2016 the recommendations state: "From what Ms Makkos explained today and copies of medical reports seen I consider her fit for a phased return to work with adjustments/restrictions from October 2017 for 4 to 6 weeks. Please meet and discuss recommendations below considering your business needs; I recommend/advise working as able; Week 1 - 6 hours per day for 2 days with 2 days off in between e.g. Monday and Thursday; Week 2&3 - 6 hours per day for three days with one day off in between e.g. Mon/Wed/Fri; Weeks 4&5 - 6 hours per day for four days with one day off after two days e.g. working Mon & Tues, then Wednesday off work on Thurs and Fri; Week 6 - working full days for 4 days as above with one day off after 2 days; Weeks 7 - trialling usual hours".

166. The Claimant produced a Fitness for Work Certificate from her GP dated 06 October 2017 which confirmed that the Claimant may be fit for work taking account of the GP's advice, which was a phased return to work, altered hours, amended duties and workplace adaptations. In the comments section it states: "16 hours per week max the first three months back at work. No heavy lifting, no shift work, no infected rooms. For frequent breaks please".

167. The Claimant attended the return to work meeting on 09 October 2017 with Ms Hagger and the notes to that meeting show that the GP's certificate was received and recorded and the matter would be reviewed by Occupational Health on 24 October 2017. The referral to Occupational Health was because after the September 2017 Report the Claimant had undergone surgery to her neck and Ms Hagger was not aware of this until the return to work meeting. The twelve-hour working week period was extended to two weeks.

168. Ms Hagger considered the 16 hours a week request from the GP related to a discussion that she had had with the Claimant at the return to work meeting on 09 October 2017 where the Claimant confirmed in answer to a direct question that she wanted the sixteen hours to be stated because she was claiming benefits. This is confirmed by Ms Hagger in an email to Ms Harrison, the Respondent's HR consultant.

169. The Occupational Health recommendations from the consultation on 24 October state: "From what Gyongyi explained I consider her fit to carefully continue with the current phased return to work with adjustments. Please meet and discuss the recommendations below considering business needs and Gyongyi working as able; Weeks 3-4 - 6 hours per day for 3 days with 1 day off after 2 days e.g. working Mon & Tues then Wednesday off working Thurs & Fri; Weeks 5-6 - working 6 hours for 4 days as above with 1 day off after 2 days; Week 7 - trialling 30 hours per week; Week 8 - trialling as able usual hours".

170. Therefore the GP's recommendation was superseded by further Occupational Health input. It was reasonable in the circumstances for the Respondent to rely upon the most up-to-date medical advice.

171. The Tribunal concludes that Ms Hagger did not disregard the Claimant's GP's recommended working hours. Also, it is not correct that Ms Hagger gave the Claimant no option other than to agree the hours suggested by Occupational Health on 5 September 2017 even though this was before the Claimant's further surgery. Ms Hagger took the Claimant's further surgery into account and referred the Claimant for an up-to-date Occupational Health report precisely for that reason.

172. It was reasonable for Ms Hagger to rely upon the newest Occupational Health report, particularly as it records the Claimant stating that she was really pleased with the return to work progress and upon Occupational Health revising the phased return to work hours. The Claimant did not raise a complaint regarding this matter until her grievance on 18 December 2017.

173. In the circumstances the Tribunal finds that the allegation, as stated, is not made out.

174. Further, even if there was a detriment, the Tribunal concludes that it can only relate to the hours the Claimant worked between her return to work on 09 October 2017 and the Occupational Health Report on 24 October 2017 not being at the level recommended by her GP. There is no dispute that the Claimant worked for 12 hours in the first week, therefore the detriment can be if, contrary to the Tribunal's finding of fact, that the Claimant did in fact work for 18 instead of 16 hours for the further week up to 24 October 2017 when the Occupational Health Report reviewed the situation as the recommendations implemented. The Tribunal concludes having regard to all of the salient facts that any such detriment was not influenced by the Claimant's protected disclosure and the Respondent has shown that it was responding to the Claimant's changing circumstances and seeking to confirm the phased return hours with Occupational Health.

175. The Tribunal also concludes that with regard to the harassment claim, the allegation has not been made out. Further, even if not implementing a recommendation from the Claimant's GP when it had been superseded by an Occupational Health report, or if the Claimant's working hours for the second week were two hours more than recommended by her GP, the Tribunal concludes that it was not done with the purpose of creating a prohibited

environment and it did not reasonably have that effect having regard to all the circumstances and the perception of the Claimant.

(F) This matter was withdrawn during the course of the hearing and was not pursued in the list of issues or submissions.

(G) *"On 26 October 2017 John Crisp failed to discuss the incident with the Claimant or support her at all when he had spoken to witnesses and had supported Sarah Dimond".*

176. An incident took place on 26 October 2017 which arose out of an allegation that the Claimant had deliberately not replied to both Ms Dimond and Mr James Hayter when they had said 'good morning' to her. This led to an altercation between the Claimant and Ms Dimond.

177. Mr Crisp first knew about this matter when Mr Ford came to his office to tell him about it. Mr Ford told Mr Crisp that there had been an altercation between the Claimant and Ms Dimond and alleged that the Claimant had been shouting at Ms Dimond who had become very upset and was in tears in her office. Mr Ford was concerned about Ms Dimond because she was heavily pregnant at the time.

178. Mr Crisp went to see Ms Dimond who was visibly upset and crying. Ms Dimond described the incident to Mr Crisp and that at the end of the incident the Claimant had gone into the kitchen and shouted at Ms Dimond.

179. Ms Dimond also mentioned that the relationship between her and the Claimant was not a good one and had impacted on the working relationship within their respective teams. Ms Dimond also mentioned that she was a little sensitive due to her pregnancy.

180. Usually an altercation of this kind would be dealt with by the Claimant's line manager, Ms Hagger, but she was absent from the office on that day, which is why Mr Ford reported the matter to Mr Crisp.

181. Once Mr Crisp had assured himself that Ms Dimond was okay his evidence was that he was content to let Ms Hagger handle the situation when she came back to the office. He had no intention of investigating the incident.

182. Mr Crisp did however ask Mr Ford to prepare a file note of what he had witnessed and Mr Crisp prepared his own file note, which is incorrectly dated 26 November as opposed to 26 October 2017. He also asked Mr Hayter to prepare a statement as he had been in the vicinity.

183. Mr Crisp left Ms Dimond and was walking back to his office he saw the Claimant in the stores talking to a member the stores team and did not seem upset. Ten minutes later when he passed the stores again he saw that the Claimant was still in conversation and asked whether she was busy, to which the Claimant stated that she was and carried on talking with the member of staff. Mr Crisp stated that he then challenged the Claimant as to whether there was work to do to, to which the Claimant replied that she was busy and

carried on talking with the member of staff. Mr Crisp left the stores and when he checked back a few minutes later the Claimant had left. Mr Crisp felt that he was content to leave Ms Hagger to deal with the matter when she was back in the office.

184. The next day Ms Edwards, HR Coordinator, told Mr Crisp that the Claimant had seen her and would be raising a grievance. Mr Crisp at that point asked Ms Dimond to prepare a file note, so she had a record of what happened.

185. Therefore at that stage Mr Crisp on his own evidence had spoken to all of the participants of the incident and had also requested them to make statements apart from the Claimant. He had resolved to then leave the matter to Ms Hagger, but upon hearing that the Claimant was to enter a grievance asked Ms Dimond to prepare a statement.

