EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs C Arthur	**v**	**Hertfordshire Partnership University NHS Foundation Trust**

Heard at: Watford **On**: 3-16 November 2020

Before: Employment Judge R Lewis
Mr P Maclean
Mr C Surrey

Appearances

For the Claimant: In person
For the Respondent: Mr A Smith, Counsel

JUDGMENT

1. The claimant made one qualifying protected disclosure on 11 October 2016.

2. The claimant was not subjected to any detriment on the grounds that she made a protected disclosure and all claims to that effect are dismissed.

3. The sole or main reason for the claimant's dismissal was not her protected disclosure and her claim of automatically unfair dismissal is dismissed.

4. The claimant was treated unfavourably because of something arising in consequence of her disability and her claim under s.15 Equality Act 2010 is upheld.

5. The respondent breached its duty to make a reasonable adjustment and one claim under s.20 Equality Act 2010 is upheld.

6. Remedy will be decided at a separate hearing, which is the subject of a separate Order.

REASONS

1. This was the hearing of a claim presented by the claimant on 5 November 2017. The lengthy procedural history need not be set out in detail. Preliminary hearings took place on 16 April 2018, 7 December 2018 and 13 March 2019 (respectively Judges Palmer, Manley and McNeill QC). Claims of public interest disclosure were struck out by Judge Manley, and reinstated by the Employment Appeal Tribunal in August 2019 (UKEAT/0121/19), after which there was a fourth Case Management Hearing before Employment Judge Tuck QC on 7 November 2019. Judge Tuck's order (91) was a significant foundation document for this hearing. Among others, Judge Tuck listed the present hearing for a 12 day hearing on liability only, and set a case management timetable.

2. Judge Tuck's order set out a list of issues which this tribunal regarded as definitive. The claimant was at that hearing represented by counsel, instructed by solicitors who had represented her since about July 2017, and who continued to do so until about May 2020.

Procedural events at this hearing

3. The first listed day was Tuesday 3 November. Due to administrative error, the hearing was listed before Employment Judge Manley sitting with members. Employment Judge Manley had in 2018 struck out public interest disclosure claims, and it was her judgment which had in part been set aside by the EAT. As the present judge understands it, she met the parties with members, and invited comments on whether she could hear the case. The claimant objected, and the judge considered that she should accede to her objection. As it happened, the present judge became free as a result of a late settlement of a lengthy case, and therefore replaced Judge Manley with the same members.

4. A Case Management hearing then took place at which a hearing timetable was set, which was based on two days for the claimant's evidence, and four days for the respondent's. Friday 13 November was allocated to submissions, following which the tribunal would deliberate. Although the listing was for 12 days, the present judge was not available on the listed 12th day. In the event, the respondent's evidence took three days. There were closing submissions on the morning of Thursday 12 November, after which the tribunal adjourned for deliberations to give judgment on Monday 16 November. During deliberations the tribunal contacted the parties and asked that before judgment was given, they address us on the issue of limitation and the discrimination claim.

5. It was confirmed, as directed by Judge Tuck QC, that this hearing would deal with liability only. The present judge sought clarification on whether contribution and/or Polkey/Chaggar should be dealt with at this stage. After submissions, the tribunal directed that contribution would be dealt with at this stage, because the evidence would deal with matters before dismissal; but that any issue as to Polkey/Chaggar should be reserved to the remedy stage if any. In the event, Mr Smith persuaded us in submission that the Chaggar issue which emerged from the evidence was relatively straightforward, and could be dealt with at this stage. We explained the

issue to the claimant, and after a break, asked her to speak to it, which she did.

6. It was confirmed that the above was the sole respondent. The claimant had originally brought claims against five named individuals, but those claims had been withdrawn by counsel at the preliminary hearing on 7 December 2018 (53). The claimant told us that she did not accept the withdrawals, and that she had made complaints against her then representatives. We advised the claimant that she could not reopen this issue now, some two years after the withdrawals. We noted that five of the six named individual respondents were witnesses in any event. There was no reliance by the respondent on any statutory defence.

7. The respondent had produced hard copies of bundles running to about 2,200 pages. The claimant was present with one hard copy of a bundle of 1,374 pages, which was indexed and numbered by item not by sequential numbers. Thus, to take one example at random, item 30 in the bundle was the respondent's stress policy. PDF software later showed that within the claimant's bundle the stress policy occupied pages 388 to 426 inclusive, all of which the claimant had paginated as 030.

8. The judge asked to see a sample of the claimant's hard copy, and she handed up the first of a number of spiral bound volumes. It was obvious almost at a glance that the volume contained documents which were in the respondent's bundle. When the judge asked the claimant to identify a sample item which was in her bundle but not the respondent's, she identified an item which in fact was page 145 of the respondent's bundle, with one name not redacted.

9. We were told that the claimant had produced her bundle on the day before the start of hearing, and had cross-referenced to it, and not the respondent's bundle, in her witness statement.

10. We took a pragmatic view. We asked the claimant to provide the tribunal with a pdf copy of her bundle, which she did. One copy was therefore available in the tribunal room on the judge's laptop. We used the respondent's bundle as the working tool, and told the claimant that if we needed to refer to an item which was in her bundle but not the respondent's we would do so when we came to it, crossing the bridge when we reached it. In the event, we were referred to a handful of pages in the pdf which were not in the bundle, none of them a central document.

11. We invited the views of the parties on whether to proceed in person or remotely. The claimant expressed a strong preference for CVP, with which we agreed. Mr Smith expressed reservations and submitted that there might be practical benefits to the parties being present. We were confident that neither party was in the event prejudiced by the use of CVP.

12. In the course of 4 November, the parties sent the tribunal a number of emails. The tribunal drew the claimant's attention again to the provisions of Rule 92. It appeared from the emails that the claimant had misheard or

misunderstood something said by Mr Smith, and it was therefore necessary to confirm the following morning that the claim for unfair dismissal proceeded in accordance with ERA s.103A (automatic unfair dismissal for having made a protected disclosure) as did claims under s.47D (detriments on grounds of having made protected disclosure).

13. Mr Smith drew to our attention a potential privacy issue. The evidence referred to a disciplinary matter involving a doctor. It was agreed that s/he would be referred to as Dr X in evidence and in this judgment, although we noted the doctor's full name in the bundle (162). The judge reminded the parties that any patient or service user was not to be referred to by actual name or actual initials, although in the event this did not arise. After giving judgment, the tribunal asked the parties for their views on how a number of third parties should be referred to in these Reasons. For reasons set out below, we refer to Dr Walker (who presented the case against Dr X) by name, and to six former colleagues of the claimant as A-F. Their identity is of course known to the parties.

14. The public hearing began on 5 November. The judge gave a brief introduction to points arising from the tribunal's reading. He stressed that given the volume of material, the tribunal did not have the familiarity of the parties with the detail. He reminded the parties that the hearing did not go beyond the list of issues, and there was no need to cross-examine on matters which might be dealt with in evidence but were not in the list of issues. He reminded the parties of the timetable which had been set, and Mr Smith indicated the running order of the respondent's witnesses.

15. The tribunal asked the claimant if any adjustment was required in light of her disability, and she referred only to the need for breaks. We took several breaks on each day of the hearing, and adjusted start, lunch and finish times throughout the case to assist the claimant. She also asked that the tribunal finish early on Fridays, in light of her religious observance. The judge asked whether any issue of privilege arose about protected conversations. Mr Smith replied that the respondent did not formally waive privilege; but that given that the claimant appeared to have alleged unambiguous impropriety, it took a pragmatic approach and agreed to evidence of what might have been protected conversations being included.

16. The respondent had during the adjournment prepared and sent to the tribunal a copy of the claimant's witness statement in which references to her bundle had been supplemented by references to the hard copy bundle. Mr Smith told the tribunal that preparation had taken the respondent two staff working for two days. We thank them for their assistance.

17. The claimant was the only witness on her own behalf. She gave evidence for two days. The respondent's witnesses in order of calling were the following:

    Ms M Maciejewski. At the time of these events she was Deputy Director of Workforce and Organisational Development, and therefore the claimant's

line manager. She gave evidence on 9 November from 10:45am until 2:40pm.

Ms H Kandola, who at the time was Deputy CEO and Executive Director of Workforce and Organisational Development. Her evidence was on 6 November from 10:40am until 12:25pm.

Mr J Moore, Solicitor, who had at the time of these events been appointed external investigator, was then a partner in Messrs Bevan Brittan. He gave evidence on 6 November from 1:55pm to 4:20pm.

Mr K Loveman, who at the time was employed by the Trust as Director of Finance and has subsequently been appointed Deputy Chief Executive. He gave evidence on 11 November from 10:10am to 1:45pm.

Ms J Lynch, now retired, and previously Director of Workforce and Education at Lewisham and Greenwich NHS Trust, gave evidence for about 20 minutes on 11 November.

Ms J Hopkins, who was then Head of Nursing and a Registered Mental Health Nurse: Ms Hopkins' evidence lasted about 30 minutes.

18. Mr Smith had provided helpful opening and closing submissions. It was made clear to the claimant that she was not expected to provide written submissions, but she was free to do so if she wished.

19. As in many cases, there remained underlying disputes about documents. Mr Smith mentioned that there had been considerable delay by the claimant in the disclosure process, as a result of which the hard copy bundle had been prepared late, and the claimant had answered it with her pdf bundle very shortly before the start of this hearing. We have not gone into this issue save to say that the case management timetable set by Judge Tuck was sent to the parties on 22 November 2019, about 50 weeks before the start of this hearing. Even allowing for the disruption caused by lock-down, we could not understand why the process was so long delayed. Throughout the hearing, the claimant asked Mr Smith to assist her to retrieve documents which she identified with reference to her bundle but could not locate in the main bundle. Mr Smith was unfailingly helpful and courteous in responding. There were no more than five or so items or pages to which we were referred, which were in the claimant's pdf but not in the main bundle, none of which seemed to us a significant omission. We could see that the claimant had pursued subject access requests and appeared convinced that there might be further documents which could assist her. We heard no reference to any document or class of document which sounded as if it might be relevant, could assist the tribunal, should have been included in the papers before us and was not. It is not unusual for claimants to pursue the mirage of an absent document which will in some way prove helpful.

20. The claimant's approach to documents was not logical. She challenged the authenticity of documents which she could have no evidential basis to

challenge. We mean by this that where a document recorded a meeting at which the claimant was not present, she had no evidential basis on which to say that it was not an accurate record of the meeting. On a number of occasions, she seemed not to understand the distinction between asserting that what was said at a meeting was untrue (which was her right to do, even if she were not at the meeting); as opposed to asserting that the document was not an accurate record of what was said at the meeting (which she could not do if she were not at the meeting herself).

21. We accept the evidence of Ms Maciejewski and Mr Moore that the notes which they made of meetings with the claimant and others are a generally accurate summary so far as they go. We do not expect them to be a full transcript, which could only be created if a meeting were recorded. We expect the summary to record what was said in a way which gives a fair overarching picture. We accept that that was done. We accept the evidence of the disciplinary panellists that the notes of their meeting accurately record what was said on 19 June 2017; we set out below our reasoning for finding that one particular note (1325) is not a fair or accurate summary of Dr Yew's report.

22. The bundle included documents prepared by the claimant which she called telephone transcripts. She said that these documents had been produced in the course of case preparation in 2020. As we understood it, the claimant said that she had telephoned a number of former colleagues who had been involved in these events. She had done so out of the blue, and it may be that she had not spoken to some of them for a matter of years before the call. She had recorded the calls, but not told the other speaker that the call was being recorded. She then produced typed transcripts, which she disclosed to the respondent, without having disclosed the audio original. We excluded these documents in their entirety. They could not fairly be admitted in the absence of the claimant having disclosed the original audio recordings to the respondent so that the respondent could hear them, check the accuracy of the transcription, and if appropriate speak to the former colleagues who had been recorded. While we reluctantly accept in principle that unguarded covert recording may produce admissible evidence, we approach casual telephone conversations years after the event with extreme caution, particularly in light of our views on the unreliability of the claimant's evidence. The mere fact that a former colleague, receiving an unexpected phone call from the claimant, may have said something apparently inconsistent with a document or record made years earlier is neither surprising nor helpful.

