EMPLOYMENT TRIBUNALS

Claimant: Ms T Hall

Respondent: Aneurin Bevan University Local Health Board

Heard at: Cardiff **On:** 14, 15 and 16 July 2021

Before: Employment Judge Brace
Members: Ms J Kiely and Ms L Owen

Appearances

For the claimant: Mr R John (Counsel)
For the respondent: Mr G Pollitt (Counsel)

JUDGMENT having been sent to the parties on 19 July 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Written Reasons

1. This had been a remote hearing which has been consented to by the parties. The form of remote hearing was video by CVP [V].

2. Following early conciliation, that had started on 4 October 2019 and ended on 4 November 2019, the Claimant had filed her ET1 on 31 January 2020 bringing claims of:

2.1 constructive unfair dismissal (s.94 and s.98 Employment Rights Act 1996),

2.2 automatic unfair dismissal (s.103 ERA 1996) and

2.3 detriments due to raising protected disclosures (s.48 ERA 1996).

Preliminary Issues

3. Prior to adjourning for reading time for the Tribunal, the Respondent made an application to adduce some additional documentation that had not been included in the agreed Tribunal Bundle of some 203 pages.

4. The Claimant's Counsel conceded that these documents were relevant although had some concerns regarding the quality and totality of the data included. After further additional documents to support was ordered to be disclosed to the Claimant by the Respondent, all additional documentation was allowed to be included, as relevant to the issues in dispute, with the exception of document that had been numbered [208]. These additional documents were numbered [204-252].

5. References to the hearing Bundle (pages 1-252) appear in square brackets [ ] below.

List of Issues

6. The parties had filed an agreed list of issues with the Tribunal prior to the hearing which was adopted by this Tribunal as the issues for determination arising out of the complaints. Counsel for the Respondent confirmed that it was not conceded that the disclosure relied on was a qualifying or protected disclosure.

7. The Tribunal heard evidence from the Claimant and from the following witnesses for the Respondent:

7.1 Sarah Rogers, ENP
7.2 Claire McCarthy, Consultant Nurse
7.3 Natalie Skyrme , Senior Nurse; and
7.4 Helene Higgs, ENP.

8. All witnesses relied upon witness statements, which were taken as read, and they were all subject to cross-examination, the Tribunal's questions and re-examination.

Assessment of Evidence

9. It is not necessary to reject a witness's evidence, in whole or in part, by regarding the witnesses as unreliable or as not telling the truth. The Tribunal naturally looks for the witness evidence to be internally consistent and consistent with the documentary evidence. It assesses a range of matters including:

9.1 whether the evidence is probable;
9.2 whether it is corroborated by other evidence from witnesses or contemporaneous records of documents;
9.3 how reliable is witness' recall; and
9.4 motive.

10. We considered the Claimant's evidence not to be reliable for the following reasons:

10.1 The Claimant was understandably upset and anxious when she caused the data breach. In addition and shortly after she commenced

her sick leave, she then had to live with the stress and anxiety that would naturally arise from a close relative becoming ill. That this was stressful for her was self-evident and we had concerns about the reliability of her recall as a result;

10.2 This was particularly highlighted during cross-examination of the Claimant. Whilst the Claimant on cross-examination gave live evidence that she had repeatedly told Natalie Skyrme, during the telephone calls between the two during the Claimant's sick leave, that she was stressed as a result of the data breach investigation and not knowing about the disciplinary proceedings, she made little to no reference to such telephone calls in her written evidence. The closest reference she made to such a conversation was at CWS§32, in which she referred to a conversation at the end of August with Natalie Syrme but, put at its highest, the statement refers to a *lack* of conversation relating to the data investigation or disciplinary. She does not say that she expressly asked Ms Skyrme or that she even had dialogue about such issues. Further the Claimant was unable to provide any or any adequate explanation for this omission from her written witness evidence.

11. In contrast, we found the Respondent's witness evidence to be clear and as such, where there was a dispute between the evidence of the Claimant and the evidence of the Respondent's witnesses, we preferred the evidence from the Respondent witnesses.

Findings of Fact

12. The Claimant commenced employment within the NHS in 1988 in an administrative capacity, but subsequently qualified as a nurse, commencing work as an Emergency Nurse Practitioner ("ENP") within the Minor Injuries Unit ("MIU") from 2014 in Ysbyty Ysrad Fawr in 2014. She was employed on terms and conditions set out in a written contract of employment contained in the bundle [78].

13. ENP staff in the MIU worked set shift patterns ending generally at 19:30, 21:30 and 7:40 and the Claimant worked 24 hours per week regularly working two-night shifts between the hours of 19:00 and 07:40, a regular two-night shift per week. Staff nurses worked a slightly different pattern finishing their night shift routinely at 00:30. A receptionist was also employed at the MIU and routinely finished the night shift at 01:00.

