EMPLOYMENT TRIBUNALS

Claimant: **Mr U Saleem**

Respondent: **Superdrug Stores Plc**

Heard at: **Leeds by CVP**

On: **22-25 March and (deliberations only) 8 April 2022**

Before: **Employment Judge Maidment**
Members: **Mrs LJ Anderson-Coe**
Mr L Priestley

Representation
Claimant: **Ms M Cornaglia, Counsel**
Respondent: **Mr R Ryan, Counsel**

RESERVED JUDGMENT

1. The claimant was not dismissed. His claim of ordinary and automatic unfair dismissal therefore fails and is dismissed.

2. The claimant's complaints of detriment on the grounds of him having made protected qualifying disclosures fail and are dismissed.

REASONS

Issues

1. The claimant complains of detriments on the grounds of whistleblowing, reliant as protected disclosures on his verbal communications to his manager, Manpreet Dhanjal, on 24 July 2020, his verbal communications to her on 30 July 2020 and his email of 5 August 2020 repeating the concerns he previously expressed on 24 and 30 July. During the course of the hearing it was accepted by Mr Ryan, on the respondent's behalf, that all of these communications amounted to protected disclosures. Indeed, they were disclosures of a health and safety nature reasonably believed to be in the public interest.

2. The claimant then alleges that the following detriments were done on the grounds of his protected disclosures:

   2.1. suspending the claimant for gross misconduct on 1 September 2020
   2.2. starting a disciplinary process against the claimant on 1 September 2020
   2.3. putting the claimant on a performance improvement plan following the disciplinary hearing held on 12 October 2020; and
   2.4. sanctioning the claimant disproportionately with a final written warning for a minor data breach following the disciplinary hearing held on 12 October 2020

3. The claimant brings a complaint of ordinary unfair dismissal based on his having resigned from his employment in response to a fundamental breach of contract, namely a breach of the respondent's obligation to maintain trust and confidence. The following acts are relied upon by the claimant as singularly and, more particularly, cumulatively amounting to a breach of trust and confidence:

   3.1. failing to listen to and dismissing the claimant's concerns regarding the safety of using the consultation room
   3.2. pressurising the claimant to conduct Medicine Use Reviews ("MUR") conversations, provide flu vaccines or other private consultations with patients in the consultation room
   3.3. threatening the claimant with disciplinary action if he failed to conduct MUR conversations, provide flu vaccines or other private consultations with patients in the consultation room
   3.4. failing to make adjustments to the pharmacy or the working arrangements which the claimant requested in order for the pharmacy to be safer to work in
   3.5. failing to ensure that an adequate risk assessment was completed for the claimant
   3.6. suspending the claimant on grounds of gross misconduct for failing to conduct MUR conversations, or other private consultations with patients in the consultation room
   3.7. continuing with his suspension despite the Pharmaceutical Services Negotiating Committee ("PSNC") advising that all MUR, NMS and AUR consultations may now be provided by phone or video consultation, without the contractor having to seek prior approval from NHSE
   3.8. starting disciplinary proceedings against the claimant for failing to conduct MUR conversations, or other private consultations with patients in the consultation room
   3.9. pressurising the claimant to attend disciplinary meetings in person despite the claimant's objections on the grounds of health and safety
   3.10. sanctioning the claimant disproportionately for the alleged data breach as a result of him failing to conduct MUR conversations, or other private consultations with patients in the consultation room

3.11. placing the claimant on a performance improvement plan for failing to conduct MUR conversations, or other private consultations with patients in the consultation room

4. In the alternative, the claimant relies on the aforementioned series of actions with the last straw being the claimant being subjected to a performance improvement plan

5. The claimant also maintains that his dismissal was automatically unfair as the reason or, if more than one reason, the principal reason for the respondent's repudiatory treatment of him was the claimant raising concerns by reasonable means of health and safety risks pursuant to Section 100(1)(c) of the Employment Rights Act 1996 (the respondent concedes that he did raise concerns covered by that section) and/or, in circumstances of danger which the claimant reasonably believed to be serious and imminent, he took steps or proposed to take appropriate steps to protect himself or others – Section 100(1)(e). The respondent makes no concession in respect of the claimant being protected under this alternative subsection.

6. Reliance on Section 100(1)(e) was allowed following the claimant's successful application to amend, after the identification by the tribunal of the issues in the claim. The claimant's original grounds of complaint disclosed expressly a claim under Section 100(1)(c). However, the underlying facts pleaded did disclose a basis for what would be a Section 100(1)(e) claim. At an earlier preliminary hearing for the purposes of case management there was identification only of a Section 100(1)(c) claim. However, the finality of the issues identified at that hearing was subject to the parties reverting to the tribunal with any contention to the contrary. A list of issues was then prepared on behalf of the claimant in that context. It is a list of issues which clearly articulates a section 100(1)(e) claim, albeit without reference to that section. The respondent must have understood that a claim was now been advanced on the basis of the claimant taking steps to avoid a serious and imminent risk of danger. It did not object and has been aware prior to this hearing that the claimant wished to run that argument.

7. In terms of the factors the tribunal may take into account in determining whether to grant an amendment, the claimant cannot plead in his favour any ignorance or lack of legal representation. This is also a late application. Nevertheless, the balance of prejudice is a crucial consideration. The respondent has the obvious prejudice of having to defend a different type of claim, but without any need for additional evidence and being able now to deal with the point without an adjournment. The prejudice of the claimant is potentially greater. There is a difference between ill-treatment because of raising something and ill-treatment because of doing something. The balance of prejudice in this case lies in favour of allowing the claimant to pursue a Section 100(1)(e) as well as 100(1)(c) claim.

Evidence

8. The tribunal had before it an agreed bundle numbering some 351 pages which included a small number of additional documents added during the hearing, but without objection. Having spent time identifying issues, the tribunal took some time to privately read into the witness statements exchanged between the parties and relevant documents. When each witness came to give their evidence, they could therefore do so by confirming the contents of their statements and then, following any brief supplementary questions, be open to be cross-examined on them.

9. The tribunal heard firstly from the claimant. On behalf the respondent, it then heard from Manpreet Dhanjal, Imran Iqbal and Rupi Basheen, all regional healthcare managers.

10. Having considered all relevant evidence, the tribunal makes the factual finding set out below.

Facts

11. The claimant worked in the pharmacy within the respondent's retail store in Barnsley from 4 July 2011 and on his days of work was the only "responsible pharmacist" on site. The pharmacy operated under separate management to the beauty/non-prescription health and hygiene products sold in the store in which the pharmacy was located. The claimant line managed the pharmacy team in Barnsley, usually consisting of 3 dispensing assistants. His responsibilities included ensuring the accurate dispensing of prescriptions, that the pharmacy complied with the respondent's operating procedures and had accurate record-keeping and providing services such as flu jabs, conducting MURs and carrying out patient consultations. He was managed by Ms Manpreet Dhanjal, regional healthcare manager, who was also a qualified pharmacist. The General Pharmaceutical Council Guidance ("GPCG") recognised that a responsible pharmacist could make temporary amendments to pharmacy procedures if felt necessary in his professional opinion.

12. MURs were conducted for the patients free of charge, albeit during the latter period of the claimant's employment the respondent could claim a fee from the NHS of £28 for each one conducted up to a maximum of 100 in any year. The claimant agreed that they were of benefit to patients, particularly when a patient took a lot of different medications. It was a way of assessing how the patient was affected by/benefiting from the medication taken and of ensuring that it was being taken correctly and in the appropriate dosages. Ordinarily they were conducted privately in the consultation room at the pharmacy which was an L-shaped room, which, for the greater part, was around 1.6 m wide and 5.3 m long. The consultation room in Barnsley was enclosed with no windows or other source of ventilation. Ordinarily prior approval of the NHS area team was required on a case by case basis if such a review was to be done over the telephone.

13. The tribunal notes that the respondent operated a whistleblowing policy which recognised that employees should not be punished for raising protected disclosures. Whistleblowing concerns were to be the subject of an investigation.

14. Whilst the pharmacy remained open during the first period of lockdown necessitated by the coronavirus pandemic, the claimant was furloughed at his request from March 2020 until 31 May 2020. He then took a period of unpaid leave at his own request from 1 June to 19 July. He did this because of concerns about catching the coronavirus at work. The claimant understood that he was at risk of the more serious consequences of catching the coronavirus due to his BAME ethnicity. Furthermore, his elderly mother lived with him. The claimant was 42 years of age at the time. The claimant agreed that during his period away from the workplace he preferred for contact with Ms Dhanjal to be by email. He told the tribunal that he preferred everything to be transparent and that it was almost a running joke that he preferred to have everything in writing.