Executive summary

23. We hope it makes these reasons easier to follow if we summarise the case.

24. The claimant was born in 1978 and is an experienced HR professional with CIPD qualifications. She joined the respondent Trust in July 2015 and in spring 2016 was appointed as a development opportunity to be Head of Medical Staffing, where she headed a small team. The first issue

chronologically with which we were concerned was dialogue about the immunisation of newly appointed doctors. We do not find that the claimant's discussion with Ms Maciejewski on 24 August 2016 included a protected disclosure.

25. In August and September three members of the claimant's team approached Ms Maciejewski in confidence to complain about the claimant's management style.

26. The crucial events in this case took place between 10 and 12 October. Ms Maciejewski was informed that the claimant had been responsible, whether alone or solely, for a serious breach of patient confidentiality and data. The claimant agreed, and on 12 October went off sick. On the same day, members of the claimant's team made another report to Ms Maciejewski. When the claimant was due to return to work after her recovery, she was placed on paid leave, and then suspended. Ms Maciejewski learned that the claimant later breached the conditions attached to her absence on paid leave.

27. Mr Moore was appointed to conduct an investigation, which lead to a disciplinary panel being convened. It made a number of attempts to meet, which led to a series of postponements. In the event, an occupational health report was commissioned from Dr Yew. Despite the language of the report, the disciplinary panel met in the claimant's absence on 19 June and dismissed her. In July, the claimant asked if she could appeal although the time limit for doing so had expired, but she was refused permission.

28. The claimant alleged that she had made one protected disclosure on 24 August, and two on 11 October. We find that she made one disclosure, on 11 October. The claimant alleged that she had suffered a large number of detriments, and been dismissed, because she had made protected disclosure(s). We find that the one protected disclosure which we found played no part whatsoever in any of the decisions which she considers were detriments, and was no part whatsoever of the decision to dismiss her. We add that our decision would have been the same if we had found that she had made either or both of the other two alleged disclosures.

29. The claimant brought three claims of disability discrimination in relation to the decisions to proceed on 19 June and to deny her the right to appeal. We find that the claims have been brought in time, alternatively that it is just and equitable to extend time; we find that the Trust had constructive knowledge of her disability; and we find that two of her claims of disability discrimination have been made out.

30. The essence of the claimant's successful claims has been that she was discriminated against when the Trust refused to adjourn the 19 June meeting and when it refused to extend her time to appeal. Having heard submissions on the point, we find that if the claimant had not been discriminated against; if, in other words, she had been given at least one further opportunity of a final hearing at which she would have had a final opportunity to attend or be represented, the same conclusion would have

been reached and her dismissal could not have been prevented. We make no precise finding about how long it would have taken to reach that stage, which is a matter for the remedy hearing. In principle our finding is that it would have taken months, and that therefore the claimant's loss of income is to be measured in months.

31. The tribunal bundle contained reports and evidence about the claimant's mental health. Compensation for injury to feelings will be decided at the remedy hearing. The remedy to which she will be entitled will be remedy for injury to feelings as at 19 June 2017, when discrimination took place, and not as at October / November 2016, when she suffered a mental health episode.

Privacy rights

32. It was agreed at the start of this hearing that a medical practitioner whose disciplinary case was involved in these facts would be referred to as Dr X. In the event, no service user or patient was identified at this hearing. At the end of the hearing the tribunal asked for the parties' views on whether it should anonymise names of former colleagues, and of Dr Walker, who had sent papers to the claimant on about 6 October. In doing so, we must balance the legitimate rights and interests of those persons, who were discussed at length during this hearing, but were not parties or witnesses, against the public interest in open justice, particularly in a public service employer. We share the view of Mr Smith that the public is entitled to know about these events, but that the names of individuals is not a matter of compelling public interest. The vehemence of the claimant's language about Dr Walker is not a consideration.

33. Our decision has been not to anonymise the name of Dr Walker, as the evidence was that he is a senior professional employee, who followed routine Trust procedures. We have anonymised the names of six former colleagues of the claimant, as we can see no interest of open justice in their being identified in public. In so saying, we note that the consequence of a public hearing has changed as a result of the administrative decision to post tribunal judgments online. The parties are fully aware of their identities, and they are:

    33.1 A spoke to Ms Maciejewski on 19 August (250) and gave a statement on 17 October (373);

    33.2 B spoke to Ms Maciejewski on 2 September (273) and gave a statement on 17 October (368);

    33.3 C spoke to Ms Maciejewski on 2 September (273) but did not sign a statement at any stage;

    33.4 D was interviewed on 18 October, and Ms Maciejewski signed a note of the interview (380);

    33.5 E gave a statement on 19 October (383);

33.6 F was involved in an incident on 2 November, and gave a report to Ms Maciejewski on 3 November (419).

General approach

34. Before we turn to findings of fact we set out a number of general matters.

35. As we told the parties, this judgment is unanimous. At a number of stages it refers to common practice or workplace practice. While all our findings are unanimous, the judge records his gratitude to the experience and wisdom of the non-legal members, whose guidance underpins those parts of this judgment.

36. In this case, as in many others, we heard evidence about a wide range of matters about which we have made no findings; or a finding which is limited in contrast to the depth of evidence which we heard. Our approach should in neither case be taken as an indication of oversight or omission. It is a reflection of the extent to which that point was truly of assistance.

37. The above observation is true in many of our cases, but particularly important in this case, given the strength of feeling on all sides and the emotion and distress shown by the claimant.

38. The tribunal considers itself familiar with the difficulties faced by litigants in person. The tribunal experience is unfamiliar and stressful. Many litigants are unfamiliar with the law and procedure of the tribunal, and struggle to achieve equality of arms against a well resourced and professionally represented opponent. Making every allowance in the claimant's favour, there were a number of aspects of her presentation which troubled us, and which, taken together, lead us to the overarching conclusion that her analysis of events is mistaken, and her evidence cannot be accepted as wholly reliable. We do not mean by this that the claimant has knowingly sought to deceive or mislead the tribunal.

39. When we approach our fact find, we do so to what we hope is a realistic standard. Realism includes recognising that individuals make mistakes at work, and that it is often more productive to reflect on the nature of the mistake and on the lesson to be learned from it, than on the details of how it came about. Realism may also involve, for example, how written procedures are to be approached, how conflict in the workplace is to be resolved, and how resources are to be applied. Realism may lead those involved in an employment dispute to regard compromise as a desirable end in itself.

40. The issue of realism also attaches to how employment procedures are to be interpreted. The bundle contained a large number of the respondent's procedures, which were detailed and thoughtful in the manner which one would expect of public service and of the NHS in particular. Our view is that procedures are to be interpreted reasonably, and with humanity and realism. They should not be approached rigidly as a straitjacket.

41. Mr Loveman's evidence and Mr Smith's submission both commented on what they saw as lack of insight in the claimant. We understand insight to be objective understanding (so far as one can achieve it) of how one's own actions or words might appear to others or affect others, and lack of insight includes a failure to develop that understanding after hindsight and reflection, and in the light of being told of the impact on others. We agree that in presenting her case in 2016-2017, and before us, the claimant showed lack of insight.

42. We nevertheless do not feel able to adopt Mr Smith's observation that the claimant's conduct in the tribunal was of a piece with her conduct at work four years previously. That seemed to us a potential error, and Mr Smith invited us to see the matter as one of consistency. The difficulty with that approach and observation is that between the events of 2016 and this hearing, the claimant has been involved in a process of conflict; for some of it she has had legal advice but for some of it she has not; and she has told us of the deterioration in her mental health. We have seen her visible distress during much of this hearing. It seems to us that we must be cautious in making findings about events in 2016 based on how the claimant presented to us in 2020. We can however say that the claimant presented this case with confidence that her approach, language and actions in 2016 and 2017 had been blameless and entirely correct, and we noted the absence of any reflection or hindsight which might have challenged that assurance.

43. We have, in general, not found the claimant to be a reliable witness, and do not consider that we can accept her evidence unless it is corroborated by an objective reading of independent documentation, or another person. We set out our main reasons for reaching that general conclusion. The claimant made assertions which plainly could not be proved. Repeatedly when asked about documents which were created in 2016 and 2017, she accepted that she had no part in the creation of the document but asserted that the document was inaccurate or incomplete; and then went on to assert that the document was dishonestly created. When asked about notes of meetings which she did not attend, the claimant denied the accuracy of the notes, a matter which she could not know or prove. When asked about Mr Moore's report, she stated that she did not agree with it: that was of course a comment she was entitled to make. However, she went on to say that the report did not in fact represent Mr Moore's genuine and sincere opinion, a comment which she could not make, because she had no knowledge of Mr Moore's state of mind.

44. We were taken at this hearing repeatedly to the Trust's written policies. On a number of occasions the claimant asserted that the policy in our paper bundle was not the right one; but on the one occasion when she was asked to show the tribunal what she considered to be the correct policy, she referred to the identical document in her own pdf bundle. We refer here to the disciplinary policy, which was the claimant's item 029 and page 1703 in the bundle. Despite the claimant's denials the documents are both plainly v5 of the respondent's Disciplinary and Suspension policy.

45. The claimant put forward interpretations of policies which the tribunal finds were unsustainable. A first example is that she asserted that the respondent's Harassment and Bullying policy prohibited anyone other than a victim of harassment and bullying from making a complaint under the policy. That would be surprising in principle. It seems to us that the policy says the exact opposite (1877-1878):

> "Individual employees are expected…
>
> To challenge or report unacceptable behaviour.
>
> To co-operate with investigations into allegations of harassment or bullying and to always raise concerns."

46. Our interpretation is in keeping with the "Anti Bullying and Harassment Pledge 2016" in the joint names of the Chief Executive and Staff Side Chair (2123):

> "We each have a part to play in eliminating behaviour that constitutes bullying and harassment. We may not have personally been a victim ourselves but we may have been observers of it. I encourage you to challenge any behaviour that does not align with our values and not to ignore inappropriate behaviour between two colleagues."

47. We turn to a second example. The Disciplinary and Suspension Policy contained a section on suspension which included the following (1716-17):

> "8.9.1 Initially the manager can authorise the employee to have five days authorised paid leave to allow a fact finding investigation to take place to determine if suspension is required…
>
> 8.12.2 Whilst suspended individuals are not permitted to enter any Trust property or to contact other Trust employees .. "

48. We understood the procedure to be that if a concern arose an employee might be asked to take five days paid leave, and if circumstances then justified their not being at the workplace after those initial days, the employee might then be suspended. The claimant repeatedly raised the point that there was no power, and it was forbidden, to exercise the power under 8.12.2 to exclude from site during a period which was designated as fact finding paid leave under 8.9.1. We disagree. There is nothing in the policy which prevents exclusion from site during paid leave. The fact that the power to exclude is expressly set out in a different sub-paragraph under the heading "Suspension" does not change that position.

49. Third, the claimant drew on the appendices to the disciplinary and suspension policy (1731-1734) and on Appendix 1 of the Harassment and Bullying Policy to argue that harassment complaints could not proceed unless the complainant completed a statement within the format of the appendix; (1891) and was required to attend any consequent disciplinary hearing, and to give evidence and be questioned. We disagree with all heads: a legitimate complaint could proceed even if the complaint was not set out meticulously in the format at 1891; and the disciplinary procedure,

following what we understand to be standard practice, leaves to the presenting officer the decision as to whether to call witnesses. If, but only if, a witness is to be called, a statement from the witness must be made available.

50. While the claimant's conviction on this point was powerful it was in our view unjustified. It would not be in accordance with good practice or our experience if a complainant of, say, race discrimination or sexual harassment was required by her employer's policy to put herself forward to be questioned in a formal setting by the alleged harasser.

