EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms Donna Simmonds	**v**	Frimley Health NHS Foundation Trust

Heard at:	Reading	**On:** 28, 29 and 30 January 2020, 31 January 2020 (in chambers), 12 March 2020 (in chambers)
Before:	Employment Judge Hawksworth Members: Mrs AE Brown and Mr J Appleton	

Appearances
For the Claimant: Mr J Boumphrey (counsel)
For the Respondent: Ms H Patterson (counsel)

RESERVED JUDGMENT

The unanimous decision of the tribunal is:

1. The claimant's complaint of protected disclosure detriment is well-founded and succeeds. The claimant was subjected to three detriments by the respondent on the ground that she made protected disclosures on 5 January 2017 and 9 February 2017:

    1.1.1. commencing disciplinary proceedings against her in respect of two disciplinary allegations;
    1.1.2. failing to adequately communicate with her throughout her suspension; and
    1.1.3. not allowing her to return to her original role.

2. The claimant is awarded compensation of £15,000 for injury to feelings.

3. The claimant's complaint of automatic unfair dismissal contrary to section 103A of the Employment Rights Act 1996 fails and is dismissed.

4. The claimant's complaint of unfair dismissal contrary to section 94 of the Employment Rights Act 1996 fails and is dismissed.

REASONS

The claim, hearing and evidence

1. By a claim form presented on 7 December 2017 after a period of Acas early conciliation from 12 October 2017 to 8 November 2017, the claimant brought complaints of protected disclosure detriment, automatic unfair dismissal and ordinary unfair dismissal. The response was presented on 25 January 2018. The respondent defends the claim.

2. The hearing was heard on 28, 29 and 30 January 2020. The tribunal deliberated in chambers on 31 January and 12 March 2020.

3. The parties had agreed a bundle which had 371 pages. An additional page was added in the course of the hearing, and some pages were replaced because of issues with legibility.

4. On the first day we took time for reading and decided an amendment application. We heard the claimant's evidence on the afternoon of the first day and on the second day. We heard evidence from the following witnesses for the respondent, on the second and third days of the hearing:

    4.1. Mr James Woodland (Lead Biomedical Scientist);
    4.2. Ms Sarah Casemore (Deputy Director of Operations);
    4.3. Ms Helen Coe (Director of Operations);
    4.4. Ms Suzie Wilkinson (Team Leader in the department where the claimant worked);
    4.5. Mr Rob Winstanley (Pathology Site Manager);
    4.6. Ms Patricia Ruwona (General Manager for Support Services).

5. All the witnesses had prepared and served witness statements.

The claimant's amendment application

6. On the first day of the hearing, an issue arose as to the scope of the claimant's complaint of protected disclosure detriment. When the issues for determination were identified at the preliminary hearing and in further particulars served after the preliminary hearing, the claimant did not identify the detriments relied on. She set out the matters she said amounted to detriments at paragraph 16 of her witness statement. The respondent said that, other than the alleged detriments at sub-paragraphs 16c and 16g, these had not been included in the claimant's claim form and therefore the claimant would need permission to amend her claim if she wanted to include them.

7. We first considered whether, in addition to those at sub-paragraphs 16c and 16g, any of the detriments set out by the claimant in paragraph 16 of her witness statement were included in her claim form. We decided that the claimant's complaints of detriment at sub-paragraphs 16d, 16e, 16h and the

first half of 16j ('not allowing me to return to my original role') were also included in the ET1. The information in those sub-paragraphs of the claimant's witness statement amounted to further information about those already pleaded complaints; no permission to amend was needed for those alleged detriments.

8. The claimant made an application to amend her claim to include two further detriments:

   8.1. 'Robert Winstanley and Suzie Wilkinson conducted a witch hunt against me between 5 January and 10 February 2017 by seeking to obtain evidence of any wrongdoing committed by me' (paragraph 16a of the claimant's statement); and
   8.2. 'James Woodland conducted an investigation which reached unreasonable and unfair conclusions in his investigation report' (paragraph 16f of the claimant's statement).

9. We allowed the amendment in relation to paragraph 16f, but not in relation to paragraph 16a. We gave our reasons at the hearing. Broadly, the application to include the allegation at paragraph 16a was refused because it was a new factual allegation not mentioned in the ET1 or at the preliminary hearing. The allegation at paragraph 16f was allowed as it was a 'relabelling' amendment, rather than a wholly new factual allegation: it related to matters which were already referred to in the ET1 and were understood to be part of the unfair dismissal complaints.

10. The detriments on which the claimant relied for her protected disclosure detriment claim are set out in full below in the issues for determination.

The issues for determination

11. The parties had prepared an agreed list of issues which was in the bundle at pages 57A to 57C. As explained above, the detriments alleged by the claimant were clarified in discussions on the first day and in the amendment application. The issues for determination by us are therefore as follows (using the original numbering):

Heads of claim

(1) The claimant brings claims for (i) Unfair dismissal, pursuant to section 98 of the Employment Rights Act 1996; (ii) Automatic unfair dismissal for making a protected disclosure, pursuant to section 103A of the ERA 1996; and (iii) Protected disclosure detriment, pursuant to s47B of the Employment Rights Act 1996.

Unfair dismissal

(2) Was the claimant dismissed for a potentially fair reason within s98(1) and (2) ERA 1996? The respondent asserts that the claimant was dismissed for a fair reason: some other substantial reason (SOSR).

(3) Was the dismissal fair in all the circumstances (including the size and administrative resources of the employer's undertaking) and did the respondent act reasonably in treating the upheld allegations as sufficient reasons for dismissing the employee within s98(4) ERA 1996?

Automatic unfair dismissal

Alleged protected disclosures

(4) The claimant relies on the following as qualifying disclosures:

(i) 5 January 2017 – She stated verbally to Suzie Wilkinson that she complained about staff training to one of her colleagues because she was concerned about the detrimental impact it was having on the department's ability to undertake blood work and that this was having a negative effect on patient wellbeing and safety.

(ii) 9 February 2017 – She stated verbally to Rob Winstanley that the reason she complained about staff training was because of the impact on patients and their safety. There was a backlog of blood and she was concerned that there were many occasions where patients were having to be re-bled.

(iii) 10 February 2017 – During a phone call with Patricia Ruwona she voiced concerns regarding patient safety. Ms Ruwona said the call was not in relation to her concerns.

(iv) During the grievance and disciplinary process – She consistently expressed her belief verbally and by e-mail to James Woodland, Sarah Casemore and Helen Coe that allegations had been raised against her maliciously because she had raised concerns about patient safety. (In closing submissions, the claimant's counsel accepted that there was no evidential basis on which to pursue the allegation that the claimant made this protected disclosure.)

(v) 28 March 2017 – During a meeting with James Woodland she stated that: (a) she did not agree with the decision to train staff on the evening of 5 January 2017 as this was not in the interest of patient safety as there was a backlog of bloods; (b) she had tried to raise previous concerns about patient safety and the backlog of blood to Rob Winstanley and Suzie Wilkinson in the past and nothing had been done; and (c) the huge cut in the number of staff and hours available in the department was a patient safety issue.

(5) In any or all of the above, did the claimant disclose information which she reasonably believed tended to show that the health or safety of

any individual had been, was being or was likely to be endangered (s43B(1)(d) ERA 1996)?

(6) If so, did the claimant reasonably believe that the disclosure/s was/were made in the public interest?

(7) If the disclosures are proved, was the reason or the principal reason for the claimant's dismissal that she made the protected disclosure(s) as detailed above)?

Detriments complaint

(8) The claimant relies on the disclosures set out at paragraph 4 (i) to (v) above.

(9) If the disclosures are proved, was the claimant subject to a detriment by reason of her dismissal on the ground she had made the protected disclosure/(s)? The claimant alleged the following detriments (paragraph numbers refer to the claimant's witness statement):

(i) constructing misconduct allegations against her which were either untrue, inflated or disingenuous (paragraph 16c);
(ii) suspending her (paragraph 16d);
(iii) failing to progress the disciplinary investigation and keeping her suspended for an unreasonable period of time (paragraph 16e);
(iv) James Woodland conducting an investigation which reached unreasonable and unfair conclusions in his investigation report (paragraph 16f);
(v) commencing disciplinary proceedings against her (paragraph 16g);
(vi) failing to adequately communicate with her throughout her suspension (paragraph 16h);
(vii) not allowing her to return to her original role (the first part of paragraph 16j).

