EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs Kim Stevens	AND	Dr Richard Olaiya (In practice as The Estover Surgery)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY BY CVP ON 1, 2, and 3 November 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Miss L Millan of Counsel
For the Respondent: Mr K McNerney of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:
1. The claimant was unfairly constructively dismissed; and
2. The claimant's claims for unfair dismissal and/or detriment arising from protected public interest disclosures and/or for health and safety reasons are all dismissed.

REASONS

1. In this case the claimant Mrs Kim Stevens claims that she has suffered detriment and has been unfairly constructively dismissed, and that the principal reason for this was because she had made protected disclosures and/or for health and safety reasons. The respondent denies the claims.
2. The parties have consented to this matter being determined by an Employment Judge sitting alone pursuant to section 4(3)(e) of the Employment Tribunals Act 1996. The parties also consented to this matter being determined remotely by Cloud Video Platform.
3. I have heard from the claimant. I have heard from the respondent and I have heard from Dr Alan Fitter on his behalf.
4. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence,

both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

5. The respondent Dr Richard Olaiya qualified as a doctor in 1984 and has been in general medical practice for over 16 years. From 2007 until August 2020 the respondent operated and ran the Estover Surgery in Plymouth ("the Surgery") either as a sole practitioner, or relatively recently as a partner with Dr Hamal. The respondent has since retired.
6. The claimant Mrs Kim Stevens joined the Surgery in 2017 as its Practice Manager. The claimant resigned her employment with immediate effect on 24 April 2020 in the following circumstances.
7. The claimant had signed a written contract of employment which describes her job title as Practice Manager, and her duties rather briefly as including "those necessary to maintain the safe and efficient running of the employer in accordance with the relevant legislation in force. The person to whom you are immediately responsible is Dr Richard Olaiya." Clause 19 of that contract headed Working Environment provides as follows: "Our working environment is to be treated with great respect. All visitors to the practice are to be made to feel welcome and you should greet all visitors pleasantly. You are expected to dress appropriately for the work you do and to consider how you represent the employer in the way you present yourself."
8. There was a case management preliminary hearing on 27 April 2021, and Employment Judge Dawson set out the issues to be determined at this hearing in a case Management Order on that date ("the Order"). He summarised the background to this case in the Order as follows: "The claimant was employed by the respondent as a practice manager. The claimant's case is that she became aware that a colleague, CP, was fraudulently completing prescriptions to obtain medication for her child and for herself that had not been properly prescribed. Her case is that when she raised the matter with the respondent, he reacted inappropriately and in such a way as to amount to a breach of contract and causing the claimant to resign. The claimant argues that bringing the matters to the respondent's attention was a protected disclosure and, also, conduct which was protected pursuant to section 100 Employment Rights Act 1996."
9. For the first few years of the claimant's employment the respondent and the claimant got on well, and the respondent was pleased with the claimant's performance. He describes her as having been keen and enthusiastic. The respondent asserts that her capabilities and performance began to decline, which the claimant disputes. It is clear that at her appraisals in January 2018 and November 2019 the respondent gave the claimant very positive feedback and described her in his notes to the November 2019 appraisal as having been "an excellent manager, quite proactive, and very professional …"
10. The relationship between the parties began to sour in early 2020, and this coincided with difficulties with the Care Quality Commission ("CQC"). Following two previous CQC inspections the Surgery had been rated as "Good", but the outcome of CCQ inspection reported in March/April 2020 was "Inadequate". This ultimately had grave consequences for the Surgery because it was put into special measures which included restrictions on the scope of its practice. The background to this deterioration in the relationship between the claimant and the respondent includes the following matters.
11. In May 2017 (just before the claimant joined the Surgery) the Surgery was a partnership of two GPs, namely Dr Hamal and the respondent. Dr Hamal retired at that time leaving the respondent as a sole practitioner. The relevant regulations required the Surgery to notify the CQC of this change, and effectively to re-register with the CQC as a different practice. The respondent did not do this. The claimant asserts that this was not her responsibility because the change occurred before she joined the Surgery. The respondent asserts that the claimant should have done so in the normal course of her duties as Practice Manager after she joined, and that she failed to do so.
12. In any event towards the end of 2019 they CQC notified the claimant that another inspection was imminent, but the claimant did not inform the respondent of this until about two weeks before the inspection took place on 24 January 2020. This gave the respondent limited time to assist in the necessary preparation, and the Surgery failed this inspection and was rated "Inadequate" for a number of reasons. These included failing to prepare the

relevant documents relating to fire safety; buildings insurance; property ownership of the Surgery building; lack of policy records and staff employment details; and lack of mandatory staff training records. The claimant disputes that these were matters which were all within her responsibility as Practice Manager. However, given her job title and her job duties in my judgment these were matters which the respondent (as a clinician) could rightly expect the claimant to have managed efficiently.

