



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121871/2018

Held in Edinburgh on 24, 25, 26 February and 5 March 2020

Employment Judge: M Sutherland
Members: Ms M Watt
Mr J McCaig

Rachel Wyse

Claimant
In Person

Health Care Improvement Scotland

Respondent
Represented by:
Mr R Davies, Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that –

- The claims for protected disclosure detriment are dismissed
- The claims for direct sex discrimination and harassment related to sex are dismissed
- The Claimant was not constructively dismissed and her claims for unfair dismissal (including automatically unfair dismissal) are dismissed
- The claims for notice pay and redundancy pay are dismissed

REASONS

Introduction

1. The Claimant appeared on her own behalf. The Respondent was represented by Mr R Davies, Solicitor.
2. The Claimant made claims for whistleblowing detriment, direct sex discrimination, harassment related to sex (gender), constructive dismissal, automatically unfair dismissal by reason of whistleblowing, contractual

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redundancy pay and notice pay. Despite use of the phrase “sexual harassment” in her claim form, it was established with the Claimant that she was asserting harassment related to her gender and she was not asserting unwanted conduct of a sexual nature.

3. Closed preliminary hearings on case management were held on 11 January and 17 June 2019. The Claimant made an application to amend her claim which was granted in part at the second preliminary hearing. The Claimant was also allowed additional time to apply for further amendments which she elected not to do.
4. At the final hearing, the Claimant gave evidence on her own behalf. The Respondent led evidence from Peter Wiggins (Medical Reviewer), Anne Laing (Head of People), Margaret Waterston (Director), Alastair Delaney (Director), Robbie Pearson (Chief Executive), and Hamish Wilson (Vice Chair).
5. Both parties were invited to make submissions should they wish to do so. The Respondent made written and oral submissions. The Claimant elected not to do so.
6. The parties had previously agreed the following list of issues (aside from the final issue which was agreed at the hearing):
 - (i) *“Whether the Claimant was constructively dismissed by the Respondent*
 - (ii) *Whether by submitting a grievance dated 21 November 2017 the Claimant made a protected disclosure under Section 43A of the Employment Rights Act 1996 [‘ERA 1996’].*
 - (iii) *Whether the Claimant suffered a detriment due to having made the protected disclosure in so far as she alleges that:*
 - a. *The Respondent did not take action to tackle the actions of their staff that led to actions that formed the subject matter of the disclosure;*
 - b. *She was moved from her substantive post and left in a state of limbo for many months without action being taken to resolve the issues that would have allowed her to return to her post; and*

c. The Respondent failed to take action to find her a suitable alternative post.

- (iv) *Whether the reason or the principal reason for the Claimant's dismissal was that she had made a protected disclosure to the Respondent, and whether accordingly her dismissal was automatically unfair under S103A of the ERA 1996*
- (v) *Whether the Respondent's alleged failure to deal with the Claimant's grievance amount to direct sex discrimination under s13 of the Equality Act 2010 ['EA 2010']*
- (vi) *Whether the claimant is entitled to a contractual redundancy payment...*
- (vii) *Whether the Claimant is entitled to notice pay*
- (viii) *Whether the Claimant was harassed by another i.e. whether they engaged in unwanted conduct related to sex (gender) and whether that conduct had the purpose or effect of violating her dignity, etc"*

7. The parties had also agreed a very brief chronology of events arising between 21 November 2017 and 12 October 2018.
8. The Claimant asserted that she had suffered detriments on the ground that she had made a protected disclosure (her complaint of 21 November 2017) and that these detriments taken together amounted to conduct calculated or likely to destroy mutual trust and confidence entitling her to resign (such that the reason for her constructive dismissal was that she had made a protected disclosure). Accordingly and having discussed matters with the parties, the hearing focused upon events arising in the period between her complaint on 21 November 2017 and her resignation on 21 October 2018.
9. The Claimant initially sought to raise issues arising after her resignation but following discussion she accepted that these issues were not relevant to her complaints.
10. The following initials are used as abbreviations in the findings of fact–

| Initials | Name | Title | Relevance |
|----------|------------------|-------------------------------|-------------------------|
| AD, IO | Alastair Delaney | Director of Quality Assurance | Grievance Investigation |

| | | | |
|-------|------------------|-------------------------------------|------------------------|
| AH | Angela Hay | Operations Team Leader | Colleague |
| ALg | Ann Laing | Head of People and Workplace | Grievance |
| ALn | Anne Lumsden | Head of Development & Learning | Coaching/ support |
| Dr GF | Dr George Fernie | Senior Medical Reviewer ('SMR') | Line manager |
| Dr BR | Dr Brian Robson | Medical Director ('MD') | Head of Service |
| HW | Hamish Wilson | Vice Chair | Grievance Appeal Panel |
| MW | Maggie Waterston | Director of Finance & corp services | Line manager |
| PW | Pamela Whittle | Non-executive Board Member | Grievance Appeal Panel |
| RP | Robbie Pearson | Chief Executive | Grievance |
| SW | Susan Walsh | Non-executive Board Member | Grievance Appeal Panel |

Findings in fact

11. The Tribunal makes the following findings in fact: -

The DCRS

12. The Respondent is a statutory body established to improve health and social care within Scotland. It has a number of directorates and around 400 staff. The Death Certification Review Service ('DCRS') was established in 2014 and has around 20 staff. The DCRS checks the accuracy of a sample of Medical Certificates of Causes of Death (completed by a doctor when someone dies). DCRS is managed through the Medical Directorate of the Respondent and comes under the responsibility of Dr BR, Medical Director who reports to RP, Chief Executive. DCRS employs both clinical and non-clinical staff. The service is led by a Senior Medical Reviewer, Dr GF who is line managed by the Medical Director, Dr BR. There are a team of part-time medical reviewers ('MRs') who undertake the death certificate reviews. The SMR is supported by an Operations Team Manager ('OTM') who reports to him, an Operations Team Leader ('OTL') (AH) and a team of Medical Reviewer Assistants (MRAs). The

service operates from three sites in South Queensferry, Glasgow and Aberdeen.

13. From 3 November 2014 to 12 October 2018 the Claimant was employed by the Respondent as an Operations Team Manager ('OTM') (Band 8a) in the DCRS. It was a new service at the time of her appointment. Prior to her employment with the Respondent the Claimant worked for various GP practices in Edinburgh and Fife. Immediately prior to her employment with the Respondent she worked for 4 years with the Kirkcaldy Health Centre who are an independent contractor providing general medical services to the Health Board.

Redundancy Pay

14. The Claimant's contract of employment provided that she was entitled to a redundancy payment based upon any continuous service with an NHS employer and that "employment with associated or other non-NHS employers is excluded from any redundancy payment arrangement".
15. The Claimant's contract incorporated the terms and conditions set out in the Agenda for Change collective agreement. It sets out the arrangements for redundancy pay "for employees dismissed by reason of redundancy". It provides that: a redundancy situation arises where there is a workplace closure or the requirements for work of a particular kind have ceased or diminished; and continuous service means continuous service with an NHS employer but includes in addition a break of 12 months or less, employment as a trainee with a GP, and "at employer discretion, any period or periods of employment with employers outside the NHS, where these are judged to be relevant to NHS employment".