51. The above three matters illustrate a general difference in approach between the claimant and the respondent's witnesses. The respondent's witnesses described their procedures as non-prescriptive, a framework. When Mr Moore was asked about one of the deadlines in the procedure, he answered to the effect that organisations miss their own deadlines every day. The claimant's approach was prescriptive to the point of dogmatic, and to the extent of her arguing that if a procedure were begun and not completed within the appropriate timetable, it would have to be abandoned and restarted. We do not agree with the claimant's approach: it seemed to us unrealistic, unreasonable, and simply not the daily framework within which organisations function.

52. The claimant mistook chronology for causation. The most striking instance was when she said that she could think of no reason why complaints were made against her on 12 October other than that she had made a protected disclosure the day before. (It is noteworthy in that context that the claimant originally contended that her first protected disclosure was on 1 September, which would in her eyes have been consistent with the fact that complaints had been made against her by colleagues on 2 September, creating a pattern of two occasions on which an alleged protected disclosure was followed the very next day by complaints. We have found that the first chronology is mistaken, because the alleged disclosure was on 24 August). We set out below reasons why specifically on 12 October a complaint was made about the claimant's behaviour.

53. The claimant at times was so unrealistic in her approach to workplace events as to appear naïve. She put to the tribunal that her team members' reports about her could not be sincere because she had texts or emails showing that they were at the same time on good terms with her in other contexts. The two are not mutually incompatible. Her conviction that she should be allowed to question the complainants, and that by doing so she would make things better for herself, seemed to us at best naïve. Her conviction that she was free to do the exact opposite of what Mr Maciejewski had instructed her to do on 27 October was at one level naïve. We accept that she was deeply hurt on 27 October to find herself escorted from the Trust premises. We accept the evidence of Ms Kandola and Ms Maciejewski that that is standard practice in the case of a suspension; it is not a reflection on the individual being suspended. Likewise, we accept that it is common practice that when conflict in the workplace appears imminent, an individual employee may be offered an agreed exit package, so as to

avoid the delay, stress and uncertainty of prolonged conflict. We can see nothing wrong in principle with this being done.

54. We now turn to our fact find and to do so, it seems to us more useful to proceed by way of strands in which we make a finding of fact and analysis as we go along. Where we consider it necessary to do so in interests of clarity, we depart from strict chronology.

Legal framework

55. The core of this case consisted of claims of public interest disclosure ('whistle blowing'). This was primarily a claim under the protected disclosure provisions of the Employment Rights Act and we were concerned with s.43B, which states as follows:

> "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) ..
>
> (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…
>
> (d) That the health or safety of any individual has been, is being, or is likely to be endangered."

56. S.47B provides that,

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

57. In considering whether an event was a detriment, we follow the well known guidance in Shamoon v RUC 2003 UKHL 11, and ask whether the reasonable person in the claimant's position would consider herself placed at disadvantage in the same setting.

58. S.48(2) provides that,

> 'It is for the employer to show the ground on which any act, or deliberate failure to act, was done.'

We noted the guidance in Fecitt v NHS Manchester 2012 ICR 372, and are helped by considering whether a protected disclosure played no part whatsoever in the treatment alleged, or was a material (ie more than trivial) factor.

59. It seems to us a matter of the logic of evidence that we consider whether it has been shown that the respondent has, or might have, an interest in concealing the wrongdoing exposed by the whistleblower, as that question might help us to assess the probability of the respondent having retaliated against the whistleblower as alleged. We find that no such interest has been shown in this case.

60. The claims of disability discrimination were brought under the provisions of s15 and ss20/21 of the Equality Act 2010.

61. Section 15 provides that "A discriminates against B if A treats B unfavourably because of something arising in consequence of B's disability". The provision is disapplied "If A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

62. The duty to make reasonable adjustments arises and is set out under sections 20, 21 and 22 and Schedule 8 of the Act, and it would be disproportionate to set out those lengthy provisions here. Section 20(3) provides, 'Where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.' Paragraph 8 of Schedule 20 provides, "A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – … (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to …"

63. We were helpfully referred to the judgment of the EAT in A Ltd v Z UK EAT/0273/18. We were particularly assisted by the guidance at paragraph 23, which in full states:

> "23. In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:
>
> (1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.
>
> (2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) longterm effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler J.
>
> (3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.
>
> (4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance:
>
> (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council [2017] ICR

610, per His Honour Judge Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and

(ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in Donelien EAT at paragraph 31.

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code, which (relevantly) provides as follows:

> "5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.
> 5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).

(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."

Protected disclosures

64. As stated above, the claimant took up post as Head of Medical Staffing early in 2016. She headed a small team, which was responsible for HR matters which were specific to clinical staff. Her role was therefore one of importance to the organisation. She had been appointed as a development opportunity, as a result of which Ms Maciejewski took a greater role in supervision than she might otherwise have done.

65. The first protected disclosure alleged by the claimant took place, on her pleading, on 1 September 2016. We accept the evidence of Ms Maciejewski, referring to her diary, and to a note of a one-to-one conversation with the claimant (233), that the conversation relied on by the claimant in fact took place on 24 August. Strictly, the date is of no consequence, although we have commented above on the mistake made by the claimant in the date.

66. The claimant and Ms Maciejewski had regular one-to-one meetings. The claimant was then relatively new in post, and as her appointment was a development opportunity, Ms Maciejewski understood that the claimant might need more support than was usual for an appointment at her level.

67. Our finding is that one of many issues with which the claimant and her team were concerned at that time was that newly appointed clinicians were required to provide proof of having had a number of compulsory

immunisations. However, the system in operation at that time (which we were told has since been changed) was not robust to ensure that a clinician had demonstrated receipt of all compulsory vaccinations before starting work. In principle, this could create a health risk for the clinician, patient, or others. A number of Trust employees were involved in addressing this issue, including the external occupational health providers. The shared understanding was that it was fundamentally an issue of process.

68. Ms Maciejewski's notes of the meeting on 24 August (233-234) set out a list of over thirty bullet point topics. Six of them were individual points under the heading "Other Issues", one of which was the following sentence:

"Vaccines – CA has concerns which she is addressing with OH".

69. That is the only evidence of the alleged protected disclosure on that date. We accept that the evidence indicates that in the context of many current issues, the claimant told Ms Maciejewski that she had concerns about the immunisation issue, and was in contact with Occupational Health providers about it.

70. There was no evidence that any more was said than that. We accept that Ms Maciejewski was familiar with the issue, and had been involved with it for longer than the claimant. We also accept that in general terms immunisation gives rise to a health and safety concern. We do not consider that this was a qualifying disclosure because there was no evidence of anything being communicated except that the question was on the claimant's radar. We are not aware of any further reference in our voluminous papers to the immunisation issue, and in light of the remainder of our judgment, this finding can be said not to matter to the outcome.

71. The claimant alleged that she made her second and third and final disclosures on 11 October. We make the following findings.

72. One of the issues which the claimant had to deal with was a disciplinary case against a clinician, Dr X. As the case involved clinical conduct, it was presented by another doctor or doctors. We understood that to be principally Dr Walker, whose role was confirmed to the claimant in a handover note prepared by her predecessor, Mr Olam (923).

73. We accept that the procedure for clinical conduct issues was elaborate. It recognised that a clinical conduct finding could have implications for the clinician far beyond this employer, and made provision for a large panel, including panellists from outside the Trust. The panel was made up of clinicians and non-clinicians. The panel was required to see some of Dr X's patient records. It was common ground that it was the duty of the Trust to ensure that patient records which were distributed as part of this procedure were anonymised, so that patients could be referred to by an anonymous code.

74. The claimant asserted that papers had been distributed for a hearing about Dr X in February 2016. There was no evidence of this having happened. We find that it did not.

75. It was common ground that Dr X's hearing was due to take place on 27 June 2016 but was cancelled that day due to illness. It should follow, from the fact of cancellation on the day of hearing, that the hearing was fully prepared and all papers had been distributed.

76. By the time with which we were concerned, the hearing had been due to take place on about 12 October.

77. It was common ground that the claimant received the panel's papers by email from Dr Walker on 6 October, and forwarded them to the panel the same day. The claimant agreed that she had neither anonymised the patient details, nor checked that that had been done. Repeatedly and emotionally her case was (a) that she was re-sending papers from the June hearing which must have been anonymised; and/or (b) that she had no need to check the papers, because Dr Walker must or should have anonymised them before sending them to her. We set out below our reasons for rejecting both points.

78. On 7 October a member of the claimant's team, B, informed the claimant that the Dr X papers had been sent out unanonymised. On Monday 10 October one of the panel members contacted Ms Maciejewski and told her. Ms Maciejewski immediately set in train a number of reporting mechanisms, including accessing Datix and reporting the matter within corporate governance. We find significant the immediate reaction of at least four of those who saw the unanonymised papers, as a powerful indication that there was a shared recognition that there had been a breach of patient confidentiality and data protection, in that confidential and patient identifying information had been sent off the respondent's site.

79. The immediacy and strength of that reaction seems to us powerful evidence that the papers sent in preparation for the cancelled 27 June hearing had not been sent in an unanonymised form because there was no evidence of any reaction to them. Putting it another way: given that a number of people immediately responded to wrongdoing when they saw the unanonymised papers in October, we would expect there to be evidence of a similar reaction in June; and there was not. Contrary to the claimant's submission we conclude that the papers for the June hearing were either sent out in anonymised form, or not at all (as Ms Maciejewski said she had been told later) and that there was no breach of confidentiality or of data rights in June.

80. At this hearing, the claimant expressed open anger against Dr Walker. She submitted that the primary data breach was his responsibility; that he was at fault for having sent her unredacted papers on 6 October, for which he should have been disciplined (or, she said, sanctioned by the GMC and / or the criminal courts). This line of argument did not lead her to accept that

she and he were jointly at fault for the data breach. Her view was that the error was his alone, and that she had been entitled to distribute the papers, without having first checked the redactions which, she wrongly assumed Dr Walker had made. We prefer the evidence of Ms Kandola (with whom Mr Moore agreed) which was that it was not the responsibility of a clinician personally to redact the papers; and that Dr Walker had been entitled to rely on the claimant, and her team, to do so before distributing the papers. That evidence seemed also to chime with common sense: redaction was, in reality, no more than a skilled clerical task, which did not require the time of a clinician. Given the record of how others reacted to discovery of the data breach, it was surprising that no one else had suggested that Dr Walker was at fault. The claimant's argument that non-clinical staff, such as the claimant, could never be allowed to see confidential data seemed to us absurd: how else could a hospital function, without non-clinical staff liaising on a daily basis with patients and their records.

81. The claimant and Ms Maciejewski met on 11 October. We accept paragraph 17 of Ms Maciejewski's statement as follows:

> "I told [the claimant] that I had been advised that some of the information in the hearing pack appendices had not been redacted. In response to this, [the claimant] confirmed that service user (patient) information had not been redacted and had been sent out."

82. We find that in that exchange the claimant conveyed to Ms Maciejewski (and therefore her employer) that Ms Maciejewski's understanding, that there had been breaches of legal obligation, was well founded. Plainly such a disclosure was in the public interest, and therefore the elements of a qualifying protected disclosure were met, even if neither the claimant nor Ms Maciejewski was aware of it at the time.

83. We note that in the exchange the claimant confirmed information already known to Ms Maciejewski, a matter which is covered by ERA s.43L(3). We also accept that the statute does not prevent the whistleblower from being the same person whose wrong doing is reported.

84. Ms Maciejewski's witness statement continued "I needed [the claimant] to send me the documentation that had been sent out to the panel." A little later that morning, the claimant sent Ms Maciejewski an email (344). In full, it read, "As discussed please see the attached". The attachment consisted of the claimant's email to the panel members which in turn said "re Dr X hearing 12 October 2016, Dear All, please see the attached." (344-348). Attached were a number of emails, as the material was too substantial to send in a single email.

