Case Number: 3303649/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs T Howse	**v**	**London North West University Healthcare NHS Trust Foundation**

Heard at: Watford

On: 16 to 21 May 2019 and 20 August 2019 (In chambers)

Before: Employment Judge Bedeau
Members: Mrs S Hamil
Mr R Lesley

Appearances

For the Claimant: Mr B Dhariwal, Solicitor
For the Respondent: Mr S Nichols, Counsel

RESERVED JUDGMENT

1. The claims of protected interest disclosure detriment are not well- founded and are dismissed.

2. The claim of constructive unfair dismissal is not well-founded and is dismissed.

3. The claim of automatic unfair dismissal, section 103A Employment Rights Act 1996, is not well-founded and is dismissed.

4. The case listed for a provisional remedy hearing on 18 October 2019, is hereby vacated.

REASONS

1. By a claim form presented to the tribunal on 30 January 2018, the claimant who worked as an In-Patient Service Matron from 1 November 2014 to 1 November 2017, made claims of constructive unfair dismissal; public interest disclosure detriment; and public interest dismissal.

2. In the response presented to the tribunal on 26 March 2018, the claims are denied. The respondent asserted that the claims were not sufficiently particularised.

3. At the preliminary hearing held on 17 July 2018 Before Employment Judge R Lewis, the claims and issues were clarified.

4. **The issues:**

Constructive unfair dismissal

4.1 Was the claimant dismissed, i.e. did the respondent breach the so-called 'trust and confidence term'? (a) Did it, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant? (b) If so, did the claimant affirm the contract of employment before resigning? (c) if not, did the claimant resign in response to the respondent's conduct? To put it another way, was it a reason for the claimant's resignation, as it need not be the only reason for the resignation?

4.2 If the claimant was dismissed, was she wrongfully dismissed because she resigned without notice.

4.3 The conduct the claimant relies on as breaching the trust and confidence term is alleged ostracism and lack of support after 4 July 2017, details of which the claimant is to provide.

Remedy for ordinary unfair dismissal

4.4 If the claimant was unfairly dismissed, she may, after judgment on liability has been given, ask the tribunal to make an order for re-engagement or reinstatement. If so, further case management may be required at that stage.

4.5 If the claimant was unfairly dismissed and the remedy is compensation, the tribunal will first have to calculate her basic award, on the standard multiplier of age x years of service x pay, and then have to consider the appropriate compensation in light of losses proven by the claimant to have been caused by her dismissal. The award will be subject to a statutory ceiling figure.

Public interest disclosure (PID)

4.6 Did the claimant make one or more protected disclosures (ERA sections 43B [*& 43C*])?

4.7 What was the principal reason the claimant was dismissed and was it that she had made a protected disclosure?

4.8 Did the respondent subject the claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.

4.9 If so, was this done on the ground that s/he made one or more protected disclosures?

4.10 The alleged disclosures the claimant relies on are as follows:

4.10.1 That on 30 June 2017, she told Ms Sullivan that Ms Carr was habitually not working her contracted hours;

4.10.2 That she repeated the above at a meeting on 4 July with Ms Sullivan, Mr O'Leary, Ms Heath and Ms Carr.

4.11 The alleged detriments the claimant relies on are as follows:

4.11.1 That three of the above four colleagues (not Ms Sullivan) after 4 July ostracised and failed to support her;

4.11.2 That she resigned in consequence.

Remedy

4.12 If the claimant succeeds, either in whole or in part, the Tribunal will be concerned with issues of remedy and, in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues which may arise, and which have not already been mentioned, include:

4.12.1 Is the claimant entitled to an award for injury to feelings (PID detriments only), and if so, in which of the Vento bands does it fall?

4.12.2 Is the claimant entitled to an uncapped compensatory award in accordance with ERA s.103A, and if so, how should future loss and pension loss, be calculated?

The evidence

5. The tribunal heard evidence from the claimant who did not call any witnesses. On behalf of the respondent evidence was given by:

- Ms Denise Sullivan, Divisional Governance Co-ordinator;
- Ms Rosemary Heed, Divisional General Manager;
- Ms Melanie Carr, Deputy Divisional Lead; and
- Mr Daniel O'Leary, Divisional Lead.

6. In addition to the oral evidence the parties adduced a joint bundle of documents comprising of 210 pages. References will be made to the documents as numbered in the bundle.

The claimant's applications

7. There are two applications before us. Both applications have been made by the claimant's representative, Mr Dhariwal. The first is in relation to an application to add two further qualifying disclosures which relate to a meeting the claimant had with Mr Jonathan Davies, Deputy Chief Nurse, on 29 September 2017 and subsequently, a document that was forwarded to Mr Davies on 5 October 2017.

8. It is asserted by the claimant that the qualifying disclosures amount to allegations of a breach of a legal obligation, health and safety and the deliberate concealment of information.

9. The second application is for documents already included in the joint bundle which intends to rely on to challenge the claimant's assertions about the behaviour of Ms Denise Sullivan, Divisional Governance Co-ordinator for Women and Children. At one of her meetings with Ms Sullivan, the claimant described Ms Sullivan's behaviour in unflattering terms, making references to her swearing. The documents, on their face, tend to show that the claimant is the sort of individual likely to have been engaged in swearing and in acts of aggression. Mr Dhariwal would like them removed from the bundle.

10. We deal with the first application which is the application to amend. There are three claims before this tribunal, constructive unfair dismissal, public interest disclosure detriment, and public interest disclosure dismissal. At the preliminary hearing held on 17 July 2018, before Employment Judge Lewis, in relation to the claimant's protected disclosures, the Judge stated that the claimant was relying on two qualifying disclosures made on 30 June 2017 and 4 July 2017. Mr Dhariwal said that although the claimant represented herself at that hearing, she handed to the Judge, a copy of an unsigned statement she had forwarded to Mr Davies on 5 October 2017, which was a qualifying disclosure.

