EMPLOYMENT TRIBUNALS

Claimant: Miss J Archibald

Respondent: North Cumbria Integrated Care NHS Foundation Trust

Heard at: Manchester

On: 7 – 11 February 2022
14 – 15 February 2022
11 April 2022 and
12-13 April 2022
(in chambers)

Before: Employment Judge Slater
Ms A Berkeley-Hill
Ms J Williamson

REPRESENTATION:

Claimant: Ms I Baylis, Counsel
Respondent: Mr I Crammond, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Tribunal has no jurisdiction to consider the complaints of protected disclosure detriment other than the complaints about the outcome of the grievance and grievance appeal and reference and being told that the second grievance would not be addressed, and the complaints in respect of which the Tribunal has no jurisdiction are dismissed.

2. The complaints of protected disclosure detriment in relation to the complaints about the outcome of the grievance and the grievance appeal are well founded.

3. The complaints of protected disclosure detriment in respect of the reference and being told that the second grievance would not be addressed are not well founded and these complaints are dismissed.

4. The Tribunal has no jurisdiction to consider the complaints of direct disability discrimination and these complaints are dismissed.

5. The complaint of discrimination arising from disability is not well founded and this complaint is dismissed.

6. The Tribunal has no jurisdiction to consider the complaints of failure to make reasonable adjustments and these complaints are dismissed.

7. The complaint of "ordinary" constructive unfair dismissal is well founded.

8. The complaint of protected disclosure constructive unfair dismissal is not well founded and this complaint is dismissed.

9. Remedy for the complaints which the Tribunal has held to be well founded will be determined at a remedy hearing on 15 July 2022.

REASONS

Claims and Issues

1. The claimant brought complaints of constructive unfair dismissal, disability discrimination and detriments on the ground of making protected disclosures. A complaint of direct age discrimination was withdrawn and is dismissed on withdrawal in this judgment.

2. Unfortunately a list of claims and issues had not been finalised prior to this hearing. In accordance with case management orders, the parties, who were both legally represented from the outset, should have sent to the Tribunal a list of claims and issues by 9 November 2020. This was not done. Counsel, shortly before the hearing, had sought to agree a list of claims and issues but this had not been agreed by the start of the hearing. Counsel continued their discussions whilst the Tribunal began its reading. By the beginning of the second day, a list of claims and issues had been largely agreed but there were still some areas of dispute. The Tribunal heard the party's submissions in relation to these matters and made the decision which follows, giving our reasons orally which are now set out in writing for completeness.

2.1. The decision of the Tribunal is that the section 103A Employment Rights Act unfair dismissal complaint, the protected disclosure detriment complaints at paragraphs 9(g), (l) and (m) of the draft list of issues (disengagement by Beryl Roberts; advising the claimant on 11 October 2019 and 17 December 2019 that her grievances were not upheld and her second grievance of 22 October 2019 would not be addressed; and the claimant being informed on 18 December 2019 that a job offer was withdrawn due to an unsatisfactory reference from the respondent) and the Section 15 Equality Act complaint about constructive unfair dismissal are part of the pleaded case so can be included in the list of claims and issues. We find that the complaint of direct disability discrimination about the Fiona Dixon comment in the grievance procedure was not a pleaded complaint. However, the Tribunal allows an amendment for it to be pursued as such a complaint, subject to the time limit issue in relation to this complaint being decided with other issues.

2.2. Our reasons are as follows.

2.2.1. In relation to the Section 103A complaint, we consider the reference at paragraph 2A of the original particulars of claim, where there is a reference to unfair dismissal (constructive), is potentially wide enough to include a complaint of a Section 103A unfair dismissal as well as what would be described as ordinary unfair dismissal. We consider, referring to paragraph 50 of the particulars of claim, where there is a reference back to the preceding detriments before a description of the complaint of constructive unfair dismissal, that this can be read as including a complaint of a Section 103A Employment Rights Act unfair dismissal. In relation to the protected disclosure detriments referred to at paragraphs 9(g), the respondent took issue with the first sentence. However, at paragraph 37B of the particulars of claim, we consider the reference to Ms Roberts disengaging to be wide enough to cover what has been described in more particulars. In relation to paragraph (l), we consider what is contained in paragraph 47 of the particulars of claim is sufficiently wide to cover that alleged detriment. We consider that the complaint referred to in paragraph (m) is sufficiently covered by the references in paragraphs 30 to 31, albeit under the wrong heading but also the reference in paragraph 48 to the grievances.

2.2.2. In relation to the Section 15 complaint about constructive dismissal, we consider that is part of the claim; the reference in paragraph 52 to constructive dismissal being to a breach of the Equality Act. The type of disability discrimination is not clearly pleaded, but we consider that paragraph 52 is sufficient to make the Section 15 claim already part of the pleaded case.

2.2.3. The complaint of direct discrimination referred to at paragraph 15B of the draft List of Issues is about Fiona Dixon's comment in the grievance procedure interview regarding the claimant's communication style. There is a reference to this in paragraph 50H of the particulars of claim under the heading of constructive unfair dismissal but we do not think that can be read as being pleading an act of disability discrimination. An amendment would, therefore, be required to pursue the complaint of direct discrimination. Since the factual allegation is there under the heading of constructive unfair dismissal, we consider that little prejudice would be caused to the respondent if the claimant is allowed to pursue that as a direct discrimination complaint. The respondent would already be responding to the factual allegations since that is relied on for the constructive unfair dismissal claim. The claimant might be subject to more prejudice if she could not pursue a complaint which might potentially be well founded. We allow the amendment, subject to the time limit point being reserved to be considered and decided at the same time as all other issues in the case are decided. The relevant date in terms of presentation of that complaint of direct discrimination is 8 February 2022, being the date of the application.

3. On 10 February 2022, the fourth day of hearing, the parties provided the Tribunal with an updated list of claims and issues, taking account of the Tribunal's decisions.

4. On 14 February 2022, the respondent conceded that the claimant had made disclosures of information and that the respondent at relevant times had knowledge of

disability but not knowledge of the alleged disadvantage. These changes are reflected in the list of claims and issues which is annexed to this decision.

5. This hearing had been listed to deal with liability only and it was agreed with the representatives that they would not be required to deal with the issues of Polkey and contribution until the remedy stage (if there was one).

The Hearing

6. The hearing was conducted by video conference.

7. After an initial discussion with the parties, the Tribunal took most of the first day of hearing to do its reading. By agreement, since Dr Goulding, one of the claimant's witnesses, was only available on the first day, the Tribunal heard his evidence before it had completed its reading, at 3.30 pm on 7 February.

8. The Tribunal, in consultation with the parties, drew up a provisional timetable for the hearing of evidence, which would have allowed time on the sixth day for the parties' submissions and for the Tribunal to start deliberations and, if possible, to give judgment on the seventh day.

9. The claimant only had access to an electronic copy of the hearing bundle and told us that she did not have a mouse to help her navigate this. It took a long time for the claimant to be able to find each page which was referred to. The claimant's evidence took much longer than was anticipated, in large part due to these technical matters but also due to the claimant's desire to give very full answers to all questions. The claimant began evidence on the afternoon of Tuesday 8 February and was still giving evidence at the end of 10 February 2022. The Tribunal took frequent breaks and Mr Crammond checked at various points whether the claimant needed other breaks.

10. At the start of the hearing on 11 February, Ms Baylis made an application on behalf of her client that the respondent's cross examination of the claimant should be curtailed by lunchtime on that day. Mr Crammond opposed that application. The Tribunal did not grant Ms Baylis's application but decided that, barring technical difficulties and the claimant not needing more than a short break in the morning and no break between 2 and 3.30 p.m., if the respondent's cross examination had not finished by 4 o'clock that day, it would be brought to an end by the Tribunal at that point.

11. The Tribunal noted that the claimant's cross examination had started at 2.30 pm on Tuesday 8 February. The technical issues the claimant had been having were not of her making but her instructing solicitors could have ensured that she had the necessary facilities to be able to engage in the hearing. The claimant's instructing solicitors had said that they could not get a hard copy of the bundle to her. This was nothing to do with the respondent. Some of the delay in the hearing was to do with the failure to draw up a list of issues which was a matter of fault on both sides. The time taken on the hearing would have been very substantially less, and it would have been much more helpful to the claimant, if she had been working with a paper bundle. On the claimant's counsel's time estimate, she would be less than two days in total in cross examining the respondent's witnesses and, therefore, the Tribunal would not go part heard in relation to hearing evidence. We informed Ms Baylis, however, that, if she was not able to complete her cross examination of the respondent's witnesses in

the time remaining, we would go part-heard, continuing the cross examination on a future date. The Tribunal noted that, if evidence was completed, there might not be time for oral submissions within the seven days allowed, but the Tribunal would discuss with the parties what to do if there was not time for oral submissions within the seven days. The Tribunal said it expected Mr Crammond to do his best to complete cross examination by lunchtime and the claimant would not be given as much leeway in her answers to questions as she had been given up to that point. The Tribunal noted the time that had been lost in dealing with this application.

12. In the event, Mr Crammond completed his cross examination just before 2pm on 11 February and re-examination was finished by 2.15 pm.

13. The Tribunal was able to hear the remainder of the witnesses in the remaining time. However, there was not time for the parties to give oral submissions within the seven days which had been allocated. The parties' preferences were to return for oral submissions for half a day, with the Tribunal then reserving its decision, so this was arranged and agreement was reached on dates by which the parties should file with the Tribunal and exchange written submissions. The representatives would then have a maximum of one hour each to speak to these on the morning of 11 April after the Tribunal had read the written submissions.

Evidence

14. The claimant and Dr Peter Goulding gave evidence for the claimant. There were also witness statements from Elizabeth Wright and Laura Malkhoo on behalf of the claimant. We were informed at the outset of the hearing that Elizabeth Wright would not be giving oral evidence and the respondent agreed that we could read this statement and give such weight to it as considered appropriate. After reading the witness statement of Laura Malkhoo, which gave an address for her in California, USA, the Tribunal asked Ms Baylis where Ms Malkhoo would be giving evidence from. We were informed that this would be from the United States. The Tribunal asked Ms Baylis whether they had obtained the necessary permission for evidence to be given from the United States. Ms Baylis made enquiries and, by the close of evidence, permission had not been obtained. Ms Baylis informed us that Ms Malkhoo would not give oral evidence but sought to rely on the written statement only. The respondent did not object to the Tribunal giving this statement such weight as it considered appropriate.

15. The Tribunal heard evidence for the respondent from: Fiona Dixon who, at the time of relevant events, was the senior Network Manager for the respondent's Neurology service; Jacquie Molyneux who, at the time of events, was the Trust's Team Lead for Neurology; Nina Bleesdale (previously known as Nina Hill) who, at the time of events, was Associate Director for Operations for Specialist Services; David Allen who, at the time of events, was the Trust's Head of CLIC deliveries support; Eleanor Clark, who, at the time of events, was the Trust's Service Manager for the Integrated Pathways Care Group; and Amanda Dunkley who, at the time of events, was the Trust's Head of Workforce Solutions. We had witness statements for all these witnesses and they also gave oral evidence. We shall refer to Nina Bleasdale in these reasons as Nina Hill, since that was her name at the time of relevant events and is the name used in the documents to which we refer.

16. We were provided with an electronic bundle in multiple parts. It appeared that the failure to have one PDF bundle was in part due to the Tribunal not having sent the

respondent a link to the document upload centre in sufficient time. The respondent provided the Judge with a hard copy bundle during the course of the first day of hearing. As previously noted, the claimant was working from an electronic bundle. The respondent's witnesses, in large part, appeared to have paper bundles, although some more recent documents were only available to them in electronic form. The hearing bundle was around 800 pages.

Summary

17. The claimant was at relevant times employed by the respondent trust as a Senior Nurse Practitioner/Specialist Epilepsy Nurse. She resigned with effect from 28 February 2020. The claimant has epilepsy and the respondent conceded, during the course of proceedings, that the claimant was disabled by reason of this condition at relevant times. The claimant alleges that she suffered detrimental treatment dating back to December 2015 because she made protected disclosures. The majority of the disclosures of information relied upon as being protected disclosures were in the form of incident forms raising concerns. The claimant claims that she was constructively dismissed and that this dismissal was automatically unfair because of protected disclosures and also was an "ordinary" unfair dismissal. The claimant also claims that she was subjected to less favourable treatment because of disability in relation to a reference by Fiona Dixon for a Psychological Assessment about the claimant and comment made by Fiona Dixon about the claimant's communication style in the grievance procedure. She claims that her constructive dismissal was unfavourable treatment arising in consequence of her disability and that there were failures to make reasonable adjustments, the provision, criterion or practice being not expediting the resolution of grievances.

18. The claimant presented a formal grievance in February 2019. There was an unsuccessful outcome to this which was not notified to her until October 2019 and she made an unsuccessful appeal against the outcome of the grievance. The claimant raised two further grievances in January 2020, one relating to a reference. She resigned on 31 January 2020, giving notice of termination. The effective date of termination was 28 February 2020.

Facts

19. The claimant began employment with the respondent on 9 February 2015 as a Specialist Epilepsy Nurse. She worked in the Neurology Service of the respondent Trust. This service was the result of a merger in 2011 of services which had been delivered by different Trusts in the north and south parts of the county. The Neurology Service in North Cumbria University Hospital had been delivered by one Consultant Neurologist and a Band 5 Epilepsy Advisor, Samantha Robinson, who was not a registered nurse. At the point of transfer, that Consultant Neurologist retired and Dr Jitka Vanderpol was appointed as the new Consultant. Prior to the merger, services in the south had been delivered by University Hospitals of Morecambe Bay NHS Trust.