85. The claimant submitted that this was a second qualifying protected disclosure. We do not agree. It seems to us that the words: "Please see attached" do not convey information. It seems to us that what happened in the emails was that the claimant provided to Ms Maciejewski the evidence in support of the first protected disclosure of that day, and that there was a single protected disclosure earlier in the morning of 11 October.

Colleagues' complaints

86. On 19 August, colleague A, a Band 7 direct report of the claimant, who was both experienced and respected, spoke to Ms Maciejewski to express concerns about aspects of the claimant's work and management style. Ms Maciejewski made a note and accepted that A did not want to have the matter taken further (250).

87. On 2 September team members B and C spoke to Ms Maciejewski in confidence and she made a note (273). Both recorded their concerns but said that they did not want the matter taken further. Their concerns were broadly about inappropriate management.

88. On 12 October A B and C had a joint meeting with Ms Maciejewski. She made a note (363). A, B and C repeated concerns which went beyond the three of them, and touched on other members of staff, including clinical staff. The team members described themselves as fearful; A and B expressed a wish to see things taken further, C said that she did not (364).

89. The claimant's case was that she could conceive of no reason why A, B and C should speak to Ms Maciejewski on 12 October other than her protected disclosure of the previous day. It seems to us more likely that the timing and choice of that day was driven by two other factors. The first was that as B mentioned (Ms Maciejewski WS22) the claimant's reaction on 7 October after being told of the data breach had been extreme, and in our papers the phrase "last straw" was used. The other is more simple: the claimant was off sick on 12 October, and we accept that absence often creates an opportunity for things to be said about an absentee which might otherwise be left unsaid.

90. After the meeting on 12 October, B provided a signed statement in support on 17 October (368). A did so the same day (373). On 19 October Ms Maciejewski met D, a bank member of the team, who gave a statement corroborative of concerns generated by the claimant's management (380). Ms Maciejewski also contacted a member of HR, who had been named by A B and C, who on 19 October wrote in reply summarising (383),

> "I got the overall impression that the team is working in a fearful non-conducive environment."

91. We accept that taken together, the language, behaviour and effect of the claimant's management style appeared contrary to the Trust's values and to the aspirations of its policy on harassment and bullying. We accept that complaints from A B and C were first made before the first protected disclosure which we have found. We note that there was consistency between their statements, and that they touched on legitimate professional managerial issues. We find that there was nothing whatsoever which ever linked or appeared to link any of them with the claimant's protected

disclosure of 11 October. We find that the sequence was an accident of chronology.

Paid leave / suspension

92. The claimant was off sick, and returned from sick leave on 27 October, when she met Ms Maciejewski. Ms Maciejewski told the claimant that she had a number of concerns. Her live concerns were that the claimant had been responsible for the data breach on 6 October; and that having been informed the next day of the breach, the claimant had not taken any prompt proactive steps to remedy the situation or to report it. A prompt step would have been to email all recipients with an urgent request to delete the emails sent on 6 October and any attachments. Immediate reporting would have been to Ms Maciejewski and / or on Datix or to more senior management. Ms Maciejewski was also concerned that by that date (27 October) she had had five reports, four of them signed, of inappropriate management behaviour. She was also concerned with a number of other day-to-day interactions, which would not in isolation have given rise to managerial intervention, and which in the event did not form part of subsequent events. We accept that Ms Maciejewski's note of the meeting (389-394) is broadly accurate.

93. Ms Maciejewski placed the claimant on paid leave. As stated above, this was a pre-suspension procedure allowing for investigation. She confirmed the leave, period of leave and its purpose by letter the next day (395). The letter included the following:

> "Whilst you are on this leave you should not contact any Trust service users and should not visit Trust sites or sites that the Trust use, or contact any Trust employee or discuss these allegations or the circumstances surrounding them with Trust staff. If you are a member of the Trade Union please feel free to contact your Union Representative for advice."

94. Ms Maciejewski considered herself entitled under the Suspension policy to impose these restrictions. The claimant's evidence was that these restrictions were not available to management in the case of authorised paid leave, only in the case of suspension. We disagree with the claimant. We find that Ms Maciejewski was acting within the scope of her authority in imposing the restrictions. We find that the claimant's argument is factually correct (ie the power to impose the restrictions is not found in the paid leave section of the suspension policy) but that her conclusion, which is that a manager was not permitted to impose restrictions during paid leave, is wrong. We find that it is wrong both as a matter of reasonable interpretation of the policy, and of the everyday practice of workplaces. (We add that the claimant's approach is also wrong in law: as a property owner, the Trust has the right to exclude any visitor from its premises).

95. The claimant's evidence about the consequence was stark. She submitted that it followed that as the restrictions were not expressly authorised in the paid leave portion of the suspension policy, they were invalid, of no effect, and that without asking Ms Maciejewski, or discussing the point with any

colleague or manager, the claimant was at liberty to disregard them. It was equally stark that at this hearing, four years later, the claimant could see nothing wrong with that analysis, or with anything which she had done as a result.

96. At the end of the meeting on 27 October, Ms Maciejewski accompanied the claimant to the security desk at the entrance to the premises. The claimant was upset to be, in her word, 'escorted' from her workplace. While we understand her upset, we do not fault or criticise Ms Maciejewski for doing so. It is, in our experience, good practice and standard practice, to accompany a colleague in such circumstances so as to avoid interaction with other staff, or access to IT. The claimant was off site from 27 October. Ms Maciejewski arranged to meet her again on 2 November. Ms Maciejewski was accompanied by an HR advisor and the claimant by a work companion. Ms Maciejewski informed the claimant that she was suspended pending further investigation. Following the discussion set out in the next paragraph, the claimant was placed on paid leave, not suspended.

97. Ms Maciejewski then asked the claimant if she wished to have a protected conversation. The claimant agreed to do so. It was common ground that we should hear evidence on this matter, particularly as the claimant's alleged detriments precisely engaged it. We find that a conversation took place, which both Ms Maciejewski and Ms Arthur understood to be on a without prejudice basis. Ms Maciejewski spoke in what we consider to be conventional terms of conflict avoidance. She alerted the claimant to the body of evidence which had already emerged (she was not to know that further significant evidence was to emerge later). She alerted her to the range of possibilities which followed, including the risk of dismissal. She asked the claimant to consider a severance agreement, on terms which would enable the claimant to avoid the delay, uncertainty and stress of an investigation, and the emotional drain of a dismissal, including the career consequences. Ms Maciejewski pointed out to the claimant that if she were dismissed, then dismissal, as a question of fact, might have to be referred to in any reference. The claimant asked to see a draft settlement agreement, which had been prepared by Messrs Bevan Brittan, and after negotiations which continued into November, rejected the offer. During the negotiation period, the claimant was absent from work, either on paid leave, or suspended. In parallel, Ms Maciejewski prepared draft Terms of Reference for a disciplinary investigation.

98. The meeting on 2 November lasted about an hour. We find that the claimant's permission to be on the Trust site ended after the end of her meeting with Ms Maciejewski (at around 10:55am), and after any consequent meeting with her representative. Later the same day the claimant contacted a junior administrative assistant, F. The claimant told F that she was suspended, but asked F to find her a memory stick so that she could access important documents. F could not find a working memory stick, so helped the claimant obtain access to Google screenshots. The claimant asked F to help with printing but F did not have time to help. Later

the claimant texted F and asked her to keep what had been said "without prejudice" which F correctly understood to mean confidential.

99. F contacted Ms Maciejewski the next day, 3 November, to report these events to her. At Ms Maciejewski's request, F wrote a statement which should be read in full (419-420).

100. Ms Maciejewski was shocked by the claimant's actions. In the short term she asked a Director to authorise the removal of the claimant's IT access. Such a drastic step required senior authorisation, which Mr Loveman gave the following day. The claimant's subsequent argument that this small step disqualified Mr Loveman from chairing her disciplinary panel seven months later seemed to us ill founded. She had no reasonable basis to believe that by agreeing to the request to debar IT access, Mr Loveman had formed a view of the claimant's culpability which would have rendered the disciplinary hearing unfair.

101. It is difficult to overstate how damaging this episode was to the claimant's standing with her employer at the time, and how damaging her attempts to justify it, including at this hearing. She repeated, as set out above, that her removal from site was invalid, leaving her free to disregard it. She told the tribunal that she was authorised to be on site on 2 November; that was a selective truth, her authority having ended with the end of the meeting with Ms Maciejewski and any subsequent meeting with her representative. She told the tribunal that as the instruction to stay away was invalid, and as she was lawfully on site, she was entitled to speak to F, who was a friend. We make no finding as to the personal relationship, and we attach no weight to the amicable texts between the claimant and F which we were shown. We agree that Ms Maciejewski had a reasonable basis to form the view that the claimant had disregarded clear written line management instructions, and had abused her power relationship with a colleague who, friend or not, was much junior to her. Ms Maciejewski was entitled to attach weight to F's report of 3 November, in which F clearly acknowledged that she felt that she had been pressured to do something wrong.

102. As things stood on 4 November, the claimant had been removed from site, and instructed to keep away from the site and the Trust's staff. Her electronic access had been disabled. Ms Maciejewski had before her reports from six individuals about aspects of the claimant's conduct at work, five of whom had signed a statement or memo. She also had before her the trigger event, which was the data breach of 6 October.

Investigation

103. In the course of preparing for an investigation, it was realised within the Trust that the issues which presented, and the staff involved, worked as part of the HR service. As we understood it, the HR staff, including the claimant and her team, worked together in an open plan setting, and it was therefore considered desirable that an external investigator should be appointed. That seemed to us a robust if not generous accommodation in favour of the

claimant. Mr Moore was at that time employed by Messrs Bevan Brittan, with considerable experience in matters of NHS governance. He was appointed as investigator, not as the Trust's solicitor.

104. The terms of reference requested a report to be prepared within 20 working days of the terms being finalised (529). They set out concerns as to "the nature of and impact of Ms Arthur's communication, interpersonal team relationships as well as management and leadership style," setting out examples drawing on the reports of A-E. Somewhat obliquely the terms included reference to the impact on "key internal stakeholders", an ugly phrase which we take to refer to the Medical Director and her team. (On 17 October A had raised a concern about working relationships between the claimant and the Medical Director and Deputy Director). The concerns included the data issue of October, and included the sentence:

> "Ms Arthur alleges, in an email of 10 November 2016, that this was a protected disclosure by her and has influenced the decision to initiate the investigation now being commenced."

105. Mr Moore was authorised to determine four questions, including whether there should be a disciplinary procedure, and the impact on working relationships and trust and confidence. He was asked in particular to "provide a view as to whether the alleged protected disclosure played any part in the decision to commence the current investigation." Mr Moore had authority to interview "any other persons who may be able to assist" as well as authority to address any "further concerns or issues identified during the course of the investigation". Mr Moore was instructed to proceed under the harassment and bullying policy, and reminded that after his investigation the disciplinary and suspension policy might be engaged.

106. We give our brief overview of Mr Moore's work, before dealing with the pleaded issues. Mr Moore interviewed the claimant twice for a total of about nine hours. He provided her with copies of the relevant policies. He provided her with copies of the statements provided by others. The claimant was concerned that there was no statement from C, and Mr Moore confirmed that C had not given a statement. He provided the claimant with copies of the statements of A, B and D-F.

107. Mr Moore also interviewed a number of other potential witnesses, either those suggested by persons already interviewed, or by the claimant. Not all of those suggested by the claimant could be contacted or provided information which was relevant or helpful to the claimant's case. He interviewed C, even though she had not provided a statement. Significantly, he interviewed Dr Zia, Deputy Medical Director, on 26 November (874). The gist of Dr Zia's evidence is caught in one sentence:

> "I think that all the clinical directors had confidence in Mr Olam but I don't think they have any trust in CA and there doesn't appear to be any working relationship with them and CA."

108. Dr Farrow, Clinical Director and Consultant Psychiatrist, spoke to Mr Moore in similar terms (871-873). The last paragraph of her note of interview reads:

> "I am afraid that I have no confidence in CA as a manager with regard to her knowledge of medical HR, professionalism or how she treats people who she works with."