Remedies

(10) Is the claimant entitled to a basic award?

(11) Is the claimant entitled to a compensatory award and, if so:

(i) What are the claimant's losses flowing from her dismissal?
(ii) Did the claimant mitigate her losses following dismissal?
(iii) Would the claimant have been dismissed in any event (Polkey)?

(12) Did the claimant contribute to her dismissal by her own conduct and, if so, should the basic and compensatory be decreased and by what percentage?

(13) Is the claimant entitled to an award for injury to feelings and, if so, at what level?

Findings of fact

Background

12. The claimant worked for the respondent as an administrator in the specimen reception department of the respondent. She worked in the evenings, from 5.00pm to 9.00pm, five days a week.

13. The department processes blood and other tests. The tests are categorised as urgent, routine or fast-track. Fast track is a category between urgent and routine. When blood samples arrive in specimen reception, they are 'spun' in a machine to stabilise them. They are then labelled and entered onto the computer system. Specimen reception staff understood that 'spinning' must take place within 6 hours of the sample being taken, otherwise the sample may be compromised and a patient may then have to give another sample.

14. Patricia Ruona is a biomedical scientist. She was the general manager for the respondent's support services, including specimen reception, at the relevant times. Ms Ruona explained to us, and we accept, that a failure to 'spin' a sample in 6 hours does not necessarily mean that another sample has to be taken. However, she accepted that she only knows that because of her specialist knowledge. She said, and again we accept, that staff on specimen reception were told that it was important or time critical to meet that time-line. Although technically a blood sample may not be compromised if it is not spun within 6 hours, the impression given to staff is that it is health critical to process samples within that period.

15. In January 2017 the specimen reception department was short-staffed. Staffing had changed following a merger and there was extra stress in the department (page 172). Working relationships within the department were also difficult, as the staff had formed two cliques which did not get on with each other.

16. On 5 January 2017 five members of the team were scheduled for staff training or cover for staff training. The training took one to two hours. Three of the staff members involved with training had been rostered to fast-track work. Although some blood samples were processed as part of the training, the rate of work was slower, and some of the training did not include processing blood samples at all. Because of the scheduled training, the claimant had to cover fast-track as well as routine samples.

17. The claimant was one of a number of members of staff who were unhappy about the decision to schedule staff training at a time when the department was short-staffed and busy. Ms Y, one of the staff involved with the training, asked the claimant whether people were upset because she was doing training. The claimant said that people were moaning because training had been scheduled when there was so much work.

Alleged disclosure (i)

18. Following this exchange, Ms Y made a complaint to the team leader, Suzie Wilkinson, about the claimant. Ms Wilkinson thought the claimant was a brash personality who would say what she thinks regardless, and would try to manipulate those around her to side with her on issues (page 169).

19. Ms Wilkinson called the claimant into a side office to discuss Ms Y's complaint. In the discussion with Ms Wilkinson, the claimant accepted that she had told Ms Y that she was unhappy about the decision to conduct training that evening.

20. The claimant said that during the discussion she told Ms Wilkinson that the staff training was having a detrimental impact on the department's ability to undertake blood work, and this was 'having a negative impact on patient safety'. The respondent denied that the claimant had said this, and said that the claimant's focus in this discussion was the extra work she had to do, rather than any patient safety issue.

21. We find that it was more likely than not that the claimant said that the training was having a negative impact on patient safety. We have made this finding because Ms Wilkinson told us that she could not remember whether the claimant referred to patient safety, while the claimant's account is broadly consistent with what she told Mr Woodland at an investigation meeting on 28 March 2017, when she said the reduction of staff on the evening of 5 January 2017 was 'not in the interests of patients which is how I like to work' (page 182) and that there had been 'a huge cut in the number of staff and hours available, and this is a patient safety issue' (page 183).

22. We have to decide whether, in disclosing this information to Ms Wilkinson, the claimant believed that she disclosed information which tended to show that the health or safety of any individual had been, was being or was likely to be endangered.

23. The respondent's witnesses said that the information disclosed by the claimant was not a patient safety matter. They said that a backlog of samples in the department was not uncommon, that any backlog caused by the training would be minimal and that delay in processing blood samples would be a matter of patient experience rather than patient safety.

24. In cross-examination, the claimant accepted that the department processed about 5,000 samples per day, and that each person processed about 32 samples per hour. It was put to her that a delay of 60 or so samples caused by two people training for an hour would be minimal and that this would not be a risk to patient safety. The claimant agreed that a backlog of 60 or so samples would not be a risk to patient safety. However, her evidence, which we accept, was that more than 60 samples would have been delayed by the training on 5 January 2017 because five people were involved in the training and the training could take up to two hours. The claimant maintained that a requirement to give another blood sample because of delay was a matter of patient safety, not just patient experience.

25. We find that the information the claimant disclosed about the impact of training on the ability to undertake blood work and the impact on patient safety was information which she believed tended to show that the health or safety of any individual had been, was being or was likely to be endangered.

26. We also find that the claimant believed that the disclosure was made in the public interest. The claimant believed that the backlog of work could compromise blood samples, resulting in patients having to give further samples, and that this was a safety issue for those patients. The claimant's belief is reflected in her later comments to Mr Woodland.

27. We have returned in our conclusions to the question of whether the claimant's beliefs were reasonable.

Complaints and concerns about the claimant

28. In addition to Ms Y's complaint, two employees complained about the claimant's conduct on 5 January 2017 to Rob Winstanley, the manager of the unit. Mr Winstanley and the claimant did not get on well. Mr Winstanley thought the claimant was a very difficult and abrasive character who often caused upset among members of the team.

29. Mr Winstanley advised staff who raised concerns with him to make diarised statements of any issues they were having with the claimant's behaviour. A number of other colleagues raised concerns with Mr Winstanley about the claimant, and Mr Winstanley was told about three Facebook posts/comments the claimant had made.

30. One of the Facebook posts which Mr Winstanley was told about was from September 2016. A colleague of the claimant had posted a message which said, 'I know who you would punch!!'. The claimant posted a comment in response, saying, 'Made pies for work'. Her comment was accompanied by a photo of a pie with the word 'knob' baked into the top (page 188).

31. Mr Winstanley thought that the photo referred to him. He said that he made this assumption because he comes from the north of England and for this reason he would be associated with pies. We find that Mr Winstanley was occasionally referred to in the department as 'Rob the knob' and that this had been going on for a number of years; we find that it was likely that Mr Winstanley knew about this and this was why he assumed the photo referred to him. We make this finding because Mr Woodland told us that when he conducted his investigation, he was told that 'Rob the knob' was widely considered to be a nickname applied to Mr Winstanley.

32. The other two facebook posts which Mr Winstanley was told about were a comment by the claimant to a colleague after a night out saying 'Brilliant company…cheered me up no end. watch out for firearms! Xxx' and a post by a colleague in which the claimant was named and which said, 'Her hair is on fiiiiiiiiiire!' with a picture (possibly a cartoon) of someone with their hair on fire (page 187)

33. Mr Winstanley was concerned about these Facebook comments/posts. He also had concerns about the claimant taking unauthorised breaks and about her sickness levels. These issues dated back some time. In September 2016, Mr Winstanley had told the claimant that she was not entitled to a break during her shift as her shifts were only 4 hours. He had sent an email to the claimant about this; it confirmed the claimant was not entitled to a break and thanked her for her co-operation (page 359). Also in September 2016, Mr Winstanley and the claimant had a meeting about sickness absence and the claimant was set an attendance target.

Alleged disclosure (ii)

34. On 9 February 2017 Mr Winstanley asked the claimant to a meeting to discuss his concerns. Mr Winstanley thought the claimant's attitude in the meeting was brash and aggressive.

35. At the meeting Mr Winstanley raised the question of unauthorised breaks, and the fact that the claimant's sickness absence exceeded the respondent's targets. He also raised the claimant's conduct on the evening of 5 January 2017. He said he had received several emails from colleagues complaining about the claimant. The respondent's bullying and harassment policy was discussed. The claimant said that she told Mr Winstanley that she had complained about the decision to hold staff training and that staff training was having an impact on patient safety as there was a backlog of blood samples to test and there were occasions where patients were having to have another sample taken.

36. Mr Winstanley accepted that the claimant mentioned the backlog of work to him, but said that it was not his recollection that the claimant expressed specific concerns about patient safety. Mr Winstanley made no notes of this meeting.