15. The respondent's retail stores were supplied with instructions to adhere to government guidelines. Ms Dhanjal expressed that pharmacies were in the frontline in terms of health service provision, particularly during a period where people were told that they could not see their own GPs. The respondent's policy provided that opening stores with pharmacies was its main priority. From 24 July 2020 face coverings were mandatory for customers, but it was said that team members were not required to enforce this law. She said that the stores had access to order their own PPE. Whilst she accepted that retail staff were restricted to the use of 2 masks each day, she had never restricted the number of masks or monitored their use in the pharmacy settings.

16. The Community Pharmacy Patient Safety Group ("CPPSG") of which the respondent was a member published their own recommendations regarding the safe use of consultation rooms in July 2020. Ms Dhanjal in cross examination accepted the stated principle that every consultation room was different, which would result in different levels of risk. The guidance went on to state that the decision to provide a service within the consultation room should be based on the professional judgement of the pharmacist following an assessment of the risk. She said that MURs had been suspended but the respondent was about to restart them and the guidelines the respondent operated under were that they could be done in the consultation rooms. She was referred to a document indicating that in another part of the country pharmacies had been given permission to carry out consultations remotely. She said however that the approval of the NHS area team was required – the respondent had no such approval. She said that she was not averse to MURs being conducted remotely.

17. The PSNC also issued periodic guidance which included a briefing note in July in anticipation of the seasonal flu vaccinations which would be carried out later in the year.

18. The claimant implemented his own measures at the Barnsley pharmacy through a staff briefing the end of July 2020. This included the use of the consulting room being optional, the phone being used by only one person each day and the encouragement of staff to wear a face mask. Ms Dhanjal accepted that he was entitled to put steps in place to promote safety, although she said that she might not necessarily understand all of his recommendations. She did not agree for example that he was entitled to direct that only one person could answer the telephone. She recognised a safety risk in conducting consultations in the consultation room but believed that 2m distancing could be very easily achieved at the Barnsley pharmacy and that public health guidelines were to mitigate the risk by the use of PPE. She agreed that ideally this would involve everyone wearing PPE.

19. Ms Dhanjal sent to her pharmacy managers on 21 July an email stating that the safety and well-being of team members was of the utmost importance to the respondent. Pharmacy and store risk assessments had been carried out, but they wished also to complete individual risk assessments for all pharmacy team members "to ensure we put appropriate mitigation in place to reduce the risks associated with Covid-19." She asked the pharmacists in her region to complete the attached pre-risk assessment to help prioritise who needed to have their risk assessment completed first. She asked that these be returned by 22 July which the claimant duly did. The individual risk assessment guidance recognised that those of a BAME background were known to be at more risk of severe illness due to Covid-19.

20. Ms Dhanjal telephoned the claimant on 23 July at work to discuss the risk assessment. He told the tribunal that it would be an overstatement to say that he was abrupt and rude to her, but did accept that he made one comment in a sharp tone. The tribunal accepts Ms Dhanjal's evidence that she was somewhat taken aback when the claimant responded that he was "not great" when asked how he was and that he then asked whether the call was about "EPS and the app". The claimant told the tribunal that he needed time to check that everything was safe in the pharmacy. He told Ms Dhanjal that he needed time to read the risk assessment and did not want to do it at that point. They ultimately agreed to speak about it on the afternoon of Friday 24 July. The claimant told the tribunal that he wanted more time. He had only been back at work a few days and felt he had not had enough time to adjust. He had returned to work, he said, to a vastly different environment.

21. The claimant emailed Ms Dhanjal on the morning of 24 July attaching the risk assessment and saying that he did not feel he had been given enough time and that she should consider the form as being supplied "under duress". He asked her to consider that he lived and worked in a deprived area, had a 39 inch waist, that access to PPE at work was restricted to 2 masks per day, that he had heart murmurs, that he occasionally took antifungals, had not had his kidney or liver function tested recently and had low blood pressure. He said that he was not willing to accept the risk of working in confined spaces even with PPE, which

included working in the consulting room. He asked Ms Dhanjal to acknowledge this email.

22. She did so at 09:04 on 24 July saying that she was surprised and struggling to understand why he felt under duress to complete the risk assessment. She said it was in his best interests for them to take time to complete the risk assessment as soon as possible, that she had undertaken the same process with 14 of the claimant's fellow pharmacy managers without the need to reschedule and that she had already accommodated him by delaying the conversation to later that day. She said that she had also made it clear that he did not need to send over the risk assessment in advance of their conversation. The process was for it to be completed together. She reiterated that they would go through the risk assessment at 16:00 that afternoon. Ms Dhanjal accepted that she did not tell the claimant that he could use as many masks as he wanted – she continued to maintain, however, that there were no restrictions and a free supply.

23. That conversation indeed took place. The claimant raised 3 concerns. Firstly he felt that they should ask customers to buy facemasks and that a member of the store team should stand at the door to advise customers to do so if they were not already wearing a face mask. Secondly, he wanted to move the computer in the dispensary to assist with social distancing. Thirdly, he said that he was not willing to enter the consulting room, canteen or lift because of the increased risk they posed. **[PID 1]**

24. After the conversation Ms Dhanjal took advice from the respondent's pharmacy superintendent and HR. She concluded that the claimant's first request was unreasonable. The respondent's policy in respect of customers wearing face coverings was consistent with other retailers, pharmacies and with legal guidance that the wearing of facemasks was not to be policed by retail staff. Furthermore, there had been internal advice advising staff against doing so due to concern regarding potential customer reaction/aggression. As regards the computer location, whilst she accepted that it was not always possible to maintain 2 m social distancing at all times, she felt that the risk was negated by the use of PPE. She told the tribunal that moving the computer, which would have involved an element of rewiring, would not have made a material difference in terms of distance from other staff when using the computer. Finally, she did not consider the claimant's unwillingness to use the consulting room as reasonable – the PSNC were actively encouraging pharmacists to use consultation rooms prior to the flu season with PPE provided.

25. On 24 July, prior to the risk assessment conversation, Ms Dhanjal had chased the claimant, using the Barnsley store email, for information she had expected by the previous day. The claimant replied on 27 July saying that the information had been provided. Ms Dhanjal thanked him for the update. Ms Dhanjal described the claimant as having been extremely apologetic. He was said to be normally fairly good at responding, but she told the tribunal, which it accepts, that a lack of response was not normal or acceptable.

26. Also on 27 July, Ms Dhanjal emailed the claimant attaching his risk assessment, saying that she had spoken to the superintendent and HR team about the claimant's concerns and setting out her position as described above.

27. Ms Dhanjal visited the Barnsley store to speak to the claimant on 30 July. She told him that she was upset at the way he had spoken to her on 23 July, noting that she had had cause to address his attitude towards her in the past. She said she felt he had been disrespectful to her. The claimant apologised saying that he felt that it was his tone which was wrong and not the content of the conversation. Ms Dhanjal expressed her disagreement. Ms Dhanjal made a critical comment regarding the claimant's conversation with a patient, which she had witnessed and where she did not feel he had properly promoted the use of the Electronic Prescriptions Service ("EPS") app. There was then a conversation regarding use of consultation rooms where the claimant maintained his position that he was not willing to use the room. **[PID 2]** There was discussion of the current guidance from Public Health England and the position of the PSNC. She expressed a need to be able to provide flu vaccinations and MURs using the consultation room. She asked the claimant to reflect on their conversation and to confirm by email whether he had reconsidered. She warned him that if he continued to state that would not provide services in the consultation room, it would lead to an investigation and possible disciplinary action because it was, in her view, a reasonable request. Ms Dhanjal said to the tribunal that she was seeking to be honest and open, letting the claimant know that there might be an investigation and that investigations can lead to disciplinary action – if someone was not adhering to a reasonable request, then that could lead to an investigation. The claimant told the tribunal that he did not feel reassured by anything he had been told. He was also concerned at her reference to a "disciplinary". The claimant agreed that the conversation had ended amicably without raised voices. He said he had been cautious and perhaps overly polite because of the reference to his tone in the earlier phone call. Ms Dhanjal then took photographs of the position of the computer so she could look again at whether it needed to be moved.