11. Mr Dhariwal submitted that the claimant said to the Judge on that occasion, that it amounted to a qualifying disclosure and as it was handed to Mr Davies, a protected disclosure.

12. If that was said by the claimant, it is not recorded in the case management summary sent to the parties on 28 July 2018. When she received it, she did not challenge the absence of the statement about the additional public interest disclosure, nor was it challenged subsequently by her legal representatives.

13. On 5 October 2018, Mr Dhariwal notified the tribunal that he was representing the claimant. In December 2018, he disclosed to the

respondent's legal representatives, the unsigned statement the claimant said she sent to Mr Davies. That unsigned statement has in the very first sentence, a reference to the claimant, making disclosures and that she wanted the content of the statement and her identity to remain anonymous.

14. No application was made by the claimant's legal representatives in relation to the meeting the claimant had with Mr Davies on 29 September and to the unsigned statement forwarded on 5 October 2017, to be further protected disclosures, until today when Mr Nicholls was handed the claimant's skeleton argument in which the claimant referred to disclosures three and four, namely 29 September and 5 October 2017. Having read the skeleton argument, reference to two further disclosures caused the respondent some surprise.

15. The respondent based its response on defending the two protected disclosures of 30 June and 4 July 2017. Were we to allow the claimant to rely on the two additional disclosures, the respondent would be prejudiced according to Mr Nicholls, because it did not have Mr Davies present to give evidence either in support of or against the various claims made by the claimant in relation to the proposed two additional protected disclosures. Were we to allow the application it would necessitate an adjournment as Mr Davies is no longer an employee of the respondent?

16. Mr Dhariwal urged upon us to take the view that the two protected disclosures are not new matters because they refer to the earlier disclosures and the fact that no action had been taken in respect of them as there had been some concealment. The statement was disclosed to the respondent's lawyers in December of 2018, therefore, they had time to take action.

Tribunal's ruling on the application

17. It is right that a party can apply to amend at any time in proceedings. In this case it is additional facts to the existing public interest disclosure claims. We have to take into account the timing of it; the reasons for the delay; and any prejudice likely to be suffered by the parties and the merits. The claimant puts her case on the basis that the meeting with Mr Davies and sending him the unsigned statement, all occurred prior to her resignation on or around 11 October 2017, and amount to public interest disclosures. In paragraph 14 of her witness statement, she stated that it was after her resignation was the statement forwarded to Mr Davies.

18. There was no good reason why a timeous application to amend could not have been made. We were not clear as to the reason for the delay, but this is only one factor to take into account. Were this application to be allowed it would cause the respondent prejudice, in that Mr Davies is not here and there would have to be an adjournment of this hearing. The proposed further disclosures are relevant to the claimant's case as it addresses disclosures at or around her decision to resign. She would be prejudiced in not being able to rely on them.

19. We have come to the conclusion that, on balance, the claimant should be allowed to rely on the two additional public interest disclosures. However, the concomitant result is that the respondent will be entitled to an adjournment in order to call Mr Davies as a witness. The costs incurred in having to adjourn the hearing will be borne by the claimant under rule 76(1)(c).

20. Moving on to the second application, we do not rule that the documents should be removed from the hearing bundle. The claimant's case is that she would need time to produce further evidence in support of her character and her demeanour at times when she engaged with her work colleagues. She is, therefore, in a position to rebut what is contained in the documents. That could be done if there is an adjournment of this case following our ruling in respect of the application to amend. As this case is unlikely to be listed within the next three or four months, there is the possibility it may be listed in the early part of next year.

21. After taking instructions, Mr Dhariwal withdrew his application to amend. Mr Nicholls was content to have the contentious documents in relation to the claimant's character, removed from the bundle.

22. The tribunal proceeded to hear the evidence on the second day of the hearing.

Findings of fact

23. The respondent is an NHS Trust which delivers hospital and community services across Brent, Ealing and Harrow. It employs more than 8,000 staff and serves a diverse population of approximately 850,000 people.

24. The claimant was previously a Healthcare Assistant and started training as a Midwife in 2003. She qualified as a Midwife in 2006. In 2011, she was offered a role as a Band 7 Senior Midwife at the respondent hospital. She thereafter took a break from Occupational Midwifery for about one and a half years, undertaking a lecturing role in midwifery at Northampton University.

25. On 27 October 2014, she was re-employed by the respondent as a Duty Matron. In September 2015, she was made the In-patient Services Matron, which is a Band 8A post and was responsible for the daily nursing midwifery operation of the Ante-Natal and Post-Natal, and Intra-Partum Wards. We were told that she was responsible for the supervision of around 100 staff.

26. At all material times the claimant's line manager was Ms Melanie Carr, Deputy Divisional Lead for Women's Services, who was also a key member of the Divisional Management Team, responsible to the Divisional Lead for Women's Services, Mr Daniel O'Leary.

27. The claimant and Ms Carr were friends. They had known each other for nearly 17 years. The claimant had known Ms Carr from when she was a Student Midwife. They became friends just after she, that is the claimant, qualified. They had previously worked together at a hospital in Luton. The claimant lives in Houghton Regis and she live in the same geographical area as Ms Carr, they would normally travel to work together. The arrangement was that they would each drive alternate weeks unless one was on annual leave or it was inconvenient. They worked the same hours which were from 6.45am until 3.45 or between 3.45 to 4.30pm, depending on the breaks taken. Ms Carr normally worked Monday to Thursday unless her line manager, Mr O'Leary, was absent. In which case she would have to work on Friday and swap her day off for another day in the week. Their joint travel arrangements mainly covered to Monday, Tuesday and Thursday, as the claimant's day off was Wednesday.

28. We find that the claimant and Ms Carr were very good friends and did socialise outside of work the other being invited to family functions.