13. In addition, in early 2020, a serious matter arose concerning a Senior Receptionist with the Surgery referred to as CP. It eventually became clear that CP had unlawfully issued prescriptions for her children which subsequently resulted in her dismissal for gross misconduct, and her accepting a caution to conclude a Police prosecution. The background to this matter was as follows.
14. As a general principle, it is accepted practice that staff at a doctors' surgery should be registered with the different GP practice, not least in order to avoid potential conflicts of interest. The same applies to children or dependents of staff members. There is no legal obligation to this effect, but both the NHS and the GMC recommend this approach. Dr Alan Fitter, from whom I have heard, is a registered GP who at that time was working for the respondent at the Surgery on two days each week. On 30 March 2020, just as the full enormity of the Covid-19 pandemic was commencing, he overheard CP say words to the effect: "I don't know what I will do as my two young girls need antibiotics all the time". He discussed this comment with another employee, an Advanced Nurse Practitioner, and she indicated that CP's children were in fact registered patients at the Surgery. Dr Fitter was concerned about this and went to see the respondent to tell him of his concerns.
15. The respondent then says that he discussed this concern with the claimant and asked whether CP's children were patients at the Surgery, and the claimant confirmed that they were not. The respondent instructed the claimant to carry out an investigation to get to the bottom of the concerns raised by Dr Fitter and to determine whether or not CP's children were registered as patients at the Surgery. He also asked Dr Fitter to confirm his concerns in writing.
16. Dr Fitter then sent an email to the respondent and to the claimant on 30 March 2020, in which he commented: "I have a very high threshold for antibiotics and would feel it would be a conflict if I was say no to CP. I note the GMC do not recommend we see staff or close relatives to staff." He suggested that his concerns could be "put on the shelf till after this virus clears" but wished for it to be revisited at that stage.
17. The parties differ slightly in their recollection as to the circumstances behind the claimant's investigation. The claimant asserts that she was concerned about Dr Fitter's "seemingly relaxed approach to this issue", and that she searched the patient records for details of CP's children but was unable to find them. She said she had no knowledge of them being registered with the Surgery. The claimant says that the respondent was not in the office on 30 March 2020, but on the following day 31 March 2020 they had a discussion and the respondent confirmed that he did not think that CP's children were registered patients with the Surgery. They had another discussion on 1 April 2020 and the respondent confirmed the same. The claimant then carried out another search, using CP's address rather than her surname, and she found reference to the children's records. The claimant also discovered that CP had been fraudulently completing prescriptions, and that she had been doing so for the previous 12 months. She had been doing this to obtain medication for her child and for herself which had not been properly prescribed.
18. The respondent agrees that they had a discussion on 1 April 2020 during which the claimant confirmed that CP's children were indeed registered with the Surgery. At this stage the respondent directed the claimant to undertake further investigations to determine when they had been registered as patients, what consultations had taken place, whether any clinicians had been seen, and what prescriptions had been issued.
19. The respondent asserts that he also instructed an Administrative Receptionist SN to determine how CP's children had been registered with the Surgery in the first place. This was because the process of registering new patients required an NHS registration form which would then be sent to the Primary Care Support department who would request the relevant paper medical records from the previous surgery before sending them on. SN

prepared a statement dated 27 May 2020 confirming what she had told the respondent, namely that in June 2019 she had received medical records for CP's daughters from their previous surgery and took them to the claimant as Practice Manager to ask what to do. The claimant told her to file the paper records on the Surgery shelves in the normal way.