28. Ms Dhanjal emailed the claimant on 1 August confirming what had been discussed on 30 July. She repeated that she had said that she felt the claimant had been curt and abrupt during the telephone conversation on 23 July which she found really upsetting and unexpected. She noted the positive being that the claimant had reflected and apologised for the tone of the conversation. She said she wanted them to work on bettering their relationship so that she was not required to have a formal conversation about the matter. She referred to the way he spoke to patients about EPS. She then said that she had also wanted to check how he felt about consultations with patients in the consultation room following on from the risk assessment especially as safety visors had now been received. She noted that the claimant was still not happy to enter the room with patients despite the provision of PPE as he believed there was still a risk he was not willing to take with reference to guidelines and knowledge about the virus changing over time. She said that she had listened intently to his reasons, but made it clear that this was a reasonable request and

part of his duties as a pharmacist. She reiterated that failing to carry out a reasonable request "will lead to a formal investigation and may then lead to disciplinary action." She said that she had further considered moving the computer but was comfortable that they were able to adhere to 1m plus distancing with PPE in the dispensary - moving the screen would make only a marginal difference. The request therefore was not considered to be reasonable.

29. The claimant told the tribunal that he accepted Ms Dhanjal was genuine in her feelings regarding his tone in the earlier telephone conversation. He also accepted that his technique in dealing with patients regarding EPS was "not really good enough at that point". He said that he had not had the opportunity to practice how he should engage with customers on the topic and took her advice on board. He did not disbelieve that Ms Dhanjal had listened "intently" to his arguments regarding use of the consultation room.

30. The claimant replied from his personal Hotmail account by email of 5 August. **[PID 3]** He revisited the issue of the completion of the risk assessment. He continued that having discussed the risks with his family, he had an additional concern regarding the use of the lift and would prefer to use the stairs at the pharmacy. He said that he was informed that some organisations had been providing facemasks free of charge to retail customers saying that something similar to that from the respondent would help customers "observe our collective obligations". He also said that the bulk of the store staff did not wear facemasks at any time and they had frequent contact with them throughout the day. He felt that the relocation of the computer would be a minor relocation and put the dispensing station further away from the pharmacist's checking station to give a distance of almost 2m. He said he believed it reasonable firstly to take steps to support social distancing and only then to look at additional protection. As regards the use of the consulting room, he said this posed a higher risk than he was willing to take and he did not feel the request was reasonable. He said that MURs could be conducted over the telephone or at alternative locations with NHS permission which would significantly reduce the exposure of pharmacists to the coronavirus. He referred to Barnsley being one of the worst affected areas with coronavirus cases remaining at a high level. He said that he felt discussing "formal proceedings is somewhat premature and threatening given the above." He asked Ms Dhanjal to regard the email as a protected disclosure in the public interest and that any further correspondence on the matter be sent to his Hotmail address. The claimant told the tribunal with reference to this being a public interest disclosure, that he wanted to ensure that his concerns were addressed.

31. Ms Dhanjal's response was delayed by a period of annual leave and was sent to the claimant by email on 20 August to his work email address. She said that going forward she would be communicating with him via telephone or his work email account which was personal to him and the correct address to use for business matters. She said that, as already discussed, the respondent would not be providing customers with facemasks nor requiring their use. She

reiterated her stance regarding the moving of the computer suggesting that changing the angle of the screen would increase distance between colleagues. She said again that she believed the use of the consultation room was a reasonable request in line with the expectations they had as a business of all their pharmacists and that the respondent had taken time to restart services in a safe manner. She said that once again she was asking the claimant to restart services within the consultation room with immediate effect given the PPE and mitigation the respondent had provided to address the risks. In evidence, Ms Dhanjal did not accept that she was dismissive of the claimant's concerns – she said that she had considered his concerns and taken advice. She was reiterating the importance of services starting up again so that they could fulfil their obligations as pharmacists. Opening up was, she said, about doing the right thing as pharmacists. Ms Dhanjal said that she had not seen the respondent's whistleblowing policy before, which set out steps to take including the arrangement of a meeting and an investigation into concerns.

32. The claimant did not disagree when put to him in evidence that all of the other pharmacists in the region had been prepared to restart seeing patients in their consultation rooms. He said however that he believed that they were not all happy in doing so. There is no dispute that the claimant did not, from his return to work in July, ever see any patient in the consultation room.

33. On 24 August, the claimant informed Ms Dhanjal that a long-standing employee had resigned and she asked him to advertise for a replacement immediately. The claimant agreed that she offered to support the recruitment by contacting the recruitment team to ask them to prioritise the vacancy. The claimant agreed that there was no mention of use of the consultation room or health and safety issues. He agreed also that by 26 August the vacancy had not been advertised. Ms Dhanjal contacted the claimant on 26 August to chase this up. He replied that he did not intend to advertise the role immediately because he did not have the time to support 2 colleagues at the same time as training a third and that he would advertise in a couple of weeks. Ms Dhanjal was confused as the claimant appeared to assume that they would have difficulty in recruiting a fully trained dispensing assistant at a time when competitors were reducing their staff, who might be therefore available to the respondent. She did not understand why having a combination of trained and staff in training would not be manageable and, in circumstances where there had been a downturn in business at the Barnsley store, there appeared to be ample time to train someone new if that was necessary. The claimant told the tribunal that he did not understand why Ms Dhanjal did not just let him do what he considered to be best for the store. He knew the store and its requirements, he said, better than she did.

34. On 26 August, Ms Dhanjal was concerned that some of her stores were flagging with EPS nominations. She emailed 7 stores at 08:09 on 26 August saying that she needed the pharmacy managers to ring her after 16:30 to confirm that they had secured EPS nominations at a level of at least half of the normal weekly target. The stores contacted were ones lagging behind the 50% mark for the

week. She emailed the claimant at 17:31 to say that she had not received a phone call and expected a call the following day to explain his failure to follow the action requested. No call had been received from the Barnsley store and 2 others. At 10:27 on 27 August she emailed the claimant to say that she was still awaiting an explanation and that a failure to ring her would result in an informal verbal warning. Before the tribunal, the claimant was unclear as to when he had seen the aforementioned emails. He accepted that it was fair for Ms Dhanjal to expect a response. However, he had never known any threat of a verbal warning in such circumstances saying that these type of emails were entirely routine.

35. On 27 August, Ms Dhanjal telephoned the Barnsley pharmacy, but no one answered her call. She sent an email to the claimant at 15:07 saying that she tried to ring several times that day but with no answer, asking him to ring her. She sent a further email at 17:41 stating it was now past 17:30 and was the second consecutive day she had asked him to call her. She said that she fully expected him to call her the following morning.

36. There is no dispute then that Ms Dhanjal tried to call the pharmacy again on 28 August and that the phone went unanswered. Ms Dhanjal decided to call the store rather than the pharmacy number instead and this was answered by an employee called Kerry. She transferred the call to the claimant who said: " Hi Manpreet, I'm extremely busy at the moment, if you have anything urgent to say to me, please email me on my Hotmail email address" proceeding to hang up before Ms Dhanjal was able to say anything. She described herself as being shocked at how he had spoken to her. The claimant agreed that he had hung up, but said that he had had a really difficult week with "all the threats", people leaving, people on holidays and no support so he decided not to speak to her. He said he was sorry now if he had upset her. He said that there had been a similar problem between them a few years previously when he had reacted in a similar manner to a phone call, but everything had been resolved within 24 hours.

37. Ms Dhanjal called the store again on the same day but it rang on a loop. The store manager called her back on her mobile number to ask if it had been Ms Dhanjal calling the store. She confirmed that it had been and asked whether the pharmacy was busy, because the claimant had told her that it was and had hung up. She replied that it had been a quiet afternoon and that the claimant was using the time to train a trainee store manager. Ms Dhanjal felt that there was no reason for the claimant not to speak to her so rang back again via the store number and the phone was handed again to the claimant. She specifically told him not to hang up the phone several times, but the claimant spoke over her saying: "I'm still really busy, email me" and put the phone down again. Ms Dhanjal described herself as being staggered and left reeling by the fact that she was unable to speak with the pharmacy manager or the pharmacy team. She said that she relied on being able to communicate with the team via telephone and felt she had no idea what was going on there because of what appeared to her to be a deliberate and blatant refusal to acknowledge her. She

considered that for the phone not to be answered, the claimant must have instructed his team not to answer it and was concerned that patients would also not have been able to get through.

38. The claimant accepted before the tribunal that his attitude had been rude and unprofessional. He denied however that he had instructed his team not to answer calls. He said that they had a rota for who answered phone calls because of Covid which was in line with government guidance. He said that he could see why Ms Dhanjal might be concerned that any calls from patients were not being answered.

