EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/41 05960/201 7

Held in Glasgow on 11, 15, 18, 19, 20, 21, 22 June and 23 July 2018

Employment Judge: F Jane Garvie
Members: Mr R McPherson
Mr P O'Donnell

Mrs Susan Hunter — **Claimant**
Represented by:-
Mr R Miller - Director

Forth Valley Health Board — **Respondent**
Represented by:-
Mrs L Ewart - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claim should be dismissed.

E.T. Z4 (WR)

REASONS

Background

1. In her claim, (the ET1) presented on 14 November 2017 the claimant alleges that she was constructively unfairly dismissed. She also makes a protected disclosure and alleges that she had been victimised. She also seeks loss of earnings, pension earnings loss and alleges breach of contract. The details of her claim were set out in a Paper Apart to the ET1.

2. The respondent submitted a response, (the ET3) on 21 December 201 7. The parties were informed that there would be a Preliminary Hearing which was held on 26 January 2018 before Judge Frances Eccles. She issued a Note dated 30 January 2018. By e-mail of 18 February 2018 Mr Miller provided a document entitled, "STATEMENT OF CLAIM Outlining detrimental treatment due to Public Disclosure and contributory breach of contract"

3. This was copied to the respondent and arrangements were made for a further Preliminary Hearing by way of a Telephone Case Management Discussion. By e-mail of 15 March 2018 Mrs Ewart provided a response from the respondent to the document from Mr Miller.

4. There was then a further Preliminary Hearing by way of Telephone Conference Call on 11 April 2018 after which Judge Eccles issued a Note dated 18 April 2018 and issued to the parties on 3 May 2018.

5. Arrangements were then made for the Final Hearing and Notices to that effect were issued dated 12 May 2018.

6. By e-mail of 25 May 2018, Mrs Ewart requested that the Hearing should be split so that the Final Hearing would deal with the merits and a Remedy Hearing would be fixed thereafter in the event that the claim succeeded. Her e-mail indicated that this was a joint application. Judge Muriel Robison directed that the request for remedy to be separated had been granted.

7. There was an application to discharge the first two days of the Hearing by Mr Miller which was opposed by Mrs Ewart.

8. By e-mail dated 8 June 2018 Employment Judge Mark Whitcombe directed that the application had been refused.

The Final Hearing

9. A joint bundle of documents was prepared and a Chronology was also provided.

10. At the start of the Final Hearing on 15 June 2018 discussion took place as to whether there should be an Order to prevent disclosure of identities of certain individuals to the public. This was in terms of Rule 50(3)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). An Order was made in relation to one individual. It then became apparent that other individuals' identities should also not be disclosed and so a further Order was issued on 15 June. Subsequently, on 19 June 2018 another Order was made in relation to one further individual.

11. The claimant gave evidence as did one witness on her behalf who was referred to as Q.

12. For the respondent, there were two witnesses these being the individual referred to as C and a second individual who is referred to as Y.

Findings of Fact

13. The Tribunal found the following essential facts to have been established or agreed.

14. The claimant commenced employment with the respondent as a District Nurse with effect from 7 July 1986. A contract was issued, (pages 62/69). In

terms of that contract there is a Clause entitled, "Temporary Transfer" which is set out as follows :-

> "19. TEMPORARY TRANSFER
>
> Subject to the exigencies of the service, you may be required from time to time to undertake duties outwith your 'normal place of employment'. Any excess travelling expenses incurred, may be reimbursed, by the Board under the conditions of Section XX of the General Whitley Council Conditions of Service."

15. The claimant remained in this post as a District Nurse from 7 July 1986 until 30 November 2017. In terms of the respondent's grading structure she was a Band 6 District Nurse.

16. The claimant's office base was at Stenhousemuir Health Centre, (referred to as "SHC"). There are four GP practices based at that Health Centre as well as one further GP practice which is not based in SHC but all five practices are within the compass of the District Nursing Team based at SHC.

17. As a District Nurse the claimant was the joint Team Leader with another District Nurse who is referred to as X. Together they had responsibility for the day to day management of 8 Band 5 Nurses and 2 Healthcare Assistants. Two of the Band 5 Nurses also cover the treatment room which is based at SHC.

18. The District Nurse team provides 24/7 nursing care for housebound patients who require treatment at home rather than attending GP or healthcare centres.

19. The Line Managers for the claimant and X was Y who is the District Nurse Team Leader. She has responsibility for the day to day operational management of 22 out of hours nurses and 115 community nurses across the Falkirk area. Y, in turn, is line managed by C who is the Clinical Nurse

Manager. C provides leadership, operational and professional management for the District Nurse service in the Falkirk area.

20. In addition to her role as a District Nurse, the claimant also works as a Staff Nurse for the respondent in their out of hours service (referred to as OOH) service. This is for 15 hours each month and the claimant remained in that post as at the Final Hearing date of this case.

21. That contract is set out at pages 71/77. It is dated 24 March 2005 and bears to have been signed by the claimant on 22 February 2015. The contract refers to its being in effect from 10 August 2004, (page 71).

22. The claimant applied for and accepted a new post with the respondent in March 2018 as a Band 7 Advanced Nurse Practitioner Trainer, (page 86). The claimant continues to work in that role as at the date of the Tribunal Hearing. The role is as a Bank Worker and as such the claimant works on an "as and when required" basis.

23. Separately, the claimant commenced employment with a GP practice in early December 2017. That employment is for 3 mornings per week, Monday, Wednesday and Fridays for 4 hours per shift worked. The claimant continues to work in that employment.

24. Before Y joined SHC she was aware that there were suggestions by unnamed members of the respondent's staff that there were "issues" at SHC. Her view was that she would decide for herself rather than pay attention to rumours and gossip.

25. In July 2016 Y and C met the claimant following the claimant's absence from work on sickness leave. There was discussion about offering the claimant a referral to Occupational Health which was declined. At this meeting there was a discussion about issues which were concerning Y and C.

26. A Note was prepared by Y setting out the concerns that were raised, (pages 89/90). Seven issues were raised and responses/actions for each issue were set out in that Note. The claimant was advised that she would be monitored over the next month, (page 90).

27. A Work Related Stress Action Plan was prepared by the claimant, (pages 92/95).

28. A meeting was held at SHC on 13 December 2016. This was attended by X, the claimant, C and Y. C prepared a Note, (page 96). This is an extract of the full note. The extract refers to "Other issues discussed". There is then a heading, "Team Dynamics" which sets out a summary of points discussed.

29. At this meeting C explained that the current set up of the office/room where the District Nurse team worked in SHC did not allow full inclusion of all staff. She therefore asked that this seating plan be reviewed. X and the claimant agreed to do so after the festive period.

30. A review was also requested of the current caseload planner and the suggestion was made that all the practices (that is the 5 GP practices) be merged into one planner, it was also agreed that X and the claimant would arrange to visit another health centre, Meadowbank Health Centre - ("MHC") in order to look at their case planning system.

31. A further meeting was held on 23 January 2017, (page 97). This was again attended by X, the claimant, C and Y. It was held to review the previous meeting which, inadvertently is referred to as having been held on 19 December, whereas it was actually held on 13 December 2016.

32. It was confirmed that there was now only one diary in use but the "daily huddle" was not happening consistently and it was agreed that from now on this would be held at 12.30pm each day.

33. Under “Team Dynamics" the room move i.e. the proposed change of desks layout had been completed and both X and the claimant are noted as agreeing that this “has had a positive effect on the team”.

34. X raised an issue regarding a member of staff where she felt that the claimant had not fully supported her. Discussion took place and it was agreed on “the importance of team leaders working together in a united fashion to ensure staff receive a consistent management approach and team leaders fee! fully supported” (page 97).

35. On the issue of the caseload planner this had not been reviewed and was to be put on hold as planners were being reviewed and would be looked at over the next few months. The Note which C prepared ended by making reference to the next meeting being held on 2 March 2017.

36. On 3 February 2017 the claimant attended a Clinical/Management Supervision meeting with C. Reference was made to the previous action plan and it was noted the claimant was feeling “much less stressed”. She was now able to focus on her workload as the team was fully staffed and there were no employees on long term sickness. It was noted that staff were now having daily lunch breaks and finishing on time. One point which the claimant accepted was that she “Still feels she has a tendency to take on too much. Has been allocating time on the caseload planner for her own personal development and for that of her team.”

37. Under “Team Dynamics” it states:-

> “Feels team are working much more closely together and getting much more.
>
> Issues raised by treatment room as she feels she could be more involved in the team.
>
> Treatment room nurse to be invited to fortnightly team meeting. ”

38. Other points were discussed and the Note was signed off by C with reference to a further supervision on 2 May 2017, (page 98).

39. Y spoke to the claimant on 3 March 2017. She made a Note of that discussion later, (pages 101/102).

40. During their discussion Y asked the claimant by Y if she could meet the claimant and X later that day. Y spoke to the claimant again later in the morning and was informed that X had not been in and was unlikely to be in and accordingly Y asked the claimant to have a word with her in her office.

41. During their discussion Y explained that she had been approached by a Domestic Assistant late on the previous afternoon and this individual informed Y that one of the computers in the District Nursing office had been left switched on. Y had then gone to check this and discovered that a PC was indeed switched on and as such was open to patient identifiable information as well as other sources of patient information being seen. Y closed the PC and informed the Domestic Assistant not to go back into the room.

42. The claimant explained that she had taken time back which was owed to her and so had not been in the office at the end of her shift the previous day. It was explained that she was not being held personally responsible but, as the District Nurse responsible for the team Y wanted her to speak to the team and emphasise the importance of the issue.

43. There was further discussion between them and it was explained that it would have been preferable for Y to have spoken to the claimant and X together as it was X's PC that had been left switched on. However, it was left that the claimant would discuss this issue with X and other members of the team.

44. The Note concluded as follows:-

> "I advised Susan that I could see she wasn't happy with our conversation and that I'm aware that this has been a difficult week for

her as this is not the first issue I've raised with her this week. She replied by saying "it's been a difficult year with you". I explained that as her line manager it is my responsibility to deal with any issues raised and either deal with them directly or pass them on to the District Nurses to deal with."

45. C held a further Clinical/Management Supervision meeting with the claimant on 2 May 2017, (page 103). There was reference to a clinical issue/reflective exercise carried out by the claimant and also discussion about Team Dynamics.

46. On 12 June 2017 Y spoke to C about another member of staff who is referred to as Z. This individual had approached Y, raising concerns about her relationship with the claimant and indicating that she felt she was not being treated with dignity and respect. Y provided X with the respondent's Dignity at Work Policy, (page 217 onwards). She also submitted an Occupational Health referral for Z.

47. Z next approached C on 14 June 2017 to advise her that she was preparing a statement in relation to a Dignity at Work complaint. Z asked C to read this over prior to her submitting it. C informed her that she could not do this as it would be the person who would receive and deal with the complaint who would do so. Effectively, C would not be involved in considering Z's Dignity at Work complaint about the claimant. C subsequently prepared a Note of her discussion with Z on 14 June, (page 104). This also refers to the earlier discussion between Y and Z two days before on 12 June 2017. For the avoidance of doubt, C was not involved in that specific discussion on 12 June between Z and Y.

48. In relation to the discussion which C had with Z on 14 June, her Note continues as follows:-

49. "Z stated that the current situation was making her "ill". She stated she was not sleeping and did not want to come to work. We discussed the importance

of dealing with the issue appropriately via the Dignity at Work policy as Z had raised this issue with Y previously and has not been willing to follow the process through and at that time had been offered a move to another Health Centre but had refused this. Z stated that she was still not sure whether or not she wished to proceed. Z stated that she did not feel she could discuss this face to face with the claimant."

50. C's Note ends by recording that she spoke to Z and enquired about paperwork. Z informed her that she had "almost finished this and would hand it in on completion." The note then ends that C advised her that there was "absolutely no pressure but requested that this be submitted today if possible", (page 104).

51. C prepared another Note also dated 12 June 2017, (page 105). This refers to discussions on 12 and 14 June. The Note under the date of 12 June 2017 records that C was advised by Y of an issue raised by another individual known as A. C had received a reflective account" from A in an envelope that was under her office door on 12 June. C and Y who share an office then met A with X also in attendance.

52. The Note under the heading which has the date of 12 June 2017 continues:-

53. "In her reflective account A stated that she felt she was not being treated fairly by the claimant and that this was as punishment for talking to Z. She stated she was being given more work than other staff and that SH (the claimant) was barely speaking to her. She described a mobbing mentality within the team and stated that this was causing her personal stress and led her to not want to attend work.

54. We discussed the content of A's statement and she advised that she was unhappy and upset by the situation and felt "something needs to be done about this". We discussed the fact that Y had already furnished A with Dignity at work policy and advised her to complete and submit. Y had also offered and submitted an OH referred for A.

55. I advised A of the stages of the Dignity at Work Policy and advised that attempts should always be made to resolve at stage one. A advised that she would complete paperwork and submit."

56. The same Note, (again page 105) also has a heading of 14 June 2017. Under this, C records that she spoke to A who said she had not completed the paperwork yet. A was advised by C to contact one of the dignity at work advisors to discuss her issues and for advice/support re the process. The Note concludes by stating, "A said she would do this."

57. As indicated above, the claimant and X are both District Nurses and each regularly visit housebound patients. On 28 May 201 7 it appears that X visited a patient who is housebound, diabetic and has learning difficulties. This patient is referred to as Patient E. For whatever reason, Patient E does not want to be visited by X. The claimant was not working on 28 May 2017. X attended this patient on 28 May as she knew he required an insulin injection. As X knew that the patient disliked being visited by X it appears that X decided to "disguise" herself by wearing her hair down as she normally wears it up and putting on sunglasses. She appears to have thought that by doing this Patient E would not recognise her. This was incorrect. Patient E did recognise X. Patient E told X to leave which she duly did.

58. At one point it appears that X considered changing into a different uniform before visiting Patient E as part of a further disguise. As the Tribunal understood it, X did not change her uniform before going to visit Patient E. She did, however, later admit that she had worn her hair done and donned sunglasses in the hope that the patient would not recognise her. This tactic failed as X was immediately recognised by the patient who ordered her to leave.