14. On 25 March 2019, the Claimant was working a night shift that had started at 19:00 and finished at 07:40 on the following 26 March 2019.

15. The staff nurse assisting also her finished work early that night, at 23:00 on 25 March 2019, as opposed to 0:30 on the morning of 26 March 2019. It is an agreed fact that from 23:00, the Claimant was the only medical practitioner within the MIU.

16. The issue of whether the Claimant was the only ENP on duty from 20:00 is a matter of dispute. The Claimant asserts that the ENPs working the earlier shift, finished work early at 20:00, as opposed to the normal shift end of 21:30 due to staff shortages during the earlier day shifts and asserts that the shift was 'understaffed' that night.

17. We have been provided with a document, known as a Symphony Report, essentially a computerised database of patients requiring the services of MIU at any given time and seen on each shift [209-236]. The Symphony Report included information relating to each patient registered as accessing the MIU services at given times. The time that the patient entered MIU was recorded with the patient details including health issue. The name of the attending clinician and the time that the clinician attended the patient was inputted, by the attending ENP or clinician inputting their personal passwords to access the Symphony Report.

18. This indicated that from 19:00, when the Claimant first commenced work a number of patients were redirected to the emergency department, a patient had been directed to their GP practice, a number did not wait to be seen and a number were admitted to the hospital.

19. The Symphony Report also indicated that ENPs other than the Claimant, namely H Wigg and A Kimche, attended patients after 20:00, a time when the Claimant asserts that she was the only ENP on the MIU as the other ENPs had left shift at 20:00 as opposed to 21:30.

20. The Symphony Report indicated that H Wigg was attending a patient at 20:07 and that A Kimche was attending patients up to 21:16 [236].

21. We found that it was more likely than not that whilst it is possible that ENP Wigg left her shift shortly after 8:00pm, it was also more likely than not that ENP Kimche, the second ENP remained until her shift end at 21:30. Further, whilst we accepted that the shift was a busy shift, with patients wating in excess of 4 and 5 hours to be seen by clinicians, we decline to make findings that the shift was 'understaffed' as such.

22. At some point during the shift, the Claimant dealt with a patient who had suffered a fractured foot. The patient wanted some evidence to demonstrate to her employer that she had received treatment. The Claimant provided them with a letter, a letter that she had printed off from the Symphony System, which was intended to confirm the patient's attendance at MIU and diagnosis, which could be then be provided by the patient to their employer.

23. As the Claimant was leaving the MIU, after finishing her shift later that morning, the receptionist called after her and told her that the

letter the Claimant had printed off from the Symphony System, contained the details, including name, address and date of birth of an entirely different patient, a child who had received treatment from the MIU earlier that day [96]. The patient on realising the error, had contacted the MIU and informed them as much.

24. The Claimant's colleague, another ENP, Sarah Rogers, working the morning shift on 26 March 2019 from 07:00, was made aware of the error by text by the Claimant and subsequently was informed by the receptionist that the Claimant had suggested covering the incorrect address with a sticky label and sending it back to the patient. Sarah Rogers advised the receptionist not to rectify the address in this way but instructed the receptionist to give her the letter and she would deal with it.

25. The patient returned the erroneous letter to MIU between 11am and 12 midday on 26 March 2019 and the letter was handed to Sarah Rogers, the ENP on duty at the time.

26. Claire McCarthy, Consultant Nurse, became aware of the error at that time, being with Sarah Rogers when the letter was given to her.

27. The data breach was reported by Claire McCarthy submitting what the Respondent's refer to as a Datix report, leaving the Claimant's line manager, Natalie Skyrme, Senior Nurse, to investigate the incident who confirmed the details the following day [101].

28. Datix Reports are commonplace within the Respondent Health Board and are generated for a wide range of incidents from data breaches, 'near-misses', violence and aggression through to equipment breakdown. The Datix Reports generate information for risk registers which are then reviewed by over 30 senior leads, including IG Lead and Support Officers and Divisional Nursing Staff, to minimise and manage the risk.

29. On **5 April 2019**, Natalie Skyrme, met with the Claimant to discuss the data error. The meeting was lengthy and whilst is admitted that Natalie Skyrme provided 'reassurance' to the Claimant, and it is agreed requested the Claimant provide a reflective statement ("Reflective Statement") regarding the incident, the exact contents of this discussion remain in dispute.

30. The Claimant's evidence was that whilst sympathetic, Nathalie Skyrme told her that HR had been informed and would be calling the parents of the child to apologise; that it was a serious breach and that her job was in the balance and that she could be invited to a disciplinary. She says that she was told that she would be kept up to date and asked to provide a Reflective Statement.

