EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Rosalyn King	v	The Surrey Park Clinic (IHG) Limited

Heard at: Aylesbury Crown Court **On**: 16, 17, 18, 23, 24 November 2020 and on 25 November and 15 December 2020 (in chambers)

Before: Employment Judge Hawksworth
Ms R Watts-Davies
Mrs F Tankard

Appearances

For the Claimant: In person
For the Respondent: Mr D Mold (counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is:

1. The claimant resigned on 23 October 2017. She was not constructively dismissed. Her complaint of constructive unfair dismissal fails and is dismissed.

2. The claimant made a protected disclosure on 23 October 2017. She was subjected to the following detriments on the ground of having made that disclosure:

    2.1. Mr Dibden's conduct at a meeting on 10 November 2017; and
    2.2. Mr Dibden saying in a letter of 21 December 2017 that the claimant's inclusion of personal issues in a letter to the CQC was neither professional nor appropriate .

3. The claimant's other allegations of protected disclosure detriment fail and are dismissed.

4. The claimant's complaint of automatic unfair dismissal because of making a protected disclosure was withdrawn at the hearing and is dismissed.

5. The respondent breached the claimant's contract when it failed to allow her to work three months notice. The claimant suffered loss of pay, pension contributions and accrued holiday for the period 19 December 2017 to 23 January 2018.

6. The respondent failed to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures by failing to offer the claimant a grievance appeal. It would be just and equitable to increase the award to the claimant by 10%.

7. The respondent is ordered to pay the claimant the sum of £10,857.00, calculated as follows:

Protected disclosure detriment: injury to feelings	£4,600.00	
Breach of contract: pay during remainder of notice period	£4,484.60	
Breach of contract: pension contributions during remainder of notice period	£64.40	
Breach of contract: accrued holiday during remainder of notice period	£721.00	
Total before Acas uplift		£9,870.00
10% Acas uplift		£987.00
Total award after Acas uplift		**£10,857.00**

REASONS

Claim, hearing and evidence

1. The respondent is a private gynaecology clinic. The claimant was employed by the respondent from 14 March 2014 to 18 December 2017 as the clinic's general manager.

2. In a claim form presented on 12 February 2018 after a period of Acas early conciliation from 2 January 2018 to 2 February 2018 the claimant brought complaints of constructive unfair dismissal, automatic unfair dismissal because of protected disclosures, public disclosure detriment, breach of contract and holiday pay. The response was presented on 27 March 2018. The respondent defended the claim.

3. There was a preliminary hearing on 18 December 2018 at which the complaints were clarified and case management orders were made. The final hearing was originally due to take place on 21 to 25 October 2019 but those dates were postponed.

4. The final hearing took place in person at Aylesbury Crown Court. Social distancing measures were in place. By consent, the claimant's witnesses gave evidence by video conference (CVP).

5. There was an agreed bundle of 1180 pages. Page references in this judgment are to the agreed bundle.

6. At the start of the hearing, the respondent applied to add some documents to the bundle. These were:

   6.1 HR documents for an employee of the respondent, Miss Lawrence (pages 1181 to 1185);
   6.2 Extracts from the respondent's bank statements from April 2015 to December 2017 (pages 1186 to 1271);
   6.3 The claimant's pay slips (pages 1272 to 1304).

7. We allowed the inclusion of these documents, for reasons given at the hearing. The main reasons for this were:

   7.1 The HR documents were only five pages and there was time for the claimant to read the documents during our reading time;
   7.2 the bank statements were the source material for information which had already been provided to the claimant in the form of a spreadsheet sent to her in June 2018; and
   7.3 the claimant had received her payslips at the time they were sent.

8. We allowed the claimant the opportunity at the start of her evidence to say anything which she would have included in her witness statement about these documents.

9. We took the morning of the first day for reading. We heard the claimant's evidence on the afternoon of 16 and 17 November 2020. During her evidence the claimant said that she did not think she was dismissed because of making a protected disclosure. After her evidence finished she withdrew her complaint of automatic unfair dismissal because of making protected disclosures. That complaint has been dismissed on withdrawal.

10. On the afternoon of 17 November 2020 and the morning of 18 November 2020 we heard the claimant's witnesses by CVP, in this order:

    10.1 Dr Helen Fawcett;
    10.2 Ms Dawn Harper; and
    10.3 Ms Vanessa Shipley.

11. We heard the respondent's witnesses on the afternoon of 18 November 2020 and on 23 and 24 November 2020, in this order:

    11.1 Mr Lindsay Dibden;
    11.2 Ms Kuljit Moore;
    11.3 Ms Elizabeth Warnes
    11.4 Ms Tracey Barney.

12. All the witnesses had exchanged witness statements.

13. The parties made closing comments on 24 November 2020.

14. We reserved judgment and deliberated on 25 November 2020. Because of the detailed nature and the number of issues for decision by us, a further deliberation day was required. This took place on 15 December 2020.

Issues

15. The issues for determination were discussed at the preliminary hearing on 18 December 2018 and a list of issues was agreed by the parties on 24 April 2019. This was at pages 60b to 60h of the bundle. They were:

A. <u>'Ordinary' unfair dismissal (section 98, Employment Rights Act 1996 (ERA))</u>

Dismissal

16. Was the claimant dismissed by the respondent within the meaning of section 95(1)(a) of the ERA 1996?

17. If not, was the claimant constructively dismissed within the meaning of section 95(1)(c) of the ERA 1996? This involves consideration of the following issues:

    17.1 Did the Respondent commit a fundamental breach of the Claimant's contract of employment? The Claimant relies upon a breach the implied term of trust and confidence by the following alleged conduct:

        a. Mr Dibden not taking seriously complaints raised by the Claimant on 21 June 2017, 18 July 2017, 2 August 2017, 25 August 2017, 19 September 2017 and several occasions during October, November and December 2017, that she felt the internal processes by which the business delivered its regulatory requirements were not being adhered to, mainly by Ms Moore; and
        b. Mr Dibden not taking seriously complaints raised by the Claimant on 23 August 2017 and on several occasions in September as well as five occasions in October, that she felt undermined and pushed out by Ms Moore;
        c. During September and October, Ms Moore having discussions with the clinic staff regarding the future plans for the business, redecoration, new software and new treatments without informing the claimant;
        d. During October 2017, Ms Moore challenging senior clinicians' commercial arrangements without consultation with the claimant;
        e. On 19 and 28 September 2017, Ms Moore making changes to the business activities and website whilst the claimant was away on two weeks holiday;
        f. In October 2017, Ms Moore falsely advising Mr Dibden that the claimant had allowed a key member of staff to take three months annual leave, when the claimant had only agreed to the staff

member having three weeks leave over the Christmas period for a long haul trip;

g. on 11 and 18 September 2017, Ms Moore falsely informing Mr Dibden that clinical staff were sending patient confidential information and images over WhatsApp;
h. on 27 July, 2 and 8 August, 14 and 19 September, 3, 9 and 11 November 2017, Ms Moore advising the clinic staff, against the claimant's request, that the clinic was to commence offering IUI (an additional IVF treatment) with immediate effect, when no training or patient protocols had been agreed;
i. during November, Ms Moore taking ownership of a specific patient complaint but then falsely telling Mr Dibden that the Claimant was supposed to be dealing with the matter.

17.2 Did the Claimant resign in response to the above breach?

17.3 Did the Claimant delay her resignation such as to either waive the breach or affirm the contract of employment?

Fairness of Dismissal

18. If the Claimant was dismissed, what was the reason (or, if more than one, the principal reason) for the Claimant's dismissal? Was it a fair reason within section 98(2) ERA 1996 or some other substantial reason of a kind to justify dismissal under section 98(l)(b)?

19. Was the Claimant's dismissal fair in all the circumstances, under section 98(4) ERA 1996?

B. <u>Detriments on the ground of protected disclosure(s) (section 47B ERA)</u>

Jurisdiction — Time Limits

20. Did the act(s) relied upon by the Claimant as detriments take place less than three months before the date on which she Claimant submitted her claim to the Employment Tribunal in accordance with s 48(3) ERA 1996?

21. If not, has the claimant proved that the detriments were 'a series of similar acts or failures', the last of which was brought within time?

22. If not, has the claimant proved that:

22.1 It was not reasonably practicable for her to have presented her claim before the end of the limitation period; and

22.2 that the claim was presented within such further period as the Tribunal considers reasonable?

Protected disclosures

23. Did the claimant make the following alleged disclosures of information:

23.1 on 9 and 11 October 2017, the claimant telling Hollie Ryan - Solicitor (Stevens Bolton Solicitors) that she was very concerned by: (i) the way that new consultants/clinicians were being introduced to the clinic, including a lack of regard for the clinic policies around clinician on-boarding specifically around interview and referencing; and (ii) that complex and sensitive treatments were being introduced to the clinic without the support of patient protocols and pathways to ensure treatment was delivered safely;

23.2 On 19 September, 2, 3 and 12 October, and 18 October and 23 October 2017, the claimant telling Mr Dibden the same matters set out at paragraph [23.1] above.

24. If so, did any such disclosures of information, in the reasonable belief of the claimant, tend to show:

24.1 that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, in accordance with section 43B(1)(b); or
24.2 that the health or safety of any individual has been, is being or is likely to be endangered, in accordance with section 43B(1)(d)?

25. If so, was any such disclosure made to the claimant's employer or other responsible person within the meaning of section 43C(1)?

Detriments

26. Was the Claimant subjected to a detriment by any of the following alleged acts:

26.1 between 25 October and 18 December, Mr Dibden ignoring the Claimant's requests to provide a written offer in writing following a meeting of 23 October 2017;
26.2 between 23 October 2017 and 18 December 2017, the Claimant being excluded from management discussions;
26.3 on 3 November 2017, Mr Dibden sharing the claimant's private correspondence with Ms Moore without the claimant's consultation or approval:
26.4 on 8 November 2017, the claimant being challenged on the activities relating to the disclosure and asked to carry on regardless;
26.5 on 9 November 2017, Mr Dibden publicly challenging the claimant's competency by email and unnecessarily copying in other staff;
26.6 on 9 November 2017 Mr Dibden behaving angrily, aggressively and unreasonably by email and verbal exchanges regards the claimant's competency and making false accusations against her;
26.7 on 9 November 2017, Mr Dibden demanding that the claimant meet him alone in the clinic in the early hours of the morning to discuss the resignation of a MAC member and falsely accusing her of causing the resignation;

26.8 on 9 November 2017, Mr Dibden bombarding the claimant with a number of emails requesting detail around financial matters of the business and reasons why a MAC member would have resigned;

26.9 on 10 November 2017, Mr Dibden calling a company meeting and accusing the claimant, during that meeting, of being guilty of business failings and causing friction between the new management structure, staff and clinicians;

26.10 on 10 November 2017, Mr Dibden providing the claimant with a letter stating that her employment would now end on 13th December 2017, without any prior consultation, and the claimant being asked to leave that day;

26.11 between 23 October 2017 and 18 December; 2017, Mr Dibden ignoring the claimant's correspondence with him:

26.12 on 24 November 2017 and 26 November 2017, making indirect accusations of payroll / banking errors by the claimant which were done on purpose to sabotage the business;

26.13 between 7 December 2017 and 11 December 2017, the claimant's access to her emails being restricted from time to time, without her prior knowledge and her email account being accessed and emails sent by others;

26.14 between 13 December 2017 and 20 December 2017 Liz Warnes (external consultant), acting on the instructions of Mr Dibden, making six calls to HMRC falsely claiming to be the claimant;

26.15 on 23 and 27 November 2017, the Respondent failing to deal with the claimant's grievance dated 14 November 2017 in accordance with the ACAS rules and dismissing the claimant's grievance;

26.16 on 10 December 2017 (a Sunday evening), Mr Dibden summonsing the claimant by email to attend a disciplinary investigation meeting on 13th December 2017, in breach of the ACAS guidelines;

26.17 from the claimant's final day of employment, on 18 December 2017, onwards the respondent's senior management team spreading mistruths regarding the claimant's alleged misconduct;

26.18 from the claimant's final day of employment, on 18 December 2017 onwards, the respondent failing to provide the claimant with an acceptable reference;

26.19 on 5, 7, 12, 19, 20, 21, 24, 26, 27, 28 and 29 June 2018 and 6, 10, 13, 14, 17, 18 and 19 July 2018, the respondent sending the claimant letters regarding allegedly impermissible salary overpayments;

26.20 from the claimant's final day of employment, on 18 December 2017, the respondent making accusations relating to allegedly impermissible salary overpayments made by the claimant; and

26.21 in a letter dated 21 December 2017, Mr Dibden stating to the claimant that her resignation to the CQC as Registered Manager was handled in an unprofessional manner.