109. Mr Moore presented his report on 6 January 2017. The body of his report was lengthy (733-757). He concluded that the claimant's conduct could amount to misconduct. He referred in particular to the incident involving F. He concluded that the claimant's failure to report the data breach could be misconduct. He concluded that there had been a complete breakdown in trust and confidence and working relationships (757). He attached to his report substantial appendices (761-1193). The report was sent in full, with all appendices, to the claimant and Ms Maciejewski on or about 7 January.

110. In the course of Mr Moore's investigation, Ms Maciejewski was replaced as Commissioning Manager (of the investigation) by Ms Kandola. As we understand it, this was a cautious response to the possibility of direct conflict in the investigation which might engage Ms Maciejewski and cause embarrassment. Presentation of Mr Moore's report triggered a disciplinary panel of which the panellists were originally Mr Loveman, Ms Kandola and Ms Hopkins. The panel was originally to meet on 7 February, but for organisational reasons rescheduled to meet on 3 March. In light of the claimant's first Med 3, that hearing was postponed. It was then arranged for 1 June and postponed further to 19 June when it was heard and concluded.

111. In the period between November 2016 and 19 June 2017 a number of simultaneous strands were engaged. First, the claimant remained suspended. We do not underestimate the psychological burden which this placed on her. Secondly the claimant became unwell. Something of the history is set out in Judge McNeill's judgment of 13 March 2019 (55), which we read with the caution that much of it was unknown to the respondent at the time. The respondent did not receive a first Med3 sick note from the claimant until mid-February 2017.

112. Thirdly, the claimant pursued a number of avenues in correspondence with the respondent. Broadly, they were requests for documents, notably policies, procedures and the evidence on which the investigation was proceeding. She presented grievances. She also presented voluminous subject access requests. Fourthly, she of course engaged with Mr Moore and the investigation process, being interviewed twice in November and December, as stated for a total of about nine hours.

113. In her correspondence, the claimant expressed herself appropriately, and in a manner which suggested that she was capable of identifying the issues to be addressed and approaching them analytically. Her correspondence was over-long: the claimant told the tribunal that she had friends who had helped her with drafting.

Detriment issues

114. Our approach is that it does not seem to us necessary or useful to pursue in these findings the many issues raised in correspondence, nor would it be useful or proportionate for us to set out a detailed summary and chronology of the correspondence. What we do rather is to turn now to the claimant's pleaded allegations of detriments on ground of public interest disclosure, almost all of which refer to the management and disciplinary process between 12 October 2016 and 19 June 2017. We follow the numbering in the claimant's original pleading (15), and we refer to the attachments to the ET1 (14-17), and to paragraph 13(a) to (cc) inclusive. Mr Smith asked the claimant if she stood by all elements in that case in their entirety, and the claimant confirmed that she did.

115. Our overarching finding is that the respondent has discharged the burden of proving that the protected disclosure of 11 October played no part whatsoever in any of the matters which now follow. We do not repeat that finding in full in relation to each of the alleged detriments separately. The same conclusion would be reached had we found with the claimant that she made two, or three protected disclosures, not one. We reach that alternative conclusion with confidence, given the complete absence from our papers of any further reference to the immunisation matter which we can find; and the general approach of all involved in this matter to the events of 11 October, which was that there had been a single protected disclosure that day at most, not two. Although below we refer to the quality of decision making (which we describe at times below as reasonable or proportionate) we do so to show that we accept managers' evidence of the ground(s) on which they took decisions. We recognise that it is not our task to assess the quality of management.

116. While we set out our individual findings below, we add that some of the alleged detriments did not in fact happen as pleaded (eg item 13(r) or 13(y)); we do not consider that some were capable of constituting a detriment (eg item 13(k)); many were commonplace management practice (eg suspension and restriction); and the great majority were matters for which the ground was the legitimate exercise of management discretion in a developing situation. We accept that we have found instances where the pleaded matter could be the subject of criticism (eg on Item 13(i) the prohibition went further than the wording of the relevant procedure, and Item 13(v) remains unclear and may be the product of a misunderstanding); but even in those situations there is absolutely no link between the criticism that could be made of the respondent and protected disclosure. One final stand alone issue is the second contention in Item 13(bb), which we come to below.

117. Item 13(a) was in short that Ms Maciejewski had on 12 October 2016 instigated a complaint and investigation against the claimant. We find that on 12 October Ms Maciejewski initiated a process of investigation. We find that she did so for legitimate managerial reasons, namely that she had before her reasonable evidence that the claimant had committed the

misconduct of data breach and failing to report it; and of inappropriate management in relation to her team members A, B and C. Ms Maciejewski's decision to do so was reasonable, legitimate and proportionate, and she could legitimately have been criticised had she failed to do so.

118. Item 13(b) was that the claimant was on paid leave and suspended from 27 October until 23 June 2017. In fact, the claimant was on paid leave and then suspension until 17 February, after which the material reason for her absence from work was ill health. We find that the decision to remove the claimant from the workplace was reasonable, legitimate and proportionate in light of evidence available by 27 October about her management and relationships with five colleagues (A-E), and to enable an investigation to take place unhindered by her presence. We add that when allegations of abuse of authority are to be investigated, it is not unusual to remove the alleged abuser from the workplace on a short-term, no-fault basis. We accept that the claimant's removal, however it was designated, was authorised by the respondent's policy (1717).

119. Item 13(c) refers to the restrictions placed on the claimant to keep away from the respondent's site and employees. We agree that the claimant was so instructed, and that the instruction was repeated. It was repeated because each period of leave or suspension was stated to be time limited, and therefore when it was renewed, the conditions of suspension were repeated. We find that the restrictions were reasonable, proportionate and necessary, as well as commonplace in any suspension. We find that authority to impose the restrictions was within the scope of the applicable policy. Their purpose was to ensure separation of parties, and the integrity of evidence in the investigation. That they were entirely necessary was confirmed by the claimant's breach of instructions on the afternoon of 2 November, when she met F.

120. Item (d) states as follows: "The initial investigation… was subsequently expanded from at least 17 November 2016 to also include breaches of data protection and an alleged loss of confidence in the claimant by her colleagues." It is correct that between 12 October, when Ms Maciejewski decided to place the claimant on leave, and 17 November, when the terms of reference were finalised, the scope of the enquiry was more properly defined. The data protection issue was live from 11 October, and the alleged loss of confidence was Ms Maciejewski's reasonable and legitimate analysis of the evidence before her. The terms of reference were a reasonable attempt to analyse the issues as they presented on the evidence available. We acknowledge that the evidence developed. On 12 October Ms Maciejewski could not foresee the F incident, or what would be said to Mr Moore by Drs Zia and Farrow.

121. Items 13(e), (f) and (g) all engage the without prejudice discussions. We agree that in the course of a number of meetings and discussions on and after 2 November, Ms Maciejewski offered the claimant a compromise settlement as an alternative to a disciplinary investigation. In doing so, she

alerted the claimant to the possibility that one possible outcome of the investigation could be her dismissal. Ms Maciejewski explained to the claimant that a factual reference about employment which ended with agreed severance would be differently written from a factual reference about employment which ended with a disciplinary procedure and dismissal.

122. We find that Ms Maciejewski conducted herself and expressed herself in appropriate and legitimate professional language, conventional to the conduct of a without prejudice discussion in the circumstances faced by the claimant. Ms Maciejewski was entitled to assume that as an HR professional, the claimant was dealing with concepts and a vocabulary which were broadly familiar to her. We find that Ms Maciejewski conducted the negotiation in a manner which was reasonable and proportionate, and our finding is not only that protected disclosure played no part in any of her actions or decisions, but that she is not to be faulted in any respect in doing so.

123. Item (h) refers to an issue which we accept troubled the claimant considerably, which was IT access during her paid leave and suspension. The pleading, that the claimant was "completely denied access" between 12 October and late January 2017, is factually wrong. The claimant had been instructed from 27 October not to have IT access until 4 November, after which she was barred. Through a designated contact (Ms Pelley) the claimant had supervised access to IT on 29 November, 6 December and 19 December, as a result of which she presented to Mr Moore over 200 pages of documents which she considered relevant to his enquiry. At the time when the disciplinary hearing was listed for 3 March, the Trust offered her a further three and a half hours' access on 14 February, but it was not clear if that offer was accepted. (No criticism attaches to the claimant if she was not well enough to do so).

124. We find that the Trust's actions in this respect were reasonable, proportionate and necessary, correctly balancing fairly the organisational need to exclude the claimant from IT access with the demands of individual fairness which required her to have access to the material which would enable her to prepare her defence. We consider exclusion from IT a common event in these circumstances, and in accordance with the respondent's policy (1717-8).

125. Item 13(i) stated: "The claimant was prohibited from speaking or contacting any of her colleagues even if they were not in any way connected with the investigation." We agree that that is a correct reflection of the prohibition (eg 395). That prohibition was subject to arrangements required to contact her representative or witnesses. We also agree, although little was made of the point, that the restriction on its face goes beyond the appropriate procedure (1717) which states: "Whilst suspended individuals are not permitted to enter any Trust property or to contact other Trust employees connected with the case" (emphasis added). It is not clear that there was a detriment. We might take a different view if the claimant had identified a friend, or work-based group or activity, whom she had wanted to contact or

join, who were not connected with the case, and whom she had been forbidden to contact. For avoidance of doubt we find that the facts that the instruction (a) was given, and (b) went beyond the respondent's procedure, were wholly unrelated to any protected disclosure.

126. Items (j) and (k) relate to the provision to the claimant of documents enabling her to defend herself and answer Mr Moore's investigation. We accept that this was a burning issue for the claimant from 27 October. We find that the claimant was entitled to relevant, proportionate documentation in good time and from a proper source. We accept that delay caused her frustration and we accept that having to deal with an outsider, Mr Moore, was not always easy for her. In making those allowances, our finding is that by the time she had her second meeting with Mr Moore, the claimant had received the statements of A-B and D-F, and had been told that there was no statement from C. However strongly she felt about it, we do not consider that the timetabling of this provision caused detriment to the claimant. We agree that the claimant was not told until 2 December that C had not provided a statement. We struggle to understand why the claimant regarded this point as so important. We cannot fault the logic of Mr Moore's answer that he recognised the duty to provide the claimant with statements, but not a duty to inform the claimant about who had not given a statement. We do not find that the delay in telling her that there was no statement from C constituted a detriment.

127. Item 13(l) is a curious draft: "Ms Maciejewski sought to obtain advance information from the claimant as to her witnesses even though the Trust and/or Ms Maciejewski had appointed Mr Moore as an investigator." It is correct that on 17 November Ms Maciejewski wrote to the claimant, confirming that Mr Moore had been appointed, and stating the following: "If you know of any documents, witnesses or information that you think will be relevant to the matters under investigation please let me know as soon as possible." (534) We cannot see anything wrong with that and we cannot see why it is a detriment. Ms Maciejewski was the internal line manager and the point of communication between the Trust and Mr Moore. The phrase "advance information" may have resonance in other contexts, but there was no detriment to the claimant and certainly no relationship with protected disclosure in this straightforward request. It was reasonable, proportionate and necessary to enable Mr Moore to move forward, given that he had an aspirational timetable of 20 days around the Christmas period.

128. Item 13(m) was that the claimant's whistle blowing complaint was dealt with under the bullying and harassment policy. This touches on a point which the claimant returned to repeatedly throughout this hearing. The events with which we were concerned could be said to engage at least four of the respondent's different policies simultaneously: bullying and harassment, disciplinary and suspension, whistle blowing, and grievance. The overarching judgment of the respondent was that the issues concerning the claimant should be dealt with jointly, by one panel, with knowledge of all the issues engaged. While the claimant did not expressly say that she thought

that there should be four panels conducting four separate processes, she came close to indicating that that was her line of reasoning.