20. As a result of these developments the respondent began to have more serious concerns about the claimant's performance and conduct. In the first place, claimant was responsible for the management of the Surgery and to follow all relevant policies and protocols but had not done so in this instance. In addition, the respondent was concerned that the claimant had lied to him on 30 March 2020 when she confirmed that they were not patients.
21. The claimant and the respondent met to discuss these matters on 1, 2 and 7 April 2020, and they dispute what occurred at these meetings. The claimant's version of events is in effect that she informed the respondent of her concerns that CP had been fraudulently writing prescriptions for medicines in order to give them to her children, which included sleeping pills, and that her children were accordingly at risk. She says she advised the respondent that these matters needed be reported to the Police and the safeguarding authorities. In reply to this the respondent was concerned about his own reputation and that of the Surgery, and that he aggressively and rudely prohibited her from reporting the matter or taking action against CP. The specific allegations to be determined (as agreed and set out in the Order) are as follows:
22. First, on 1 April 2020, the respondent told the claimant that (i) she should "get CP in and give her a good telling off"; (ii) "a good receptionist is hard to find"; and (iii) she was not to discuss this matter with anyone else.
23. Secondly, on 2 April 2020, "the respondent got very angry and expressed his concern that if this information became public knowledge the respondent's reputation would be ruined. When the claimant reiterated that as there were safeguarding issues here, the matter ought to be reported, the respondent insisted that it would be dealt with internally, and he told the claimant that she was not to do anything without his permission".
24. Thirdly, on 7 April 2020: "The claimant approached the respondent again to confirm that this matter really ought to be reported to the Police and the Safeguarding Team. The respondent got angry once again, saying he did not want to get sued, and did not want himself or the practice to suffer, and refusing to let the claimant even speak to her colleagues for advice."
25. There are no formal minutes of these meetings. The claimant made notes of these meetings several weeks later (after her resignation and when she was considering these proceedings). These notes are not contemporaneous and are not agreed by the respondent. For these reasons I only attach limited weight to them. However, the claimant also had a work diary, in which she made brief contemporaneous notes, and for this reason this evidence appears to be more cogent.
26. With regard to the meeting on 1 April 2020 the claimant's later notes suggest that she informed the respondent that CP had issued 10 prescriptions for herself, and 12 for her daughter and that there was discussion between the parties about "drilling down" to establish who had signed the prescriptions and whether to start the disciplinary process. The claimant also added the note: "Telling off! Good receptionist hard to find! Discuss no one". The claimant's diary note for Wednesday, 1 April 2020 is different, and suggests that the respondent was unhappy when the claimant had cancelled the scheduled Practice Meeting in order to discuss CP and prescriptions for her child, and whether to involve safeguarding and the Police, and that he thought that a "telling off would be adequate". The claimant's diary notes suggest that she wanted to make a safeguarding referral, but the respondent told her to calm down and not to discuss the matter.
27. The respondent's version of events is different. Following Dr Fitter's email on 30 March 2020 the respondent instructed the claimant to investigate whether or not CP's children were registered patients at the Surgery. She reported back on 1 April 2020 at that meeting to the effect that they were registered. The respondent says that he decided that further investigation was required and asked the claimant to find out when the children were registered, what consultations had taken place, which clinicians they had seen, and what prescriptions had been issued.

28. Against this background on balance I find that the meeting on 1 April 2020 was an amicable meeting between the parties. The respondent may well have made the comment that a good receptionist is hard to find, but at this stage it seems to me probable that the respondent's version is more likely, namely that further investigation was required in order to establish the facts and against this background it would be appropriate to suggest that the claimant did not discuss it with anyone. I reject the claimant's assertion to the effect that the respondent knew that there was a serious safeguarding matter at that time and that he prohibited her from reporting it to the authorities. As Practice Manager she was always at liberty to do so if she wished in any event.
29. Turning to the meeting on 2 April 2020, the claimant's notes of the meeting prepared several weeks later suggest that she raised the issue again with the respondent who was concerned that the surgery would get into trouble and that his reputation will be ruined. He is said to have admitted signing prescriptions and that the matter should be dealt with internally without any outside help. The contemporaneous diary note which the claimant prepared on Thursday, 2 April 2020 is different, and it suggests that the claimant referred to a safeguarding issue in connection with CP's children, but that the respondent denied her permission to seek outside help for fear that his reputation would be ruined.
30. The respondent's version is different, and it is to the effect that the claimant was reporting back additional findings at this meeting. Apart from the initial allegation that CP's children were wrongly registered at the Surgery, there was now evidence for the first time to suggest that CP had been self-prescribing medication for her and her children. As accepted by the respondent in paragraph 13 of his witness statement, the claimant reported to the respondent her additional findings to the effect that CP had been self-prescribing medication for her and her children. The respondent denies discussing whether he had signed the fraudulent prescriptions and denies any safeguarding concerns would only be dealt with internally. He says this was an amicable meeting again and they both agreed that further investigation was needed, which is why they met again on the following day 3 April 2020.
31. Against this background I also find that the meeting on 2 April 2020 was an amicable meeting between the parties, to discuss the potentially serious matter which was still being investigated. It makes sense for the respondent to have indicated that the matter was kept internal until the facts are established, and it is simply not the case that the respondent determined not to take any action against CP, because that is inconsistent with the fact that the respondent did subsequently take the necessary action. I do not accept the claimant's version that the respondent admitted signing the legal prescriptions and prohibited the claimant from making any necessary referral in order to protected his reputation. The investigations had simply not yet been concluded.
32. There was then a further meeting on 3 April 2020 at which the parties discussed the matter again and agreed that CP's actions would in all probability constitute gross misconduct if proven. However, both the claimant and the respondent felt that they lacked sufficient HR or employment law expertise and they agreed that the claimant would make contact with ACAS to seek guidance on what to do. The claimant did so on 6 April 2020. This is all consistent with the parties agreeing at this time that there was a potentially serious issue concerning the registration of CP's children at the Surgery; CP's fraudulent completion of prescriptions; and the fact that unauthorised prescriptions and medication might have been used by CP for her children, but that the matter needed to be investigated fully, and a fair process adopted with CP before any decision could be reached as to her dismissal.
33. Turning now to the meeting on 7 April 2020, the claimant's notes prepared some weeks later merely referred to the duty of care and candour and that she (the claimant) needed to do the right thing. There is a comment "get rid of CP, make no repercussions on RO [the respondent]".
34. The claimant's contemporaneous entry records they discussed the matter which became "very heated" and that the respondent instructed the claimant to ask a colleague to print out all the relevant documents. The claimant noted that she refused to cover up for CP and the respondent was concerned about being sued for an example of bad practice.