59. It seems also that, at some point after 28 May 2017, Y became aware of X having tried on a difference uniform but she thought this had been in the nursing team's office at SHC. This was brought to her attention by other staff

but Y was not aware of what had happened at Patient E's home on 28 May 2017.

60. On 16 June 2017 the claimant and X were both out on patient visits. X had suggested to the claimant that they should visit Patient E together as X knew that this patient "likes" the claimant. X suggested that they could have a discussion with the patient in order to try and resolve the situation whereby Patient E did not want to be visited by X. The claimant went into Patient E's house with X but the patient immediately became distressed and asked X to leave. X duly did. The claimant then calmed the patient down and advised that X would not visit Patient E again.

61. The claimant understood from X that she was upset at the way the claimant had handled this situation on 16 June and that X felt that the claimant should have supported X more. X also stated that the claimant was "not a manager", (page 112).

62. On the following Monday, 19 June the claimant attended SHC for her shift. She was in the duty room when C arrived. There was considerable divergence in the evidence of the claimant and C about this meeting which both accepted was very short. The claimant maintained that she had said by way of what she thought was "a flippant comment"; words to the effect that "Perhaps I should move to another health centre."

63. C accepted that the claimant looked visibly upset when they met in the duty room. C explained to the claimant that she was on her way out as she had meetings to attend that day and so she would not be back in SHC for the rest of the day. She asked the claimant if she was willing to wait and have a meeting with her the following morning. The claimant agreed to this and C recalled that the claimant indicated that this "would probably be better as she felt she may be too upset today". C later made a Note of this meeting, (page 106).

64. Before C left SHC to go to her various scheduled meetings she went to the office which she shares with Y. She asked Y if she could make enquiries as to whether another member of staff who was a trainee District Nurse and is referred to as N might be interested in moving from MHC to SHC.

65. Y duly contacted N and it appears that N was interested in considering such a move. The reason C had asked Y to do so was that she thought it appropriate to make enquiries to see if it would be possible for another nurse to move to SHC so that the claimant could then herself re-locate to MHC.

66. The claimant was adamant that the comment (which she accepts she made to C) regarding a possible move to another Health Centre was only flagged by her as a possibility. It was intended in a flippant way. The claimant had not expected that C would follow up on this suggestion, particularly on 19 June when C had already informed her that she had meetings out of SHC all day and had suggested waiting to speak to the claimant the following day.

67. Crucially, the claimant maintained that she also said to C at this meeting on 19 June that there was an issue which she needed to discuss i.e. she was not only mentioning the possibility of a move from SHC but rather there was another issue which she wished to discuss with C. Against that assertion, C was emphatic that no such issue was raised. The only thing that was said to her by the claimant was that “perhaps she should move" or words to that effect. Nothing else was raised and had it been and C had realised that it was about Patient E then she would have made time to discuss this with C on 19 June 2017. On the balance of probabilities, the Tribunal concluded that it preferred C’s version of this short meeting that Patient E was not mentioned to her by the claimant on 19 June 2017. The Tribunal did so as it did not seem, on the balance of probabilities, likely that had C been informed by the claimant about the issue of X visiting Patient E in some form of disguise that C, as the senior line manager, would have asked the claimant if she was happy to wait and meet instead the following morning.

68. C's position was also that if the claimant did indeed have an issue that needed to be discussed on 19 June then it would have been open to the claimant to approach Y as her direct line manager rather than C who is Y's line manager and so is the claimant's second line manager.

69. In any event, the claimant did not approach Y during the course of 19 June to speak to her in C*s absence about the issue of X and Patient E.

70. Meanwhile, on 19 June 2017 Z signed a Dignity in respect at Work form notification, (page 107). This sets out the details of the complaint being made as follows:-

71. "Dignity at Work, Bullying in the Workplace By another member of staff Susan Hunter

72. Under the heading, "Detail how the complaint could be resolved" it reads:

"She needs to understand that it is not acceptable to constantly abuse her staff on a daily basis, causing them to breaking point."

73. Z also prepared a statement which she sent to C on 20 June 2017 at 12:49 hours, (ppges 108/111).

74. On 20 June 2017 the claimant duly met C in her office. The claimant raised a clinical concern with C about the incident involving X and Patient E which the claimant understood had occurred when X was on a shift on 28 May. The claimant was not at work on 28 May and she did not witness what happened when X visited Patient E. The claimant explained that, in hindsight, she should not have agreed to have X accompany her to Patient E's house on 16 June. While the claimant understood that X was upset at what she saw as the claimant's lack of support for her, the claimant too was upset by the terms of their discussion. The claimant then tried to speak to X on the following Monday 19 June but X refused, indicating to the claimant that she (X) "had done nothing wrong". The claimant went on to say that she felt that the

situation was "not right" and she was concerned by X's apparent lack of insight into her behaviour. C informed the claimant that she should provide a written statement and that she would speak to X.

75. C prepared a Note which is dated 20 June 2017, (page 112). In it, she noted that the claimant had advised her that she felt she could no longer continue to work with X as she stated X had told her that she feels she (the claimant) does not back her up and that she (the claimant) is "not a Manager". The claimant said that she was unable to support some decisions that X makes.

76. The claimant is noted as having referred to Patient E and that he had stated he did not want X to attend his house to administer his insulin. She referred to this patient being diabetic and having a learning disability.

77. A formal investigation into the complaint raised by the claimant against C about the incident involving Patient E was initiated under the respondent's Conduct Policy. Neither C nor Y were responsible for carrying out the investigation. A letter was sent to X dated 27 July 2017 inviting her to an investigatory meeting, (page 132). This was from another manager who is referred to as K.

78. At their meeting on 20 June 2017 C informed the claimant that there was a Dignity at Work complaint against the claimant and that it was from Z when the claimant asked her if it was from Z. C told the claimant in broad terms of the issues arising in that complaint, namely an allegation that Z thought she was not being treated fairly by the claimant; that she was not being treated with dignity or respect and allegations about breaches of confidentiality in relation to personal information. C also informed the claimant that issues about her had been raised by other team members over recent weeks but these had not been formalized. She did not divulge names or details. As it turned out the respondent received only one formal complaint about the claimant which was the Dignity at Work complaint from Z.

79. The other individual who brought issues to C's attention were A who complained that the claimant gave her disproportionate workload compared with a colleague, F. A put in a reflective account, see above) to C by leaving this under her office door. As indicated, A did not later formalise this by using the Dignity at Work procedure. A she did say to Y that she felt there was a "mobbing mentality" in the duty room, this was making her ill and she agreed to an Occupational Health referral.

80. Another employee, referred to as O who was a student, advised the respondent's management team, that he had left his mobile phone charging in the team office and, whether this was accidentally or on purpose was not clear, but as the phone was in recording mode he later found a recording of the claimant talking about his weight and his sexuality. This was not formalised as a complaint against the claimant.

81. The result of these various staff issues meant that as at 20 June Y and C were faced with a considerable number of personnel issues in the team. C thought that "things were chaotic". It caused her to be concerned as to how the District Nurse Team could continue to function. C and Y were also concerned about the ongoing delivery of patient care. They knew that A and Z had been given copies of the respondent's Dignity at Work Policy and had been referred to Occupational Health. Both A and Z felt under stress and were not wanting to attend work. C and Y were anticipating that there would be formal complaints from A, Z and O although as indicated above, in the event the only one received was from Z.

82. C and Y were adamant that they did not "drum up" such complaints or encourage members of the District Nurse Team to complain about the claimant because she had made a protected disclosure about X and her visit to Patient E. The issues raised by A, O, Z and also X who had made a complaint about her ongoing relationship with the claimant were known to C and Y before C raised the protected disclosure. For the avoidance of doubt, C and Y were both very clear that they accepted the claimant was entitled to bring her concern about X and the visit to Patient E to their attention and that

it raised a Clinical issue about a fellow nurse. It was always the respondent's position that the claimant in doing so made a protected disclosure in terms of the legislation and it was treated seriously by the respondent's management team.

83. The claimant had raised concerns about Z as she thought that X was allowing Z to handle nursing tasks beyond her nursing skill set. The claimant had raised her concern about Z as early as July 2016, (page 89). Much later on Y sent an email to the team, reminding them as to what were Z's areas of responsibility. This email was dated 26 October 2017, (page 170) by which time the claimant was absent on sickness leave.

84. Later on 20 June 2017, C met X with Y in attendance. Again, she made a Note of the discussion, (pages 113/114). X provided an explanation as to why she visited Patient E as she was the only nurse on duty. X accepted having tried to change her appearance under explanation that the patient required an insulin injection. She accepted what she had not was "not right" and was "deception". X was given a copy of the respondent's Conduct Policy. X was totally shocked that there was to be an investigation and did not appear to appreciate the severity of the issue. X mentioned having drawn the issue to Y's attention some weeks before but Y was clear she did not have the full facts given to her then and, had she done so, she would have made further enquiries, (page 113).

85. X pointed out that the incident occurred some weeks before and she believed that the claimant was only now reporting it following a disagreement between them on the preceding Friday and the following Monday. C informed X that she would have to provide a written statement. It was clear to her that X was upset and she informed her that she should not complete her shift but go home and return on the Thursday as the Wednesday which was the next day was her allocated leave day. X offered to work instead at MHC but later telephoned to say that she did not feel able to do so.

86. C then met the claimant again, this time with Y in attendance. The claimant was informed that the incident would be investigated under the respondent's Conduct policy and that she was likely to be invited to attend a witness interview, (page 114). C is noted as having informed the claimant that she likely to be asked why she did not make a report for "four weeks" about her knowledge of the incident with Patient E.

87. The remainder of pages 114 and 115 sets out information added by C following an interview she attended on 17 July with two members of management who were investigating the patient incident. They are named in that Note by C but referred to here as J and K. C's also refers to an incident reported to C by X about an occasion when she accidentally overheard the claimant who was using a phone via Bluetooth. It seems that the claimant thought their call had ended and that X was no longer able to hear the claimant. This was incorrect and, according to X, she overheard the claimant make derogatory comments about C to another member of staff, unaware that X could hear her. C had later challenged the claimant who apologized to her.

88. Meanwhile, on 20 June C had a further meeting with the claimant with Y in attendance. C made a Note of the discussion, (page 116). The purpose of this meeting was to let the claimant know that a Dignity at Work complaint had been received from Z against the claimant.

89. At this meeting C told the claimant that she had decided that the claimant should move to MHC as a "supportive measure" with effect from the following Monday, 27 June. C and Y were clear that this was not intended to be a permanent move for the claimant and that it was thought it would be in the best interests of the claimant and the wider nursing team. The claimant disputed this was the case and was adamant that C had told her that she had the "power and authority" to move the claimant to another Health Centre. C was equally clear that she did not use this phrase but may have indicated that she could require the claimant to move but was also equally certain that the claimant was advised it was to be a temporary measure and intended to be

supportive of the claimant. Y agreed that the claimant was not given the impression that the move was to be a permanent one.

90. The claimant was noticeably upset and C offered to refer her to Occupational Health which the claimant declined. C knew the claimant would be on annual leave on the Thursday and Friday and so she asked her if she wanted to use the next day, (Wednesday) as a leave day. The claimant did not want to do so but would come to work. She was advised that there would be another meeting to discuss the move to MHC, the offer of occupational health support and anything else that the claimant might want to discuss.

91. As indicated above, the claimant took a very different view as to what was said to her about a move to MHC. She believed that this was to be a permanent move. C accepted it was not documented on the file note at page 116 as being a temporary move, albeit this was said to be an oversight on C's part.

92. For completeness, C contacted the Head of Nursing and HR as to whether to suspend X. She understood that advice was taken from the NMC and the decision that was taken was not to suspend X.

93. The claimant duly attended work on Wednesday, 21 June. C attempted to organise a meeting with her to discuss a request made by another nurse referred to as L who had made a request for flexible hours as well as the claimant's move to MHC.

94. During that morning Y said to the claimant in the team office that she wanted to discuss a flexible working request from this member of staff. The claimant declined, indicating that she did not want to discuss this "on her last day". She declined the request to meet in Y and C's office. C then sent the claimant an email at 11.43 hours, asking her to attend a meeting at 12.30 hours, (pages 119-120). The claimant did not receive a reply so C sent another email to reschedule this meeting to 1pm. Again, the claimant did not reply, her explanation being that she was not at her desk and so did not see the emails.

C then tried to find the claimant in the building but was unable to do so. There was no reply on the claimant's mobile phone so she left a message asking the claimant to contact her. She then telephoned the claimant's home and spoke to her husband who said the claimant was not there.

95. Around 13.40 hours the claimant arrived at C and Y's office. She provided a medical certificate from her GP to cover one month's absence from work on certified sickness leave. It was apparent that the claimant did not want to talk. The claimant maintained that she did not receive the e-mails at page 119 as she was not at her desk and so did not "refuse to attend".

96. Instead, the claimant said that she did not leave the building (i.e. SHC) as she was attending her GP who works in that building. The GP signed the claimant off with effect from 21 June 2017.

97. Separately, Y made a Note dated 21 June, (page 118) about seeing the claimant in the team office that morning. Y was there to provide assistance to Z about the new caseload planner. Z scribbled Y a note to the effect that the claimant was displaying a paper stating, "Dignity at Work, that's why I'm out of here." Y did not see this note as she had her back to the others in the room, including the claimant. A few minutes later, Y asked the claimant to come to her office to discuss the flexible working hours application from L. It was at this point that the claimant indicated she would not do so saying this was "on my last day".

98. Y decided not to pursue the issue with the claimant as she knew there was to be a meeting with the claimant, herself and C later that day as is referred to above.

99. The claimant was then on sickness absence. She continued to provide medical certificates for her absence through to the end of her employment on 30 November 2017.

100. Y made a Note on 27 June of a telephone call she had with the claimant about her wellbeing and a proposed attendance management meeting. It was accepted that the claimant duly attended occupational assessments and an absence management interview. The claimant has no issue with the conduct of any of these processes. Y asked the claimant if she wanted to meet her as part of the respondent's attendance management support and the claimant agreed to doing so. The claimant agreed to be referred to Occupational Health, (page 121). A referral was made, (page 122). The claimant attended an occupational health appointment on 14 July 2017 and a report was prepared, (page 129). This was shown to the claimant on 19 July when she met Y for another attendance management meeting, (page 130).