20. The claimant's role with the trust was a new one. She was one of two Specialist Epilepsy Nurses who were appointed. The other, Graham Bickerstaff, had previously been employed by the respondent in another role. Graham Bickerstaff did not start in his new role until a number of months after the claimant, in August or September 2015. Once he started, the area to be covered was divided geographically, with the

claimant taking responsibility for the north of the region and Graham Bickerstaff for the south.

21. It appears that Graham Bickerstaff may, at some time prior to the claimant's appointment, have had some supervisory responsibility for Samantha Robinson. In her letter to the Chief Executive dated 8 August 2019 (p.559), the claimant wrote that she had been told by Graham Bickerstaff that he used to be her supervisor. The claimant, in submissions, also relied on the document at page 763, on which Graham Bickerstaff is described as Team Leader, of the neuroscience service.

22. The claimant has epilepsy. When she joined the respondent trust, her seizures were under control. Her pre-employment screening declaration indicates that she did not anticipate any problems at work.

23. The claimant's line manager was initially Jonathan Kenworthy. Fiona Dixon was Jonathan Kenworthy's line manager. At the time, Fiona Dixon was Senior Network Manager for the respondent's Neurology Service.

24. In or around February 2015, soon after the claimant started her role, the claimant had a meeting with Samantha Robinson. Samantha Robinson told her that she had her own clinics. We find that she told the claimant that she prescribed medicines. Fiona Dixon did not think that an investigation found that she had done that; however, the document at page 217 indicates that she made recommendations about medication.

25. The claimant also discovered that Samantha Robinson was described on correspondence as a nurse. An example of this is at page 217. Samantha Robinson was not a registered nurse. There are various references in documents to Samantha Robinson as a "Neurology Specialist" (p.216), and "Epilepsy Nurse" (pp.224, 226).

26. We consider it more likely than not that Samantha Robinson described herself in this way with the knowledge of at least some managers and clinicians. This appears to be supported by the evidence of Fiona Dixon, who describes the concerns the claimant raised about Samantha Robinson being the "product of the historic structure" and why there was no disciplinary action against Samantha Robinson (para 25).

27. In February or March 2015, the claimant made a verbal report to Jonathan Kenworthy about what she had discovered about Samantha Robinson. This is the first matter relied on by the claimant as being a protected disclosure. The claimant later made the same verbal report to Fiona Dixon. The claimant agreed in cross examination that her concerns about Samantha Robinson were taken seriously by Jonathan Kenworthy and an internal investigation ensued into the matters raised about Samantha Robinson.

28. Samantha Robinson went on sick leave and remained on sick leave until she left the trust. Her employment was terminated by reason of redundancy and no disciplinary action was taken against her. We consider that this is contrary to the impression given on incident forms, which suggest she was removed from post because of concerns about her practice e.g. as referred to in the incident form completed 21 December 2015 on which Fiona Dixon wrote: "The unregistered member of staff was investigated and is no longer with the Trust."

29. We were not shown a copy of the investigation report.

30. Incident forms are reports recorded on the respondent's datix system. The report is signed off by a manager who writes the "outcome" section of the form. The forms remain on the hospital's system. The disclosures relied on by the claimant as protected disclosures were, other than the initial verbal disclosures, made by completing incident forms.

31. On 3 June 2015, an incident form was completed by another member of staff, Karen Tallentire, about an incident involving the claimant where the claimant was alleged to have upset a patient and his mother. Fiona Dixon spoke to the claimant about this incident. Fiona Dixon was satisfied at the time that the claimant would reflect on the incident and be more mindful of her approach in the future.

32. On 6 October 2015 the claimant completed an incident form (number 2015224201) which related to an incident on 5 May 2015. This is relied on as a protected disclosure. The form was signed by Jonathan Kenworthy who inserted the outcome details. The claimant relies on the following as being a relevant disclosure of information

> "Patient attended the Epilepsy Nurse Clinic for review at Hilltop Heights. Noted from the EMIS notes patient had not been reviewed by a Neurologist since attending the Neurology Department, patient transferred in November 2011.
>
> "Only person to have reviewed patient was SR Epilepsy Advisor.
>
> "SR [Samantha Robinson] had made reference to patient's medication that she would make "no changes to patient's medications".
>
> "No evidence of a referral letter on transfer letter in 2011".

33. Jonathan Kenworthy inserted in the outcome details: "SIRI investigation has identified the root cause of the incident – many lessons learnt including Sam Robinson no longer employed as Epilepsy Advisor. A lack of supervision and governance was historically cause of the issues. Investigation has resulted in epilepsy safety plan with clear guidance of appropriate service governance that is underwritten by Registered practitioners working with the patient group".

34. The claimant was concerned that Samantha Robinson might be able to take up employment with other NHS Trusts and do work outside her scope of practice; she spoke to Fiona Dixon about taking steps to ensure that she was not able to do this. The claimant felt that Fiona Dixon minimised her concerns. Fiona Dixon said in cross examination that she could not stop Samantha Robinson getting another job in another trust since she had not been disciplined.

35. There were two further complaints about the claimant around this time. One was from a colleague at West Cumberland Hospital who complained about the claimant wearing a cardigan; the claimant says this was because she was cold. In oral evidence, Fiona Dixon said that there was an issue about the claimant's manner when the sister asked her to remove the cardigan; the claimant becoming really annoyed. Fiona Dixon did not put this in her witness statement. We consider that, if this had been a serious issue, Fiona Dixon would have included this information in her statement. The second complaint was from a patient unhappy about the support they had received from the claimant. Two patients were transferred to be supported by Graham Bickerstaff rather than the claimant. We accept that Fiona Dixon began to

form the view that the claimant was not reflecting on, and learning from, incidents in the way she would have expected.

36. On 13 November 2015, the claimant had a supervision with Jonathan Kenworthy in which it was noted that she had made excellent progress in establishing the service. There were no adverse comments recorded about the claimant's communication.

37. On 9 December 2015, Fiona Dixon and Jonathan Kenworthy met and discussed a patient complaint. Following this conversation, the claimant says that Jonathan Kenworthy told the claimant that Fiona Dixon had told him to discuss the claimant with a psychologist. We find that Fiona Dixon told Jonathan Kenworthy that she intended to go to the psychologist, rather than that Jonathan Kenworthy should go to the psychologist, although with the aim of assisting Jonathan Kenworthy in managing the claimant. This finding is based on Fiona Dixon's contemporaneous email, responding to the claimant's email of 10 February 2015. We consider this to be the most reliable evidence as to who said what. The claimant's email of 10 December is unclear as to who was to be going to the psychologist. We consider it likely that the claimant and Fiona Dixon have misremembered, given the passage of time, who Fiona Dixon said at the time was to go to the psychologist. We find that Fiona Dixon was making the suggestion because Jonathan Kenworthy had raised with her issues about managing the claimant relating to issues with communication and lack of insight. This followed the complaints about the claimant referred to previously. We had no evidence which suggested to us that Fiona Dixon's intention to go to the psychologist was related to the claimant's epilepsy. Fiona Dixon's later comment in the grievance we find to be a much later reflection on the possible cause of the claimant's communication difficulties. There is no evidence that, around December 2015, Fiona Dixon was making a link between what Fiona Dixon considered to be communication difficulties and the claimant's epilepsy. The claimant has not suggested any communication issues relate to her epilepsy.

38. There is no evidence that Fiona Dixon did go to speak to the psychologist after the claimant raised concerns about this.

39. The claimant was concerned that she was to be discussed with a psychologist with whom she might work in the future and who could identify her, even if her name was not mentioned.

40. On 10 December 2015 the claimant sent an email to Fiona Dixon. Her email included the following:

> "It now appears that after yesterday's meeting with Jonathan you advised Jonathan you would like to contact Psychology to get some advice about me (the same department who I have [part missing] to a meeting to discuss Epilepsy Service development).
>
> I am totally shocked by your reaction and how you feel it should be managed. If you [part missing from copy document] the Psychology Department you will be in breach of my confidentiality".

41. The claimant asked for a face to face meeting at which her trade union representative would be present. Fiona Dixon replied by email which included the following:-

> "As Jonathan stated to you we did have a discussion yesterday regarding the complaint and other concerns that had been raised regarding communication. I did ask Jonathan to have a word with you in relation to this and he explained that he had discussed this with you in previous discussions as part of supervision and that you acknowledged that at times there were some difficulties indicating that you had some awareness of this. However we both acknowledged that issues seemed to keep coming up and we discussed how we might be able to support you with this going forward. I did say that I would check out with Elspeth Desert regarding what else might be considered for this type of situation but at no point was I intending to discuss your personal details with her."

42. She continued that they both felt that perhaps workload might be causing the claimant some stress and that this may be impacting on her and her communication style "as this issue isn't present all the time and generally you communicate well". Fiona Dixon apologised if this caused the claimant upset.

43. The claimant replied in an email including the following:-

> "I understand you are trying to help, but unfortunately the way in which this meeting took place without me being consulted, and then the way in which a new problem appears to have been highlighted and the mention of Psychology, I feel totally let down by employers who I have previously felt supported by. I do wish for you to consult Psychology. [the claimant says this is a grammatical error and there should have been a "not" in this sentence].
>
> "I would like to know what had been discussed and what the communication issues are".

44. On 21 December 2015 the claimant completed an incident form (number 2015224196). This was about an incident on 5 May 2015 and is relied on as a protected disclosure. The manager signing the form was Fiona Dixon. The information which the claimant relies on as the disclosure is as follows:

> "Incident form completed in retrospect.
>
> "Patient attended nurse clinic in May 2015. Prior to this was reviewed by Epilepsy Advisor [Samantha Robinson].
>
> "Patient documented on EMIS as being reviewed in April 2013 by a Consultant. No information on EMIS on consultant involvement since this date.
>
> "Medication advice given by Epilepsy Advisor to GP".

45. We have no reason to think that the matters described were not of genuine concern to the claimant. We accept the claimant's evidence that her purpose in recording this at a later date was so that someone reviewing the patient in future would know that the claimant had done all the right things.

46. The outcome details completed by Fiona Dixon were as follows:

> "The final outcome was the result of a SIRI investigation that provided root cause as to how such an issue arose. The unregistered member of staff was

> investigated and is now longer with the Trust. The clinical review process is now robust and patients are seen only by a Consultant and then followed up by the Epilepsy Nurse Specialist when necessary. The incident was allowed to happen due to a number of factors highlighted in the SIRI including a lack of supervision/poor TUPE process/lack of leadership in the service and Consultant misunderstanding of the individual's role within the team".

47. On 9 June 2016, the claimant had an appraisal with Fiona Dixon. No areas for development were identified, including in relation to the values and behaviours of kindness and fairness. There was no reference to communication difficultires.

48. In March 2017, there was a sudden unexplained death of a patient with epilepsy. Fiona Dixon informed the claimant about this as she was walking through the administration office. A couple of weeks later, Fiona Dixon told the claimant she had contacted the patient's partner and fed back on what he had said about difficulties he and the patient had had with the claimant. The claimant recalls that Fiona Dixon told her that he had said that he and the patient had found the claimant "quite a challenge". Fiona Dixon recalls that she told the claimant they had found her "brusque". We have not seen any contemporaneous note recording what was said. The reported comments are to a similar effect. We accept that both witnesses have told us their genuine recollection but they may have not remembered correctly the exact words. We do not consider it necessary to make a finding as to the exact words used.

49. The death of a patient open to the epilepsy service automatically triggers a Serious Untoward Investigation (SUI). We accept the evidence of Fiona Dixon that it is standard practice, in accordance with the Duty of Candour process, that in any investigation of this nature, the family of the deceased have to be involved and asked if there is anything they would like to contribute to the investigation. Fiona Dixon contacted the family in accordance with this process. We accept that Fiona Dixon was given the information that she then fed back to the claimant. We understand that the claimant takes issue with the truth of what Fiona Dixon was told but we accept this was what she was told. We find that feedback to a staff member of this information is in accordance with normal practice. The information from the family is always included in the SUI report. We find that Fiona Dixon gave this information to the claimant in accordance with the normal practice of passing on feedback to relevant staff members.

50. In the summer of 2017, Sue Leech, a member of the non-nursing staff, commented to the claimant "Oh, I have heard you are difficult to work with". We did not hear evidence from Sue Leech and have no evidence as to what led Sue Leech to make this comment.

51. In late June 2017, Jacquie Molyneux began line managing the claimant. The claimant has incorrectly referred to this being in July, although then giving evidence about attending a meeting with Jacquie Molyneux on 29 June 2017, when Jacquie Molyneux had become her manager. Since the claimant complains about Jacquie Molyneux's behaviour in this meeting, we consider that the claimant has made an error, in her witness statement and the list of issues, in identifying the period during which she alleges that Jacquie Molyneux deliberately undermined her in front of other staff as beginning in July 2017, rather than 29 June 2017.

52. Jacquie Molyneux said she knew little about the claimant before taking over the team. We consider it more likely than not that, as a matter of normal management

practice, she would have had a briefing about the people she was taking over managing. Jacquie Molyneux came from a learning disability background. Fiona Dixon, Graham Bickerstaff, Beryl Roberts and Wendy Turl were all known to her before she started line managing the claimant. Jacquie Molyneux understood that the claimant had fallen out with her previous line manager, Jonathan Kenworthy. She told the investigator of the grievance this. She agreed in cross examination that she must have got this information from Fiona Dixon. The Tribunal heard no evidence that the claimant had fallen out with Jonathan Kenworthy; we find that he ceased to line manage the claimant because he left and there was a restructure going on.