186. The Tribunal refers to the Claimant's protected disclosure of 15 September 2016 of an e-mail to Ms Dimond, copied to Mr Crisp, Ms Hagger and Mr Southwood. The e-mail is written in intemperate language: "Sorry, but you have got to be kidding me?!"; "It is not exactly rocket science is it?"; "How do you think it is acceptable". Mr Crisp sent an email to Ms Hagger on the same day: "Disappointed to receive this as I guess you are. Not sure what Gyongyi is trying to achieve by copying me in. I accept there may have been an issue but her response is wholly unacceptable and is a reflection of an attitude I have had concerns about for a while now. Happy to chat if you want, but sure you will resolve". Mr Crisp also made some observations about the Claimant's attitude in his witness statement, which he was not able to corroborate in his oral evidence.

187. The Tribunal concludes that Mr Crisp's actions were undoubtedly influenced by the events on 24 October and by the Claimant stating that she was going to lodge a grievance (which was not a pleaded protected disclosure). However, the Tribunal concludes that the protected disclosure in September 2016, although some time before this event, did have an influence on Mr Crisp's actions towards the Claimant on 24 and 25 October in a way that was more than trivial.

188. The Tribunal concludes that Mr Crisp's view of the Claimant's attitude influenced his actions when he did not speak with the Claimant on the day about the incident and when he did not advise her to make a statement or note of the event at a time when he had resolved in his mind to leave the matter to Ms Hagger to deal with, but had nevertheless advised Ms Dimond to prepare a file note of what happened. The Tribunal concludes that Mr Crisp's view of the Claimant's attitude arose to an extent that was more than trivial by the Claimant's September 2016 protected disclosure.

(H) *"On 26 October 2017 the Claimant felt degraded and humiliated by John Crisp informing Sarah Dimond that he would "march" the Claimant "out of the door" if he wanted her to".*

189. Mr Crisp and Ms Dimond were the only parties to the alleged conversation. Both confirmed in evidence that it did not occur.

190. The Claimant at paragraph 24 in her Particulars of Claim states that she was informed of the conversation by Ms Lillian Wood. However, in the Claimant's witness statement at paragraph 58 the Claimant alleges that it was James Hayter that had told her.

191. On balance the Tribunal prefers the evidence of the Respondent and concludes that the allegation did not occur.

(I) *"On 14 November 2017 during a telephone conversation Ms Harrison informed the Claimant she could face disciplinary action further to the incident with Sarah Dimond".*

192. The Claimant in her witness statement states: "Ellie then told me that although my grievance was being upheld against Sarah my behaviour been so poor that had Sarah raised a grievance against me it would have been upheld and I would face disciplinary action".

193. The grievance outcome letter itself states: "Had Sarah chosen to raise a grievance about your conduct on the day this would also have been upheld. Your poor behaviour was at a level where it may be appropriate to investigate a disciplinary hearing to consider the matter further. This will not occur on this occasion because 1) you have reflected and acknowledged the shortfall in your behaviour and 2) Sarah has advised that she does not want a formal process followed and wants matters to be resolved informally". Ms Harrison confirmed that she spoke to the Claimant to inform her of her conclusions.

194. The Tribunal finds as fact that what is said in the grievance outcome letter is what was conveyed to the Claimant on the phone. Accordingly the allegation has not been made out. The Claimant was not informed that she could face disciplinary action. The information conveyed was that a disciplinary investigation, although justifiable from the Respondent's perspective, would not occur. However, even if the circumstances can be argued as amounting to unfavourable or unwanted conduct, it did not relate to the Claimant's disability. It was done because of the behaviour of both the Claimant and Ms Dimond on that occasion.

(J) *"By a letter of 16 November 2017 Ms Harrison notified the Claimant that her grievance had been upheld, but stated "had Sarah chosen to raise a grievance about your conduct on the day this would also have been upheld. Your poor behaviour was at a level where it may be appropriate to instigate a disciplinary hearing to consider the matter further"*.

195. The Tribunal refers to (I) above and accepts Ms Harrison's evidence that the Claimant accepted that she could have handled matters differently and that her behaviour had been wrong. The Tribunal concludes that it was open for Ms Harrison to reach the conclusion she did with regard to the grievance process and notify the Claimant in the same paragraph, with reasons, that disciplinary action would not occur.

196. The Tribunal concludes that the allegation does not set out the complete exchange between Ms Harrison and the Claimant regarding the grievance. It

misses out the confirmation by Ms Harrison that any disciplinary investigation that may have been instigated would not occur.

197. The Tribunal concludes that even if the actions of Ms Harrison can be considered to be unfavourable or unwanted conduct, it dd not relate to the Claimant's disability. It was action taken because of the Claimant's behaviour, which the Claimant had accepted had also been wrong. Even if Ms Harrison's conduct relates to the Claimant's disability, it did not have the purpose of creating a prohibited environment and could not reasonably be regarded as having that effect having regard to the perception of the Claimant and all the circumstances.

(K) *"From November 2017 Evelyn Hagger expected the Claimant to work early and late shifts which meant that she was working alone contrary to the reasonable adjustments regarding her hours of work and working with a buddy which were as recommended by OH in their reports dated 5 September 2017, 24 October 2017 and 27 December 2017".*

198. The Tribunal has been referred to the timesheets for the relevant periods commencing at page 456 of the bundle. Timesheets for November commence at page 609 and demonstrate the Claimant working 6½ to 7 hours per day and the only day with an early start of 6.20 had a commensurate early finish of 13.20.

199. The Tribunal was referred to an email by the Claimant dated 01 December 2017 which attaches pictures of Daycare that morning and is timed at 5.42. The Tribunal has referred itself to the timesheets for December 2017 and that day has the early start of 5.30 with a commensurate early finish of 13.30. There is another start time of 6.00 with a finish time of 14:00. The remaining times are all 9.30, 10.00 and 10.30 starts with commensurate finish times and each day is a 7½ hour working day, save for one day which is six hours.

200. Therefore, there are a handful of occasions where the Claimant had an early start but each occasion corresponds with an early finish.

201. These hours corroborate the evidence of Ms Hagger when she states that at the return to work meeting on 09 October 2017 they discussed the recommendation in the Occupational Health report that the Claimant should not have to carry out shift work, which they agreed meant that she would work during the core hours of 9.00 to 18.00, that the Claimant requested to some flexibility in her start and end times and that Ms Hagger was happy to agree.

202. Ms Hagger asked the Claimant to record in advance on the team Rota for each week the hours that she expected to be working as this would enable the Claimant to have flexibility in her start and end times, but would also give the cleaning team notice of when the Claimant will be working should she require support.

203. The Tribunal finds as fact that the allegation as stated has not been made out.

(L) "From 16 November 2017 Evelyn Hagger failed to arrange a meeting with John

Crisp as had been recommended by Ellie Harrison in her grievance outcome".

204. The Respondent accepted that Ms Hagger should have done this but did not do so.

205. In the grievance outcome relating to the October incident it is recorded: "At the start of the meeting you advised you were very disappointed by John Crisp on the day the incident because he never spoke to you about what had occurred. To be clear I have not interviewed John about this matter or his actions and suggest that, if this matter remains important to you that Evelyn arranges a time for the three of you to meet so that you can ask him about his actions on the day".

206. The Claimant made that request in an email dated 26 November 2017.

207. The matter was not in the Grievance outcome recommendations and therefore it was not followed up as part of that process. In her oral evidence Ms Hagger referred to the request and said that was not dealt with because she did not understand the context and it was an oversight.

208. The Claimant had a meeting with Mr Crisp on 20 December 2017, which again the Claimant covertly recorded.

209. The Tribunal accepts Ms Hagger's reason for not arranging a meeting between the Claimant and Mr Crisp and concludes that it was not influenced by the Claimant's protected disclosures.