101. There was then a further occupational health meeting on 15 August and a memo prepared by the doctor, (page 146). A further meeting was held on 26 September and again a memo was prepared by the doctor, (page 153). Y then met the claimant again for a further attendance management meeting on 27 September 2017 and a Note was prepared, (page 154). At that meeting Y discussed with the claimant a phased return to work at MHC and the claimant agreed to consider this over the following weekend. It was agreed that they would speak again at the start of the week.

102. Y telephoned the claimant on 2 October to follow up from the meeting on 27 September and she made a Note, (page 156). During their conversation the claimant advised Y that she had been going to tell her at the meeting on 27 September that she was retiring and would hand in a letter in person with a view to retiring as at 30 November 201 7. Y was shocked to hear this news as she had thought the claimant was going to be discussing a phased return to work. Y was informed that the claimant had "thought long and hard about it and discussed it with her family and had come to the right decision." Y noted that she asked the claimant if she would carry out extra shifts as an Advanced Nurse Practitioner at the Out of Hours Service but the claimant explained she had a new part time post as an ANP at one of the GP practices within SHC.

Y, for her part, was sorry to see the claimant go and wished her well for the future.

103. The claimant duly handed in her letter to Y on 2 October, (page 157). This reads as follows:

> "I have worked as a community District Nurse for over 30 years and the last 20 years at Stenhousemuir where I have built up a very good working relationship with my colleagues, all the GP's and their staff. It was my intention to retire in November next year however due to recent events and confirmation that I would still be getting moved to Meadowbank I feel that I have been put in an untenable position despite being told that this would be a temporary measure. It was management's desire to move me to Meadowbank earlier this year and I firmly believe that once there I would never be allowed to return to Stenhousemuir, unfortunately I have lost all faith in management. My work related sickness has nothing to do with the workload at Stenhousemuir and was solely connected to the allegation of dignity at work. I will remain off sick and regretfully retire on the 30th of November 2017. 1understand that this is short notice but I feel it is the right decision for me at the current time given all the circumstances.
>
> I am intending to retire via the VERA scheme so could you please sent me out a VERA form to be completed."

104. The Tribunal understood that VERA is the respondent's Voluntary Early Retirement Agreement/Scheme.

105. Y replied by letter dated 9 October 2017, (page 162). In it she explained:-

> "You have advised that it was managements desire to move you to Meadowbank earlier this year and that you firmly believed that once there you would never be allowed to return. I can confirm that this was never the intention of management. I understand that you asked C, Clinical

Nurse Manager on 19th June 2017 about a move to another area when C found you in your office and in a distressed state. C asked you to meet with her the next day as she had several meetings scheduled over the course of the day. I was asked to contact District Nurse N who was based at Meadowbank and was looking for extra hours and considering leaving on completion of her District Nurse training to secure extra hours elsewhere. This move would only have become permanent if both parties were happy and in agreement. N was in agreement to trial this arrangement but this was never more formally discussed or actioned due to the events which then unfolded on 21st June 2017.

With several investigations commencing and as a supportive and protective measure, C offered you a move to Meadowbank until the investigations were concluded. L was present at this meeting and can confirm that C advised this would be a supportive measure which would commence on 27th June. She also advised that this was in no way a punitive measure but that she felt due to the nature of the complaint and current issues between you and X that this was in the best interests of yourself and the wider Stenhousemuir team. You also advise in your letter that you have lost all faith in management and I apologise if you have been made to feel this way?

106. Her letter concluded by noting that the claimant intended to remain off sick until her retirement date. She advised that under the respondent's attendance management policy she had a duty to support the claimant until that date and so she indicated that she would like to arrange another meeting for 27 October 201 7. If this date and time were unsuitable the claimant was to let her know.

107. The claimant replied by letter dated 20 October 201 7, (pages 167/1 68). She was unable to meet Y on 27 October as she had a pre-arranged holiday but was willing to meet her the following week. In her reply, the claimant took issue with Y's letter. She indicated that:

"Again I can only confirm that my retirement is due to the alleged Dignity at work complaint and not the workload at Stenhousemuir.

We either have to agree to differ on this because I find your letters very upsetting, this was never the way I wanted to retire after 20 years of working in Stenhousemuir."

108. Y made a Note of a message having been left for her at reception from the claimant about a meeting. Y tried to contact the claimant at home and on her mobile but as she could not contact her she left a message on the claimant's mobile to contact her.

109. A further meeting was arranged for 20 November 2017 but the claimant by letter dated 14 November, (page 175) advised that she could not attend as she had wanted to do so with another colleague but went on to say that as she would shortly be retiring she was not sure that a meeting would be of any benefit but was happy to be telephoned by Y. The claimant had indeed asked that this person attend with her but Y explained that she would need to bring a colleague or a union representative rather than a friend.

110. A retiral lunch was organized for the claimant on 10 November 2017 which Y attended.

111. Y telephoned the claimant on 16 November, (page 176) and again on 20 November, (page 177)

112. As indicated above the claimant retired on 30 November 2017. Her new contract as an Advanced Nurse Practitioner in one of the GP practices based at SHC commenced on 1 December 2017. This is with a private GP contract, It is not with the respondent. She works part time, three mornings each week on 4 hour shifts.

113. In relation to the incident that occurred when X and the claimant met at the medical practice the claimant attempted to speak with X and X replied, "You

reap what you sow", the claimant informed Y of this encounter during a phone call on 7 September. The claimant maintains that Y never responded to her in relation to this issue. Against this, Y understood that the claimant did not want her to take it forward as a formal complaint but did tell the claimant that she would discuss it with X. However, X was absent on sickness leave.

114. On 2 October the claimant handed Y her letter of resignation indicating she originally intended to retire in November 2018 but was resigning early due to management putting her in an untenable position. The claimant also stated she had lost faith in management and believed the move to MHO would be permanent.

115. Reference was made to Y's reply at page 162 and the reference to moving N from MHC to SHC. N did not want to move to SHC. It was put to Y that the reply at page 163 it is stated that the reasons for the claimant's move were in relation to the issues of the investigation with X. Neither A or Z were mentioned in the letter. Y had indicated in cross-examination it would be inappropriate to return the claimant to SHC whilst investigations were ongoing and asked if X continued to work at SHC while the investigation was ongoing Y answered "yes, until she went off sick."

116. The claimant was in her own GP's waiting room (this GP practice operates within SHC) as she had an appointment. This was on 7 August 2017. While she was there X appeared as she was checking diaries in relation to the District Nurse Team which covers this GP practice's housebound patients. As X was leaving she spoke to the claimant and said hello. T\he claimant apologised for how things had turned out. X responded saying, "I don't know what you are talking about the two things are not linked. Nothing is going to happen to me. I will be ok. You reap what you sow."

117. The claimant did not contact either Y or C to report this encounter with X. On 7 September 2017 Y telephoned the claimant as part of the ongoing attendance management process and the claimant told her about the encounter with X. No complaint was made by the claimant to Y. During their

conversation Y told the claimant that she would speak to X but added that X was now off sic. Page 151 records Y's Note of their discussion.

118. Y then met X as part of her attendance management process on 25 September. X told Y without her raising the encounter first that X had met the claimant on 7 August. X accepted that she did say to the claimant, "You reap what you sow" and her account of the encounter was very similar to the claimant's version. Y told X that she must remain profession and respectful should she happen to meet the claimant again. Her Note is set out at page 160 and while dated 9 October refers to their meeting on 25 September.

119. Y did not understand the encounter between the two to be ongoing and, in any event, the claimant did not mention it to her again. The claimant had a further Occupational Health meeting on 26 September and the note of that meeting does not refer to it, (page 153). The claimant then met Y again on 27 September but did not mention it to her, (page 153) nor did she mention it when they spoke on 2 October. There is no mention of it in the claimant's letter of resignation, (page 157) nor did she do so in her letter of 20 October, (page 167).

120. The claimant attended an investigatory meeting about the incident involving X and Patient E on 26 July 2017, (page 137). She provided a statement dated 14 August 2017, ([age 138).

121. Separately, the claimant prepared a statement for her union representative, (page 144).

122. There was also an investigation into Z's complaint against the claimant. As part of that investigation the claimant attended a meeting, (page 148). The manager who conducted this investigation was a different manager from the manager who carried out the investigation meeting with the claimant about X's conduct.

Closing Submissions

123. Mr Millar and Mrs Ewart provided written submissions. The Tribunal explained that it would meet in private at the conclusion of the Hearing on 22 June but that it might be necessary for it to meet again once the draft reasons had been prepared by the Judge. This was confirmed to the parties by letters from HMCTS and they were also informed that this further meeting would be held on Monday 23 July 2018.

124. The Tribunal was grateful to the representatives for providing written submissions. It gave careful consideration to these when deliberating both on 22 June and again on 23 July.

125. For ease of reference their submissions are set out in full below.

Claimants Submission

126. The claimant has been employed with the respondent for a continuous period of 32 years with the last 20 years being at Stenhousemuir Medical Practice. The claimant worked as a District Nurse (DN).

127. The claimant has made a claim for constructive dismissal and has averred that she has been treated at a detriment as a result of making a public disclosure. The fact that the claimant made a disclosure is not resisted by the respondent in this claim.

128. One of the main issues which requires to be dealt with is that if the Tribunal finds that there has been a breach of contract, a decision requires to made as to whether a breach of contract claim can be upheld as the claimant remains employed by the NHS Board.

Breach of Contract

129. It is the claimant's position that although she is still employed by the NHS board she has had, and continues to have separate contracts with the same

employer. It is the claimant's position that the breach of mutual trust and confidence was committed by her direct managers namely the managers known as Y and C. It is therefore the claimant's position a breach of contract can exist. Y confirmed in cross examination that only one of the four contracts outlined in the bundle was overseen by herself. It is this contract which the claimant states was breached in relation to mutual trust and confidence.

130. It is also the claimant's position that if the "golden rule" applies that a breach cannot occur given the claimant is still employed by the NHS board then it is asked that the Tribunal consider whether a derogation of the rule can be applied for a just and equitable outcome.

Preceding Issues:

131. The team dynamics of the staff at Stenhousemuir was raised in evidence on pages 96 and 97 of the bundle. It was stated in the cross examination of both C and Y that any team dynamic issues were resolved at this point and the events of those dates 13th December 2016) had no influence on any decisions made in the future in relation to the claimant

Protected Disclosure

19 June 2017:

132. It is the claimant's position that she was treated at a detriment due to making a protected disclosure in relation to an incident which was instigated by X.

133. It was heard in evidence that C had seen that the claimant was "visibly upset on the morning of the 19th but did not enquire as to why the claimant was upset. It is the claimant's position that she was upset due to having a discussion with X about the disclosure. It is the claimant's position that she told X on the morning of the 19th June 2017 that she had no choice but to make the disclosure given the seriousness of the incident.

134. It is the claimant's position that she was upset after making the disclosure to X and attempted to speak with C. The claimant states that approached C on the morning of the 19th June 2017 and stated that she wanted to discuss

something with C. C's position was that the claimant made no such attempt to speak with her, however, in cross examination, Y repeated several times that C had stated to her that the clamant had "something she wanted to discuss" with C which contradicts the statement made by C in her evidence in chief.

20 June 2017

135. On the 20th June 2017 the claimant made the disclosure to C about X's conduct, X's conduct is not denied by either the respondent or X herself. It is the claimant's position that due to making this disclosure, she was treated at a detriment, the detriment being that allegations against her were raised in order to allow C to push her out of her position and into a position at Meadowbank Health Centre.

136. It is the respondent's position that prior to the claimant making the disclosure issues had been raised in relation to Dignity at Work against the Claimant. It was the respondent's position that complaints were pending against the claimant from parties O, *A &* Z. In evidence the respondent confirmed that as at the 19th June 2017, none of the above mentioned parties had "formalised" their complaints.

137. It is the respondent's position that they could not disclose the complaints to the claimant as they did not have the consent of O, A or Z to speak with the claimant. However, under cross examination of C, it was stated that C informed the claimant of the potential complaints (including a further anticipate complaint by X) despite them not being formalised. It was the C's position that she was able to do this as she did not disclose the name of the parties who were bringing the DAW complaints. When questioned as to why the issues were not raised earlier the respondent reverted to the position that she did not have the consent of A, Z or O. During the cross examination of Y, she was asked if A, O or X ever formalised their complaints. Y stated that none of the named parties did, in fact, ever formalise their complaints at any point.

138. It was established in evidence by all parties that Z submitted her DAW complaint on the 20th after the claimant had made her disclosure about X.

139. On page 104 of the bundle C stated that the last paragraph on this page, which seemed to form part of the file noted dated "140617" was, in fact, a separate file note which should have been dated 20/6/2017. This statement was confirmed by Mrs Ewart and accepted by Mr. Miller.

140. In cross examination C was repeatedly questioned as to why Z was asked specifically requested to submit her DAW complaint "today" (20th June 2017). C was asked, under cross examination why it had to be that day, not the next day or some other day, but specifically that day. C failed to give an answer which categorically answered the question put to her. It was put to her that C asked Z to raise the complaint that day so that it could be used against the claimant in order to push her out her job. This was denied by C.

141. It is the claimant's position that C had indicated to her that she would be moved to the Meadowbank medical practice as of the 27th June 2017. It is the claimant's position that C indicated to her that this would be a permanent move. In cross examination C took the position that it was made clear to the claimant that this would only be a temporary move. When questioned as to why this was not documented in the file note on page 116 of the bundle, C stated that this was an oversight on her part.

21 June 2017

142. It is the respondent's position that they had attempted to organise a meeting with the claimant to discuss a work request by L and also the move to Meadowbank. The respondent has stated that the claimant refused to attend the meeting and they were unable to locate the claimant. It is the claimant's position that she did not receive the emails which appear on page 119 of the bundle as she was not at her desk, and therefore did not "refuse to attend".

143. The claimant stated that she did not leave the building but, in fact, attended her GP (who works in the same building) who signed her off work from the 21st June 2017.

Absence Management and OH Reports

144. Over the next few months the claimant attended occupational health assessments and attended absence management interview. It is the claimants position that there were no issues with the conduct of any of the processes of the above.