Grievance/ complaint

16. On 21 November 2017 the Claimant lodged a formal complaint under the Dignity at Work policy in relation to Dr GF (SMR), and three medical reviewers (MRs) (Drs PC, RS and EJ) extending to 15 pages and in summary regarding: the cancellation of a service development day in September 2017; the appointment of a fixed term service coordinator post in May 2015; the breakdown in relationship between Dr EJ, MR and the Claimant in the period to August 2017; the victimisation of AH, OTL by Dr RS, MR in November 2017; the re-appointment of Dr PC, MR in January 2017; the February 2017 survey which had indicated that 5 out of 13 people were sometimes harassed and 1 out of 13 were bullied; the failure of medical reviewers to 'link in' with her as OTM in line with standard operating procedures as raised with Dr GF, SMR in May 2017; capability management of AH, OTL in July 2017; the notes taken of stress at work meetings in August 2017; scope for discussions or mediation between her and Dr RS, MR in October 2017; cancellation of rota meetings with medical reviewers by Dr PC, MR in September 2017; the undermining of her role; a 'them and us' mentality between medical and non-medical staff; the appointment of a part time medical reviewer in October 2017; Dr GF, SMR and other medical reviewers performing aspects of her role; cover issues, service rota and peer reviews in October 2017; issues with values and behaviours Dr PC, MR in October 2017; Dr GF, SMR making unspecified inappropriate remarks about her; the medical reviewers conspiring against her and that a complaint from the MRs was on its way; Dr GF, SMR revising her response to a customer complaint in October 2017; "I have had a long standing suspicion that Dr GF, SMR has been intentionally undermining me and maliciously trying to abuse his power of authority to negatively influence the challenging behaviour from some of the medical reviewers towards me"; in October 2017 Dr GF, SMR advised the Claimant that for some reason some of the doctors just don't like her; Dr GF embarrassed and intimidated her by summoning her in front of staff by simply saying "a word"; Dr GF, SMR and Dr BR, adopted a "command and control" management style; the OTM role not being anywhere near as senior as advertised; the implications of raising this complaint for her current position and any ambitions to further her career within the Respondent and also the wider NHS. (The Claimant did not allege sexual harassment or

harassment on grounds of sex in her complaint.) The Claimant's predominant motive in making the complaint was to protect her own interests. The Claimant genuinely believed that her complaint disclosed information which showed that her mental health and that of colleagues was at risk. The Claimant genuinely believed her complaint was of public interest because the Respondent is a public body whose function is to improve healthcare.

17. On 28 November 2017 a SNOMED coding meeting was arranged by Dr Colin Fischbacher of National Service Scotland. The meeting did not concern the DCRS.
18. On 30 November 2017, and on request by HR, the Claimant provided a summary of her complaint: "my concerns relate primarily to the leadership and management of the service/ medical staff, and the disempowerment of the operations team manager role;" there was a failure by the medical team to comply with the standard operating procedures, the roles/responsibilities flow chart and the job descriptions regarding communication with the OTM; operational or process advice/ decisions, organisation and management, complaints, feedback and improvement, provision of information, and inappropriate behaviours constituting bullying and harassment. She explained she had raised these concerns informally without improvement. "Unfortunately, it has led to a complete breakdown in working relationship between the senior medical reviewer and I, and deterioration in working relationship between a small number of medical reviewers and I". The Claimant did not believe that mediation was appropriate.
19. In November 2017 the Claimant cancelled her pension because she was contemplating resigning. She did not re-start it until she secured alternative employment in March 2019.
20. On 12 December 2017 AL, Head of People offered to appoint an external person to conduct a service review which offer was declined by the Claimant.

21. On 14 December 2017 a complaint was made by Dr GF, SMR and six medical reviewers ('the counter-complaint') which extended to 17 pages and in summary regarding the Claimant: making frequent complaints and criticisms; making verbal attacks; dominating and micro-management approach; dysfunctional behaviour contributing to staff departures; refusal to mediate to resolve issues; adopting a rigid and unyielding approach to Standard Operating Procedures. Prior to receiving her complaint, the counter complainers had already approached the BMA for an informal resolution but their approach changed because she had then raised a formal complaint. The counter complainers "felt unsafe in the work environment and agreed that there was a clear issue with [the Claimant] that required resolution". The counter complaint made five suggested solutions which included consideration that the role of OTM was no longer required (that this was the reality underlying the current conflict). In rejecting a "do nothing" response it stated: "HIS has a quality assurance and governance role across NHS Scotland, as such it has to maintain very high standard of itself and should it become evidence that it cannot even manage its own medical staff properly the reputational damage could make the wider work of HIS much hard to achieve successfully".

Grievance investigation

22. The Chief Executive, RP was appointed to oversee investigation because her complaint concerned the Senior Medical Reviewer and the Medical Director. In December 2017 RP, Chief Executive appointed Dr AMW to investigate and terms of reference were agreed. The Claimant was reassured by MW, Director that her complaint was being investigated as a grievance and not as a service review.
23. On 20 December 2017 Claimant and MW, Director met to discuss: her self-referral to OH; the Claimant working in Corporate Services on a temporary personal development placement pending outcome of investigation; and the provision of counselling support. On 22 December the Claimant met with OH and subsequently advised MW, Director that she wished to take up the offer of a temporary placement. They agreed that the placement would commence after the Christmas break on 8 January 2018. There was no defined job title for

the placement. There were projects for the Claimant to do but she was expected to be self-directing. She was asked to undertake a review of the NHS strategic plan and align this to the Respondent's operational delivery plan. It was initially agreed that the Claimant would also write the DCRS annual report in March 2018 but ultimately she was not required to do so.

24. In January 2018 ALg, Head of People asked the Claimant to move desk away from the HR section, because of the confidential nature of discussions taking place, which the Claimant found humiliating.
25. On 26 January 2018 Dr AMW advised that she was not willing to conduct an investigation but was willing to conduct a review after the investigation had concluded.
26. On 30 January 2018 the Claimant was signed off sick with work related stress. She remained off sick until her resignation. The Claimant was contractually entitled to 6 months full pay and 6 months half pay. During her absence, and particularly in the early stages, she experienced symptoms of anxiety and depression. She also experienced an exacerbation of existing conditions of IBS, migraines and Meniere's Disease. MW, Director was in regular contact with the Claimant from end January to early August. The Claimant was not referred to OH until end May 2018.
27. In February 2018 AD, IO (Director of Quality Assurance), was appointed to conduct an investigation into the grievance and counter-complaint. AD, IO had only been with the Respondent for 5 months and was therefore considered impartial. AD, IO was previously Chief Inspector with Education Scotland for 18 years and was regarded as having significant investigation experience. Terms of Reference were agreed regarding the investigation which were in summary that he was to investigate both the Claimant's complaint and the counter complaint in accordance with the Grievance Policy and the Dignity at Work policy, and he was to consider each of the complaints separately recognising that there was some overlap. AD, IO sought to understand the various perspectives of the complainants.

28. On 13 February 2018 AD, IO held an investigation interview with the Claimant. AD was accompanied by HR and the Claimant by her union rep. The Claimant was asked who might provide additional detail and she identified AH, OLT, three medical reviews ('MRs') and two medical reviewer assistants ('MRA'). During the course of that meeting the Claimant advised HR that on the advice of her union rep she felt that it was not safe for her to return to the DCRS and it was agreed that she could be added to the Redeployment Register. The Claimant's previous role at the DCRS was and continued to be performed by AH, OLT who was acting up to OTM.