(M) *"On 28 November 2017 Evelyn Hagger refused to pay the Claimant for her sickness from 20 to 26 November 2017 notwithstanding that on her return to work form that was completed by Evelyn Hagger on 9 October, she confirmed that the Claimant will be considered for company sick pay in relation to any further period of sickness absence" and (S) "On 19 January 2018 Ellie Harrison refused the Claimant's request that as a reasonable adjustment her sickness for January 2018 was paid notwithstanding that on her return to work form those completed by Evelyn Hagger on 9 October, she confirmed that the Claimant will be considered for company sick pay in relation to any further period of sickness absence".*

210. It was accepted by the Respondent upon advice during the course of the hearing that sick pay should have been paid to the Claimant in respect of 20 to 26 November 2017 and 19 January 2018.

211. The company sick pay terms are contained in the Respondent's Managing Absence Policy. Company sick pay is a discretionary payment calculated on a rolling year basis at any time with the period of payment dependent upon length of service (page 177 of the bundle).

212. With regard to the November pay, Ms Hagger confirmed that it was correct that the Claimant did not receive company sick pay for the November absence and that was because of a mistaken belief by Ms Hagger at the time that the Claimant had exceeded her entitlement to company sick pay for that twelve-month period. That is also confirmed by the Claimant's covert

recording of her meeting with Ms Hagger on 28 November 2017 (page 598). It was not a case of Ms Hagger declining to exercise her discretion.

213. In that return to work meeting on 28 November 2017 Ms Hagger told the Claimant that the recent period of sickness would not be paid and had marked the Return to Work Interview Form (page 595) as 'No' next to the section entitled "Will employee be considered for company sick pay on next episode of absence. However, at the earlier Return to Work meeting on 09 October 2017 Ms Hagger had marked the form as "Yes' in answer to that section (page 421).

214. In respect of the January period, Ms Harrison after input from Ms Hagger also considered that at the time the Claimant had exhausted her sick pay entitlement and that is why that period absence was also unpaid.

215. Both the original witness statements of Ms Hagger and Ms Harrison maintained the company sick pay calculations were correct, but they amended their statement after receiving legal advice during the hearing that the calculations were in fact incorrect when applying the terms of the Respondent's Absence Management Policy. It was confirmed that the Claimant would receive the outstanding payment.

216. The Tribunal has given this matter very careful consideration and on balance accepts the Respondent's evidence that the non-payments were a mistake and were not influenced to any extent by the protected disclosures or the protected acts.

217. However, with regard to discrimination arising from disability, the Tribunal concludes that non-payment of discretionary company sick pay within the terms of the policy is unfavourable treatment when objectively considered.

218. When considering the two stages of causation the Tribunal concludes that with regard to 'because of something', the reason for the non-payments was a mistake by Ms Hagger (and also by Ms Harrison with input from Ms Hagger) when calculating the terms of the Company sick pay entitlement. That caused the non-payment. At this stage motive is irrelevant.

219. With regard to the second stage of causation and for the 'because of something' to be 'arising from disability', the Tribunal turned to the useful guidance by the EAT in **Pnaiser -v- NHS England** [2016] IRLR 170.

220. Arising from disability could describe a range of causal links and may include more than one link. The Tribunal refers to the example given in **Pnaiser** of the **Land Registry -v- Houghton** "where a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact".

221. In this case, Ms Hagger and Ms Harrison made mistakes in calculating sick pay entitlement. Those mistakes were made because the Claimant had been absent from work through sickness. The Tribunal concludes that an effective cause of the sicknesses was the Claimant's disability.

222. The Tribunal finds as fact that the Claimant was immuno-suppressed at these times and that this created an increased susceptibility to infection as confirmed in the December Occupational Health Report. Therefore, although the Claimant's absences were recorded as being due to a 'cold/cough' in November 2017 and 'chronic cough – breathing concerns regarding dust exposure at work' in January 2018, the Tribunal concludes that given the Claimant's immuno-supressed condition caused by Cancer treatment, it is likely on a balance of probability that the effective cause of the absences was the Claimant's disability. The Tribunal concludes it was because of something 'arising from' the Claimant's disability.

223. As it was a mistake, the Respondent cannot meaningfully argue that it was a proportionate means of achieving a legitimate aim.

224. The Court of Appeal in **City of York Council -v- Grosset** [2018[IRLR 746 held that "it is not possible to spell out of section 15(1)(a) a … requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability". The Court warned that If A knows of the disability, they would be wise to look into the matter more carefully before taking the unfavourable treatment. Ms Hagger, who was also Health and Safety Officer, had access to resources to seek confirmation of the position had she wished to do so.

225. The Tribunal is conscious that it may appear harsh to make a finding of discrimination arising from disability in circumstances of inadvertent unfavourable treatment where there was a genuine mistake which has a sufficient causal link to an individual's disability. However, the Tribunal concludes that the circumstances may be reflected in remedy assessed on a just and equitable basis and also that it need not necessarily lead inexorably to a finding of a discriminatory constructive dismissal as it has been long recognised in case law that it is possible to find discrimination that does not amount to a repudiatory breach of contact.

(N) *"On 13 December 2017 Evelyn Hagger informed the Claimant that if she was not able to demonstrate learning from the grievance outcome then she would be placed on a performance improvement plan".*

226. The notes of the 13 December 2017 mediation meeting that followed the Claimant's grievance outcome start at page 647 of the bundle and the Claimant's transcript of that meeting from her covert recording is at page 655.

227. The meeting was with the Claimant, Ms Dimond, Ms Hagger, and Ms Edwards, HR Coordinator, as notetaker.

228. The Respondent's note records Ms Hagger saying: "I have a concern that you

are both in leadership roles and it impacts on your teams. We need to find a solution to move forward".

229. In the Claimant's transcript it is recorded as Ms Hagger stating: "I would just say that I think from the grievance outcomes, you have some learning from those outcomes, you need to be able to show that to me and if I don't feel that you have demonstrated that I may have to look at things about those behaviours". That comment is also clearly being addressed to both the Claimant and Ms Dimond.

230. The Tribunal finds as fact that the comments were aimed at both the Claimant and Ms Dimond and that the matter was dealt with by Ms Hagger in an even-handed manner.

231. The Tribunal concludes that the comments made to both the Claimant and Ms Dimond were not in any way influenced by the protected disclosures. The Respondent has proved that the reason why they were said was because of the outcome of the grievance procedure and the need for both participants to move on in a constructive manner.

232. The Tribunal also concludes that the circumstances do not amount to harassment. It was not unwanted conduct that related to the Claimant's disability, it was because of the behaviour of both the Claimant and Ms Dimond in that particular instance. Further, if it did amount to unwanted conduct related to the Claimant's disability, it did not have the purpose of creating a prohibited environment and nor did it have that effect having regard to all the circumstances and the perception of the Claimant. Both the Claimant and Ms Dimond accepted that they were culpable to a degree. Addressing the matter in an even-handed manner was a reasonable action by Ms Hagger. The circumstances also do not amount to discrimination arising from disability. Even if the allegation can amount to unfavourable treatment it was not related to the Claimant's disability, for the reasons given above in relation to harassment.

(O) This matter was withdrawn during the course of the hearing and was not pursued in the list of issues or submissions.

(P) *"From 9 October 2017 the Respondent failed to carry out a risk assessment for the Claimant with regard to the construction dust despite the Claimant's repeated requests, the recommendation of Jennifer Day on 4 December and 5 December 2017 and as recommended as a reasonable adjustment by OH in their report dated 27 December 2017"*.

233. The Tribunal received a good deal of evidence on this matter of which not all was relevant to the issue to be determined.

234. The Tribunal accepts Mr Crisp's evidence that in January 2016 the Respondent commenced refurbishment of its main Outpatient Reception and main waiting areas. This work was done in two stages, with both areas closed with restricted access. Patients and staff accessed the hospital from a new area and patient clinics were moved to a temporary area. This

refurbishment was completed in September 2016 and reopened for patient and staff access.