Ms Carr's working hours

29. The claimant told us that she became aware in early 2017 that Ms Carr was leaving work earlier than her contractual hours as she was often not around during the latter part of the working day. She stated that the first time she noticed Ms Carr's work pattern was when Ms Carr was a Consultant Midwife prior to her promotion on 16 March 2017. The previous Deputy Head of Midwifery, Ms Julie Cooper, Band 8, and the claimant, on a particular day, the claimant said, went to Ms Carr's office and noticed that she had left early. They both commented that she was scheduled to have been at work much later that day. The claimant, however, did not make a note of the actual date, nor was Ms Cooper called to give corroborative evidence.

30. The evidence given by Ms Carr was to the effect that, as part of her duties, she had to visit the respondent's other hospital sites. Neither the claimant nor Ms Cooper, if Ms Carr did leave work early on this unspecified date, knew whether her departure had been authorised. We do not place much credence on this account.

31. The claimant also gave an unspecified date when Ms Carr allegedly told her that she had a doctor's appointment at 3pm and that the claimant had to drive herself on that day. The claimant later noticed that Ms Carr's office was locked and her car had gone by lunchtime. She said that when she asked Ms Carr about what she had observed, Ms Carr appeared to be flustered and replied that the doctor had changed the time of the appointment. If that be right, there is no evidence given by the claimant to challenge that statement by Ms Carr. The claimant, however, believed that Ms Carr was not telling the truth.

32. The claimant said that on 21 April 2017, she had to attend a meeting in London with Mr O'Leary and Ms Rosemary Heed, Divisional General Manager. Ms Carr remained behind. The claimant recalled that there were

only two senior managers in the department. When she parked her car in the morning, she remembered that Ms Carr's car was only one away from hers. When she returned at 1.45 in the afternoon, Ms Carr's car had gone and her office was locked. They drove into work the following Monday and on their way, she asked Ms Carr how her day was, meaning the previous Friday. She stated that Ms Carr informed her that it had been a busy day. The claimant then asked her if she had been involved in any meetings or incidents on that day, to which Ms Carr confirmed that she had not, but did not mention that she had left work early.

33. In evidence, Ms Carr said that Monday 17 April 2017 was a bank holiday and no manager was expected to work. On the following day, Tuesday 18 April, she was at work dealing with human resources issues. On Wednesday 19 April, she worked in the Unit and its status had moved from Amber to Red, meaning extremely busy. She went down to support those on the Labour Ward. Mr O'Leary was on annual leave at the time. She had a meeting with Ms Heed and then left the Unit between 6.30pm and 7pm. She stated that she worked her hours for that week. Again, the claimant was not in a position to challenge this account.

34. Ms Carr worked on Thursday 20 April 2017 as normal. Mr O'Leary asked her to come the following day, Friday 21 April, as he and Ms Heed were going to be in London for a doctors' meeting. Ms Abiola Jinadu, who would cover for Ms Carr, was on bereavement leave for six weeks as her mother had died. Mr O'Leary asked Ms Carr, to cover on 21 April 2017 in place of Ms Jinadu. Ms Carr worked on that day and left at lunch time when everything was normal. She chose to go home when the Unit's status was Green. She had told those on the Labour Ward that she was leaving at lunchtime on 21 April 2017. The claimant was not her line manager. At the time managers were not required to put down accrued hours on the Health Roster. She stated that her diary was regularly available to everyone for inspection. Manager are not entitled to be paid for overtime.

35. Having heard the evidence, we preferred Ms Carr's account, which was a detailed account of her movements that week. We find that she was not on unauthorised absence from lunchtime on 21 April 2017.

36. On 30 June 2017, the claimant said that Ms Carr had told her that she, Ms Carr, had to attend a meeting on the main site of the hospital with, Ms Amanda Pye, Chief Nurse, and Mr Johnathan Davies, Deputy Chief Nurse. At the time Mr O'Leary was on leave. She stated that Ms Carr had told her that the meeting may overrun, therefore, she would have to drive herself home that day.

37. On that day day the claimant attended training relating to the Perfect Ward. She was surprised to see Mr Davies and asked him if he was meant to be at a meeting that afternoon. She was told by him that there were no meetings scheduled. The claimant returned to her ward in the afternoon and noticed that Ms Carr's office was locked and her car had gone. The claimant was of the view that Ms Carr had gone home early.

Meeting between the claimant and Ms Sullivan on 30 June 2017

38. That day the claimant had a pre-planned meeting with Ms Denise Sullivan, Divisional Governance Co-ordinator for Women and Children, Grade 8. She said that she met with Ms Sullivan some time after 2pm that afternoon. We have noted, however, that in Ms Sullivan's evidence, particularly under cross examination, she said that she met with the claimant at 10.30am to discuss a complaint from the patient and not at 2pm She would normally meet with the Neo-Natal Unit Team at 2pm in the afternoon.

39. It is not disputed that at the meeting Ms Sullivan asked the claimant how she was, to which the claimant responded by saying: "I have a dilemma". She then told Ms Sullivan that her line manager was regularly leaving work early. She noticed that Ms Carr's office was locked and her car had gone before her normal leave time. She confirmed that her line manager was called "Mel". She said in evidence that Ms Sullivan told her to advise either Mr O'Leary or Ms Heed, but she was reluctant to do so as she did not know what they would do if they found out and believed that they would tell Ms Carr that she was leaving work early. The claimant was concerned as she did not want to betray her friend. She explained to Ms Sullivan that the problem for her was that Ms Carr was not around to guide her and was concerned that patient care could suffer. She said to Ms Sullivan that she did not know what to do. At that point the meeting came to an end.