35. The respondent denies these events, and he suggests that there was no discussion about raising the matter with the Police or safeguarding and that they both agreed that as advised by ACAS the claimant should be suspended upon her return from holiday on 14 April 2020 and that a formal investigation should commence. This is consistent with the fact that Police and/or safeguarding are not mentioned in either of the minutes relied upon by the claimant, and that the claimant commenced the disciplinary investigation partly in the respondent's name and with his authority.
36. However, it may well have been the case as indicated by the claimant that these conversations were beginning to become heated. This is against the background of the onset of the Covid-19 pandemic (which was stressful for everyone, including of course doctors' surgeries), and a CQC inspection which was extremely critical of the Surgery. On the one hand the claimant did not want to be held responsible for the actions of CP while she was the Practice Manager, and the respondent did not wish to be sued for bad practice.
37. Following these discussions with the claimant, the respondent wrote to CP by letter dated 7 April 2020. This was a letter approved by the respondent and signed on behalf of both the respondent and the claimant. The letter invited CP to attend an investigatory meeting on 14 April 2020. As advised by ACAS, that letter made it clear that the meeting was "in no way a form of disciplinary action against you".
38. On about 9 April 2020 the respondent then contracted Covid-19 and became very ill. He was absent from work until the week commencing 27 April 2020. During this time the claimant continued to conduct the investigation against CP, and she took the meeting on 14 April 2020 which went ahead by telephone. During this meeting CP agreed that she had issued prescriptions when she should not have done, and the claimant then decided to suspend CP on full pay. This was confirmed in a letter from the claimant to CP dated 14 April 2020 stating that she was suspended on full pay pending an investigation into an allegation of gross misconduct. On 20 April 2020 she invited the claimant to attend a meeting on 22 April 2020, which again took place by telephone. After that meeting the claimant confirmed to CP that the Surgery was considering dismissal for gross misconduct but that she would need to speak with the respondent before a final decision was made.
39. On the following day 23 April 2020, the claimant then telephoned the respondent who was still on sick leave to discuss the events of the previous day and the disciplinary meeting. The contents of this telephone conversation are disputed. The claimant asserts: (i) the respondent became angry, and stated that "it is my practice and I will make these decisions", and that "I have already told you to keep it internal and not to bring the practice and me into disrepute"; and (ii) the respondent became even more angry and aggressive shouting at the claimant over the phone "Who do you think you are? This is my practice, it's not your job to make these decisions, I have the final say, you do not do anything without my permission."
40. The claimant's note completed some weeks later is very brief and merely records that the claimant telephoned the respondent to discuss his return from illness and the matter concerning CP and that the claimant resigned on 24 April 2020. The claimant's earlier diary note for Thursday, 23 April 2020 suggests that the claimant and the respondent had a telephone conversation concerning an update on CP, to check when he was to return to work, and what to do about safeguarding. The note records that the respondent said words to the effect that it was his practice and it was not the claimant's decision to make; that the matter should be kept internal; that his reputation was ruined with CQC. She notes he became very angry and was shouting out and then she "just hung up."
41. The respondent disputes this version of events. He makes the point that he was still very ill with coronavirus and did not have the energy to shout. In any event he makes the point that the claimant had been instructed to carry out a preliminary investigation only and it was up to him as the employer to decide whether to proceed with the disciplinary case. He confirmed that upon his return, hopefully within the week, he would commence the relevant disciplinary proceedings and that if it became clear that CP had been prescribing medication unlawfully then he would make the necessary external reports.
42. In broad terms I favour the claimant's version of events of this discussion. At this stage CP had already admitted in the investigation process that she had unlawfully completed