39. Ms Dhanjal then took HR advice. She then decided to suspend the claimant pending an investigation. She said it was originally intended that she would call the pharmacy on 1 September to inform the claimant of that decision. However, despite calling twice on that day her calls went unanswered. She had anticipated that this might happen and Mr Craig Watt, area manager, attended the store that day and informed the claimant of his suspension. As regards her reason for suspending the claimant, Ms Dhanjal told the tribunal that she couldn't communicate or have a discussion with the claimant. She was clear that their relationship had broken down because the claimant would not answer her communications. She couldn't get in touch with the dispensary. She was his line manager and if the respondent couldn't make contact, it did not know what was going on there. That was a danger and they had a responsibility.

40. Mr Watt provided a statement by email to Mr Iain Fulton on 6 September regarding his attendance at the Barnsley store. He said that he had observed the phone ringing but remaining unanswered. He then saw the claimant sitting in the corner of the dispensary. He said that he read out to the claimant a statement confirming his suspension and asked if the claimant understood. He said that whilst doing so the claimant repeatedly interrupted him, raising his voice and saying that he would not acknowledge the action taken until he had it in writing. Eventually, the claimant left the store.

41. A letter was subsequently sent to the claimant from Mr Watt confirming his suspension due to a suspected act of alleged gross misconduct for failing to follow direction from line management resulting in the respondent losing direct contact with the pharmacy, the pharmacy failing to provide an adequate MUR service to patients and being unresponsive to his line manager despite earlier conversations regarding his attitude. It was stated that suspension was a neutral act to allow a fair investigation.

42. The claimant's actions were then subject to an investigation conducted by Mr Fulton, another regional healthcare manager.

43. It is noted that on 1 September PSNC guidance changed to the effect that patient consultations could now be undertaken by telephone without permission. The claimant told the tribunal that he was aware of that within a

few days of the announcement. Ms Dhanjal emailed all her pharmacies expressing her delight at the changes and saying that MURs could be conducted over the phone where clinically appropriate without additional approval. She told the tribunal that from then she encouraged the conducting of telephone MURs saying in answer to questions: ”Why wouldn’t we?” She was happy to work to the new guidelines. Previously they had not allowed MURs to be done remotely or ad hoc.

44. Ms Dhanjal submitted her own statement as part of the investigation giving a detailed account of events. She went through all the aforementioned communication issues at length stating then that “in addition to this” the claimant had continued to refuse to use the consultation room. She referred to Barnsley as being the only pharmacy failing to respond to her request to undertake MURs. She said that she felt she had gone out of her way to make allowances for the claimant in terms of support and communications, including taking extra steps to see what they could do to alleviate his concerns around Covid. She said that, despite this, the claimant had been discourteous and pushed the boundaries. She said that she felt disappointed that she had let her other pharmacy managers down by favouring and overlooking some of the claimant’s behaviours as she would not necessarily do this for others.

45. The claimant was invited to an investigation meeting, initially in person, but upon his request the respondent agreed to arrange for this to take place on 3 September by videoconferencing.

46. Mr Fulton referred to the fact that MURs could now be done remotely and the respondent would consider that. The claimant told the tribunal that the regulations had indeed been changed and that issue was resolved. The claimant did not volunteer to Mr Fulton that he had put the phone down on Ms Dhanjal on 28 August. The claimant agreed that the missed calls could have been from patients. Before the tribunal he said that “sometimes we answer in time, sometimes we don’t.” The claimant wished to debate the safety issues in him seeing patients in the consultation room. The claimant confirmed to the tribunal that it was his position that it was his responsibility and judgement call to decide whether to conduct them.

47. The claimant attended a further investigation meeting with Mr Fulton on 11 September. Following an adjournment, Mr Fulton referred to not wanting to disregard Covid, but that at the heart of the issue were the three allegations which he went on to repeat, with some amendments. He said that he believed that the matter needed to be considered at a disciplinary hearing. Subsequently the claimant supplied some requested amendments to the interview notes.

48. On or around 16 September another regional manager, Imran Iqbal, spoke to the claimant about a matter which Ms Dhanjal had referred to him, her having spoken to members of the Barnsley pharmacy team about their difficulty in

accessing information regarding patients requiring repeat prescriptions. This had become an issue when customers had reported not receiving their prescriptions. The claimant confirmed to Mr Iqbal that he held patient information on a word file on his personal computer which related to the dates they were due to be issued with repeat prescriptions. Arrangements were made for him to hand that information to Mr Iqbal. Mr Iqbal wrote to the claimant on 18 September asking to meet him at the respondent's Huddersfield site for a further investigation meeting into an allegation of potential data breaches referring to "storing patients' first and last name on your personal computer/email account. The data is believed to have been transferred to a USB and then stored on your personal device…" That meeting also ultimately took place remotely.

49. The claimant confirmed that he had this information stored on a Google cloud, accessible only to himself. When asked how he would transfer the patient details he said that he would just make a mental note that this person was due a prescription, telling the tribunal that he would amend the details at home or from his mobile phone. He told Mr Iqbal that the system at the pharmacy didn't work. He said he was presented with a problem and had tried to find a solution. The claimant confirmed that he hadn't told anyone that he had changed the system they were using. The claimant said that he did not know whether technically there had been any data breach. He told the tribunal that his understanding was that there would be a breach if he had lost the information or there had been unauthorised access.

50. Mr Iqbal was aware of the claimant's email stating that he was making a protected disclosure. However, he did not consider that he had been asked to consider the nature of his disclosure. He was not aware of any whistleblowing policy at the time. His focus was simply on the allegation regarding a data breach. For him, the claimant as responsible pharmacist must have known how to handle patient data appropriately. This was not down to training. Mr Iqbal had been through the same pharmacy exams as the claimant and was aware of frequent alerts and updates on the issue. When put in cross examination that no one had seen any of the patients' personal information he queried how he would feel if his data had been taken out of the pharmacy without his consent. The claimant had known what he was doing and in terms of the proposition that the claimant did not know what he was doing was wrong, Mr Iqbal again referred to him being a qualified pharmacist. To him this was certainly a matter serious enough to be referred to a disciplinary

51. The claimant was invited to a disciplinary meeting by letter of 25 September and to take place on 30 September via Teams. The date was subsequently changed to 12 October. The matter was to be heard by another regional manager, Rupi Bhasin, who referred to alleged acts of gross misconduct consisting of the data breach and failing to follow the direction from a line manager resulting in the claimant being unresponsive to his line manager, despite earlier conversations regarding attitude, the company losing direct

contact with the dispensary and the dispensary failing to provide an adequate MUR service to patients.

52. The claimant was given an outcome at the end of the hearing, but resigned from his employment on 14 October before he received the outcome letter on 16 October. The claimant accepted that the outcome letter accurately reflected what had been told at the conclusion of the hearing. He also sent his amendments to the disciplinary hearing notes on 16 October. These included some significant additional passages. The claimant's evidence is that he had read from a pre-prepared statement which had anticipated the questions he would be asked. The tribunal cannot accept such evidence. A note taker was present at the hearing and the additional passages would be suggestive of that notetaker completely switching off for significant periods of time. Further, it is not feasible that the claimant was able to anticipate questions and without a pause read out appropriate passages from a lengthy preprepared statement. There are examples where the conversation loses its natural flow if the claimant's additions are included.

53. Mr Bhasin told the tribunal that he was aware of the respondent's whistleblowing policy and the process to be adopted. He was aware that whistleblowers enjoyed legal protection. He considered the claimant referring to himself blowing the whistle was just doing what he felt was right. When put to him that had there been an investigation into the claimant's whistleblowing it would have been found that his behaviour was unusual, Mr Bhasin responded that the claimant's unresponsiveness was "just wrong". He did not think to pause and look into the whistleblowing complaint. The disciplinary hearing was for him to understand what had gone on in respect of the specific allegations made. The whistleblowing complaint was not something he had been given to do. It didn't concern him at the time that the whistleblowing policy had not been followed, perhaps he said because he was looking at what he had to decide as regards the disciplinary allegations.

54. The claimant was accompanied at the disciplinary hearing by his union representative, Mr Roberts. Mr Bhasin went through the allegations of a failure to communicate, including failure to answer telephone calls and the use of various email accounts by the claimant. Mr Roberts said that from his own experience of being a pharmacist it would be normal to concentrate on the patients in the store. He said that he could not understand why this was a disciplinary issue and not a performance one, saying that there ought to have been a face-to-face meeting which could have resolved matters a lot quicker. Mr Bhasin asked the claimant what he had done in his consultation room between returning to work on 20 July and suspension. The claimant confirmed that he had not provided any services there. The claimant was asked to explain why and went through his safety concerns. He referred to differing advice and said that he had to make a judgement call. The claimant referred to having had a difference of opinion, him feeling that his concerns were correct. In his amended notes, he referred to the fact that he had been proven to be right given the change in guidelines to allow telephone consultations. The claimant

accepted in cross-examination that at no point had the respondent ridiculed his concerns about conducting the MURs.