53. The claimant attended her first meeting with Jacquie Molyneux, on 29 June 2017. Graham Bickerstaff and Carol Hillman were also present. There is common ground that there was a discussion about the information the claimant had for learning disabled patients and that there was criticism of the material the claimant had available. There is common ground that there was a discussion about consent by learning disabled patients. There is a dispute as to what was said by the claimant. The claimant has not satisfied us that Jacquie Molyneux deliberately undermined her in front of other staff at this meeting.

54. On 12 July 2017 the claimant sent an email to Fiona Dixon telling her that she had decided to reduce case clinic numbers. The claimant wrote of being very exhausted by work in recent months from a combination of “errors made by the secretary, increasing number of admin jobs, booking new patients, secretarial jobs getting behind, juggling two secretaries, stress from the inquest and increasing patient load”. She wrote that she was also being asked by Jacquie and Carol to do more work in relation to care plans for each patient. Fiona Dixon, in her reply, did not expressly refer to the the health and well being aspects of the claimant’s email, but suggested, before they change things, everyone should sit down and review where they were with case numbers and plan accordingly.

55. In a multi-disciplinary meeting (MDT), the date of which is uncertain (Jacquie Molyneux referring to it as being in July and the claimant in December 2017), it is agreed that Jacquie Molyneux told the claimant, in front of other staff, to be quiet. Jacquie Molyneux said that the claimant spoke over others, the claimant disagrees with this and says that Jacquie Molyneux tried to take over the meeting which the claimant had organised. We have seen no notes of this meeting. Contrary to the claimant’s submissions, we have found no evidence that Jacquie Molyneux agreed she took over the meeting the claimant had been set to chair. We accept both witnesses have different recollections of the meeting. The claimant has not satisfied us that Jacquie Molyneux intervened inappropriately and did not have any cause to tell the claimant to be quiet.

56. We consider that the meeting the claimant refers to in paragraph 86 of her witness statement must refer to same MDT meeting as described above. The claimant does not give evidence in her statement about two different meetings in December where she alleges Jacquie Molyneux raised her voice and was patronising. The claimant’s submissions do not refer to these as separate meetings.

57. The claimant has alleged that Jacquie Molyneux was over-bearing and intimidating in supervisions. The claimant has acknowledged in submissions that there is no documentary evidence to support this. Paragraph 60 of the claimant’s witness statement which deals with this allegation is unspecific about what happened. We

consider the evidence in relation to this allegation is insufficient for us to find that Jacquie Molyneux was over-bearing and intimidating in supervisions.

58. There is insufficient evidence to satisfy us that there was inappropriate criticism of clinical and other recommendations put forward by the claimant for best practice. The claimant's witness statement lacked specific details in relation to this allegation and there is no documentary evidence to support this.

59. Sometime prior to 27 October 2017, the claimant had an absence from work due to stress. She was referred to Occupational Health and a report was produced on 27 October 2017. By this date, the claimant was described as being currently at work on full duties and the advisor noted that no adjustments were required. The Occupational Health Advisor noted that the claimant perceived her absence due to stress to be due to work related issues. She reported a patient committing suicide and having to attend a Coroner's Court, having large clinics and her secretary making mistakes. She reported that, when she returned to work, she had a stress assessment, she had reduced her clinics and now had a new secretary and she was managing her workload and did not have any work issues.

60. On 2 November 2017 the claimant completed an incident form which was signed by her manager Jacquie Molyneux. This related to a patient being kept waiting when the reception staff were not aware the patient had no appointment and had no clinic list. This is not relied on as a protected disclosure.

61. On 24 November 2017, the claimant emailed Fiona Dixon; she wrote about two incidents she had been involved in where she said staff had not wanted to discuss the case or admit to gaps in knowledge and referred to Wendy Turl and Graham Bickerstaff. The claimant wrote that she needed to seriously consider whether this was an environment which was conducive to the safe working of her patients if staff could not discuss cases and admit mistakes.

62. From late 2017, Graham Bickerstaff was perceived by the claimant as disengaging from her. He cancelled meetings. The claimant considers that being asked by Dr Vanderpol to take over one of Graham Bickerstaff's cases was the main reason for Graham Bickerstaff's disengagement after this.

63. Around December 2017, Jacquie Molyneux told the claimant in a meeting with her, Dr Vanderpol and Fiona Dixon, that Wendy Turl did not want to have another meeting with the claimant alone. Although the list of issues states that Jacquie Molyneux gave the claimant no guidance as to how to address the situation, the claimant gave no evidence about this. We make no finding that no guidance was given.

64. On 20 December 2017, the claimant completed an incident form which was signed by her manager Jacquie Molyneux. This related to an emergency medication plan sent by a Learning Disability Nurse stating Buccal Midazolam (BM) was to be administered for complex partial seizures. The incident report noted that current NICE guidelines for epilepsy did not indicate the use of BM for complex partial seizures. The claimant noted that she had highlighted with her line manager and senior manager that there were gaps in knowledge within the learning disability team about BM. The outcome details completed by Jacquie Molyneux stated that an action plan was being developed to agree how complex Epilepsy/Learning Disability patients are managed in the future and outline any training required for Learning Disability Nurses. This

incident form is not relied on as a protected disclosure, although some later incident forms relating to BM are relied on as protected disclosures.

65. The claimant completed an incident report form on 2 February 2018. This was about the admin team not advising all patients about the cancellation of a clinic. This is not relied on as a protected disclosure.

66. On 31 May 2018, there was an incident when the claimant was asked to move her car by Caroline Evans, a senior manager, because it was blocking access to the rear of the hospital. The claimant refused to move the car, until after being told to do so by Fiona Dixon, not believing that there was a problem in where it was parked. Fiona Dixon was contacted by Caroline Evans when the claimant refused to move her car. No disciplinary action was taken against the claimant, but a note about the incident was put on the claimant's file. The claimant accepted in evidence that she could have handled the situation better but the claimant still did not seem to appreciate the gravity of the situation and that the way she reacted to the request to move her car was unusual. She agreed she said, at the time, that Caroline Evans was not a parking attendant.

67. On 1 June 2018 the claimant completed an incident form which related to an incident on 11 April 2018 where a member of staff made an unprofessional comment about a patient in the hearing of others. This is not relied on as a protected disclosure.

68. On 12 June 2018, the claimant sent an email to Fiona Dixon in which she complained about Jacquie Molyneux being confrontational and argumentative, so she asked that Fiona Dixon take over as her supervisor.

69. On 19 June 2018, Fiona Dixon suggested, in an email to the claimant, that she facilitate a discussion between the claimant and Jacquie Molyneux. The claimant asked her trade union representative to attend a meeting with her, writing that it was about unprofessional behaviour from Jacquie. Fiona Dixon subsequently saw this in an email chain and clarified with the claimant the purpose of the meeting. Fiona Dixon wrote that the meeting would have given both of them the opportunity to say how they felt and what they felt was unprofessional and to agree actions going forward. She wrote: "You may feel aggrieved at how Jacquie communicated with you but equally Jacquie feels concerned regarding your apparent lack of awareness and acknowledgment regarding the potential clinical risks associated with these two incidents". The claimant refused, over a number of months, to have a facilitated discussion with Jacquie Molyneux.

70. Fiona Dixon agreed in early July 2018 to take over the claimant's supervision and sign off her expenses while they tried to resolve the supervision relationship.

71. On 21 June 2018, Jacquie Molyneux completed an incident form about the claimant having not sent a care plan nine weeks after the patient's appointment (not 9 months as Jacquie Molyneux later, incorrectly, told the investigator of the claimant's grievance).

72. On 29 June 2018, Fiona Dixon emailed Nina Hill, Associate Director of Operation for Specialist Services, highlighting issues with the claimant. She wrote that they had had problems with the claimant regarding her communication skills with patients and other staff. She wrote about the attempt to have a facilitated conversation. She wrote

that she would go back to HR to see what they advised as the claimant was not accepting any supervision from Jacquie. She wrote: "I will keep you posted on what HR say but just thought I would give you the heads up as it will at some point go down a more formal route either from us or from her taking out a grievance".

73. On 6 July 2018, the claimant emailed Jacquie Molyneux, writing that she was doing her expenses and it said that April's was still awaiting authorisation. Jacquie Molyneux replied that, as the claimant was refusing to have management supervision with her, she felt it inappropriate for her to authorise the claimant's expenses. She wrote that the claimant would need to ask Fiona Dixon who would be doing it. She wrote that it would put her in a difficult position to authorise something she was unable to discuss with the claimant (p.336). She wrote that, regarding the April expenses, it might be that she was not the authoriser at the time. Jacquie Molyneux gave evidence that she thought the claimant was also past the three month point for claiming the expenses and she could not sign off expense claims, giving her approval to things she had no knowledge of and could not discuss with the claimant. We find that Jacquie Molyneux refused to authorise the claimant's expenses because she was not managing her at the time, because the claimant was refusing to have supervisions with her. Fiona Dixon agreed to sign off the claimant's expenses while they tried to resolve the supervision situation with Jacquie Molyneux. Fiona Dixon signed off some parking tickets in November 2018 (p.376). The claimant's witness statement did not identify the particular expenses not authorised and paid and the total amount of these. However, we understand from her answers in cross examination that the amount involved was relatively small, around £60.

74. On 7 August 2018, the claimant sent an email to Beryl Roberts, a Learning Disability nurse. She asked Beryl Roberts to make some changes to the Buccal care plan. The claimant tried telephoning Beryl Roberts very shortly after sending the email but was told that Beryl Roberts was at lunch. The claimant thought they previously had a good relationship but attributed Beryl Robert's disengaging from her to the email she sent on 7 August.

75. On 8 August 2018, the claimant completed an incident form (number 2018248153). This was signed by Fiona Dixon. The claimant relies on this as a protected disclosure. The information the claimant relies on as a protected disclosure was:

> "Advised by Learning Disability Nurse [Beryl Roberts] that patient had been given three doses of Buccal Midazolam in a 24-hour period in her home accommodation.
>
> Patient has a learning disability and lives in 24-hour accommodation. History of poorly controlled seizures and is prescribed rescue medication (Buccolam).
>
> Patient Neurologist has advised one dose – in 24 hours this year to the GP"

76. The form indicates that she had discussed the matter with Beryl Roberts who was the Learning Disability Nurse referred to in the form.

77. We accept the claimant's evidence that she left further telephone messages for Beryl Roberts but Beryl Roberts did not return her calls.

78. On 8 August 2018, the claimant escalated the matter about Beryl Roberts to Linda Turner, Quality and Safety Lead for the network, forwarding an email trail to her. The claimant did this because she thought there were shortcomings in Beryl Robert's skills and knowledge. The claimant had made a referral to Social Services about this in April or May 2018.

79. On 22 August 2018, the claimant sent an email to Wendy Turl and Sammy Henderson about two patients under their care. She wrote that she thought they both needed to reflect on these cases and how to prevent this happening again. Both patients were prescribed BM. In both cases this was incorrectly administered by the carer, the carer stated it had been a long time since they had been on Buccolam training and they had no documentation for the BM and no care plan. The claimant asked what they could suggest to prevent this happening again in the future, when a patient who is prescribed BM is admitted or assessed into the Learning Disability Team.

80. On 24 August 2018, the claimant completed an incident form (number 2018248557) which was signed by Jacquie Molyneux. This is relied on as a protected disclosure. The information relied on as the disclosure is:

> "Reviewed patient in the nurse clinic for the first time. Mother attended with her daughter who had a learning disability and under the learning disability team. Prescribed Buccolam Midazolam for prolonged seizures.
>
> Mother advised me she was last given training for Buccolam over three years ago".

81. Jacquie Molyneux recorded that Fiona Dixon had recommended a full review of all Learning Disability clients on BM.

82. On 3 September 2018, the claimant submitted an incident form (number 2018248784) which was signed by Jacquie Molyneux. This is relied on as a protected disclosure. The information relied on as having been disclosed is as follows:

> "Reviewed a patient who is currently under the care learning disability team.
>
> "New patient to the nurse clinic.
>
> "Mum giving buccal midazolam prematurely (before five minutes).
>
> "Patient has a learning disability.
>
> "Mum can't remember when she was last given training for buccal midazolam.
>
> "Missed opportunities to assess training needs, document and VERBALLY discuss buccal midazolam with patient's mother, while attending review with other healthcare professionals".

83. In the outcome section (p.289), Fiona Dixon wrote that she had asked Learning Disability services to review all Learning Disability clents who are on BM.

84. During the period 14 September to 29 September 2018, Sammy Henderson, a Learning Disability Nurse, sent the claimant a number of emails about a seizure

management plan. Sammy Henderson was asking if the claimant had had a chance to look at plans she sent. The claimant replied on 27 September 2018 "no your plans haven't been checked". There was further correspondence between them after Sammy Henderson had a period of leave. The claimant alleges that Sammy Henderson's emails changed to a hostile tone. Both began to copy in their managers. The claimant was the first to copy in others to the correspondence. We find no hostile tone from Sammy Henderson in the email correspondence we have been referred to. The claimant's submissions suggested it was the copying in, and not the tone, which the claimant said was problem. Whilst the claimant did say she thought it unnecessary to copy in others, in oral evidence she maintained a complaint about the tone used; alleging a change of tone which we have been unable to discern from the emails. We consider, reading the email correspondence, that the claimant's tone is less pleasant than that of Sammy Henderson.