prescriptions, which included sleeping tablets for her children. The claimant was concerned for the safety of CP's children. Against the background of the damning CQC report, for which arguably the claimant was largely responsible as Practice Manager, the matter of the legal prescriptions and whether and when reports should be made to the safeguarding authorities was obviously a matter which raised concern. The claimant did not wish to be held responsible for any failings relating to CP. Similarly, the respondent was concerned about his reputation and that of the Surgery.

43. On the balance of probabilities against this background I find that there was a heated exchange between the parties during which the respondent was very angry and shouted at the claimant.
44. The respondent then returned to the Surgery on 27 April 2020 and on his return, he found a letter on his desk which was the claimant's letter of resignation. The letter was dated 24 April 2020 and it stated: "As you read this it will become obvious this is my resignation with immediate effect. It was clear from our telephone conversation yesterday, Thursday 23 April, that we have very different views on how we should deal with key/important matters at the practice. This makes it impossible for us to have a practical working relationship and to continue to work together."
45. The respondent asserts he was shocked by the claimant's resignation and then attempted to contact the claimant by telephone, email, text message, and WhatsApp message, all to no avail. The respondent also tried to make contact with the claimant through local Nurse Practitioners. The claimant did not respond to any of these attempts by the respondent to discuss the matter further with her. On 12 May 2020 the respondent then wrote to the claimant to confirm that he had tried to make contact with the claimant without success and accordingly her resignation was accepted. He invited the claimant to an exit interview, and he requested a statement from the claimant with regard to the ongoing investigation concerning CP, but without reply.
46. Following the claimant's departure, the respondent called a staff meeting and updated all concerned to the effect that the claimant had left, and the CQC report was very damaging. Dr Fitter was at that meeting, as was Charlotte Smith. The claimant asserts that at that meeting the respondent informed various other third parties, particularly Charlotte Smith, that the reason the claimant resigned was because she could not cope with the stress of the role, and that she left him in the lurch." The respondent denies this. That denial is supported by Dr Fitter who was present and who gave evidence to that effect. The claimant was not present at that meeting. For these reasons I reject the allegation and I find that the respondent did not make that comment about the claimant.
47. The investigation against CP continued in the claimant's absence and resulted in CP's summary dismissal for gross misconduct on 10 June 2020. The respondent also assisted in investigations which ensued by the Police, NHS England, and the safeguarding authorities. This is of course inconsistent with the claimant's earlier allegations that the respondent was not prepared to investigate CP and/or to take necessary action with the authorities.
48. The claimant replied to the respondent's enquiries by email dated 26 May 2020 which included the following comments: "I would refer you to our last telephone conversation on 23 April. During this conversation we discussed CP and the appropriate action to be taken and we were clearly in total disagreement … I had made it clear that I felt the practice was not showing the appropriate due diligence and failing in our duty of care to the child who was our patient. Failing to report a safeguarding incident in a proper and timely manner and failing to report a possible prescription crime to the appropriate authorities. At the end of this conversation I felt I had no choice but to resign. I am convinced that this is the right thing to do and stand by my actions to "whistleblow"."
49. Finally, by way of general comment, I make the observation that this was a difficult case to determine because of the conflict of evidence between the parties. I found there to have been inconsistencies and unsatisfactory aspects of each party's case. For example, the claimant's evidence was inconsistent and/or unsatisfactory in the following respects: (i) the claimant told the respondent that she did not know that CP's children were patients at the Surgery even though SN had raised a query with her about this and asked where to put

their relevant medical files; (ii) the claimant's assertion that she resigned because she insisted on reporting CP to safeguarding is not consistent with the reasons given in her resignation letter; (iii) the claimant's actions in seeking advice from ACAS and writing letters either from the respondent or with his approval, and conducting an investigatory meeting with CP before her disciplinary hearing, support the respondent's contention that the claimant agreed to due process being followed and that he never tried to cover the matter up or prohibit reporting to safeguarding; (iv) the claimant's evidence was that the respondent gave her permission to dismiss CP on 7 April 2020, but later she asserted that on 23 April 2020 he refused her permission to do that; and (v) in her capacity as Practice Manager the claimant could (and arguably should) have reported the matter relating to CP's children to the safeguarding authorities at any stage, or alternatively discussed the same with Dr Fitter, but she chose not to do so. It seems much more probable that she had agreed initially to see due process undertaken with regard to the investigation against CP, rather than doing nothing because the respondent prohibited her from doing so.