40. In Ms Sullivan's evidence, as already referred to, she stated that the meeting with the claimant was 10.30am on 30 June 2017. She asked the claimant whether she and Ms Carr were friends, to which the claimant responded, "Now you see my dilemma". Ms Sullivan knew that both the claimant and Ms Carr travelled in the same car to and from work and was confused as to how Ms Carr could be arriving late as the claimant had alleged and was leaving early without the claimant. When she asked the claimant that she understood that they both turn up for work together, the claimant responded by saying that there were occasions when Ms Carr had told her that she had a meeting in London in April 2017 and could not travel together. The claimant then told Ms Sullivan that she later established that Ms Carr had not had a meeting in London as she had claimed and had concluded that she must have been using the meeting as an excuse to travel to work later. Ms Sullivan said, with regard to Ms Carr leaving early, that the claimant explained that there were times when she would look out of her window and see that Ms Carr's car was not parked in the car park and concluded that she had left early. Ms Sullivan asked the claimant whether she had discussed her concerns with Mr O'Leary, but the claimant said she felt unable to do so. She then suggested that the claimant could speak to Ms Heed, again, she felt unable to do so. The conversation ended without a resolution. They both then went on to review the patient complaint.

41. During her oral evidence to the tribunal the claimant said that at the meeting with Ms Sullivan she, the claimant, was "sounding off". We find that at no point during that meeting did the claimant say that she was making the

whistleblowing disclosure or complaint. We further find that if the claimant had used the word "Whistleblowing", Ms Sullivan would have directed her to the respondent's Whistleblowing Policy and would have terminated the discussion. The claimant did not say to Ms Sullivan that she was speaking to her in confidence, or confidentially, or privately.

42. At or around 12.30 that afternoon Ms Sullivan went to speak to Ms Heed because she felt that she needed to follow up the issue. If the claimant was correct that Ms Carr was not attending work as she should, Mr O'Leary needed to be aware. She also felt it was not conducive to relationships within the midwifery team, to keep the concerns to herself. If there was a problem between the claimant and Ms Carr, it was important that it was addressed. Mr O'Leary was on annual leave at the time so in his absence she discussed the concerns raised by the claimant with Ms Heed. This was during a routine scheduled one-to-one meeting during which she disclosed to Ms Heed, what the claimant had said to her about Ms Carr. Ms Heed, in her evidence to the tribunal, told Ms Sullivan that it was something that needed to be brought to Mr O'Leary's attention as overall Head of Service and in his capacity as Professional Lead for Midwifery. She offered to make him aware upon his return from annual leave the following week. Ms Sullivan said that at one point during their discussion Ms Carr popped her head round the door and said that she was leaving. This, however, was not in Ms Sullivan's witness statement.

<u>Tuesday 4 July 2017</u>

43. On Tuesday 4 July 2017, Ms Heed spoke to Mr O'Leary following his return from annual leave about the claimant's concerns about Ms Carr's arrival and departure times. He was instructed to have a discussion with both the claimant and Ms Carr and to brief her if there were any particular concerns outstanding.

44. On 4 July, Ms Carr had a one-to-one scheduled meeting with Mr O'Leary during which he informed her that the claimant had raised concerns, via Ms Sullivan, about her timekeeping. Ms Carr told the tribunal that she was astounded and upset that the claimant had suggested that she had not been fulfilling her duties. She felt hurt that someone whom she considered as a friend, would make such an "Outrageous allegation" that she knew to be untrue and did not understand why she would do such a thing. They had travelled to work the previous day but the claimant who had not given any indication that anything was wrong or that she had raised concerns about her timekeeping. She informed Mr O'Leary that she would speak to the claimant to try to understand why she had raised her timekeeping. She believed that it could be resolved between them as it may have been a misunderstanding on the claimant's part.

45. When Ms Carr returned to her office, she telephoned the claimant to ask her to come and see her in her office, Level 6, Maternity Block.

46. When the claimant arrived at Ms Carr's office she alleged that she was met with a "torrent of abuse", but we find that there was a heated exchange between the two of them during which foul language was used. The claimant said that she explained to Ms Carr that she noticed that she, Ms Carr, had been leaving work early as her office was often locked during the afternoon and her car was not in the car park. Ms Carr responded by contradicting herself about her whereabouts. The claimant also stated that she had been told about Ms Carr leaving meetings in London early. At that point Ms Carr suggested it was the claimant's friend, Ms Heidi Beddal, who had reported her leaving London conferences early when Ms Carr was, at the time, a Consultant Midwife. The claimant said that Ms Carr then said to her that they would be going to Mr O'Leary's office to sort the matter out.

47. Ms Carr said in evidence that the claimant had insisted that she tried to talk to her about the issue of her timekeeping, but Ms Carr rejected that statement as they had never discussed her working hours. At that point the claimant became angry and was upset, repeating that they had discussed the matter previously. Due to the claimant's reaction, Ms Carr felt that they needed to involve Mr O'Leary. Ms Carr denied calling the claimant "a backstabbing bitch", as the claimant alleged. She did, however, say to the claimant that she felt that she had been "stabbed me in the back".

48. Their attempts at resolving their differences were unsuccessful given the heated nature of their discussion.

49. They made their way to Mr O'Leary's office on Level 5. The claimant went to get Ms Sullivan who waited outside Mr O'Leary's office. Mr O'Leary met with Ms Carr and the claimant. He asked Ms Sullivan to join them to outline what the claimant had said to her.