85. As noted previously, the claimant perceived Graham Bickerstaff to be disengaging from contact with her from late 2017 and she attributes to this to a complex patient of his being transferred to the claimant. We find that, prior to late 2017, they had a reasonable working relationship, often speaking on the phone even if it is true that, as Graham Bickerstaff later said in the grievance interview, he found her patronising. We accept the claimant's evidence that he disengaged to some degree from contact with her from late 2017 onwards. They continued to have some direct professional contact.

86. The claimant refers to a meeting in August or September 2018, with Graham Bickerstaff where he sat with his arms crossed and did not engage with her. She referred to this in supervision without naming Graham Bickerstaff. We find this was the same meeting as referred to in paragraph 118 of the claimant's witness statement, and, therefore, took place on 27 September 2018, the day before an email from Graham Bickerstaff to Fiona Dixon about this meeting. We find that Graham Bickerstaff sat with his arms crossed and did not engage with her. The claimant claimant asked him if his problem with her was that she was a woman.

87. On 28 September 2018, Graham Bickerstaff emailed Fiona Dixon writing "I have been thinking about my discussion with J yesterday and her indirect accusation that I am sexist towards her and this may sound petty but I would rather not be involved in any one to one meetings or work with her. Happy to meet/work with her in a group but I have been advised not to put myself in this situation again". Fiona Dixon replied asking Graham Bickerstaff to discuss this at his supervision with Jacquie so there was a formal record of it. If there was a record made of a discussion about this in a supervision between Graham Bickerstaff and Jacquie Molyneux, we have not been shown it.

88. On 19 October 2018, the claimant had a supervision with Fiona Dixon. The notes of the supervision record that some issues had arisen regarding the relationship between the claimant and the Learning Disability Team in supporting a particular patient. The claimant mentioned a staff member, not by name, saying she had experienced some hostile behaviour which she felt was unwarranted. This was a reference to Graham Bickerstaff. Fiona Dixon told the claimant in this meeting that the claimant gets people's backs up and annoys them. We are not satisfied the claimant asked for examples at this meeting but was not given them. Had that been the case, we think that would have been reflected in the claimant's subsequent email. Either she asked for examples and was given some, or she did not ask and no examples were given.

89. Following the supervision, the claimant emailed Fiona Dixon recording Fiona Dixon's comment that she gets people's backs up and annoys people. The claimant wrote that she had never heard these comments before and that comments like this were not constructive for her and did not help her working in a team. She wrote that most of her work highlights areas for improvement and this involves having to be direct with people, which people do not always like.

90. The claimant had an appraisal with Fiona Dixon on 22 October 2018. This was to identify any areas for development in relation to the Trust's values and behaviours. The claimant wrote: "logging incidents has been necessary to allow safe practice, correct prescribing and appropriate education of staff. This however has resulted in a disengagement of staff on more than one occasion. Much of my communication has challenged staff about their practices and documentation and in some cases some practice and advice is not evidence based". Fiona Dixon's comments included the following: "Jane has experienced some difficulties engaging with certain parts of the LD Team which has resulted in frustration and in some cases delays in relation to getting the required information". Fiona Dixon recorded, in the column for areas for development: "Jane to think about how to approach any staff member who she feels may have disengaged with her in order to continuing positive working relationships". The claimant did not give evidence that Fiona Dixon told her in this meeting that she annoyed staff. The claimant has not satisfied us she said this at the 22 October 2018 appraisal meeting (although, as noted above, it was said in the 19 October 2018 supervision).

91. On 8 November 2018, the claimant completed an incident form (number 2018250623) which was signed by Jacquie Molyneux. This is relied on as a protected disclosure. The information relied on is as follows:

> "Visited patient with a learning disability at her day centre facility to make a full assessment of her epilepsy. Reason for involvement Learning Disability Team asked for advice, and noted patient having frequent hospital admissions and frequent administration of buccal midazolam. Documentation did not state which seizures the rescue was to be administered for.
>
> "On arrival, patient given buccal midazolam just before I arrived for incorrect seizure type. Other day centre staff commented we give (buccal midazolam) for epilepsy for all seizure types.
>
> Missed training last given to day centre staff three years ago".

92. On 16 November 2018, the claimant and Fiona Dixon exchanged emails about expenses and the claimant wrote in relation to mileage claims that it said on the page "waiting for authorisation".

93. On 6 December 2018, the claimant completed an incident form (number 2018251512) about an incident on 19 November 2018, which was signed by Jacquie Molyneux. This is relied on as a protected disclosure. The disclosure of information relied on is:-

> "Patient attended the nurse clinic.

> "Family angry and annoyed. Stated the rescue medication (buccal midazolam) had been stopped by the Learning Disability Nurse/Team" and had now been reinstated by the GP.
>
> "Day centre staff – advised not to give rescue medication by learning disability nurse Advised to call for an ambulance. Plan was for patient to be reviewed in nurse clinic and for the medication to be discussed, and the epilepsy to be reviewed".

94. The outcome details recorded: "there is a planned review of LD patients with epilepsy that the Q and S lead is involved in looking at these issues."

95. Linda Turner, Quality and Safety Lead for the Network, and Fiona Dixon put together an action plan. The claimant was not involved in this.

96. In late 2018, Graham Bickerstaff took over from the claimant as Audit Lead. The claimant was requested to do a handover but refused to do this.

97. In around January 2019, there was an audit meeting. The claimant felt that this was not transparent enough because there was no mention of the medication incidents which had led to the audit.

98. On 31 January 2019, the claimant had a supervision with Fiona Dixon. The notes of this supervision were not sent to the claimant until 22 February 2019 and the claimant then raised an issue with Nina Hill in an email about the supervision notes not reflecting what took place. The notes (page 515) include:-

> "FD acknowledged that the clinical messages which Jane was giving out was relevant and appropriate but FT was of the opinion that staff ended up not hearing the message as a result of how it was communicated to them".

99. The claimant took issue with the record of what was said. However, from the claimant's answers to cross examination, it is clear there was some discussion about problems with the claimant's communication and the claimant was very hurt by these comments. It is agreed that Fiona Dixon told the claimant that what she said to others "seems to get lost in translation". This was the last supervision which the claimant had before her resignation.

100. We saw or heard no evidence that the claimant was offered any training to help with communication issues at this or any other time.

101. On 1 February 2019, the claimant completed an incident form which was signed by Jacquie Molyneux. This was about BM being administered prematurely by a carer to a Learning Disability Team patient on the claimant's caseload. This is not relied on as a protected disclosure.

102. On 13 February 2019, the claimant submitted a 10 page grievance to Nina Hill (p.382). The grievance is incorrectly dated 13 February 2018. The start of the letter records that it mainly relates to management issues in relation to Fiona Dixon but also relates to Jacquie Molyneux. She wrote:

> "This grievance discusses the following:

1. Management of informal complaints.

2. Investigating patient deaths.

3. Management supervision with Jacquie Molyneux and unprofessional conduct in meetings.

4. Management of staff comments made in relation to myself.

5. Management supervision with Fiona Dixon."

103. The claimant complained in this grievance about incidents dating back to December 2015 and included a complaint about Fiona Dixon wanting to contact Psychology to get advice about the claimant.

104. Nina Hill agreed in cross examination that the claimant raised a grievance that she was treated differently because she had raised incident forms. However, in the written grievance, the only express links the claimant makes between incident forms and her treatment by others is about Beryl Roberts and Sammy Henderson. Subsequently, in her solicitors' letter sent just before the grievance hearing, a link is made between incident forms, expressly stated to be protected disclosures, and treatment by a wider range of Trust employees.

105. Nina Hill was Fiona Dixon's line manager. She had discussed issues about the claimant with Fiona Dixon on some occasions prior to the grievance and received the email dated 29 June 2018 from Fiona Dixon highlighting some issues Fiona Dixon said they were having with the claimant (p.548). Nina Hill appointed an independent investigator because of possible difficulties in being, or perceived as being, an impartial arbiter. However, she remained the decision maker in relation to the grievance.

106. Nina Hill acknowledged the grievance on 15 February 2019.

107. By email dated 22 February 2019, the claimant raised the issue of supervision notes with Fiona Dixon not reflecting what had taken place. In her email, the claimant said she was seeking legal advice.

108. From 25 February 2019, the claimant was on sick leave for seven days.

109. The claimant had an initial grievance meeting with Nina Hill on 11 March 2019. We have seen no minutes of this meeting but there is an email from Nina Hill to the claimant written on the same day, after the meeting, (p.397). This email does not record what was to be dealt with in the grievance but sets out two points which Nina Hill said could not be dealt with as part of the grievance. The claimant replied on 12 March 2019, referring to two points relating to Fiona Dixon and the handling of informal complaints around June 2015 and comments from Wendy Turl, which Nina Hill said could not be looked into because of time. Nina Hill replied on 19 March 2019, writing that these matters would not be included in the grievance and referring the claimant to the grievance policy which stated that grievances must be raised within 3 months of the incident/concern unless there were exceptional circumstances preventing this. She confirmed that the claimant's new line manager would be Andrew Wilkinson with immediate effect.

110. On 14 March 2019 the claimant had a return to work interview with Andrew Wilkinson, her new line manager.

111. On 19 March 2019, the claimant was provided with formal terms of reference and informed that Martin Daley had been appointed to investigate concerns raised by the claimant. This included the following:

> "Precise Area(s) to be Investigated:
>
> - That Fiona Dixon failed to conduct herself in a professional manner with regards to management, supervision, complaint handling and treatment of you in front of other staff and failed to appropriately manage other staff who made comments about you.
>
> - That Jacquie Molyneux failed to conduct herself in a professional manner with regards to management, supervision and treatment of you in front of other staff.
>
> - That you feel harassed by other staff when raising concerns and that these have often not been investigated appropriately or dealt with professionally."

112. Although the terms of reference referred to an allegation that the claimant had been harassed by other staff when raising concerns, they did not refer expressly to concerns having been raised (in the most part) by incident forms.

113. The terms of reference anticipated that the final investigation report would be completed by 30 April 2019.

114. Martin Daley, the investigator appointed, was not an employee of the respondent.

115. Nina Hill met with Martin Daley to go through the terms of reference and processes. She could not recall in her evidence whether she directed him to interview anyone in particular. We do not feel able to make a finding, on the evidence available, that it was Nina Hill who directed him to interview particular people, where it is not clear on the documents who suggested that they be interviewed. Given that Martin Daley was external to the organisation, someone within the respondent must have identified for him the people he interviewed who were not named in the grievance itself.

116. A referral was made to occupational health and the claimant had an assessment on 12 April 2019. By the time of the assessment, it was recorded that the claimant had returned to work. The report referred to her having an underlying medical condition which was well controlled at present. The advisor suggested that the claimant's workload and the driving to clinics across the county were assessed to ensure that they were kept to a minimum while she recovered from the fatigue which caused her absence. The advisor wrote that excess fatigue can exacerbate symptoms associated with her underlying medical condition. The advisor expressed the view that the Equality Act was likely to apply. The underlying medical condition was not specified but this referred to the claimant's epilepsy. This report did not suggest that stress could cause seizures.

117. Nina Hill sent the grievance letter and other material to Martin Daley and to HR on 16 April 2019. Since no grievance investigation meetings had yet taken place, it was already unlikely that the investigation report would be completed by the anticipated date of 30 April 2019.

118. A grievance investigation meeting with the claimant was arranged for 10 May 2019.

119. In the evening of 9 May 2019, a letter was sent to Nina Hill by the claimant's solicitors. They asked that their letter be placed before the grievance officer before the hearing the next day. The letter made it explicit that the claimant felt that large elements of the adverse treatment she had experienced at the hands of management and staff of the Trust had been due in part or whole to protected disclosures beginning soon after the start of her employment and subsequent incident forms she had lodged. The letter also referred to other issues categorised as discrimination mainly on the grounds of her medical condition being epilepsy.

120. The grievance investigation meeting took place on 10 May 2019. The claimant was accompanied by Gail Hodgson, her union representative. An HR advisor was also present. Martin Daley confirmed that he had received the solicitor's letter but said he had not read it. We assume that Martin Daley read it following the meeting. However, the letter is not one of the documents annexed to the investigation report.

121. Following the meeting, Martin Daley sent the claimant typed notes of the meeting (p.445). We have seen the handwritten notes taken, presumably by the HR advisor, during the meeting (p.411). We note that the typed note is considerably shorter than the handwritten version and omits various matters recorded in the handwritten notes. For example, it omits an allegation made by the claimant that Graham Bickerstaff disengaged from her and that, over time, she was ostracised (pp 420-421) and a suggestion made by the claimant that Sammy Henderson should be interviewed.

122. The claimant did not have a copy of the handwritten notes but took issue with the typed notes. She replied on 20 May 2019 saying she would not be signing them due to factual inaccuracies and that she would now consult her legal team. She subsequently produced a detailed comparison of the typed notes provided by Martin Daley with the notes taken by her trade union representative (p.449). She noted very substantial omissions from the typed notes, including any mention of Graham Bickerstaff and Sammy Henderson.

123. A GP letter dated 20 May 2019 "to whom it may concern" (p.424), which we infer was provided by the claimant to the respondent some time soon after it was written, provided information about the claimant's epilepsy, including the information that, in the past, tiredness and stress have been triggers for seizures.

124. Following the grievance investigation meeting, Martin Daley interviewed various people. The same HR advisor was present as at the meeting with the claimant, again taking notes. The typed notes of interviews with other witnesses are noticeably more detailed than the notes of the interview with the claimant.