129. Our finding is that the Terms of Reference included the whistle blowing issue; and that the management judgment, which was to approach the matter through first the bullying policy (investigation), then the disciplinary policy, both proceeding in the knowledge and understanding that the claimant responded to the complaints in part by raising a whistle blowing issue, was one that was reasonably open to the Trust in the circumstances and was certainly proportionate to the facts before it. It has not been shown to have the slightest relationship with protected disclosure.

130. Item (n) was not quite the case put to us by the claimant. The pleading was that the Trust invoked the bullying and harassment policy although none of the complainants had asked it to do so; but at this hearing, the claimant submitted that the Trust was *precluded* from invoking the policy unless a complainant asked it to do so. We find the second limb of that argument wrong for the reasons set out above. Our finding is that Ms Maciejewski was reasonably entitled to proceed under the bullying policy in light of the information which had come to her by 19 October, and whether or not anyone else had asked her to do so. If she had failed to do so, she could have been criticised for dereliction of her own responsibilities to A, B and C as a manager, and for breach of the statement of principle found in the anti harassment pledge quoted above.

131. Item (o) was "the allegation that the claimant had committed a breach of data protection laws was not dealt with under the disciplinary and suspension policy." That is factually wrong. Breach of data protection was one of the matters referred to in the terms of reference and in Mr Moore's investigation and report.

132. Item (p) appears to contradict Item (o) but although the drafting could be criticised, the sting appears to be that the respondent did not really believe that the breach of data protection was that serious and therefore it was wrong to discipline the claimant for it. The allegation goes to the respondent's good faith more than anything else.

133. We do not agree that the respondent did not regard the breach as serious. The immediate reaction of a range of colleagues between 7 and 11 October speaks for itself. We attach no weight to the classification of data breach by the ICO, which was mentioned to us. The ICO applies a different legal framework to different questions. The drafting of Item (p) opens: "In contrast to the other perpetrators the claimant's past breach of data protection .." So that there is no doubt about it, our finding is that there were no other perpetrators. We have set out above our findings that there was no past breach in February or June. We have rejected above the claimant's assertion that Dr Walker was at fault for failing personally to redact the patient data which he sent to the claimant for distribution to the Dr X panel.

134. Item (q) is a reformulation of Item (j), namely that the claimant when first interviewed by Mr Moore on 30 November had not received all the statements; she had them in time for her second interview with Mr Moore on 7 December. We agree that the pleaded assertion is correct factually. It could only be a detriment if Mr Moore had questioned her on 30 November about the contents of documents which he had withheld from her. We were taken to no evidence to that effect. We accept Mr Smith's comment that it is difficult to understand the logic of arguing that she would have received any statement earlier if she had not made a protected disclosure.

135. Item (r) alleges that Mr Moore interviewed the claimant stating that he was an independent investigator, but that he later "reneged on his representation and sought to claim legal professional privilege." The sting of the allegation is that the claimant was in some way misled. We find that when Mr Moore conducted his investigation, he did so as an external investigator. At that stage, no point arose about his being qualified as a solicitor or working for Bevan Brittan.

136. In spring 2017 the claimant embarked on voluminous requests for subject access. We understand that at some point in that procedure, Messrs Bevan Brittan, as solicitors for the respondent, resisted access to a number of items on grounds of legal professional privilege, as between Bevan Brittan and its client, the Trust. Mr Moore was not the individual member of Bevan Brittan dealing with the matter.

137. We do not find that the factual basis of Item (r) has been made out. We do not find that Mr Moore reneged on any undertaking or assurance, and therefore conclude that there was no detriment as pleaded. We do not understand the issue before us to encompass that of whether the claim for legal professional privilege was well founded, and therefore express no view on the point. We add, for completeness and avoidance of doubt, that we can see, with hindsight, that it may not have been prudent for Bevan Brittan first to provide the investigator, and then defend the Trust in subsequent disputes which encompassed the conduct of the investigation. We note that Bevan Brittan were later replaced in this case by Messrs DAC Beachcroft. (No criticism of either firm, or of Mr Moore, is to be read into that sentence).

138. Item 13(s) refers to an issue raised by the claimant in February, that she had had access to IT and discovered that a number of her emails had been deleted. This is an allegation of deliberate wrongdoing, namely that a person or persons on behalf of the Trust had wrongly accessed the claimant's email account, and because of protected disclosure(s), deleted certain items. In an email on 3 March to Ms Kandola the claimant set out what she said was a non-exhaustive list. The list referred to four items or trails, one with Ms Maciejewski, two with C and one with B (1265). It is difficult to look at the brief summary of the missing items given by the claimant and identify any rational reason why anyone, for whatever reason, should have deleted those items alone. As they were all internal email trails, they might, at least, have been retrievable from the other party's inbox.

139. Ms Kandola's evidence was that it was not possible for another person to enter the claimant's email account and delete items selectively, and that corporate archiving would be unlikely to explain the disappearance of a handful of items.

140. Our finding is that it has not been shown on evidence on balance of probabilities that items were in fact selectively deleted by another person on behalf of the respondent. This claim fails because the factual basis has not been established. We add that we accept from experience the possibilities of human error (eg accidental deletion by the claimant) or an inexplicable IT issue, a matter to which we return on 13(bb) below.

141. In Item 13(t) the claimant alleges a failure to reply to a subject access request. The tribunal has no direct jurisdiction over subject access. Subject access requests engage a different approach from that of the tribunal. Compared with the tribunal's focused and structured approach to disclosure, subject access appears indiscriminate and disproportionate. In many cases, documents generated by subject access requests go far beyond the scope of what is necessary or relevant to the tribunal. The question for the tribunal is whether the response of the respondent was materially influenced by the claimant's protected disclosure. The respondent's reply to the ICO (1358) illustrates the difference in approach. In that letter, the Trust acknowledged that "in its capacity as Data Controller, it should have supplied the data to Ms Arthur even if this meant she would receive duplicate copies." The proposition that it is reasonable and proportionate to require two separate tranches of disclosure of the identical material by the same organisation to the same individual may represent the correct approach to subject access, but is not easy to reconcile with the value which the tribunal places on reasonableness, proportionality, and sheer common sense.

142. The claimant's request of 20 February was extensive (1226-1231). It named 20 individuals including the claimant. It covered material going back to 2015 and included items which were potentially open ended in scope. We note for example a request for (emphases added), "All records of equality opportunities, anti-discrimination and anti-bullying, health and safety etc training given to all staff since 2015." Ms Kandola commented in evidence that the Trust estimated 150 hours' work was engaged in answering the claimant's requests. That is the work of a single member of staff working all day every day for four weeks. Our finding is that any delay or shortcoming in addressing any part of any SAR is wholly attributable to the volume of material requested, and to no other factor.

143. Items 13(u), 13(x) and 13(w) engage the same point, which was how the claimant's grievances were dealt with. We accept that the claimant's grievance of 24 February was not her first but her second, but nothing turns on that point. This complaint partly engages the claimant's repeated assertion to us that even if the same factual issues were engaged, separate policies required separate procedures. We do not agree: the claimant's

argument leads logically to an organisational absurdity, ie that there should be four simultaneous considerations of intertwined and overlapping issues.

144. We accept that the claimant presented a grievance on 24 February 2017, to which Ms Kandola replied on 13 April (1267), essentially stating that as the substance of the grievance related to the disciplinary matter, it would fall to be dealt with at the anticipated disciplinary hearing. That is not an unusual approach to a grievance which arises out of a disciplinary process, and we cannot fault it.

145. The claimant's grievance of 27 April was answered by the Chief Executive, Mr Cahill, on 15 May. Mr Cahill wrote in anticipation of an imminent disciplinary hearing, and declined to take any step of substance until that had been concluded, although in recognition of a potential issue regarding Ms Kandola's membership of the disciplinary panel, he took the decision as a matter of fairness to replace her with Ms Lynch.

146. The claimant raised issues about the time taken to deal with her grievances, which were about seven weeks in the case of Ms Kandoola, and over two weeks by Mr Cahill. We find that the complexity of the claimant's position, along with the demands of seniority, answer any questions which might arise to that effect. It was not at all to the claimant's credit that at this hearing, years after the event, she asserted that Ms Kandola and Mr Cahill, respectively then Deputy Chief Executive and Chief Executive, should have afforded her grievance priority over other operational demands, or that she criticised Mr Cahill, because his reply was sent 18 days after the grievance had been presented, rather than within the 14 days set by the relevant policy.

147. We find in both cases that no criticism on any ground is to be made of Ms Kandola or Mr Cahill. Both sought to deal with a complex demanding situation, by adhering to the procedure which had been adopted months before, was most close to completion, and which contained procedural safeguards. Their responses were reasonable and proportionate in light of all the material before each. There was no indication of protected disclosure playing any part whatsoever in how either of them exercised professional judgment.

148. Item 13(v) is not easy to analyse. The detriment is said to be that the Trust did not acknowledge the immunisation remark as a protected disclosure. This allegation engages the third paragraph of Ms Kandola's email to the claimant of 13 April (1267) in which Ms Kandola stated and explained why the Trust did not regard the immunisation remark of 24 August as a protected disclosure at any time before the claimant had asserted it was in her grievance of 23 February. We accept that Ms Kandola's email sets out her genuine understanding of the position at the time. We are not aware that the immunisation issue was referred to anywhere in evidence after the 24 August conversation. We are not aware of having seen evidence which makes good the point that the Trust had been told at any time between 24 August 2016 and 23 February that the claimant thought she had made a

protected disclosure about immunisation. It is not clear to us why this is said to be a detriment. We accept the integrity of Ms Kandola's reply, and find that the respondent was not aware, before 23 February 2017, that the claimant thought that she had made a protected disclosure about immunisation on 24 August. The reasons were first that the claimant did not say so (on 24 August, or at any time before 23 February); and secondly that Ms Maciejewski did not understand that she had.

149. Item 13(y) is wrong in fact. We find that the claimant was sent Mr Moore's full report with all appendices in January 2017. The reason the same report was sent in redacted format the following October was because it was sent in response to the claimant's SAR, and the respondent was entitled, and required, to redact it in light of compliance with data protection requirements: we remind ourselves of the final sentence of #141 above.

150. Item(z) is a complaint that Ms Kandola should not have been appointed to the disciplinary panel. As set out above, Ms Kandola replaced Ms Maciejewski as the commissioning manager in December 2016. Mr Smith was correct to point out that no complaint about this was made at the time. She replaced Ms Maciejewski, because it had become apparent that she might herself be in separate dispute with the claimant. When in May 2017 the Chief Executive dealt with the claimant's grievance of 27 April, he became aware of the potential for a parallel issue about Ms Kandola's membership of the panel. He therefore removed her from the panel. It was the second occasion on which the respondent's management responded to a change in circumstances by changing the membership of the claimant's disciplinary panel. Both instances show managers understanding that one aspect of fairness is flexibility. It is difficult to see what detriment there was; on the contrary, we find that there was thoughtful and proportionate management.

151. Item(aa) refers to the decision to proceed with the disciplinary hearing on 19 June and we deal with it, as pleaded, in the context of disability discrimination. We accept that the reasons given for proceeding were the actual reasons, and that they had no relationship whatsoever with protected disclosure.

152. Item(cc) refers to the claimant's dismissal and Mr Smith correctly pointed out that that cannot be pursued as a detriment claim. It is a claim under s.103A, applying a different test. We set out below, in our discussion of the claimant's dismissal, why that claim has been rejected. We deal with the refusal of the claimant's right of appeal in the same context.

153. The final detriment therefore is Item (bb): "The Trust removed the claimant from its payroll and deleted her email account prior to the conclusion of the disciplinary process."

154. The first half of the assertion is factually incorrect. We accept that the claimant was paid through payroll on 30 June and 31 July (2100 and 2114).