55. Following an adjournment, the claimant had an opportunity to make a final statement. Mr Roberts said that he had had a chat with the claimant and reiterated that the issue regarding the emails and phone calls should be a performance issue. As regards the use of the consultation room, this was a matter for the responsible pharmacist and the claimant's concerns ought to have been looked into.

56. The claimant accepted before the tribunal that Mr Bhasin had concentrated on the claimant's communication style. The claimant's position was not that there was no substance behind the allegations but that the response to them had been exaggerated. He accepted that he had not had any previous dealings with Mr Bhasin who he said had no axe to grind. He was not suggesting that Mr Bhasin was not genuine in the view he held. The claimant's evidence was that he could not recollect what he had discussed prior to or during the meeting with Mr Roberts. He said that he did not have much experience in matters of discipline and that he did not object to what Mr Roberts had said, but did not know if he entirely agreed with it either.

57. Mr Bhasin told the tribunal that he agreed with Mr Roberts that this was a performance rather than a conduct issue.

58. At the hearing, Mr Bhasin explained that this was a performance issue which he was not taking any further from a conduct point of view. He continued: "We need to help you run the dispensary correctly and get the dispensary where it needs to be. When you return to the business, we will be putting you through a PIP, personal improvement plan. This is not the tool to discipline people, it is a supporting tool to help you get back to where you need to be. We will start by taking you through the performance issues you have. This should not have been a conduct issue and should not have been included in the disciplinary." This was his summation of his conclusion on all of the initial allegations. In cross examination, Mr Bhasin said that all he could think was that this was a performance issue for many different reasons. The claimant needed help with his performance and guidance. He did not feel it was right to take action on the allegations put to him. He 100% agreed with Mr Roberts that the issue was round the claimant's day-to-day performance. He had been with the respondent for a long time and clearly something was not right. They needed to sit down and understand his reasons in order to support him. He thought that a PIP was the best tool to get people back to their best and all of the allegations were "bundled into" performance. When put to Mr Bhasin that this included how the claimant ran his practice and services he responded: "Everything. We needed to understand what was holding him back. We needed to provide solutions. The PIP was to help him more than us." In cross-examination specifically on the claimant's use of the consultation rooms, Mr Bhasin said that he understood the claimant's concerns and therefore no action was taken whatsoever. Subsequently, he referred to everyone having an opinion regarding what was

safe. He accepted that the claimant had his own opinion but reiterated that there was no sanction arising. He wanted to consider how they helped him overcome the barriers to help him provide the services. The matter would have been different if he had been worried about him as a pharmacist. He had no concerns regarding his practice. In re-examination, Mr Bhasin said that none of the action he had taken was to do with the claimant's refusal to do MURs. The PIP, he said, was around the "communication aspect". He was referred to one of the claimant's amendments to the notes of the disciplinary hearing where the claimant noted that shortly after he was suspended it had been announced that MURs could be conducted by telephone and that he had been proven to be right.

59. At the disciplinary hearing, Mr Bhasin then went on to discuss the new allegation regarding a potential data breach. The claimant accepted that he had undergone GDPR and patient confidentiality training. The claimant wanted to raise an issue which had arisen in store in March 2018 when a book with details of customers and medication had been taken from the store, it appears by a delivery driver in error and where no one had suffered disciplinary action. In cross examination he would not engage with the proposition that the circumstances there were quite different from his own. The claimant also later raised the use in the pharmacy of a WhatsApp group, albeit there is no evidence that this involved the disclosure of patient data. Mr Roberts put forward that the claimant had breached a Standard Operating Procedure ("SOP"), but there had been no data breach. The claimant had done it "for a patient safety perspective…". Mr Bhasin said that the claimant, regardless, had chosen to take patient data in breach of the respondent's policy.

60. After a further adjournment the claimant had an opportunity to sum up. Mr Roberts, on the claimant's behalf, said that he thought this fell into an SOP issue saying that everyone made mistakes and had broken SOPs. However, he thought it was infrequent for disciplinaries to be held for breaking an SOP.

61. Mr Bhasin then summed up that the claimant had chosen to take data outside of the respondent where he could access the data from home without consent. He said that to him that was a "massive breach and conduct issue". He said that he had been trying to think for the previous 30 minutes what to do. He repeated that the claimant had taken it upon himself to take the personal data from the respondent's platform and stored it on his personal files. He said that he was upholding this allegation and issuing the claimant with a final written warning. The claimant asked when this would be issued. He was told the following afternoon and the claimant said he would read through it and think about it. Mr Bhasin told the claimant that he should return to work as normal the following day, which the claimant in fact did. Mr Bhasin accepted in cross examination that the data breach could be gross misconduct if it was deliberate or caused significant harm and that there was unlikely to be gross misconduct if there was no intention and no harm. However, he considered that there had been a deliberate act in the claimant removing data in the circumstances. The claimant had taken patient data out of the respondent without any permission

for its removal in circumstances of there being a "massive culture" within the respondent regarding the protection of confidential information and that he couldn't get away from that conclusion. The claimant knew that patient data had to be protected. Mr Bhasin said that the claimant was a "pharmaceutical professional". He had made his own choice regarding a way of working.

62. The claimant confirmed to the tribunal that he was not happy with the decision. When asked in re-examination, if he thought that the allegation regarding MUR consultations had been dropped, he said: "No. They just seemed unresolved". When put to him what he might have done had he been given only an informal warning (and if he could have accepted that) he responded: "yes, possibly yes." He was also questioned as to whether, if he had not been put on a PIP and just asked to work on his relationship with his line manager, he could have tolerated that. He replied in the affirmative. He then said, however, that he had also issues with the process. When put that it had been foolish for him to take patient data away from the store, he said that he had come to realise that it was very much frowned upon to do it in that way. As regards putting the phone down and not responding to emails, he said he was not proud as to how he behaved, but there was a reason. He said he did not know what else to do, but he understood Mr Ryan's point.

63. The claimant said that he could not remember speaking to Mr Roberts about the possibility of an appeal. He said he knew there was an option, but with everything that had happened, he couldn't stay. This was despite the fact that he knew that MURs could now be undertaken by telephone.

64. The claimant resigned from his employment by letter of 14 October considering himself to have been constructively dismissed. He referred to a breach of the implied term of trust and confidence and considering the disciplinary outcome of 12 October to be the last straw in a chain of events. He then referred to being asked to perform MURs and that, instead of discussing concerns, the respondent had decided to instigate disciplinary proceedings. He believed that after making a protected disclosure about the impact that using the consultation rooms would have upon his and others' health, he had suffered detrimental treatment. He complained of being persistently asked to attend face-to-face meetings referring to this being an "alarming tactic". He believed the issue made of his communication style had been disproportionate and that there had been no data breach. He referred to his punishment having been given "as a result of a minor policy infraction" and being the last straw in "a long line of abuse".

Applicable law

65. In order to bring a claim of unfair dismissal an employee must have been dismissed. In this regard the claimant relies on Section 95(1)(c) of the Employment Rights Act 1996 which provides that an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason

of the employer's conduct. The burden is on the claimant to show that he was dismissed.

66. The classic test for such a constructive dismissal is that proposed in **Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27CA** where it was stated:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employer is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".

67. Here no breach of an express term is relied upon. The claimant asserts there to have been a breach of the implied duty of trust and confidence.

68. In terms of the duty of implied trust and confidence the case of **Mahmud v Bank of Credit and Commerce International 1997 IRLR 462** provides guidance clarifying that there is imposed on an employer a duty that he "will not without reasonable and proper cause conduct himself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee". The effect of the employer's conduct must be looked at objectively. It is recognised that there are situations where a balance has to be struck between an employer's interest in managing its business as it sees fit and the employee's interest in not being unfairly and improperly exploited. Mr Ryan refers the tribunal to **Amnesty International v Ahmed [2009] ICR 1450** where it was said that "it is plainly right that conduct on the part of the employer may be for 'proper and reasonable cause' even if there were other options available to him."