125. Martin Daley interviewed Wendy Turl on 22 May 2019 (p.465). The notes record Wendy Turl saying that she had told Fiona Dixon, after a meeting with the claimant, that she did not want any more one to ones with the claimant. She said the claimant

was patronising and would not listen to Wendy Turl's side. Wendy Turl is recorded as saying that the claimant regularly raised incident forms, totally overreacting to various things. We consider this comment is not supported by the incident forms we have seen which all raise legitimate concerns, most of a serious nature.

126. Beryl Roberts was interviewed on 22 May 2019 (p.462). She was asked whether the claimant was any different to other colleagues. She is recorded as saying:

> "She's different. It's disgraceful that she doesn't recognise the L & D nurses. I have 30 years' experience and she has gone over my head and referred to social care for someone I have known for 30 years. I had all my paperwork and it was thorough. She could have used this as part of her assessment."

127. Martin Daley asked about an incident where the claimant logged an incident form about Beryl Roberts dealing with a particular patient. Beryl Roberts replied: "what actually happened was that there was a poor relationship from Jane's side." She said her manager had no concerns about the treatment Beryl Roberts had provided. Martin Daley did not have a copy of the incident form. Our reading of the relevant incident form suggests to us that the claimant's action in logging this was appropriate. The suggestion from Beryl Roberts that the claimant inappropriately logged an incident form is not supported by Fiona Dixon's recorded outcome on the incident form. This records that the incident occurred due to lack of standardised processes being in place which was in hand, and that the patient's care plan and staff team have been reviewed and advised regarding what is appropriate regarding the administration of BM (p.287).

128. Graham Bickerstaff was interviewed on 24 May 2019. He was recorded as saying "she is a good clinician and she knows her stuff about epilepsy but she doesn't have the ability to interact with anyone, including the patients. This then leads to conflict and I think the way she survives this is to put complaints in about people to deflect attention away from herself". We consider that the suggestion by him that the claimant was putting in complaints without merit is not supported by the evidence we have seen.

129. Jacquie Molyneux was interviewed on 28 May 2019. Jacquie Molyneux asserted that there had always been issues with the claimant. She asserted that the claimant was very difficult to work with, very tunnel visioned and alleged that if anyone interfered or interrupted, an incident form went in. She said there had been a lot of incident forms against the Learning Disability Nurses and patients; that most people would go and find out how to work together but the claimant just put in incident forms. She acknowledged that the claimant was skilled in epilepsy but said communication caused problems. Martin Daley asked Jacquie Molyneux whether there were copies of the incident forms. Jacquie Molyneux replied "we don't keep a copy of the incidents". When asked about this in cross examination, Jacquie Molyneux acknowledged that she could get the incident forms from the computer system. She did not volunteer this information to Martin Daley. No one subsequently corrected the misleading information given by Jacquie Molyneux to Martin Daley, so he did not obtain the relevant incident forms as part of his investigation. Jacquie Molyneux incorrectly referred to the claimant being responsible for a 9 month wait for care plan rather than a 9 weeks wait. Jacquie Molyneux did not correct this when sending her comments on the notes. Jacquie Molyneux said Graham had picked up a lot of the claimant's patients (p.474). Graham Bickerstaff's interview did not support this assertion and Fiona Dixon's evidence was of two patients transferred from the claimant to Graham Bickerstaff. Jacquie Molyneux said in cross examination that she had no reason to contradict the evidence given by

Fiona Dixon and, on the basis it was only two patients, she agreed that what she said in the interview was an exaggeration. She was not asked in cross examination why she made the exaggerated assertion.

130. On 30 May 2019, Jacquie Molyneux went to see the claimant in her office to discuss office space. Following this, Jacquie Molyneux put in an incident form. She wrote that they had been in the claimant's office when the claimant walked in and that Jacquie Molyneux had begun to remind her why she was there but the claimant waved her arms at all of them shouting at them to get out. She wrote that the claimant waved her Dictaphone at Jacquie Molyneux saying "I am recording you" and became more aggressive, standing by the door waving her arms telling them to leave, so they left in a very distressed state.

131. On 31 May 2019 the claimant started a period of sick leave with work related stress. She did not return to work before her resignation.

132. Martin Daley spoke to some other Trust employees who did not have day to day contact with the claimant. We do not know who suggested he should speak to some of these employees. He spoke to two people whose previous involvement with the claimant had been investigating complaints about her. They made negative comments about the claimant's interactions with them.

133. Fiona Dixon suggested Martin Daley should speak to Linda Turner. Linda Turner said that she personally had never had an issue with the claimant but a lot of people had told her that they had less than positive experiences of working alongside the claimant. Linda Turner said that a lot of the claimant's concerns were based on clinical evidence and some of the things she had raised had been brilliant and led to improvements being made. She said the claimant appeared to struggle with email communication and she was aware that other clinicians had been upset by the tone and content of some emails the claimant had sent. She said that the claimant had raised a number of incidents and it was positive that she had picked up on service gaps in development and training. The notes record:

> "She concluded that Jane has demonstrated some good work and identified issues well but that the main concerns noted come back to communication and people feeling that she doesn't value them or doesn't recognize their skills."

134. We have no evidence that the claimant suggested anyone be interviewed who was not, other than Sammy Henderson, who the claimant noted was on maternity leave.

135. On 7 June 2019, Fiona Dixon was interviewed in the grievance investigation. The interview included Fiona Dixon saying: "I have no concerns of her clinical knowledge but the impact of not being able to communicate with MDT and patients it then gets fractured, I do feel sorry for her because it is not deliberate, I think it may be linked with her epilepsy but how do you raise that? To be fair, she has never raised that as needing reasonable adjustments as an issue, but we could have supported her". We accept that this was Fiona Dixon's reflection at this time on why there were communication problems with the claimant.

136. The last interview in the investigation was conducted on 12 June 2019. Nina Hill accepted in cross examination that more effort could have been taken to expedite the interviewing of witnesses.

137. After interviewing other witnesses, and presumably reading the letter from the claimant's solicitors, Martin Daley did not hold any further interview with the claimant or seek her comments in any other way on what had been said by the other witnesses.

138. We did not see evidence as to when the report was sent to Nina Hill but it appears from a reference to occupational health that this was likely to have been some time no later than July 2019. Nina Hill gave evidence that she was satisfied that Martin Daley had carried out a comprehensive investigation and that the investigation was sound and impartial. It was Nina Hill's responsibility following the investigation report to reach a decision and provide the claimant with an outcome.

139. Although the summary of findings identified the precise areas to be investigated as being the three matters set out in the terms of reference (see paragraph 111), the title of the report, the introduction and conclusions referred only to the grievance against Jacquie Molyneux and Fiona Dixon. The report does, however, contain a section on the complaint that the claimant felt harassed by other staff when raising concerns and that these were often not investigated appropriately or dealt with professionally, with a finding, on the information available to Martin Daley, that there was no foundation to the claim. It is not clear to us from the report, whether Martin Daley was considering whether the claimant had been harassed by other staff because of raising concerns or whether his finding relates only to whether concerns she raised were investigated appropropriately. The claimant had explained in the investigation meeting that she considered she had been treated differently by other staff because of raising concerns. Her solicitor's letter made it explicit that she was complaining about suffering detrimental treatment because of raising protected disclosures, most of which were done by means of incident forms. Martin Daley did not have copies of the relevant incident forms, having been informed by Jacquie Molyneux that there were no copies. The claimant was not aware, until she received the interview notes, shortly before the appeal hearing, that Martin Daley had not had the incident forms.

140. Martin Daley found no foundation to the grievances against Jacquie Molyneux and Fiona Dixon.

141. The report was very critical of the claimant's own behaviour. The conclusions to the report included noting that those interviewed "independently of one another, they were all detrimental when commenting on her manner, the way she communicates with people, and her disregard and disrespect for the skills and the knowledge of others."

142. In accordance with the respondent's policy, the outcome should be delivered in person. We accept that Nina Hill had concerns that the claimant might not be fit to receive this outcome. A reference was made to occupational health requesting advice on whether the claimant was fit to attend a meeting to discuss the outcome of a recent grievance.

143. The claimant met with an Occupational Health Advisor on 23 July 2019. By a letter dated 24 July 2019, the Occupational Health Advisor advised that the claimant

was not fit to attend a meeting to discuss the outcome of the grievance or to return to work. The report referred to the claimant having psychological symptoms affecting her well being.

144. Around this time, Nina Hill was facing the possibility of redundancy. She was also on annual leave between 2 and 19 August 2019. We accept that these were factors in the delay in the grievance outcome.

145. In August 2019, Ellie Clark became the claimant's line manager but Ellie Clark was off work during the whole of August so did not meet the claimant until September 2019.

146. There was a further occupational health referral and on 1 August 2019 the Occupational Health Advisor advised that the claimant was able to receive the results of the grievance. They wrote that this did not imply that the claimant was fit to return to work.

147. On 8 August 2019, the claimant wrote to the Chief Executive of the respondent Trust. She wrote that she was writing to highlight concerns which she believed were in the public interest. She wrote about concerns she raised about Samantha Robinson working outside her scope of practice and about lodging other incidents regarding controlled medication, most of which involved Learning Disability Nurses, who she found to be working outside their scope of practice. She wrote that, as a result of raising the incidents, she was then subjected to a prolonged campaign of bullying and harassment by management and completely ostracised by learning disability staff. She wrote about lodging her grievance and subsequent meetings. She referred to there being omissions in the minutes of the grievance meeting and attached a copy of the notes written by her trade union representative. In particular, she wrote that there was no reference in the minutes to Fiona Dixon and her comments during supervision, no reference to harassment from Jacquie Molyneux and senior staff such as Graham Bickerstaff and Sammy Henderson being omitted from the minutes. In the concluding summary of her concerns, she wrote that she now held the belief that there was a culture of management cover up with a view to protecting themselves. On the final page, she set out seven points on which she sought clarity. She enclosed a copy of the letter from her solicitors which had been provided at the original grievance meeting. The claimant received no response to her letter to the Chief Executive.

148. On 11 September 2019, HR wrote to the claimant seeking to arrange a meeting to discuss her current situation and possible return to work and also writing that they would like to use the opportunity for Ellie Clark to discuss with the claimant when she could receive feedback about the outcome of her grievance.

149. On 16 September 2019, the claimant requested that she receive the grievance outcome in writing in the next seven days.

150. On 25 September 2019, the claimant's trade union representative emailed HR writing that they had tried on three occasions to contact Nina Hill and left voicemail messages for her. The claimant's representative wrote that they were not aware of why the outcome could not be sent to the claimant and wrote that requesting that the trade union representative deliver this was an unusual request. She asked that they come back to her that day and let her know of the reasons. In an email of the same day, HR replied to the claimant's trade union representative, writing that Nina Hill felt

it would be better if someone was with the claimant when she read the letter but, if the representative believed there was no need for that, they would just post it.

151. On 4 October 2019, the grievance outcome letter was sent to the claimant's trade union representative by email, writing that it would be posted to the claimant on Monday. The grievance outcome letter (p.586) did not enclose the investigation report. It informed the claimant that her grievance was not upheld. The letter included the statement that the investigation involved speaking with people from different geographical locations around the county, people of different grades and people from different organisations and wrote:

> "Many acknowledged your clinical skills which suggests there was no bias; and some didn't even know each other, therefore there was found to be no suggestion of collusion by witnesses.
>
> "However, independently of one another, they were all detrimental when commenting on your manner, the way you communicate with people, and your disregard and disrespect of skills and knowledge of others.
>
> "As well as those interviewed, there was evidence that other colleagues, patients and their families have found you to be confrontational and lacking in empathy."

These paragraphs were direct quotes from the conclusions section of the investigation report.

152. The letter continued, again drawing on the conclusions of the investigation report:

> "The IO advises that the findings identified that Fiona and Jacquie have tried to support and develop you, and address any weaknesses and misunderstandings by suggesting training or seeking to clear up matters informally, either through meetings or at supervision sessions. You have interpreted such suggestions as being inappropriate and unprofessional, and have often refused to participate (supervision meetings being an example). This has resulted in several complaints and incidents being raised by you and has culminated in this formal grievance investigation.
>
> "The IO concuded that they did not find anything wrong with Fiona and Jacquie's management and concluded that their approach has been both reasonable and appropriate."

153. The claimant received this outcome on 11 October 2019.

154. On 9 October 2019, the claimant attended a long-term absence review meeting. At that meeting, the claimant asked why the grievance outcome had taken so long and said she had not received the outcome. She was told that the outcome letter was in the post to her. Angela Hodgkinson said that she would find out the reason for the delay in sending the outcome and get back to the claimant as soon as she could. The claimant, also in the meeting, raised the matter of expenses. They discussed her email to the Chief Executive. The letter dated 18 October 2019 summarising the meeting recorded that the claimant said she did not want to re-open the matters but merely wanted to draw the Chief Executive's attention to the failure to follow the

grievance procedure or communicate the outcome appropriately and that she did not require a response from him. The claimant disputes that she said that she did not want a response from the Chief Executive.

155. On 25 October 2019, the claimant raised a second grievance. Matters raised in this grievance included why it took nine months from lodging her first grievance to receiving the outcome. The claimant disagrees that most of the matters in this grievance had already been considered in the first grievance.

156. In September or October 2019, the claimant's sick pay reduced to half pay.

157. On 11 November 2019, the claimant attended a long-term absence review meeting. She said in this meeting that she could not regain the trust broken between her and the respondent. The respondent offered adjustments to help her return to work. She was offered external counselling which she declined.

158. In November 2019, the claimant put in three flexible working requests; all of these were agreed.

159. Also in November 2019, the claimant lodged County Court proceedings for unpaid expenses. The respondent admitted liability and agreed to pay these. The claimant says these were not paid before her employment ended and were not paid until 31 May 2020. No witness from the respondent could say when this had been paid or explain the delay in doing so. During cross-examination the claimant did not allege that all the people who did not sign off her expenses did so because of her making protected disclosures.