50. Similarly, the respondent's evidence was inconsistent and/or unsatisfactory including in the following respects: (i) there were a number of clear inaccuracies in the respondent's own statement. He said that he been a sole practitioner from 2007 to 2020 when in fact he had a partner namely Dr Hamal for some years until 2017; (ii) in addition, the respondent had not informed the CQC about this when he was required to do so; (ii) the respondent claimed to have been at work on 30 March 2020 but agreed under cross-examination that this was a Monday and he did not work on Mondays; (iii) the respondent asserted the had spoken with Dr Fitter and asked him to send his email of 30 March 2020 after he had spoken to him, when Dr Fitter had not been in the practice on Tuesday, 31 March 2020, by which stage the email of 30 March 2020 had already been sent.
51. The above findings of fact were made against this background, and where there seemed to be doubt, my findings reflected what most probably happened, bearing in mind the background of a poor CQC report and the effect that would have on the Surgery; the deteriorating relationship between the parties; the clear evidence of Dr Fitter who had no particular reason to favour either party; and such documents as were contemporaneous and to which I was referred.
52. Having established the above facts, I now apply the law.
53. Constructive Unfair Dismissal
54. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.
55. If the claimant's resignation can be construed to be her dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
56. I have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT; and Palmanor v Cedron [1978] IRLR 303.

57. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "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 his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
58. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
59. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.
60. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".
61. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."
62. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an

employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465.

63. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.
64. The claimant also relies upon Palmanor v Cedron as authority for the proposition that unacceptable verbal abuse by manager is behaviour found to amount to a breach of the implied duty to maintain trust and confidence
65. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
66. The basis of the claimant's constructive unfair dismissal claim is set out in the Order. The claimant relies upon a breach of the express term of her contract of employment in clause 19 to the effect that "Our working environment is to be treated with great respect." She also relies upon a breach of the implied term relating to trust and confidence. The allegations of breach of contract are as follows.
67. First, on 1 April 2020, the respondent told the claimant that (i) she should "get CP in and give her a good telling off"; (ii) "a good reception it is hard to find"; and (iii) she was not to discuss this matter with anyone else.
68. Secondly, on 2 April 2020, "the respondent got very angry and expressed his concern that if this information became public knowledge the respondent's reputation would be ruined. When the claimant reiterated that as there were safeguarding issues here, the matter ought to be reported, the respondent insisted that it would be dealt with internally, and told the claimant that she was not to do anything without his permission".
69. Thirdly, on 7 April 2020: "The claimant approached the respondent again to confirm that this matter really ought to be reported to the Police and the Safeguarding Team. The respondent got angry once again, saying he did not want to get sued, and did not want himself or the practice to suffer, and refusing to let the claimant even speak to her colleagues for advice."
70. Fourthly, on 23 April 2020: (i) the respondent became angry, and stated that "it is my practice and I will make these decisions", and that "I have already told you to keep it internal and not to bring the practice and me into disrepute"; and (ii) the respondent became even more angry and aggressive shouting at the claimant over the phone "Who do you think you are? This is my practice, it's not your job to make these decisions, I have the final say, you do not do anything without my permission."
71. For the reasons set out in my findings of fact above I do not accept these allegations, nor that the content of these discussions is as asserted by the claimant. However, I do accept the claimant's assertions that the conversations were heated on both 7 April 2020 and 23 April 2020, and that the respondent shouted at the claimant, and particularly so on 23 April 2020. This was against the background of difficulties with the CQC report, with the claimant concerned to avoid responsibility for CP's actions, and the respondent's concern about his reputation and that of the Surgery. Their approaches as to how to deal with the issues concerning CP had differed, and in her resignation letter the claimant made it clear that their differing views made it impossible to continue with a practical working relationship. This followed a heated exchange on 23 April 2020 at the end of which the respondent shouted at the claimant to such a degree that she ended their telephone call.
72. I do not accept that this is a breach of an express term in the claimant's contract of employment to the effect that: "Our working environment is to be treated with great respect". This was a general comment followed by the encouragement to treat all visitors

will respect. In my judgment the provision is merely encouragement for respectful behaviour and common sense rather than an express term.