27. If so, did the respondent subject the claimant to the above act(s) on the ground that she had made a protected disclosure?

[C. <u>Automatic unfair dismissal (section 103A ERA)</u>

28. If the Claimant was dismissed, was the reason (or if more than one the principal reason) for the Claimant's dismissal the fact that she made a protected disclosure?

29. This complaint was withdrawn by the claimant at the hearing.]

D. Breach of contract

30. What was the Claimant's contractual notice period? The Respondent alleges that it was two months as set out in the Claimant's written contract of employment. The Claimant alleges that it was three months pursuant to an alleged oral agreement on 23 October 2017.

31. Was the Claimant wrongfully dismissed in breach of any contractual notice period?

E. Holiday pay

32. What holiday pay was the Claimant entitled to in respect of her dismissal, having regard to the appropriate length of contractual notice pay?

33. Has the Claimant proved, on the balance of probabilities, that she is entitled to any outstanding holiday pay which she has not yet been paid for and, if so, what?

Remedy

34. What remedy, if any, is the claimant entitled to in respect of the matters set out above?

Good Faith

35. Was the claimant's protected disclosure made in good faith?

36. If not, should any award for compensation in respect of her whistleblowing claims be decreased by up to 25% under s49(6A) and/or s123(6A) ERA?

Other reductions/increases

37. Should any award made to the Claimant be decreased on the grounds that she has taken insufficient steps to mitigate her losses?

38. Should any award for unfair dismissal also be reduced:

    38.1 to reflect any contributory fault on the part of the Claimant in accordance with section 123 ERA; and/or

    38.2 for just and equitable reasons under section 122(2) ERA.

Findings of fact

39. In the course of the hearing, we heard and read a large volume of evidence. Where we make no finding about an issue (or where we make a finding which goes into less detail than the evidence we heard) this is not because we have overlooked it, this reflects the extent to which the point was of assistance to us in deciding the issues for determination by us.

Introduction

40. The respondent is a private gynaecology clinic. The claimant was employed by the respondent as finance manager from 14 March 2014. In December 2014 the entire shareholding of the respondent was purchased by Lindsay Dibden. At the time the business was in a poor financial position and was struggling. When he bought the business, Mr Dibden recognised that further injections of funding would be likely to be needed. Over the next three years or so Mr Dibden provided injections of working capital as and when he and the claimant considered this was necessary.

41. Mr Dibden and the claimant discussed the claimant taking on a wider role and she became the respondent's general manager. Mr Dibden offered the claimant the role of Chief Executive Officer but the claimant said she would prefer to be general manager. Mr Dibden agreed an increase in the claimant's salary to £65,000 to reflect the new role.

42. The claimant is not an accountant; she discussed with Mr Dibden employing a qualified accountant to assist with the provision management accounts, but the respondent could not afford to do this. Mr Dibden was content to receive cashflow spreadsheet forecasts from the claimant, as adequacy of cash was his main concern at the time.

43. At the time of the purchase Mr Dibden suggested that the respondent would work towards a position whereby the claimant would acquire a 7.5% share of the business in the future, but in the event this did not happen. No shares were ever transferred to the claimant.

CQC inspection, regulations and guidance

44. The claimant was the respondent's registered manager for the purposes of the Care Quality Commission (the CQC), the regulatory body.

45. In October 2016 the respondent was inspected by the CQC. The report recorded areas of practice that were inadequate, including in relation to the question of whether the respondent's services were well-led (pages 200 and 210). One of these was that Mr Dibden and the claimant, both non-clinical staff, took responsibility for granting practising privileges. The CQC highlighted that it might have been difficult for the senior management team to assess the suitability and competency of doctors without a medical consultant or doctor to advise on the processes (page 200). The CQC recommended that there should be an interview with a medically qualified person before the appointment of a medical consultant.

46. After receiving this report, the claimant made improvements to the respondent's process for recruiting staff including introducing a recruitment checklist and a requirement for an interview by a medically qualified member of the team for the recruitment of medical consultants. The CQC on a subsequent inspection visit on 25 July 2017 endorsed the changes the claimant had made (page 400), concluding that significant action had been taken and significant progress made in establishing a governance structure and robust support processes. The CQC report recorded that the relevant regulations were now being complied with and other concerns had been addressed.

47. The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ('the Regulations') apply to regulated activities which include the treatment of disease, disorder or injury by or under the supervision of a health care professional or a team which includes a health care professional and surgical procedures (Schedule 1, paragraphs 4 and 6). Under regulation 3, an activity which is ancillary to, or is carried on wholly or mainly in relation to, a regulated activity, is treated as part of that activity. We accept the claimant's evidence that she believed that the respondent's non-clinical staff as well as clinical staff were performing a regulated activity.

48. Regulation 5 relates to the appointment of fit and proper persons as directors or people performing the function of or equivalent to directors. Regulation 19, 'fit and proper persons employed', provides at sub-paragraphs 1 and 2:

> *"(1) Persons employed for the purposes of carrying on a regulated activity must—*
>
> *(a) be of good character,*
> *(b) have the qualifications, competence, skills and experience which are necessary for the work to be performed by them, and*
> *(c) be able by reason of their health, after reasonable adjustments are made, of properly performing tasks which are intrinsic to the work for which they are employed.*
>
> *(2) Recruitment procedures must be established and operated effectively to ensure that persons employed meet the conditions in—*
>
> *(a) paragraph (1), or*
> *(b) in a case to which regulation 5 applies, paragraph (3) of that regulation.*
>
> *(3) The following information must be available in relation to each such person employed—*
>
> *(a) the information specified in Schedule 3, and*
> *(b) such other information as is required under any enactment to be kept by the registered person in relation to such persons employed."*

49. Schedule 3 is headed 'Information required in respect of persons employed or appointed for the purposes of a regulated activity'. The list of information required includes:

> *"1. Proof of identity including a recent photograph.*
>
> *…*
>
> *4. Satisfactory evidence of conduct in previous employment concerned with the provision of services relating to—*
>
> *(a) health or social care, or*
> *(b) children or vulnerable adults.*
>
> *…*
>
> *6. In so far as it is reasonably practicable to obtain, satisfactory documentary evidence of any qualification relevant to the duties for which the person is employed or appointed to perform.*
>
> *7. A full employment history, together with a satisfactory written explanation of any gaps in employment."*

50. The CQC provides online guidance on these regulations (pages 1052 to 1064). It sets out the regulation in full, then provides an explanation and guidance. In relation to regulation 19(2) the guidance states:

> *"Providers must have effective recruitment and selection procedures that comply with the requirements of this regulation and ensure that they make appropriate checks for both employees and directors. Information about candidates set out in Schedule 3 of the regulation must be confirmed before they are employed."*

Ms Moore's initial involvement with the respondent

51. At around this time in late 2016 the respondent was considering expanding its services to include offering IVF services in conjunction with Guy's and St Thomas' Hospital. Mr Dibden met Kuljit Moore, a medical business consultant and Yacoub Khalaf, a consultant doctor in IVF. They were interested in investing in the respondent.

52. There were lengthy discussions and negotiations between Mr Dibden, Ms Moore and Mr Khalaf about the purchase of equity in the respondent. It was proposed that Ms Moore would join the respondent in a CEO role, and there were discussions about the claimant's and Ms Moore's respective roles.

53. In May 2017 the claimant wrote to Ms Moore about the formal recruitment arrangements (page 257). She enclosed the recruitment checklist which set out the documents that Ms Moore would need to provide as part of the process. The claimant also proposed that she, Ms Moore, Mr Khalaf and Mr

Dibden should meet to discuss roles, responsibilities and working arrangements.

54. On 21 June 2017 the claimant wrote to Mr Dibden to say that she had not heard from Ms Moore in response to six emails she had sent. Mr Dibden replied, 'I'll pick her up on that' (page 289). He spoke to Ms Moore on the same day and she explained that she had been away (page 1155).

55. On 23 June 2017 Ms Moore prepared draft job descriptions for her proposed role as CEO and for the claimant's proposed new role of operations manager (page 1157).

56. At around this time, Ms Moore began taking an increasing role in the respondent's activities and organisation.

57. Ms Moore recommended four new consultants who could work for the respondent. They were practising IVF specialists at Guys and St Thomas' Hospital. The claimant made arrangements to interview them in accordance with the new procedure she had introduced following the CQC report. On 18 July 2017 Ms Moore and the claimant had an email exchange in which Ms Moore asked whether it was necessary for the consultants to be interviewed by Dr Simpson, the respondent's medical director (page 308). The claimant replied,

> "*Yes unfortunately, as painful as it is, especially from a CQC perspective."*

58. Ms Moore replied, *"That's fine, I just don't want to delay them starting if possible."*

59. Ms Moore also suggested that the respondent should introduce a new procedure called IUI. In July 2017 the procedure was offered by Mr Elkington, a consultant who worked part-time for the respondent, to two couples who had IVF consultations with the respondent. There were problems with this because clear pricing arrangements and procedures known as patient pathways had not yet been set up for IUI, and the claimant felt that IUI was being offered before the respondent was ready. However, her view was that the respondent should continue with the IUI service for the two couples to honour the offers made to them (page 322). In the event, one couple decided not to go ahead (page 321). One couple made a complaint which the claimant dealt with (page 313 and 315).

60. On 2 August 2017 the claimant emailed her colleagues and copied in Mr Dibden and Ms Moore (page 323). She had spoken to Guys and St Thomas' Hospital about IUI and she set out her proposals for pricing and details to be provided to the patients who had been offered IUI. The claimant suggested that they set up a workshop with Guys in the next couple of weeks for all the respondent's staff. The claimant said,

> *"Please all read through and let me know if you see any issues with us following this for the second couple that Mr Elkington saw last week."*

61. Discussions about IUI pricing and setting up the IUI training were continuing in August and September 2017 (pages 372 and 382).

62. On 8 August 2017 the claimant emailed Lindsey Lawrence, the respondent's HR manager, and asked her to 'log a concern' (page 326). She said she had issues with the CEO role that Ms Moore was intending to take. The issues listed by the claimant included a lack of faith in Ms Moore's ability to deliver, and the fact that Ms Moore had not provided any paperwork from the recruitment checklist 'so no due diligence has been completed on her'. The claimant also said that she had 'no interest in hanging around if [Mr Dibden] hands the business over to [Ms Moore] to run'. She said she would suggest to Mr Dibden that Ms Moore be taken on in a different role on the same level as herself, and that if he did not agree then she would negotiate an exit for herself.

63. The claimant emailed Mr Dibden on the same day and raised her concerns about Ms Moore, saying this was 'between you and I' (page 332). The claimant said that the CEO job description developed by Ms Moore overlapped considerably with the claimant's own role, and that there was no sign of any of the paperwork required for Ms Moore as part of the recruitment process.