31. On cross examination, the Claimant accepted that Natalie Skyrme was reassuring.

32. Natalie Skyrme's evidence was that the Claimant was tearful and anxious but that she explained to the Claimant that the issue would need to be escalated to Information Governance within the Respondent and that it would be helpful if the Claimant could prepare an account of her shift when the incident had occurred.

33. We prefer the evidence of Natalie Skyrme and found that the Claimant was told that the matter would need to be escalated to Information Governance and she was asked to write a Reflective Statement and account of what had happened.

34. The following day the Claimant was on annual leave on holiday in Mexico.

35. On 10 May 2019, the Claimant spoke to Natalie Skyrme again regarding the incident. The exact contents of this discussion remain in dispute.

36. The Claimant says[1] that she was told by Natalie Skyrme has as 30 days had passed and nothing had been brought up, the Claimant should consider the matter dropped given that if any disciplinary was going to arise, it would have been brought up by then.

37. Helen Higgs' evidence was that she could only hear one side of the conversation; i.e. she could only hear Natalie Skyrme. She had referred to the Claimant being told that the matter was 'done and dusted' in her witness statement but we accepted her live evidence that the words '*done and dusted'* were not actually used by Natalie Skyrme, but rather words she had decided to use to convey that Natalie Skyrme was reassuring the Claimant not to worry about the disciplinary and that as Natalie Skyrme was reassuring the Claimant, she believed '*it was closed'* as she termed it, rather than Natalie Skyrme had said such words.

38. Natalie Skyrme's evidence[2] was that she accepted that she told the Claimant not to worry but that she needed the Reflective Statement to demonstrate the Claimant's learning and reassured her that there was nothing to worry about. She told her that she needed to speak to Information Governance and if there was anything to report, the Claimant would be contacted as soon as possible.

39. We found that on balance it was likely that this was a conversation intended to reassure the Claimant and that the tenor of the conversation would likely have led the Claimant to the conclusion that there was nothing to worry about.

40. We also found that Natalie Skyrme did not tell the Claimant that the matter had been 'dropped' but rather that it was 'probably dropped'

[1] CWS §21
[2] NSWS§16

(as reflected in the Claimants' subsequent email of 5 June 2019 [120], that she still needed to speak to Information Governance and if there was anything to report, the Claimant would be contacted and she was asked to send in the Reflective Statement to demonstrate the Claimant's learning.

41. We did not find that Natalie Skyrme told the Claimant that the matter had been dropped or would be dropped as a disciplinary issue.

42. The Claimant did not submit her Reflective Statement to Natalie Skyrme until 28 May 2019 [114]. The Claimant relies upon this statement as a protected disclosure [115]. We don't propose to set out the detail of the Reflective Statement but we found it necessary to consider the contents of that.

43. In her Reflective Statement the Claimant also confirmed the flow of patients that day, indicating that when she arrived for her night shift at 19:00 there had been 31 patients wating to be seen and the ENP in charge of the day shift had hand over, advised that they had been struggling to keep up with the high volume of patients to be seen, that this had been escalated to management by the day ENP and that the hospital had advised that they had no staff available to send to MIU.

44. The Claimant had set out in some detail the patients that she had seen that night and explained the discovery of the mistake that she had made in the course of the early hours of the morning in including the patient details which had been brought to her attention by the receptionist as the Claimant was leaving her shift.

45. She also included the wording set out at §ET1 Grounds of Complaint [62] as follows:

'I feel the increasing flux of patients at these times with only one ENP after 21:00 and lone working after 0:30 is unsafe. I also feel it is indicative on reflection of my error, the need to forward this reflective account to all Senior A&E Consultants and Chief Executives of the Health Board to show how unsafe the Department can become with the consistent influx of patients from out of area that are being re-directed from their local A&E departments and advice being given by NHS direct to re-direct to YYF. There needs to be an escalation concerning the welfare of having only one ENP (Lone Working) at night. After in-depth reflection and analysis, if the situation is not monitored and YYF MIU continues to increase in volume at night a serious error could possibly occur if not staffed correctly and the hospital direction signage changed to accurately reflect minor injuries units only'.

46. On 31 May 2019, Sarah Rogers emailed Claire McCarthy and Natalie Skyrme and in the email, she indicated that she was feeling

uncomfortable working with the Claimant stating '*as Tracy is still bad mouthing me about the data protection issue!'* She requested a meeting between her, the Claimant, Claire McCarthy and Natalie Skyrme [121]. At some point that year Sarah Rogers retired from the Respondent and that meeting did not take place.

47. Sarah Rogers believed that the Claimant held her accountable for reporting the breach to management. She did not, during the remainder of her employment with the Respondent, or indeed at any point up to June 2021, prior to this hearing, know that there had been a Datix Report regarding the incident or that the Claimant had submitted a Reflective Statement or indeed that this litigation was on-going. She said as much in cross-examination and we accepted that evidence.