Redeployment

29. The Respondent's Redeployment Policy provides that the organisation is committed to the deployment of staff to sustain job security. The policy provides that no vacancies will be advertised internally or externally before consideration is given to staff on the register. All relevant vacancies are sent to staff on the register who then have a period of time to express an interest before the vacancy is then advertised. If a staff member expresses an interest there is a matching exercise between skills and experience (including identification of reasonable training requirements). In order to facilitate the identification of alternative employment, staff and their line manager should complete a staff profile form but no staff role profile was completed for the Claimant. The Claimant was advised of all vacancies which arose in Band 8a (her current band) and Band 7 (the band below) and she was given a period of time to express an interest.
30. AD, IO held investigation meetings with each of the complainers in the counter complaint in February and March. There were delays in the investigation because some key witnesses were absent from work.
31. AD, IO also held an investigation meeting with AH, OLT. By the time AD, IO had taken statements from all eight of the complainers (the Claimant and the seven counter complainers) and AH, OLT, he considered that he had sufficient information in support of the Claimant's complaint and he did not consider it necessary to interview the other MRs and MRAs she had identified as

witnesses. The Claimant has supplied recordings of telephone calls which AD, IO did not listen to because he accepted her own summary of those calls.

32. In March 2018 regular coaching sessions were set up between ALn, Head of Development and Learning, and the Claimant regarding her career development. ALn advised the Claimant to consider whether to involve MW, Director to enable support in implementing the changes.
33. On 3 April 2018 the Claimant was advised of an Improvement Advisor (Band 8a) vacancy. The Claimant replied the same day advising that she was not ready for such a role and was awaiting something more suitable.
34. On 4 April 2018 the Claimant expressed interest in a temporary secondment opportunity with NES but through administrative error her email was not actioned until the closing date had passed (the recipient had left the Respondent).

Grievance outcome

35. On 11 April 2018 the Claimant was advised that AD, IO had finished investigating and was in the process of compiling his report for the Chief Executive but that it was a matter for the Chief Executive as to whether individuals would receive the complete report.
36. The Investigation Report was finalised towards the end of April 2018 and extended to 14 pages. AD, IO tried to address all of the issues in his report and align his recommendations against options in the policies. He found that both complaints related to behaviour over a protracted period rather than any major specific incidents:
37. *"In summary [the Claimant] alleges that Senior Medical Review, Dr GF, and two Medical Reviewers, Dr PC and Dr DR, behaved in such a way as to undermine, belittle and ignore her. This behaviour has gone on for many months, eventually leading [the Claimant] to conclude that there had been a complete breakdown in her relationship with these individuals, and prompting her to make it known that she felt compelled to leave DCRS for another post."*

38. *"In summary the medical reviewers allege that the Claimant had a dominating, micro-management style and approach, that she undertook duties that were not appropriate to her role during the absence of the SMR due to illness, that she was confrontational leading to unfounded complaints against them, and that she was undermining the morale and working atmosphere of DCRS by her actions".*
39. His report made findings in relation to specific events that were raised by both parties. In relation to the complaint submitted by the Claimant he found that there was sufficient evidence to support some of the allegations. He also concluded that the MRs believed that the Claimant's role of OTM was perhaps no longer required and they wished more direct control. In relation to the counter complaint he found that there was some evidence to support some of the allegations. He found that: the work of DCRS had changed since its inception but leadership had not addressed this; there had been issues in the relationships since at least January 2017 but leadership did not take sufficient action to address this which may have avoided the relationship breakdown; there was a conflict between the Claimant requiring strict adherence to the standard operating procedures and the medical reviewers seeking flexibility in the operating procedures in exercise of their professional judgment. He acknowledged that the Claimant considered that the relationship breakdown was irretrievable and would not return to work in DCRS. AD, IO recommended the provision of external support to DCRS "to ensure that any residual relationship and behavioural issues are tackled for the safety and wellbeing of the staff who still work there" and that a review is undertaken of the functioning of DCRS with regard to service demands, role of the Deputy SMR, and the staffing model.
40. The Respondent's Dignity at Work Policy provides that the investigation report should offer one of four potential outcomes: "1. The complaint is not founded; 2. There is insufficient evidence; 3. Evidence and/or nature of complaint justified counselling/ advice, teambuilding, mediation, discrimination awareness training, etc only; or 4. Evidence justifies a disciplinary hearing".

The Respondent's Grievance Policy does not specify potential outcomes other than to state that the manager hearing the grievance will decide the outcome.

41. On 1 May 2018 the Chief Executive, RP wrote to the Claimant enclosing a copy of the Investigation Report but not the transcript of the interviews which were considered confidential. In that letter he described the issues identified as substantial and requiring to be addressed.
42. On 4 May 2018 the Claimant met with RP, Chief Executive. He apologised both for the leadership within DCRS by the Medical Director and the Senior Medical Reviewer which had been insufficient and for the delay in investigating her complaint. He advised that he took these matters very seriously and it was not an acceptable position. The Claimant advised that there are no roles within HIS that interest her and that "if there was not a role in HIS then she would like immediate support to help her move to another role". The Claimant advised that her preference was to remain working within the NHS but out with the Respondent. RP, CE advised that there were a number of potential roles coming up and he hoped she would stay in the organisation. The Claimant said that there had been lots of opportunities to help her to find another role but this hadn't happened until the very end of the process.
43. On 11 May 2018 RP, Chief Executive wrote to the Claimant stating that "insufficient action by those responsible for the leadership of DCRS resulted in a fundamental breakdown in relationships, and...the destructive end result"; "I take the matters identified extremely seriously and view such a situation as unacceptable in HIS"; and that he would be taking steps to address the serious concerns but "it would be inappropriate to share with you the exact steps that are being taken, as they relate to specified individuals". (This comment related to conduct investigations concerning DCRS senior management.) He outlined proposals regarding two Change Manager roles at Band 8a (her level) - both roles were reporting to Directors, were new roles and required to be fully developed.
44. On 15 May 2018 the Claimant met with RP, Chief Executive. The Claimant had advised that she was starting to feel ready to return to work but that her GP

had expressed concerns about the appropriateness of a return to work in the near future. In May 2018 the Claimant was referred to OH by RP, Chief Executive. He explained that they were exploring with her return to potential new roles to be further discussed in June 2018.