160. At the end of November or beginning of December 2019, Ellie Clark provided a reference for the claimant for a job working at HMP Preston. She wrote in this reference that she had known the claimant since September 2019. She recorded in answer to a question about absence that the claimant had six episodes of absence totalling 210 days in the last two years. In answer to the question "would you reemploy this person", she wrote "unknown". In answer to a question asking her opinion on the claimant's suitability or otherwise for the post, she wrote "unable to answer this due to short period of time I have known Jane". We were told that there is no policy at the respondent trust that HR must be involved in checking references. We do not know whether Ellie Clark contacted HR: her witness statement suggests she did not but, in oral evidence, she said it was possible, but did not recall.

161. The claimant started looking for jobs prior to the request for this reference. This was the first interview that claimant had been invited to, following applications. She said, in cross examination that she did not have the information as to when she first applied for other roles. She did not know how many roles she had applied for prior to her resignation. This was the only job she was interviewed for prior to her resignation. The claimant did not have a job to go to when she resigned.

162. On 3 December 2019, the claimant appealed against the first grievance outcome.

163. On 7 December 2019, shortly before the appeal hearing, the claimant received transcripts of the grievance interviews. We accept the claimant's evidence that her sleep was affected after the investigation report and statements were received. She started having seizures again in December 2019.

164. The claimant would not have been aware, before receiving the transcripts, that Martin Daley had not had copies of the incident forms.

165. The claimant attended a grievance appeal hearing with David Allen, who, at the time, was the Trust's Head of CLIC – Delivery Support, and Angela Jeffries, HR Business Partner, on 11 December 2019. This was not a re-hearing of her grievance. The claimant was offered mediation but the claimant refused to engage with this.

166. On 17 December 2019, the claimant was informed in writing that her grievance appeal hearing was not upheld. The letter (p.629) included information that expenses had not been authorised because they were beyond the three-month cut off. However, Mr Allen said that expenses had now been authorised and would be paid in January. It appears that they were not, in fact, paid then. He noted that the claimant had been asked if she would consider mediation but she had declined to pursue this further. He wrote that the Panel accepted the reasons for the time taken in relation to the grievance and that the action taken was in accordance with Trust Values as it was in relation to her health and well being. We accept the evidence given in Mr Allen's witness statement that he rejected the appeal because he found no procedural error in the grievance findings and no absence of rationale for them. He considered the findings clear and based on evidence from the claimant and numerous other colleagues.

167. The claimant, in cross examination, said that she had decided, before the appeal outcome, that she had no trust and confidence in the respondent, although she still hoped that David Allen would look at it with fresh eyes.

168. The claimant attended a further long-term absence review meeting on 18 December 2019. She referred in that meeting to having had seizures. She was invited to speak to the Freedom to Speak Up Guardian, Linda Turner, but refused to do so. Other Freedom to Speak Up Guardians were suggested, but she did not contact them. In the letter confirming the meeting (p.769), Ellie Clark wrote that they would meet again to discuss the position after the claimant's next OH appointment. She recorded that Angela Hodgkinson, HR Business Partner, had explained that, if they could not obtain information that suggested a return to work in the reasonably foreseeable future, they would arrange a final formal review meeting in line with the Attendance Policy. Angela explained that the outcome could be to terminate the claimant's employment.

169. On 18 December 2019, the claimant was informed that the job offer from Spectrum Community Health CIC for the job at the prison was withdrawn due to an unsatisfactory reference from the respondent. The claimant emailed Ellie Clark on 23 December 2019, informing her that the offer of employment had been withdrawn due to the reference. Ellie Clark replied the same day (p.634). She apologised for the way her reference had been interpreted. She wrote:

> "Having only known you for a short time whilst managing your sickness there were a number of questions I was unable to answer, to remain factual I could only respond with unknown.
>
> "As the reference was addressed to me I dealt with it in the strictest of confidence and did not discuss with your colleagues."

170. On 30 December 2019, the claimant notified ACAS of a potential claim under the early conciliation process. The claimant said in cross examination that she had a fairly good idea by this time that she would resign. The ACAS Early Conciliation Certificate was issued on 31 December 2019.

171. The claimant presented a grievance about the reference on 17 January 2020.

172. On 21 January 2020, the claimant emailed HR to say that she wanted to retire and apply for her pension.

173. HR acknowledged her grievance on 30 January 2020 and Amanda Dunkley was appointed to deal with it.

174. On 31 January 2020, the claimant resigned giving four weeks' notice. This was reduced notice, instead of the normal three months' notice, and she wrote that this had been negotiated with HR. The claimant was still receiving sick pay when she resigned. The claimant wrote in her letter of resignation (p.648), that there were multiple reasons for her resignation. She gave background about raising concerns from 2015 onwards and alleged that she had been ostracised, harassed and bullied as a result of raising these serious matters and that she had lodged three grievances for discrimination and detriments suffered as a whistleblower. She alleged that the respondent had breached her contract on countless occasions, the cumulative effect of which was that she had lost all trust and confidence and had no alternative but to resign. She wrote:

> "1. North Cumbria Integrated Care have failed to acknowledge any of my concerns in my grievance raised in February 2019. I have been told all my concerns and allegations were unfounded.
>
> "2. There have been countless failures to follow the grievance policy for the first (02/2019) and second grievance (22/10/2019) which has still not been addressed.
>
> "3. I have been discriminated against and also ostracised, harassed and bullied as a result of raising important and legitimate whistleblowing complaints.
>
> "4. My psychological and neurological health (epilepsy) has been affected, and I can no longer continue to work in an environment which is continuing to have an adverse effect on my health. This is the sad realisation I have come to and is also the advice of my GP.
>
> "5. I attempted to leave the Trust without taking any further action but even this was thwarted. In December 2019, I received a Job offer that was subsequently retracted based on a poor reference from E. Clark, service manager, North Cumbria Integrated Care.
>
> "6. My financial situation has been affected due to a reduction of sick pay due to the amount of time it has taken the Trust to determine my original grievances (in excess of 8 months).
>
> "7. There remain Unpaid expenses from North Cumbria Integrated Care which I have had to pursue via the County Court to recover as I am facing financial

> hardship. This is being pursued via Claim Nuniber: 105MC131, which was lodged in November 2019."

175. On 4 February 2020, the claimant was informed by the respondent that they would not investigate her second grievance because it was a repetition of her first grievance (p.650). Ellie Clark invited the claimant to contact her if there was anything the claimant wanted to discuss further. The claimant did not contact Ellie Clark. We find that the respondent did not deal with the claimant's second grievance because they thought it had been dealt with already.

176. The effective date of termination was 28 February 2020.

177. The claimant presented her claim to the Tribunal on 13 March 2020.

178. On 14 April 2020, the outcome of the third grievance was provided to the claimant (p.658). This was that the grievance was not upheld. The letter suggests that Ellie Clark had not consulted HR before issuing the reference, relying only on her own, very limited knowledge about the claimant, apart from accessing ESR to produce the claimant's sickness records.

179. On 9 February 2022, during the course of this hearing, the claimant made a successful application to amend her claim to include the complaint of disability discrimination about Fiona Dixon's comment, made during an interview in the grievance investigation, about the claimant's communication style.

180. The respondent's witnesses acknowledged in evidence that there was nothing wrong with the claimant raising incident forms, although, in relation to some matters, other staff might have chosen to raise the concern in a different way. The respondent's witnesses did not give evidence that any of the claimant's incident forms were raised inappropriately, contrary to the impression given by a number of employees to the investigator in the grievance interviews. Jacquie Molyneux, in her witness statement, wrote that the claimant put lots of incident forms in, often in circumstances where other colleagues might just go straight to their colleague or team in question and have a discussion about it to make recommendations or raise it in their MDT meetings. However, she wrote "that was fine though, everyone has their own ways of working and Jane liked to record everythingon incident forms." In cross examination, however, Jacquie Molyneux demonstrated a negative view of the claimant putting in incident forms, rather than dealing with matters by other means, but, when pressed, could not say that any forms submitted were inappropriate.

181. All the employees of the respondent, other than the claimant, of significance in relevant events, had a Learning Disability Services background and had worked together for years.

Submissions

182. There was insufficient time in the original listing to hear oral submissions. The claimant's preference was to return to make oral submissions on another day. Both parties wished to provide written submissions to each other and the Tribunal in advance of oral submissions and agreed that, having done this, their time for oral submissions would be limited to an hour each.

183. Both parties produced lengthy written submissions. We do not seek to summarise these, which can be read, if required. Both representatives used their allotted time for oral submissions, but these did not change in any material respect the written submissions.

184. In submissions, Ms Baylis relied, for the relevant category in s.43B(1) ERA, only on (d) i.e. that the health and safety of any individual has been, is being or is likely to be endangered, acknowledging that, although the claimant's case had been pleaded on other bases as well, the claimant's live evidence was that health and safety was really her key consideration.

The Law

Protected disclosure detriment claims

185. Section 47B(1) ERA provides: "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."

186. What constitutes a protected disclosure is defined by sections 43A to 43H ERA. Section 43A provides: "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

187. The relevant parts of section 43B for this case are as follows:

> "(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
>
> ……
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,….."

188. It is agreed in this case that the disclosure was made to the claimant's employer, so section 43C is relevant.

189. Section 48(2) ERA provides that in relation to a complaint including a complaint that the worker had been subjected to a detriment in contravention of section 47B

> "On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done."

190. The employer must show that the protected disclosure did not materially (in the sense of more than trivially) influence the employer's treatment of the claimant: **Fecitt v NHS Manchester (Public Concern at Work Intervening)** 2012 ICR 372 CA.

191. The case law on the meaning of detriment in discrimination is relevant to the meaning of detriment in section 47B ERA i.e. disadvantage (see paragraph 198 below).

192. The time limit for bringing a complaint of protected disclosure detriment is set out in section 48 ERA. The Tribunal may not consider a complaint unless it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where the act or failure is part of a series of similar acts or failures, the last of them, or within such further period as the Tribunal considers reasonable if the Tribunal considers it was not reasonably practicable for the complaint to be presented within that three month period. The time for presentation of the claim will be extended to take account of time spent in early conciliation, if ACAS is notified of the potential claim within the primary time limit.

Disability discrimination

193. Section 13(1) EQA provides:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

194. Section 4 lists protected characteristics which include disability.

195. Section 23(1) EQA provides that "on a comparison of cases for the purposes of section 13….there must be no material difference between the circumstances relating to each case."

196. Section 15 EQA provides:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

197. Section 39(2) provides, amongst other things, that an employer must not discriminate against an employee by subjecting that employee to a detriment.

198. In **Ministry of Defence v Jeremiah [1980] ICR 13***,* Lord Justice Brandon, in the Court of Appeal, thought "any other detriment" meant "putting under a disadvantage".

199. The provisions relating to the duty to make adjustments are included in section 20 EQA and Schedule 8 to that Act. Schedule 8 imposes the duty on employers in relation to employees. Section 20(3) imposes a duty comprising:

> "A requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage."

200. Paragraph 20 of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

Proving discrimination

201. Section 136 EqA provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

202. The tribunal makes findings of fact, having regard to the normal standard of proof in civil proceedings, which is on a balance of probabilities. A party must prove the facts on which they rely. A claimant must prove they suffered the treatment alleged, not merely assert it.

203. Once the relevant facts are established, the tribunal must apply section 136 in deciding whether there is unlawful discrimination.

204. The Court of Appeal in **Ayodele v CityLink Ltd and another [2017] EWCA Civ 1913***,* reaffirmed that there is an initial burden of proof on the claimant; the claimant must show that there is a prima facie case of discrimination which needs to be answered. The Court of Appeal concluded that previous decisions of the Court of Appeal, such as **Igen Ltd v Wong [2005] IRLR 258***,* remained good law and should continue to be followed by courts and tribunals. The Supreme Court in **Efobi v Royal Mail Group Limited 2021 ICR 1263** held that the enactment of section 136 EqA did not change the requirement on the claimant to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

Time limits relating to discrimination complaints

205. Section 123 EqA provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

206. Time limits are extended to take account of time spent in the early conciliation process with ACAS, if notification to ACAS is made within the primary time limit.

Constructive unfair dismissal

207. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) provides that an employee is to be regarded as dismissed if "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."

208. An employee will be entitled to terminate a contract of employment without notice if the respondent is in fundamental breach of that contract and the employee has not waived the breach or affirmed the contract by their conduct.

209. An implied term of an employment contract is the term of mutual trust and confidence. This is to the effect that an employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Browne-Wilkinson J in **Woods v WM Car Services (Peterborough)**

Limited 1981 ICR 666, said that the tribunal must "look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

210. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the "last straw" is not, by itself, a breach of contract: **Lewis v Motorworld Garages Limited** 1986 ICR 157 CA. The last straw does not have to constitute unreasonable or blameworthy conduct, but it must contribute, however slightly, to the breach of the implied term of trust and confidence: **Omilaju v Waltham Forest London Borough Council** 2005 ICR 481 CA.

211. In *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978,* the Court of Appeal set out the questions the tribunal must ask itself in a case where an employee claims to have been constructively dismissed:

> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation because the effect of the final act is to revive the right to resign.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?

<u>"Ordinary" unfair dismissal</u>

212. Section 98(1) ERA provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

213. Section 98(4) ERA provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, depends on whether, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and this is to be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses. The burden of proof is neutral in deciding on reasonableness.