73. However, I do find that the respondent's behaviour towards the claimant by shouting at her on 7 April 2020 and to a greater degree on 23 April 2020 amounts to a repudiatory breach of the implied term that an employer will not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The claimant relies upon Palmanor v Cedron as authority for the proposition that unacceptable verbal abuse by a manager is behaviour found to amount to a breach of the implied duty to maintain trust and confidence.
74. Applying Meikle, Abbey Cars and Wright, the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation. I find that the breach of the implied term of trust and confidence as committed by the respondent was an effective cause of the claimant's resignation without necessarily being the predominant, principal, major or main cause. The claimant accepted that repudiatory breach of contract without delay, and I find that her resignation can be construed to be her dismissal, and that she was therefore constructively dismissed.
75. The respondent has sought to argue in paragraph 37 of its Grounds of Resistance that if there was such a dismissal then it would be fair and reasonable in all the circumstances of the case by reason of misconduct and/or some other substantial reason. Whereas it might well be the case that some responsibility for the damaging CQC report lies with the claimant in her capacity as Practice Manager, no such issues were pursued at this hearing as potentially fair reasons for the claimant's dismissal. Even bearing in mind the size and administrative resources of this respondent, I do not accept that the claimant's dismissal was fair and reasonable in all the circumstances of the case.
76. Accordingly, I find that the claimant was unfairly dismissed.
77. Protected Public Interest Disclosures
78. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that 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.
79. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it 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.
80. Under section 103A of the Act, an employee is to 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.
81. Under section 47B of the Act, 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.
82. Under section 48(2) of the Act, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
83. I have considered the cases of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT; Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436 Fecitt and Ors v NHS Manchester [2012] ICR 372 CA Kuzel v Roche Products Ltd [2008] ICR 799 CA; Blackbay Ventures Limited t/a Chemistree v Gahir

UK/EAT/0449/12/JOJ; Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] EWCA Civ IDS 1077 p9; Underwood v Wincanton Plc EAT 0163/15 IDS 1034 p8 Parsons v Airplus International Limited EAT IDS Brief 1087 Feb 2018 Ibrahim v HCA International Ltd [2019] EWCA Civ.

84. The statutory framework and case law concerning protected disclosures was helpfully summarised by HHJ Eady QC in Parsons v Airplus International Limited UKEAT/0111/17 from paragraph 23: "[23] As to whether or not a disclosure is a protected disclosure, the following points can be made - This is a matter to be determined objectively; see paragraph 80 of Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.
85. [24] "As for the words "in the public interest", inserted into section 43B(1) of the ERA by the 2013 Act, this phrase was intended to reverse the effect of Parkins v Sodexho Ltd [2002] IRLR 109 EAT, in which it was held that a breach of legal obligation owed by an employer to an employee under their own contract could constitute a protected disclosure. The public interest requirement does not mean, however, that a disclosure ceases to qualify for protection simply because it may also be made in the worker's own self-interest; see Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] IRLR 837 CA (in which the earlier guidance to this effect by the EAT ([2015] ICR 920) was upheld).
86. In whistleblowing claims the test of whether a disclosure was made "in the public interest" is a two-stage test which must not be elided. The claimant must (a) believe at the time that he was making it that the disclosure was in the public interest, and (b) that belief must be reasonable. See Ibrahim v HCA International Limited [2019] EWCA Civ 2007.
87. The statutory framework and case law concerning protected disclosures was also summarised by HHJ Tayler in Martin v London Borough of Southwark (1) and the Governing Body of Evelina School UKEAT/0239/20/JOJ. He referred to the dicta of HHJ Auerbach in Williams v Michelle Brown AM UKEAT/0044/19/00 at para 9: "it is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."
88. The claimant's claim, as set out under the Order, is as follows. The disclosures relied upon by the claimant are her informing the respondent on or around 1 April 2020, 2 April 2020, and 7 April 2020 about the activities of CP (specifically her fraudulently completing prescriptions in order to take medication for her child and herself that had not been properly prescribed). The claimant asserts that these were protected public interest disclosures and that these were the sole or principal reason for the treatment which led to her resignation. The claimant repeats the allegations relied upon for her constructive unfair dismissal claim. The claimant also repeated these allegations for the purposes of her detriment claim, together with one more allegation of detriment, namely: "[did the respondent] inform various other third parties, being Charlotte Smith that the reason the claimant resigned was because she could not cope with the stress of the role, and that she left him in the lurch."
89. For the reasons set out in the findings of fact above, I do not accept the claimant's version of events with regard to these alleged disclosures. The discussions on 1 April 2020 related to whether CP's children were registered with the Surgery. These were questions raised by Dr Fitter, and was not information relayed by the claimant, which in any event did not indicate any breach of a legal obligation. I find that there was no protected public interest disclosure at that stage.