45. On 31 May 2018 RP, Chief Executive wrote to Claimant to advise that he had recently met with Dr BR, MD and “expressed in clear terms my deep concern to Dr Robson regarding the situation that was allowed to unfold in the DCRS and what I described as the lack of leadership and operational grip. I also expressed my serious concern related to his apparent lack of interest in your personal welfare, as a substantive employee of the Medical Directorate, and the consequences for you. The investigation report...does make it clear that there was evidence in relation to your complaint. The report makes two broad recommendations (i.e. the need for team development and the need to review the future design of the service) and these issues are being taken forward. I will though be taking further action in relation to the underlying issues that the report has clearly identified. In parallel to this, we are taking forward discussions regarding your future role in HIS. I would like to continue these discussions.” He failed to advise the Claimant of her right to appeal but the Claimant had union representation and was aware of that right.
46. On 31 May 2018 RP, CE referred the Claimant to OH. He stated that “her absence was provoked by behaviours arising from the working environment in DCRS”; the Claimant had indicated that she was starting to feel ready to return to work; and they are discussing new potential roles to allow her to return to work within wider HIS outside DCRS.
47. On 5 June 2018 OH provided a report which stated: “There appear to be ongoing unresolved workplace issues that are currently a barrier to her successfully returning to work...An alternative role has recently been suggested for [the Claimant] within HIS, however further clarity would be required over the terms of the appointment including role, responsibilities, support, demands, control, relationships and salary protection. Additionally, if [the Claimant] is to return to a workplace where she will have contact with colleagues involved with the workplace investigation, it would be essential for

relationships to be re-developed and for issues to be address prior to her commencing any such role. There is otherwise a risk that exposure to this environment would have a detrimental effect on [the Claimant's] health and wellbeing. If adequate resolution of the above is not feasible, it may be appropriate to consider an alternative role within NHS but out with HIS...Providing these issues can be resolved [the Claimant] appears to be fit to resume work activities”.

48. In June 2018 the Respondent sent the Claimant copies of Inspector/ Reviewer roles asking her to make contact to discuss them if she was interested. The Claimant replied advising that she did not have relevant experience and did not express any interest.
49. On 29 June 2018 RP, Chief Executive wrote to the Claimant to advise that they were extending her full sick pay entitlement by one month firstly in recognition of the delay in the investigation and secondly because there was an expectation of her return to work in the short term. He also arranged with ALn, Head of Development & Learning to support a facilitated return to work in light of the OH report. He also advised her that the Quality Assurance Directorate would be establishing a new Child Death Review hub and that a Senior Programme Manager was required to lead on the establishment of the hub reporting to a named director and he sought a discussion with her regarding this role. The Claimant replied on 29 June 2018 advising that she would be absolutely delighted to be part of the team taking this forward and RP, Chief Executive replied advising that they would meet to discuss it after his annual leave. The Claimant considered the role to have similarities to her current role. During the course of his leave the Claimant then wrote to RP, CE to advise that “in order to return to work, relationship need to be repaired, and on order for relationships to be repaired, there needs to be a clear outcome and decision from you regarding my grievance and the counter complaint. If this is not possible in a realistic timescale, OH have recommended that an alternative post out with HIS is sought”.
50. On 10 July 2018 ALn, Head of Development contacted the Claimant with a view to agreeing an appropriate plan regarding her return to work. The

Claimant replied the same day advising that relationships required to be rebuilt before she came back to work and in order to rebuild relationships the Chief Executive must first communicate a clear outcome to the grievance. ALn replied advising that once she is satisfied that she has a clear outcome they can then make arrangements for the relationship building to allow her to return to work.

51. On 27 July 2018 RP, Chief Executive wrote to the Claimant advising that: the investigation report had found evidence which supported her complaint and he had accepted its recommendation; an external service review was being commenced; that team building and facilitation was being undertaken to tackle the underlying issues; and that the leadership/ behaviour issues identified in the report were being addressed. He agreed that return to work parameters required to be discussed ahead of her return to work. He sought to address the specific issues raised regarding reimbursement for travel and working public holidays. He remained committed to ensure that she has an attractive role in HIS which matches her skills and experience. The Claimant replied immediately advising that she still does not have a clear outcome in relation to her grievance, no progress has been made regarding return to work support, or the roles identified, she seeks a role within NHS but out with HIS, and that she would be escalating matters to the board of HIS.
52. On 28 July 2018 KC, HR advised the Claimant of a Specialist Lead role at the National Collaboration Board.

Grievance Appeal

53. On 28 July 2018 the Claimant raised a Grievance Appeal with the interim Chair of HIS, Dr HW. Her grievance appeal raised the following concerns in summary –
 - (i) The grievance has taken 9 months to date (the grievance was lodged in November, the counter complaint in December and the outcome was advised in May)

- (ii) The outcome decision is not clear in the Chief Executive's letters and there is no mention of her right to appeal (she understood that her grievance was upheld and the outcome was level 3 but this was not explicitly stated; she understood that the countercomplaint was partially upheld as a level 2/3 but this was not explicitly stated)
- (iii) The investigation and report were not objective and were not conducted according to Grievance or Dignity and Respect policy – particularly that the investigatory did not conduct investigatory interviews with any of the staff named by her (AD, IO met with one of the six names she provided)
- (iv) The Chief Executive has proposed 3 alternative roles since May 2018 which have not come to fruition.
- (v) Occupational health recommendations have not been taken forward namely clarity regarding the proposed role and relationships to be redeveloped prior to commencing the role.
- (vi) The Respondent was courteously compliant or manipulative in respect of achieving an outcome of teambuilding/ service review.
- (vii) The note of the meeting on 4 May 2018 was a verbatim account rather than actions only.
- (viii) The Respondent attempted to manipulate her into agreeing service review by asking her if she was willing to agree to this in November 2017.
- (ix) Her grievance constituted whistleblowing
- (x) She sought an extension of her full sick pay and support to find an alternative post out with the Respondent.

54. On 1 August 2018 the Claimant advised MW, Director that given there was no progress around any of the proposed roles she was seeking a new role out with the Respondent.

55. On 14 August 2018 OH report advised that the Claimant remained unfit to work because of unresolved workplace issues and advised considering whether identifying a role outside HIS would be feasible.
56. In mid-August the Claimant contacted HR to confirm her notice period and holiday entitlement if she were to resign.
57. On 23 August 2018 the Claimant attended a Grievance Appeal hearing chaired by HW, Vice Chair of the Respondent and heard by SW and PW, both Non-Executive Members of the Respondent, as panel members. The Claimant was supported by her husband. Support for the panel was secured from an external organisation. The Appeal Panel was supported by Linda Lynch, Deputy Director of HR for NHS 24. The note taking was undertaken by Jackie Cunningham, NHS 24.
58. At the start of the appeal hearing HW, Chair advised the Claimant that a copy of the notes would be forwarded to her in due course. At the appeal hearing the Claimant did not have the benefit of union representation. During the course of the hearing the panel members pursued strong challenges to the process adopted on behalf of the claimant – their customary approach was to make potentially controversial statements to relevant witnesses to test their evidence: regarding the hearing of the complaints together: PW stated to MW, Director “this had made no sense, the report had not addressed the issues in the grievance raised by RW”; SW stated to AD, IO that her complaint had not been addressed and “the outcome gave no response to either complaint”; HW, Chair stated that it was important to recognise that there were both personal and organisational issues and “he was not sure this balance had been recognised”. Adopting this approach gave the Claimant hope that her grievance appeal might be upheld.
59. During the grievance appeal hearing AD, IO stated that “the outcome was stronger on RW’s side for a level 2/3 outcome whereas in his view it was a level 3 against the medical reviewers”.
60. During the grievance appeal hearing the Claimant advised that her concern was around how her grievance had been handled and the process not being

followed correctly; she had been told that she would get the pick of band 8a and band 7 roles and she was sent all available jobs; that there had been promises of jobs but that they had not come to fruition; the investigation report said that there had been a breakdown in relationships and that things should have been handled better, and it had recommended teambuilding and a review as an outcome; she had lost all confidence in the Respondent and she was now looking for roles outside HIS; that OH had advised that a role should be sought out with the Respondent.