64. On 25 August 2017 the claimant emailed Mr Dibden to ask about Ms Moore's references as she had concerns that they had still only been provided with references from one employer. Mr Dibden replied to say that it was fine to press ahead, but he recognised that the references provided so far were 'soft pats' (page 357). By this he meant that they were standard references and they were not terribly informative about capabilities, qualities and skills.

65. Mr Dibden decided, in light of the concerns raised by the claimant, that Ms Moore should join the respondent initially as a business consultant, rather than immediately starting as CEO.

<u>Ms Moore's role as a business consultant</u>

66. On 31 August 2017 Ms Moore started working at the respondent's clinic as a business consultant (page 358). At this time the claimant had just started a period of two weeks' annual leave.

67. While the claimant was on leave, Ms Moore held meetings with the staff. During one she told the staff that a a redecoration/refresh of the interior of the clinic was being considered. On her return from leave, the first the claimant heard about this was from staff and she felt that made her look stupid (page 429).

68. On 11 September 2017 Ms Moore emailed the claimant about use of whatsapp to send patient scan images. She had learned from Guys and St Thomas' Hospital that a scan had been sent via whatsapp to a consultant there. She suggested that a restricted access database should be used instead (page 370). This was a genuine query by Ms Moore, and was not an

attempt to undermine the claimant. The claimant replied in an email on 26 September 2017 saying that whatsapp was only used for communications with patients, and scan images were sent by email (pages 1158 and 389). Ms Moore considered that the issue had been addressed.

69. Also in September 2017 Ms Moore made changes to the website, adding a new click box for fertility services. The claimant raised concerns that this had replaced a click box for blood testing services, and levels of interest in blood services had since dropped (page 376). On 19 September 2017 Ms Moore replied, suggesting that she and the claimant discuss it and agree a strategy for the overall management of the website (page 377). Later that day Ms Moore emailed the claimant to say that she had a meeting about the website, adding 'happy for you to join us' (page 379).

70. Also on 19 September 2017 the claimant emailed Ms Moore to ask about the training for IUI. She suggested that a training session should be rescheduled as soon as possible, and she suggested who should attend (page 382). Mr Dibden was copied in to the email.

71. On 19 September 2017 the claimant had a meeting with Mr Dibden to address some issues. She made a contemporaneous note of the meeting which we accept was accurate (page 431). In the meeting the claimant told Mr Dibden that she felt the business was out of control and in a 'right hand/left hand situation'. She asked who had approved Ms Moore's access across the business, supplies and staff. Mr Dibden said that he had. He said that he was sorry that the claimant was so upset, but said that 'this is what happens when you inject energy into the business'. He said that he had written to Ms Moore to ask her to include the claimant in communications.

72. Mr Dibden's evidence, which we accept, was that during this meeting, he and the claimant had a discussion about the recruitment process for consultants. We find that the claimant raised concerns that she felt the recruitment process was being ignored, that the need for consultants to have medical interviews was being questioned and that a doctor had been introduced at a patient open evening as a consultant before the recruitment checks had been completed. We reach this finding as these concerns are noted in the claimant's list of concerns which is referred to in her note of this meeting (pages 429 to 431).

73. On 28 September 2017 the claimant, Mr Dibden and Ms Moore had been discussing other services which could be offered. The claimant suggested that they should 'work through patient journey and clinical operational activity' to allow them to understand the business case and whether the activity could be offered (page 403).

74. In late September 2017 the respondent held a patient information evening. One of the new consultants who had not completed the respondent's recruitment checks attended the evening and carried out an initial consultation alone with a patient. The respondent's senior nurse Ms Shipley reported this to the claimant. The following day the claimant told Mr Dibden what had happened. She said it was against clinic protocols and CQC

regulations not to take care to ensure the fitness of the doctor prior to them seeing patients. She said this was the purpose of the recruitment policy. Mr Dibden said it was fine and sometimes you have to deal with things as they happen.

75. In around October 2017 Ms Moore suggested that the agreement regarding Mr Elkington's fees should be reviewed. She felt the fees were quite high.

76. Also around this time Ms Moore had a conversation with clinic staff about who would cover a period of annual leave which the clinic manager was taking over Christmas. The claimant had authorised three weeks' annual leave. Ms Moore mistakenly thought that three months' leave had been granted, and was concerned about how this long period would be covered. She raised this with Mr Dibden, and the misunderstanding was clarified.

77. On 2 October 2017 the claimant emailed Ms Moore and Mr Dibden following a meeting (page 410). She said she thought a change should be made to the website to reinstate the blood testing services button following a drop in the provision of blood testing. She also raised the recruitment process, saying:

> *"we need to re-enforce the recruitment process. I will send an email to everyone involved in recruitment reminding them of the protocols agreed with CQC for managers and clinicians. Just a heads up."*

78. On 3 October 2017 the claimant emailed Ms Moore and Mr Dibden (page 417). She said:

> *"To be clear employed or self-employed our CQC requirements are the same for any person that we allow to see our patients. Hope that clarifies."*

79. The claimant, Mr Dibden and Ms Moore had a meeting on 4 October 2017. We accept the evidence of Mr Dibden about what was discussed at that meeting. At the meeting the processes by which consultants were recruited and checked was discussed. Ms Moore's view was that the process was too ponderous, and that even pre-existing consultants had not been properly checked. The claimant argued that the process which she had put in place had been demanded by the CQC and should not be adjusted. Mr Dibden did not consider this to be true, he accepted that the CQC had found fault previously and had demanded an improved process, but he thought they had not specified exactly what the process has to involve. Mr Dibden sided with Ms Moore. He felt the ponderous process ran the risk of making the four consultants Ms Moore had introduced decide not to work at the clinic and that this would have been a disaster for the respondent. The discussions at the meeting were heated.

80. On 5 October 2017 Mr Dibden and the claimant met again. The claimant said she was worried about avoidance and lack of regard for the recruitment protocols, and the seriousness of allowing a consultant to see a patient without being on-boarded and before due diligence had been completed. She said she was cautious of Ms Moore as she felt she did not respect protocol

nor understand governance implications, and that she was driven only by commercial success (page 434). Mr Dibden told the claimant that she might apologise to Ms Moore.

81. In the meeting the claimant said that she was disappointed that things had not progressed as they had planned, with her developing into the CEO role. They agreed that this was pretty tough, but that the claimant's issues should not interfere with business growth (page 434).

82. The claimant met with Ms Moore on 6 October 2017. The claimant told Ms Moore that she was cautious and anxious mainly because of the CQC disregard that she was seeing (page 434).

83. On 9 October 2017 Mr Dibden sent the claimant and Ms Moore draft contracts and job descriptions. Ms Moore's job description was for the role of CEO, the claimant's was for the role of Operations Manager. Mr Dibden said the contracts were substantially identical and said they should feel free to 'polish' the job specifications (page 435).

84. On 12 October 2017 the claimant sent an email to staff including Mr Dibden setting out the recruitment policy. She said it applied to employed and self-employed positions (page 513).

85. On 17 October 2017 there was another patient open evening. No patients attended. Ms Moore emailed the claimant letting her know about this (page 522). She asked the claimant to look into what had happened and made suggestions for steps that could be taken in future to confirm patients' attendance and avoid consultants turning up unnecessarily.

86. The claimant sent an email to Ms Moore on 18 October 2017 (page 523). Mr Dibden was copied in to the email. In the email the claimant responded to the issues arising from the patient information evening. She did not mention governance or regulatory issues.

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

87. The claimant felt that Ms Moore was blaming her for the failure of the patient open evening. She spoke to Mr Dibden on the phone. During the call she said that she felt compromised by what she saw as regulatory breaches, and undermined by Ms Moore. She said she couldn't carry on as she was. Mr Dibden said that the importance of the decision merited a face-to-face conversation and they should meet to discuss.

88. Mr Dibden understood the claimant to be resigning. In an email to the respondent's accountant the next day, he said that the claimant had tendered her resignation (page 533). The claimant said that she could not carry on as she was. We find that this was not a resignation nor words that could reasonably be understood as a resignation. In saying that she could not carry on as she was, the claimant was indicating that something would have to change. That could have been something other than the claimant leaving the respondent. It could have been Ms Moore's resignation, or the respondent

looking again at their job roles. What the claimant made clear at the meeting was that things could not go on as they were.

89. On 23 October 2017 the claimant met with Mr Dibden. Mr Dibden told the claimant that her role was there to be done, that there was enough work for three and they could work well together to make the respondent a thriving business. The claimant said she could not continue because of her perception that there had been regulatory breaches in relation to the recruitment of clinicians and the introduction of new services, and because she felt undermined and discredited by Ms Moore. She said that the recruitment of consultants and provision of new services had not been done according to CQC regulations or the commitments the respondent had made to the CQC and that patient safety and care was potentially being compromised. She said that she could not stay. The claimant and Mr Dibden discussed the terms of a settlement agreement.

90. We find that the claimant believed that the information she disclosed tended to show that the respondent was failing to comply with its legal obligations relating to recruitment. The claimant described the regulations as the 'CQC regulations' but she was in fact referring to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010. The respondent's HR manager described the regulations in the same way (page 556). The claimant and the respondent obtained information about their legal obligations under the statutory regulations from the CQC's online 'guidance to providers' which included the text of the relevant regulations (pages 1052 to 1064). We also accept that the claimant believed that the information she gave Mr Dibden was in the public interest because a failure to follow the regulations meant that patient safety and care was potentially being compromised. In our conclusions below we address the question of whether the claimant's belief was reasonable.

91. We find that the claimant's disclosure to Mr Dibden on 23 October 2017 was made in good faith. The claimant was genuinely concerned to ensure that the respondent complied with its obligations in respect of the recruitment process.

92. The claimant emailed Mr Dibden the following day to set out what they discussed about her departure (page 543). We accept that this is an accurate note of the conversation and that the points set out by the claimant as agreed had been agreed. We make this finding because the note was contemporaneous and because Mr Dibden did not challenge any of the points recorded in the claimant's email, except in a reply on 3 November 2017 (page 579), when the only point he clarified was that the claimant was not on garden leave.

93. The claimant's email said that she and Mr Dibden had agreed that:

    93.1 "I will have three months' notice from 23 October";
    93.2 she would be in effect on garden leave, but would come into the clinic from time to time and would be available by email and mobile,

she would also maintain daily cash flow forecasting and management until a replacement was on board;

93.3 Mr Dibden would consider an ex gratia arrangement to compensate her for the shares they had discussed/her commitment to the business;

93.4 she would provide Mr Dibden with a calculation of her bonus due and this would be paid;

93.5 Mr Dibden would as soon as possible send an announcement of her resignation and Ms Moore's involvement on a more permanent basis.

94. Following the meeting Mr Dibden drafted an announcement of the claimant's departure. This approved by the claimant and sent to staff on 24 October 2017 (page 541).

95. We do not accept the claimant's suggestion that at this meeting she indicated her intention to resign in future subject to an agreement with the respondent being reached. We find that the claimant actually resigned during the meeting on 23 October 2017. We reach this finding because the claimant said in her email of 24 October 2017 that the three month notice period would run from 23 October, not from a future date once the agreement had been finalised. The claimant also approved Mr Dibden sending an announcement about her leaving the following day, before any agreement about the terms of the claimant's departure had been reached. Finally, in two emails to Mr Dibden on 3 November 2017, the claimant referred to having resigned (pages 578 and 580).