235. In August 2017 the Respondent commenced refurbishment of a second Outpatient area, Medical Records area and 15 patient bedrooms in its inpatient ward area. This involved a full refurbishment of each affected room and corridor area, including ceilings, wiring, bathrooms and new flooring.

236. This refurbishment was done in sections to minimise disruption to the business, patients and staff. The bedrooms were refurbished in blocks of 4 to 5 at a time. The impact of the refurbishment to the hospital operation was minimal as a works were staged over a twelve-month period and were also being carried out at less busy times and in the evening.

237. This building work commenced whilst the Claimant was on sickness absence and continued after her return to work through to around December 2017. At a certain point on the 26 and 27 November 2017 the ceiling to one particular area was removed.

238. The contractors the Respondent engaged had worked with the Respondent for many years and had significant experience of carrying out similar type work in both private and NHS hospitals, including when those hospitals were in operation.

239. The refurbishment was led by the Respondent's Head Office and being Head of Operations at the hospital Ms Hagger was kept up-to-date about progress. Ms Hagger was fully aware of the nature of the refurbishment, the measures that were put in place to mitigate any risk and she personally had no concerns with the level of the dust in the hospital.

240. However Ms Hagger can recall there being particular concern surrounding the single weekend on 26 and 27 November 2017 that involved the contractors removing the ceiling in a particular corridor as it was expected to release trapped dust. The area was isolated from the rest of the hospital in advance and the adjacent rooms were sealed off to prevent dust escaping. When the ceiling had been removed the immediate and surrounding areas were deep cleaned before anyone was moved back in.

241. The grievance investigation meeting notes of Ms Day of 19 January 2018 record that members of staff, Ms Jenny Baker and Ms Rebecca Ahmed, did raise concerns with her about dust levels relating to the time immediately after the ceiling was removed, but no no-one specifically went to Ms Day to say there was a problem.

242. When the ceiling was removed, for example, there was no clinical concern raised, which means no concern over the health of patients.

243. There was no evidence produced to the Tribunal of any complaints from patients and the witnesses for the Respondent who could give evidence on the matter confirmed that as far as they were aware no complaints had been made regarding dust and the odd patient complaint had been made about

noise. It was confirmed by the Respondent that there were no respiratory patients within the hospital as it dealt with day-to-day general surgery issues.

244. The Tribunal accepts Mr Crisp's evidence that the surgeons and consultants would be very quick to inform him if they were having any difficulties at all.

245. Mr Crisp stated that he held regular meetings with Ms Dimond and the Ward Matron, which was called a '10 at 10' where all issues could potentially be raised. Mr Crisp could not recall issues relating to dust, but could recall regular concerns about drilling noise. The Matron would not necessarily raise those kinds of matters and did not attend all the meetings.

246. The Claimant walked through the refurbishment area as did many staff and the Claimant could use the first floor for her route to avoid the immediate area subject to any particular work she was undertaking.

247. Ms Silva claimed in her witness statement in support of the Claimant that "We could not sit in her [the Claimant's] office too long as we all started coughing from the dust in there. I could see that the vents in her office were full of dust. Gyongyi spent as much time as possible outside of her office as she was literally choking there when we had meetings." However, in her oral evidence she accepted she had only been in the Claimant's room twice during the relevant periods and the second time, for reasons unrelated to dust levels, she did not actually step into the office.

248. Ms Durao's evidence, also in support of the Claimant, was: "There was so much dust generated that we were struggling to breathe" and said that eventually she had an asthma attack in December 2017 "caused by the dust levels". However the Tribunal finds that this is an exaggerated and inaccurate account of the amount of duct in the hospital. For example, Ms Durao had an asthma attack caused by her allergy to flowers. The Occupational Health report does not indicate that everyone was struggling to breathe and there were no recorded complaints from patients.

249. Ms Durao also claimed that: "the dust was not contained which led to dust settling everywhere including on equipment that was used for surgery and by the nurses for patient care". Again, the Tribunal finds this allegation to be wholly exaggerated and is not consistent with any account that anyone gave in evidence, even Ms Silva. The Tribunal finds, for the reasons set out earlier, that Ms Durao and Ms Silva had a motive for exaggerating their evidence against the Respondent. The Tribunal finds their evidence not to be credible.

250. The Tribunal accepts the evidence from Mr Crisp that he would have received serious complaints from consultants, staff and patients had the dust been anywhere near the level described by Ms Silva and Ms Durao.

251. The Tribunal was shown a plan of the hospital at page 1159 and it is noted that the Claimant's Housekeeping Office is a long way from where the refurbishment was taking place and there are at least three sets of double doors on the most direct route. The office is the same distance away from the refurbishment and is adjacent to the hospital kitchen.

252. The Tribunal was shown photographs taken by the Claimant, but she accepted in evidence that the pictures did not show the level of dust.

253. The Claimant complained that the vent in her office was blowing dust into the room. However, it was actually an extractor fan and was not linked to the main system, which was confirmed in the Quadriga report: "There was apparently concern raised by the individual member of staff that their office had a ceiling air vent that was releasing dust contaminated air from the refurbishment areas into the office. Through a visual inspection of the vent it was clear that the opening was extracting air out of the room more than blowing into it. The Chief Engineer also confirmed that this ducted ventilation from the room was not connected to the refurbishment area" and "The Housekeeping office ventilation system is physically separate from the refurbishment area".

254. The investigation meeting notes dated 23 January 2018 with Mr Emanuel Dumitrescu, Hospital Engineer, confirmed his view of the extractor fan and that it should not have been affected by the refurbishment works The investigation meeting notes on 23 January 2018 of Mr David Gantlet, Engineering and Estates Manager, confirmed that the only grille in the Claimant's office is an extractor fan and moves air from the room to the outside of the building.

255. Ms Hagger went into the Claimant's office and spoke to the engineer to check the service plan. The extractor fan was checked every three months.

256. In April 2018 the Respondent received a commissioned report by Quadriga Health and Safety Ltd into the "Dust Incident at Gatwick Hospital". The Tribunal refers to the sections addressing "Pre-construction information (PCI) provided by the Principal Designer" and "Construction Phase Health and Safety Plan (CPHSP) established by the Principal Contractor" together with further similar extracts of information in Appendix 4 of the Report. The Tribunal also refers to the 'Construction Phase Health and Safety Plan' commencing at page 219 of the bundle.

257. The Quadriga Report concludes: "Based on information gathered during this investigation and the precautions in place, dust exposure within the hospital during the refurbishment works is likely to be insignificant and orders of magnitude below the EH 40 workplace exposure limits". However, this report was compiled after the building works had been completed and without any testing of air quality at the time.

258. The Tribunal finds as fact that with regard to the refurbishment that any prepared walls were damp dusted and sealed. The contractors used sticky doormats outside the rooms to help contain dust. The Respondent contended that each of the rooms being refurbished had zipped plastic sheeting inserted into the doorway to seal off the rooms and to contain the dust. The Claimant argues that these were not used. The Tribunal has received no photographic evidence from either party that shows whether or not this sheeting was being used. The Claimant produced a few photographs of the rooms, but the doorways are not visible. For example, there were some photos taken inside

a refurbished room facing inwards. The Respondent produced no photographs of the works, even though Mr Crisp's oral evidence to the Tribunal was that many photographs of the refurbishment were taken.

259. At the return to work meeting between the Claimant and Ms Hagger on 28 November 2017 there was an exchange recorded in the transcript from the Claimant's covert recording where Ms Hagger states that an e-mail from the Claimant implied that the Hospital is unsafe for her, which the Claimant refuted and confirmed "And of course this is not what I am saying, what I am saying is that it can be a safe environment for me to work in but this dust puts a lot of pressure on me I have to say it really made me ever so upset" (page 600).