37. We accept the claimant's evidence on this point. We find that it is more likely than not that in her conversation with Mr Winstanley the claimant said that the backlog of work was impacting on patient safety. The claimant's account is consistent with what she told Mr Woodland about this meeting.

38. The words used by the claimant were similar to disclosure (i). We find that at the meeting with Mr Winstanley, the claimant disclosed information which she believed tended to show that the health or safety of any individual had been, was being or was likely to be endangered, namely that there was a backlog of work impacting on patient safety. For the reasons set out above, we find that the claimant also believed that the disclosure was made in the public interest.

39. After the meeting with Mr Winstanley, the claimant spoke to a colleague, Mr P, about whether Mr P had made a complaint about her. Mr P said he had not reported the claimant, but that he been asked about the claimant's conduct towards him on 5 January 2017. In an email statement which Mr P later provided to the claimant for the disciplinary hearing, Mr P said, and we

accept, that he had been asked repeatedly by Mr Winstanley whether he felt intimidated by the claimant, and Mr P had said he did not (page 203 to 204).

Suspension and alleged disclosure (iii)

40. On 10 February 2017 the claimant sent an email to Mr Winstanley's line manager, Patricia Ruona (page 147). In her email the claimant asked to speak to Ms Ruona regarding some concerns she had. The claimant said that the concerns were work related but she could not discuss them with her line manager. The claimant's email does not mention patient safety.

41. On the same day, Ms Ruona was asked by the respondent's HR department to implement a decision to suspend the claimant for bullying and harassment pending a disciplinary investigation. This was because Ms Ruona was the general manager for support services. Ms Ruona was told that there were allegations of inappropriate and bullying behaviour in the workplace but she was not made aware of the detail of the allegations against the claimant. She relied on the advice of HR that the claimant should be suspended. She called the claimant to tell her this.

42. When she got the call from Ms Ruona, the claimant thought it was to discuss the email the claimant had sent earlier that day. In her evidence to us, Ms Ruona said that the call was only about the decision to suspend. She said that the claimant did not mention anything about patient safety. The claimant's evidence was that she referred to patient safety during this call but she accepted that it was entirely possible that Ms Ruona's account was correct.

43. We find that it is more likely that the claimant did not mention patient safety during this call. We accept the evidence of Ms Ruona that she would have remembered a complaint about patient safety because, as general manager for support services, if such a complaint had been made, she would have had to take action to address it. We find that it is likely that the decision to suspend the claimant was the only subject of the discussion, as it overtook events as far as the claimant's earlier email was concerned.

44. We also accept the evidence of Ms Ruona that she did not have any contact with the claimant prior to this. We find that Ms Ruona was not aware of the claimant's disclosures to Ms Wilkinson and Mr Winstanley.

45. The claimant's suspension was confirmed in writing on 13 February 2017 (page 150). The letter said the claimant was being suspended because of alleged inappropriate and bullying behaviour in the workplace on 9 February 2017 (the allegation concerning the claimant's behaviour towards Mr P).

46. On 13 February 2017 the claimant was contacted by a colleague who left a message asking where she was, because the claimant was still rostered to work. The claimant called her colleague back to explain that she would not be at work because she was suspended.

47. The claimant was suspended from 10 February 2017 until the outcome of the disciplinary process on 14 July 2017.

48. The respondent's disciplinary policy provided that the suspension should be for as short a period as possible. The policy also said that suspension should be kept under review and that a formal review should be carried out after four weeks by the manager conducting the investigation, with a senior member of the HR department who had not been involved in the process (page 106).

49. James Woodland, Lead Biomedical Scientist and Mortuary Services Manager, was appointed as the investigating officer. It was his responsibility to communicate with the claimant about her suspension and to carry out a formal review. He did not carry out any formal review of the claimant's suspension. He decided that the fact that the claimant's circumstances did not change meant that there was no need to conduct a formal review.

Disciplinary investigation

50. Mr Woodland's investigation took place in March and April 2017. By this stage there were four other allegations being investigated, in addition to the allegation of bullying on 9 February 2017 for which the claimant had been suspended.

51. The five allegations against the claimant were:

    51.1.1. bullying/harassment towards Ms Y on 5 January 2017;
    51.1.2. bullying/harassment towards Mr P on 9 February 2017;
    51.1.3. unauthorised absence during shifts, amounting to insubordination;
    51.1.4. making contact with the specimen reception department after her suspension (this related to the phone call on 13 February 2017);
    51.1.5. bringing the trust into disrepute and cyberbullying because of three Facebook posts.

52. It was not clear whose decision it was to include the additional allegations in the investigation after the claimant was suspended. It was not obvious why the respondent considered that the two Facebook posts relating to firearms and hair on fire amounted to cyber-bullying or brought the respondent into disrepute as there was nothing to suggest that these posts were related to the claimant's work. We also find the description of unauthorised absence as amounting to insubordination to be excessive, in the light of the terms of the only email about this which we were shown (page 359).

53. For his investigation, Mr Woodland interviewed the claimant and eight other members of staff. The interviews started on 24 February 2017.

54. Mr P was interviewed on 21 March 2017 (page 178). The allegation about the claimant's conduct towards Mr P had been made by another colleague,

who alleged that, after the meeting with Mr Winstanley on 9 February 2017, the claimant had spoken aggressively to Mr P and asked whether he had complained about her. In his interview with Mr Woodland, Mr P said that he had been happy to answer the claimant's question about whether he had made a complaint. He thought it was not asked in an aggressive manner, but felt it was passive-aggressive. He was asked about an earlier occasion when the claimant asked him what work he was doing. Mr P said he treated this as a throwaway comment. Mr Woodland asked Mr P whether anyone had ever displayed bullying behaviour towards him and Mr P said no.

55. Mr Woodland's disciplinary interview with the claimant took place on 28 March 2017. The claimant was asked about the Facebook posts. She said that the pie picture related to a family member. However, she accepted that it could have been construed as being about Mr Winstanley. She said that she thought the nickname for him pre-dated her starting in the department. She said that the post about hair on fire related to her nearly setting her hair on fire when lighting candles on a cake, and the firearms post was a reference to a joke playing on the words 'firearms' and 'fire arms' which she explained to Mr Woodland.

Alleged disclosure (v)

56. During the interview with Mr Woodland, the claimant stated that:

    56.1. she had an issue with the decision to train staff on the evening of 5 January 2017 because of the workload. She felt it was not in the interest of the patient;
    56.2. people had tried to approach Ms Wilkinson and Mr Winstanley about their concerns but 'nothing happens';
    56.3. the department was poorly led, she was more productive than others and always put patients first; and
    56.4. there had been a huge cut in the number of staff and hours available and this was a patient safety issue.

57. These comments by the claimant were recorded in Mr Woodland's note of the interview (pages 182 to 183).

58. We find that in disclosing her concerns about staff shortages and patient safety, the claimant disclosed information which she believed tended to show that the health or safety of any individual had been, was being or was likely to be endangered. It was clear from what the claimant said that she thought staff shortages and high workloads impacted on patient safety.

59. We find that the claimant also believed that the disclosure was made in the public interest, for the same reasons set out above.

The claimant's grievance

60. The claimant made a grievance on 31 March 2017 (pages 157 to 158). She complained about the amount of time she had been suspended, and the

failure to communicate with her during her suspension. She had had no updates about how long the process might take or any contact at all from 10 February 2017 to 21 March 2017.

61. The respondent decided to deal with the grievance jointly with the disciplinary issues because the grievance related to the disciplinary process.

Disciplinary investigation report

62. Mr Woodland's investigation report was dated 7 April 2017 (pages 159 to 164). He concluded that there was a case to answer in relation to the first three of the allegations (that is, bullying/harassment towards Ms Y on 5 January 2017 and towards Mr P on 9 February 2017, and unauthorised absence during shifts).

63. Mr Woodland concluded that there was no definitive evidence for the fourth allegation (contacting staff during suspension) as it is was not clear that the claimant had been clearly instructed not to make contact with the department at the time of the contact. On the fifth allegation he found that there was a case to answer on whether one of the Facebook posts (the pie picture) amounted to cyber-bullying. He decided that there was insufficient evidence in relation to whether the other two posts were cyber-bullying. He did not find that there was a case to answer as to whether the claimant brought the trust into dispute in respect of any of the three Facebook posts, because there was no reference to the claimant's work on her Facebook profile or the posts themselves. He recommended that the case should progress to a disciplinary hearing in respect of allegations 1, 2, 3 and the part of allegation 5 relating to cyberbullying by the pie post.