Incident with X reported on 7 August 2017

145. It is averred and admitted that on the 7th August X approached the claimant at Stenhousemuir Medical Practice. It is the claimant's position that she attempted to speak with X to which X replied "you reap what you sow". It is the claimant's position that she informed Y of this during a phone call on the 7th September 201 7. It is the claimant's position that Y never responded to her in relation to this issue.

Retirement

146. On the 2nd October 2017 the claimant handed Y her letter of resignation. In the letter of resignation, the claimant states that it was originally her intention to retire in November 2018. The claimant states in her letter of retirement that she is resigning early due to the management putting her in an untenable position. The claimant also states in this letter that she has lost faith in the management and still believes that the move to Meadowbank would be a permanent one.

147. At page 162, Y responds to the claimant's letter of retirement. In this letter Y speaks about N moving from Meadowbank to Stenhousemuir. It was heard in the claimant's evidence that N did not want to move to Stenhousemuir. It was also put to Y that in her letter of response on page 163, it is stated that the reasons for the claimant's move to Meadowbank were in relation to the issues and investigation with X. It was noted that neither A.Z or O were mentioned in the letter written by Y. Y had commented in cross examination that it would be inappropriate to return the claimant to Stenhousemuir whilst investigations were ongoing. When asked if X continued to work at

Stenhousemuir whilst her investigations were ongoing, Y answered "Yes, until she went of sick".

Determinations:

148. Was the claimant treated at a detriment for making a disclosure in the public interest?

149. Was there a fundamental breach of contract in confidence and trust?

150. If there was a fundamental breach of contract, is the claimant able to successfully bring a claim for constructive dismissal?

Respondent's Submission

Introduction

151. The Claimant presented a claim to the Employment Tribunal on 14 November 2017 alleging that she was constructively dismissed and that the dismissal was unfair. The Claimant alleged she had made a protected disclosure and that she had been victimised as a result of this.

152. Whilst it is not set out in this manner on the ET1 , my submissions are based on the fact that the Claimant is alleging that her dismissal was unfair in terms of Section 103A of the Employment Rights Act 1996 and/ or unfair in terms of Section 98 of the Employment Rights Act. They are also based on the presumption that the Claimant is alleging that she has been subjected to detriment(s) in terms of Section 47 of the Employment Rights Act.

153. The Respondent's position was set out in the ET3. It was accepted that the Claimant made a protected disclosure on 20 June 2017 but the claims were otherwise denied in their entirety.

154. At a PH on 26 January, the Claimant was asked to provide further and better particulars to the claim, which would list in date order each alleged detriment specifying the date, identity of the person or persons who are said to have subjected the Claimant to a detriment and the basis on which she claims to have been subjected to the said treatment for having made the protected disclosure.

155. The Claimant was also asked to provide a list of conduct on the part of the Respondent which she claims entitled her to resign and claim constructive dismissal.

156. The further and better particulars that were provided are at pp.41-49 of the Bundle. The Respondent was asked to respond to anything that had not already been responded to on the ET3, and did so. The responses are set out in the document at pp. 50-61 of the bundle.

157. The Tribunal granted the representative's application to have the Tribunal determine the issue of liability only, at this Hearing.

158. An Order to prevent Disclosure of Identities to the Public under Rule 50(3)(b) of the Employment Tribunals Rules of Procedure 2013 was granted in relation to the witnesses, other than the Claimant, and, those who were named in the bundle of documents/ referred to in the evidence.

Witnesses

159. The Tribunal heard evidence from: -

i. The Claimant;

ii. The Claimant's witness, Q;

iii. The Respondent's witness C; and

iv. The Respondent's witness Y.

160. It is for the Tribunal to assess whether the witnesses before them were telling the truth. It also needs to assess the reliability of the evidence it listened to. I ask the Tribunal to find the Respondent's witnesses both credible and reliable.

161. In my submission, witness Q gave an honest account of what she saw and gave her view of what the Claimant had told her was happening to her. However, witness Q was not able to give direct evidence about any of the key issues in this case, as she was not present at any of the meetings or interactions between the Claimant, Y, C and X.

162. In my submission, all of the witnesses attempted to answer the questions put to them to the best of their ability. However, in relation to the Claimant, there are certain tranches of evidence where the Claimant has given evidence in direct contradiction to her pleadings and in doing so, has undermined her overall position. The evidence in relation to the Claimant's reasons for her resignation was not credible. The Claimant said, at one point in her evidence, that her reference to "Dignity **at Work" in her resignation letter was actually a reference to her clinical concern about X. When questioned about this in cross, her answers were evasive and when asked the direct question by the Judge at a later point, she said that it referred to the Dignity at Work complaint against her by Z.**

163. This leaves the Tribunal with the task of establishing who it believes, and, if it does not accept all of the evidence of the Claimant, whether her evidence on these points is not credible or simply not reliable. In my submission, there were times when her evidence was neither reliable nor credible.

164. Material facts established from the evidence

165. I suggest that from the evidence of the witnesses and the productions the Tribunal had before it (which included an agreed Chronology), the following material facts can be established and are not in dispute.

The District Nursing Team

166. The Claimant was employed by the Respondent as a District Nurse ("DN") from 7 July 1986 to 30 November 2017. Her contract is at p.62 of the productions.

167. At the time of her retirement, she was a Band 6 DN.

168. Her office base was at Stenhousemuir Health Centre. There are 5 GP Practices at that Health Centre.

169. In her DN role, the Claimant was joint Team Leader with X with responsibility for the day to day management of 8 Band 5 nurses and 2 Healthcare Assistants. Two of the Band 5 nurses also cover the Treatment Room, at the Health Centre.

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170. X is a Band 7 DN.

171. The DN team's role is to provide 24/7 nursing care for patients who require treatment in their own homes.

172. The Claimant and X were line managed by Y.

173. Y is the District Nurse Team Leader and she has responsibility for the day to day operational management of 22 out of hours nurses and 115 Community Nurses, across the Falkirk area.

174. Y is line managed by C.

175. C is the Clinical Nurse Manager. C provides leadership, operational and professional management to the DN service **in the Falkirk area.**

The Claimants other contracts with the Respondent

176. The Claimant has held another contract of employment with the Respondent since 10 August 2004, in the Respondent's out of hours service, as a Staff Nurse (p.71). This contract is for 15 hours per month and is continuing as at the date of the Tribunal Hearing.

177. The Claimant applied for, was offered and accepted a new promoted role with the Respondent in March this year (2018) as a Band 7 Advanced Nurse Practitioner Trainer (p.86). This role is also continuing as at the date of the Tribunal Hearing. This role is a bank worker role and operates on an "as and when" required basis.

19 June 2017 (p.106)

178. At 8.10 on 19 June 2017, the Claimant was in the duty room at Stenhousemuir Health Centre.

179. C came into the duty room.

180. The Claimant looked upset.

181. The Claimant asked for a move to another Health Centre.

182. C asked if she and the Claimant could meet the next day when she would have more time to discuss it.

The Claimant's protected disclosure (p.112)

183. At 8.30am on 20 June 2017, the Claimant raised a clinical concern with C about an incident involving X and Patient E. The Claimant told C that X had purposely disguised herself to deceive Patient E into thinking she was a different nurse because Patient E did not want X to give him his insulin injection. Patient E has learning difficulties.

184. A formal investigation was commenced into this matter under the Respondent's Conduct Policy. Neither C nor Y were responsible for investigating the concern (p.132).

Z Dignity at Work Complaint (pp.1 07*111)

185. Prior to 15.00hrs on 20 June 2017, Z submitted a written Dignity at Work (DAW) complaint against the Claimant.

186. The DAW complaint form was signed and dated 19 June 201 7 and the paper apart to the form was submitted by e-mail dated 20 June 2017.

187. C met with the Claimant with Y present at 15.00hrs on 20 June 201 7 and told her that a DAW complaint had been made about her.

188. The Claimant asked if it was by Z and C confirmed that it was.

189. C told the Claimant that the main issues from Z were:-

- Not being treated fairly;
- Not being treated with respect or dignity;
- Breaches of confidentiality in relation to personal information.

190. C told the Claimant that issues had also been raised with her by other team members about the Claimant, over the past few weeks but that these had not been formalised.

191. The Claimant was upset, after she had been told about the complaint.

192. C told the Claimant that she had decided to move the Claimant to Meadowbank Health Centre after her annual leave. **C asked the Claimant to come and meet with her the next day, to discuss this (p.114, p.116)**

21 June 2017 (pp.116-118)

193. Y asked the Claimant to come to her and C's shared office to discuss a flexible working request for L.

194. The Claimant refused to go with Y to her office.

195. C sent an e-mail to the Claimant to ask her to come and meet with her and Y (p.119).

196. The Claimant had left work. She went to her own GP Practice.

197. The Claimant obtained a fit note signing her off sick from that date.

198. At 14.30pm, the Claimant presented at C and Y's office and handed over her fit note.

The Claimant's sickness absence

199. The Claimant was off sick from 21 June 201 7 until she retired on 30 November 2017.

200. On 27 June 2017, Y telephoned the Claimant and explained that she wanted to meet with her as part of the attendance management process to offer her support.

201. Y asked the Claimant if she would like a referral to Occupational Health (OH) and she said that she would (p.1 21).

202. The Claimant was referred to OH by Y on that day (p.122).

203. The Claimant attended an OH appointment on 14 July 201 7. The Dr prepared a report in Memo form dated the same day (p.129). The Claimant was shown this on 19 July 2017.

204. Y met with the Claimant on 19 July 2017 for an attendance management meeting (p.1 30).

205. The Claimant attended OH on 15 August 2017. A memo was produced by the Dr regarding that appointment (p.146).

206. The Claimant attended OH on 26 September 2017. A memo was produced by the Dr on the same date (p.153).

207. Y met with the Claimant under the Attendance Management process on 27 September 2017 (p.154).

208. A phased return to work at Meadowbank was discussed and the Claimant agreed to consider this over the weekend and then speak to Y at the start of the following week.

Investigation into X Conduct

209. The Claimant attended an investigatory meeting into X's conduct on 26 July 2017 (p. 137).

210. A statement was prepared as part of that process and the Claimant signed and dated that on 14 August 2017 (p.138).

211. The Claimant prepared a separate statement for her Union representative (p.144).

Investigation into Z DAW Complaint

212. The Claimant was invited to an investigatory meeting in relation to Z's complaint about her. This was held on 30 August 2017 (p.148).

Meeting of X and the Claimant at GP Practice

213. The Claimant was attending her own GP Practice in Stenhousemuir Health Centre on 7 August 2017.

214. X was working that day and said hello to the Claimant in the waiting room.

215. The Claimant apologised to X for how things had turned out.

216. X said to the Claimant "you reap what you sow".

217. The Claimant told Y that this had happened during a telephone conversation where Y had telephoned her on 7 September (p.1 51).

218. The Claimant asked Y what she was going to do about it.

219. Y told the Claimant that she would speak to X but that X was off sick. She told the Claimant that she needed to remain professional if she met X again.

220. The Claimant never asked about this or mentioned this to Y again.

221. The Claimant told Y that this had happened at her Attendance Management meeting on 25 September 201 7. Her account mirrored what the Claimant had told Y and she admitted saying "you reap what you sow".

222. Y told X to remain professional and respectful if she saw the Claimant again and told her that she would say the same thing to the Claimant. In fact, she had already said the same thing to the Claimant during the call on 7 September.

The Claimants resignation

223. As agreed at the Attendance Management meeting between Y and the Claimant on 27 September 2017, Y telephoned the Claimant on 2 October (p.156).

224. The Claimant told Y that she had been going to tell her on 27 September that she had decided to retire.

225. On that same day, 2 October 2017, the Claimant handed Y her resignation letter (p.1 57). She stated that she intended to apply to retire under the VERA (Voluntary Early Retirement Application) scheme.

226. The Claimant gave one month's notice of her retirement date.

227. Y sent a letter to the Claimant to respond to the issues she had raised in her resignation letter on 9 October 2017 (p.162).

228. The Claimant wrote a letter back in response dated 20 October 201 7 (p.167).

229. The Claimant telephoned and left a message for Y asking for a meeting (P-171).

230. Y attempted to meet with the Claimant on 22 November 2017. The Claimant wanted to bring a friend with her and when she was told that she needed to bring a colleague or a Union Representative, she said that she did not want to meet and that Y could keep in touch with her by telephone (p.175).

231. A retiral lunch was held for the Claimant on 10 November 2017 (p.174).

232. Y attended the retiral lunch.

233. Y telephoned the Claimant on 16 November 2017 (p.1 76) and 20 November 2017 (p.177).

234. The Claimant retired on 30 November 2017.

The Claimant's new employment

235. The Claimant immediately commenced new employment on 1 December 2017, after she retired from her DN role with the Respondent.

236. This employment is with a private GP employer within Stenhousemuir Health Centre (i.e. not a NHS role). She undertakes five four hour shifts a week, in this role.

The Evidence

237. It is my position that it is not clear what the Claimant alleges were breaches of contract and/or detriments from the ET1, the further and better particulars or from her evidence to the Tribunal. However, I have tried to identify these from the pleadings and I have grouped these into the themes which arose in the evidence of the witnesses.

238. **issues within the DN Team at Stenhousemuir**

- We heard evidence from the Respondent's witnesses and the Claimant about issues within the DN team, as far back as 2016.
- C had overheard members of the team openly discussing confidential information about other members of the team, for example, a flexible working request that had been made.
- Members of the team had complained to Y that they felt undervalued and left out and Z complained to her that the Claimant was barely talking to her.
- The Claimant accepted that team dynamics were on the agenda at meetings as far back as July 2016 and that action was taken to try to address issues with the cohesiveness of the team, for example, by re-arranging the seating in the DN office.
- The Claimant said that all teams have issues; that people fall out with each other and that she was problem solving them.

- The Claimant gave evidence that the team was divided between X's team and her team, because they covered different practices and to ensure continuity of care to patients.

- The Claimant accepted that one of the aims of the meeting with Y in July 2016 and the meetings with C and Y in December 2016 and January 201 7 was to try to get the team to work together better as one team.

- The Claimant and Y gave evidence that an issue arose between Z and H, in relation to Z re-arranging a cupboard. H was not happy with this and had a go at Z. Z felt that the Claimant should have intervened, as, she had told Z to tidy the cupboard in the first place. She complained to X that she felt unsupported.