96. After the claimant resigned, Ms Lawrence, the respondent's HR manager, wrote to Mr Dibden on 29 October 2017 raising concerns about the claimant's resignation, including governance concerns (page 552 to 554). In particular, she was concerned about the suggestion in Mr Dibden's announcement to the staff that Ms Moore would be responsible for the clinic 'going forward'. Ms Lawrence said:

> *"If [Ms Moore] is now "responsible for the clinic", then this role is not as Business Consultant and we will need to request new references as the current ones do not cover her new role.*
>
> *From a clinical governance perspective, all new employees must be signed off and approved by the Registered Manager. If we are now employing [Ms Moore] without all pre-employment checks completed and without the approval of the Registered Manager, we are leaving ourselves open to disclosure to the CQC. The Registered Manager needs to satisfy themselves that all due diligence is complete and compliant. If we go ahead and employ any new employee without satisfying due diligence then the Registered Manager would need to disclose to the CQC that this is the case.*
>
> *…*
> *I also feel that I am leaving myself exposed and at risk of compromising my position if you proceed without taking on board the advice I have provided."*

97. Later on 29 October 2017 Ms Lawrence emailed Ms Moore (copying the claimant) setting out the documents which were still missing from her recruitment checklist (page 557). Mr Dibden replied to ask for details of the CQC requirements. He felt there was hiding behind CQC requirements and he was becoming frustrated.

After the claimant's resignation

98. After the meeting on 23 October 2017 the claimant cleared her office. She was expecting to receive a draft settlement agreement as they had discussed. She emailed Mr Dibden about this on 25 October 2017 (page 549), 27 October 2017 (page 550) and 1 November 2017 (page 582) and 3 November 2017 (578). The emails of 25 October 2017 and 3 November 2017 asked for his thoughts or information about the settlement. Mr Dibden replied to the claimant on 3 November 2017 (page 579). During 3 November 2017 to 18 December 2017 Mr Dibden and the claimant were in regular email and telephone contact, including on the question of a settlement.

99. The claimant and Mr Dibden had a meeting on 1 November 2017. In her email of 1 November 2017, the claimant raised concerns with Mr Dibden about the business, including phone calls not being picked up, billings being a mess and staff being very unhappy. She was concerned that there were plans to reduce staff numbers (page 583). On 3 November Mr Dibden forwarded the email to Ms Moore and she replied to the claimant. The claimant was not expecting the information she had provided to be shared with Ms Moore but she did not say in the email that it was confidential or private. She replied to Ms Moore (page 580), saying

> *"When you refer to 'we' as the management team you must exclude me from that. I am, as far as I am concerned and have agreed with [Mr Dibden], currently on gardening leave for the next three months and do not wish to be part of any new management or strategic plans for the clinic. Hence the reason for my resignation in recent weeks."*

100. In his reply, Mr Dibden said he had shared the email with Ms Moore because the matters the claimant raised were business-critical and Ms Moore now had day to day authority and responsibility for running the clinic. He also said that the claimant was not on gardening leave: 'you're simply working mostly from home at your request. You have also helpfully offered to work in the office when requested' (page 579). The claimant and Mr Dibden disagreed about whether the term 'gardening leave' was appropriate and about how much work the claimant was expected to do. Mr Dibden's summary of the position on this was different to that in the claimant's email of 24 October 2017. She was not expecting to be working full time (even from home) during this period. She was expecting to be able to use her notice period to search for a new role and attend interviews.

101. On 7 November 2017 Mr Dibden called the claimant to ask for an update on the recruitment checks for the new consultants. He was not happy about the time that it was taking. He said that the claimant had to own the process and should chase it hard (page 607). The next day, the claimant had an email exchange with Ms Moore about the interview process for one of the new consultants. The claimant replied and said that it would be better for the process to be left running and for Ms Moore not to be involved in validating references, as she had recommended the consultant (pages 602 and 604). Following this exchange, Ms Moore suggested to Mr Dibden that the claimant should leave all personnel-related issues to them (page 601). Shortly afterwards, Mr Dibden emailed the claimant and asked her to forward to him and Ms Moore all interview notes for the new consultants, and copies of the process and procedures (page 605). Mr Dibden and Ms Moore's perception was that the claimant was being obstructive in the recruitment process (page 603).

102. On 8 November 2017 Mr Dibden also emailed Ms Lawrence to give a 'state of play' in relation to the claimant (page 620). He said:

> *"The most fundamental issue that I have come to recognise is that as [Ms Moore] has engaged and sought to get under the skin of the clinic I am increasingly disappointed with [the claimant's] performance. ..the fact that she chose to tender her resignation so abruptly and within a relatively short period of time since [Ms Moore] arrived leads me to the conclusion that she might have seen that the writing was on the wall. I have made a list of issues and have asked [Ms Moore] to do the same, which substantiate this belief.*
>
> *…*
>
> *What worries me most of all is that [the claimant's] motivation stands in the way of the clinic hiring the three new consultants introduced by Kuljit, all of whom I have met….I don't wish for a moment to duck, dodge or otherwise fail to observe CQC requirements, but I am frustrated at the continual finger-pointing going on which has led to a singular lack of progress in this regard. I have asked Ros for the interview notes for each of these consultants, in order to be better able to understand what remains outstanding. I find it irritating for example that no DBS processes have been started because I am told our process dictates that we don't do that until interviews are complete. This runs counter to the commercial needs of the clinic. I am deeply uncomfortable that Ros in her capacity as Registered Manager might be in a position to delay and obstruct (then to be able to say 'I told you so') as much as the risk of whistleblowing. I don't believe we have anything to hide and so I don't think there should be any risk, but if, as I am minded (for a range of reasons) I choose to dismiss Ros summarily, I don't want to find that I inadvertently cause another issue. The question therefore arises as to whether our pre-employment checks are appropriate, excessive or inadequate.*

…

I am seeing Ros tomorrow, in order to go through the financial projections. I don't want her communicating any more with anyone at the clinic because there's seems to be too much circumstantial evidence to suggest that she has stirred matters up in a way not in the business's interest. I would like by Wednesday next week to be in a position to terminate her contract and settle what she is due, while having her sign her compromise agreement (attached). I am still to agree any payoff, but your guidance on what the statutory minimum is would be helpful. I anticipate asking her for her laptop, keys, passwords, and company debit and credit cards. Have I overlooked anything?"

103. We find that the claimant resigned because she was concerned about the approach Ms Moore was taking and what the claimant saw as failures to follow the respondent's procedures, not because she had seen the 'writing on the wall'. The claimant felt undermined by Ms Moore's involvement in the business and by Ms Moore's raising concerns direct with Mr Dibden. She had made known to Ms Lawrence on 8 August 2017 that she had no interest in working with Ms Moore. We also find that Mr Dibden was already aware, certainly in broad terms, of the financial state of the respondent. He had chosen to receive limited information in terms of financial reporting and not to engage qualified accountants because of the cost. It was only when Ms Moore and Mr Khalaf requested detailed financial reports to consider their proposed investment in the respondent that Mr Dibden became more focused on financial information such as the balance sheet. His position and attitude changed and he began scrutinising the financial information provided by the claimant much more closely and requiring more detailed information.

104. On 9 November 2017 Mr Dibden and the claimant had a number of email exchanges. The advisor to the respondent's medical advisory committee (MAC) had resigned the previous day and Mr Dibden emailed the claimant to ask whether he had offered any explanation (page 635). The claimant accepted that it was reasonable for Mr Dibden to ask her about this. Mr Dibden asked the claimant to share her thoughts about why the medical advisor might have 'reached this conclusion' and asked for the advisor's contact details as he was 'keen to make it [his] business to debrief' him. Both the claimant's and Mr Dibden's emails were copied to three other members of staff.

105. Later that evening the claimant emailed Mr Dibden to say she had given the advisor Mr Dibden's number and he would call (page 649). Mr Dibden replied saying, 'Would you be good enough to pass me his number please?' (page 649). When the claimant did, Mr Dibden replied saying, 'I wouldn't mind hearing from you what his reasons are and what you make of it' (page 648). When she replied at 22.50 (page 653-654), the claimant copied in three other members of staff. She said:

"I believe that he has resigned following my resignation…

> *He is a contact of mine and took some persuading to come on after CQC evaluated us the way that they did regards governance.*
>
> *He raised some concerns during the interviews that we have carried out. All of which you are aware. I suspect he feels no need to be further involved…."*

106. Mr Dibden replied (page 653):

> *"Resigning following your resignation isn't a reason. Actually I see it as pretty unhelpful at this time. It leaves us with an incomplete MAC. Might he not have waited until we had found a replacement?"*

107. Also on 9 November, the claimant sent Mr Dibden a cashflow spreadsheet and they spoke on the phone, following which they exchanged more emails (all of which were copied to other members of staff). Mr Dibden asked the claimant to let him know when she could attend the clinic to go through material with him (page 638). He said 'any time after 01.00 works for me'. He asked for an explanation of the creditors' figure in the cashflow spreadsheet, saying 'Have we really run up some £70,000 of credit without my being aware?' (page 639). When the claimant asked Mr Dibden whether he would like her to discuss reconciliation of creditors with their external accountant, Mr Dibden replied (page 640):

> *"I don't much care how you do it. If you can't tell me find someone who can..I want to know what this business owes and I want to know by tomorrow morning please…*
>
> *And could you please let me know at what time you can get into the clinic tomorrow please. I asked you about 2½ hours about when we spoke. I am available from 1.00am."*

108. At 22.15 that evening the claimant emailed Mr Dibden with further details about the cashflow spreadsheet which she said she hoped provided explanations for his concerns and suggested they discuss further tomorrow (page 646). Mr Dibden replied saying 'I'm afraid your breakdown makes no sense' (page 645) and 'How do you expect me to believe your spreadsheet?' (page 647). He copied three other members of staff and the external accountant into his emails. The claimant replied to his email at 22.52 (page 651).

109. We find that Mr Dibden's tone in these emails was very abrupt. He was however asking her to explain issues with the financial information he had been sent. He did not challenge the claimant's competency.

110. On 9 November 2017 Mr Dibden also had an exchange of emails with Ms Lawrence. He forwarded the claimant's email of 24 October 2017 summarising the meeting of 23 October. The claimant's contract of employment (4 August 2014) had a two month notice period, it was ambiguous as to whether notice by the employee had to be given in writing (page 70). The contract allowed the employer to make reasonable changes

unilaterally, and said that these would be notified in writing (page 72). It did not provide that all variations had to be in writing. Ms Lawrence asked Mr Dibden whether he had verbally agreed to three months' notice. He replied (page 643):

> *"I initially offered 3 months as an opening gambit. With what I've come to understand since Ros's resignation I am inclined to offer the bare minimum. If she behaves appropriately I might stick to the 3 months."*

111. At the end of the day on 9 November 2017 Mr Dibden asked the clinic manager to send an email requiring all staff to attend a meeting the following morning at 7.30am (page 641). The email said it was to share important information about the future of the clinic, and the significance of it demanded that all staff should make themselves present.

112. The claimant was worried about the exchanges of emails and Mr Dibden's tone. He would not tell her what the meeting was about. She need to leave home at 5.30am to get to the meeting on time and was anxious she might not wake up in time, so she stayed up all night.

113. The meeting on 10 November 2017 was recorded by one of the respondent's staff and a transcript was prepared (page 660). This records that Mr Dibden said he wanted to discuss some 'very fundamental messages'. He said:

> *"Starting with the chronology, so as you know [the claimant] resigned for her own reasons on 13th October, since which time, with the assistance of [Ms Moore] and what I have seen myself has led me to believe that the state of affairs in this clinic is actually far, far worse than I had thought or that had been led to understand.*
>
> *…*
>
> *There don't seem to be enough procedures, standard operating procedures and processes actually documented and written down. The process of recruiting new consultants manifests a sore lack of weakness in process. ..this doesn't really lead me to believe that there has been any sense of professionalism or competence frankly in the management of the clinic.*
>
> *…*
>
> *The third and final big heading in all of this is the process that we have been trying to go through to recruit some more consultants for the benefit of this clinic but it seems to me that process has been des, or could be described as somewhere between incompetent or conscious obstruction to get that to happen and I am deeply frustrated by that…*
>
> *…*

> *I am not going to put up with this anymore. …Your attitudes must change…There's a fantastic opportunity here …but it has been mismanaged."*

114. Mr Dibden asked all staff to confirm in writing by the end of the day whether they wanted to stay with the business, and concluded the meeting by saying:

> *"Otherwise I will assume that you want out and I will shut the doors as early as I can next week."*

115. A summary of the meeting was confirmed by Mr Dibden in an email at 07.54 (page 655). It referred to the claimant being incapable of giving him adequate explanations about finances and said that the process of recruiting the new consultants had been 'anywhere from incompetent to consciously obstructive'. It ended by saying that Mr Dibden would decide whether to close the clinic down depending on the responses from staff as to whether they wanted to stay with the clinic or not.