64. In cross-examination, the claimant accepted that it was reasonable for the respondent to consider the allegations against her and that, based on the information which Mr Woodland had, it was legitimate for these allegations to be looked at by her employer at a disciplinary hearing as he had recommended.

Disciplinary proceedings

65. The respondent's HR business partner wrote to the claimant on 2 May 2017 to say that following the disciplinary investigation it had been decided that the claimant's inappropriate behaviour and conduct needed to be considered at a formal disciplinary hearing in line with the disciplinary policy and procedure (page 190).

66. The letter listed all the allegations which had been considered by Mr Woodland. It included all five of the original allegations in full, even though Mr Woodland had not recommended proceeding with the fourth allegation and on the fifth allegation he had only recommended proceeding with the allegation of cyber bullying in respect of the pie post. We did not hear any evidence on why it was decided to commence proceedings in respect of all

the allegations. Ms Casemore told us that she thought allegation four may gone forward to the disciplinary hearing in error, but she was not sure.

Disciplinary hearing and outcome

67. The claimant objected to the first decision-maker who was appointed by the respondent to chair the disciplinary hearing, because of concerns about independence. The respondent appointed Sarah Casemore instead. She was the respondent's Deputy Director of Operations; the claimant did not object to her appointment. Ms Casemore dealt with both the disciplinary decision and the claimant's grievance. The change of decision-maker led to a delay of around five weeks in the process. The hearing which was originally due to take place on 9 May 2017 was rescheduled to 16 June 2017.

68. The disciplinary hearing was held over a number of days: 16 June 2017, 6 July 2017 and 12 July 2017. At the hearing Mr Woodland presented the management case and called evidence from a number of the claimant's colleagues. One of the witnesses asked for the claimant not to be present while she was giving evidence, and said that she felt unsafe. Another witness said that she found the claimant intimidating.

69. Ms Casemore was unable to reach a decision by the end of the day on 12 July 2017. She told the claimant of the outcome of the disciplinary hearing on 14 July 2017 and the outcome was confirmed in a letter dated 20 July 2017 (page 263).

70. One of the allegations against the claimant was upheld; cyberbullying in respect of the picture of the pie. Ms Casemore decided on the balance of probabilities that the post referred to Mr Winstanley and that this was unacceptable behaviour which was not in line with trust policies and was in breach of the respondent's bullying and harassment and disciplinary policy. Ms Casemore considered whether the claimant's actions brought the trust into disrepute, concluding that there was no evidence of this. She found that there was insufficient evidence in relation to allegations 1 and 3 and that there was no evidence of bullying/harassment of Mr P (allegation 2). She said that allegation 4 (contact during suspension) was not considered. She considered the parts of allegation 5 relating to the two Facebook posts on which Mr Woodland had suggested there was insufficient evidence, and the allegation of bringing the trust into disrepute, concluding that there was insufficient evidence on these points.

71. Ms Casemore upheld the claimant's grievance about the delay in the disciplinary process. She concluded that the investigation could have been more timely and that communication with the claimant could have been more regular so that she felt more supported (page 267).

72. Ms Casemore issued the claimant with a final written warning in respect of the finding about the posting on Facebook of the picture of the pie.

The search for alternative role

73. In addition to issuing a final written warning, Ms Casemore instructed that the claimant should be moved to another department in accordance with section 12.4.3 of the disciplinary policy ('transfer to another ward/department').

74. Ms Casemore thought that there was a breakdown in the claimant's working relationships with Ms Wilkinson and Mr Winstanley. She said there was evidence of a dysfunctional team which had split into two cliques, with a culture of unhappiness and disharmony. She considered that it was untenable for the claimant to return to her post. Ms Casemore decided that the respondent would assist the claimant to identify a suitable vacancy and that if the claimant was not successful in gaining another post by 11 August 2017 then the panel would reconvene to reconsider the original outcome, including consideration of ending the claimant's employment (page 266).

75. Ms Casemore noted in the outcome letter that the claimant had indicated during the hearing that she did not wish to return to her post (page 266). The minutes of the meeting on 12 July 2017 record the claimant as saying that she could not 'work alongside people telling lies' (page 259). On 20 July 2017 in an email to HR the claimant said, 'Unfortunately, because of how I was treated, I couldn't go back into that' (page 261). At this time, it was clear that the claimant accepted that she could not return to the specimen reception team and that she would have to move posts.

76. The respondent's HR team discussed possible alternative roles with the claimant (page 270). Some of the roles highlighted by the respondent appeared to be suitable roles for the claimant. The claimant was not willing to move to another hospital as it would mean a longer journey (page 289). There were no roles that the claimant felt were suitable.

77. By 11 August 2017 when the panel reconvened, the claimant had suggested that she was willing to return to her old job. We find that this was likely to have been because it had become clear to her that there was no alternative role that she considered to be suitable. On 11 August 2017 the claimant sent another email to HR in which she said that she had offered to return to her role (pages 272 to 273).

<u>First dismissal of the claimant</u>

78. The claimant attended the reconvened disciplinary hearing on 11 August 2017. At the hearing Ms Casemore took the decision to dismiss the claimant because it had not been possible to identify a suitable alternative role for the claimant. The claimant was dismissed with immediate effect and received five weeks pay in lieu of notice (page 276).

<u>The claimant's appeal</u>

79. The claimant appealed the decision to dismiss her (page 283). The appeal was chaired by Helen Coe, the respondent's Director of Operations and also included Chris Cutler (the head of Commissioner Business Development).

80. The appeal hearing took place on 10 October 2017 (pages 298 to 303). The claimant attended and Ms Casemore attended to present the management case.

81. The claimant said during the appeal hearing that she did not want to return to work at Frimley Park or at another trust, and she wanted a settlement. Ms Coe said that settlement was not an option, that this was not a redundancy situation, and that only an alternative role would be an option. The claimant then confirmed that she wanted to work at Frimley Park, and do 20 hours a week in a suitable role, preferably in pathology. She mentioned a possible job in blood sciences.

82. The panel's decision was communicated to the claimant in a letter of 11 October 2018 (page 304). In relation to sanction, the panel was of the view that the final written warning given in respect of the Facebook pie post was disproportionate. The sanction was reduced to a first written warning.

83. The panel was in agreement with the decision at the disciplinary hearing that Ms Simmons could not return to her substantive post because of the clear breakdown in working relationships. Ms Coe attached weight to the fact that some staff had been affected by the claimant's behaviour to the point of feeling scared for their safety and she considered there to be an underlying dysfunction in the team relating to many people.

84. However, the panel thought that there should be an appropriate alternative role with the equivalent level of skills and experience for the claimant, even if some element of training was required. They decided that it was reasonable and appropriate to reinstate the claimant and grant her a further period of time in which to secure an alternative post with the respondent.

85. Ms Coe said that HR would send the claimant a list of at least three suitable alternatives for the claimant to chose from. Ms Coe said that the claimant would have to confirm which of the roles she would like to chose and be able to start within four weeks; if the claimant did not accept any of the roles or if she failed to engage in the process, the termination of her employment would stand, and she would be deemed to have resigned on the date four weeks from when she was sent the list of alternative roles.

<u>The second search for an alternative role</u>

86. The respondent's HR department sent the claimant an email with some alternative roles but this was sent to the wrong email address. A second email was sent on 26 October 2017 with two suitable vacancies. The roles were:

    86.1. MLA Blood sciences (Frimley) (full time)
    86.2. OPD receptionist (25 hours a week over three days)

87. Ms Coe wrote to the claimant on 7 November 2017 with an update (page 306). She said that the four-week period would start from when the second

email was sent. She said that the two roles were on hold for the claimant and that the respondent expected the claimant to accept one of the two roles and be available for work before the end of the four-week period. She said there was also a 0.93 FTE pathology role at the Royal Surrey available.

88. Three further roles were offered to the claimant (page 309). These were:

    88.1. Admin support (point of care)
    88.2. Housekeeper band 1 with pay protection (evening hours)
    88.3. Switchboard operator.

89. The claimant declined the first four roles offered to her, including the housekeeper role which had the working hours and location requested by the claimant. She did not respond to the offer of a switchboard operator role.

90. On 15 November 2017 the claimant emailed HR to say that she was under too much stress to consider any other options (page 309).