69. The handling of an investigation or disciplinary process may constitute a fundamental breach. The tribunal is referred to **Working Men's Club and Institute Union Ltd v Balls UKEAT/0119/11** where it was said: "Of course tribunals should be slow to treat the initiation of an investigation as itself a repudiatory breach: very often an employer may act reasonably in investigating allegations of misconduct which turn out in the end to be groundless."

70. The Court of Appeal in the case of **London Borough of Waltham Forest v Omilaju 2004 EWCA Civ 1493** considered the situation where an employee resigns after a series of acts by his employer. The claimant brings his case, in the alternative, on such basis saying in evidence that the imposition of a performance improvement plan was the final straw.

71. Essentially, it was held by the Court of Appeal that in an unfair constructive dismissal case, an employee is entitled to rely on a series of acts by the employer as evidence of a repudiatory breach of contract. For an employee to rely on a final act as repudiation of the contract by the employer, it should be an act in a series of acts whose cumulative effect is to amount to a breach of the implied term of trust and confidence. The last straw does not have to be of the same character as the earlier acts, but it has to be capable of contributing something to the series of earlier acts. There is, however, no requirement for the last straw to be unreasonable or blameworthy conduct of the employer, but it will be an unusual case where perfectly reasonable and justifiable conduct gives rise to a constructive dismissal.

72. If it is shown that the employee resigned in response to a fundamental breach of contract in circumstances amounting to dismissal (and did not delay too long so as to be regarded as having affirmed the contract of employment), it is then for the employer to show that such dismissal was for a potentially fair reason. If it does so then it is for the Tribunal to be satisfied whether the dismissal for that reason was fair or unfair pursuant to Section 98(4) of the Employment Rights Act 1996.

73. The respondent accepts that the claimant made protected qualifying disclosures. Section 47B of the 1996 Act encapsulates a worker's rights (in circumstances other than where the worker is an employee and the detriment in question amounts to dismissal) providing at subsection (1) that :-

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

74. It is for the employer to show the ground on which any act or deliberate failure to act was done.

75. The issue of causation is crucial. The test is not whether 'but for' the disclosures, the claimant would have been detrimentally treated. The Tribunal refers to the case of **NHS Manchester v Fecitt and others [2001] EWCA Civ 1190** and in particular the judgment of Elias LJ. His view was that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. He said:

*"Once an employer satisfies the Tribunal that he has acted for a particular reason – here, to remedy a dysfunctional situation – that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the Tribunal considers that the reason given is false (whether consciously or unconsciously) or that the Tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the **Igen** principles".*

76. In the claimant's complaint of automatic unfair dismissal, the reason or, if more than one, the principal reason for the employer's repudiatory breach of contract, if found, must be the claimant's health and safety actions pursuant to Section

100(1). The claimant's complaint is not based on any act of whistleblowing. The tribunal referred the parties to a decision of the Leeds Employment Tribunal in the case of **Miles v DVSA (Case no. 1806726/2020)** where it dealt with the test to be adopted in assessing the claimant's belief as to the serious and imminent risk of danger (referring to the case of **Oudahar v Esporta Group Ltd [2011] ICR 1406**) and made findings as to the relevant context in terms of the coronavirus pandemic and guidance in place at a time, contemporaneous with the allegations made in these proceedings.

77. Applying the legal principles to the facts as found, the tribunal reaches the conclusions set out below.

Conclusions

78. The tribunal considers firstly the complaints of whistleblowing detriment. It is accepted that the claimant made the pleaded protected disclosures. There is then no dispute that he can show detrimental treatment in the initiation of the disciplinary process, in being suspended, in being placed on a PIP and, finally, in receiving a final written warning. The burden is then on the respondent to prove that the reason for the detrimental treatment was not because of the disclosures.

79. The first detriment chronologically is the respondent's decision to initiate a disciplinary process which commenced from 1 September 2020. This arose against a background of the respondent trying to get back to the more normal provision of services, including the provision of patient services in consultation rooms coinciding with an easing of the lockdown put in place as a result of the coronavirus pandemic. The evidence is clearly of the respondent understanding its health and safety obligations and taking them seriously. That is not to say it had done everything possible, but it had conducted risk assessments of its stores and pharmacies. It wanted the claimant to complete a personal risk assessment. It was clearly seeking to adhere to government advice and guidance. Ms Dhanjal line managed a number of pharmacists in her region which included the claimant. All of the other pharmacists had returned to conducting MURs in their consultation rooms. The size and available ventilation in each consultation room varied from pharmacy to pharmacy, but they were not generally large rooms with outside windows.

80. The claimant was rude and, objectively, obstructive of the completion of his personal risk assessment on 23 July and by email of 24 July maintained that he was completing the assessment under duress. Ms Dhanjal conducted then that risk assessment later in the afternoon of 24 July during which the claimant raised concerns about his safe use of the consultation room in Barnsley. It is absolutely clear to the tribunal that Ms Dhanjal did not understand the claimant, in raising his safety concerns, to be making protected disclosures. Whilst such appreciation is not necessary in a whistleblowing claim, she saw his raising of concerns as being integral to the risk assessment process which she had initiated herself.

81. She did not ignore those concerns. She sought advice internally on issues relating to customers wearing masks, the position of the computer and the claimant's concerns regarding being in certain areas, including the consultation rooms. Having taken such advice, she responded. She did not deny the health risks, but believed that they could be mitigated against by the use of PPE and social distancing.

82. Ms Dhanjal visited the Barnsley pharmacy on 30 July. During her conversation with the claimant he re-raised safety concerns regarding the use of the consultation rooms. Ms Dhanjal did not recognise what the claimant was saying as whistleblowing, but again part of their ongoing debate regarding Covid safe working arrangements. She did genuinely believe that she had considered the claimant's concerns, that they were not well founded and that it was reasonable for the respondent to require the claimant to commence undertaking MURs in the consultation room. In the context that she thought he was refusing to comply with a reasonable request, she told him that a refusal might lead to a disciplinary investigation. She emailed the claimant on 1 August to summarise their conversation and repeated the effective threat that if he refused to undertake the MURs in the consultation room, he would be subject to an investigation which might lead to disciplinary action. Again, she saw him as refusing to comply with what she regarded as a reasonable request.

83. The claimant then emailed Ms Dhanjal further on 5 August repeating his safety concerns and explicitly stating that he was making a public interest disclosure and wanted his concerns to be addressed. Ms Dhanjal was then on a period of annual leave, hence a lack of response until 20 August. Again, despite the explicit reference in this latest communication, Ms Dhanjal considered this was a continuation of their disagreement regarding whether the respondent had done sufficient to provide a Covid safe working environment, particularly in the consultation rooms. She did not consider activating the whistleblowing procedure and in that sense formalising an investigation into the claimant's concerns. She believed that she was dealing with his concerns, but in any event she was unaware of the respondent's whistleblowing policy and therefore gave no thought to treating this latest communication any differently to the others. She repeated that she was still asking the claimant to restart providing services in the consultation rooms and that she thought that she was making a reasonable request. She again addressed some of the claimant's concerns. There was no threat within this communication as to any further steps which might be taken.

84. No step was taken at that point. There then occurred the claimant's lack of proactive response regarding staff recruitment, his failure to respond to the EPS email and the communication issues which included the claimant twice hanging up on Ms Danjal when she got through to him on the telephone. It is said on the claimant's behalf that the respondent took no action when he had been remiss in replying to email correspondence in July. However, the situation at this later time represented a failure in communication at an entirely different level. The claimant himself accepts now that he had been rude and

unprofessional in his behaviour with particular regard to the incidents where he put the phone down. Ms Dhanjal described herself as "staggered and reeling" by the claimant's behaviour. The tribunal struggles to imagine Ms Dhanjal being left reeling, but entirely accepts that she was staggered and indeed angry at the claimant's conduct during those few days culminating in him hanging up on her twice in quick succession and with no obvious justifiable reason.

85. There was clearly some history of poor relations between the claimant and Ms Dhanjal which were not fully disclosed to the tribunal in evidence, but had involved a previous incident of the claimant putting the phone down on his line manager. In any event, regardless of that, the tribunal concludes that Ms Dhanjal determined to "go strong" (to adopt the phrase of one of its members) because of the claimant's attitude towards her and for no other reason. For her, what made the initiation of disciplinary action appropriate was the manner in which the claimant had dealt with her requests. The claimant had been rude to Ms Dhanjal a few weeks earlier, but had apologised. Now he, in Ms Dhanjal's perception, appeared to have learnt nothing and now been even ruder to her. It is not surprising for a line manager in a professional business setting to take significant umbrage at having the phone hung up on her twice in quick succession. She genuinely believed that the claimant was treating her with disdain. Despite the earlier threat of an investigation, Ms Dhanjal had taken no steps to initiate one and, if the claimant had not behaved in the way described, the tribunal concludes that no further steps would have been taken, certainly when by the beginning of September guidance had changed to allow MURs to be conducted by telephone.