116. The claimant felt and we accept that the references to the state of affairs in the clinic being worse than Mr Dibden thought, to the lack of procedures and processes and to incompetent management and mismanagement were directed at her. The claimant was the general manager. Mr Dibden specifically referred to her resignation as the start of the chronology.

117. The meeting filled the claimant with horror. She felt that Mr Dibden was condemning her time and competence with the respondent and that she had let everyone down. The claimant was very upset and shaken, and felt shocked and humiliated. Even if other members of staff felt that some of the things said during the meeting were directed at them, it is clear that the claimant was the main target.

118. After the meeting, Mr Dibden asked the claimant to go through some financial projections with him and Ms Moore. During the discussion Mr Dibden handed the claimant a letter formally accepting her resignation (page 636). It said that he had agreed that her two month notice period would be worked from home, except when she was requested by him to make herself available for work. He said that her termination date would be 13 December 2017. This was a miscalculation of what the respondent considered to be the claimant's notice period (two months). This calculation had been discussed in Mr Dibden's emails with Ms Lawrence the previous day (page 643). The respondent subsequently changed the termination date to 18 December 2017.

119. The letter continued:

> *"We have discussed the matter of financial compensation to reflect your contribution to the financial performance of the business over the past three years. At this point I am unable to make any undertaking or afford you any guidance on this matter as I have no firm fix on the state of affairs of the company at the present time, save to believe that it may be insolvent."*

120. The letter had a list of tasks that the respondent wanted the claimant to complete during her notice period. This included completion of the reference and admitting rights process for the new consultants.

121. After Mr Dibden and the claimant had finished going through the financial projections, Mr Dibden told the claimant she could leave and that she was not wanted in the clinic anymore as she caused too much disruption, but she should make herself available to support him and Ms Moore as required.

122. On 15 November 2017 the claimant made a formal written grievance (page 678 and 687). She was signed off sick by her doctor on 15 November 2017 (page 688). Mr Dibden replied to her email in which the claimant told him that she had been signed off sick by asking for an update on 'projections, assumptions and collating the creditor list'.

123. The claimant was fit to work again on 22 November 2017.

124. On 24 November 2017 Ms Moore processed the respondent's staff payroll. There were a number of overpayments. The claimant had no involvement with payroll or the overpayments but she felt that she was being indirectly blamed for the error (page 740). We did not see any evidence that this was the case. During communications with Ms Lawrence at around this time, Mr Dibden referred to the additional month's notice he had offered the claimant and said this was *'before [he] came to understand the insolvent shambles in which she has left the business.'*

125. On 27 November 2017 the respondent engaged Tracey Barney, an independent human resources consultant, to deal with the claimant's grievance (page 732). Ms Moore asked Ms Barney to make arrangements to conduct a disciplinary meeting on the same day, and listed a number of concerns which she felt should trigger disciplinary action. These included delaying the engagement of the new directors and obstructing the business by delaying the appointment of the new consultants.

126. On 28 November 2017 Mr Dibden emailed Ms Barney with additional points which he considered 'germane to the discplinary process' (page 734). These included financial state of affairs, business management and business development and the 'consultant on-boarding process', about which Mr Dibden said:

> *"On inspection of the HR files, I found them to be woeful; incomplete no references and those there shamefully incomplete. She has in my opinion sought to confound the on-boarding process for two reasons. Firstly that she does not wish for the clinic to succeed under new management when it couldn't under her management; and secondly that she had established some new processes which she couldn't follow. We seem to have the need for example for three references on one of the new consultants, but only two for others. In the full knowledge that DBS checks can take up to 8 weeks sometimes, her process still maintains that we don't seek DBS checks until all other diligence is complete. This seems to me to be totally unnecessary*

> *and counter to the company's interests because it causes the whole process to take the longest possible length of time.*
>
> *…*
>
> *When I challenged [the claimant] as to exactly what the requirements of the regulator (CQC) are as to on-boarding clinicians, I was forwarded by [Ms Lawrence] the two relevant regulations about this matter. They simply say that care providers must satisfy themselves having undertaken the appropriate checks that clinicians are suitable. There is no specific number of references set out. [The claimant] has failed to show any commercial understanding of the impact of the ensuing delays on the business. The other clinician on the MAC … had not even seen the file for one of the consultants... Why had [the claimant] failed to provide anything and get this whole process moving forward?"*

127. Ms Barney provided the respondent with some advice about the disciplinary process but said she could not get involved while she was still working on the claimant's grievance.

128. On 5 December 2017 the claimant attended a meeting with Ms Barney to discuss her grievance complaint (page 797). She was accompanied by Ms Lawrence. On 13 December 2017 Ms Barney interviewed Mr Dibden as part of her consideration of the claimant's grievance (page 871). Mr Dibden told Ms Barney that, in respect of the CQC regulations, he did not ask for the rules to be bent but was frustrated with the process and felt the claimant was hiding behind the requirements (page 872).

129. On 7 December 2017 the claimant received an alert from google which said that her email address had been signed into from a new device (page 771). Ms Moore emailed the claimant to her account had been wrongly closed by the respondent's IT as there had been a misunderstanding and they wrongly thought she had already left the business (page 772).

<u>Financial issues</u>

130. At around this time the respondent engaged Elizabeth Warnes, an external consultant, to assist them with financial matters. She found outstanding, duplicated and unallocated payments which she had to correct.

131. At 22.15 on 10 December 2017 (a Sunday evening), Mr Dibden emailed the claimant to ask her to attend a disciplinary investigation meeting on 13 December 2017 (page 777 and 778) . The meeting was to discuss:

> *"recent findings that have led to serious concerns regarding potential failings in your capability and performance in your position as General Manager. These issues have been categorised into the following groups:*
>
> - *Financial failings;*

- *Business management failings."*

132. The meeting between the claimant and Ms Warnes on 13 December 2017 was a fact finding meeting (page 832). The claimant did not return to work at the respondent's clinic after this meeting.

133. The claimant said that between 13 December 2017 and 20 December 2017 Ms Warnes, acting on the instructions of Mr Dibden, made six calls to HMRC falsely claiming to be the claimant. This was based on the evidence of Ms Harper, who was present in the room when Ms Warnes was making the calls and heard Ms Warnes giving the claimant's name during one or more telephone calls. However, Ms Harper was not able to hear the other side of the call and so was unable to say whether Ms Warnes was claiming to be the claimant or was giving her name in response to something being asked by the other person on the call, for example the name of the general manager.

134. A meeting of the respondent's Medical Advisory Committee was also held on 13 December 2017. The claimant presented a draft of her resignation from her post of CQC registered manager at the meeting. The resignation letter was sent on 15 December 2017 (page 843). The resignation letter included details of the background to the termination of her employment. It said:

> *"I am concerned that the new management team do not follow reasonable governance processes and this has been proven to date with the recruitment of new Consultants and also new patients services without appropriate protocols and SOP."*

135. The claimant's employment terminated on 18 December 2017. The respondent did not allow the claimant to work the remainder of her three month notice period. This would have expired on 23 January 2018.

<u>After the termination of the claimant's employment</u>

136. The respondent sent the claimant the outcome of her grievance and the disciplinary investigation on 21 December 2017 (page 894). The grievance decision maker was Mr Dibden. Ms Barney had reported her findings to Mr Dibden before he reached his decision. She said that the meeting on 10 November 2017 was unorthodox and she was surprised by it.

137. Mr Dibden said that he disputed the issues the claimant had raised in her grievance and that as the claimant's employment had now ended he did not intend to take any further action. She was not offered an appeal. The same approach was taken to the disciplinary investigation. Mr Dibden said that the findings to date indicated that there would have been grounds for a formal warning at least because of business management shortcomings (page 894 to 895). He also said that he did not think it was professional or appropriate for the claimant to include personal issues relating to her employment relationship in her letter informing CQC that she was no longer the respondent's registered manager. There is no reference in this letter to the recruitment process or the concerns the claimant raised about that process.

138. In January 2018 the respondent was still considering the claimant's performance and conduct. For example on 9 January 2018 Ms Moore sent Mr Dibden a list of costs incurred by the claimant (page 908). These included pay rises paid to staff which had been authorised by Mr Dibden.

139. The claimant 2 January 2018 to 2 February 2018 and presented her ET1 claim on 12 February 2018.

140. After she left the respondent's employment, the claimant was concerned about the reference which the respondent might provide if she requested one. She referred to this in her ET1 (page 13). At the time she presented her claim the claimant had not found another job (page 6). We do not find that the claimant failed to mitigate her losses during the 8 week period between the last day of her employment and the date of presentation of her claim, especially as it included the Christmas period, a time when employers tend not to be recruiting.

141. On 14 March 2018 the respondent's solicitor sent a proposed form of standard reference to the claimant. The proposed reference detailed the claimant's position, main responsibilities and dates of employment (page 963).

142. Following the claimant's departure, Ms Warnes continued to work for the respondent as a consultant on financial matters. She was assisting with the 2016/17 and 2017/18 year end accounts. In doing this work, some issues arose for the previous year which Ms Warnes could not reconcile. The issues related to payments to the claimant between October 2015 to February 2016 which were recorded as temporary staff payments but without invoices to back them up. The claimant did not receive any salary or pay through payroll during this time. Ms Warnes thought there were other payments to the claimant for which there was no explanation.

143. In June and July 2018 Ms Warnes corresponded with the claimant about these issues. There was no evidence before us that these issues were raised by the respondent with the claimant any earlier than this. Mr Dibden had told Ms Barney in the grievance interview that from time to time the claimant did not pay herself or paid herself later to support the cash flow (page 874). This was consistent with the correspondence we saw between the claimant and Mr Dibden. The claimant said that during October 2015 to February 2016 she and Mr Dibden had agreed that she would stop receiving salary via the payroll and would work on a self-employed basis to reduce costs. Mr Dibden's evidence was that he understood that the claimant had agreed that the claimant would not be paid at all during this 5 month period. We do not accept his evidence on this point as we think it is inherently unlikely that an employee, as the claimant was, would agree to work for no pay for such a lengthy period. We find that Mr Dibden and the claimant agreed that she would be paid on a self-employed basis for this period.

144. The claimant had put money into the business, and sometimes took refunds of money she had put in. For example, in around May 2017 the claimant put £6,000 into the business. Mr Dibden was aware of this payment and he was

aware that the claimant would be taking it back (page 271). The respondent's bank statements showed other payments in by the claimant (for example pages 1220, 1230, 1235).

145. The respondent maintained that the claimant had been overpaid salary even if a notional salary was included for the period October 2015 to February 2016 and even if repayment of all of the claimant's payments into the business was taken into account. The respondent decided not pursue its investigation into this matter beyond the initial fact-finding interview with the claimant. We did not have sufficient evidence to satisfy us that the claimant was overpaid during this period.

The law

Constructive unfair dismissal

146. The definition of dismissal in section 95(1)(c) of the Employment Rights Act includes constructive dismissal. This is a dismissal where the employee terminates the contract of employment in circumstances where they are entitled to terminate it without notice by reason of the employer's conduct.

147. Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 sets out the elements which must be established by the employee in constructive dismissal cases. The employee must show:

    147.1 that there was a fundamental breach of contract on the part of the employer;
    147.2 that the employer's breach caused the employee to resign; and
    147.3 that the employee did not delay too long before resigning and thereby affirm the contract.