91. After this, two other roles were offered to the claimant:

    91.1. Logistics assistant
    91.2. Temporary staffing assistant

92. The claimant did not accept either of these two roles.

93. We find that the respondent carried out a meaningful search. The offers of alternative roles by the respondent were genuine, and it was open to the claimant to accept any of these 7 roles. The roles included some roles which were suitable alternatives for the claimant and which were at the same location and had the same hours as her previous role.

94. The second four-week period which the respondent had allowed the claimant to secure an alternative role ended on 27 November 2017. The trust emailed the claimant on 24 November 2017 summarising the roles which had been offered and informing her that if the respondent did not hear back by 27 November 2017 the respondent would treat her as having resigned and would process her as a leaver.

95. On 25 November 2017 the claimant replied to the respondent's email of 24 November 2017 (page 311 to 312). The claimant said that she had been under an enormous amount of stress. She said:

> *"I shall make it perfectly clear. I do not wish to return to the trust. I have no faith or trust working within the organisation as I have pointed out before."*

Reconvened appeal hearing

96. On 28 November 2017 Ms Coe replied to the claimant by email (page 315). She said that the claimant had not engaged in the redeployment process

and that the appeal hearing would be reconvened. The email said that the reconvened panel would take into account the clear breakdown of the claimant's relationship with the respondent, the breakdown in trust and confidence, and the claimant's refusal to engage in the redeployment process. The email continued, '*You should be aware that this may result in the termination of your employment'.*

97. Ms Coe wrote to the claimant on 29 November 2017 inviting her to the reconvened appeal hearing and warning her again that the termination of her employment was a possible outcome of the meeting (page 320).

98. The reconvened appeal hearing took place on 12 December 2017. It was attended by the claimant, Ms Coe, and an HR officer. Ms Coe said that as the claimant had not engaged in the redeployment process, the only course of action available was to dismiss the claimant for the following reasons:

    98.1. the breakdown in trust and confidence based on the claimant's refusal to return to work in her email of 25 November 2017 and 15 November 2017;
    98.2. the claimant's failure to engage in the redeployment process despite this being a condition of her reinstatement;
    98.3. an irretrievable breakdown of the claimant's relationship with her manager and colleagues that would not enable her to return to her original post.

99. The claimant's employment was terminated with immediate effect and she was given 5 weeks' pay in lieu of notice. The outcome was confirmed in a letter from Ms Coe on 14 December 2017 (page 328).

100. The claimant suffered from stress, difficulty and unhappiness as a result of the treatment she complains of. She had suicidal thoughts and weight loss. She had to see her doctor on several occasions and was prescribed anti-depressants. She had online counselling.

The relevant law

Protected disclosures

101. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is:

- a 'qualifying disclosure' (a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'relevant failures' set out in section 43B has occurred or is likely to occur);

- which is made in accordance with one of six specified methods of disclosure set out in sections 43C to 43H.

102. In relation to 'qualifying disclosure', in this case the relevant failure relied on by the claimant is set out in sub-section 43(1)(c). Sub-section 43(1)(c) is a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered.

103. The method of disclosure relied on by the claimant is section 43C. This section provides that a qualifying disclosure is a protected disclosure if it is made to the worker's employer.

104. In Kilraine v London Borough of Wandsworth [2018] IRLR 846 the Court of Appeal held that the concept of 'information' used in section 43B(1) is capable of including statements which might also be characterised as 'allegations'; there is no rigid dichotomy between the two. Whether an identified statement or disclosure in any particular case amounts to 'information' is a matter for the tribunal to evaluate in the light of all the facts.

105. In Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 the EAT held that reasonableness under section 43B(1) requires both that the worker has the relevant belief, and that their belief is reasonable. This involves a) considering the subjective belief of the worker and also b) applying an objective standard to the personal circumstances of the worker making the disclosure.

Protected disclosure detriment

106. Section 47B of the Employment Rights Act provides:

> "*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."*

107. The test for whether a detriment was 'on the ground that' the worker had made a protected disclosure is set out in Fecitt and ors v NHS Manchester [2012] IRLR 64. What needs to be considered is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistleblower. This is a different test to the test for automatic unfair dismissal because of a protected disclosure.

Automatic unfair dismissal

108. Section 103A of the Employment Rights Act provides that the dismissal of an employee is unfair where the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

109. A dismissal which is contrary to section 103A is 'automatically' unfair. The tribunal does not need to consider whether the dismissal was reasonable in the circumstances.

110. Where there is more than one reason for a dismissal, the tribunal must be satisfied that the principal reason is that the employee made a protected

disclosure. The protected disclosure must be the 'primary motivation' for the dismissal (Fecitt and others v NHS Manchester [2012] IRLR 64, CA). As set out above, this is a different (and stricter) test than in a claim for unlawful detriment under section 47B, where a decision will be unlawful if a protected disclosure 'materially influences' the decision-maker.

Burden of proof

111. In a complaint of detriment, section 48(2) provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. This means that where all of the other elements of a complaint of detriment are proved by the claimant, then the burden of proof will shift to the respondent. The claimant is required to show that there was a protected disclosure, and a detriment to which she was subjected by the respondent. At this point, the burden will shift to the respondent to show that the detriment was not done on the ground that the claimant had made a protected disclosure.

112. In a complaint of automatic unfair dismissal, the claimant must produce some evidence to suggest that the dismissal was for the principal reason that she has made a protected disclosure. The tribunal must decide what was the reason or principal reason for the dismissal, on the basis that it is for the employer to show the reason. If the tribunal does not accept the employer's asserted reason, then the tribunal may (although not 'must') go on to find that the principal reason is the reason asserted by the employee. The operation of the burden of proof in unfair dismissal cases, including claims under section 103A, is not the same as in the discrimination legislation (Kuzel v Roche Products [2008] IRLR 530, CA).

113. In Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14 the EAT said that the approach to the burden of proof in a section 47B complaint of detriment is the same as that taken in respect of section 103A complaints for protected disclosure dismissal by the Court of Appeal in Kuzel v Roche Products. If an employment tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment or dismissed her, it does not follow that the claim must succeed. If the tribunal rejects the reason put forward by the employer, it is not bound to accept the reason put forward by the employee: it can conclude that the true reason for the detriment or dismissal was one that was not advanced by either party.

114. The tribunal may draw 'reasonable inferences from primary facts established by the evidence or not contested in the evidence', although, unlike the discrimination legislation, it is not obliged to do so (Kuzel v Roche Products).

Ordinary unfair dismissal

115. An employee with two years' service has the right not to be unfairly dismissed by her employer.

116. Section 98(1) of the Employment Rights Act provides:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

117. In this case, the respondent says that the reason for the claimant's dismissal was 'some other substantial reason' within section 98(1)(b) (SOSR).

118. Section 98(4) provides:

> *"4) Where the employer has fulfilled the requirements of subsection (1), 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 employer's 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."*

Conclusions

119. We have applied the relevant legal principles to our findings of fact as set out above, and reached the following conclusions.

Disclosures

120. We have first set out our factual findings in relation to each of the alleged disclosures, then considered whether the disclosures meet the legal tests required to be qualifying and protected disclosures.

121. *Disclosure (i):* We have found that in her discussion with Ms Wilkinson on 5 January 2017 the claimant said that staff shortages because of training 'created a safety issue for patients' and that she believed that the information she disclosed was in the public interest and tended to show that the health or safety of any individual had been, was being or was likely to be endangered. We conclude that there was sufficient factual content disclosed such that this was a disclosure of information. It was information about the staffing position in the claimant's department and about the impact the claimant believed it was having or was likely to have on patients.

122. *Disclosure (ii):* We have found that in her meeting with Mr Winstanley on 9 February 2017 the claimant told Mr Winstanley that staff training was having an impact on patient safety as there was a backlog of blood samples to test and there were occasions where patients were having to have another sample taken. We have found that she believed that the information she

disclosed was in the public interest and tended to show that the health or safety of any individual had been, was being or was likely to be endangered. We conclude that this was also a disclosure of information for the purpose of section 43B.

123. *Disclosure (iii):* We have found that the claimant did not mention patient safety in her telephone call with Ms Ruona on 10 February 2017. We conclude that she did not make a disclosure of information on this date.

124. *Disclosure (iv):* In closing submissions, the claimant's counsel accepted that there was no evidential basis on which to pursue the allegation that the claimant made the protected disclosure described as disclosure number (iv) on the list of issues.