48. On 5 June 2019, the Claimant sent an email to Natalie Skyrme headed "HR investigation of an error made" [120] asking for an update regarding the error. In that email she asked if there was still an investigation open with HR and confirm if it was '*active or closed'*. In that email she also stated the following:

'*I have not received any paperwork or letters informing me of any outcome related to it, or been asked to attend a meeting to discuss my mistake. You informed me that it has probably been dropped during our last conversation. Would you be kind enough to send me written confirmation of this please or let me know if it is on going – not knowing has made me worry'*

49. That email was not replied to immediately as Natalie Syrme was on annual leave herself and so the Claimant followed this up with a further email on 11 June 2019 asking if the investigation was ongoing.

50. Natalie Skyrme responded later that day to advise she had been on annual leave and was waiting for information from Claire McCarthy and would update the Claimant as soon as she could. She apologised for the delay [123]. Whilst not made clear to the Claimant what 'information' was awaited, this was the original erroneous patient letter that was required for Natalie Skyrme to upload and complete the Datix Form.

51. On 11 June 2019 the Claimant's Reflective Statement was uploaded to Datix. The risk rating recorded by Natalie Skyrme was a Grade 3 : that there had been low harm, the letter had been returned and data not disseminated more widely and that she did not expect it to arise again but that it was possible.

52. On 17 June 2019, the Claimant informed the Respondent that she was suffering with stress and unable to attend work on the basis of ill-health. She commenced sick leave from which she did not return.

53. The Claimant gave live evidence on cross-examination that 'within weeks' of her commencing sick leave she was visited by colleagues and she became aware that Sarah Rogers was questioning her professionalism and conduct on shift, including drinking on shift. No witness was called by the Claimant to support this complaint and the Claimant accepted on cross-examination that she did not know what Sarah Rogers had said about her as she had not heard the comments herself.

54. Sarah Rogers denied saying things about the Claimant, in particular that the Claimant may have had an alcohol problem.

55. We accepted that evidence. We therefore found that the Claimant had not proven to us on balance of probabilities that disparaging remarks were made by Sarah Rogers at this or indeed at any time.

56. On 25 June 2019 the Claimant submitted a FIT note for 28 days indicating that she was not fit for work due to 'Stress at work' [199]. A further Fit note was presented dated 31 July 2019 for a further 28 days, again with 'Stress at work' [199].

57. On 15 July 2019, the patient letter was received and uploaded with the Datix Form.

58. Despite that form being uploaded, Natalie Skyrme did not inform the Claimant that she had done this at the time as she did not consider it appropriate with the Claimant was off sick and caring for her father.

59. We accepted this evidence in context of our findings that :

59.1 the Claimant did not repeat her concerns to Natalie Skyrme beyond 11 June 2019; and

59.2 Natalie Skyrme did not know that the Claimant was off with work-related stress.

60. We also accepted that Natalie Skyrme did not know when or if Information Governance would contact her regarding the data breach and that she did not hear back from Information Governance after the Datix Report and letter had been submitted.

61. On 25 July 2019, Natalie Skyrme sent a letter to the Claimant inviting her to a meeting '*to discuss any issues that you may have'* [124]. The letter indicated that the meeting was informal to have an understanding of the requirements that the Claimant may have and how the Respondent could assist in developing a safe and working roster/working environment. The letter was not specific to the Claimant but part of a wider consultation to all MIU staff to engage on changing roster times.

62. The meeting was arranged for 7 August 2019, but the Claimant did not attend, emailing Natalie Syrme and Claire McCarthy on 9 August 2019 indicating that she had only that day received the invite letter. She asked if the meeting could be re-arranged [125]. Again, she raised no issue regarding the data breach and/or actions flowing from that.

63. The meeting was re-arranged for at 12:00 noon on Tuesday, 3 September 2019 [126] by way of letter dated 12 August 2019 and on 12 August 2019, a Fit note from 12 August to 7 September 2019 was obtained by the Claimant [201].

64. On 27 August 2019, the Claimant was also sent a further letter by Natalie Skyrme inviting her to a formal long term sickness meeting in accordance with the Respondent's Sickness Absence Policy on 17 September 2019 [127].

65. At this juncture we would add that whilst it is unhelpful for Fit notes not to be provided to line managers, but to another administration department, particularly in circumstances where the manager is then expected to manage and support the employee during their sickness absence, we accepted Natalie Skyrme's clear evidence that she had not had sight of the Claimant fit notes and that throughout the Claimant's sick leave she believed that the Claimant was off work with stress arising as a result of her father's health.