148. The Claimant relies on breaches of the implied term of trust and confidence. This is a term implied into all contracts of employment that employers (and employees) will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

149. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 Underhill LJ set out a series of questions to be considered where an employee claims to have been constructively dismissed and where there are said to be a number of repudiatory breaches. Those questions are:

    149.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, her resignation?
    149.2 Has she affirmed the contract since that act?
    149.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

149.4 If not, was it nevertheless a part of a course of conduct comprising several acts and/or omissions which, viewed cumulatively, amounted to a breach of the implied term of trust and confidence?

149.5 Did the employee resign in response (or partly in response) to that breach?

150. If a constructive dismissal is established, the tribunal must also consider whether the reason for the dismissal is a potentially fair reason, and whether the dismissal is fair in all the circumstances, pursuant to section 98(4) of the Employment Rights Act 1996.

Protected disclosures

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

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

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

152. In this case the claimant says that she made disclosures about the relevant failures set out in sub-sections 43(1)(b) and 43(1)(d), that is:

152.1 a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject (sub-section 43(1)(b)); and

152.2 a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that a the health and safety of any individual has been, is being or is likely to be endangered (sub-section 43(1)(d)).

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

154. The context in which a disclosure is made is important, and two or more communications taken together can amount to a qualifying disclosure even if, taken on their own, the individual communications would not (Norbrook Laboratories (GB) Ltd v Shaw 2014 ICR 540, EAT).

155. In Kilraine v London Borough of Wandsworth [2018] IRLR 846 the Court of Appeal held that the concept of 'information' used in section 43B(1) is capable of including statements which might also be characterised as 'allegations'; there is no rigid dichotomy between the two. Whether an

identified statement or disclosure in any particular case amounts to 'information' is a matter for the tribunal to evaluate in the light of all the facts.

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

Protected disclosure detriment

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

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

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

Burden of proof

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

160. In Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14 the EAT said that the approach to the burden of proof in a section 47B complaint of detriment is the same as that taken in respect of section 103A complaints for protected disclosure dismissal by the Court of Appeal in Kuzel v Roche Products [2008] IRLR 530, CA. If an employment tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment or dismissed her, it does not follow that the claim must succeed. If the tribunal rejects the reason put forward by the employer, it is not bound to accept the reason put forward by the employee: it can conclude that the true reason for the detriment or dismissal was one that was not advanced by either party.

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

Conclusions

162. We have applied the relevant legal tests to the findings of fact that we have made, to reach our conclusions on the issues for determination. We have set out our conclusions in broadly the same order as the list of issues but we have left the time point to the end.

Ordinary unfair dismissal

163. The claimant says that she was constructively dismissed.

164. The legal test for us to apply is whether there was a repudiatory breach of the contract of employment by the respondent. In this case the claimant says there was a breach of the implied term of trust and confidence, a fundamental part of every employment relationship. We have to consider whether the respondent, without reasonable or proper cause, conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

165. We have approached this by considering the steps set out in the case of Kaur v Leeds Teaching Hospital.

166. First, we have to identify and consider the most recent act by the respondent which the claimant says caused or triggered her resignation. The last three dates referred to in issue 3.1(h) and the conduct described in issue 3.1(i) of the list of issues occurred in November 2017. However, these acts post-date the claimant's resignation. We have discounted these acts; they cannot have triggered the claimant's resignation because they happened after it.

167. The most recent acts relied on by the claimant are those that took place in October 2017. In her witness statement, the claimant said that the incident that brought things to a head was the email Ms Moore sent to her on 17 October 2017 following the patient information evening which no patients attended. The claimant felt that Ms Moore was blaming her for the failure of the evening when it was not her fault. This incident was not included in the list of the conduct which the claimant relied on in the agreed list of issues, but the respondent treated this incident as the last act relied on by the claimant. We conclude that this was the act by the respondent that was most recent in time prior to the claimant's resignation.

168. We have to consider whether the claimant affirmed the contract after this email. We find that she did not. She telephoned Mr Dibden the day after the email was sent and she said that she could not carry on as she was. The claimant and Mr Dibden arranged to meet five days later, and at that meeting the claimant resigned. We conclude that the claimant did not affirm the contract after she was sent the email of 17 October 2017.

169. We next consider whether the email of 17 October 2017 was by itself a repudiatory breach of contract. We conclude that, looked at carefully, it was not. Although the claimant felt that Ms Moore was blaming her for the fact that no patients attended the evening, this is not what Ms Moore said in the email. Ms Moore asked the claimant to look into what had happened, and made suggestions for improvements for the future. The email was not conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties; it assumed a future working relationship between the claimant and the respondent. In addition, there was a reasonable and proper cause for the email which was to suggest improvements to the process for setting up patient information evenings so that similar problems could be avoided in future.

170. In light of our finding that the email of 17 October 2017 was not by itself a repudiatory breach of contract, we have to go on to consider whether that email was part of a course of conduct which viewed cumulatively amounted to a breach of trust and confidence. The other acts relied on by the claimant as breaches of trust and confidence are set out at paragraph 17 in the list of issues above. In relation to each of these:

    170.1 (issues 17.1a and 17.1b) We have found that the claimant did not make complaints to Mr Dibden on the dates given. In the majority of the communications made on these dates the claimant provided Mr Dibden with updates or informed him what steps she would be taking. Those communications could not be described as complaints, and most of them did not request a response or ask Mr Dibden to do anything. In the email of 21 June 2017 the claimant told Mr Dibden about delays hearing back from Ms Moore, and he chased this up the same day. We conclude that the allegation that the claimant made complaints on these dates which Mr Dibden failed to take seriously is not made out.

    170.2 (issue 17.1c and 17.1h) We have found that Ms Moore discussed redecorations of the clinic at a staff meeting while the claimant was on holiday. There were also discussions about a new treatment, IUI, and this was offered to two couples by Mr Elkington. There were problems with this service being offered to patients before patient pathways were in place. The claimant took steps to investigate the procedure and to arrange training for staff on IUI. The claimant was critical of how this was done, and clearly disagreed with the introduction of the new service before things were ready. However, Ms Moore's actions were aimed at improving the respondent's business, not at undermining the claimant. There was a professional disagreement between them about how this should be done. This was not conduct which was calculated or likely to destroy the relationship of trust and confidence between the claimant and the respondent.

    170.3 (issue 17.1d) We have found that Ms Moore raised the possibility of a review of Mr Elkington's fees. This was not conduct which was calculated or likely to destroy the relationship of trust and confidence between the claimant and the respondent. There was a reasonable

and proper cause for her to do this, which was that she wanted the respondent to consider whether the fees being paid were at an appropriate level.

170.4 (issue 17.1e) We have found that Ms Moore made changes to the website at about this time. The claimant raised concerns about the changes and Ms Moore suggested that they discuss it and invited the claimant to attend a meeting about it. Again, this was not conduct which was calculated or likely to destroy the relationship of trust and confidence between the claimant and the respondent.

170.5 (issue 17.1f) We have found that Ms Moore was mistaken about the claimant authorising a three month period of leave and that she raised this with Mr Dibden rather than the claimant. We agree with the claimant's suggestion that it would have been better for Ms Moore to have asked the claimant about this first, rather than raising it with Mr Dibden, but we do not consider it to be conduct which was calculated or likely to destroy the relationship of trust and confidence between the claimant and the respondent.

170.6 (issue 17.1g) We have found that Ms Moore raised the question of whether patient scans were being sent via whatsapp because this was raised with her by staff at Guys and St Thomas'. It was understandable that she wanted to check this. She had reasonable and proper cause to do so. It was not conduct which was calculated or likely to destroy the trust and confidence between the claimant and the respondent.

171. We do not consider that any of the conduct relied on by the claimant individually amounts to a breach of trust and confidence.

172. Further, viewed cumulatively with the email of 17 October 2017, these incidents do not amount to a breach of the implied term of trust and confidence. It was clear to us from the evidence we heard that the claimant and Ms Moore did not have an easy working relationship. Ms Moore was a 'new broom' taking an increasing role in the respondent's business. The claimant did not agree with the changes Ms Moore was making. Ms Moore joining the respondent while the claimant was away on leave did not help. Ms Moore could have taken a more tactful and inclusive approach when she introduced new plans for the business and new ways of working or when she queried existing procedures. However, from June 2017 and as recently as 9 October 2017 the respondent had been trying to ensure clarity of Ms Moore's and the claimant's roles by providing draft job descriptions for them both. The respondent was trying to shape roles for the claimant and Ms Moore to allow them to work together. There was a reasonable and proper cause for much of the conduct complained of by the claimant and considered as a whole, we do not find the conduct relied on by the claimant to have been such that it amounted to a breach of the trust and confidence between her and the respondent.

173. In light of our conclusion that there was no breach of the implied term of trust and confidence, we conclude that the claimant resigned on 23 October 2017

and was not constructively dismissed. Her complaint of 'ordinary' unfair dismissal therefore fails.

Protected disclosures

174. We have next considered whether the claimant made one or more protected disclosure.

175. The claimant relied on disclosures she made to her solicitor on 9 and 11 October 2017. Disclosures made in the course of obtaining legal advice are protected disclosures within section 43D of the Equality Act 2010. However, these disclosures were confidential between the claimant and her solicitor, and the claimant accepted that the respondent would not have been aware of what she discussed with her solicitor. We have therefore focused on the disclosures which the claimant made to the respondent. These were said to have taken place on 19 September 2017 and 2, 3, 12, 18 and 23 October 2017.

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

177. 19 September 2017: We found that in a meeting on this date the claimant raised concerns with Mr Dibden that she felt the consultant recruitment process was being ignored, that the need for consultants to have medical interviews was being questioned and that a doctor had been introduced at a patient open evening as a consultant before the recruitment checks had been completed.

178. 2 October 2017: We have found that the claimant emailed Ms Moore and Mr Dibden following a meeting on this date. She said she would send an email to everyone involved in the recruitment process to remind them of the protocols agreed with CQC for managers and clinicians.

179. 3 October 2017: We have found that the claimant emailed Ms Moore and Mr Dibden on this date, saying that CQC requirements are the same for any person that is allowed to see patients.

180. (The meetings the claimant had with Mr Dibden and Ms Moore on 4 October 2017 and with Mr Dibden on 5 October 2017, while not said by the claimant to be protected disclosures, are nonetheless an important part of the context of the claimant's alleged protected disclosures. We have found that on 4 October 2017 the claimant said that the process which she had put in place for the recruitment of consultants had been demanded by the CQC and should not be adjusted. On 5 October 2017 we have found that the claimant told Mr Dibden that she was worried about avoidance and lack of regard for the recruitment protocols, and the seriousness of allowing a consultant to see a patient without being on-boarded and before due diligence had been completed. She said she was cautious of Ms Moore as she felt she did not respect protocol nor understand governance implications, and that she was driven only by commercial success.)

181. 12 October 2017: We have found that on this date the claimant sent a summary of the recruitment policy to Mr Dibden, Ms Moore and other staff. She said that it applied to both employed and self-employed positions.

182. 18 October 2017: We have found that the claimant sent Ms Moore and Mr Dibden an email on this date, following the patient information evening. However, she did not mention recruitment, regulatory, governance or health and safety issues.

183. 23 October 2017: We have found that in a meeting with Mr Dibden the claimant said she could not continue because of her perception that there had been regulatory breaches in relation to recruitment of clinicians and new services. She said that the recruitment of consultants and provision of new services had not been done according to CQC regulations or the commitments the respondent had made to the CQC and that patient safety and care was potentially being compromised.

184. Having reminded ourselves of the factual findings in relation to each of the alleged protected disclosures and the relevant context, we go on to consider whether the legal tests are met.