- X complained to Y that she had overheard the Claimant talking about her in derogatory terms to other members of team, after the Claimant accidentally called her on her mobile. She said that the Claimant had apologised. The Claimant confirmed this in her evidence. Y said in her evidence that X decided that she did not want to formally complain about it.

- A complained to Y about the Claimant giving her a disproportionate amount of the workload in comparison to F and put a reflective account under C's door. A told Y that she felt that she was being punished for speaking to X and that the Claimant was barely speaking to her. Y took from this that she was complaining about cliques within the DN team. A told Y that there was a "mobbing" mentality in the room which was making her ill and not want to attend work. Y referred her to OH that day.

- A student, O had recorded the DN Office whilst his mobile was charging and complained to X and C that he could hear the

Claimant talking in derogatory terms about his weight and his sexuality.

- We heard in evidence that all of these issues were going on at the same time and C and Y were trying to deal with them. C felt that, by 20 June, things were "chaotic" and everything seemed to be coming to a head. She was worried about how the team could continue to work together. C and Y were both concerned that the difficulties within the team would impact on patient care and service delivery. A and Z had been given copies of the Dignity at Work Policy and referred to OH for support. Both A and Z said to Y and C that the stress they were under was making them not want to come to work. By June 201 7, C and Y believed that A, Z and O intended to lodge formal Dignity at Work complaints about the Claimant.

The Claimant alleges that "the allegations about her treatment of staff are false. The Claimant believes that said allegations are a result of her making the public disclosure" (p.48). It was put to Y and C at the Hearing that they "drummed" up complaints or encouraged members of the team to complain about the Claimant because the Claimant had made a protected disclosure. It is my submission that this cannot be the case. C and Y were clear in their evidence that A, O, X and Z (who I will address later) all came to speak to them. They were not approached by C and Y. The issues that they had with the Claimant were brought to the attention of C and Y prior to the Claimant making a protected disclosure. The timeline of events was not challenged.

239. Z undertaking work beyond her role

- The Claimant alleges on her ET 1 form that Z "had previously been administering care to patients which she was not qualified to administer" (p.1 3).

- In her further and better particulars is states "X was going to teach her [Z] to take on nursing tasks which were beyond her skill level and not included in her role as a nursing assistant The Claimant was shocked by this and said that Z was not qualified to do this but she was still allowed by X to carry out such tasks. Also X encouraged Z to check the books from all the practices..." (p.41). No evidence was given in relation to X teaching Z nursing tasks.

- The Claimant gave evidence that she had a problem with Z, as far back as July 2016 (p.89).

- She said that Z was undertaking work which was beyond her role and expertise, for example, she had had to tell Z not to do HIC and PICC lines or to go and give insulin to diabetic patients.

- Y gave evidence that the Claimant told her at the meeting in July 2016 (p.89) that Z had questioned the Claimant about the numbers of venipunctures she had to do in comparison to F. She said that the Claimant told her that she was trying to resolve this.

- Y also gave evidence that the Claimant told her at that meeting that Z had been coming in early and going down to the GP Practices to check the diaries then delivering messages back to the DN team.

- Y said that she told the Claimant that Z should not be doing this and that it should be DN or senior staff going to the practices each day. She said to the Claimant that, if there were issues with this, then she needed to know. The Claimant said to Y that she was unable to elaborate on any specific issues. The Claimant did not mention HIC or PICC lines to Y or that Z was visiting diabetic patients. Y told the Claimant that management needed to be made aware if there were any issues.

- The Claimant gave evidence that Y had told her to "reign her in" in relation to Z. Y did not recall using that phrase but it was C and Y's position, and accepted by the Claimant in cross, that, as Z's Team Leader, along with X, she was responsible for making sure that Z's work was appropriate for her level and making sure that she worked within her role.

- Y gave evidence about this, and, it was accepted by the Claimant in cross, that, when specific issues had been raised with Y, for example, in relation to Z going to visit a palliative care patient, Y sent an e-mail to the team to make sure that Z only undertook duties within her role (p.170).

It is not clear that there is any alleged breach of the Claimant's contract or detriment that arises from this issue, as plead. The Claimant did not pursue any complaint about the work that Z was undertaking. In her own evidence, she said that she was problem solving it and she admitted that, as a Team Leader, she was jointly responsible with X for managing the work of Z. There is no evidence or suggestion by the Claimant, either in the pleadings, or, in her evidence to the Tribunal, that she asked Y or C to do anything about this issue. It is not plead and there was no evidence given that there was a failure by the Respondent to take action about this issue; that it caused the Claimant to resign, or, was a factor in her resignation.

240. **Process in relation to X following Protected Disclosure**

- The Claimant gave evidence that she felt that X should have been suspended as a result of the Claimant's concern being raised about her.

- In her further and better particulars she states "it is usually policy when such a complaint is made, for the employee accused to be suspended whilst a full investigation proceeds, the respondent did not suspend X…"

- We heard in evidence from C that she spoke to the Head of Nursing and HR in relation to whether or not to suspend X. She said that she understood at the time that the Head of Nursing had taken advice from the NMC and the decision was jointly taken not to suspend X.

- In the further and better particulars, the Claimant states "when I made the disclosure to C it was 8am on the 20th June her first reaction was "I will have to speak to X about this". Not at any time did C ask me any more details about the incident so was totally ignorant of the complete picture and how it unfolded". C confirmed in her evidence that the Claimant told her what X had done and that she said to the Claimant that she would need to speak to X about it. She also asked the Claimant to provide a written statement about what happened (p.1 12).

- We heard in evidence from C that she was not responsible for investigating this matter. She asked the Claimant to provide a statement; she spoke to X who admitted the conduct; she told X that it would be investigated under the Conduct Policy and gave her a copy of the Policy. She then spoke to the Claimant again and told her that the matter would be taken forward under the Conduct Policy and that she would be called as a witness.

- The investigation into X's conduct was undertaken by K (p.132).

- In her further particulars, the Claimant said "It is unknown to the claimant if she was investigated" (p.43). In cross, it was accepted by the Claimant that that was not true because she had been involved in the investigation and provided a statement to the investigation and her Union Representative in August 2017 (pp.137-145). In fact, further on in the better particulars, the Claimant refers to attending the investigatory meeting (p.45).

- At the time of the Claimant's retirement, the process in relation to the incident involving X was ongoing.

It is not clear that there is any alleged breach of the Claimant's contract or detriment that arises from this issue, as plead. The Claimant may have wanted X to be suspended but it was not her decision to make. The Claimant went off sick the day after she made the disclosure until she retired. The Claimant never worked with X again.

We heard in evidence that both C and Y took this matter extremely seriously and they told the Claimant that she was right to report the matter. C spoke to X at the earliest opportunity on 20 June and she told her the matter would need to be formally investigated under the Conduct Policy. C and Y then met again with the Claimant to tell her that the matter would be taken forward under the Conduct Policy.

The Claimant alleges that this matter was not dealt with appropriately but this is, in my submission, without rational foundation in light of the evidence about what was done and what the Claimant knew at the time.

241. Z's DAW complaint about the Claimant

- It was agreed that Z's DAW complaint form was signed and dated 19 June (p.107).

- We heard evidence from C that it was submitted to her on 20 June. We heard evidence that C had said to Z that, if she was going to submit it, could she do so that day. C's explanation for this was that she knew Z had drafted it, because she had asked her to look over it for her and she had to make a decision about what to do about the team, that day. C said that she felt that everything was coming to a head that day. She knew the DAW complaint was coming from Z, she expected formal complaints from A and O and

both X and the Claimant had said that they could not work together anymore.

- It was accepted by the Claimant in cross that, if the notes of meetings were accurate, Z had raised her concerns and told C and Y that she wanted to make a formal DAW complaint the week before the Claimant raised her concern about X.

- C and Y gave evidence that Z had spoken to them about the issues she had with the Claimant the week before she made her complaint. Z had been given a copy of the DAW Policy and had said that she was going to raise the matter formally.

- Z asked C if she would look over her complaint the week before the Claimant made her disclosure and C declined to do this because the complaint would come to her.

- The Claimant accepted that, despite what was plead on the ET1, Z did not make "frivolous" complaints about her. She said that they were personal complaints.

- The Claimant accepted that she did not know when or how the complaint was submitted, but, if it was written on 19 June, it could not have been made because she had complained about X.

- The Claimant accepted that, if Z's DAW complaint did come in on the same day that she raised her concern about X, it was appropriate for management to raise it with her that day.

- In her evidence, she said that there were "two separate train lines" being followed that day, one because she had raised a patient concern and one because Z had made a DAW complaint.

I submit that it cannot be the case that Z made a DAW complaint about the Claimant because the Claimant made a protected disclosure.

242. Decision to tell Claimant about other issues on 20 June

- In the Claimant's further and better particulars she alleges that, on 20 June, "C stated that there were several complaints regarding the Claimant's manner towards them but this has never been mentioned or substantiated and the Claimant feels that this was a deliberate ploy to put her in a state of fear and alarm and to accept the move without question [to Meadowbank]". The Claimant never said anything about fear and alarm in her evidence or that it was a deliberate ploy to get her to move to Meadowbank.

- C and Y gave evidence that they were not able to tell the Claimant about the issues that had been raised about her by O, A, Z or X at the time when these individuals complained to them. This was because they did not have the permission of these individuals to speak to the Claimant about the issues, and, also, because the individuals said that they were still deciding whether to make their complaints formal.

- C and Y gave evidence that they had asked A, Z and X whether they had tried to address their issues with the Claimant informally or felt that they could speak to the Claimant about the issues. Y gave evidence that X said that the Claimant had apologised to her and she wasn't going to take her issue forward, despite being unhappy about it. Y gave evidence that A said that she had raised her issues with the Claimant but she now felt she needed do something formal, because the situation was making her ill. Y said that Z told her that she had tried to address the issues informally with the Claimant and, for a while, it helped but then things just went back to the way they were before. That was why

she felt that she needed to raise something formally about it, because it was making her ill.

- Once the formal DAW complaint came in from Z and the Claimant had raised her complaint about X, C knew that she needed to do something to stabilise the team and safeguard patient care. She knew that the team would not be able to carry on all working together, whilst these issues were investigated.

- C gave evidence that she mentioned that other issues had been raised with her as part of her explanation to the Claimant for her decision to move her temporarily to Meadowbank.

- C said that she did not breach any confidentiality because she did not tell the Claimant who had raised concerns but she felt it was relevant to tell her that day that there were other concerns, because it factored in her decision making about what to do with the team.

- C gave evidence that the complaint involving X was a clinical concern that X admitted. The issues involving the Claimant were all of the same type - one formal and then other informal allegations of bullying and harassment. This was a factor in the decision to move the Claimant to Meadowbank and why C mentioned them on 20 June.

The evidence was that the Claimant was upset about Z raising a DAW complaint against her. Although the Claimant imputes a sinister motive for C telling her about the other informal complaints when she tells her about Z's formal complaint, in my submission, this is without foundation, in light of the evidence. The situation changed on 20 June. C had to make a decision about what to do now that she had a formal DAW complaint against one Team Leader and a clinical concern raised about the other Team Leader. It was

against this background, and, to explain her decision to move the Claimant, that she mentioned that other concerns had been raised.

243. Decision to move the Claimant to Meadowbank

- A move to Meadowbank was not mentioned by C during the conversation when the Claimant raised her clinical concern about X. The Claimant, at one point in her evidence, said that Meadowbank was raised with her as soon as she reported X. However, under cross, she said that it was during the conversation about Z's DAW complaint and not the conversation when she reported X.

- C's evidence in relation to the conversation about a move to Meadowbank was that she said to the Claimant that it was an interim move to enable the investigations to be undertaken. This was corroborated by Y. The Claimant did not accept that she may not have heard it said that it was an interim move, because she was upset.

- However, the Claimant agreed that, even if she had wrongly thought it was a permanent move that was being proposed, she knew on 14 July, at the latest, that it was a temporary move. This was because the OH Doctor discussed this with her at her OH appointment.

- The OH referral by Y stated "interim move" (p.124), the OH report stated the same (p.129) and then Y also reiterated that it was not a permanent move that was proposed, at her meeting with the Claimant on 19 July (p.131).

- The Claimant accepted that the atmosphere in the DN team at Stenhousemuir was not good at the time that she raised her concern about X and Z made her DAW complaint about her.

- The Claimant accepted that it was reasonable for management, faced with such a situation, to ensure that the team was able to function and to deliver safe care to the patients, to move someone temporarily. However, she stated that it was not reasonable, for them to move her.

- In response to Judge Garvie's follow up question on this point, the Claimant accepted that, if C had not thought that the comment the Claimant made on 19 June about wanting to move health centre was "flippant", that it would be reasonable for C, with this set up in her mind, to move the person whose suggestion it had been to move i.e. the Claimant.

- We heard evidence from C that she decided to move the Claimant on an interim basis because the Claimant had mentioned it the day before; because there were informal complaints from a student and A about the Claimant and because the DAW complaint by Z was about the Claimant. The concern raised by the Claimant was in relation to the conduct of X. It was not an allegation of bullying by a Team Leader from one of her team.

- The Claimant's contract of employment contains a clause permitting temporary moves (p.65) and the Claimant accepted that staff are moved between Health Centres, for example, if a flexible working request could not be accommodated at a particular health centre or to cover absence. The Claimant's contract does not have a base mentioned in it.

- The Claimant gave evidence that she was told "by a girl who works with a girl she goes for coffee with" that the trainee, N, who was approached to temporarily swap health centre with the Claimant for the period of the investigations, was "devastated" by the proposed move. However, the Claimant accepted in cross

that she had not spoken to N; did not know what N was told or thought about the proposed move, other than what she had heard, at best, third hand.

- Y gave evidence that she was asked to call N on 19 June, after the Claimant had asked C for a move of health centre. She did this and N was positive about the suggestion of a move. N had previously asked for a move and was looking to increase her hours, which is why C thought of her when the Claimant asked for a move on 19 June.

It is my submission that the evidence of Y and C should be favoured over the evidence of the Claimant in relation to whether or not she was told that the move was for the duration of the investigations, on 20 June. However, even if the Claimant was not told that this was a temporary move that day, or did not hear that said to her, she knew shortly afterwards when she met with OH that it was an interim move that was being proposed.