50. We accept Mr O'Leary's evidence in relation to the account of the meeting. He told the tribunal that as Ms Carr's line manager, he had no concerns about her starting late and leaving early. During the meeting at no point did he think it had anything to do with whistleblowing. Ms Carr was neither tearful nor agitated. He asked the claimant whether there was a whistleblowing claim and was it a disclosure, to which the claimant said twice that it was not. If it was a whistleblowing complaint, Mr O'Leary told us that he would have stopped the meeting. The claimant said that Ms Carr was leaving work early. He did not recall saying "Now the truth is out", as alleged by the claimant. The concerns the claimant raised were not protected disclosures and he was not aware that she had made a disclosure to Ms Pye and to Mr Davies. He described the claimant's body language as defensive; her tone and volume were aggressive. He felt that her behaviour was appalling for a senior member of staff. He asked Ms Sullivan to leave the room whereupon Ms Carr asked if she could go as well. The claimant accused Ms Sullivan of betraying her confidence. As Ms Carr was about to leave the room the claimant stood up and told her that she loved her and demonstrated this by hugging her. Ms Carr did not reciprocate by hugging the claimant.

51. To Mr O'Leary it was clear that the claimant's fury stemmed from Ms Sullivan's action in passing on the concerns she had raised. He was then alone with the claimant. He described her behaviour as inappropriate as she was shouting. She said: "I fucking hate this place, they're all lazy bastards, I have to do everything, you don't fucking care." At that point he asked the claimant to calm down or he would deal with her behaviour as a disciplinary issue. He reminded her that he was Ms Carr's line manager and was aware of and had approved her work patterns. He said to her that she should have discussed her concerns with him rather than with Ms Sullivan, that she needed to go and reflect on the situation and try to rebuild relationships starting with Ms Carr. He told the tribunal that nothing said by the claimant during the meeting gave him any reason to believe that she was making a protected disclosure. He had no further involvement with her until she resigned in October 2017 other than to exchange day-to-day pleasantries. He said that his door was always open to allow staff to approach him.

52. In the respondent's Whistleblowing Policy, under "Confidentiality" it states the following:

> "We hope you will feel comfortable raising your concern openly, but we also appreciate that you may want to raise it confidentially. This means that while you are willing for your identity to be known to the person you report your concern to, you do not want anyone else to know your identity. Therefore, we will keep your identity confidential if that is what you want, unless required to disclose it by law (for example, by the police). You can choose to raise your concern anonymously, without giving anyone your name, but that may make it more difficult for us to investigate thoroughly and give you feedback on the outcome."

53. The policy sets out the procedure to be followed once a formal disclosure is made in accordance with it. (176-186)

54. We considered the evidence given by the respondent's witnesses and the evidence given by the claimant and find as fact that it was the claimant who was aggressive and behaved in a rude and unprofessional manner during the meeting on 4 July 2017. She was informed by Mr O'Leary that should her conduct continue that she would be the subject of disciplinary proceedings. We do not take the view that the respondent's witnesses colluded in their evidence as some of their accounts were not consistent with others.

55. We find that the respondent's policy on "Raising Concerns at Work" revised in August 2015, encourages its staff to raise concerns about "something that is, or could result in, danger (to patients, public or colleagues) professional misconduct or financial malpractice whilst maintaining the appropriate level of confidentiality and respecting the rights of staff, patients and the Trust."

56. It sets out the informal as well as the formal procedures for the person's line manager to follow. It also respects the person's confidentiality. However, malicious allegations are likely to be dealt with under the respondent's Disciplinary Policy (88-125).

57. At the preliminary hearing held on 17 July 2018, in accordance with paragraph 4.1, the claimant provided on 26 November 2018, a list of detriments she alleged she suffered as a result of making alleged protected disclosures on 30 June and 4 July 2017. In the first paragraph she stated that she ceased to travel to and from work with Ms Carr who also did not meet with her at work nor have internal discussions with her. It was a deliberate failure to on the part of Ms Carr, as her line manage, to support or communicate with her. Her treatment by Ms Carr was the result of making the alleged protected disclosures.

58. We find that travelling to and from work was not a work requirement and, in any event, their relationship had deteriorated after 4 July 2017. It would have been unrealistic to expect Ms Carr to travel with the claimant to and from work in circumstances in which she felt that their friendship had gone.

59. As regards meetings with the claimant, a one-to-one appointment was arranged for Monday 10 July 2017 at 10am but was cancelled by Ms Carr as she was due to be off-site at that time. There was no evidence to contradict this. No further one-to-ones were thereafter scheduled. Ms Carr candidly said in evidence that she did not meet with the claimant regularly after 4 July 2017, as she felt hurt and upset.

60. We find that on 5 July 2017, the claimant was involved in disciplinary hearings all day at which Ms Carr was the chairperson. The claimant was on a non-working day on 6 July. On 7 July it was Ms Carr's was off site at Central Middlesex Hospital where some of her team members worked.

61. On Tuesday 11 July she had a meeting with the claimant in her office with another member of staff present, to discuss that staff member's flexible working arrangement. Ms Carr's role was to support the claimant who was leading the discussion. During the rest of the week Ms Carr spent a significant amount of time preparing for an external mediation in respect of another member of staff.

62. On 12 and 13 July she attended an external unit-wide mediation at Central Middlesex Hospital.

63. Friday 14 July was the claimant's non-working day. Ms Carr had to take one-day emergency leave on Tuesday 18 July as her father was admitted to hospital with life threatening sepsis.

64. On 20 July 2017, she sent an email to the claimant and other senior Midwives to ask them to diarise appraisal meetings with her due to take place before 10 August 2017. The claimant responded by stating that she was too busy to attend an appraisal as she was interviewing Maternity Assistants on 3 and 4 August 2017 and Band 5 Midwives on 7 and 8 August 2017. She suggested the 31 July. (135)

65. During the week commencing Monday 24 July 2017, Ms Carr was on annual leave. The claimant's appraisal took place, as she had requested,

on Monday 31 July in Ms Carr's office, when the appraisal form was completed. In it the claimant wrote: "I enjoy my role despite some of the challenges I face on a daily basis. I am learning daily." It is noted that the section in relation to Personal Development Plan, was not completed by either the claimant or Ms Carr. (136a to 136n)

66. The appraisal form, we find, was not unreasonably critical of the claimant and do not disclose any animosity exhibited by Ms Carr towards the claimant.