61. At the end of the appeal hearing HW, Chair advised the Claimant that they would not reach a decision today, they may wish to seek further information, and they would advise her of the outcome in due course.
62. In September 2018 the Claimant's entitlement to sick pay changed from full pay to half pay.
63. On 25 September 2018 RP, Chief Executive wrote to the Claimant to propose that in October she return to work to take up a role in the Child Death Review Hub which he described as a natural fit with her skills and experience which could be accompanied by a phased return and with appropriate mediation with colleagues, and asking her to contact him to discuss how to take this forward.
64. On 27 September 2018 the Claimant contacted HR advising that she understood that she could only be on the redeployment register for a defined period of time. HR replied the same day advising that there was no applicable time limit. On 1 October the Claimant sought clarity as to what the Respondent understood her continued NHS employment to be for the purposes of calculating redundancy pay.
65. On 27 September 2018 HW, Chair issued a grievance appeal outcome letter which responded to the concerns that she had raised as follows:
 - (i) The grievance "should have been concluded in a more timeous and speedy manner".

- (ii) “The outcome letter of 31 May from the CEO did not clearly state an outcome to your complaint... whilst this letter does not state the exact words “partially upheld or upheld,” it is clear that the CEO acknowledged that the report found some evidence in support of your complaint”.
- (iii) There was no evidence that the report was not factually correct and the report was balanced.
- (iv) “The Chief Executive has sought to effect a return to work for you into other senior roles, and...these were roles that had not yet been fully realised...and...the CEO of HIS is still focused on effecting your return to a role within HIS in the near future”
- (v) Occupational health recommendations are being taken forward.
- (vi) There was no evidence that staff involved were courteously compliant or manipulative in reaching an outcome. There was no evidence that the counter complaint was vexatious.
- (vii) “The panel believed that the CEO has acted with positive intention throughout, in what...will have been a complex and challenging time for all parties, and agree that he took personal responsibility as the CEO of HIS for attempts to remedy the situation...”.
- (viii) “We found no evidence to support your claims that you were manipulated into agreeing to the carrying out of a review of the DCRS service ...”.
- (ix) “The Board has a clear policy for the handling of Whistleblowing disclosures. The panel consider your claims of bullying and harassment to have been addressed by the investigation and the subsequent actions taken by the CEO”.
- (x) The issue of extension to her sick pay was a matter for senior management “However the panel would take the opportunity to highlight the fact that the CEO did emphasise his focus on

supporting you to find suitable alternative employment within HIS, and effecting a return to HIS as soon as possible”.

66. The grievance appeal letter stated that “the panel partially upholds your grievance, specifically in relation to the length of time that the process has taken and the degree of confusion caused by the conflation of the complaints from both parties”. The appeal panel were unanimous in their decision and the draft outcome letter was discussed with them.
67. The grievance appeal outcome letter did not include a note of the appeal hearing. The note of the appeal hearing was not deliberately withheld. The note of the appeal hearing was being prepared by the external note taker from NHS 24 who was on sick leave for an extended period. When the note did become available it was provided to the Claimant but this was after she had resigned.
68. On 3 October 2018 the Claimant wrote to RP, Chief Executive and HR regarding the offer of a role in the child death hub and the outcome of her grievance appeal. The Claimant advised that the role was not suitable because of issues with less favourable terms and because the role would involve contact with the doctors who bullied her. (There would be no material contact with that role which was based at a different location). The Claimant advised that the grievance appeal was unsatisfactory because the outcome does not reflect what was said by the panel during the grievance appeal hearing, she has not been given a note of the meeting, the outcome does not address all of her concerns, she had hoped and believed that the Respondent would proactively assist her in finding a role within the wider NHS but it had now become clear that the Respondent was not prepared to do so.

Claimant's resignation

69. On 12 October 2018 the Claimant intimated her letter of resignation to RP, Chief Executive. She advised that she was resigning with immediate effect because the respondent had materially breached her contract of employment and her relationship with the Respondent has irretrievably broken down. In particular: the treatment she received from her line manager Dr GF, SMR and

the MRs, as outlined in her grievance of 21 November 2017; the Respondent failed to create a safe and suitable working environment; she was the victim of harassment on the grounds of sex from Dr GF; the Respondent failed to adequately deal with her grievance; the Respondent failed to communicate to her clearly the outcome of the counter complaint; the Respondent failed to engage with the recommendations of occupational health; the Respondent failed to engage with her and respond to communications regarding potential roles; the Respondent allowed a situation where she has been on the redeployment register for nearly eight months without a role; the grievance appeal hearing failed to deal adequately with her grievance. She also advised that her role is redundant (she not been offered a suitable alternative role) and she is entitled to enhanced contractual redundancy of £81,648 based upon her NHS related service. She advised of her intention to raise a claim of constructive dismissal, sex discrimination, and enhanced redundancy pay.

70. On 17 October 2018 ALg, Head of People replied stating that the Respondent did not accept that they had breached her contract; there had not been a failure to deal adequately with her grievance; she had not previously made allegations of sexual harassment; they have engaged with the recommendations of OH but “the real obstacle to a return was your unwillingness to agree a role to come back to. Your focus has consistently been on the possibility of finding work outside HIS”; she has been contacted about seven separate alternative roles within the Respondent which she has declined; the post of OTM is not redundant and is being carried out by a colleague who is acting up; she has been offered and refused roles; and she is not redundant and her reckonable service is 4 years.
71. As at the termination of her employment on 12 October 2018 the Claimant’s monthly pay with the Respondent was £4,082 (gross) and £2968 (net).
72. The Claimant applied for a number of roles in the period between her resignation and securing alternative employment. One of the roles was in the same building as the DRCS and shared a canteen. On 5 March 2019 the Claimant secured employment as a Programme Manager with NHS Fife at a band higher than her role with the Respondent.

Observations on the evidence

73. The Claimant and the Respondent witnesses gave their evidence in a measured and consistent manner and there was no reasonable basis upon which to doubt the credibility and reliability of their testimony. They answered the questions in full, without material hesitation and in a manner consistent with the other evidence. Their recollections were sometimes hampered by the passage of time, but this did not undermine the credibility and reliability of the evidence they were able to recall.

Relevant LawProtected disclosure detriment

74. Under Section 43A Employment Rights Act 1996 ('ERA') a protected disclosure is a qualifying disclosure made by a worker ordinarily to his employer (Section 43C) or to a prescribed person (Section 43F). The burden of proving a protected disclosure rests upon the Claimant.
75. Under Section 43B ERA 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 relevant wrong doing including failure to comply with any legal obligation and that the health and safety of any individual has been, is being or is likely to be endangered.
76. The disclosure must convey information or facts, and not merely amount to a statement of position or an allegation (*Cavendish Munro Professional Risks Management Ltd v Geduld* 2010 IRLR 38).
77. Section 47B ERA provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. A reasonable worker in their position would or might take the view that they have been put to a disadvantage in the circumstances. An unjustified sense of grievance is not enough (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11). The worker compared with other workers (hypothetical or real) in materially the same circumstances suffered, or would suffer, a disadvantage.