It is my submission that C seeking to move the Claimant to Meadowbank was not in breach of the Claimant's contract - it was permitted by her contract and it was a reasonable thing for a manager to do, in the circumstances.

I submit that it was also not a detriment as a result of making a protected disclosure. The decision to move the Claimant was made because the Claimant asked for a move to another health centre the day before she made the disclosure; because Z had raised a DAW complaint against the Claimant, because A, O and X had also complained about the Claimant and because the Claimant had said when she raised her concern about X that she could not work with X anymore. C appreciated that when X knew that the Claimant had raised a concern about her clinical practice, it would not be feasible for them to continue working together whilst this was investigated. The purpose of the temporary move was to enable the two separate investigations to be undertaken and to ensure that the team was stabilised and able to fulfill its purpose - to provide patient care.

244. **Attempt to get the Claimant to meet with Y and C on 21 June 2017**

- The Claimant admitted that she refused to speak to C and Y on 21 June. She said that this was because she thought she was moving permanently to Meadowbank and because she had heard rumours that people thought that she was stopping L reducing her hours.

- C and Y gave evidence that they were minded to grant the flexible working request but wanted the Claimant to be involved in that discussion and decision making, because she would return to manage L once the investigations were complete.

- C gave evidence that she sent an e-mail to the Claimant because Y had told her she was upset and she did not want to go round to the office in front of the team and ask her again to come to speak to her.

- C gave evidence that she was concerned about the Claimant when she did not show up and went to look for her. She also telephoned the Claimant's house to see if she was at home.

I submit that C was not trying to create a paper trail, as is alleged, by e-mailing the Claimant. C understood that the Claimant had agreed to come and meet with her on the 21 June when they met on the 20 June. C wanted to discuss the move to Meadowbank with the Claimant and to offer her support with the move. She also wanted to discuss OH support with the Claimant.

245. **GP exchange between X and the Claimant (the final straw)**

- The Claimant's alleged last straw in relation to her constructive dismissal claim was "when she told Y about being verbally threatened by X and management failed to take any action at all" (P.60).

- We heard evidence from the Claimant that the interchange that the Claimant had with X happened whilst the Claimant was attending an appointment at her own GP Practice on 7 August. X was working in the same Health Centre that day. The Claimant gave evidence that she was in the waiting room and X was checking the diaries. Whilst X was walking out of the room, X spoke to her. The Claimant said that X said hello to her and the Claimant then apologised for the way things had happened. The Claimant said that X said to her, "I don't know what you are talking about; the two cases are not linked. Nothing is going to happen to me. I will be ok. You reap what you sow".

- The Claimant did not report what had happened to Y or C, when it happened. Y telephoned the Claimant on 7 September, a month after the Claimant had seen X, as part of the attendance management process. During that call, the Claimant told her what had happened at her GP Practice with X. She did not make a complaint, she told her it had happened. It was accepted by the Claimant that Y said to her during that call that she would speak to X about it but that X was off sick (p.151).

- We heard evidence from Y that she did not need to raise this issue with X because when she next met with X as part of her attendance management process on 25 September, X told her about running into the Claimant, as soon as she came into the meeting. She admitted saying to her "you reap what you sow" and Y's evidence was that X's version of events tallied with what the Claimant said. Y's evidence was that she told X that she must remain professional and respectful, if she encountered the Claimant again (p.160 - note made on 9 October of meeting on 25 September). We heard evidence that Y considered the matter dealt with.

- The Claimant never raised this matter again with the Respondent. She didn't mention it at her next OH appointment on 26 September (p.153). She did not mention it at her meeting with Y on 27 September (p.154). She did not mention it during her telephone call with Y on 2 October. She did not refer to it in her resignation letter (p.157) and she did not refer to it in her letter dated 20 October (p.167).

It is my submission that the Claimant is wrong when she alleges that management failed to take any action at all in relation to the interchange between X and her at her GP Practice. We heard in evidence that X told Y about what had happened when Y met with her for the first time after the Claimant had told Y about the issue.

Y did exactly what she said she would do, during the conversation with the Claimant. She spoke to X about it and told her to be professional and respectful if she met the Claimant again. C said that, in hindsight, she should have told the Claimant that she had spoken to X but she did not consider that this was a formal complaint. The interchange had happened a month prior to the Claimant telling her about it and it was raised in passing during a telephone conversation that Y had made to the Claimant.

The Claimant never asked Y anything about this again or mentioned it. In my submission, therefore, Y acted appropriately in telling the Claimant that she would speak to X about it and then speaking to X about it.

It is my submission that the Claimant has failed to establish a series of acts, which cumulatively amount to a breach of trust and confidence on the part of the Respondent. I submit that this "last straw", viewed objectively, did not add anything to the alleged breach of trust and confidence. If the Tribunal accepts that this was a "last straw", it will need to identify and address the breaches on which the Claimant said she relied.

246. Reasons for resignation

- In her evidence, the Claimant stated that she decided to retire in September. She did not actually resign, with notice, and ask for the application form (VERA) to early retire until 2 October.

- The Claimant admitted that she pretended to Y at a meeting on 27 September that she was going to return on a phased return when, in fact, she had already decided to retire. The Claimant said in evidence that this was on the advice of her union representative. She said that she genuinely wanted to say that day but that she did not do so.

- The Claimant gave evidence that it was her intention to retire the following year, in November 2018, if the events she complains of had not happened. This was to tie in with her ordinary pension age and her lease car contract.

- The Claimant obtained new employment, at some point prior to her resignation. She gave evidence that a job offer had been on the table for over a year and she started her new job on 1 December 2017. During her telephone conversation with Y on the day that she resigned, 2 October, she told Y about her new employment as an APN with one of the GP Practices in Stenhousemuir Health Centre.

- In the Claimant's resignation letter, she stated the reasons for her decision to apply for voluntary early retirement (p.157). She said that, despite being told that the move to Meadowbank was a temporary measure, she firmly believed that, once there, she would never be allowed to return to Stenhousemuir. She also stated that she had lost all faith in management and that her sickness absence was solely connected to the allegation of dignity at work and not the workload at Stenhousemuir.

- In the Claimant's follow up letter to her resignation letter (p.167) she sets out the four reasons that she is retiring and she states that she is confirming that her retirement is due to the alleged Dignity at Work complaint.

- In the Claimant's ET1 at p.14 she states "the claimant was fearful that her employer may attempt to dismiss her ultimately resulting in possible loss of pension, given the handling of the matters to date". In her further and better particulars (p.47) she states that "The Claimant was fearful that her employer may attempt to dismiss her". However, in evidence, the Claimant said that she did not think that her employer would dismiss her because she had no previous disciplinary record and her union representative had told her that Z's case was very weak. This raises a significant issue of credibility.

- The Claimant agreed in cross that she did not use the words Dignity at Work when she reported X. C gave evidence that the Claimant never said she wanted to make a Dignity at Work complaint and she never thought of the clinical concern that had been raised as a Dignity at Work complaint. The two things being completely separate and different to each other.

- When it was put to the Claimant that she didn't make a Dignity at Work complaint about X and that, for someone who has worked in the NHS for over 30 years, she would know that a DAW complaint has a specific meaning and it is not the same as raising a clinical concern, she said that she didn't give it much thought. The Claimant said that she knew that X was to be investigated under the Conduct Policy on the day that she reported the concern and she was then involved in the investigation herself (p.137).

- When the Claimant was asked by Judge Garvie to clarify if her reference in her resignation letter to dignity at work referred to the complaint by Z against her, she said it did.

It is submitted that the Claimant knew that the matter with X was not a DAW matter. She did not raise it as one (correctly, given that a concern about the treatment of a patient would not be a DAW) and that process was not being followed in relation to it. It is not credible, therefore, when she says that her reference to DAW as the reason for her resignation was referring to her reporting of X. It is my submission that, at the time when the Claimant resigned, she was referring to the DAW process involving her and Z, and, it is only with reference to her claim that she is now seeking to make a causal link between her disclosure about X and her resignation.

It is my submission that the Claimant chose to retire from her employment because of the DAW complaint that had been raised against her by Z. It is my submission that the Claimant thought that by retiring, the DAW process would end and she could put that process behind her. It is my submission that, contrary to the evidence that the Claimant gave to the Tribunal but consistent with the pleadings, she was worried that she would be found to have bullied and harassed Z and, if she was dismissed, that it would impact on her pension and her registration.

It is also my submission that the Claimant retired to go to another job. The Claimant gave evidence that she had had an offer of alternative employment on the table for at least a year but her Union representative had advised her to think carefully about resigning because of the pension implications. The Claimant commenced her new job immediately after she retired from her old job.

The Claimant gave notice of her retirement, continued to participate in the absence management process, continued to receive pay and attended the retiral tea that was arranged for her.

The Claimant has continued to work for the Respondent in its OOH service and has been offered and accepted a new role with the Respondent.

It is my submission that the Claimant not only delayed in resigning but that her actions were not the actions of someone who was constructively dismissed.

The Issues

247. The issues that the Tribunal requires to determine in this case are as follows:-

- Is the Tribunal able to hear a breach of contract claim raised by a Claimant who remains in the employment of the Respondent?
- Was the Claimant subjected to detriment on the ground that she made a protected disclosure in terms of 47B of the Employment Rights Act?
- Was the Claimant unfairly constructively dismissed in terms of 103A of the Employment Rights Act or Section 98 of the Employment Rights Act?

The Claimants employment position

248. The contract from which the Claimant retired was her Band 6 DN contract (P.62).

249. The Claimant is seeking compensation for unfair constructive dismissal, following upon her resignation from her DN role. Unusually, in a constructive dismissal case, the Claimant has continued in the employment of the Respondent, to date, in her out of hours role. This raises a question mark in relation to the Claimant's ability to pursue a breach of contract claim against the Respondent, whilst remaining in its employment.

250. It is established law that for a Tribunal to be able to hear a contractual claim brought by an employee, the claim must arise or be outstanding on the termination of the employment of the employee in question. In this case, the Claimant's employment under her DN contract has terminated but her employment relationship with the Respondent is continuing. It is the Respondent's primary submission on this point, therefore, that the Tribunal does not have jurisdiction to determine this case because the Claimant remains in the employment of the Respondent.

251. If the Tribunal is not with me on this point, the Respondent denies that the Claimant resigned in response to the conduct of the Board, which was calculated to, and did, destroy her trust and confidence in the Board, her employer. The Claimant is claiming that there were a series of incidents, culminating in a "last straw" event, which amounted to a breach of the implied duty of trust and confidence owed to her by her employer. This is denied by the Respondent.

252. The Respondent further denies that the conduct of the Board arose from the Claimant having made a protected disclosure, and, that this was the sole or primary reason for the breach of trust and confidence which resulted in her dismissal.

253. With the comments above on the evidence in mind, I turn to address the relevant legal authorities.

The Law

Whistleblowing

254. It is accepted by the Respondent that the Claimant made a qualifying disclosure on 20 June 2017 under section 43B, Employment Rights Act 1996 and that it was a protected disclosure under s.43B(1)(d) of the same Act.

255. The Claimant had the right not to be subjected to any detriment on the ground that she had made a protected disclosure. It is not clear from the pleadings whether the Claimant is making a claim for detriment up to the date of dismissal under section 47B(1) ERA 1996 separately to an unfair dismissal claim under section 103A, ERA 1996. Both are denied by the Respondent.

256. The term "detriment" is not defined in ERA 1996 and tribunals have therefore looked to the meaning of detriment in discrimination case law. In *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285,* it was held that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An "unjustified sense of grievance" is not enough.

257. The meaning of "subjected to" is also not defined in the whistleblowing provisions. In *Abertawe Bro Morganwg University Health Board v Ferguson UKEAT/0044/1 3,* the EAT held that the words had the same force and meaning as causation but that the word "caused" had not been used in the statute because "subjected to" better expressed how an "act" and a "deliberate failure to act" could result in a detriment. I submit that a failure by the employer to meet an expectation that it would act in a certain way would not be sufficient to amount to a failure to act, for these purposes.

258. In *Blackbay Ventures Ltd (t/a Chemistree v Gahir UKEAT/0449/12,* the EAT held that an actionable detriment arising from an omission or failure to act can only arise once a deliberate decision is taken not to do that act.

259. Whether detriment is "on the ground" that the worker has made a protected disclosure involves an analysis of the mental processes of the employer acting as it did. In a claim for detriment under section 47B, the employee must prove that they have made a protected disclosure and that there has been detrimental treatment. In the case of a detriment, the Tribunal must be satisfied that the detriment was "on the ground that the worker has made a protected disclosure". There must be a causative link between the two.

260. In *NHS Manchester v Fecitt and ors [2012] IRLR64* at para 45, the Court of Appeal held that the test in detriment cases is whether the protected disclosure "materially influences the employer's treatment of the whistleblower". The court noted that this meant that there was a different causation test depending whether the whistleblower is alleging unfair dismissal or detriment.

261. In a dismissal case, an employee shall be regarded as automatically unfairly dismissed if the reason or principal reason for the dismissal is that they have made a protected disclosure (section 103A, Employment Rights Act 1996).

262. In a constructive dismissal case, where the Tribunal has to identify whether a protected disclosure was the reason or principle reason for dismissal, it is important that it focuses on the employer's reasons for its actions, rather than the employee's response *(Berriman v Delabole State Ltd [1985] ICR 546 9CA)).*(p.551 para A)

263. In *Salisbury NHS Foundation Trust v Wyeth UKEAT/0061/15,* (p.1 1 para 35) Mr Wyeth made several protected disclosures about inappropriate drug use by another employee. His shifts were then changed from night to day shift, causing him difficulties and the Trust failed to call him as a witness at the investigation into his disclosures. Mr Wyeth subsequently resigned and the Tribunal held that he had been constructively dismissed. The EAT held that the Tribunal had been incorrect to focus on Mr Wyeth's response to his employer's actions rather than the Trusts reasons for acting as it did.