67. During the period July and August 2017, Ms Abiola Jinadu, took over some of the day-to-day line management of the claimant. This was in recognition of the fact that the claimant and Ms Carr were no longer travelling to work together and were not having one-to-one conversations as they had in the past.

68. From 10 August 2017, Ms Carr commenced a period of extended planned sickness absence as she was required to have surgery. During her absence Ms Jinadu deputised for her. She returned to work following surgery on a phased return basis from 4 October 2018 over a period of four weeks. We find that during that time she deliberately took part in fewer meetings pending her return to full fitness.

69. The claimant met with Mr Davies, Deputy Chief Nurse, on 29 September 2017, though her witness statement referred to the meeting as having taken place after she had resigned. It was to discuss her concerns about certain practices and the failure to investigate the issues she raised in her grievance. In her witness statement she said that after she resigned, she was asked by Mr Davies to officially put in a statement the issues she had disclosed to Mr O'Leary and Ms Heed. She stated that this was requested by Miss Pye, Chief Nurse, and that she would be protected. She further stated that she believed that her disclosure resulted in a report into the department known as the Ockendon Report.

70. Following on from the meeting she sent him a statement on or around 5 October 2017. (202-205)

71. The claimant asserted that she resigned after giving three weeks' notice instead of her contractual 3 months' notice because of the "collective failure of management to deal with the disclosure professionally confidentially."

72. On 5 October 2017, the claimant entered Ms Carr's room and was upset and angry. She threw the Co-ordinator's Book on to Ms Carr's chair and said that she was leaving. She later informed Ms Carr that she had gone off sick for the next two days with high blood pressure.

73. In relation to the alleged detriments, having regard to the above, we find that although there were some contacts between Ms Carr and the claimant, it could not be said that Ms Carr had ostracised and had failed to line manage her. They did meet as referred to above, but the claimant's line

management was transferred to Ms Jinadu. It was not unreasonable for this change to have taken place given the breakdown in their friendship. We also take the view that the claimant had a forceful personality and was not afraid to vent her feelings to her line manager and to senior managers. It was also fair to the claimant to be given a new line manager to avoid any arguments of unfairness.

74. The claimant's further detriment was in relation to Mr O'Leary whom she alleged would regularly invite her to his office to speak to him to update him on various work-related matters. After 4 July 2017, on or about 10 July, she claimed that he completely ignored her. Mr O'Leary said that on or around 10 July his habit was to leave his door open, but he was sits with his back facing the door and would not be able to see those walking past his room. He did not prevent staff from dropping in to have a chat though he would be quite busy. There was no evidence, we find, that he stopped the claimant from speaking to him.

75. The claimant said that she was ignored by Mr O'Leary while in Costa Coffee at the hospital. Mr O'Leary could not recall the incident. The claimant alleged that Mr O'Leary did not acknowledge her. We find that Mr O'Leary does not normally say hello to everyone. He is quite busy with three Councils and as well as the Commission Clinical Care Group. He is also responsible for 400 staff as well as senior managers. There was no evidence, even if he had behaved in the manner alleged in Costa Coffee, that it was in any way connected with the protected disclosures.

76. The claimant further alleged that Ms Heed, on or around 10 July 2017, ignored and excluded her.

77. In evidence Ms Heed said that she had limited contact with the claimant after 4 July 2017 as a result of the concerns she discussed with Ms Sullivan. She operates an open-door policy which staff would regularly take advantage of. She genuinely enjoys spontaneous conversations with her staff and would like to think she is an approachable manager. The claimant did not avail herself of the opportunity to speak to her. She, however, operates through the normal chain of command and was not the claimant's direct line manager.

78. The claimant alleged that shortly after the meeting on 4 July 2017, she sat at a table in Costa Coffee at the hospital. Ms Heed sat at another table in a meeting. The claimant alleged that Ms Heed did not acknowledge her. The incident could not be recalled by Ms Heed. As she was in a meeting, it could very well be that she was preoccupied with what was being discussed and did not notice the claimant.

79. We find, even if the claimant is right, that there is no direct link between Ms Heed's behaviour and any protected disclosures. The evidence that Ms Heed ignored her was tenuous.

The claimant's resignation

80. From 14 July 2017, the claimant applied for work outside of the respondent hospital. Band 7 positions did not have the additional responsibilities of a Band 8 Matron. Band 7 is Senior Midwife. She said that her position at the hospital was untenable.

81. On 11 October 2017, she submitted her letter of resignation to the respondent. By then she had obtained a Grade 7 position at another hospital. In her resignation letter she wrote:

> "Dear all,
>
> It is with sadness that I will be tending my resignation; this is due to circumstances that have led me to no longer have any trust or respect for my senior managers.
>
> I feel I excelled in my role as a Matron and made significant changes that have led to me and my staff leading to very productive wards.
>
> Due to me feeling demoralised and undervalued I do not feel I am able to work the 12 weeks' notice my contract states I need to give due to the stress I am under. I am happy to work, to finalise all the outstanding tasks I have, until my annual leave commences in November.
>
> But I would request that I do not return after this with your permission. I would be grateful if you could inform me today if this is possible." (139)

82. The resignation letter was responded to by Ms Carr on 18 October 2017, in which she wrote the following:

> "Dear Tina,
>
> Thank you for your recent letter dated 11 October 2017 confirming your resignation from your post as In-patient Service Matron.
>
> I am concerned that you have stated feeling demoralised and undervalued as an employee and would like to offer an opportunity to discuss this in more detail in order to gain better understanding and to consider ways forward. I would like to further state that this will be a loss to the Department as you have been a valued member off staff, whose support, care and compassion has impacted on many women and their babies as they adjust to motherhood.
>
> I have considered your request to terminate your contract of employment without working your full notice period. I can additionally confirm that you have no outstanding annual leave entitlements; therefore, your last day of service with the Trust will be 1 November 2017.
>
> I would like to take this opportunity to thank you personally for your hard work, service and commitment to the maternity service and I wish you well for the future." (140)