260. The Tribunal has set out above the salient extracts from the notes of the meeting between Ms Day and the Claimant on 04 December 2017 with regard to the refurbishment dust and also the cleaning of the air vent in the Claimant's office to "minimise her concerns".

261. Ms Day attended at the meeting between the Claimant and Ms Haggard on 05 December 2017. The transcript of the Claimant covert recording starts at page 612. In the transcript of the covert recoding of the meeting Ms Hagger states her worry over the Claimant being with patients whilst wearing a dust mask, Ms Day remarks how dusty she found the refurbishment area: "but where there is a lot of dust like yesterday we walked down the corridor it was like wauhhhhh, it was bad . . we were looking down the corridor and it was like ahhhh, you can taste it so you knew it was happening". The Claimant stated that "in those rooms I think it is going to be fine. (see page 626).

262. The grievance investigation meeting notes with Ms Day on 19 January 2018 are at pages 757 to 759.

263. The Quadriga Report records that it spoke to Jennifer Day when reaching its conclusions on the dust levels in the hospital at the time, however there are no notes of the meeting with her.

264. The Tribunal has considered the Claimant's grievance. The second part of the grievance outcome addresses the dust issue and was provided by Mr Neville-Towle on 17 May 2018 and starts at page 987.

265. The Tribunal has considered the Occupational Health reports, as referred to above, and the only place that construction work is mentioned is in the report dated 27 December 2017 from a consultation date of 19 December. That report records that: "On 191217 Gyongyi explained: - significant ongoing coughing triggered by the dust of refurbishment Gatwick Park - attending her GP in November and having a chest infection diagnosed and treated, Gyongyi considers working in an environment where construction is taking place is a likely trigger… Gyongyi is understandably upset by it all and anxious about her job, she coughed consistently through our appointment although we were in an office upstairs away from any work or visible dust and I am concerned for her".

266. Under the section 'Fitness for work and recommendations' it states: "Please meet and discuss the recommendations below considering your business needs - the guidance regarding occupational risk assessment for those who are immune-suppressed is to avoid inorganic dusts e.g. construction sites - considering this I recommend removing Ms Makkos as far as is reasonably possible from significant dust exposure until we have further guidance from a specialist after the January scan/OH Physician review - the best option for her health will be to consider redeployment to another role away from the dusty areas (even discuss if another Spire location would be achievable) - considering sensitivity to the dust COSHH regulations require protective clothing - a mask used by workers in these environments as suggested by HSE and I recommend this for her - please risk assess whether extract ventilation is being used in refurbishment as this may help reduce dust exposure". The report states: "The priority now is a risk assessment ongoing of Mrs Makkos working nearby - construction work . . . " (Occupational Health's emphasis).

267. It was agreed that the Respondent did not receive that report until 04 January 2018.

268. The Claimant returned from an extended absence from work on 09 October 2017 and was further absent from 20 November 2017 returning on 28 November 2017 the day after the ceiling removal was undertaken.

269. The Claimant had attended an Occupational Health consultation since the start of the refurbishment and no dust issue was mentioned by either the Claimant or the Occupational Health advisor.

270. The Claimant's witness statement at paragraph 46 states: "Wakehurst 1, a ward area, was like a war zone; dust was everywhere as there were no barriers put in place a separate refurbishment areas from the rest of the hospital . . Dust was everywhere. It was settling on equipment, on the linen on surfaces, and I could feel herself breathing it in particularly in the back corridor that led to my office". The Claimant confirmed in oral evidence that when she considered it was extremely bad she was referring to the period immediately after the ceiling came down although that is not at all clear from her witness statement.

271. The Claimant states in her witness statement at paragraph 50 that: "I was still struggling with my vocal chords and the dust was making them worse. I started coughing by the second week and it progressively got worse over the days which upset me a great deal. My wound on my neck which started from the middle of my throat right through the back of my head was filled with dust each day at work and it was visible as it was black. I had to disinfect it everyday to make sure it wouldn't become infected".

272. However, despite this description, the Claimant relates this to the time before she met with Occupational Health on 24 October 2017, whose report, as stated, makes no reference to dust levels or being informed of the Claimant's difficulty with dust as she has expressed in her witness statement. One may reasonably have thought that it would have been if the dust was at the level

described above by the Claimant.

273. The Claimant in her witness statement at paragraph 66 states: "By 14 November 2017 I was struggling so much with coughing, the issues in Daycare and the issues with not having any handover from Will that I asked Evelyn for a meeting so could have a proper handover and discuss the issues". The Claimant cross-refers to an email that she sent to Ms Hagger dated 14 November 2017, however again there is no mention in that email to refurbishment dust or the Claimant having any issue with it.

274. The Claimant did not raise any difficulty regarding dust with the Respondent until November 2017. The Claimant mentions dust in the meeting with Ms Hagger on 17 November at page 511, which is the Claimant's covertly recorded transcript and which does not appear in Ms Hagger's notes of the meeting at page 510.

275. The Claimant agreed in evidence that the meeting on 17 November 2017 was the first time that she relies upon where she raised the matter of refurbishment dust with the Respondent.

276. The Claimant first put the matter in writing in an email dated 20 November 2017 to Ms Hagger in which she states: "I was also very disappointed to see the hospital extremely dirty on my return clearly health and safety/infection control measures are not being followed during the building works that cause extreme dust. I have also had no risk assessment carried out at my return to protect me from infection from the dust. My office with the air vent circulates all the dust which could contain mould, fungus, bacteria and viruses and considering I am still in immune compromised is not safe for me being in there".

277. This is a claim of a protected disclosure detriment only and relates only to a risk assessment regarding construction dust. The Tribunal concludes that even if the Respondent's actions in the circumstances can objectively amount to a detriment, it was not done on the ground of the Claimant's protected disclosures.

278. The Claimant raised the matter for the first time in writing on 20 November 2017. The Claimant was off work from that day, returning on 28 November 2017. On 28 November, after the return to work meeting, Ms Hagger arranged a meeting on the 04 December 2017 between the Claimant and Ms Day so they could discuss matters before the three of them held a further meeting on the following day. An Occupational Health recommendation regarding the construction dust was first made in a report on 27 December, which was not received by the Respondent until 04 January 2018. The Claimant was off work from 21 December 2017 until the effective date of termination on 04 February 2018.

279. The Respondent has shown that the reason for its actions with regard to construction dust was that the only reasonable period available to the Respondent for addressing the matter with the Claimant in her workplace after she first raised it as a problem was between 5 December and 21 December.

During that period the Claimant was again referred to Occupational Health and that report was not provided until the Claimant was off work through illness. There was no opportunity to address the Occupational Health recommendations whilst the Claimant was in the workplace.

280. Ms Hagger addressed the Claimant's concern over dust reasonably promptly after the Claimant had raised it and enlisted the assistance of Ms Day. The Tribunal concludes that the Respondent has shown that it endeavoured to address the issue and the actions it took were not in any way influenced by the Claimant's protected disclosures.

(Q) *"The Respondent failed to assess and/or clean the air vent in the Claimant's office despite the Claimant's repeated requests, the recommendation of Jennifer Day on 4 December and 5 December 2017 and as recommended as a reasonable adjustment by OH in their report dated 27 December 2017"*.

281. The Tribunal refers to (P) above and the section addressing the extractor vent in the Claimant's office.

282. The Tribunal has concluded that the vent was not connected to the main system. Ms Hagger inspected the Claimant's office and spoke to the engineer to check the service plan. The extractor fan was checked every three months. On the Claimant's own evidence the maintenance engineer confirmed to her that he had checked the vent, although it is not clear when this was in time, but it was obviously before 28 November 2017 as the Claimant mentions it in her meeting with Ms Hagger.