264. The EAT noted that, in a constructive dismissal case, after the Tribunal has identified the fundamental breaches of contract that caused the employee to resign, the Tribunal must then consider the employer's reasons for acting in fundamental breach. In a whistleblowing claim, the Tribunal must consider whether the dismissal was automatically unfair. The employee's perception, although relevant to the issue of why they left, does not answer that question.

265. The EAT considered that when considering the reason for the employer's actions, a "but for" test was not the correct approach. The focus should be on "the reason why". If an employer gave an account of why it acted, other than the protected disclosure, the Tribunal needs to determine whether that reason was false; only then should it go on to consider the alternative prohibited reason.

Constructive dismissal

266. It is not clear from the pleadings whether the Claimant seeks to argue that, if she was not automatically unfairly constructively dismissed as a result of the whistleblowing, then she was, nevertheless, constructively dismissed under section 95(1)(c) of the Employment Rights Act 1996. In both regards, the Respondent denies that the Claimant was unfairly constructively dismissed.

267. In a case of constructive dismissal, the employee sets out to prove that she has been dismissed. She must prove that she has terminated her 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 (section 95(1)(C) of the Employment Rights Act 1996).

268. She must establish that: -

- there was a fundamental breach of contract on the part of the employer;
- the employer's breach caused the employee to resign;
- the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

269. The leading case *is Western Excavating (E.C.C.) Ltd v. Sharp [1978] ICR 221 CA* which held that the question of whether or not there has been a

constructive dismissal should be answered according to the rules of the law of contract. Lord Denning M.R. said at page 226:

> "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 being discharged from any further performance ... 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".

Materiality of the breach

270. In Scotland, the terminology is that there must be a material breach of contract. The classic definition in *Wade v. Waldron 1909 SC571* per Lord President Dunedin page 576 is:

> It is familiar law, and quite well settled by decision, that in any contract which contains multifarious stipulations there are some which go so to the root of the contract that a breach of those stipulations entitles the party pleading the breach to declare that the contract is at an end. There are others which do not go to the root of the contract, and which would give rise, if broken to an action of damages.

271. There is a duty to maintain trust and confidence between employer and employee. The precise formulation of the duty has varied from case to case but has been accepted as existing by Lord *Steyn in Malik v. BCCI [1998] AC 20 HL at page 46G-H.* Probably the most extensive discussion is set out in *Woods v. W.M. Car Services (Peterborough) Ltd ['981] ICR 666 EAT* by the Employment Appeal Tribunal, which was approved in *Lewis v. Motorworld Garages Ltd, [1986] ICR 157 CA* where Lord Justice Neil said, at page 169, that:

"The principles to be found in the relevant authorities can, I believe, be summarised as follows:

(1) In order to prove that he has suffered constructive dismissal, an employee who leaves his employment must prove that he did so as the result of a breach of contract by his employer, which shows that the employer no longer intends to be bound by an essential term of the contract: see *Western Excavating (E.C.C.) Ltd v. Sharp [1978] ICR 221.*

(2) However, there are normally implied in a contract of employment mutual rights and obligations of trust and confidence. A breach of this implied term may justify the employee in leaving and claiming he has been constructively dismissed: see *Post Office v. Roberts [1980] IRLR 347 and Woods v. W.M. Car Services (Peterborough) Ltd.[1981] ICR 666, 670, per Browne-Wilkinson J.*

(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied test? (see *Woods v. WM. Car Services (Peterborough) Ltd. [1981] ICR 666.)* This is the "last straw" situation.

(4) The decision whether there has been a breach of contract by the employer so as to constitute constructive dismissal of the employee is one of mixed law and fact for the industrial tribunal. An appellate court, whether the Employment Appeal Tribunal or the Court of Appeal, may only overrule that decision if the

> industrial tribunal have misdirected themselves as to the relevant law or have made a finding of fact for which there is no supporting evidence or which no reasonable tribunal could make: see *Pederson v. Camden London Borough Council (Note) [1981] ICR 674 and Woods v. W.M. Car Services (Peterborough) Ltd. [1982] ICR 693* both in the Court of Appeal, applying the test laid down in *Edwards v. Bairstow [1956] AC 14."*

272. The employment tribunal cannot go too far and imply a duty on the employer to behave reasonably towards his employees. The Employment Appeal Tribunal in *Post Office v. Roberts* (supra at paragraphs 27 and 28) refused to accept that there was such an implied term on the grounds that such a term would be too wide and too vague. The Employment Appeal Tribunal in *Courtaulds Limited v. Sibson [1987] ICR 329* said at page 333:

> "Reasonable behaviour on the part of the employer can point evidentially to an absence of a significant breach of a fundamental term of the contract; conversely wholly unreasonable behaviour may be strong evidence of a significant repudiatory breach. Nevertheless it remains true that conduct, however reprehensible, may not necessarily result in a breach of a fundamental term of the contract."

(The result of this case was revered by the Court of Appeal: see *[1988] ICR 451,* but it is submitted that the above comment still holds good.)

Breach of a term of the contract

The employment tribunal must first consider whether the employer's action is in breach of his or her contractual obligations or is a repudiation of them, that will involve ascertaining the express terms of the contract and considering whether any terms should be implied as explained *in Scally v. Southern Health and Social Services Board [1992] 1 AC 294 HL.*

The employee must leave in response to the breach of contract.

Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his or her taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.

Lord Justice Glidewell in *Lewis v. Motorworld Garages Ltd* (supra) said:

> "..... the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term."

In *Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA.* the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relative insignificant. As a result, if the final act did not contribute or add anything to the earlier series of acts it was not necessary to examine the earlier history.

Paragraph 14 set out 5 basic propositions of law - 1wish to particularly draw to the Tribunal's attention the fourth basic proposition laid out in *Omilaju,*

> "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 p.464,* 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 her employer".

The case is also pertinent in relation to the necessary quality of a final straw if it is to be successfully relied upon by the employee as a repudiation of the contract. Paragraphs 19-23 deal with this and are of assistance to us, not only in relation to what it says about the nature of the final straw but also about the timing of it and what should be made, if anything, of preceding acts (paras 21,22).

At paragraph 19, Lord Justice Dyson said: -

> "A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term."

At paragraph 21, he stated: -

> "If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and confirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so.

If the later act on which he seeks to rely on is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

At paragraph 22 he went on to say: -

> "Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective".

Conclusions

It is my submission that the claimant has not suffered any detriment as a result of making a protected disclosure.

It is my submission that there has been no evidence to suggest that the Claimant's disclosure amounted to any part of the reason for the conduct of the Respondents' employees, which, it is alleged, led to her ultimate resignation.

It is my submission that the Claimant was not automatically unfairly dismissed in terms of S.103A of the Employment Rights Act.

It is my submission that the Claimant was not unfairly dismissed in terms of s.98 of the Employment Rights Act.

It is my submission that the Claimant has failed to establish a series of acts, which cumulatively amount to a breach of trust and confidence on the part of the Respondent.

1 **I submit that the Claimant's "last straw", viewed objectively, did not add anything to the alleged breach of trust and confidence.**

The Claimant has not demonstrated that the Respondent breached any express or implied term of her contract of employment sufficient to entitle her to resign and claim that she was constructively dismissed.

The Claimant did not resign because of any conduct by the respondent, but because she had found suitable alternative employment and she was worried that the Respondent would find her guilty of some misconduct through the DAW process.

If, which is denied, the Respondent did breach the Claimant's contract of employment, it is denied that such a breach was fundamental or repudiatory.

It is my submission that the Claimant did not resign in response to a breach of her contract of employment by the Respondent However, if (which is denied) the Respondent breached the Claimant's contract, which breach was fundamental or repudiatory and was the cause of the Claimant's resignation, I submit that the Claimant delayed too long in resigning and therefore accepted the breach.

In my submission, the evidence mitigates against any conduct by the Respondents' staff as being directed towards the Claimant without reasonable and proper cause.

I invite the Tribunal to reject the Claimant's allegations and thus dismiss the complaint.

The Law

273. Section 94 of the Employment Rights Act sets out the right not to be unfairly dismissed and Section 95 sets out the circumstances in which an employee is dismissed as follows:-

> "(1) For the purposes of this part an employee is dismissed by his employer if (and, subject to subsection (2)... only if) -
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
>
> (b) ...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

274. Section 103A deals with protected disclosures as follows:-

"An employee who is dismissed shall be regarded for the purposes of this Part 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."

275. Section 104 deals with the assertion of a statutory right as follows:-

"(1) An employee who is dismissed shall be regarded for the purpose of this Part as unfairly dismissed if the reason (or, if more than one), the principal reason for the dismissal is that the employee -

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right which is a relevant statutory right;

(2) It is immaterial for the purposes of subsection (1) -

a) whether or not the employer has the right, or

b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right made it reasonably clear to the

employer what the right claimed to have been infringed was."

Observations on the Witnesses

276. As was suggested by Mrs Ewart, the Tribunal accepted that the witnesses all appeared to give their evidence clearly.

277. However, one important issue where the evidence was in dispute was in relation to what did or did not happen on 19 June 2017. The claimant was adamant that she had disclosed to C that she was making a protected disclosure about X's unprofessional conduct. C disputed this. She was equally adamant that the only discussion she had was with the claimant saying that she had something she wished to discuss. C made it clear that she was not in a position to do so that day and asked if they could meet the following day. It seemed to be accepted by the claimant that she had no objection to a meeting the following day. It was also accepted by C that the claimant was visibly upset on 19 June. The Tribunal considered that the point was well made that the claimant did not then go to speak to Y who was her direct Line Manager on 19 June which presumably she could have done if, as she indicated in her evidence to the Tribunal, she was so concerned about X.

278. The Tribunal concluded, on the balance of probabilities, that it preferred C's version of events, namely that she was busy and so she explained this to the claimant and asked if she could wait until the next day and that the claimant did not make a disclosure to her about X on that day. The Tribunal's conclusion that C's recollection was to be preferred (that she was not told about the disclosure which the claimant wished to make about X's unprofessional conduct on that morning) was reached since C was very clear that, had this been raised on 19 June, then she would have made time to meet with the claimant there and then given the seriousness of the issue as it later emerged at the meeting on 20 June.

279. It is very important to stress that the respondent accepted that a protected disclosure was made on 20 June 2017. It is also appropriate to note that both

C and Y were very clear in their evidence that the claimant was entirely within her rights to bring a professional conduct complaint against X. There is no doubt that this was then subsequently followed up by a formal investigation under the respondent's Conduct Policy into X's conduct. The claimant was interviewed as part of that investigation.

280. The next important issue which arose where there was a material difference in the evidence of the witnesses was as to what was discussed on 20 June and what was said about a possible move for the claimant from SHC to MHC.

281 . The claimant maintained that her understanding, at least on that date was that this was being forced on her by C and she believed that it was intended to be permanent. Both C and Y disagreed with this interpretation as their recollection was that this was suggested to the claimant as being a temporary move rather than a permanent one.

**

282. The Tribunal concluded, again on the balance of probabilities, that the evidence of C and Y should be preferred. It did so as C's testimony, supported by Y was that, as the senior Line Manager C, had to do something and the proposal to move the claimant was intended as a temporary one and was intended to be supportive of her.

283. Even assuming the claimant was correct on 20 June 2017 in understanding or perhaps misunderstanding that the suggested move was to be permanent, it was apparent from the claimant's letter of resignation that she later accepted that the respondent's intention was that any move to MHC was to be on a temporary basis.

284. It was clear to the Tribunal that C as the claimant's second Line Manager was entitled to make arrangements to move the claimant. The claimant's contract allowed her to do so.

285. The Tribunal also noted that C's explanation for proposing to do so was that she was faced with a situation where the claimant had made a complaint against X which, being a professional complaint about her conduct, required there to be a conduct investigation against X.

286. Separately, the respondent had received a Dignity at Work complaint brought against the claimant by Z. Much was made by the claimant of the suggestion that, in effect, the respondent's managers, namely C and Y, used this and other potential complaints against the claimant from others within the District Nurse Team with a view to, as she saw it, of effectively "pushing her out the door" or away from MHC. The Tribunal accepts that the claimant did not use that phrase but this was what the Tribunal understood her position to be regarding a move away from SHC to MHC.

287. The Tribunal was not satisfied that there was any such intention on the part of C or Y. It was persuaded that what C, as the Senior Line Manager was doing on 20 June 2017, was attempting to stabilise a Nursing Team.

288. Unfortunately, from 21 June 201 7 onwards, the claimant was absent through ill-health having been signed off as unfit by her GP. As indicated above, she did not return to work after that date and her resignation (see below) took effect on 30 November 2017.

289. The Tribunal noted that the claimant's resignation was in relation only to the District Nurse contract and that later in the summer the Consultant Occupational Physician whom she attended said that, in his view, she was fit to continue in the Out of Hours contract which is, of course, entirely separate from the District Nurse contract. As the Tribunal understood it, the claimant continues to work in that role.

290. Next, dealing with the occasion when the claimant encountered X unexpectedly while she was waiting to see her GP it does not seem to be in dispute that there was a discussion between the claimant and X. It also does not seem to the Tribunal to be in dispute that the terms of that discussion were as the claimant indicated to Y and indeed in broad terms this seems to have been confirmed by X to Y when she spoke to her later.

291 . It was not explained to the Tribunal why, if this was such a serious matter and of such concern to the claimant that she delayed for a month before reporting it to Y.

292. It seems that the claimant was indicating at the meeting on 27 September 201 7 with Y that it was her intention to agree to a potential phased return to work, albeit this was to be at MHC and that Y was extremely surprised when the claimant then notified her on 2 October that she was now going to retire as at 30 November 2017.

293. If the claimant was determined not to agree to a move, even temporarily to MHC from SHC, then it was not clear to the Tribunal why the claimant did not mention this on 27 September at their meeting.

Deliberation and Determination

294. In reaching its decision the Tribunal noted the issues as set out by the representatives.

295. Dealing first with the claimant's request for "Determinations" the points are set out again with the Tribunal's conclusions then set out below.

Was the claimant treated "at a detriment" (s/c) for making a disclosure in the public interest?

296. The Tribunal concluded that the claimant was not subject to a detriment as a result of making the protected disclosure about X. The respondent's witnesses throughout their evidence made it clear that they accepted the claimant was entitled to make the protected disclosure which related to X's professional conduct as did Mrs Ewart in her closing submission. There was no evidence to suggest that the disclosure impacted on the decision making process undertaken by the respondent's employees, namely C and Y.