83. The letter was hand delivered by Ms Carr to the claimant at her office.

84. It would appear that when Ms Carr hand delivered the acceptance of the claimant's resignation on 19 October 2017, they had a heart-to-heart discussion about work and their relationship. After their conversation, the claimant emailed Ms Carr later that day in which she wrote the following:

> "Hi,
>
> I just wanted to say thank you for our chat and letter today, I feel so much better and I hope you do too.
>
> I want you to know that I have never felt let down by you. The people who let me down are our peers and I let you down by not being open and transparent.
>
> I feel they have jeopardised our 17 year friendship while they sit there like the innocent party. They did not need to tell you in the manner they did and it is very unprofessional the way they managed the whole situation.
>
> I have always felt supported by you and you were my mentor and taught me my craft, I will always be grateful to you for that (you didn't teach me to keep my mouth shut though lol).
>
> Thank you for all the support you have given me, I have learnt a lot from you over the years, but what I do know is that I do not want to be senior management. My career path is a Band 7, Labour Ward Midwife.
>
> Thanks once again and maybe we can meet up thrash things out and moan about a few.
>
> Give me a text when you're ready to meet up." (141)

85. The email has a smiling emoji at the end of the penultimate sentence.

86. The claimant's last working day was 1 November 2017. She told the tribunal that she continued working from July 2017 out of a sense of loyalty to her patients.

87. She stated that the last straw was the apparent failure on the part of management to investigate her concerns, one of which was to do with Ms Carr's alleged working times. (202-205)

Submissions

88. We have taken into account the submissions by Mr Dhariwal, Solicitor on behalf of the claimant, and by Mr Nicholls, counsel on behalf of the respondent. We have considered the authorities they have referred us to. We do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The law

89. Section 95(1)c Employment Rights Act 1996, provides,

> "(1) For the purposes of this Part an employee is dismissed by his employer if …..
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

90. It was held by the Court of Appeal in the case of Western Excavating (ECC) Ltd-v-Sharp [1978] IRLR 27, that whether an employee is entitled to terminate his contract of employment without notice by reason of the employer's conduct and claim constructive dismissal must be determined in accordance with the law of contract. Lord Denning MR said that an employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

91. It is an implied term of any contract of employment that the employer shall not without reasonable cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, Malik-v-Bank of Credit and Commerce International [1997] IRLR 462, House of Lords, Lord Nicholls.

92. In the case of Lewis-v-Motorworld Garages Ltd [1985] IRLR 465, the Court of Appeal held in relation to the "last straw" doctrine that,

> "…the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?", Glidewell LJ.

93. Dyson LJ giving the leading judgment in the case of London Borough of Waltham Forest-v-Omilaju [2005] IRLR 35, Court of Appeal, held:

> "A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw

> may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be…. .
>
> If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.", pages 37 - 38.

94. The test of whether the employee's trust and confidence has been undermined is an objective one, Omilaju.

95. In the case of Tullett Prebon plc v BGC [2011] IRLR 420, on the issue of whether the first instance judge had applied a subjective test rather than an objective one to the actions of the alleged contract breaker, the Court of Appeal held, reading from the headnote,

> "The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is a 'question of fact for the tribunal of fact'. It [is] a highly specific question. The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract-breaker has clearly shown an intention to abandon and altogether refused to perform the contract. The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract breaker towards the employees is of paramount importance.
>
> In the present case, the judge had approached the issue correctly. He had not applied a subjective approach. He had objectively assessed the true intention of Tullett and had reached the conclusions that their intention was not to attack but to strengthen the employment relationship. That was a permissible and correct finding, reached after a careful consideration of all the circumstances which had to be taken into account in so far as they bore on an objective assessment of the intention of the alleged contract breaker."

96. In relation to public interest disclosure, we have taken into account sections 103A and 47B Employment Rights Act 1996 on dismissal and detriment.

97. Section 47B(1), Employment Rights Act 1996 provides,

> "A worker has the right not to be subjected to any detriment by any, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

98. A protected disclosure means a qualifying disclosure as defined under section 43B made by a worker in accordance with sections 43C to 43H, ERA 1996, section 43A.

99. Section 43B defines what is a qualifying disclosure. It provides,

> "(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following --
>
> (a) that a criminal offence has been committed, is being committed or is

likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

100. What is a detriment under section 47B is not defined in the legislation. In this regard the judgments of their Lordships in the case of Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, will apply. It is whether or not the worker was put at a particular disadvantage having made a protected disclosure? The disadvantage could be either physical, such as being instructed to engage in degrading work; or denying them benefits such as a company car, medical cover or membership of a sports or social club; being denied the opportunity of promotion, or a delay in addressing an issue. It may also be psychological, financial or not being offered employment, amongst other things.

101. A qualifying disclosure must be a disclosure of information, that is conveying facts, Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, a judgment of the Employment Appeal tribunal.

102. A reasonable belief is assessed objectively taking into account the particular characteristics of the worker in determining whether it was reasonable for him/her to hold that belief, Korashi v Abertwe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT.

103. In the case of Fecitt and Others and Public Concern at Work-v-NHS Manchester [2011] EWCA Civ 1190, the Court of Appeal held that the causal link between the protected disclosure and suffering a detriment under section 47B, is whether the protected disclosure "materially influenced", in the sense of being more than a trivial influence, the employer's treatment of the whistleblower.

104. In a breach of a legal obligation case, the tribunal should identify the source of the legal obligation and how the employer failed to comply with it. Actions could be considered wrong because they were immoral, undesirable or in breach of guidance without being a breach of a legal obligation, Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT.