90. On 2 April 2020 (as accepted by the respondent in paragraph 13 of his witness statement) the claimant reported to the respondent her additional findings to the effect that CP had been self-prescribing medication for her and her children. That was clearly information which the claimant gave to the respondent to the effect that a criminal offence had occurred and/or the health and safety of individuals (particularly CP's children) was endangered. I accept the claimant's evidence that she believed that this information was in the public interest because it is in the public's interest to know that unqualified staff at doctors' surgeries should not be preparing fraudulent prescriptions. That was a reasonable belief to hold. In addition, the claimant believed that a criminal offence had been committed and/or there was a breach of legal obligations, and/or a risk to health and safety. This too was a reasonable belief to hold.
91. I find that this was a disclosure of information which satisfied each of s 43B(1)(a),(b) and (d) of the Act. The disclosure was made to the claimant's employer such as to satisfy s43C(1)(a) of the Act. I therefore find that the claimant made a protected public interest disclosure on 2 April 2020. To the extent that this information was repeated on 7 April 2020, I find that there was also an identical disclosure on 7 April 2020.
92. However, I do not find that the public interest disclosures made were the reason or principal reason for the claimant's dismissal. Although the claimant had raised the matter of reporting the matter at that early stage, effectively they agreed to conduct an investigation to try to establish the facts before proceeding further. The claimant did not tender her resignation following the disclosures relied upon, and did not assert in her resignation letter that they were in any way the reasons for her resignation. The reason for the claimant's resignation was the subsequent behaviour of the respondent when he shouted at her such as to undermine the trust and confidence between them. Applying Fecitt, I do not find that these disclosures materially influenced the respondent's treatment of the claimant (in the sense of more than trivially).
93. I therefore dismiss the claimant's claim that her dismissal was automatically unfair by reason of section 103A of the Act.
94. For the same reasons I dismiss the claimant's claim that she suffered the detriment alleged by reason of having made these protected public interest disclosures. In addition, the final detriment relating to criticism of the claimant at the staff meeting after her resignation, is dismissed because I have found that this did not occur.
95. Health and Safety
96. Section 44(1A) of the Act provides: "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that - (b) in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.
97. Section 44(3) provides that for the purposes of section 44(1A)(b) whether steps which a worker took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.
98. Section 100(1) of the Act provides: "an employee who is dismissed shall be regarded for the purposes of this Part is unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that – (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or others from the danger."
99. Section 100(2) provides: "for the purposes of subsection 1(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time."
100. The claimant's claim, as identified in the Order, is to this effect: Was CP, in fraudulently obtaining sleeping tablets and other prescription medication for herself and her child, a circumstance of danger? Secondly, had the claimant, in circumstances of danger which she reasonably believed to be serious and imminent taken appropriate steps to protect others in danger by making the disclosure set out above? Thirdly, was the bringing

of those things to the respondent's attention the principal reason for the treatment which led to the claimant's resignation?

101. In my judgment this claim is misconceived. The claimant's evidence is to the effect that her concern for health and safety was that of the health and safety of CP's children who might have been taking (or made to take) prescription medication which had not been prescribed by a medical practitioner. That is obviously a serious issue and the health and safety of CP's children could well have been at risk. The claimant is not to be criticised for being concerned about their health and safety.

102. However, this was not a workplace issue in the sense that they were not at the claimant's workplace, and in any event I have rejected the claimant's argument that the alleged detriment and/or dismissal which she suffered were because she had allegedly threatened to report the circumstances to the Police and/or safeguarding authorities. The parties agreed to carry out appropriate investigations, and the respondent subsequently dismissed CP and reported the matter to the relevant authorities. In any event, the claimant as Practice Manager could (and arguably should) have reported the matter to the relevant authorities at any time. I reject the argument that the claimant suffered detriment and/or was dismissed because she had taken appropriate steps to protect others in danger.

103. Accordingly, I dismiss the claimant's claims under sections 44 and 100 of the Act.

104. This hearing was to determine liability only in the first instance, and a further hearing will now be listed to determine the appropriate remedy, to include whether there should be any reductions in potential compensation applying sections 122 and 123 of the Act and Polkey principles.

105. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 51; a concise identification of the relevant law is at paragraphs 54 to 65, 78 to 87 and 96 to 99; how that law has been applied to those findings in order to decide the issues is at paragraphs 66 to 76, 88 to 94 and 100 to 103 .

Employment Judge N J Roper
Dated: 4 November 2021

Judgment sent to parties: 29 November 2021

FOR THE TRIBUNAL OFFICE