86. Within the disciplinary allegations, the claimant was told that his refusal to undertake MURS in the consultation room would be addressed. Nevertheless, the tribunal is convinced, on Ms Dhanjal's evidence, that such allegation was not pursued because of the claimant's raising of health and safety concerns. She had no concept or thought of him as a whistleblower. She was not seeking to open him up to punishment for raising safety concerns. Her reason for initiating disciplinary procedures, which included the allegation regarding the refusal to use the consultation room, was purely on the grounds of her belief that it was reasonable to require him to do so in the context of the safety measures which the respondent had taken which she viewed as being adequate and having, she thought, appropriately addressed his concerns. It is suggested that there was a breakdown in relations between the claimant and Ms Dhanjal due to the claimant taking the position he did regarding safe working in the consultation room. That does not make the disclosures causative of the initiation of disciplinary proceedings if those disciplinary proceedings were initiated because the claimant's behaviour arose out of that breakdown. Nor can a causative link be made between the respondent's response to the claimant's behaviour on the basis of the proposition that he would not have behaved in the way that he did had his concerns been dealt with formally under the respondent's whistleblowing procedure – a matter of pure speculation in any event. The claimant made no complaint at the time.

87. The tribunal turns next to the issue of the claimant's suspension. Obviously, the initiation of a disciplinary investigation did not of itself necessitate the claimant's suspension. It is put on the claimant's behalf that suspension would have been appropriate and justifiable only in circumstances where, for instance, the claimant might interfere with an investigation, be subject to criminal proceedings or the working relationship had significantly broken down to the point where the employee was a risk to the business. The respondent was not however considering the ACAS Code on Disciplinary Procedures when determining whether the claimant ought to be suspended. It was reacting to the situation before it. That was, as Ms Dhanjal saw it, one where the responsible pharmacist at the Barnsley store had shown in a number of instances, occurring in quick succession, an unwillingness to communicate with her. The manner in which he had then dealt with her when she had spoken to him over the telephone was regarded by her as concerning. It was the claimant's behaviour which prompted the suspension in circumstances where the respondent believed it could not continue in a situation where it could not trust its responsible pharmacist to communicate with his line manager which in turn gave it inevitable concern as to what might be happening within the pharmacy on a day-to-day basis. The reaction of suspension is unsurprising in the context of a line manager such as Ms Dhanjal being prevented from communicating with her subordinate - an individual in which she had to place a significant amount of trust and who had his own line management responsibilities. It is no answer to submit that suspension was unnecessary in circumstances where Mr Watt had been able to visit the pharmacy in Barnsley and speak to the claimant there and Ms Dhanjal was able to send him emails if she wished to communicate with him. Certainly, the suspension was in no sense whatsoever because of the claimant's refusal to use the consultation room. Again, an examination of the timeline is suggestive of the claimant's behavioural issues in the days prior to the suspension being the trigger for it rather than the longer running issue of the consultation rooms which had provoked no such reaction in the respondent previously.

88. The respondent placing the claimant on a PIP is then said to be a further act of detriment because of his whistleblowing. At the disciplinary hearing, there was no argument but that what Mr Bhasin was faced with was a performance issue. Mr Bhasin took a liberal approach to the nature of the claimant's behaviour towards Ms Dhanjal. He was prepared to accept that there was a need for the claimant to understand the aspects of his communication which had proven to be problematical and genuinely saw the performance improvement plan as a way of the respondent being able to constructively engage with the claimant in addressing such issue. Indeed, this approach was generous to the claimant in circumstances where certainly the claimant putting the phone down on Ms Dhanjal twice mid-conversation could have been reasonably viewed as wilful misconduct. Mr Roberts, on the claimant's behalf, put forward that the first set of allegations ought not to been brought as ones of misconduct, but were in fact indicative of a performance issue. The claimant expressed no disagreement with that position at the hearing and would have, had he not thought that to be an acceptable conclusion. The claimant had behaved inappropriately in his communications with Ms Dhanjal. A disciplinary process leading to a PIP in

this full context raises no inference that there were no genuine performance concerns.

89. On the claimant's behalf, it is suggested that his reactions ought to have been viewed against a background of the upset felt in respect of the safety concerns he had and which the respondent did not accept, in particular regarding use of consultation rooms. Whatever the cause of the claimant's inappropriate behaviour might have been and however out of character it also might have been, this does not make the respondent's reason for taking action the claimant's raising of health and safety concerns. In cross examination, Mr Bhasin referred to the claimant's refusal to use consultation rooms as being part of the overall issue of behaviour which he had determined ought to be subject to a PIP. However, that was in the context of it being put to him that he had not dealt with the issue of the claimant's refusal to use consultation rooms. The claimant's position was that he did not think this had been dealt with and that the whole issue remains unresolved. The tribunal considers the reality of the situation to be that Mr Bhasin did not, in his conclusions, have any material regard to the claimant's safety concerns regarding the use of the consultation rooms. There was some discussion of the safety issues during the disciplinary hearing, but very much subsidiary to the issues of lack of communication and behaviour towards Ms Dhanjal. This was unsurprising in the sense that the use of consultation rooms had ceased to become an immediate issue for the claimant and respondent in circumstances where the day after his suspension permission had been granted by the regulator to carry out consultations remotely. It was not in Mr Bhasin's mind that there was any live or continuing issue regarding the claimant having safety concerns regarding the use of consultation rooms. The tribunal accepts Mr Bhasin's explanation. His imposition of a PIP was in no way whatsoever on the grounds of the claimant having raised health and safety concerns. Mr Bhasin had seen the correspondence, in particular of 5 August 2021, where the claimant said that he was making a public interest disclosure, but he did not understand himself to be charged with dealing with that. Indeed, he understood that he was simply looking at the allegations before him and in doing so he did not give consideration to the claimant having made health and safety disclosures.

90. The final whistleblowing detriment is the final written warning, which is said to be disproportionate in the context of a minor data breach. This was not, however, a minor data breach. The fact that Ms Dhanjal reported the breach gives no rise to any adverse inference – any manager would have realised the seriousness of the issue and sought to escalate it. It is unsurprising that there was no attempt to deal with this informally as is submitted, on the claimant's behalf, ought to have occurred. It was not at all comparable with a situation where a book had been accidentally taken off site by a delivery driver. The claimant held a senior and responsible position. He was aware of the need to protect the personal data of patients. He had been trained on this, but, in any event, the tribunal accepts that confidentiality is well understood as a fundamental principle to be maintained in a healthcare provision setting. The Tribunal agrees that this is not something of which the claimant needed to be told given his position as a professionally qualified pharmacist. The claimant

then did indeed make a choice to take patient data out of the respondent and to store it in a personal cloud. He did so as a workaround in circumstances where he thought that the respondent's systems were inadequate, but without seeking permission or raising the issue at all internally. It matters not that the data was not proven to have been accessed by anyone other than the claimant. It matters not that the claimant might have believed that the data was still secure or that he had not committed any breach of the data protection regulations. He had acted wilfully in storing sensitive data outwith the respondent's systems, which no patient would regard as a secure and authorised use of their personal information. The tribunal cannot regard the sanction as disproportionate. Mr Bhasin clearly on the evidence thought carefully about the appropriate level of sanction and did have very genuine concerns at what the claimant had done. The tribunal considers that the final written warning was in fact a lenient reaction. The final written warning is perhaps the least the tribunal would expect to have been imposed in such circumstances where it considers that it is likely that dismissal for such actions would have fallen within a band of reasonable responses for an employer in the respondent's circumstances. Would Mr Bhasin have been so forgiving in the imposition of the PIP, only to then react quite disproportionately to the data breach by giving a final written warning? The tribunal does not consider that to be likely. It entirely accepts that the final written warning was given because of the genuine view Mr Bhasin took regarding the seriousness of the claimant's conduct. That was the sole reason for the sanction.

91. The tribunal then turns to the acts relied upon by the claimant in his complaint of constructive dismissal.

92. The first act relied on is failing to listen to and dismissing the claimant's concerns regarding the safety of using the consultation rooms. This is linked with the fourth act relied upon of failing to make adjustments to the pharmacy or the working arrangements which the claimant requested in order for the pharmacy to be safer to work in.