283. Ms Day only refers to cleaning the vent in the context of allaying the Claimant's concerns.

284. The Tribunal concludes that the Claimant's allegation has not been made out as fact. Ms Hagger looked into the matter, checked the service plan and the vent was checked and cleaned. The Claimant was not in her office after the Occupational Health Report dated 27 December and therefore was not affected by the circumstances and cannot provide evidence on the position.

285. The Tribunal concludes that the Respondent's actions were not influenced to any extent by the Claimant's protected disclosures.

(R) This matter was withdrawn during the course of the hearing and was not pursued in the list of issues or submissions.

The claim of a failure to make a reasonable adjustment

286. The Claimant relies upon four pcp's as part of her reasonable adjustment claim.

287. The first is "a policy whereby the Respondent carried out annual maintenance of the extraction/ventilation system and/or a requirement to work in an environment where building works are taking place as a result of which dust is produced".

288. The first part of the pcp was not applied as a matter of fact. The maintenance of the vent in the Claimant's office, which is what this pcp relates, was carried out every 3 months/12 weeks.

289. There was a requirement for the Claimant to attend at work when the refurbishment was being undertaken and the Tribunal finds that at stages there was dust in the environment, particularly after the ceiling was removed, although the Tribunal finds that it was not at the sustained high level expressed by the Claimant, Ms Silva and Ms Durao in evidence.

290. The Tribunal finds that this placed the Claimant at a substantial disadvantage compared to non-disabled persons as the Claimant was immuno-suppressed and was at a potential infection risk from contact with inorganic dust as confirmed in the December Occupational Health Report at page 718 and Ms Day's comments in the 04 December meeting at page 610.

291. The Tribunal concludes that it is not a reasonable adjustment to undertake a risk assessment and to develop a plan from that assessment to address the issues raised as argued by the Claimant. As concludes by the Tribunal above, that is not of itself an adjustment to avoid the disadvantage, it is only a step or process that may be taken to identify risks and potential adjustments that might be made to remedy any identified disadvantage.

292. The further suggested adjustment was to regularly assess and maintain the air vents and the extraction fan in the Claimant's office. The extractor vent was serviced every 12 weeks. It was also an extractor fan taking any dust out of the Claimant's office and was not connected to the main system. Therefore it was not a reasonable adjustment as it would not have remedied the disadvantage, in any event it was being done by the Respondent.

293. With regard to the suggested adjustment of the provision of a dust mask for the Claimant to wear, the Tribunal finds as fact that the Claimant was given a dust mask to wear and that she did wear it. However the Matron at the time asked the Claimant to take it off when she was near patients, This occurred pre 26 November 29017 when the Claimant mentions it in an e-mail. This was recognised by Ms Day in the investigation notes dated 19 January 2018 (page 758) and the meetings on 04 and 05 December 2017 (page 625). Ms Day confirmed that the Claimant was asked not to wear a mask when she was around patients and other areas generally, but she was advised to wear a mask if there were infectious patients or a TB patient. Ms Day described wearing masks around patients generally as "not entirely appropriate".

294. The Tribunal concludes having regard to all the circumstances that it was a reasonable adjustment for the Respondent to allow the Claimant to wear a face mask at all times (as ultimately recommended by Occupational Health). The Tribunal can understand the Respondent's reluctance to have the Claimant wear a mask around patients, but given the nature of the substantial disadvantage and the fact that it would only be the Claimant who would wear a mask around patients, this single exception would be a reasonable adjustment in the circumstances.

295. With regard to the final suggested reasonable adjustment of transferring the Claimant to work in another area not exposed to construction dust, this was recommended in the December Occupational Health Report, but the Claimant did not return to work before the termination of her employment. The refurbishment also finished soon in the new year of 2018.

296. However, on the Claimant's evidence, having regard to the Hospital plan and the distance the Claimant's office was from the refurbishment, it is difficult to envisage where the Claimant would have been reasonably content to move to within the Hospital. No alternative place to work within the Hospital was suggested by the Claimant in evidence. No suggestions were put to the Respondent's witnesses in cross-examination.

297. Similarly there was no indication of alternative hospitals where the Claimant would have been agreeable to work. There was no evidence of potential geographic location or potential available work at other Respondent sites.

298. The Tribunal concludes that there is no evidence of any transfer that would have amounted to a reasonable adjustment.

299. The second pcp is: "a requirement that the Claimant work any hours as directed by her employer, including in particular early and/or late night shifts".

300. The Tribunal concludes that this was not a pcp operated by the Respondent. As stated above, the Respondent sought to agree core hours and the Claimant had flexibility over start and finish times. There were only very few occasions when the Claimant had an early start and these occasions were accompanied by a commensurate early finish.

301. The third pcp is: "a requirement that the person carrying out the Claimant's role should be capable of undertaking physical tasks such as manual handing of linen and stores, cleaning rooms and making beds".

302. The Tribunal concludes that the Respondent did not operate this pcp. The Claimant had help available and was a Supervisor and could direct her staff to do any of those tasks. The Tribunal finds as fact that someone was always available to assist. It was for the Claimant to direct how the work was to be distributed. There was no requirement for the Claimant to be capable of doing those tasks.

303. The fourth pcp is: "a requirement that the Claimant works with infectious disease patients".

304. The Tribunal finds that there was a general pcp to this effect. The Tribunal concludes that the Claimant was at a substantial disadvantage compared to non-disabled persons in that she was immune-suppressed and more vulnerable to infection.

305. However, the Respondent had already made an adjustment as soon as the matter was raised by Occupational Health. As stated above, the Respondent removed the Claimant from cleaning the room of any patient with an infectious

disease or a room recently vacated by a patient with an infectious disease. The Respondent screens patients and places a notice on the room door of any patient who has an infectious disease. The Tribunal concludes that the removal of the Claimant from cleaning rooms of infectious patients was a reasonable adjustment and it was in operation from the Claimant's return to work on 09 October 2017.

306. Therefore the Claimant was only at risk of working with patients, staff or the public who had an unknown infectious disease to the same extent as she would have been exposed outside the Hospital generally, as confirmed by Ms Day. Also if the infection was unknown there was no reasonable adjustment that could have been made by the Respondent.

307. The Claimant suggest that a reasonable adjustment would have been to undertake a risk assessment with respect to infectious patients, however as stated above, of itself this does not amount to a reasonable adjustment. All that step might have done was highlight what actual adjustment may have been made to avoid the disadvantage, but the Respondent had already done it by removing the Claimant from contact with cleaning the room of patients and former patients who had a known infectious disease.

308. The final suggested adjustment was for a buddy to undertake the Claimant's work which involves working with infectious patients. As already stated the Claimant was instructed not to clean the rooms of infectious patients and therefore there was no work that involved working with known infectious patients. Further the Claimant as Supervisor could instruct other members of staff to undertake that work if it arose.

A review of the complaints

309. As mentioned, the Claimant covertly recorded five significant conversations with the Respondent, which gave her an opportunity not only to catch the participants unawares but also to direct the conversation. It is notable that despite that no comments were drawn to the Tribunal's attention in evidence made by the participants that suggested anything other than they were addressing the situations on the merits as they arose.

310. The Tribunal concludes that the single successful complaint of a detriment in employment on the ground of having made a protected disclosure was presented to the Tribunal out of time. Day A on the ACAS Certificate is 07 March 2018 and therefore any event that occurred on or after 08 December 2017 is in time. Issue G occurred on 24 and 25 October 2017 and is therefore out of time. The Tribunal concludes when considering all the circumstances that it was reasonably practicable for the Claimant to have presented a claim to the Tribunal within time. The Claimant has demonstrated that she was able to write communications dating back to September 2016 that amounted to protected disclosures. The Claimant refers to having discussed matters after the end of October 2017 with a person who had legal knowledge. There was no impediment suggested to her presenting a claim to the employment tribunal within time. It does not form part of a similar series of acts. Accordingly, the Tribunal does not have jurisdiction to consider it.