155. The email allegation turned on page 2099, a bounce back from the claimant's work email account, stating that the claimant's email address was not recognised. It was dated 31 May. Mr Loveman's witness statement stated as follows:

> "I understand that as part of the preparation for the tribunal hearing enquiries were made by a member of the Trust's HR team to our external IT providers but they have not been able to confirm the date on which Mrs Arthur's email account was deleted because the nebular account has been deleted. For clarity, all staff have a nebular account which is the initial security and personal password which gives them access to the Trust's IT systems and as Nebular is the software that provides overarching access. There are then additional security and password entry processes for each further system depending on whether the member of staff is authorised to access these. Deleting or preventing access to nebular is therefore an immediate failsafe as it prevents all access to other systems."

156. There was no other evidence about why, when and by whom (if by human decision) the claimant's email account was closed. As the claimant had been locked out of the system for several months, save for supervised access, there may have been some electronic reason for this event about which we can only speculate. The truth is that the claimant does not know why her email account was not recognised. She infers that it was the 28th item in a sequence of 29 detriments on ground of protected disclosure. In considering it in isolation we attach very considerable weight to our rejection of the other 28 links in the same chain. It seems to us, in light of that finding, and in light of #140 above, that it has been shown on balance of probabilities that the email account was closed electronically, and without human intervention on the part of the Trust.

Dismissal

157. We now turn to the issues of the claimant's disciplinary hearing, dismissal, automatic unfair dismissal and disability discrimination claims. We do so in the context that all other claims based on protected disclosure have failed and been dismissed. The three issues of disability discrimination were identified by Judge Tuck (94-95).

158. It will be recalled that the claimant had been absent from work, first on sick leave, then on authorised paid leave, then on suspension, since 12 October 2016.

159. Unknown to the respondent, as found by Judge McNeill (57) the claimant saw her GP on 18 November 2016 and was seen again in January and on 14 February. On 14 February a request, stated to be urgent, was made to the mental health team. On 17 February the claimant submitted the first of three Med3s. It was for one month for "anxiety and panic attacks" (1531); she submitted a second certificate of 10 March to expire on 31 May (over 12 weeks later) for "anxiety with depression" (1536); and the third and final one before dismissal was dated 30 May and was for one month for "anxiety with depression" (1544).

160. Meanwhile the claimant remained in correspondence with the respondent which gave no indication of a lack of lucidity or rationality. The subject access request of 20 February was prolix and disproportionate, but no more than that. She also engaged in correspondence about her grievances.

161. The claimant's disciplinary hearing was initially set to take place on 7 February (1211) and was postponed by the respondent to 3 March (2060). The latter date was postponed in light of the claimant's first Med3. On 26 May the claimant was invited to attend the rescheduled disciplinary hearing on 1 June. On 31 May the claimant asked for that to be postponed (1318) and it was rescheduled for the last time to 19 June (1320). The respondent's letter of 1 June, rescheduling to 19 June, was long. It advised the claimant that she had a right to submit written representations if she was unable to attend, that she had a right of accompaniment, and that it was her responsibility to make arrangements for the attendance of witnesses.

162. On 5 April Ms Kandola referred the claimant to Occupational Health. The referral was made in light of the claimant's second Med3, which ran for over 12 weeks. The referral letter (1540) is carefully worded. The instruction read:

> "I am keen to ensure that the disciplinary matter is concluded in order to support Cynthia; I would appreciate if she could have a physician face-to-face review to establish her fitness to participate in the disciplinary hearing including any modifications or mechanism of support, such as regular breaks, videolink, or any other assistance that will support her in resolving this matter. I will refer Cynthia post-hearing as appropriate in relation to fitness to work."

163. It is not unusual for occupational health referrals to ask the physician to express an opinion on whether an employee meets the s.6 definition of disability, and/or to seek advice on reasonable adjustments. This was not done.

164. The claimant was seen on 16 May and Dr Yew submitted a report dated 31 May, which he stated he had dictated in the presence of the claimant. It is a crucial document and should be read in full (1545-6).

165. Dr Yew recorded the claimant's account of her experiences at work. He wrote (all emphases added),

> "recounting her perceived difficulties during the consultation provoked <u>great distress</u>. She was volunteering symptoms of anxiety and depression and this was borne out using a recognised and validated questionnaire tool that suggested that she had <u>very high levels</u> of anxiety and depression…"

166. Dr Yew's conclusion was:

> "1. I do not feel that Ms Arthur is fit to return to work. She is not in a state of emotional or administrative readiness to participate in a disciplinary hearing.
> 2. I do not feel that she is currently able to represent herself fully in any formal process… given the levels of anxiety and depression that are (a) situational in nature

> secondary to distress about the formal proceedings and inability to retrieve supportive data and (b) due to reactive depression… Despite traditional wisdom being that prolongation of a disciplinary process adds to the distress of participants, I do not feel that Ms Arthur is able to represent herself or instruct an individual, currently, in any formal hearing… I would therefore suggest that some time is allowed to elapse to allow the antidepressant treatment and further sessions of CBT to take effect. It is difficult to be proscriptive about a time frame but I would suggest 6 weeks in the first instance."

167. Dr Yew was not asked whether the six weeks ran from the date of the consultation or the date of the letter. In either event, the review date would have been about 27 June or 11 July. We read the letter as indicating the later date. Dr Yew did not advise that the panel could safely proceed after a six week delay; we read him as advising that there should be a further review after at least six weeks.

168. The disciplinary panel convened on 19 June. Its members were Mr Loveman, Ms Lynch and Ms Hopkins. Their respective professional backgrounds were finance, HR and mental health nursing. Mr Loveman said that an HR advisor attended; he thought, but was not sure, that it was Ms O'Rourke. The meeting notes show that the meeting commenced at 9.30. The claimant was not present. The notes record that it reconvened at 9.45am, then continue (1325):

> "KL: CA was not in attendance, two previous hearings had been arranged and a notice had been provided to CA in advance of the hearing that the hearing would continue in CA's absence and the decision would be reached by the panel.
>
> An occupational health report had concluded that it would not be appropriate for CA to attend the hearing. The investigation had taken place and concluded in January 2017, there was limited prospect to arrange a further event and it was agreed by the panel to bring the matter to conclusion today by proceeding in accordance with the Trust's disciplinary policy.
>
> All: All panel members introduced themselves.
>
> KL: Outlined the purpose of the meeting.
>
> KL: Called upon Mr Moore to present the management statement of case."

169. The notes then indicate a meeting which lasted about three hours, during which Mr Moore presented his report and spoke to it and called Ms Maciejewski as his only witness. The panel had the opportunity to question Ms Maciejewski. After evidence and deliberations, the panel concluded that summary dismissal was the appropriate course. The claimant was by letter dated 23 June informed that she was dismissed with immediate effect and informed of her right to appeal within 10 working days. The letter was sent by recorded delivery and we take it that it arrived on 24 June (1336-1340). Neither side had evidence of actual delivery.

170. The dismissal letter was lengthy, and should be read in full. We paraphrase that the panel upheld all the allegations against the claimant. It found that there were two instances of gross misconduct; they were (a) the sequence

of events which ran from the data breach, and included failure to disclose it and 'lack of acknowledgement of responsibility and accountability;' and (b) the F incident, which the panel summarised as, 'you breached your suspension conditions by accessing Trust property and using your position of authority ..' The panel also found 'significant & compelling evidence that bullying & harassment had taken place' and 'an overwhelming loss of confidence and an irretrievable breakdown in working relationships.'

171. We accept that the above points, taken together, constituted all the operative considerations in the minds of the panel members, and that each was reasonably evidenced in the material which they had. The fact of a protected disclosure played no part whatsoever in the decision to dismiss; we would make the identical finding if we had accepted that the claimant made two or three disclosures. It follows that the claim of automatic unfair dismissal under s.103A fails.

172. On 25 July the claimant's then solicitors wrote to Mr Loveman to ask to institute an appeal. The letter recognised that the appeal deadline had passed, and set out a number of points and submissions as to why the claimant should be permitted to appeal outside the deadline. These included her deteriorating mental health.

173. By letter dated 31 July Mr Loveman informed the solicitors that time would not be extended (1344). He wrote:

> "Unfortunately your client did not appeal the outcome of the hearing of 19 June 2017 within the necessary ten working days and indeed your letter is significantly outside the timeline for appeal as set out in our Disciplinary and Suspension of Employees Policy. It is not possible therefore to allow your client's appeal as requested in your letter. I am sorry that I am unable to consider this matter further."

174. The relevant policy states (1722):

> "Employees who wish to exercise the right of appeal against formal action shall notify the Chair of the Panel in writing, clearly stating the grounds of the appeal, no later than 10 working days after receipt of the written notification of the formal action being appealed against.
>
> An appeal may be made on the following grounds: … Serious procedural error… further information/evidence… decision unfair and unreasonable…"

175. We take the last of the permitted working days to have been 8 July.

Disability discrimination

Limitation

176. At the third preliminary hearing, Judge McNeill QC found that at the material time, which was 31 May / 1 June 2017, the claimant was a disabled person as a result of a mental impairment (54). Her finding (59) was that the claimant 'had a mental impairment since around the end of October 2016.'

177. The claimant's solicitors remained instructed until about May 2020. Day A in early conciliation against the Trust was 17 August and Day B was 1 October. The claim was presented on 5 November. The claimant had originally claimed against individual respondents. In their cases Day A was 21 August, Day B was 5 October and the same ET1 was presented. The claims against the individuals had been withdrawn by the claimant's counsel at the hearing on 7 December 2018 (53).

178. Judge Tuck had at a hearing on 7 November 2019 permitted the claimant leave to amend by addition of a complaint relating to the failure to allow her to appeal. Her reasons (99-104) recognised that the application to amend was made 28 months out of time. In so saying she was not asked to make any decision about time limits affecting the rest of the case. Judge Tuck's approach at least left open the possibility that the disability discrimination claim about events on 19 June was out of time, but that the claim about the event of 31 July had been permitted to proceed.

179. Mr Smith submitted the last act of disability discrimination to be considered for these purposes was that on 19 June, namely the decision to proceed/not to adjourn. He stressed, as Judge Tuck had, that the claimant did not bring a claim of discrimination in dismissal, and that the only claim in relation to dismissal was that under s.103A. Mr Smith submitted that time ran from 19 June, and that the effect of the entry into early conciliation on different days was that the claim was out of time as against the Trust but was in time as against the individual respondents, who had since been removed from the case.

180. Our starting point is that while the act of discrimination took place on 19 June, the claimant did not know about it before 24 June at the earliest. (That was a Saturday, and it is at least possible the claimant did not receive the letter until the following week). Our calculation is that if we are correct to count time from 24 June and add the normal limitation period from that day, plus the stop the clock period, the claim has been brought in time.

181. If we are wrong about that (and Mr Smith correctly reminded us that time under s.123 runs from the act of discrimination, not from the date of the claimant's knowledge of it) we have no hesitation in exercising our discretion to find that it is just and equitable to extend time, so as to allow the claimant the benefit of the full statutory limitation period. In so saying we attach weight to a number of factors. We note the extreme language of Dr Yew's report of 31 May, and its indication of the claimant's state of mental health, which in turn is an indication of her considerable reliance on professional advice. We note that the claim, when presented, was indeed in time against five respondents. Had the claim not been withdrawn against the individual respondents, it would have been open to this tribunal to reach precisely the same conclusions which it has done, while expressing them formally as a finding against Mr Loveman, who had been an individual respondent.

182. We think it desirable to achieve consistency with Judge Tuck's reasoning. She clearly envisaged a comprehensive fact find around the claimant's dismissal. We would find it curious, and inequitable, to have heard a case which in part was allowed to proceed 28 months out of time, while declining jurisdiction over a part of the case which at most was four days out of time.

183. It has been a curiosity that we have had to decide the limitation point so late in these proceedings; no doubt that is the consequence of the proceedings having been considerably driven by the public interest disclosure issue. Having heard all the evidence, it seems to us that the balance of prejudice and justice overwhelmingly favours the claimant. We find that it is undoubtedly in the interests of justice to give a determination of all these allegations on their merits.

Knowledge of disability

184. The respondent submitted that it did not have actual knowledge of the disability. We agree. We consider the matter as one of constructive knowledge, ie ought it reasonably to have known. We found the guidance at paragraph 23 of A Ltd v Z of enormous assistance at this stage.