Was there a fundamental breach of contract in confidence and trust?

297. Having given careful consideration to all that it was said on the claimant's behalf, the Tribunal concluded that it could not find that there was a fundamental breach of contract on the evidence before it.

298. While it is apparent to the Tribunal that the claimant lacked confidence in her Line management, namely in C and Y there was no evidence that the

respondent breached any express or implied term of the contract of employment such as to entitle the claimant to resign and claim that she was constructively dismissed.

299. In reaching this conclusion the Tribunal noted all that was said by C as to the reason why she indicated to the claimant on 21 June 2017 that she was intending to relocate the claimant to MHC. The Tribunal concluded, on the balance of probabilities, that what was said the claimant was that this would be a temporary measure. It was not intended to be permanent but was being done with the intention of providing support to the claimant. It was not used as a way of "pushing" the claimant out of her employment as a valued District Nurse based at SHC. It was proposed as a way to find a temporary solution to a very difficult situation where the claimant had perfectly properly submitted a complaint about a professional colleague, X and which the respondent accepted amounted a protected disclosure. Against this, the respondent had a Dignity at Work complaint intimated to it from Z and potentially, further complaints against the claimant from O and A and possibly also from X. C's understandable concern was to maintain stability in the District Nurse Team and she thought that moving the claimant away from SHC to MHC on a temporary basis might assist as well as offering support to the claimant away from what they may have felt was a hostile environment for the claimant.

300. In relation to the suggestion as to what was the "last straw" the Tribunal was not persuaded that the encounter which the claimant had with X on 7 August 2017 at the claimant's GP practice when the claimant was attending there for her own medical appointment was so far as the claimant was concerned, a "last straw". The Tribunal concluded this since it was clear that the claimant did not contact the respondent until she happened to be speaking to Y one month after this incident had occurred. If the Tribunal was wrong in that and this did amount to a "last straw" then the Tribunal would have concluded that the claimant delayed too long in treating it as a sufficient breach going to the root of the contract, *(see Western Excavating* above).

301. The Tribunal concluded that the respondent was correct to say that the claimant had failed to establish that there was a series of acts which cumulatively amounted to a breach of trust and confidence.

302. The claimant also failed to demonstrate that there was a breach of any express or implied term of her contract of employment that was sufficient to entitle her to resign and thereby claim that she was constructively dismissed. The Tribunal was satisfied that C was entitled to arrange for the claimant to move to MHC in terms of the contract of employment. As indicated above, the Tribunal was satisfied, on the balance of probabilities, that there was no intention on the part of C that this should be permanent unless had the claimant moved there and then decided for herself that she wished to remain there. Of course, that did not happen as the claimant remained absent on sickness leave.

303. The final question asked for the claimant in the closing submission is set out below.

If there was a fundamental breach of contract, is the claimant able to successfully bring a claim for constructive dismissal?

304. The Tribunal assumes this is in relation to the issue of whether in the unusual circumstances of this case where the claimant had other and separate employment contracts with the respondent (as opposed to the later contract entered into with effect from 1 December 2017 with one of the GP practices at SHC which is a contract between the claimant and that GP and or its practice and had no connection to the present respondent) the Tribunal concluded that the various contracts held by the claimant with the respondent are separate and severable and so the present claim can be considered by this Tribunal. This is dealt with again below when considering the respondent's conclusions set out in their written submission.

305. Turning to the respondent's submission and the issues set out under the final 12 points the Tribunal considered each of these in turn. As with the claimant's

submission, the Tribunal's conclusions are set out in order for each of the 12 points.

- **Mrs Ewart's submission is that the claimant has not suffered any detriment as a result of making a protected disclosure**

306. The Tribunal concluded that this submission was well made as it was unable to identify any detriment to the claimant as a result of her making what was accepted to be a protected disclosure. As can be seen above, the Tribunal gave careful consideration to the evidence and has set out its findings on the facts and explained why, where there was disagreement between the parties as to what was said by them it concluded that on the balance of probabilities it preferred the accounts given by C and Y. In doing so the Tribunal wants to make it clear that it understood that there must have been considerable emotional upset for the claimant on 19 June and again on 20 June. While the Tribunal concluded as set out above that it was not satisfied that the claimant did set out the protected disclosure on 19 June she most certainly did so on 20 June. Indeed, that was accepted by both C and Y. It is also understandable that the claimant must have been upset by having to raise the issue of X's conduct with Patient E. However, the respondent accepted she was entitled to do so and indeed there was no suggestion at any time that she was subjected to any criticism for doing so. There is reference in C's file note to her indicating to the claimant that questions might be asked of her as to why she took time to report her understanding of what was said to have occurred on 28 May when X visited Patient E. As the Tribunal understood it, the claimant appears to have challenged X on Friday, 16 June and then again on the following Monday, 19 June. That does not sit comfortably with the claimant's explanation that she saw C first thing on the Monday morning when she asserts she brought or tried to bring to her attention the clinical concern she had about X.

It was Mrs Ewart's submission that there has been no evidence to suggest that the claimant's disclosure amounted to any part of the reason for the conduct of the respondent's employees, which it is alleged, let to her ultimate resignation

307. The Tribunal concluded that this submission is well made in that there was no evidence to support that the claimant's disclosure amounted to any part of the reason for the conduct of the respondent's employees. The Tribunal has set out above how it reached its conclusion on this issue and does not intend to repeat it here.

It was Mrs Ewart's submission that the claimant was not automatically unfairly dismissed in terms of section 103A of the 1996 Act.

308. The Tribunal could not be satisfied that the claimant was automatically unfairly dismissed. In reaching this view it took into consideration all that was said for the respondent in their submission. The Tribunal concluded that while it noted this may have been the claimant's perception that is not sufficient in law to sound in an automatically unfair dismissal. The Tribunal noted that the respondent gave an account of why the step was taken by C in indicating to the claimant why she required to move her from SHC to MHC, albeit as a temporary basis, and while the Tribunal could appreciate why the claimant was unhappy with her doing so, she accepted that, as the Senior Line Manager, C did so and that she was entitled to do so in terms of the clause 19 of the claimant's contract, (see again page 65).

It was Mrs Ewart's submission that the claimant was not unfairly dismissed in terms of s98 of the 1996 Act

309. The Tribunal concluded that this submission was well founded since there was no evidence to support a contention that the claimant was dismissed by the respondent. The claimant decided to resign from her employment and in her resignation letter she cites the Dignity at Work complaint against her from Z. She did go on to mention the proposed move to MHC but~she had also accepted that the respondent was entitled to do this in terms of her contract.

It is difficult for the Tribunal to see how the claimant can argue that there was a constructive unfair dismissal where they require to take action once a Dignity at Work complaint was made against the claimant. The Tribunal appreciated that the claimant may have had a perception that such a complaint was only made because X and Z were friends but the evidence does not support any suggestion that C and Y were trying to create such a complaint against the claimant. C explained very clearly what she had told Z and that it was for Z to decide whether to proceed with a Dignity at Work complaint or not. The form is signed and dated by Z on 19 June which is before C was aware of the claimant's professional conduct complaint, (this is on the basis that the Tribunal has already explained why it preferred C's evidence to that of the claimant as to when C became aware of that professional complaint). In addition, C already had the reflective account from A. She was also aware of a possible complaint against the claimant from O and of X having issues with the claimant. The Tribunal was not persuaded that the steps taken by C to propose the move to MHC was made in a way that was intended to undermine the claimant but was done with the intention of providing her with support and to work away from the District Nurse Team which may well have seemed to her and Y to be unravelling. The Tribunal appreciated that the claimant may have taken the view that X should have been suspended, pending the investigation into her complaint against her but even if that had happened and it is not for this Tribunal to comment on this then the respondent would still have been faced with the situation where there was a formal Dignity at Work complaint filed against the claimant by Z and others potentially pending as at 20 June 2017.

Mrs Ewart submitted that the claimant has failed to establish a series of acts, which cumulatively amount to a breach of trust and confidence on the part of the respondent.

310. The Tribunal again gave careful consideration to all that was said in support of there being a series of acts in this regard. It concluded that it could not be satisfied that there was such a series of acts.

Mrs Ewart submitted that the claimant's "last straw" viewed objectively, did not add anything to the alleged breach of confidence.

311. The Tribunal concluded that if, as seemed to be the position, the claimant is asserting that the encounter between herself and X on 7 August was the "last straw" then it was unclear why it took the claimant a month to bring this to the respondent's attention and having done so, if she then expected action to be taken there was no indication as to how she brought this to Y's attention.

Mrs Ewart submits that the claimant has not demonstrated that the respondent breached any express or implied term of her contract of employment sufficient to entitle her to resign and claim that she was constructively dismissed.

312. The Tribunal concluded that the claimant has failed to demonstrate what breach of her contract, express or implied occurred. As indicated above, the Tribunal concluded that C was entitled to move the claimant as a temporary rather than as a permanent move in terms of Clause 19 of her contract. If the claimant remained in any doubt about this as at 20 or 21 June she seemed to accept that the temporary nature of the move was discussed later on and it was certainly referred to by Y in her detailed reply to the claimant's resignation letter.

Mrs Ewart submitted that the claimant did not resign because of any conduce by the respondent but because she had found suitable alternative employment and was worried that the respondent would find her guilty of some misconduct through the DAW process.

313. While the Tribunal noted this submission the claimant did not in terms accept that this was why she decided to resign. She had secured alternative part time employment to start on 1 December 2017 the day after her resignation took effect. It is not for the Tribunal to speculate as to whether the claimant was concerned as to what might happen in relation to her own position once the DAW process was concluded.

Mrs Ewart submitted that if, which is denied, the respondent did breach the claimant's contract of employment, it is denied that such a breach was fundamental or repudiatory.

314. Given the Tribunal's view as set out above, the Tribunal was not satisfied that the respondent breached the claimant's contract and, if it was wrong in this conclusion, then it was not satisfied that any alleged breach was fundamental or repudiatory.

Mrs Ewart submitted that the claimant did not resign in response to a breach of her contract of employment by the respondent. However, if (which is denied) the respondent breached the claimant's contract, which breach was fundamental or repudiatory and was the cause of the claimant's resignation, she submitted that the claimant delayed too long and therefore accepted the breach.

315. The Tribunal concluded that there was merit in this submission. If there was a breach of the contract such as to entitle the claimant to resign and claim constructive dismissal then the Tribunal concluded that the claimant did delay too long and so accepted the breach if there was such a breach. As indicated above, the Tribunal understood the claimant to have accepted, albeit she did not like it, that C was entitled to propose to move her to MHO. In relation to the encounter with X on 7 August 2017 the Tribunal concluded that, if the claimant was taking the view that this was the last straw" then she delayed too long in waiting a full month before bringing it to Y's attention at their meeting in early September 2017.

Mrs Ewart submitted that the evidence mitigates (militates? Tribunal's query) against any conduct by the respondent's staff as being directed towards the claimant without reasonable and proper cause.

316. The Tribunal concluded that the necessary conduct by the respondent's staff towards the claimant without reasonable and proper cause was lacking given the evidence and findings of fact set out above.

(Finally) Mrs Ewart invited the Tribunal to reject the claimants allegations and thus dismiss the complaint.

317. See below for the Tribunal's summary of its determination.

318. As indicated above, the Tribunal considered all the submissions before it from the claimant and the respondent. In doing so, as indicated above, when considering the claimants submission as to whether the Tribunal has jurisdiction where the claimant remains in the respondents employment where she remains in the employment of the respondent under separate contracts of employment which are ongoing.

319. The Tribunal noted that the respondents primary submission was that, since the claimants employment under District Nurse contract was terminated but her employment relationship with the respondent continued, then a tribunal can only hear a claim where a contractual complaint is brought by an employee if it arises or is outstanding on termination of the employment of the employee in question.

320. The Tribunal concluded that there were separate contracts and it therefore concluded that it does have jurisdiction to determine this current claim.

321. In the alternative, if the Tribunal is wrong in reaching this conclusion because there was an ongoing employment relationship between the claimant and the respondent, then it would follow that the claimant cannot bring such a complaint for breach of contract since there is an ongoing employment relationship in which case the Tribunal would not have jurisdiction to determine the case.

322. However, since the Tribunal concluded that the individual contracts of employment are severable it has jurisdiction to determine the present claim and the complaints set out within it.

323. Turning to the issue of whether the claimant was subjected to a detriment the Tribunal concluded and, indeed it was not in dispute, that the claimant had made a protected disclosure. The Tribunal was nevertheless, satisfied that

the claimant was not subjected to a detriment(s) on the grounds of having made such a disclosure.

324. It is again important to note that the respondent accepted that the disclosure made by the claimant was a protected disclosure and that it was one which she was entitled to make. However, the issue that then arises is whether the claimant was subjected to any detriment(s) as a result of making that disclosure. The Tribunal concluded that there was no evidence to support the claimant's contention that she was subjected to any detriment(s) as result of making that disclosure for the reasons set out above.

325. In relation to whether the claimant was automatically unfairly dismissed in terms of Section 103A of the 1996 Act the Tribunal concluded that she was not. It reached the same conclusion in relation to the assertion that she was not unfairly dismissed in terms of section 98 of the 1996 Act as is explained above.

326. The Tribunal concluded that the claimant failed to establish a series of acts which cumulatively amount to a breach of trust and confidence. It also found that the claimant's las straw viewed objectively did not add anything to any alleged breach of trust and confidence as explained above.

327. The Tribunal concluded that there was no material breach, entitling the claimant to resign and claim constructively unfair dismissal.

328. In summary, and in all the circumstances, the Tribunal concluded that while the claimant was clearly dissatisfied with her Line Management it could not say that there was any breach of the employment contract on their part sufficient to entitle the claimant to resign and claim constructive dismissal. It is clearly unfortunate that the claimant having had such a long and unblemished career with the respondent chose to resign a year earlier than she had intended to do.

329. The Tribunal having considered the issues as set out above, concluded that it follows, applying the law to the facts as outlined above, that this claim cannot succeed and it must therefore be dismissed.

Employment Judge: **J Garvie**
Date of Judgment: **23 July 2018**
Entered in register: **27 July 2018**
and copied to parties