311. The Tribunal concludes that the failure to make a reasonable adjustment finding and the discrimination arising from disability finding were both presented to the Tribunal within time as the acts occurred on or after 08 December 2017.

312. The Tribunal has stepped back and considered all of the above allegations in the entire factual matrix and concludes that there are no changes to the findings made above when they are considered cumulatively.

The claim of dismissal by reason of having made a protected disclosure and/or a discriminatory dismissal

313. The Tribunal concludes having regard to all the evidence, including the Claimant's second grievance and letter of resignation, that the single finding of a detriment in employment on the ground of having made a protected disclosure did not form part of the effective cause of the Claimant leaving her employment. In addition, the Claimant chose to continue her employment after the event for a further eight weeks until she made her second grievance and ten weeks until her resignation. The Tribunal concludes that the breach was waived by that passage of time.

314. The Tribunal has concluded that one element of discrimination arising from disability regarding the failure to pay sick pay and one claim of a failure to make a reasonable adjustment with regard to dust mask use around patients have been successful.

315. The Tribunal concludes that these matters do not constitute a repudiatory breach of contract entitling the Claimant to resign. Having regard to the Court of Appeal decision in **Callaghan** above, the failure to pay sick pay was a mistake and was not conduct that went to the root of the contract.

316. The Claimant was allowed to wear a dust mask but not around patients. Wearing the mask at all times was an adjustment the Tribunal has found could reasonably have been made, but it was not a circumstance where the Respondent had not allowed its use at all and the matter was sympathetically reviewed by Ms Day and Ms Hagger. The Tribunal concludes that this was not conduct that without reasonable and proper cause was calculated or likely to destroy or seriously damage the relationship of trust and confidence.

317. Those matters neither individually or cumulatively go to the root of the contract sufficient to amount to a repudiatory breach of contract.

The claim of ordinary unfair constructive dismissal

318. The Tribunal reaches the same conclusion regarding the matters considered under protected disclosure and discriminatory dismissals above with regard to the ordinary unfair constructive dismissal claim. The protected disclosure issue did not form part of the effective cause of the Claimant leaving her employment and had been waived by the time of her resignation and the discrimination claims as found in the Claimant's favour did not go to the root of the contract and was not conduct that without reasonable cause was

calculated or likely to destroy or seriously damage the relationship of trust and confidence.

319. The Tribunal has carefully considered all the circumstances and concludes that none of the issues raised by the Claimant above either individually or cumulatively amount to a repudiatory breach of contract save for an analysis of the Respondent's failure to undertake a risk assessment with regard to patients with infectious diseases.

320. The Tribunal cross-refers to the findings of fact under (D) above.

321. The recommendations of the September Occupational Health Report states that the priority is a risk assessment of the Claimant working nearby infectious disease patients.

322. The Claimant returned to work on 09 October 2019 and at the return to work meeting Ms Hagger agreed for the Claimant not to clean rooms where there was or had been an infectious patient and ward-based housekeepers would fulfil that role.

323. Because of surgery subsequent to the September Occupational Health Report the Claimant was re-referred to Occupational Health. The October Occupational Health Report gave the same risk assessment recommendation as the September Report.

324. The Claimant was absent from work from 20 to 26 November 2019.

325. Ms Hagger e-mailed the Claimant on 27 November 2019 setting out her understanding of the Claimant's circumstances and attaching a template Spire Healthcare General Risk Assessment document.

326. Ms Hagger had a return to work meeting with the Claimant on 28 November 2019. On that date Ms Hagger arranged a meeting between the Claimant and Ms Day. In that e-mail exchange Ms Hagger states: "As part of this Occupational review the following has been considered/recommended: Risk assessment of her working nearby infectious disease patients - agreed action to date is for Gyongyi not to carry out deep cleans on patient rooms used by infectious patients". Ms Day described the Claimant's concerns as "quite valid".

327. At the meeting between the Claimant and Ms Day on 04 December was to discuss the Claimant's concerns with regard to her return to work, her health and potential infection risk. Ms Day emphasised the need for the Claimant to manage the housekeeping team in respect of any rooms where patients had known infectious risks, especially for terminal cleans. The Claimant was advised to check with clinical staff daily with regard to infection risks and allocate staff accordingly. Any room where there was a known infection risk should be cleaned by a member the housekeeping team prior to the Claimant inspecting the room. Ms Day had enforced the use of gloves and aprons and strict adherence to good hand hygiene, which she considered was adequate precaution to protect the Claimant. Clinical staff must be requested to remove

items such as linen and equipment prior to housekeeping entering the rooms; avoiding potentially contaminated items been left in corridors.

328. However, it also records: "We addressed the fact that a risk assessment had not be completed to facilitate Gyongyi's return to work. I have suggested that a meeting with the Occupational Health advisor Joan Mann, Evelyn Hagger, Gyongyi and myself, will be advisable to discuss and implement a strategy for safeguarding Gyongyi's return to work and identify any potential health issues/risks with a view to minimising these accordingly".

329. A meeting took place on 05 December 2017 between the Claimant and Ms Hagger during part of which Ms Day was present. This was not the meeting with Ms Mann as suggested by Ms Day. Ultimately after a long conversation Ms Hagger confirmed: "So from what I have heard, do you want me to write a risk assessment, and put the actions at the bottom of it and you see if that is what we agreed", to which the Claimant confirmed “OK”.

330. An Occupational Health report was provided after a consultation on 19 December 2017 in which it states: "The priority now is risk assessment ongoing of Ms Makkos working nearby - construction work; - and as previously mentioned infectious disease patients". That report was provided to the Respondent on 04 January 2018.

331. The Claimant handed in her resignation by a letter dated 05 January 2018 (pages 725 to 727 of the bundle). The Claimant raises the issue of the risk assessment not having been completed. The Tribunal concludes that it formed part of the Claimant’s reason for leaving her employment.

332. The Tribunal concludes that it was a repudiatory breach for the Respondent not to undertake a risk assessment regarding infectious disease patients as had been recommended twice by Occupational Health before the Claimant’s absence from work leading up to her termination of employment.

333. The September Occupational Health Report recommended a risk assessment regarding infectious disease patients as a priority. A formal risk assessment was not done.

334. Ms Hagger had removed the Claimant from cleaning the rooms of infected patients on 09 October before the second Occupational Health report on 24 October, but that Report still raised the risk assessment as a priority. The Tribunal has not seen the Occupational Health referral forms to see whether it sets out the actions taken so far, but that opportunity would have been available. A formal risk assessment was not completed.

335. Ms Day suggested on 04 December that it would be advisable to have a meeting with the Occupational Health advisor Ms Mann, Ms Hagger, the Claimant and herself to discuss and implement a strategy for safeguarding the Claimant’s return to work and identify any potential health issues/risks with a view to minimising them. This meeting did not materialise. This is in spite of the Claimant’s clear concerns for her health as already expressed orally and in writing and Ms Hagger, the Claimant’s line manager, being the Hospital’s

'Risk Champion' and Health and Safety Officer.

336. At the subsequent meeting between Ms Hagger the Claimant, and Ms Day Ms Hagger said she would write a risk assessment with the actions taken to see if that is what was agreed. That assessment did not materialise.

337. The final Occupational Health Report further confirmed that a priority risk assessment ongoing of infectious disease patients remained an issue despite the actions taken by the Respondent.

338. Therefore the issue of a formal, comprehensive risk assessment regarding infectious disease patients had remained outstanding for a period of around two and a half months in circumstances where the Claimant had a particular vulnerability being immune-suppressed after treatment for a Cancer condition and the Respondent knew that to be the position. The Respondent also knew of the Claimant's concern that dust was affecting her health and adding to the risk of infection well before the December Occupational Health report.