125. *Disclosure (v):* We have found that during her disciplinary interview with Mr Woodland on 28 March 2017, the claimant referred to having an issue with the decision to train staff on the evening of 5 January 2017 which she believed was not in the interest of the patient, and she said that the huge cut in the number of staff and hours available was a patient safety issue. We conclude that this was a disclosure of information within the meaning of section 43B.

126. We have to consider whether the claimant's belief was reasonable. This requires us to apply an objective standard, taking into account the claimant's circumstances. We have found that staff in specimen reception were given the impression that it was health critical to process samples within six hours. We do not agree with the respondent that delays in processing samples are only a matter of patient experience or inconvenience, rather than patient safety. Staff shortages could mean tests taking longer to process, and in some circumstances delays in processing blood tests could endanger patient safety, for example because they could lead to delays in diagnosis or treatment, or because they could result in a patient having to attend a medical setting to have a further sample taken. We conclude that it was reasonable for the claimant to believe that delays in processing blood samples could impact patient safety and therefore that the information she disclosed tended to show that patient health or safety had been, was being or was likely to be endangered.

127. We have found that the claimant believed that the three disclosures were made in the public interest. We conclude that, viewed objectively, it was reasonable for the claimant to believe that her concerns about patient safety arising from delays in processing blood samples were a matter of public interest. Delays in carrying out patient blood tests in a hospital are clearly matters of public interest.

128. For these reasons, we have concluded that the claimant made qualifying disclosures on 5 January 2017, 9 February 2017 and 28 March 2017. As these disclosures were made to her department's Team Leader, the Pathology Site Manager and the Mortuary Services Manager, they were disclosures to her employer within the meaning of section 43C and therefore they were protected disclosures within the meaning of section 43A.

Detriments

129. The detriments which the claimant alleges were on the ground that she had made protected disclosures were as follows:

    (i) constructing misconduct allegations against her which were either untrue, inflated or disingenuous (paragraph 16c);
    (ii) suspending her (paragraph 16d);
    (iii) failing to progress the disciplinary investigation and keeping her suspended for an unreasonable period of time (paragraph 16e);
    (iv) James Woodland conducting an investigation which reached unreasonable and unfair conclusions in his investigation report (paragraph 16f);
    (v) commencing disciplinary proceedings against her (paragraph 16g);
    (vi) failing to adequately communicate with her throughout her suspension (paragraph 16h);
    (vii) not allowing her to return to her original role (the first part of paragraph 16j).

130. We have first considered our factual findings in respect of each of the matters relied on by the claimant, and considered whether they happened as alleged and whether they were detriments to which the claimant was subjected by her employer. We then go on to consider whether any detriment we have found was on the ground that the claimant made one or more protected disclosure (the causation question).

131. *Detriment (i) Constructing misconduct allegations against the claimant which were either untrue, inflated or disingenuous*

132. We have found that in the period between 5 January 2017 and 9 February 2017 the claimant's line manager Mr Winstanley advised staff to make diarised statements of any concerns they had about the claimant. A number of staff raised concerns with him, and he was told about three Facebook posts.

133. We have also found that Mr Winstanley repeatedly asked Mr P whether he felt intimidated by the claimant. An allegation of bullying of Mr P was included in the allegations which were investigated by Mr Woodland, even though Mr P himself had said he did not feel intimidated.

134. We have found that additional allegations were included in the disciplinary investigation after the claimant's suspension, that it was not obvious why the Facebook posts were considered to have brought the respondent into disrepute and that the description of unauthorised absences as insubordination was excessive.

135. This factual background might suggest that Mr Winstanley, who did not get on with the claimant and who considered the claimant to be difficult and

abrasive, was encouraging or exaggerating allegations against the claimant. However, in cross-examination the claimant accepted that it was reasonable for the respondent to consider the allegations against her and that, based on the information which Mr Woodland had, it was legitimate for the allegations to be looked at by her employer at a disciplinary hearing. This seems to us to be inconsistent with a suggestion that the respondent constructed misconduct allegations against the claimant which were either untrue, inflated or disingenuous. We conclude that the claimant accepted that she was not subjected to a detriment of this nature.

136. *Detriment (ii) Suspending the claimant*

137. We have found that the claimant was suspended by Ms Ruwona on 10 February 2017. The suspension of the claimant removed her from her workplace and required her to cut off contact with all her colleagues (some of whom were also her friends). A reasonable worker might take the view that suspension in these circumstances is a detriment, or disadvantage. We conclude that in suspending the claimant, the respondent subjected her to a detriment.

138. *Detriment (iii) Failing to progress the disciplinary investigation and keeping her suspended for an unreasonable period of time*

139. The disciplinary investigation began on 10 February 2017 when the claimant was suspended and was completed on 7 April 2017. During this time Mr Woodland interviewed nine members of staff including the claimant and wrote up interview notes for each. The detailed investigation report was dated 7 April 2017. Ms Casemore who decided the claimant's grievance concluded that the investigation could have been more timely. We agree that the investigation could have been done more quickly but we have not found that this amounted to a failure to progress the disciplinary investigation.

140. As to whether the claimant was suspended for an unreasonable period of time, overall the claimant was suspended for five months, from 10 February 2017 to 14 July 2017. The respondent's policy requires suspension to be for as short a period of time as possible.

141. After the investigation report was completed on 7 April 2017, the disciplinary hearing was arranged for 9 May 2017. The claimant raised concerns about the independence of the first person appointed to chair the disciplinary hearing. A new chair had to be appointed and the hearing was rescheduled to 16 June 2017, approximately five weeks later. After that, the disciplinary hearing took place in three parts, on 16 June 2017, 6 July 2017 and 12 July 2017. The claimant was notified of the outcome on 14 July 2017, and her suspension was lifted on the same day.

142. We find that the five-month period for which the claimant was suspended was lengthy, and there were no formal reviews as required by the policy. However, taking into account the time taken for each step, we do not conclude that the suspension was for an unreasonable period of time.

Therefore this was not a detriment to which the claimant was subjected by the respondent.

143. *Detriment (iv): James Woodland conducting an investigation which reached unreasonable and unfair conclusions in his investigation report*:

144. In cross-examination, the claimant accepted that it was reasonable for the respondent to investigate the allegations against her and that, based on the information which Mr Woodland had, it was legitimate for these allegations to be considered at a disciplinary hearing. She also accepted that Mr Woodland's conclusion that the fourth allegation (contacting a colleague whilst suspended) should not be pursued, suggested a balanced approach by him. We did not find that the conclusions reached by Mr Woodland were unfair.

145. We conclude that the claimant was not subjected to this detriment.

146. *Detriment (v) Commencing disciplinary proceedings against her.*

147. Disciplinary proceedings were commenced against the claimant; this was a detriment to which the claimant was subjected by the respondent.

148. Disciplinary proceedings were commenced in respect of five allegations. However, Mr Woodland's investigation report did not recommend that there was a case to answer on the fourth allegation (contacting colleagues while suspended) or on some parts of the fifth allegation (bringing the trust into disrepute and cyberbullying in respect of two of the three Facebook posts). Despite this, disciplinary proceedings were commenced against the claimant in respect of allegations four and five in full.

149. At the formal disciplinary hearing, the claimant therefore had to respond to more allegations than had been recommended by Mr Woodland. The fourth allegation was not considered by Ms Casemore, however Ms Casemore did consider all the Facebook posts and also considered whether the claimant had brought the respondent into disrepute. We conclude that commencing disciplinary proceedings against the claimant in respect of these two allegations was also a detriment.

150. *Detriment (vi) Failing to adequately communicate with her throughout her suspension:*

151. Ms Casemore concluded as part of the grievance complaint that communication with the claimant during her suspension could have been more regular so that the claimant felt more supported. The respondent accepted that its communication could have been better throughout the claimant's suspension. We conclude that this was a detriment to which the claimant was subjected by the respondent during the period of her suspension (10 February 2017 to 14 July 2017).

152. *Detriment (vii) Not allowing the claimant to return to her original role*

153. The respondent accepts that a decision was taken that it would not be appropriate to return the claimant to her original role. This was initially taken by Ms Casemore and then confirmed by Ms Coe in the disciplinary appeal hearing.

154. The claimant initially agreed that she could not return to her original role but by 11 August 2017, when it became apparent that there was no other role which the claimant regarded as suitable, she offered to return to her original role. It was the decision that the claimant could not return to her original role which led to the need to identify an alternative role for the claimant. We conclude that, even though she initially agreed with the decision not to return her to her original role, the decision was a detriment.