66. We also accepted Natalie Skyrme's evidence that whilst she had between 3-4 telephone conversations with the Claimant over the course of the Claimant's sickness absence, in none of the these calls did the Claimant tell her that she was off with work-related stress. We accepted her evidence that during these conversations the Claimant talked of her father being unwell and she did not mention the data breach and/or any concerns regarding a potential disciplinary process.

67. The Claimant says in her written evidence that she spoke to Natalie Skyrme towards the end of August 2019 (§32). The Claimant's written evidence was that Natalie Skyrme did not confirm the outcome of the investigation or disciplinary in that conversation.

68. In live evidence, Natalie Skyrme recalled speaking with the Claimant in August and agreed that they did not talk of the data breach or disciplinary potential . As reflected earlier in these written reasons, the Claimant in her written evidence does not state at any time that she expressly asked Ms Skyrme or that she even had dialogue about the data breach and/or in that conversation and on cross-examination we found that the Claimant was unable to provide any or any adequate explanation for this omission from her written witness evidence.

69. As such, we found that whilst the Claimant and Natalie Skyrme did have a conversation in late August, or possibly early September 2019, the issue of the data breach and potential disciplinary was not raised by the Claimant and / or was not discussed.

70. Indeed we found that it was not likely that any time during these conversations did this subject get raised or discussed and that the fact that the Claimant never referred to the issue in her subsequent emails supporting that finding also.

71. At 14:05 on 30 August 2019 the Claimant sent two emails:

71.1 The first confirming that she was feeling ready to return to work and that her sick note would be ending on 'Saturday' [128|; and

71.2 the second, sent to Natalie Skyrme, Claire McCarthy and Sonia Parry, in which the Claimant said she was feeling ready to return to work and had a new sick note, ending Saturday 7 September [130].

72. In that second email the Claimant requested she was placed back on the "off duty" from week commencing 8 September and requested her shifts did not coincide with Sarah Rogers. The Claimant stated she had been informed of some "*very unsavoury discussions*" Sarah Rogers had had with other members of staff about the Claimant including some '*alarming accusations'* as she termed it which had upset her [130].

73. Again the Claimant made no reference to the data breach or raised any queries regarding possible ongoing investigation or action.

74. On 1 September 2019, Natalie Skyrme emailed the Claimant acknowledging the Claimant's email and asking the Claimant to meet with her and Claire McCarthy on 3 September 2019 stating the following: '*There are concerns in your email which I really think we need to catch up about. Claire and I are in YYF on Tuesday. It would be really good if you could come and meet with us? If not I can arrange another date* [129].

75. The Claimant did not attend that meeting but, at 13:21 on 3 September 2019, sent a further email to the three headed 'Back to work' confirming that she had not received the formal letter inviting her to the meeting that day and confirming her address. She referred to her father's health and explained in some detail how the correspondence from the Respondent was being sent to her neighbour. She did not raise the data breach issue or concerns regarding disciplinary.

76. On 16 September 2019 at 10:16, the Claimant emailed Natalie Skyrme confirming that she was unable to attend the sickness meeting organised for the following day [131]. She confirmed that she had a set back and her GP insisted that she was not yet fit for

work. She asked for the meeting to be re-arranged. Again there is no reference to the data breach or disciplinary.

77. The Claimant did not in fact return to work and a further FIT note was obtained by the Claimant that day to cover her absence from 8 September to 21 September 2019 [202]. As a result the long term sickness meeting did not take place on 17 September 2019 and a letter re-arranging this meeting to 24 September was sent to the Claimant [132]. The Claimant emailed expressing gratitude for the change of date [133].

78. On 17 September 2019, the Claimant was informed that she had passed the first stage of the assessment process for the Disability Assessor role and that she was asked to attend an interview on 19 September 2019 [135]. We were unable to make any findings as to when the Claimant had started this application process, there being no documents before us and the Claimant being unable to recollect.

79. On 23 September 2019, the Claimant wrote confirming her resignation from her role at the Respondent giving one month's notice [136/137]. On that letter she confirmed that they would shortly be receiving paperwork regarding her reason for leaving and that she had been offered a position as a Disability Assessor. On 1 October 2019 formal offer from Capita was sent to the Claimant [138]. This was never received and shortly after her employment ended she commenced work with Capita. A role that was significantly better paid that the salary that the Respondent had enjoyed at the Respondent

80. On 4 October 2019 the Datix was closed, the delay arising due to the volume of Datix investigations within the department.

81. Early conciliation commenced on 4 October 2019 and ended on 4 November 2019 and the Claimant filed her ET1 on 31 January 2020.

Submissions

82. The Respondent's Counsel presented written submissions and the Tribunal will not attempt to summarise those submissions but incorporates them by reference. The written submissions were supplemented with some further oral submissions dealing in particular with **Kaur** v **Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 9778 and what the Claimant was now relying on as the 'last straw', submitting that the Claimant had not been able to point to a last straw and that the suggestion in her witness statement at §32 that the conversation in August was the last straw, was not consistent with the Claimant's pleaded case.