339. The Tribunal concludes that in the circumstances, taking the account also of the size and nature of the Respondent as a Healthcare provider, this did amount to a repudiatory breach of the implied term of mutual trust and confidence. It was conduct without reasonable cause that had the effect of seriously damaging trust and confidence between the Respondent and the Claimant.

340. The Tribunal concludes that upon receiving confirmation from the December Occupational Health Report that the outstanding risk assessment was still a priority and that the Respondent should take steps to remove or minimise the risk to the Claimant of construction dust to which she believed had already been exposed, it was open to the Claimant to accept the Repudiatory breach. The breach was not affirmed and it formed part of the Claimant's reasons for leaving her employment.

341. The Tribunal considers that this decision does not cut across its conclusion regarding the protected disclosure issue (D). The Tribunal concludes that despite inferences that may be drawn from the facts, the Tribunal accepts the Respondent's explanation for the actions it took and that they were not influenced in any way whatsoever by any protected disclosure.

ANNEX 1

Agreed Chronology

* = witnesses giving oral evidence before the tribunal

*C = Claimant, Gyongyi Makkos, Housekeeping Supervisor

*EHn = Ellie Harrison, HR Consultant

*EHr = Evelyn Hagger, line manager, Head of Operations, health and safety officer

*ENT = Ed Neville Towle, grievance investigator, Finance and Commercial Manager

*FD = Filomena Durao , Housekeeper

*JC = John Crisp, Hospital Director

JD = Jennifer Day, Infection, Prevention and Control Lead

*LA = Lynette Awdry, grievance appeal decision maker, Matron at Spire Montefiore Hospital

*LS = Louisa Silva, Housekeeper

PD = Protected Disclosure (for whistleblowing claim)

PA = Protected Act (for victimisation claim)

*SD = Sarah Dimond, Head Chef

PDs are listed with reference to the sub-paragraphs in the List of Issues, para 1 (a), (b), (c) etc

Detriments are listed with reference to sub-paragraphs in paragraph 76 of the Grounds of Claim and given capital letters to distinguish them from the PDs – so (A), (B), (C) etc

Harassment is not specifically identified as every detriment is also said to be harassment related to disability

9/11/15	C's employment with R started
13/9/16	alleged PD (a) to SD cleanliness [214, 414(a)-(f)]
14/9/16	alleged PD (b) to EHr staff leaving early [209]
15/9/16	alleged PD (c) to SD, EHr, JC staff not cleaning properly and leaving early said to amount to fraudulent activity (staff claiming for hours not worked) [210]
9/10/16	C's operation and diagnosis of cancer at end of October
Oct 16-Oct17	C absent from work
Jan 17	alleged detriment (A) by EHr stating that C should give up job
27/6/17	alleged detriment (A) by EHr stating that C should give up job
14/8/17-Dec17	building work at Gatwick Park Hospital
31/8/17	meeting at which SD allegedly disclosed private information about C's health – alleged detriment (B) [1274-1277]
5/9/17	OH appointment & report [412-413]
17/9/17	alleged PD (d) to EHr [415]
25/9/17	C underwent left neck dissection (having been told about it on 8/9/17)
late Sept 17	C call with Ehr
6/10/17	C's GP fit note [419]
9/10/17	rtw – meeting with Her [420-421] Rtw form records employee will be considered for co sick pay on next episode of absence
from 9/10/17	alleged detriments (C), (D), (E) failure by EHr to arrange handover / risk assessment / failure to agree GP recommended hours

9/10/17	alleged detriment (F) / ftmra – refusal by EHr to pay accrued a/l
from 9/10/17	alleged detriments (P) and (R) and victimisation – R failed to carry out a risk assessment wrt construction dust / caused C to acquire an infection
24/10/17	OH appointment & report [441-443]
26/10/17	incident between C and SD – alleged detriments (G), (H) by JC
27/10/17	C's 1st grievance [446-447]
30/10/17	C PET scan
from Nov 17	alleged detriment [K] that EHr expected C to work early and late shifts
9/11/17	grievance hearing with EHn []
14/11/17	C telephone call with EHn – alleged detriment [I] EHn said C could face disciplinary action
14/11/17	alleged PD (e) to EHr – cleaning standards [499-500]
16/11/17	grievance outcome [503-508] – alleged detriment [J] EHn's comment on C's behaviour
from 16/11/17	alleged detriment [L] that EHr failed to arrange a meeting with JC
17/11/17	C meeting Her [509-510]
20-26/11/17	C off sick - unpaid
20/11/17	handover meeting arranged [510] (did not take place due to C's absence)
20/11/17	alleged PD (f) and PA1 to EHr various [531]
20/11/17	C contacted HSE – alleged PDs (g) & (h) [550-557]
20/11/17	HSE conclude 'appears to be general dust' [550]
21/11/17	C contacted CQC – alleged PD (i)
21/11/17	EHn letter to SD [562]
26/11/17	alleged PD (j) and PA2 to EHr various [577]
27/11/17	EHr email to C [580-582]
27/11/17	alleged PD (k) and PA3 to EHr - various [583]
28/11/17	rtw – meeting with EHr – alleged detriment (M), ftmra and victimisation - refusal to pay sick pay for 20-26/11/17 [594-596]
4/12/17	C met with JD – alleged PD (l) – health and safety [610-611] (written 2.1.18)
from 4/12/17	alleged detriment (Q) and victimisation – R failed to clean air vent
5/12/17	C met with EHr and JD - alleged PD (l) – health and safety
5/12/17	C met with EHr to discuss grievance outcome [612-616]
7/12/17	everything before this date is out of time as an individual act
12/12/17	C email to EHr [638]
13/12/17	C met EHr and SD to discuss grievance outcome – alleged detriment [N] and victimisation EHr told C she could be placed on PIP [647]

18/12/17	C's 2nd grievance – alleged PD (m) and PA4 [672-682]
19/12/17	OH appointment – C alleges JC inappropriately spoke to OH – alleged detriment (O) and victimisation by or via OH nurse
19/12/17	EHn email [692]
20/12/17	alleged PD (n) to EHn re JC breach of confidentiality [691-692]
20/12/17	C met JC [698, 701-]
20/12/17	C, SD and EHr met
21/12/17-3/1/18	C on holiday
21/12/17	C emailed EHn [705-706]
22/12/17	alleged PD (o) to EHn - various [712-715]
27/12/17	OH report [717-719] – received by R on 4/1/18
4/1/17	C certified sick for 1 month [723]
5/1/18	alleged PD (p) and PA5 - C resigned giving 1 month notice [724-727]
8/1/18	EHn confirms C's resignation is being processed [730]
21/1/18	alleged detriment [S] (wrongly stated in ET1 to be 19/1/18) ftmra and victimisation - EHn informed C that she would not get sick pay for Jan 18 illness [763-764]
30/1/18	C's PET Scan
Jan 18	Quadriga dust report commissioned
4/2/18	EDT – alleged detriment (T)
after 4/2/18	alleged detriments (U) and (V) – failure to pay notice pay or accrued holiday pay
7/3/18-15/3/18	EC Period [1]
3/4/18	grievance report part 1 [931-968] – alleged detriment (W) and victimisation
after 3/4/18	delay in dealing with part of grievance relating to dust – alleged detriment (X) and victimisation
14/4/18	ET1 [2-55]
24/4/18	Quadriga dust report [918-929]
17/5/18	grievance report part 2 [987-1001]
19/5/18	appeal [1002-1058]
27/7/18	PH [94-97]
7/8/18	appeal outcome [1115-1124]

Employment Judge Freer
Date: 16 July 2019