Protected disclosure unfair dismissal

214. Section 103A ERA provides:

> "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.

Conclusions

215. There were time limit issues in relation to many of the protected disclosure detriment complaints and discrimination complaints. We decided to return to the issue of jurisdiction after considering the merits of the complaints, since our decisions on merits would have relevance to the time limit issues.

Protected disclosures

216. We consider first whether the claimant made protected disclosures. The respondent concedes that she made disclosures of information. The respondent has not disputed that the disclosures were made to the employer. The respondent does not concede that the other parts of the test in section 43B ERA are made out i.e. that the claimant reasonably believed that the disclosure tended to show one or more of the mattrs set out in section 43B(1) of ERA, or that the claimant reasonably believed that the disclosures were made in the public interest.

217. The disclosures were all about matters relating to patient safety. We find they were all matters of concern to the claimant. The first group of disclosures in 2015 (see paragraphs 27, 32 and 44) concern the practice of Samantha Robinson, who the claimant was concerned was acting outside her scope of practice, with possible risks to patients as a result of this. The second group of disclosures, in the period August to December 2018 (see paragraphs 75, 80, 82, 91 and 93), were about the incorrect use of Buccal Midazolam by patients with epilepsy under the care of the Learning Disability Team.

218. In relation to the initial verbal disclosures, the concern was ongoing at the time the disclosures were made to Jonathan Kenworthy and Fiona Dixon. In relation to the disclosures made on incident forms, by the time the incident forms were completed, action had been taken to secure patient safety. The respondent has suggested that the claimant cannot, when she raised the matters, have reasonably believed that there was endangerment to health and safety because steps were already being taken to resolve the matter. The test in section 43B(1)(d) is that the person making the disclosure must have the reasonable belief that the disclosure tended to show that the health or safety of any individual **has been** [our emphasis], is being or is likely to be endangered. The test is, therefore, satisfied by a concern that the health and safety of any individual has been endangered; the danger does not have to be ongoing according to the statutory wording. All the disclosures made by the claimant referred to where a patient could be endangered or had been endangered. The claimant's concern was for patient safety. She wanted to ensure that others knew what had been done. We conclude that she had a reasonable belief, when she made the disclosures, that the disclosures tended to show that the health or safety of any individual had been, was or was likely to be endangered.

219. The respondent also suggested that the claimant was not making protected disclosures because she was raising matters as part of her day to day job. We conclude that it does not matter that it was part of her job to flag up such concerns and complete incident forms where appropriate; the statutory test does not prevent concerns raised as part of a person's day to day job satisfying the statutory test for protected disclosures.

220. Concerns about patients are concerns about the public. We conclude that the claimant had a reasonable belief, at the time she made the disclosures, that all the disclosures she made, and which are relied on as protected disclosures, were made in the public interest.

221. We conclude that all the disclosures relied upon were protected disclosures.

Claims of detrimental treatment on the ground of making protected disclosures

222. the claimant learnt through Jonathan Kenworthy that Fiona Dixon was intending to seek advice from a psychologist relating to the claimant. We found that Fiona Dixon told Jonathan Kenworthy that she intended to go to the psychologist with the aim of assisting Jonathan Kenworthy in managing the claimant (see paragraph 37).

223. The claimant was caused alarm and concern that Fiona Dixon was going to speak to a psychologist about her since the claimant might work with the psychologist in the future. We conclude that this put the claimant at a disadvantage, because of this alarm and concern.

224. We conclude that the reason Fiona Dixon suggested speaking to a psychologist about dealing with claimant was because of concerns she had about what she perceived to be the claimant's lack of insight and communication issues. The respondent has satisfied us that the treatment was not done on the ground that the claimant had made protected disclosures. If we have jurisdiction to consider this complaint, we conclude it is not well founded.

225. There is a time limit issue in relation to this complaint. We will return to this when we deal with time limits after dealing with the merits of all the complaints of detrimental treatment.

226. The second alleged detrimental act is that, in or around March 2017, following a patient death, Fiona Dixon was directly critical of the claimant's involvement, informing the claimant that she had sought feedback from the deceased patient's partner and that he had told her both he and the patient had found the claimant "quite a challenge". We did not find that Fiona Dixon was critical of the claimant. We found that she did feedback comments from the patient's partner. We do not consider that being told feedback, which was part of the normal process, was detrimental treatment in the sense of putting the claimant at a disadvantage. We found that it was normal process, following a sudden unexplained death, for the family of the patient to be consulted and any feedback to be passed on to relevant people (see paragraph 49). We conclude that the reason Fiona Dixon passed on the information was because of this process and not because of any protected disclosures. If we have jurisdiction to consider this complaint, we conclude that the complaint is not well founded on its merits.

227. There is a time limit issue in relation to this complaint to which we will return.

228. The third alleged detrimental treatment is that, in or around the summer of 2017, Sue Leech (non- nursing staff) made a comment to the claimant "oh, I have heard you were difficult to work with." We found that this comment was made. The claimant was upset by the comment. We conclude that the claimant was put at a disadvantage by the comment in that she was upset by the comment and this could make it difficult for future interactions with this member of staff. We conclude that the claimant was subjected to a detriment by this comment. Sue Leech did not give evidence to this tribunal. The respondent has not provided evidence to the tribunal as to why Sue Leech made this comment. It is possible that the claimant had gained a reputation for being difficult to work with because of her completion of incident forms highlighting concerns relating to the practice of other staff. The respondent has not discharged the burden of proving that the protected disclosures had no material influence on this comment being made. If we have jurisdiction to consider this complaint, we conclude that the complaint is well founded.

229. There is a time limit issue in relation to this complaint to which we will return.

230. The fourth alleged detrimental act is that Fiona Dixon advised the claimant that there had been incidents lodged against her but did not provide details or follow up on these. Ms Baylis conceded, on behalf of the claimant, that this complaint was not sufficiently particularised. We conclude that the evidence does not support this complaint and, if we have jurisdiction to consider the complaint, we conclude it is not well founded.

231. There is a time limit issue in relation to the complaint which we will return.

232. The fifth alleged detrimental act is that, from late 2017, after the claimant's involvement in the case she took over from Graham Bickerstaff, Mr Bickerstaff gradually disengaged from the claimant and avoided contact with her, cancelling scheduled meetings. We found that Mr Bickerstaff did disengage from the claimant. We conclude that the claimant was subjected to detrimental treatment by Mr Bickerstaff not working with her in the way he had previously; it was to the claimant's disadvantage to no longer have a good working relationship with the person doing her job in the other part of the region. However, we conclude, on the basis of the evidence before us, the protected disclosures were not a material factor in Mr Bickerstaff's conduct towards the claimant. Disengagement began a long time after the 2015 protected disclosures and well before the 2018 protected disclosures. The claimant acknowledged in her own evidence that she thought the main reason he had disengaged was because one of his patients had been transferred to the claimant (see paragraphs 62 and 85). From 28 September 2018, Graham Bickerstaff did not want to have one to one meetings because he understood the claimant had accused him of sexism (see paragraph 85). If we have jurisdiction to consider this complaint, we conclude that it is not well founded.

233. There is a time limit issue in relation to the complaint which we will return.

234. The next alleged detrimental act is that, between June 2017 and June 2018, when she was the claimant's line manager, Jacquie Molyneux subjected the claimant to unprofessional/hostile conduct. Specific allegations were made in this respect, which we will deal with in turn. There are time limit issues in relation to the allegations to which we will return.

235. The first specific allegation is that, at meetings between July 2017 and June 2018, Jacquie Molyneux deliberately undermined the claimant in front of other members of staff. We found as a matter of fact, that Jacquie Molyneux did not deliberately undermine the claimant (see paragraph 53). If we have jurisdiction to consider this complaint, we conclude that it is not well founded.

236. The second specific allegation is that, in December 2017, Ms Molyneux became quite annoyed with the claimant, raised her voice and spoke to the claimant in a patronising manner in a meeting. We understand this to be a reference to the MDT meeting. The claimant has not satisfied us that she was subjected to the alleged detriment. (See paragraph 55). We conclude, if we have jurisdiction, that this complaint is not well founded.

237. The third specific allegation is of overbearing and intimidating supervision. We found that the claimant had not satisfied us that this occurred as alleged; the evidence in relation to this allegation was insufficient for us to find that Jacquie Molyneux was over-bearing and intimidating in supervisions. (See paragraph 57). We conclude, if we have jurisdiction, that this complaint is not well founded.

238. The fourth allegation is of criticising the clinical and other recommendations the claimant put forward for best practice. We found that the claimant did not satisfy us that this occurred as alleged. (See paragraph 56). We conclude, if we have jurisdiction, that this complaint is not well founded.

239. The fifth and final specific allegation is that Jacquie Molyneux informed the claimant that Wendy Turl no longer wanted to meet with her and no guidance was given as to how to address the situation. We found that Jacquie Molyneux informed the claimant that Wendy Turl no longer wanted to meet her one-to-one. The claimant did not satisfy us that no guidance was given. (See paragraph 63). We conclude that relaying that information from Wendy Turl was not subjecting the claimant to a detriment. We also conclude that the reason Jacquie Molyneux told the claimant that was because Wendy Turl had said this to her. The respondent has satisfied us that the protected disclosures were not a material reason for this occurring. For these reasons, if we have jurisdiction, we conclude that the complaint is not well founded.

240. The next alleged detrimental treatment is that, on 8 August 2018, Beryl Roberts did not reply to telephone and email messages left by the claimant and, after this, disengaged from further contact with the claimant. The claimant asserts that there were a number of occasions when the claimant tried to call Ms Roberts and another member of staff answered and said “she’s out at lunch” or “not around” and the claimant’s calls to her were never returned. We have found that this disengagement started before the incident form which the claimant relies on as a protected disclosure and which involves Beryl Roberts. Previous protected disclosures were in 2015 and had not prevented the claimant and Beryl Roberts having a good working relationship. The claimant attributed the disengagement, in evidence, to an email she sent on 7 August 2018, the day before the incident form relied on as a protected disclosure (see paragraph 74). We conclude that the claimant was subjected to a detriment by the treatment, not being able to work with Beryl Roberts in the way she had previously, having previously thought they had a good working relationship. However, on the evidence, we conclude that the protected disclosures were not a material factor in Beryl Roberts’ disengagement from the claimant. If we have jurisdiction to consider this complaint, we conclude that it is not well founded.

241. There is a time limit issue in relation to the complaint to which we will return.

242. The next alleged detrimental treatment is that, on 22 October 2018, Fiona Dixon said to the claimant "you seem to annoy staff". The claimant asserts that during the management supervision meeting on 19 October 2018, Fiona Dixon said to the claimant "you seem to annoy staff" and the claimant requested examples so she could address this but but none were given. We were not satisfied on the facts that, on 19 October 2018, the claimant had asked for examples (see paragraph 88). We found that Fiona Dixon had told the claimant on 19 October that the claimant annoyed people but found that she did not say that on 22 October (see paragraph 90). We conclude that the claimant was not subjected to a detriment by Fiona Dixon telling her that she annoyed staff. This was feedback in the context of the supervision and we do not consider that it can reasonably be considered to be putting the claimant at a disadvantage. If we have jurisdiction, we conclude that the complaint is not well founded.

243. There is a time limit issue in relation to the complaint which we will return.

244. The next alleged detrimental treatment is that, during October 2018, Sammy Henderson sent the claimant emails which changed to a hostile tone. We found that the emails from Sammy Henderson were not in a hostile tone (see paragraph 82). If we have jurisdiction to consider this complaint, we conclude it is not well founded. There is a time limit issue to which we will return.

245. The next alleged detrimental treatment is that, during a management supervision meeting on 31 January 2019, Fiona Dixon criticised the claimant's "communication" and said "your communication seems to get lost in translation. We found that Fiona Dixon did make the alleged comment (see paragraph 99). However, we conclude that this was not detrimental treatment; it was not putting the claimant as a disadvantage. It was normal management supervision, with Fiona Dixon raising legitimate issues with the claimant and seeking to explain the difficulties to the claimant. If we have jurisdiction to consider this complaint, we conclude that it is not well founded. There is a time limit issue to which we will return.

246. The next alleged detrimental treatment is that the claimant did not have her fuel or other expense forms signed and suffered hardship as she was not paid for the same. It has not been very clear from the claimant's case as to exactly which expenses this claim relates to and when the alleged failures took place. We have seen some emails relating to expenses being approved. We understand that the complaint relates to a decision taken by Jacquie Molyneux in July 2018 not to sign the claimant's expenses. The respondent accepted in county court proceedings that it had breached her contract in not paying her for certain expenses, although we have not seen the details of that claim. We accepted the evidence of Jacquie Molyneux, supported by the email at page 336, that she could not sign off expense claims for the claimant at a time when she was no longer managing her, giving her approval to things that she had no knowledge of and could not discuss with her because the claimant had made it quite clear that she did not want to have any communication with Jacquie Molyneux (see paragraph 73). Fiona Dixon took over the supervision of the claimant and signed off the claimant's expenses while they tried to resolve the supervision relationship between the claimant and Jacquie Molyneux. We conclude that the claimant was subjected to a detriment by not having her expenses approved, leading to non-payment of the expenses in breach of contract, even though the amount involved was

relatively small. However, the respondent has satisfied us that the protected disclosures did not play a material part in the decision of Jacquie Molyneux not to approve expenses. She did not approve the expenses because this was at a period when she was no longer able to speak to the claimant because the claimant was refusing to have supervision with her. We conclude that the detrimental treatment was not on the ground of the claimant having made protected disclosures. If we have jurisdiction to consider the complaint, we conclude that it is not well founded.