93. The tribunal concludes that Ms Dhanjal did in fact listen to the claimant's concerns. She did not agree that they were all valid concerns or that they were not dealt with by measures which were being taken within the pharmacy, including the use of PPE. She did not, however, dismiss the concerns in the context of any refusal to engage with them. Indeed, she took advice from the respondent's pharmacy superintendent and HR before reverting to the claimant with an explanation of her position as to the safe use of the consultation rooms and other areas of the pharmacy. The claimant was not unreasonable in raising safety concerns and they were genuine concerns where the claimant genuinely and with justification believed that he would still be at risk of catching the coronavirus. On the other hand, the respondent was not unreasonable in seeking to provide patient services to the fullest degree possible within the constraints imposed by the safety considerations resulting from the pandemic. The respondent had taken significant steps to provide a Covid safe working environment, but in circumstances where a completely safe working

environment was never going to be attainable. There was room in this debate for a difference of opinion where neither party could be categorised as acting unreasonably. The tribunal considers that Ms Dhanjal could have engaged in more detail with some of the claimant's arguments. She could have responded to his contention, based on the retail store guidelines issued, that he could only access 2 facemasks on each working day. Ms Dhanjal did not say that there was a free supply of this PPE. She could have agreed to obtaining additional cabling to enable the computed to be moved. However, she did clearly seriously assess the issue of the computer's location and her view, that any additional work would have made no material difference in terms of safety, was not an unreasonable position to take.

94. The claimant had a responsibility himself for taking steps to ensure a safe workplace. He did not however have a monopoly on decision making. Ms Dhanjal could and perhaps should have invoked the respondent's whistleblowing policy, but there was already a live discussion about the very issues the claimant was raising. He is not raising such failure as material to his resignation. The claimant had valid safety concerns and was reasonable in raising them. The respondent nevertheless took a reasonable and informed view, having considered the claimant's concerns, as to where the balance of risk lay against the imperative to provide a functioning service to patients.

95. This was not an employer acting in disregard of the safety risks created by the coronavirus pandemic, nor one unwilling to listen and consider representations as to safety. No breach of trust and confidence can arise as regards these pleaded actions.

96. The claimant next asserts that he was pressurised to conduct MUR conversations, provide flu vaccines or other private consultations with patients in the consultation room. This is then linked with him being allegedly threatened with disciplinary action if he failed to conduct MUR consultations, provide flu vaccines or other private consultations with patients in the consultation room. The tribunal would note that the issue of conducting flu vaccines was something for the future and not a current imperative during the claimant's employment. There was an element of pressure on the claimant to use the consultation room and the threat of a disciplinary investigation which might lead to disciplinary action was part of such pressure. However, in acting as it did, the respondent had reasonable and proper cause. The respondent, having taken steps to create a Covid safe workplace and having conducted risk assessments of the pharmacy and individually with the claimant, believed that it was reasonable to request the claimant to work in the consultation room. It did so in the context of it being at the time a frontline healthcare services provider and wishing to restore patient services to the fullest level possible for the benefit of patients seeking advice and medication. Again, the claimant and the respondent did not agree as to the sufficiency of the safety measures, but in a context where a completely safe working environment would never be attainable in the circumstances the respondent and other employers faced at this time in the pandemic. The claimant was the only pharmacist in the region who would not

work in the consultation rooms. The claimant being told that his refusal would lead to an investigation cannot be viewed as a breach of trust and confidence in that the respondent was not indicating that any decision had been taken and was indeed indicating that it only would, once the issue of the claimant's refusal had been considered further. Nor was it saying that disciplinary action would necessarily follow. The possibility only of where an investigation might lead was being flagged up. Again, the respondent's treatment of the claimant in this regard cannot be seen as amounting to a breach of trust and confidence.

97. The respondent is then accused of failing to ensure that an adequate risk assessment was completed for the claimant. The tribunal has reached no such conclusion. The respondent was clearly anxious to ensure that the claimant did have an individual risk assessment as well as that there had been a risk assessment of the pharmacy site in Barnsley itself. That risk assessment was conducted and there is no basis upon which the tribunal could conclude, as is suggested, that this was merely a tick box exercise. In so far as the claimant might be able to point to flaws in the process, again they cannot be said to be tantamount to a disregard of his health and safety such as might amount to a breach of the implied term of trust and confidence.

98. The claimant then complains of him been suspended on the grounds of misconduct for failing to conduct MUR conversations or other private consultations with patients in the consultation room. The tribunal has already concluded, in the context of the protected disclosure detriment complaint, that the respondent had reasonable and proper cause for suspending the claimant which indeed arose out of his behaviour and lack of communication and not his refusal to use the consultation room.

99. The claimant separately complains that his suspension was continued despite PSNC advice that consultations could be provided remotely without prior approval from NHS England. However, an inability or refusal to work in consultation rooms was not the reason for the suspension or its continuance. The ability to conduct consultations remotely did not remove the respondent's genuine concern regarding the claimant's behavioural issues and his lack of communication. It feared he would continue not to communicate adequately with his line manager. Against a background of such genuine concerns, the respondent continuing with the claimant's suspension cannot be said to be without reasonable and proper cause.

100. Again, the respondent starting disciplinary proceedings for failing to conduct MUR conversations or private consultations with patients in the consultation room was not the primary reason for the initiation of disciplinary proceedings, which would not have been initiated at that time had the claimant not exhibited the behavioural issues referred to and failed to communicate in a manner which the respondent considered adequately which occurred immediately prior to and provoked his suspension. One of the disciplinary allegations was in respect of a failure to use the consultation rooms, but again, this was in the context of a disagreement regarding the sufficiency of safety measures taken where neither

party could be said to be acting unreasonably and where certainly the respondent had a basis for initiating a process whereby the claimant's refusal would be investigated. In starting proceedings, the respondent did not act without reasonable and proper cause.

101. The claimant was initially invited to investigation meetings to be held in person. They were not, however, to be held in the consultation room in Barnsley which was the source of the dispute regarding the existence of a safe workspace. The request was in the context of the claimant already actually attending work and working indeed in a customer facing environment. In any event, there was no pressure in the sense that as soon as the claimant raised a preference to have the hearings conducted remotely, his request was acceded to. The respondent did not act without reasonable and proper cause in wishing to conduct attended meetings in the first place considering them to be the ideal forum for this type of meeting (and reasonably so), but then in any event switching the meetings to ones conducted by videoconferencing.

102. As already addressed in the context of the whistleblowing detriment complaint, the claimant was not disproportionately sanctioned for the data breach. The sanction was entirely reasonable in all of the circumstances and certainly cannot sound as a breach of the mutual obligation of trust and confidence.

103. Finally, the placing of the claimant on the PIP was not by reason of his failing to conduct MUR conversations or other private consultations with patients in the consultation room. The reason for the PIP was the genuinely perceived performance issues arising out of the claimant's lack of appropriate communication style. This accorded with the view of the claimant's own union representative that there were issues of performance. Whilst one of the allegations pursued against the claimant up to the point of the disciplinary hearing was his refusal to use the consultation rooms, the tribunal has concluded that this itself was not part of Mr Bhasin's consideration as to the appropriateness of a PIP.

104. In conclusion, the claimant has shown no fundamental breach of his contract of employment whether arising out of a breach of trust and confidence or otherwise and whether the allegations are viewed singularly and, stepping back, when viewed by the tribunal cumulatively. The claimant was not dismissed. His claim of unfair dismissal must therefore fail.

105. In such circumstances, absent a fundamental breach, it is unnecessary for the tribunal to consider the reason for the respondent's treatment of the claimant in the context of the automatic unfair dismissal claim, where it is alleged that the reason (for any repudiatory breach) was the claimant reporting health and safety concerns and/or his refusal to work in consultation rooms in circumstances where he reasonably believed there to be a serious and imminent risk of danger. The tribunal certainly, in any event, has already, in the

context of the whistleblowing complaints, arrived at conclusions which do not support the claimant having been treated to his detriment in any sense whatsoever by him having raised safety concerns. The respondent accepts that the claimant enjoyed protected status by reason of having raised such concerns pursuant to Section 100(1)(c). No admission has similarly, however, been made as regards Section 100(1)(e). The tribunal would have had no difficulty in concluding that the claimant reasonably believed that he was at serious risk of contracting the coronavirus. Whether that could reasonably be viewed as an imminent risk in circumstances of danger is much more debatable, but unnecessary for the tribunal to conclude.

Employment Judge Maidment

Date 26 April 2022