155. We have found that the claimant was subjected to the following four detriments by the respondent:

    155.1. suspending her (detriment (ii), paragraph 16d);
    155.2. commencing disciplinary proceedings against her (detriment (v), paragraph 16g);
    155.3. failing to adequately communicate with her throughout her suspension (detriment (vi), paragraph 16h);
    155.4. not allowing her to return to her original role (detriment (vii), the first part of paragraph 16j).

The causation question

156. The claimant has therefore established that she made protected disclosures on 5 January 2017, 9 February 2017 and 28 March 2017 and that she was subjected to four detriments. We conclude that the burden shifts to the respondent under section 48(2) to prove that the claimant was not subjected to any of these detriments on the ground that she had made one or more protected disclosure.

157. The respondent must satisfy us that the protected disclosure(s) did not materially (in the sense of more than trivially) influence its treatment of the claimant. In relation to each detriment we focus on the mental processes of each decision maker. In relation to some of the treatment we did not have any evidence about who was responsible for the treatment.

158. *Detriment (ii):* Ms Ruona carried out the suspension of the claimant on 10 February 2017. By this date the claimant had made protected disclosures to Ms Wilkinson on 5 January 2017 and Mr Winstanley on 9 February 2017. Ms Ruona was not aware of either of these protected disclosures.

159. Ms Ruona suspended the claimant based on the advice of the respondent's HR officer. There was no evidence before us that the HR officer had an unlawful motivation or was manipulating Ms Ruona. There was no evidence that Ms Ruona spoke to anyone else about the decision.

160. We have found that when she suspended the claimant, Ms Ruona was aware that there were allegations of inappropriate and bullying behaviour

against the claimant. The suspension letter referred to the claimant's behaviour on 9 February 2017, and said that it was inappropriate for her to contact work colleagues about the incident. The claimant accepted in her evidence that it was legitimate for the respondent to investigate this conduct. We accept that Ms Ruona believed, on the advice of HR, that there was a legitimate reason to suspend the claimant. We accept the respondent's explanation that the claimant was suspended to remove her from the workplace during the investigation of an allegation of inappropriate and bullying behaviour in the workplace.

161. We conclude that the suspension of the claimant by Ms Ruona was not materially influenced by the protected disclosures the claimant made on 5 January 2017 and 9 February 2017. Ms Ruona was not aware of the protected disclosures and there was no evidence that her decision was affected by another person who was influenced by the protected disclosures. We accept the reason advanced by Ms Ruona for her decision to suspend the claimant.

162. *Detriment (v):* There was no dispute that the respondent commenced disciplinary proceedings against the claimant and we have found that this amounted to a detriment. We have also found that commencing disciplinary proceedings in respect of allegations four and five (in full), contrary to the recommendations of Mr Woodland, was a detriment.

163. Under section 48(2) it is for the respondent to prove that disciplinary proceedings were not commenced against the claimant on the ground that she had made a protected disclosure, ie that the protected disclosures made by the claimant did not materially influence the decision to commence disciplinary proceedings.

164. We conclude that Mr Woodland's conclusions in his investigation report that the claimant had a case to answer on some of the allegations was the reason for disciplinary proceedings being commenced in respect of the first three allegations against the claimant and parts of the fifth allegation.

165. However, we have not been given any evidence or explanation for the decision to commence disciplinary proceedings against the claimant in respect of the fourth allegation, and parts of the fifth allegation (the allegation about two of the Facebook posts and the allegation about bringing the trust into disrepute). In the light of Mr Woodland's conclusions and the nature of these allegations, this is surprising. We were not told who made the decision to do this. Ms Casemore told us that she thought allegation four may have come forward to the disciplinary hearing in error, but she was not sure. If it was an error, it was one which was repeated in the disciplinary hearing invitation letter, at the disciplinary hearing and in the disciplinary outcome letter. There was no evidential basis for concluding that there was a series of errors.

166. We conclude that the respondent has not satisfied us that the claimant's protected disclosures did not materially influence the respondent's decision

to commence disciplinary proceedings against the claimant in respect of the fourth disciplinary allegation and parts of the fifth allegation.

167. There was evidence before us that the claimant was regarded by her managers as difficult and a troublemaker. The claimant's team leader Ms Wilkinson thought she was a brash and manipulative personality and her line manager Mr Winstanley thought she was very difficult and abrasive and often caused upset. The claimant's disclosures and the concerns the claimant raised with them about training and patient safety are likely to have played a part in that perception. There was also evidence that Mr Winstanley invited staff to provide information about concerns they had about the claimant, advising staff to make diarised statements of any concerns they had about the claimant and repeatedly asking Mr P whether he felt intimidated by the claimant.

168. We infer from this evidence that the claimant's protected disclosures of 5 January 2017 and 9 February 2017 materially influenced the decision to progress disciplinary proceedings against the claimant in respect of all of allegations against her.

169. *Detriment (vi):* the respondent accepted that communication with the claimant could have been better throughout her suspension.

170. The respondent said that this was an unfortunate but relatively unexceptional oversight on the respondent's part, and that there was no link whatsoever between this and the claimant's alleged disclosures.

171. We have found that the claimant had no contact at all from 10 February 2017 to 21 March 2017. It was Mr Woodland's responsibility to communicate with the claimant about her suspension. We would have also expected there to be some other welfare contact with the claimant by her managers or Human Resources while she was suspended. Ms Casemore accepted that more communication would have made the claimant feel more supported.

172. We have not been given any evidence or explanation for the failure to communicate with the claimant throughout her suspension, other than a suggestion that it was an oversight, and the indication by Mr Woodland that he decided not to conduct a formal review because the claimant's circumstances had not changed.

173. As set out above, there was evidence before us that the claimant was regarded by her managers as difficult and a troublemaker. The claimant's team leader Ms Wilkinson thought she was a brash and manipulative personality and her line manager Mr Winstanley thought she was very difficult and abrasive and often caused upset. The claimant's first two protected disclosures were made to Ms Wilkinson and Mr Winstanley. We conclude that this is material from which we can infer that the claimant's first two protected disclosures materially influenced the claimant's managers' perception of her and that the perception of the claimant as difficult and a troublemaker played a part in the failure to communicate adequately with her during her suspension.

174. *Detriment (vii):* The decision not to allow the claimant to return to her original role was part of the decision taken by Ms Casemore. It was taken because Ms Casemore thought that there had been a breakdown in the claimant's working relationships with Ms Wilkinson and Mr Winstanley, and that the team was dysfunctional, with cliques and a culture of unhappiness and disharmony. Ms Casemore's decision was taken on 13 or 14 July 2017 (after the last day of the disciplinary hearing on 12 July 2017).

175. On 11 October 2017 Ms Coe confirmed the appeal panel's decision. The appeal panel reinstated the claimant but agreed that she could not return to her original role because of the breakdown in working relationships in the department.

176. We have considered the reasons why Ms Casemore and Ms Coe reached the decisions that they did that the claimant's working relationships had broken down so that the claimant could not return to her original role. The respondent said that the problems with the team were not limited to the claimant. It was accepted that the team as a whole was dysfunctional. We did not hear any evidence about why the respondent decided that, despite there being a problem across the whole department, it was the claimant who had to move. As set out above, there was evidence before us that the claimant was regarded by her managers as difficult and a troublemaker and we have inferred that her first two protected disclosures materially influenced that perception. We also infer that the perception of the claimant as a troublemaker by her line managers played a material part in the decisions by Ms Casemore and Ms Coe that there had been a breakdown in the working relationships between the claimant and her managers in the department and the decision that it was the claimant who had to move.

177. The fact that Ms Casemore took into account the claimant's view that relationships had broken down and that she could not return to her original role does not affect the inference that her protected disclosures also materially influenced the decision.

178. In summary, we conclude that the claimant was subjected to three detriments on the ground that she made protected disclosures on 5 January 2017 and 9 February 2017, namely:

    178.1. commencing disciplinary proceedings against her in respect of two of the disciplinary allegations;
    178.2. failing to adequately communicate with her throughout her suspension; and
    178.3. not allowing her to return to her original role.

Jurisdiction (time limits)

179. We have considered whether the claimant's complaints were brought in time. The detriments which we have concluded were on the ground of the claimant's protected disclosures took place on the following dates:

179.1. 2 May 2017 (commencing disciplinary proceedings against her in respect of two disciplinary allegations);
179.2. 10 February 2017 to 14 July 2017 (failing to adequately communicate with her throughout her suspension); and
179.3. 13/14 July 2017 and 11 October 2017 (the decisions by Ms Casemore and Ms Coe respectively not allowing her to return to her original role).