78. A deliberate failure to act is treated as done when it was decided upon - in the absence of evidence to the contrary, when an act is done which is inconsistent with doing the failed act, or at the end of the period when it might reasonably have been expected to do be done.
79. The Claimant must prove that the act or deliberate omission amounting to a detriment. Section 48 provides that it is for the employer to show the ground on which any act, or deliberate failure to act was done. The issue to be determined is whether the protected disclosure materially (more than trivially) influenced the employer's treatment (*Fecitt and Ors v NHS Manchester* [2012] IRLR 64 CA).

Unfair dismissal

80. Section 94 ERA provides the Claimant with the right not to be unfairly dismissed by the Respondent.
81. 'Dismissal' is defined in s 95(1) ERA 1996 to include 'constructive dismissal', which occurs where an employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct (s 95(1)(c)).
82. The test of whether an employee is entitled to terminate their contract of employment without notice is a contractual one: has the employer acted in a way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the contract: (*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221). The issues to be determined are: was there a repudiatory breach of the Claimant's contract; if so, was the breach a factor in the Claimant's resignation; if so, did the Claimant affirm the breach; and if not, did the Respondent have a potentially fair reason for the breach; and if so, was the reason fair in the circumstances.
83. Section 98 ERA provides that it is for the Respondent to show the reason, or principal reason, for dismissal. If the reason for his dismissal is potentially fair, the tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or

unreasonably in treating it as a sufficient reason for dismissing the Claimant. At this stage of enquiry the onus of proof is neutral.

84. Under section 103A ERA an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure. It is for the employer to show the reason, or principal reason, for dismissal (unless the employee does not have sufficient qualifying service). The issue to be determined is whether the reason or principal reason for the acts which constituted the repudiatory breach was that the Claimant made a protected disclosure; what was the reason why the Respondent engaged in repudiatory conduct? (*Salisbury NHS Foundation Trust v Wyeth* [2015] UKEAT/0061, EAT)

Direct Sex Discrimination

85. Section 13(1) of the Equality Act 2010 ('EA 2010') provides: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."
86. Direct discrimination requires consideration of whether the Claimant was treated less favourably than others and whether the reason for that treatment was because of her gender.
87. The Tribunal may consider firstly whether the Claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds.
88. However, and especially where the appropriate comparator is disputed or hypothetical, the less favourable issue may be resolved by first considering the reason why issue.
89. The reason for the treatment need not be the sole reason but it must be an effective cause or have a significant influence on the outcome.
90. Section 136(2) of EA 2010 provides that "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provisions".

91. It is for the Claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has treated the Claimant less favourably because of a protected characteristic ('Stage 1' *prima facie* case).
92. If the Claimant satisfies Stage 1, it is then for the Respondent to prove that the Respondent has not treated the Claimant less favourably because of a protected characteristic (Stage 2).
93. The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (*Laing v Manchester City Council* [2006] ICR 1519). The treatment must be "in no sense whatsoever" because of the protected characteristic (*Barton v Investec* 2003 IRC 1205 EAT). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 *prima facie* case (*Network Rail Infrastructure Limited v Griffiths Henry* 2006 IRLR 865).
94. The tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the reason for the less favourable treatment is fully adequate and cogent (*Laing*).

Harassment related to sex (gender)

95. Under Section 26 of the EA 2010 a person harasses the Claimant if they engage in unwanted conduct related to sex (gender) and the conduct has the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. In deciding whether the conduct has that effect each of the following must be taken into account: the Claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

Contractual redundancy payment

96. A claim for contractual redundancy pay may be brought as a contract claim under Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

Notice pay

97. Under Section 86 of the ERA 1996 an employee is entitled to one week's notice of termination of employment for each year of continuous employment up to a maximum of 12 weeks' notice.
98. A claim for statutory or contractual notice of termination may be brought as a contract claim under Article 3 (above).

Claimant's submissions

99. The Claimant elected not to make submissions but we noted in summary the following from her claim form –
100. Her grievance of 21 November 2017 amounted to a protected disclosure because it contained information tending to show that the Respondent was failing to comply with a legal obligation to provide a safe and suitable working environment
101. Her colleagues engaged in retaliatory conduct in response to the protected disclosure in the form of bullying and harassment on grounds of sex (gender).
102. The failure to deal with her grievance amounted to harassment related to sex (gender)
103. The Respondent acted in an arbitrary and capricious manner after her grievance. She suffered detriment because they failed to take action to tackle the conduct of staff that led to the complaint and as a result of making the complaint she was moved from her substantive post and left in a state of limbo for many months without action being taken to resolve the issues or to find her a suitable alternative post. Her health suffered significantly as a consequence.
104. These detriments taken together amounted to conduct calculated or likely to destroy mutual trust and confidence entitling her to resign. The final straw was the stage 3 hearing outcome letter which did not reflect the hearing and reneged on its promise to produce a hearing note. The reason for her constructive dismissal was that she had made a protected disclosure.
105. Her post was redundant (no one was performing the role after her departure from DCRS). She has 20 years reckonable service and is therefore entitled to redundancy pay of £81,648.40. She was also entitled to 12 weeks' notice pay of £8,220.

Respondent's submissions

106. The Respondent's submissions were in summary as follows –

Constructive dismissal

107. In order to determine whether the Claimant was constructively dismissed the tribunal should ask: what was the most recent act which caused resignation; has the Claimant subsequently affirmed; if not was that act of itself a repudiatory breach; if not was it part of a course of conduct which viewed cumulatively amounted to a repudiatory breach; and if so did the employee resign in response (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978)

108. "So far as concerns of repudiatory conduct, the legal test is simply stated ... It is whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract." (*Eminence Property Developments Limited v Heaney* [2010] EWCA Civ 1168)

Sexual discrimination

109. At the first stage the burden is on the Claimant to show less favourable treatment than a real or hypothetical comparator (*Ayodele v Citylink Ltd* [2017] EWCA Civ 1913). Having a protected characteristic and there being a difference in treatment is not sufficient (*Madarassy v Nomura International Plc* [2007] ICR 867). The claimant must also prove "something more" that a difference in treatment to establish a prima facie case.

Protected disclosure

110. The Respondent accepted that there was a disclosure of information which the Claimant reasonably believed tended to show relevant wrongdoing. The Respondent disputed that the Claimant believed it was made in the public interest (the summary of her grievance focuses only on her own interests) and in any event that belief was not reasonable (in evidence only one other individual was named) (*Chesteron Global Ltd v Nurmohamed* [2017] EWCA Civ 979).

111. A deliberate failure to act only arises where there is a duty or power to act and an expectation is not sufficient (*Abertawe Bro Morgannawg University Health Board v Ferguson UKEAT/0044/13*). The onus is on the Claimant to prove that duty or power. A deliberate failure to act implies choosing not to act in compliance with that duty or power.
112. If the Respondent does not prove the reason for the detriment the claim does not succeed by default but remains a question of fact to be determined (*Ibekwe v Sussex Partnership NHS Foundation Trust UKEAT 72*).

Contractual redundancy pay

113. The burden of proof is upon the Claimant that she was dismissed by reason of redundancy and separately that she had continuous service (the statutory presumptions do not apply to contractual redundancy pay).