185. The information provided by the claimant on 19 September 2017, 2, 3 and 12 October 2017 was not information which in the claimant's belief tended to show that there had been a failure to comply with a legal obligation. We have not found that the claimant said on these occasions that there had been any regulatory breach or other failure to comply with a legal obligation. However, those communications, together with what the claimant said in the meetings of 4 and 5 October 2017, were the background to and the context in which the claimant provided information to Mr Dibden on 23 October 2017.

186. We have found that on 23 October 2017 the claimant disclosed information that she believed tended to show that the respondent was failing to comply with its legal obligations relating to recruitment. We have found that this was a disclosure of information. It does not matter if Mr Dibden was already aware of this information. We go on to consider whether the claimant's belief was reasonable. We have concluded that it was for the following reasons:

    186.1 The claimant said on 23 October 2017 that there had been regulatory breaches and that recruitment had not been done according to what she called the CQC regulations. We have found that by this she was referring to the Regulations.
    186.2 The claimant believed compliance with the recruitment process to be a legal requirement under the Regulations. We have accepted that she believed, as she said in her emails of 3 and 12 October 2017 and in her evidence, that the recruitment process applied to all positions, including non-clinical positions and including people who were employed and self-employed. That belief was reasonable bearing in mind the scope of 'regulated activities' under regulation 3 of the Regulations, which includes activities ancillary to or related to a regulated activity.

186.3 The respondent suggested that the Regulations did not specify exactly what the recruitment process had to involve and therefore a failure to follow the internal recruitment policy was not a failure to comply with a legal obligation. We do not accept this. Regulation 19 requires that recruitment procedures must be established and 'operated effectively'. It is a legal requirement under the Regulations for a provider to operate established recruitment procedures effectively. The claimant reasonably believed that the respondent was not doing this. Schedule 3 lists the information which must be obtained as part of the recruitment process and this includes satisfactory evidence of conduct in previous employment and a full employment history. It was reasonable for the claimant to believe that failures to follow the respondent's established recruitment procedure or to obtain the employment information listed on the recruitment checklist were failures to comply with the respondent's legal obligations under the Regulations.

186.4 The claimant had dealt with the CQC inspection in October 2016 at which the respondent's recruitment procedure had been criticised and she had made the changes to the respondent's procedures which the CQC endorsed in July 2017. The need for compliance with recruitment procedures would have been at the forefront of her mind at the time of the discussions about the recruitment of Ms Moore and the new consultants in July – October 2017.

186.5 Ms Lawrence, the respondent's HR manager, shared the claimant's concerns. After the claimant resigned, Ms Lawrence wrote in strong terms to Mr Dibden about the need to conduct pre-employment checks for Ms Moore and all new employees, and described this as a clinical governance issue.

187. It was also reasonable for the claimant to believe that the information she gave Mr Dibden was in the public interest because a failure to follow the Regulations meant that patient safety and care was potentially being compromised. The Regulations ensure the safety of health and social care provision to the public. It is clearly a matter of public interest if a health care provider is not complying with the Regulations.

188. We conclude that the claimant made a qualifying disclosure to Mr Dibden on 23 October 2017 and that as this was made to her employer, it was a protected disclosure.

Detriments

189. As we have found that the claimant made a protected disclosure, we have gone on to consider whether she was subjected to detriments by the respondent. If we find that she was, the burden shifts to the respondent to show that any detriments we have found were not done on the ground that the claimant had made a protected disclosure.

190. The first stage therefore is to consider whether the claimant was subjected to the alleged detriments which are set out at paragraphs 26.1 to 26.21 in the

issues section above. We reach the following conclusions on each of them (some are addressed together with similar issues).

190.1 (issues 26.1 and 26.11) We have not found that during the period 23 October 2017 to 18 December 2017 Mr Dibden did not reply to the claimant's correspondence, including her requests for an update on their settlement discussions. They had a meeting on 1 November 2017 and exchanged emails on 3 November 2017. They were in regular email contact after that, including about settlement discussions. The claimant was not subjected to these detriments as alleged.

190.2 (issue 26.2) We have found that in an email of 3 November 2017 the claimant asked to be excluded from the management team as she did not want to be part of any new management or strategic plans for the clinic. We find that being excluded from management discussions was not a detriment because the claimant asked to be excluded from them.

190.3 (issue 26.3) We have found that on 3 November 2017 Mr Dibden did share the claimant's email with Ms Moore but that the claimant had not said that it was confidential, private or just between them (as she had done with an earlier email on 8 August 2017). We conclude that as the email was business related and the email did not say that it was private or confidential, it was not a detriment for Mr Dibden to forward it to Ms Moore.

190.4 (issue 26.4) We have found that on 7 November 2017 Mr Dibden asked for an update on the recruitment process for the consultants and Ms Moore asked whether another interview was necessary. Ms Moore wanted personnel-related issues to be left to her and Mr Dibden, and Mr Dibden asked for all the recruitment information to be sent to him and Ms Moore. However, completion of the reference and admitting rights process for the new consultants was included on the list of matters to be dealt with by the claimant in the respondent's letter of 9 November 2017. Asking the claimant to complete the recruitment process (along with a number of other tasks) was not a detriment.

190.5 (issues 26.5, 26.6 and 26.8) We have found that Mr Dibden did not challenge the claimant's competency in his emails of 9 November 2017. Although his tone in the emails was abrupt, we have not found that it was angry, aggressive or unreasonable. We have not found that Mr Dibden unnecessarily copied in other staff to his emails; both Mr Dibden and the claimant copied some of their emails of 9 November 2017 to other staff. Although Mr Dibden and the claimant did exchange a number of emails on 9 November 2017, some of which were out of hours, they were requests for financial or other information which the claimant had agreed to provide. The claimant was not subjected to these detriments as alleged.

190.6 (issue 26.7) We have found that in two emails on 9 November 2017 Mr Dibden told the claimant that he was available for a meeting any time after 1.00am. We did not understand why he had said this. He did not however demand the claimant meet him at that time. While he

asked the claimant about the reasons for the resignation of the chair of the MAC, he did not say that she had caused the resignation. The claimant accepted that it was reasonable for Mr Dibden to ask her about this. The claimant was not subjected to this detriment as alleged.

190.7 (issue 26.9) We have found that in the meeting on 10 November 2017, Mr Dibden referred to the state of affairs in the clinic being worse than he thought, to the lack of procedures and processes and to iincompetent management of the clinic and mismanagement, and that these references were directed at the claimant. She felt shocked and humiliated by the meeting. This was a detriment.

190.8 (issue 26.10) The letter dated 9 November 2017 which was given to the claimant on 10 November 2017 said she would have two months notice. It miscalculated the two month period. It meant to say that her last day of employment would be 18 December 2017. The claimant continued to work from home and in the clinic when requested, until 18 December 2017 which was her last day of employment. Giving the claimant two months notice when three months had been agreed at the meeting on 23 October 2017 was a detriment. (We return below to the question of the claimant's entitlement to the longer notice period.)

190.9 (issue 26.12) The claimant had no involvement with payroll or the salary overpayments but felt that she was being indirectly blamed for the error. We did not see any evidence that this was the case. The claimant was not subjected to this detriment as alleged.

190.10 (issue 26.13) We have found that there were problems around 7 December 2017 with the claimant's access to her work email account and she received an alert that her account was signed into on a different device. Ms Moore explained that there had been a misunderstanding by the respondent's IT provider and this was addressed. There was no evidence that any emails were sent from the claimant's account by someone else. This was not a detriment to the claimant.

190.11 (issue 26.14) We were not able to make a finding as to whether Ms Warnes falsely claimed to be the claimant in calls to HMRC when she was engaged to deal with the respondent's finances. In any event, even if we had made this finding, we would not have found this to have amounted to a detriment to the claimant.

190.12 (issue 26.15) Ms Barney was engaged to investigate the claimant's grievance. A meeting was held with the claimant at which she was allowed to be accompanied. Mr Dibden sent his decision to the claimant on 21 December 2017. The claimant was not offered an appeal and the respondent did not uphold the claimant's grievance. Those were detriments.

190.13 (issues 26.16 and 26.17) The claimant was emailed on 10 December 2017 to say that she was required to attend a fact-finding investigation with Ms Warnes on 13th December 2017. This was not a breach of the Acas code of practice; the code requires employers and employees to deal with issues promptly. In investigating the financial queries brought to its attention by Ms Warnes the

respondent was not spreading mistruths regarding the claimant's alleged misconduct. The claimant was not subjected to these detriments as alleged.

190.14 (issue 26.18) We were not shown any evidence that the claimant requested a reference from the respondent or that the respondent failed to provide a reference. When the claimant raised the question of her reference in her claim form, the respondent's solicitors provided her with a draft of the standard form reference it was proposing to provide. The claimant was not subjected to this detriment as alleged.

190.15 (issues 26.19 and 26.20) These issues relate to the respondent's investigation into allegations that the claimant was overpaid salary. These allegations were made after the claimant's claim was presented on 12 February 2018. Complaints about matters which occurred in June and July 2018 after the claim was presented are not part of the claim.

190.16 (issue 26.21) We have found that in a letter dated 21 December 2017, Mr Dibden told the claimant that it was not professional or appropriate for her to include personal issues in her letter to the CQC notifying her resignation as registered manager for CQC purposes. We do not agree. As the registered manager of the respondent for statutory purposes it was both professional and appropriate for the claimant to raise any concerns she had with the CQC. This was an unjustified criticism of the claimant which called her professionalism into question. This was a detriment to her.

191. We have therefore concluded that the claimant was subjected to four detriments by the respondent, namely:

191.1 (issue 26.9) in a meeting on 10 November 2017, Mr Dibden referred to the state of affairs in the clinic being worse than he thought, to the lack of procedures and processes and to incompetent management of the clinic and mismanagement, and these references were directed at the claimant;

191.2 (issue 26.10) the respondent gave the claimant a letter confirming that her notice period would be two months;

191.3 (issue 26.15) the claimant was not offered a grievance appeal and the respondent did not uphold the claimant's grievance;

191.4 (issue 26.21) in a letter dated 21 December 2017, Mr Dibden told the claimant that it was not professional or appropriate for her to include personal issues in her letter to the CQC notifying her resignation as registered manager for CQC purposes.

192. In light of our conclusions that the claimant made a protected disclosure and was subjected to detriments by the respondent, the burden of proof shifts to the respondent. We need to consider whether the respondent has shown that the detriments to which the claimant was subjected were not done on the ground of the protected disclosure. We have set out our conclusions below.

193. Issue 26.9: In relation to the meeting on 10 November 2017, the respondent said that the claimant was not treated differently to any other employee. We do not agree. We have found that the references to the state of affairs in the clinic being worse than Mr Dibden thought, to the lack of procedures and processes and to incompetent management of the clinic and mismanagement were clearly directed at the claimant. The respondent also said that the claimant was not named in the meeting. This was not correct. The transcript shows that Mr Dibden said at the start of the meeting, 'Starting with the chronology, so as you know [the claimant] resigned for her own reasons on 13 October'. This expressly associated the concerns Mr Dibden was about to raise with the claimant and her resignation.

194. Ms Barney, an independent HR consultant, regarded the meeting as unorthodox. The meeting was a shock to all the staff. They were told in no uncertain terms that their jobs were at risk. It was particularly shocking for the claimant who understandably felt that she was being blamed for the clinic's position. She felt humiliated that this was being said in front of the other staff.

195. The transcript of the meeting records that Mr Dibden said that the process of trying to recruit more consultants was the third 'big heading' and had been somewhere between incompetent and conscious obstruction and that he was deeply frustrated by it. This was a reference to the subject of the claimant's protected disclosure, that is, her insistence that the respondent's recruitment process had to be followed. Mr Dibden also said in the grievance interview that he was frustrated by claimant's reliance on CQC regulations. He felt she had been 'hiding behind CQC requirements'.