105. Section 103A ERA provides that, "An employee who is dismissed shall be regarded for the purposes of the Part as unfairly dismissed if the reason or

principal reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure." It is for the employer to prove the reason for the dismissal. Where the employee lacks the relevant qualifying period of service the burden will be on the employee to prove the reason for the dismissal was by reason of making a protected disclosure, Kuzel v Roche Products Ltd [2008] ICR 799.

106. A claim under section 47B must be presented within three months beginning with the date of the act or the failure to act, section 48(3).

107. This time is extended under section 207B where there has been conciliation before the presentation of the claim, section 48(4A).

108. Section 48(3) provides that the claim must be presented within three months from the date of the act or failure to act. Time could be extended if it was not reasonably practicable to present the claim in time, Section 48(4) states,

> "For the purposes of subsection 3 ---
>
> (a) where an act extends over a period, the "date of the act" means the last day of that period, and
>
> (b) a deliberate failure to act shall be treated as done when it was decided on."

109. In the case of Arthur v London Eastern Railway Ltd [2006] EWCA Civ 1358, the Court of Appeal held, Mummery LJ giving the leading judgment, that,

> "Section 48(3) is designed to cover a case which cannot be characterised as an act extending over a period by reference to a connecting rule, practice, scheme or policy, but where there is some link between the acts which makes it just and reasonable for them to be treated as in time and for the claimant to rely on them. In order for the acts in the three-month period and those outside to be connected, they must be part of a "series" and acts which are "similar" to one another."

110. If a detriment claim is well-founded the tribunal can make a declaration to that effect and award compensation, section 49(1) Employment Rights Act 1996. The claimant is under a duty to mitigate, section 49(4), and the tribunal can consider whether the claimant either caused or contributed to the act complained of, section 49(5). Compensation is assessed on the same basis as a discrimination claim and can include an injury to feelings award, Virgo Fidelis Senior School v Boyle [200] IRLR 268.

111. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employees undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

Conclusion

Public interest disclosure detriment

112. In relation to the 30 June 2017 meeting, the claimant did not say that she was making a protected disclosure. She said she was "sounding off" and in a "dilemma". She did not say to Ms Sullivan that she was making a whistleblowing complaint. She did not refer to either patient safety or breach of contract. She did not expect Ms Sullivan to act on her dilemma and was clearly reluctant to talk about Ms Carr.

113. As Ms Sullivan was not told by the claimant to keep what she said confidential, the matter of Ms Carr's work pattern was referred to Ms Heed who took it up with Mr O'Leary upon his return from leave. Had the claimant carried her own cursory investigation she would have discovered that Ms Carr had perfectly acceptable reasons for her actions during the week commencing 17 April 2017. The claimant based her belief purely on her observation and what Ms Carr told her about her movements without checking with Ms Carr when she next saw her and did not check Ms Carr's diary to ascertain whether Ms Carr was on authorised leave. The claimant's belief was not reasonably held. We have concluded that the claimant did not hold a reasonable belief in the claimed protected disclosures. Ms Carr was not on unauthorised absence.

114. At the meeting on 4 July, the claimant behaved in an aggressive manner. She did not say to Mr O'Leary that she was making a whistleblowing disclosure or was complaining about patient safety. Indeed, had the claimant stated as much he would have referred her to the respondent's whistleblowing policy. The same approach Ms Sullivan would have followed on 30 June.

115. Mr Nicholls submitted that even in the statement given to Mr Davies, she did not write that she had made the two alleged protected disclosures, nor did she mention patient safety or breach of contract in relation to Ms Carr's working hours. We accept his submissions.

116. For the reasons already given above, she did not have a reasonable belief that a breach of contract had occurred or that patient safety had been or may have been compromised.

117. There were no concerns expressed by Mr O'Leary about Ms Carr's work and working hours. There was no evidence that patient safety was a risk in relation to her hours of work.

118. Even if the claimant had made either one or both protected disclosures, we have found that she did not suffer any detriments. A causal connection had not been established. We agree with Mr Nicholls that the claimed detriments were based on the claimant's perceptions rather that objective evidence.

119. For the above reasons we have come to the conclusion that the claimant's public interest detriment claims are not well-founded and are dismissed.

Unfair dismissal, section 103A ERA 1996

120. As the claimant cannot establish either one or both protected disclosures, she cannot succeed under section 103A.

Constructive unfair dismissal

121. It is the claimant's case that the respondent breached the implied term of mutual trust and confidence. She relies on the alleged detriments and the failure on the part of the respondent to investigate the matters contained in her statement to Mr Davies.

122. We have already found and concluded that the claimant did not suffer the detriments she claimed. There were perfectly rational and reasonable explanations for the respondent's managers' behaviour which are dealt with in our above findings of fact.

123. The claimant has a very forceful and aggressive personality as Mr O'Leary observed on 4 July and as she referred to in her email response to Ms Carr dated 19 October 2017. She decided that she should focus on a Band 7 role and looked far and wide for such a position and made her mind up to resign on 11 July 2017.

124. She said in evidence that the last straw was on or around 4 October 2017, but she had made up her mind three months prior and was looking for work from 14 July 2017 and secured a job which she later moved occupied. There was nothing at play on or after the 4 October that contributed in some way towards her decision to resign.

125. She decided to resign in July 2017 and took steps towards that by securing a Band 7 role elsewhere. She continued after this date out of loyalty towards her patients.

126. We have come to the conclusion that the respondent did not breach the implied term of mutual trust and confidence. Even if there was a breach it occurred in July 2017 when she decided to resign and took steps towards

that end. She thereafter affirmed the breach. Her constructive unfair dismissal claim is not well-founded and is dismissed.

_____
Employment Judge Bedeau

Date: 14/10/2019

Sent to the parties on: .....

.14/10/2019
For the Tribunal Office