83. The Claimant's counsel presented oral submissions only, submitting that behaviours towards the Claimant after she had submitted her

Reflective Statement had changed, highlighting the changes the Claimant asserted, supported her complaints of detriments.

84. With regard to the 'last straw', the Claimant's counsel submitted that this was the Claimant's conversation in August and the failure to provide the Claimant with information regarding the data breach was the operative cause of her resignation, not the receipt of the new role.

85. We were invited to find that there was a course of conduct and a chain of events for the claims to have been brought in time.

The Law

Constructive Unfair Dismissal

86. The parties are agreed on the law and the Respondent's Counsel reflected this in some detail within his written submissions / skeleton which is incorporated into these written reasons and which is not repeated in full.

87. As the Claimant resigned her employment and relies on constructive dismissal, she must establish that she terminated the contract under which she was employed (with or without notice) in circumstances in which she was entitled to terminate it without notice by reason of the Respondent employer's conduct (section 95(1) Employment Rights Act 1996).

88. Lord Denning, in **Western Excavating (ECC) Ltd** v **Sharp** [1978] 1 All ER 713 sets out the approach to constructive dismissal as follows:

'*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. he is constructively dismissed.'*

89. Whilst conduct of the employer must be more than unreasonable, breach of trust and confidence will invariably be a fundamental breach. Lord Steyn in **Malik** v **Bank of Credit**; **Mahmud** v **Bank of Credit** [1998] AC 20 gave guidance for determining if there has been a breach of trust and confidence, when he said that an employer shall not:

'…without reasonable and proper cause, conduct itself in a matter calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

90. The burden of proof is on the employee to demonstrate that the employer's actions have destroyed or seriously damaged trust and confidence or were calculated or likely to do so and that the employer had no proper cause for the actions in question.

Last Straw

91. The claimant needs to establish his decision to resign, on the basis of the 'last straw', which need not in itself be a breach of contract. Dyson LJ in **Omilaju** v **Waltham Forest London BC** [2005] All ER75 said that:

'If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

92. Finally, the breach must cause the employee to resign which is a question of fact for the tribunal based on the evidence before it.

<u>Public Interest Disclosure</u>

93. Section 43B provides as folows:

"(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

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

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

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

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

94. Section 43C provides:

"*Disclosure to employer or other responsible person*

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure
(a) to his employer, or
(b) where the worker reasonably believes that the relevant failure relates solely or mainly to
(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility, to that other person…"

94.1 The disclosure must be of information tending to show one or more of the types of wrongdoing set out at Section 43B. In order to be such a disclosure "*It has to have sufficient factual content and specificity such that it is capable of tending to show one of the matters in subsection (1)"* (**Kilraine** v **London Borough of Wandsworth** [2018] ICR 185). Determining that is a matter for evaluative judgment by the Tribunal in light of all of the facts of the case.

95. Section 43B(1) also requires that in order for any disclosure to qualify for protection, the disclosure must, in the reasonable belief of the worker:

95.1 be made in the public interest, and
95.2 tend to show that one, of the six relevant failures, has occurred, is occurring or is likely to occur.

96. The test is a subjective one, with the focus on what the worker in question believed rather than what anyone else might or might not have believed in the same circumstances. That it is made in the context of an employment disagreement does not preclude that conclusion.

96.1 In terms of time, section 48(3) Employment Rights Act 1996 provides that an employment tribunal shall not consider a complaint unless it is presented before the end of three months beginning with the act or the failure to act to which the complaint relates or, where that act or failure to act is part of a series of similar acts or failures, the last of then or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint o be presented in time.

Automatic Unfair Dismissal – s.103A Employment Rights Act 1996

97. s.103A ERA states that an employee will be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for that dismissal is that the employee made a protected disclosure.

98. An employee will only succeed in a claim of unfair dismissal if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure and a 'principal reason' is the reason that operated in the employer's mind at the time of the dismissal (as per lord Denning MR in **Abernethy v Mott, Hay and Anderson** 1974 ICR 323, CA). If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under s.103A ERA 1996 will not be made out.

99. The approach to the burden of proof in s.103A cases is (**Kuzel** v **Roche Products Limited** [2008] IRLR 530).

Detriment short of dismissal - s47B ERA 1996

100. S.47B ERA 1996 provides that a worker has the right not be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

101. In cases where the 'whistleblower' is complaining that the employer has subjected him to a detriment short of dismissal, the employee has the burden of proving that the protected disclosure was a ground or reason for the detrimental treatment.

102. Section 48(2) provides that the onus is on the employer to show the ground on which any act, or failure to act, was done. If it fails to do so an adverse inference may be drawn against it.