Decision

Protected disclosure detriment

114. The Claimant's complaint of 21 November 2017 amounted to a disclosure of information regarding the behaviours of the medical reviewers and gave examples of their "command and control" management style. She described stress at work caused by those behaviours. The Claimant believed that the information tended to show breach of a legal obligation to provide a safe working environment. The February 2017 survey, which she referred to in the complaint, had indicated that 5 out of 13 people in the department felt they were sometimes harassed and 1 out of 13 (the Claimant) felt they were bullied. There was a reasonable basis for the Claimant's belief and this was accepted by the Respondent.
115. The Claimant's complaint referred to behaviours exhibited to others in the department and the effect on them. The Claimant genuinely believed that her complaint disclosed information which showed that the mental health of colleagues was at risk. The Claimant genuinely believed her complaint was of public interest because the Respondent is a public body whose very function is to improve healthcare.

116. Whilst the Claimant's predominant motive in making the disclosure was her own private interests this did not render her belief in the public interest unreasonable. Although the number of colleagues affected was not significant, the nature of their interests were, namely the effect on their mental health. The alleged perpetrators were doctors working for an organisation whose primary purpose was to improve health care in Scotland. There was therefore a reasonable basis for the Claimant's belief that the disclosure was in the public interest. Indeed the outcome of the investigation was that the DCRS required external support "to ensure that any residual relationship and behavioural issues are tackled for the safety and wellbeing of the staff who still work there."
117. The Claimant alleged the following detriments: attempting to manipulate her into a service review; moving her from her substantive role to a personal development placement; failing to speak to her witnesses; failing to communicate clearly the outcome of the complaint; failure to deal adequately with (take action to tackle) the issues raised in her complaint; failing to engage with the OH recommendations; failing to take action to find a suitable alternative post; and the outcome letter of her grievance appeal which did not reflect the hearing and reneged on its promise to produce a hearing note.
118. This list of detriments is wider than those captured in the List of Issues but reflects those alleged in her claim.
119. The Claimant was offered a service review as an option and declined it. There was no reasonable basis upon which it could be inferred that there was an attempt to manipulate her. The offer of a service review did not amount to a detriment.
120. The Claimant was offered a temporary transfer and initially declined it; she then asked the Respondent for that temporary transfer. She was not moved to the personal placement against her will. There was no reasonable basis upon which it could be said that she was moved against her interests. The move to the personal placement did not amount to a detriment.
121. The Claimant provided a list of six witnesses on 13 February 2018 at the investigating officer's request. The investigation officer then interviewed the counter complainers and one of the Claimant's witnesses. The investigation

officer then formed the view that he had sufficient information in support of the Claimant's complaint and that it was not necessary to interview the other witnesses she had identified at his request. Whilst the Claimant may have expected him to interview her other witnesses there was no obligation upon him to do so in those circumstances. There was no evidence of any disadvantage – as to what additional information these other witnesses would have provided and the likely effect of that information on her complaint. A reasonable person in these circumstances would not have regarded his decision as putting them to a disadvantage. In any event the investigation officer provided a reasonable explanation for his decision which was not challenged by the Claimant as unreliable. There was no basis upon which it could reasonably be inferred that the protected disclosure materially influenced his decision not to interview the other witnesses.

122. The Dignity at Work Policy specifies one of four potential outcomes (“1. The complaint is not founded; 2. There is insufficient evidence; 3. Evidence and/or nature of complaint justified counselling/ advice, teambuilding, mediation, discrimination awareness training, etc only; or 4. Evidence justifies a disciplinary hearing”) and that the Claimant will be notified accordingly. (The grievance procedure refers merely to deciding the outcome and notifying the claimant accordingly.) The outcome of her complaint was that there was sufficient evidence to support some of her allegations, and as a consequence there was to be team building, a service review and further action in respect of specific individuals. Although it did not explicitly state this, the Claimant understood (on advice from her union) that outcome number 3 had been adopted. On appeal the Respondent found that the CEO letter failed to use the words “upheld or partially upheld” but the CEO did state that “the investigation report...does make clear that there was evidence in relation to your complaint”. The grievance outcome did communicate with sufficient clarity the outcome of her complaint. The failure to use the words “Outcome number 3” or “partially upheld” did not put the Claimant to a disadvantage. This outcome was apparent from the report and letters and the Claimant understood this. This did not amount to a detriment.

123. The outcome of her complaint was teambuilding within DCRS, a service review of DCRS and investigations in respect of failures by DCRS senior management (the Claimant was advised that steps would be taken in respect of these failures but the details were confidential). The Claimant did not specify any additional steps that ought to have been taken as an outcome to her complaint or explain how the failure to take them put her to a disadvantage (the Claimant was no longer working in within DCRS). There was no failure to deal adequately with her complaint which amounted to a detriment. In any event both the investigation officer and the CEO provided a reasonable explanation as to the reason for the outcome to her complaint which was not challenged by the Claimant as unreliable. There was no basis upon which it could reasonably be inferred that the protected disclosure materially influenced their decisions regarding the outcome of her complaint.
124. The OH report of June 2018 recommended clarity regarding the terms of the new appointment; that if she is to return to a role where should would have contact with DCRS colleagues “ it would be essential for relationships to be re-developed and for issues to be address prior to her commencing any such role”; and “if adequate resolution of the above is not feasible, it may be appropriate to consider an alternative role within NHS but out with HIS”. The OH Report of August 2018 advised considering whether identifying a role outside HIS would be feasible. The terms of the new appointment had been clarified by the CEO, she was not returning to a role that would have material contact with DCRS colleagues but arrangements were being made for relationship building, and the CEO was committed to finding her a suitable role within HIS itself (finding a role within the wider NHS was considered unnecessary). There was no failure to engage with the OH recommendations and the Claimant was not subject to any such detriment.
125. The Claimant asked for the temporary removal from her substantive post within DCRS to be made permanent and she was placed on the redeployment register from February 2018 until her resignation in October 2018. As agreed she was sent all available roles at Band 8a and Band 7 within that time period but she did not express an interest in any of these roles bar one. She expressed interest in a temporary secondment opportunity with NES but

through administrative error her email was not actioned until the closing date had passed. The failure to action her expression of interest amounted to the loss of an opportunity to potentially secure a temporary secondment. This failure put her to a disadvantage but it was not a deliberate failure. In any event the Respondent provided a legitimate explanation for the failure by way of administrative oversight. This explanation was not challenged by the Claimant as unreliable. There was no basis upon which it could reasonably be inferred that the protected disclosure materially influenced the failure to action her expression of interest.

126. In addition to the Band 8a and Band 7 roles, the CEO was in discussions with her regarding three new roles which required to be established (including Senior Programme Manager within the Child Death Review Hub). In September 2018 the CEO offered the Claimant to return to work in October 2018 as the Senior Programme Manager within the Child Death Review Hub which was a natural fit with her skills and experience. Although the Claimant had initially advised that she would be “absolutely delighted” with that role that Claimant subsequently advised that she was unwilling to return to work until there was a clear outcome regarding the complaint and counter complaint and unless relationships have been repaired. The Claimant asserted that whilst she had been on the redeployment register there had been no matching exercise, no redeployment form completed and no review undertaken. A matching exercise is only undertaken when an employee expresses interest in a role. In order to facilitate the identification of alternative employment, staff and their line manager should complete a staff profile form but no staff role profile was completed for the Claimant. The Claimant did not explain how this failure put her to a disadvantage given that she was advised of all roles which arose, she was in receipt of coaching sessions regarding her career development, and given that she was in active discussion with the CEO regarding her redeployment. There was no requirement for a review but the Chief Executive was actively seeking her redeployment. The Respondent did not fail to take action to find her a suitable alternative post and the Claimant did not suffer a detriment in this regard.