185. On 19 June the respondent had three Med3s running from 17 February to 30 June. One was for a full 12 weeks. The respondent cannot have failed to note the language in which Dr Yew couched his advice. It saw that Dr Yew advised review in the first instance. It followed that Dr Yew did not assume or predict fitness to return at that stage. Although the occupational health referral had not requested guidance on disability, we find that the combination of circumstances was such as to impose on the respondent a duty to "do all they can reasonably have expected to do to find out if a worker has a disability" (paragraph 5.15 of the Code, quoted at paragraph 23.5 of A Limited).

186. We then ask what we find would have happened on balance of probability had that further enquiry been pursued. We accept Mr Smith's caution not to place over reliance on the judgment of Judge McNeill. We can, however, place reliance on paragraphs 9 and 10 of her judgment, to the extent that they show what information would have been available, if it had been asked for.

187. We find that the first step would have been to invite Dr Yew to conduct his review. As is common with occupational health referrals involving the disability question, we find that Dr Yew would have asked for access to the health history and records. He might well have formed the view that he could not rely on the claimant's narrative alone. That process in turn would have given an indication that the claimant's mental health symptoms presented in November if not earlier, and not on 17 February.

188. The question would therefore have arisen for Dr Yew, after mid-July, as to whether a mental health impairment which appeared to have manifested the previous November, and was at the severe state which he described in May

was likely to last a year, in the sense that it could well happen that it lasted a year. That question requires the tribunal, disregarding hindsight and what we know actually happened after May 2017, to ask what we think a physician would have predicted over three years ago on information reasonably available to him in about August 2017 (but possibly later).

189. We find that on balance of probability Dr Yew would have advised the Trust that the effects which he described in May 2017 had begun by November 2016, and could well continue into November 2017. That being so, our finding is that the test of s.15(2) and paragraph 20 of schedule 8 is made out, and that the respondent ought reasonably to have known that the claimant had the disability. It follows therefore that we find that the Trust had constructive knowledge of disability.

S.15 claim

190. We then turn to the separate steps required by s.15. We ask first was the claimant treated unfavourably and we find that she was. The unfavourable treatment consisted in the hearing on 19 June proceeding in her absence. We ask next whether that was because of something arising from her disability and we find that it was. The hearing proceeded in her absence, because she was unable to attend; she was unable to attend because of the impact on her of disability.

191. We must then consider the defence of justification, namely whether the Trust, through the evidence of Mr Loveman, has shown that the decision to proceed was a proportionate means of achieving a legitimate aim.

192. Before we turn to Mr Loveman's evidence, there is one crucial matter. Our finding is that the report of Dr Yew was central to the decision to proceed. It was a specific reply to focused questions from a previous panel member. It was the final, up to date medical advice to an NHS employer. We ask whether Ms Lynch or Ms Hopkins as panellists saw the report and we find that they did not. In reaching that conclusion we note the following. None of the three panellists' witness statements said that Ms Lynch or Ms Hopkins had seen the report. None of them gave written or oral evidence that the report had been considered by the panel in full session. The notes of the meeting do not indicate that they did. When asked in the tribunal whether they had seen Dr Yew's report, both Ms Lynch and Ms Hopkins answered that they could not recollect doing so.

193. Ms Lynch attended the meeting as a senior HR specialist from within the NHS. Ms Hopkins was head of nursing, and a registered mental health nurse. If either of them, with their specialist backgrounds, had seen Dr Yew's report, we would expect each to have given a minuted comment at the time, and evidence about it to the tribunal. It might also be expected that Mr Loveman and/or Ms Lynch would ask Ms Hopkins to express a professional opinion about it. We attach an entirely realistic standard to recollection in the tribunal years after the event, but in this tribunal's

experience, Dr Yew's report is expressed in unusual language. It would be surprising if the specialist members had read it but could not recall doing so.

194. The minuted note quoted above (1325) is, we find, not a fair summary of Dr Yew's advice. Dr Yew did not use the word "appropriate" and that word in any event is not apposite to summarise his conclusions and advice. The minuted summary did not remotely do justice to the fact that Dr Yew declined to express an opinion beyond that the claimant needed to be reviewed further on a date which fell after the disciplinary hearing.

195. We find that the decisions not to postpone, and to proceed, were made although the majority of the panel had not seen the crucial, up to date medical advice. We therefore find that the decision making process was so fatally flawed that it cannot have represented a proportionate means. It would also follow that if we had had before us a claim of 'ordinary' unfair dismissal, it would have succeeded.

196. At paragraph 36 of his witness statement Mr Loveman set out a number of aims which required or pointed in favour of proceeding. They were a range of organisational reasons, including the need that the claimant's important post should be filled, to regain the confidence of the team, and to bring to an end the hiatus imposed on the team by the absence of its head. When asked by Mr Maclean what had been the main factor in the decision not to postpone, Mr Loveman answered impact on the team; the knock-on effect on the rest of the service provided by the respondent; and the need for finality, allowing for the possibility touched on by Dr Yew of a prolonged period of uncertainty. In so saying, Mr Loveman took the opposite course from Dr Yew, who had expressly departed from the general preference for closure.

197. We accept that those were the panel's aims and we accept that they were legitimate. We accept that closure, certainty, and reassurance of continuing staff were legitimate aims. We also accept that appointing a replacement post holder in due course was a legitimate aim, although the post had been hard to fill for some time before the claimant joined, and had remained vacant for the nine months or so of her absence.

198. Mr Loveman touched on another aim when he wrote (WS30),

> "I was also aware that there was an additional consideration on the part of HR that Mrs Arthur was approaching two years' service and that the hearing ought to be convened before that".

That was candidly said. In answer to questions from the tribunal, Mr Loveman said that he understood that after two years' service there would be a change to the claimant's employment status. We accept that an aim of the Trust was to reach conclusion of this matter before the claimant completed two years' service, which would be on 28 July 2017. We accept that there are circumstances in which an employer may fairly dismiss up to the end of week 103 of employment (noting the deeming provisions of ERA

s. 97(2)). Approaching the matter through discrimination law, we do not accept that avoidance of the accrual of employment rights is a legitimate aim, nor can we accept that a discriminatory termination is a proportionate means of achieving it.

199. To the extent that one factor was not just uncertainty of delay allowing for medical factors, but the diary commitments of the panel members, we do not accept that that administrative convenience was a legitimate aim. It was no more than a matter of administration.

200. We find that the aims of the respondent were a mixture of legitimate and illegitimate aims. To the extent therefore that the claimant's treatment was in furtherance of illegitimate aims, the defence of justification fails.

201. When we go on to consider whether the means was proportionate, we find that it was not. We ask whether the means were a means of achieving an aim which would have the least discriminatory effect that could be achieved. Within that question, we repeat our above findings: the panel members did not all see Dr Yew's report; the hearing proceeded in the teeth of his clear advice.

202. At the time in question the claimant was at risk of a dismissal which, given the available information about her health, could have a disastrous and long term impact. The medical advice available was that she was too ill to take part in her own hearing, even vicariously by instructing a representative. In reply to questions from the tribunal, Mr Loveman said that he did not recall the panel discussing matters "in disability terms". We find that the respondent failed to undertake a balancing exercise between the claimant's needs as a person with a disability versus organisational need, and we find that it was disproportionate to proceed, rather than give her an opportunity to be heard at one final stage.

203. We accordingly uphold the claim under s.15.

Reasonable adjustment

204. The claimant brought two claims of a failure to make reasonable adjustments. The first was that the respondent applied a PCP of proceeding in the absence of an employee who was unable to attend a hearing. We find that that claim fails at the first hurdle. Mr Smith submitted that as the evidence of this case showed, disciplinary hearings might often be postponed in the event of illness. Indeed, that had happened to the claimant. The hearing had been postponed from 3 March and 1 June. What had happened in this case was a series of discretionary management decisions taken individually in light of the circumstances at the time. That being so, the element of systemic application required to prove a PCP (as indicated most recently in Ishola v TfL 2020 EWCA Civ 112) is not made out. The claim fails.

205. The second claim was a failure to make reasonable adjustment to the procedural timetable for appealing. The respondent conceded that it applied to the claimant the PCP of its own disciplinary procedure without extension. Our finding is relatively straightforward. The claimant's time for appealing expired within the six week window for review proposed by Dr Yew. We do not think it was a relevant consideration that cogent letters had been sent on the claimant's behalf earlier in 2020 at times when she had been signed off sick. It seems to us clear and we find that the application of the time limit put the claimant at a substantial disadvantage in comparison with persons without disability. An extension of time to 25 July would in our judgment have been a reasonable adjustment. We stress that our finding relates to the adjustment which would allow the claimant the opportunity to appeal; we make a separate finding below on what would have happened if there had been an appeal. We find that it has been shown that the failure to do so was a failure to make a reasonable adjustment. Accordingly that claim succeeds.

Remedy points

206. A remedy hearing will deal separately with compensation. Having heard evidence and submission, and in light of the claimant's schedules of loss, which we noted in her pdf bundle were in excess of £1,000,000 (£1 million) it is right that we give further conclusions.

207. We have found that the claimant was discriminated against in two respects only: they were, in short, proceeding in her absence and not allowing her the right to appeal.

208. We make the following further finding. If a non-discriminatory course had been followed, it might well have involved further medical advice, followed by clear direct statements to the claimant that she would have one final opportunity at a hearing (whether by adjourned disciplinary hearing or by appeal); advising her of her rights of accompaniment; possibly offering her the right to participate by videolink; and making abundantly clear that it would be the final opportunity for resolution. (We appreciate that most if not all of those points were made in the Trust's letter of 1 June 2017). If that had been done we find that there is no prospect whatsoever of the claimant having returned to employment. She would have been dismissed, or her appeal would have failed. If we have to apply a probability figure, we set it at 100%. We say so because there was at the time of dismissal evidence against the claimant under four broad headings of wrongdoing: complaints from her team; the F incident; the data breach sequence; and the collapse of confidence in her of colleagues, including very senior medical staff. Those matters were compounded by the lack of insight shown by the claimant in response, by her persistent denial of personal responsibility, and by her attempts to pass blame to others.

209. If the matter had been reconvened as we say, it would have been a reconvening of the same panel; the claimant had no right to demand a fresh panel. It would have been without the attendance of the complainants

against her; the claimant had no right to insist on their attendance. Even if they were there, we strongly suspect that hostile questioning of them would have made her position worse. Although the claimant has pursued documentation for three years, there was no evidence at this hearing of the existence of a document which might have changed the course of this matter.

210. It follows that when we come to consider remedy, it seems to us that (subject to submissions and evidence at the remedy hearing) the correct measure of damages is loss of income for the time it would have taken to have achieved the outcome suggested above, which seems to us likely to be measured in months. We invite submission on whether the loss is to be calculated at full net pay, or sick pay rates.

211. The respondent raised the issue of contribution. As the claim of automatic unfair dismissal fails, we need make no finding on contribution, save to say that if we had considered it, we would have set it at, or close to, the top of the available scale.

212. The claimant is entitled to compensation for injury to feelings; on that matter we draw to the claimant's attention that the injury to feeling for which she is to be compensated is that at the dates of discrimination which we have found. Those were 19 June and 31 July 2017, and not the onset of psychiatric illness in October / November 2016 described in the evidence seen by Judge McNeill, or advised by Dr Yew.

213. The respondent has confirmed that it applies for a Costs Order and that is the subject of a separate case management hearing; the claimant is reminded of the terms and effect of Rule 39(5).

214. The tribunal finally thanks the respondent's team at DAC Beachcroft for the high quality of the orderly documents and bundles which we were able to use, and for their speed and efficiency in cross referencing the claimant's witness statement from her pdf to our paper bundles. Our gratitude was of course not a consideration in the outcome of the case.

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Employment Judge R Lewis

Date: 21.12.20……..

Sent to the parties on: .....

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For the Tribunal Office