103. In **Fecitt and ors v NHS Manchester (Public Concern at Work intervening)** *ICR 372, CA*, Elias LJ gave guidance that causation is satisfied where the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower. If the protected disclosure materially influences the employer's treatment of the whistleblower, this is sufficient to establish causation for the purposes of s47B ERA 1996.

Conclusions

Protected Disclosure

104. Dealing firstly with the question of whether the Claimant made one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996, we made the following conclusions:

105. By way of her Reflective Statement on 28 May 2019 the Claimant disclosed the following information:

105.1.1 with only one ENP after 21:00 and lone working after 0:30;

105.1.2 the increasing flux of patients at these times was unsafe.

106. Essentially the Claimant raised issues that having only one ENP lone working at night was unsafe and supported that by referencing the mistake that she herself had made.

107. We concluded that this Reflective Statement had sufficient factual content and specificity such that it was capable of tending to show one of the matters in subsection 43(1) in this case that the health and safety of an individual i.e. a member of the public using the NHS services at the MIU, would be endangered i.e. health and safety endangerment.

108. We were also satisfied that the Claimant demonstrated to us that she believed the disclosure tended to show one of more of the listed wrongdoings.

109. Despite the Respondent's misgivings as to the purpose of the content of the Claimant's Reflective Statement, namely to excuse her own misconduct and deflect the blame from herself, we accepted that the unit was busy that night irrespective of our findings on whether she was left without ENP support from 8pm or later.

110. Turning to the question of whether, if the Claimant did hold such a belief, whether it was reasonably held, the Claimant did not have to show that the information did in fact disclose wrongdoing of the particular kind relied upon, it was enough that she reasonably believed that the information tended to show this to be the case. A belief may be reasonable even if it is ultimately wrong.

111. That we declined to find that the shift was 'understaffed' did not mean that we could not conclude that the shift in question was a busy shift and we considered that the Claimant's allegations were supported by the evidence that she had presented and, irrespective of whether those concerns were accurate, we concluded that such a belief was reasonably held by her after that busy shift.

112. Our focus was on whether the Claimant believed the disclosure was in the public interest (not the reasons why the Claimant believed that

to be so). We accepted that the Claimant would have believed that the disclosure was made in the public interest and that this belief was reasonably held following that busy shift, reminding ourselves that this did not have to be the Claimant's predominant motive for making the disclosure.

113. It was our conclusion that the disclosure was both a qualifying disclosure and, having been made to the employer, therefore fell to be a protected disclosure under s.43B.

Detriment – s.47B(1) Employment Rights Act 1996

114. Turning to the detriments complained of:

Disparaging remarks about the Claimant

115. Having found that the Claimant had not proven that Sarah Morgan had made disparaging remarks about the Claimant and her professionalism, it followed that this complaint was not well-founded, the Claimant had not been subjected to this detriment and this complaint is dismissed.

116. In any event, the Claimant had accepted on cross-examination that she did not know why such comments had been made and that Sarah Rogers would not have seen her Reflective Statement (a matter which had also been confirmed by Sarah Rogers in cross-examination). The claim would have therefore failed on that basis even if the factual allegation had been proven.

R began to take proceedings under the LTA Policy

117. We concluded that whilst being subject to formal action under a formal Sickness and Absence Policy could in some circumstances eventually amount to a 'detriment' in the same way as a disciplinary proceeding (as it could eventually lead to the Claimant's dismissal,) this did not constitute a detriment in these circumstances given that this was:

117.1 just a first meeting as part of absence management process after the Claimant had been off for 2-3 months; and

117.2 the purpose of such meeting was to be an opportunity for the manager and the employee to explore the circumstances of the employee's sickness absence and for the employee to raise any matters which they feel may be causing or exacerbating their sickness whether work-related or not.

118. We were not persuaded by the argument from the Claimant, that because the Claimant's sickness absence was, on the face of it, caused by 'Stress at work' it was unreasonable to have implemented the policy at that point. The Claimant had been off work for over 28 days when initially invited and such a meeting would have been an opportunity for the Claimant to have discussed her concerns rather than resulted in an opportunity for the Respondent to shut down those concerns if that was in fact their intention, which we found it was not, for the avoidance of doubt.

119. Further, we accepted the evidence from Natalie Skyrme, that she had not been provided with copies of the Claimant's Fit notes, had not been told by the Claimant that she was off work as a result of stress caused by work, and it follows that we were not persuaded that there was any causal link between the disclosure and the onset of the sickness absence procedure.

Intimating through lack of clarification that there may still be a disciplinary procedure

Did not inform the C of what action would be taken and next steps

Unreasonable refused to confirm that action was being taken or not taken

Sent letters which did not clarify the possibility of disciplinary action

120. Neither Mr Pollitt nor Mr John dealt with these subsequent detriments separately. As Mr Pollitt put it, these allegations were to an extent the same point repeated in largely the same way. We agree and we deal with them together.