127. No outcome was intimated at the grievance appeal hearing itself and accordingly it cannot be said the outcome letter of her grievance appeal did not reflect the hearing. The approach adopted at the appeal hearing, which was to robustly challenge the process, was to her advantage but it also gave the Claimant hope that her appeal might be upheld. The Claimant was advised at the appeal that a note of the hearing would be produced in due course. The Respondent failed to produce a note of the hearing with the appeal outcome letter (issued a month after the hearing). It was to the Claimant's disadvantage not to be able to consider the appeal outcome with reference to the note of the hearing but this was not a deliberate failure – due to circumstances beyond their control there was no note available. In any event the Respondent provided a legitimate explanation for the failure by way of sickness absence of the third party note taker. This explanation was not challenged by the Claimant as unreliable. There was no basis upon which it could reasonably be inferred that the protected disclosure materially influenced the failure to produce the note of the hearing before she resigned.

Direct sex discrimination

128. The Claimant alleged that the failure to deal with her grievance amounted to sex discrimination. There was no evidence that the Claimant had been treated less favourably than the Respondent has treated or would treat a male colleague who brought a grievance. There was no reasonable basis upon which it could be inferred that the alleged failures regarding the management of her grievance arose because she was female. Her claim for direct sex discrimination is accordingly dismissed.

Harassment

129. The Claimant alleged that her colleagues engaged in retaliatory conduct in response to the protected disclosure in the form of bullying and harassment on grounds of sex (gender). The only conduct of her colleagues after the protected disclosure was to lodge a counter complaint rather than proceed informally and to give evidence during the grievance investigation. There was no reasonable basis upon which it could be inferred that the decision to lodge a counter complaint and the decision to give evidence was related to her

gender. In any event the last of such acts occurred in March 2018 would raise issues of timebar.

130. The Claimant also alleged that the failure to deal with her grievance amounted to harassment related to sex (gender). There was no failure to deal with her grievance. There was no reasonable basis upon which it could be inferred that the alleged failures regarding the management of her grievance were related to her gender.

131. Her claim for harassment is dismissed.

Constructive dismissal

132. Constructive dismissal requires a breach of contract by the employer. The breach must be “a significant breach going to the root of the contract” (*Western Excavating*). This may be a breach of an express or implied term. The essential terms of a contract would ordinarily include express terms regarding pay, duties and hours and the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (*Malik v Bank of Credit and Commerce International Ltd [1998] AC 20*).

133. In her letter of resignation the claimant cited: the treatment by the doctors as outlined in her complaint; the failure to deal adequately with that complaint; the failure to communicate clearly the outcome of her complaint; the failure to engage with the recommendations of OH; the failure to engage with her whilst on the redeployment register; and the outcome letter of her grievance appeal which did not reflect the hearing and reneged on its promise to produce a hearing note (the final straw) (indirectly incorporated by reference to her email of 3 October 2018).

134. A final straw need not be unreasonable or blameworthy, but it must in some way contribute to the breach of the implied obligation of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw (*Omilaju v Waltham Forest London Borough Council [2005] IRLR 35*). The failure to produce a note of the hearing with the appeal outcome letter (without explanation as to its delay) did not amount of itself amount to a repudiatory breach (and was not asserted to be) but it was capable of amounting to a final

straw. The appeal outcome letter was issued on 27 September and the Claimant resigned on 12 October and accordingly it was not asserted that the Claimant had subsequently affirmed the contract.

135. It therefore falls to be determined whether the final straw formed part of a course of conduct which viewed cumulatively amounted to a repudiatory breach.
136. The treatment outlined in her complaint occurred prior to 21 November 2017. The Claimant moved out of the DCRS on 8 January 2018. The Claimant asserted that she was subjected to detriments because her complaint amounted to a protected disclosure. She asserted that these detriments taken together amounted to a course of conduct calculated or likely to destroy mutual trust and confidence entitling her to resign. The Claimant asserted the following detriments: attempting to manipulate her into a service review; moving her from her substantive role to a personal development placement; failing to speak to her witnesses; failing to communicate clearly the outcome of the complaint; failure to deal adequately with the issues raised in her complaint; failing to engage with the OH recommendations; failing to take action to find a suitable alternative post; and the outcome letter of her grievance appeal which did not reflect the hearing and reneged on its promise to produce a hearing note.
137. It therefore falls to be determined whether those acts and omissions when viewed cumulatively amounted to a repudiatory breach. Whether there is a breach is determined objectively: would a reasonable person in the circumstances have considered that there had been a breach. As regards the implied term of trust and confidence: *"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of..."* (Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT). The respondent's conduct must be considered as a whole in order to determine whether its effects, judged reasonably and sensibly, were such

that the Respondent demonstrated an intention to no longer be bound by the contract and that the claimant could not be expected to put up with it.

138. Viewed objectively from the perspective of a reasonable person in the position of the Claimant: there was no attempt to manipulate her into a service review; her move to the personal placement was not against her will or her interests; during the appeal process the investigation officer gave adequate explanation for not speaking to her witnesses; the grievance outcome did communicate with sufficient clarity the outcome of her complaint; there was no failure to deal adequately with her complaint (it had been independently investigated by an experienced investigator and recommendations had been made regarding relationship building and a service review and action was to be taken in respect of senior management); the Respondent did not fail to engage with the OH recommendations; and the Respondent did not fail to take action to find a suitable alternative (the only issue being the failure to respond on 4 April 2018 which the Claimant accepted was an administrative error); it cannot be said the outcome letter of her grievance appeal did not reflect the hearing (since no outcome was intimated at the hearing); and the appeal outcome letter did not contain a note of the hearing (because no note of the hearing was available although the Claimant was not provided with an explanation at the time).
139. The course of conduct when viewed cumulatively did not amount to a repudiatory breach. The Respondent did not by their conduct evince an intention not to be bound by the contract. It did not amount to a course of conduct calculated or likely to destroy mutual trust and confidence and accordingly the Claimant was not constructively dismissed.
140. In any event, the Claimant had determined significantly before her resignation that she no longer wanted to be employed by the Respondent. She resigned when she did because she had exhausted the grievance procedure and she had come to believe she was entitled to enhanced contractual redundancy pay based upon 20 years continuous service.

Unfair dismissal

141. The Claimant was not dismissed and accordingly was not unfairly dismissed either under Section 98 or Section 103A. In any event there was no reasonable basis upon which it could be inferred that the reason or principal reason for the alleged detriments (said to constitute the repudiatory breach) was protected disclosure.

Notice pay

142. The Claimant was not dismissed by the Respondent and accordingly has no entitlement to notice of termination. In any event her period of continuous employment was 3 years (her prior employment with the GP practice did not count towards her period of continuous employment under her contract or statute).

Contractual redundancy payment

143. The Claimant was not dismissed by the Respondent and accordingly has no entitlement to redundancy pay. In any event her dismissal could not have been by reason of redundancy because there was no redundancy situation: the DCRS was not closing and the role of OTM was still being performed.
144. Accordingly all her claims fail and fall to be dismissed.

Employment Judge: Michelle Sutherland

Date of Judgment: 17 April 2020

Entered in register: 22 April 2020

and copied to parties