196. We conclude that the claimant's protected disclosure of 23 October 2017 materially influenced Mr Dibden's conduct at the meeting of 10 November 2017 and that his conduct at the meeting therefore subjected the claimant to a detriment on the ground of a protected disclosure.

197. Issue 26.10: The letter which Mr Dibden gave the claimant on 10 November 2017 in which she was told that her employment would end on 13 December 2017 (later changed to 18 December 2017) was a detriment because Mr Dibden and the claimant had agreed in the meeting on 23 October 2017 that the claimant would have three months notice. Mr Dibden told Ms Lawrence that he had resiled from this because of 'what he had come to understand since [the claimant's] resignation'. We accept that by this Mr Dibden was referring to the financial issues which had arisen.

198. We conclude that Mr Dibden's decision to give the claimant two months rather than three months notice was prompted by concerns about financial issues which arose after the claimant's resignation and was not materially influenced by the claimant's protected disclosure. The claimant's disclosure was made on 23 October 2017, the same day as Mr Dibden made an offer of three months' notice. If he had been influenced by the protected disclosure in deciding not to give three months' notice, it is unlikely that he would have made the offer in the first place, at the same time as the disclosure.

199. Issue 26.15: Mr Dibden's grievance response letter does not refer to the recruitment process or the concerns the claimant raised in relation to that process. We conclude that, as Mr Dibden said, the claimant was not offered a grievance appeal because he felt there was not course of action that could be taken now that her employment had ended, and that the respondent did not uphold the claimant's grievance because Mr Dibden took a different view to her on the points she had raised. We accept that the failure to offer an appeal and the decision not to uphold the grievance were not materially influenced by the claimant's protected disclosure.

200. Issue 26.21: We have concluded that the comment by Mr Dibden in the letter of 21 December 2017 that it was not professional or appropriate for her to include personal issues in her letter to the CQC notifying her resignation as registered manager for CQC purposes was unjustified criticism of the claimant and amounted to a detriment.

201. The claimant's letter to the CQC referred to her concerns about governance in the context of the recruitment of new consultants. This was the subject of her protected disclosure. We have concluded that the claimant's protected disclosure materially influenced the respondent's treatment of her in this respect.

202. We have therefore concluded that the claimant was subjected by the respondent to two detriments on the ground of having made a protected disclosure, namely Mr Dibden's conduct in the meeting of 10 November 2017 and his description of her CQC resignation letter as unprofessional and inappropriate. The claimant's complaint of breach of section 47B succeeds to this extent.

Automatic unfair dismissal

203. This complaint was withdrawn by the claimant at the hearing.

Breach of contract

204. We have found that the claimant resigned on 23 October 2017. The respondent wrongly treated the claimant as having resigned on 18 October 2017. She received pay during her notice period up to 18 December 2017.

205. The claimant's contractual notice contained in her contract of 4 August 2014 was two months. The contract did not contain a restriction that only written variations were permitted. We have found that the claimant and Mr Dibden reached an oral agreement on 23 October 2017 that she would be entitled to three months' notice, in other words, the notice provision in the written contract was varied by agreement to three months. An agreement was reached on this stand-alone point, even though discussions on the other terms of departure which would apply to the claimant remained ongoing. Mr Dibden confirmed to Ms Lawrence that he had offered a three month notice period to the claimant, and the claimant's email confirmation of the meeting recorded her agreement to this offer.

206. The respondent did not permit the claimant to work the remainder of her notice period. The respondent's failure to permit the claimant to work three months' notice in accordance with the contract as varied in the meeting of 23 October 2017 was a breach of contract. The respondent breached the claimant's contract by not permitting her to work her full notice period and by only paying her for a shorter notice period. The respondent failed to pay the claimant during the period 19 December 2017 to 23 January 2018.

Accrued holiday

207. If the respondent had permitted the claimant to work the full period of notice to which she was entitled, her employment would have terminated on 23 January 2018 rather than 18 December 2018. The claimant would have accrued paid holiday during the period 19 December 2017 to 23 January 2018. The claimant would have accrued 2.8 days holiday during this period.

Jurisdiction – time limits

208. The claimant's employment terminated on 18 December 2017. Acas early conciliation took place from 2 January 2018 to 2 February 2018. The claimant presented her claim on 12 February 2018.

209. A complaint under section 48 of the Employment Rights Act 1996 must be presented within three months of the act of detriment to which the complaint relates. The acts of detriment which we have found breached section 47B occurred on 10 November 2017 and 21 December 2017. The claimant presented her claim within three months of both of these acts (discounting time spent on Acas early conciliation).

210. A complaint of breach of contract must be presented within three months of the termination of employment. The claimant presented her claim within three months of the termination of her employment.

211. The claimant's complaints of breach of contract and detriment contrary to section 47B of the Employment Rights Act 1996 were therefore presented in time.

Remedy

212. We make the following additional findings of fact and reach the following conclusions in relation to remedy issues.

Compensation for protected disclosure detriment

213. Where the tribunal finds that there has been a breach of section 47B of the Employment Rights Act 1996, section 49(2)(b) requires the tribunal to have regard to 'any loss which is attributable to the act, or failure to act, which infringed the complainant's right'.

214. Section 49(3) provides that 'loss' for this purpose will be taken to include (a) any expenses reasonably incurred by the complainant in consequence of the

act or failure to act which is the subject of her complaint, and (b) loss of any benefit which she might reasonably be expected to have had but for that act or failure to act.

215. The tribunal must also have regard to 'the infringement to which the complaint relates', pursuant to section 49(2)(a). In Virgo Fidelis Senior School v Boyle 2004 ICR 1210, EAT held that it was appropriate to adopt the same approach to compensation in whistleblowing detriment claims as in discrimination cases, and that detriment on the ground of a protected disclosure should normally be regarded by tribunals as a very serious breach of an employment right that is equivalent to the right not to be discriminated against. Employment tribunals may make an award for injury to feelings, adopting the general guidelines that apply to discrimination claims. However, the general principle remains that the aim is to compensate and not to punish.

216. In the claimant's case, both acts of detriment occurred after the claimant had already resigned from her employment. No financial losses are attributable to the respondent's breaches of section 47B.

217. The respondent's counsel said that the claimant had not made any claim for injury to feelings in her schedule of loss. We do not agree with this. It is common for claimants not to put a figure for injury to feelings awards in schedules of loss. The claimant says in the narrative section (page 58) that her schedule of loss 'allows for the following elements' and then includes a paragraph stating:

> *"This has affected me personally in many ways both mentally and physically and my self-confidence has been affected."*

218. The claimant was a litigant in person. We conclude that it would be in accordance with the overriding objective, in particular the objective of ensuring that the parties are on an equal footing, to treat this part of the narrative section of the claimant's schedule of loss, where she refers to the effect on her personally, as a claim for an injury to feelings award.

219. The presidential guidance of 5 September 2017 on injury to feelings awards applies to the claimant's claim. The guidance provides updated 'Vento' bands: a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,200 (cases that do not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000.

220. We have found that Mr Dibden's conduct at the meeting of 10 November 2017 had a considerable impact on the claimant. We also need to take into account the fact that the acts of detriment which we have found to have breached section 47B were limited to one meeting and one comment in a letter to the claimant. We have concluded that the appropriate Vento band is the lower band which applies to less serious cases. We conclude that the award should be £4,600, the middle of the lower band. We have assumed that this award will not be taxable as it does not exceed the £30,000

threshold under section 403 of the Income Tax (Earnings and Pensions) Act 2003.

221. There should not be any reduction of the award under section 49(6A) (protected disclosures not made in good faith). We have found that the claimant's disclosure to Mr Dibden on 23 October 2017 was made in good faith. The claimant was genuinely concerned to ensure that the respondent complied with its obligations in respect of the recruitment process. The claimant's position was entirely understandable when considered in the context of the criticisms made by the CQC at the inspection in June 2016 and the work the claimant did to ensure that by 25 July 2017 the CQC's inspectors confirmed that that the relevant regulations were now being complied with.

222. It would not be just and equitable to make any reduction for contributory conduct. We have not found that the claimant caused or contributed to the respondent's acts which constituted detriments contrary to section 47B.

Breach of contract

223. We have found that the respondent breached the claimant's entitlement to notice by not allowing her to work the remainder of her three month notice period (19 December 2017 to 23 January 2018). This is a period of five weeks.

224. The claimant's net weekly pay at the time of the termination of her employment was £896.92 (page 59). Compensation for 5 weeks' net pay is £4,484.60. We have used the net figure on the basis that the breach of contract damages will not be taxable as they do not exceed the £30,000 threshold under section 403 of the Income Tax (Earnings and Pensions) Act 2003.

225. Wages in respect of the notice period can generally be paid in full without mitigation (Norton Tool Co Ltd v Tewson). In any event, we have not found that the claimant took insufficient steps to mitigate her losses during the remainder of the notice period.

226. The respondent made employer's pension contributions for the claimant at the rate of 1% of gross pay (pages 59 and 1303). Her gross weekly pay was £5,579.17 x 12/52 = £1,287.50 (page 1303). The respondent's weekly pension contributions for the claimant were £1,287.50 x 0.01 = £12.88. Contributions for five weeks would have been £12.88 x 5 = £64.40.

Accrued holiday

227. As part of her claim for damages for breach of contract, the claimant is entitled to the pay she would have received for accrued holiday during the five week period from 19 December 2017 to 23 January 2018. Holiday which accrued during this period and which was untaken on termination of employment would have been payable at the rate of £257.50 per day (page 1304). The claimant would have accrued 2.8 days holiday.

228. The claimant would have been entitled to £257.50 x 2.8 = £721.00 pay for accrued untaken holiday. This award is made as part of the award of damages for breach of contract.

Acas Code of Practice

229. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 applies to proceedings set out in Schedule A2, including complaints by employees of detriment under section 48 of the Employment Rights Act 1996 and complaints of breach of contract. Section 207A therefore applies to the claimant's claim.

230. The claimant's claim concerns matters to which the Acas Code of Practice on Disciplinary and Grievance Procedures applies (a grievance complaint and a disciplinary investigation).

231. We have not found there to have been any breach of the code in relation to the disciplinary fact-finding investigation. However, when addressing the claimant's grievance complaint of 14 November 2017, the respondent failed to allow the claimant the opportunity to appeal. This was a failure to comply with the Acas Code of Practice.

232. We conclude that the respondent's failure to follow the Acas Code in this respect was unreasonable, because the appeal is a key stage of the process. We take into account the fact that it may not be straightforward for an employer the size of the respondent to find a suitable person to hear an appeal. There would have been options for the respondent however, such as engaging another independent HR consultant as they did with Ms Barney or asking an external contact of the respondent to hear the appeal. We also take into account the fact that the claimant had left the respondent's employment by the time of the grievance outcome. While there may be circumstances in which it would not be unreasonable for an employer to fail to follow the Acas Code after the employee's employment has ended, we consider that in this case, bearing in mind the length of time taken for the earlier stages, the failure to allow the claimant an appeal in line with the Acas Code was unreasonable.

233. We have therefore considered whether it is just and equitable to increase the claimant's award. We have concluded that it is just and equitable to increase the claimant's award by 10% to reflect the fact that although the respondent complied with some elements of the Acas Code, it failed to offer an appeal and this is a key part of the grievance process as set out in the Code.

Summary of award to claimant

234. The claimant is awarded the sum of £10,857.00, calculated as follows:

Protected disclosure detriment: injury to feelings	£4,600.00	
Breach of contract: pay during	£4,484.60	

remainder of notice period		
Breach of contract: pension contributions during remainder of notice period	£64.40	
Breach of contract: loss of accrued holiday pay	£721.00	
Total before Acas uplift		£9,870.00
10% Acas uplift		£987.00
Total award after Acas uplift		**£10,857.00**

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Employment Judge Hawksworth
Date: 23 December 2020

Sent to the parties on: ...12/1/21.

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For the Tribunal Office