121. We accepted that having the threat of disciplinary action hanging as a result of your data breach could constitute a detriment, but we were satisfied that the Respondent, through the evidence of Natalie Skyrme which we accepted, had not at any point told the Claimant:

121.1 That she could lose her job;

121.2 Then told the Claimant that the disciplinary had been 'dropped';

121.3 Then intimated that there may be disciplinary once her Reflective Statement had been received.

122. We agree that the Claimant's case, as argued, has been that Natalie Skyrme in some way wanted to cover up the disclosure, but we did not conclude that this demonstrated that Natalie Skyrme was 'playing down ' the breach where we made findings that the Datix Report was sent to 30+ individuals and irrespective of the risk rating that had been allocated by Ms Skyrme:

122.1 clearly sets out the actual details of the breach;

122.2 attaches a copy of the Reflective Statement of the Claimant which sets out her concerns; and

122.3 a copy of the erroneous letter in question.

123. In addition, the Claimant had repeatedly been asked to meet to discuss not just her sickness absence, but also been asked to separate meetings to discuss working conditions, which would have reduced any potential for this to have been down-played.

124. In contrast, despite the Claimant's live evidence, we found that the Claimant had not repeatedly raised her concerns about the data breach. We accepted Natalie Skyrme's evidence that she had not informed the Claimant that the disciplinary had been 'dropped' on 10 May, simply that she was assuring the Claimant not to worry.

125. Indeed it was our finding that the last time this was raised in writing by the Claimant was 11 June 2019 and that she did not, in any conversation subsequent to 10 May 2019, discuss this issue.

126. We did not conclude that Natalie Skyrme had 'changed her mind' or 'reversed her position' in retaliation to the contents of the Reflective Statement after the Claimant submitted it. This was not a narrative that we had found on the evidence. Rather this was a data breach involving the sensitive personal data of a child, that had to be internally reported and investigated . That the matter may have progressed to formal disciplinary was always a possibility despite the gentle approach with the Claimant that was adopted by Natalie Skyrme.

127. Whilst we concluded that it would have been helpful for Natalie Skyrme to have confirmed to the Claimant that the letter had been uploaded into Datix on 15 July 2019 and possibly explain next steps, we accepted the Respondent evidence that in the circumstances of:

127.1 a sick employee with domestic worries who was not in work,

127.2 Natalie Syrme not knowing that the absence was work-related stress; and

127.3 An employee who had not queried the matter after 11 June 2019;

we concluded that the Respondent had demonstrate the reason for not reporting back to the Claimant and that this was not on the ground that the Claimant had made a protected disclosure:

128. For these reasons and on the same bases, each of these detriments complaints failed and are dismissed.

129. In addition, and for the avoidance of doubt, we did not conclude that the Claimant had been subjected to detriment of '*unreasonable refusal'* in any event. We concluded on the basis of our findings that there had been no further communication on the issue and no further request for confirmation from 11 June, that that there had been no *refusal* to confirm what action would or would not be taken and such a complaint would fail on that basis also.

130. In terms of time limits, we were persuaded that the detriments claims constitutes a series of acts or failures to act by the Respondent under s.48(4) ERA and the claims were brought in time.

Constructive Unfair Dismissal

131. We would repeat our conclusions in relation to the detriments.

132. Whilst we did have a concern that the Claimant did not have 'closure' as such on her concerns regarding her data breach, and that it would have been reasonable for an employer to have communicated to an employee the final outcome of any Datix investigation, we remind ourselves that unreasonable conduct in itself is insufficient and the conduct of the employer must be more than unreasonable (**Malik**).

133. The Claimant has asserted that the 'last straw' was the conversation in August 2019. However we did not find that the Claimant had asked in that conversation for information regarding the data breach and the Claimant has not proven to us the act that she relies on as the last straw.

134. We were not satisfied that the Claimant had discharged the burden of proof to demonstrate that the employer's actions have destroyed or seriously damaged trust and confidence or were calculated or likely to do so and that the employer had no proper cause for the actions in question on the basis of our findings in relation to the protected disclosure detriments.

135. Further we concluded that the Claimant did not resign, partly or wholly in response to any breaches asserted in any event, but because she had a better paid job. The Claimant was willing to return to work in early September as evidenced by the emails sent by the Claimant on 30 August and it was our conclusion that the circumstances which altered that position was in fact her ability to obtain a better paid role.

136. The complaints for both ordinary constructive dismissal and automatic unfair dismissal fail and are dismissed.

Employment Judge R Brace

Date 4 August 2021

REASONS SENT TO THE PARTIES ON 5 August 2021

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FOR THE TRIBUNAL OFFICE Mr N Roche