180. The claimant's claim was presented on 7 December 2017 after a period of Acas early conciliation from 12 October 2017 to 8 November 2017. Any act that occurred before 13 July 2017 is, on the face of it, out of time.

181. Both decisions that the claimant could not return to her original role are in time as they occurred on or after 13 July 2017.

182. The failure to communicate adequately with the claimant during her suspension was a failure to act which extended over a period until 14 July 2017 and is therefore in time (section 48(4)(a)).

183. The commencement of disciplinary proceedings on 2 May 2017 fell during the claimant's suspension. All the acts of detriment are connected with the disciplinary proceedings and we conclude that they are a series of similar acts or failures to act. The detriment on 2 May 2017 is therefore also in time (section 48(3)(a)).

Automatic unfair dismissal

184. In the context of the automatic unfair dismissal complaint, we have to decide what the principal reason for the dismissal was. The dismissal will only be automatically unfair if one or more of the claimant's protected disclosures were the principal reason for the dismissal of the claimant. This is different to the test of whether one or more of the claimant's protected disclosures materially influenced the acts or decisions which are alleged to be detriments.

185. The reasons given by the respondent for the dismissal of the claimant on 12 December 2017 were:

185.1. the breakdown in trust and confidence based on the claimant's refusal to return to work in her email of 25 November 2017 and 15 November 2017;
185.2. the claimant's failure to engage in the redeployment process despite this being a condition of her reinstatement;
185.3. an irretrievable breakdown of the claimant's relationship with her manager and colleagues that would not enable her to return to her original post.

186. Ms Coe reinstated the claimant for the purpose of giving her another opportunity to find an alternative role. If Ms Coe's real reason for the dismissal of the claimant in December 2017 had been one or more of the

claimant's protected disclosures, Ms Coe could have upheld Ms Casemore's decision at the appeal hearing on 10 October 2017 and not reinstated the claimant. We accept therefore that the reasons given by Ms Coe in the hearing on 12 December 2017 and confirmed in the letter of 14 December 2017 were the reasons for the decision to dismiss the claimant on 12 December 2017.

187. We have considered which of the reasons given by Ms Coe was the principal reason for dismissal. That means focusing on the position as it was on 12 December 2017.

188. The decision that the claimant could not return to her original role because of the breakdown in her relationship with her managers and colleagues set in motion the events that led to her dismissal. However, this was not the principal reason for her dismissal. The appeal panel reinstated the claimant after the first dismissal, and agreed that the claimant could remain in employment in another role. The respondent undertook meaningful searches for an alternative role for the claimant:

    188.1. Prior to the appeal hearing with Ms Coe on 10 October 2017, there was a four-week search for another role for the claimant, she was provided with a list of vacancies and she had been told about 7 other roles (page 300);

    188.2. After the appeal hearing, the claimant was offered another 7 roles as summarised in Ms Coe's email of 24 November 2017. One of these was a role in blood sciences, the department the claimant had mentioned at the appeal hearing. One had the working hours and location the claimant had requested, and pay protection.

189. We have found that these were genuine offers of alternative roles by the respondent. If the claimant had accepted any of these roles, her employment with the respondent would not have come to an end. We conclude therefore that the fact that the claimant did not accept any of the alternative roles which she was offered by the respondent after she was reinstated was the primary motivation and the principal reason for her dismissal. If she had accepted one of these roles, she would not have been dismissed.

190. We accept that the reasons for dismissal given by Ms Coe in the dismissal letter of 14 December 2017 are the reasons for the claimant's dismissal, and that of these the principal reason for dismissal was the claimant not accepting any alternative role.

191. We have not concluded that the protected disclosures made by the claimant were the reason or the principal reason for her dismissal. The complaint of automatic unfair dismissal therefore fails and is dismissed.

Ordinary unfair dismissal

192. We have concluded that the principal reason for the claimant's dismissal was the fact that the claimant did not accept any of the alternative roles offered by the respondent. This is a substantial reason which related to the position the claimant held, and her inability to continue in that role, and which could potentially justify dismissal.

193. We conclude that the dismissal of the claimant because she failed to accept any of the alternative roles offered was for a potentially fair reason, namely 'some other substantial reason' (SOSR) within section 98(1)(b) of the Employment Rights Act.

194. We have gone on to consider whether the respondent acted reasonably under section 98(4) in dismissing the claimant for that reason.

195. We have to consider whether the dismissal of the claimant was within the range of reasonable responses that a reasonable employer might adopt. We conclude that the dismissal for failure to accept an alternative role was within the range of reasonable responses. In reaching this conclusion, we have taken into account the following in particular:

    195.1. The claimant initially agreed that she could not return to her old role and that an alternative post would have to be found;
    195.2. The respondent searched for alternative posts over two periods, both of over four weeks;
    195.3. The job searches which the respondent carried out were genuine and meaningful, and a number of roles which appeared to be suitable were identified;
    195.4. The claimant was warned at both stages of the process that not accepting an alternative role could lead to her dismissal;
    195.5. The dismissal of the claimant was considered in parallel with the disciplinary allegations as part of the formal disciplinary procedure adopted by the respondent;
    195.6. The respondent held a reconvened hearing with the claimant to consider dismissal at the initial stage;
    195.7. There was an appeal and a reconvened appeal hearing with the claimant to consider dismissal at the appeal stage;

196. For these reasons, we have concluded that the dismissal of the claimant was fair in all the circumstances, and the claimant's complaint of 'ordinary' unfair dismissal fails and is dismissed.

Remedy

197. We have concluded that the claimant's complaint of detriment on the ground of protected disclosures is well founded in respect of three detriments.

198. Under section 49 of the Employment Rights Act, we may make an award of compensation of such amount that we consider just and equitable in the circumstances of the case, having regard to:

a) The infringement to which the complaint relates; and
b) Any loss which is attributable to the act or failure to act which infringed the claimant's right not to be subjected to a detriment.

199. In the claimant's case, the infringement to which the complaint relates took place over the period from 10 February 2017 to 11 October 2017, a period of eight months, which is substantial. During five months of this time the claimant was suspended and was not in contact with any of her work colleagues and friends. The respondent accepted in the grievance that claimant would have felt more supported if she had been contacted more regularly during her suspension. The claimant also had to face additional disciplinary allegations and could not return to her original role.

200. In terms of financial loss, we have to consider what is attributable to the respondent's acts or failure to act. We have found that the dismissal of the claimant, while a consequence of the decision that she could not return to her original role, was attributable to the fact that the claimant did not accept any of the alternative roles which she was offered by the respondent after she was reinstated. We therefore conclude that the claimant's financial losses arising from her dismissal were not attributable to the unlawful detriments.

201. Loss is not limited to financial loss, it may include injury to feelings and personal injury. The claimant did not make any claim for personal injury. In terms of injury to feelings, our findings are that the claimant suffered from stress, difficulty and unhappiness as a result of the events surrounding her dismissal, which included the unlawful treatment. She had suicidal thoughts and weight loss. She had to see her doctor on several occasions and was prescribed anti-depressants and had online counselling.

202. We have considered the Vento bands for awards of injury to feelings. This was not a 'less serious case' where the unlawful treatment was an isolated or one-off occurrence suggesting an award in the lower band, and it was not one of the most serious cases requiring an award in the top band. The appropriate award for injury to feelings in the claimant's case is an award in the middle Vento band.

203. The Presidential Guidance of 5 September 2017 provides that for claims presented on or after 11 September 2017, as this was, the middle Vento band is £8,400 to £25,500. We have decided that an award towards the middle of this band is appropriate. The claimant is awarded £15,000 in respect of injury to feelings.

204. No adjustment or reduction is required:

204.1. We have not found that the claimant's disclosures were not made in good faith or that she contributed to the respondent's unlawful acts or failures to act;

204.2. The claimant's schedule of loss includes an uplift for a failure to follow the Acas Code of Practice on Disciplinary and Procedures. The code does not apply in SOSR dismissals. In any event, we have not found that there was any breach of the code.

205. The employment judge apologises to the parties for the delay in the judgment being sent to the parties. Completing the judgment was delayed by changes in working arrangements during the Covid-19 measures.

Employment Judge Hawksworth

Date: 28 May 2020

Sent to the parties on: .9 June 2020

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For the Tribunals Office

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