247. There is a time limit issue in relation to the complaint which we will return.

248. The next alleged detrimental treatment is that on 11 October 2019 and 17 December 2019, the claimant was advised that grievances were not upheld and her second grievance of 22 October 2019 would not be addressed. There are three parts to this allegation. In relation to the first, about being told on 11 October 2019 her grievance was not upheld, it is correct, as a matter of fact, that the claimant received the outcome on that date. We conclude that the outcome of this grievance was flawed for the following reasons. The claimant argued, at least in part, that treatment she was complaining about was because of lodging incident forms. Her solicitor's letter, which Martin Daley received but did not read, before the meeting, made this clear. Nina Hill who made the ultimate decision on the grievance also received this letter. We assume that Martin Daley read the letter as part of his investigation although it does not appear that this letter was included in the documents appended to the report. Martin Daley did not look at the incident forms and was told by Jacquie Molyneux that they did not keep these forms. No one sought to correct this misleading information from Jacquie Molyneux. If Martin Daley had read the incident forms, this would have cast doubt on some of the comments made about the claimant, to the effect that she put in incident forms as a form of retaliation. He did not seek any comments from the claimant after interviewing other witnesses. We conclude that it was detrimental treatment, putting the claimant at a disadvantage, to receive a grievance outcome which was based on a flawed process. In these circumstances, we conclude that the respondent has not proved that the detrimental treatment of the first grievance outcome was not in any material sense on the grounds of the claimant having made protected disclosures. Subject to the time limit issue, to which we will return, we would conclude that this complaint is well founded.

249. The next part of this allegation is about 17 December 2019, when the claimant was informed that her appeal was unsuccessful. The appeal was not a rehearing. We conclude that it was, therefore, tainted by the original flaws in the grievance investigation. We conclude that the claimant was subjected to a detriment by receiving a grievance appeal outcome relying on a flawed grievance process. We also conclude that the respondent has not proved that this outcome was not in any material sense on the grounds of making protected disclosures. This complaint is in time and we conclude, for the reasons given, that it is well founded.

250. The third part of this allegation is that the claimant was told that her second grievance on 22 October 2019 would not be addressed. She was told this on 4 February 2020 (page 650). We heard no submissions on behalf of the claimant on this part of the allegation. The claimant has not satisfied us that she was subjected to a detriment by being told that this second grievance would not be addressed. We conclude that the respondent has satisfied us that telling the claimant this was not in any material sense on the grounds of her making protected disclosures. The respondent has satisfied us that the reason the claimant was told this was because

the respondent thought that the matters raised in her second grievance had been dealt with already in the grievance and appeal process. We conclude that this complaint, which was presented in time, is not well founded.

251. The final allegation of detrimental treatment is that, on 18 December 2019, the claimant was informed that a job offer made by Spectrum Community Health CIC was retracted due to an unsatisfactory reference received from the respondent. There was no dispute that the claimant was given this information. The complaint is, in effect, about the reference which was given, leading to the job offer being withdrawn. We conclude that the claimant was subjected to a detriment by the reference being given in the form that it was, leading to the job offer being withdrawn. We consider the reference to be unsatisfactory in a number of respects and not in accordance with good practice. However, Ellie Clark satisfied us, in evidence, that she completed the reference in the way she considered appropriate. If she had any HR advice, which is unclear, she received poor advice. If she completed the reference without taking any advice, this was unwise and she is responsible for the deficiencies. We do not feel able to infer from any of the evidence that the protected disclosures were a material cause for the reference being given as it was. This complaint is in time. However, for the reasons given, we conclude that it was not treatment on the ground of making protected disclosures and the complaint is not well founded.

Jurisdiction in relation to the complaints of detrimental treatment on the grounds of making protected disclosures

252. A complaint in relation to any act or failure to act prior to 13 December 2019 is out of time, unless if forms part of a series of similar acts or failures, in respect of which the last act or failure was on or after 13 December 2019.

253. All the complaints other than the complaint in relation to the appeal outcome, the reference and being told that the second grievance would not be addressed, were presented outside the normal time limit, unless they form part of a series of similar acts or failures, in respect of which the final act or failure was on or after 13 December 2019.

254. We concluded that the outcome of the grievance forms part of a series of similar acts or failures, with the appeal outcome, which was presented in time. We, therefore, have jurisdiction to consider the complaint about the outcome of the grievance.

255. The only other complaint which we would have found to be well founded, if we had jurisdiction, is the complaint about the Sue Leech comment. This was made by a different person to the other acts of alleged detrimental treatment, it was a different type of act and there was a long gap between this and the only detrimental act presented in time which we have found to be well founded (the grievance and appeal outcome). We conclude that the Sue Leech comment did not form part of a series of similar acts or failures. It was presented out of time. We conclude that it would have been reasonably practicable to present this in time. The claimant had access to advice from her trade union throughout the relevant period. We, therefore, have no jurisdiction to consider the Sue Leech complaint and it is dismissed on this basis.

256. We have found that the other complaints of detrimental treatment would fail on their merits if we had jurisdiction. Since they are not well founded, we conclude that they cannot form part of a series of similar acts or failures and they are presented out

of time. We conclude, for the same reasons given in relation to the complaint about the Sue Leech comment, that it would have been reasonably practicable to present complaints about these matters in time. We conclude, therefore, that we do not have jurisdiction to consider any of these complaints.

Complaint of constructive unfair dismissal

257. We consider this before the complaints of disability discrimination since the complaint of discrimination arising from disability can only succeed if there is a finding that the claimant was constructively dismissed.

258. The complaint of constructive unfair dismissal is pursued on two bases: a complaint of "ordinary" unfair dismissal and a complaint of protected disclosure unfair dismissal. Both complaints require there to have been a constructive dismissal so we consider this issue first.

Whether the claimant was constructively dismissed

259. The list of issues identifies the matters referred to in paragraph 50 of the claimant's grounds of complaint as being the matters the claimant relies on for alleging breach of the implied term of trust and confidence. Paragraph 50 refers to "the above series of events" leading to a gradual loss of trust and confidence. Paragraph 50 then lists a number of points at (a) to (h). Some of these relate to how the claimant felt, rather than to what the respondent did or failed to do. Given the reference back to previous matters set out in the particulars of claim, this pleading is widely drawn. In submissions for the claimant, the claimant continued to rely on all the treatment alleged to be protected disclosure detriments and disability discrimination as unreasonable treatment culminating in a breach of contract. The submissions identified the last straw as being the respondent unreasonably refusing to provide the claimant with an effective reference, losing her a job to move on to.

260. We have not found all matters the claimant relies on as made out as a matter of fact. However, we have concluded that the outcome of the grievance was based on a flawed process. Since the appeal was not a rehearing, the flaws were not corrected.

261. In relation to the reference, we conclude that this was incomplete. The writer had either not taken HR or other advice as to how to complete it; for example, about the claimants length of service; or she received poor advice. Where Ellie Clark did not have personal knowledge of the matters about which the reference asked, Ellie Clark did not take steps to obtain that information or say that she did not have the knowledge to complete this. We conclude that the completion of the reference was done in such a poor way that it could contribute to a breach of the implied duty of mutual trust and confidence.

262. In relation to the grievance, as noted above (see paragraph 248), the claimant argued, at least in part, that treatment she was complaining about was because of lodging incident forms. Martin Daley did not look at the incident forms. If Martin Daley had read the incident forms, this would have cast doubt on some of the comments made about the claimant, to the effect that she put in incident forms as a form of retaliation. He did not seek any comments from the claimant after interviewing other witnesses. We conclude that the grievance outcome was so flawed that it could contribute to a breach of the implied terms of mutual trust and confidence.

263. Taking these matters together, we conclude that the respondent was in fundamental breach of the implied duty of mutual trust and confidence. There is no reasonable and proper cause for the respondent's conduct in relation to the grievance outcome and the reference. We do not consider that any of the other matters the claimant seeks to rely on contribute in any significant way to a breach of this implied term.

264. We consider whether the claimant resigned in relation to this breach. There appears to be no plausible alternative reason for the claimant's resignation. Although the claimant was thinking of leaving before the final straw, we have no evidence that the claimant was thinking of leaving the respondent before the grievance outcome. The fact that the claimant gave notice of termination does not lead us to conclude that she did not resign in response to the breach. Her notice period was served at a time when she was on sick leave and not attending work.

265. We accept the claimant's submissions in relation to the issue of whether the claimant affirmed and/or waived the breach. The claimant was on stress-related sick leave and did not have a job to go to. The claimant was reliant on her sick pay from the respondent until she could obtain other employment although she did, in the end, leave without having a job to go to. The claimant remained protesting at her treatment. We conclude that the claimant did not affirm the contract by her conduct following the matters relied upon.

266. The failure to pay expenses has, we were told, been accepted in the County Court as having been a breach of contract. However, we do not consider that this breach played any material part in the claimant's decision to resign. The figure involved was apparently small.

267. We conclude that the claimant was constructively dismissed.

<u>"Ordinary" unfair dismissal</u>

268. The respondent's pleaded case and submissions argued that, if the claimant was constructively dismissed, the respondent had a potentially fair reason for dismissal and any dismissal was fair and reasonable in all the circumstances. However, Mr Crammond did not expand on this brief submission.

269. With a case of constructive unfair dismissal, we have to examine whether a potentially fair reason has been shown for the acts which we have found to constitute a fundamental breach of contract. In this case, that is the flawed grievance outcome and the poor way the reference request was dealt with. We conclude that the respondent has not shown a potentially fair reason for this treatment. We, therefore, conclude that complaint of unfair dismissal, relying on section 98 ERA, is well founded.

<u>Protected disclosure unfair dismissal – s.103A ERA</u>

270. The final straw relied upon for the constructive unfair dismissal is the reference. We have found that this was not related in any material way to the protected disclosures. Whilst the respondent did not satisfy us that the protected disclosures were not a material influence on the flawed grievance process, we are not satisfied on the evidence before us that the making of protected disclosures was the sole or

principal reason for the flawed process. We conclude, for these reasons, that the complaint of unfair dismissal, relying on section 103A ERA is not well founded.

Disability discrimination

271. The respondent conceded that the claimant was disabled by reason of epilepsy and that the respondent had knowledge of the disability at relevant times.

Direct discrimination

272. There are two complaints of direct disability discrimination. These are as follows: a) Fiona Dixon referred the claimant for a psychological assessment about her, without her knowledge or consent; and b) Fiona Dixon's comment regarding the claimant's communication style in the grievance procedure. The second complaint was added by way of amendment following an application made on 8 February 2022. The amendment was subject to the time limit issue being determined along with other issues. The date of presentation of the second complaint is taken to be 8 February 2022.

273. Dealing with the first complaint, the facts we have found do not correspond exactly to the way the complaint is put in the list of issues. However, we do not consider it in the interests of justice to take a very strict approach to how the complaint has been put. We, therefore, consider whether there was less favourable treatment because of disability in relation to the relevant facts we did find, which was that Fiona Dixon intended to seek advice from a psychotherapist in relation to how to deal with the claimant, rather than referring the claimant for a psychological assessment about her.

274. The initial burden of proof is on the claimant to prove facts from which we could conclude that this was less favourable treatment because of disability. We conclude that the claimant has not satisfied that burden. The claimant has argued that Fiona Dixon acted as she did based on the claimant's communication style and that Fiona Dixon had clearly linked this to epilepsy. We have found, as a matter of fact, that this link was not made by Fiona Dixon at this time (see paragraph 37).

275. Had the burden of proof passed to the respondent, the respondent would have satisfied us that Fiona Dixon acted as she did because of what she perceived as communication problems with the claimant. The claimant is not arguing in this case that she has communication problems because of epilepsy. On the merits of the case, we would, therefore, conclude that this complaint is not well founded.

276. This complaint was presented out of time unless it forms part of a continuing act of discrimination. We conclude that there was no continuing act of discrimination. We do not, therefore, have jurisdiction to consider the complaint unless we consider it just and equitable to do so in all the circumstances. We do not consider that there is any basis for us concluding that it would be just and equitable to consider the complaint out of time. The claimant had access to trade union advice at all times.

277. The second complaint is about Fiona Dixon's comment regarding the claimant's communication style in the grievance procedure. We conclude that we have no jurisdiction to consider this complaint. It was presented a very long time out of time (the date of presentation being the date of the application to amend – 8 February 2022). It could easily have been included at a much earlier stage. Taking account also

that the claimant had access to trade union advice at all times, and to advice from solicitors from a later date, and certainly by the time the claim was presented, we conclude, in all the circumstances, that it would not be just and equitable to consider the complaint out of time.

278. Had we had jurisdiction to consider the complaint, we would have concluded that the claimant was not subjected to a detriment by this remark having been made. Whilst the comment was ill-advised, the claimant was not put at any disadvantage by Fiona Dixon's speculation about the reasons for the claimant's communication issues in the grievance interview. The parties did not identify detriment as an issue in relation to the direct discrimination complaint but it is a matter the tribunal needs to consider. Discrimination under section 13 of the Equality Act is not unlawful unless made so by another relevant section of the Act. The section which must be relied on in this case is section 39 which makes discrimination unlawful, amongst other things, where an employee is subjected to a detriment at work. We would have concluded, for this reason, that the complaint was not well founded on its merits.

Discrimination arising from disability

279. The only complaint is of unfavourable treatment in relation to constructive dismissal. We have concluded that the claimant was constructively dismissed. This was clearly unfavourable treatment. The "something arising" identified by the claimant is the claimant's reduced ability to tolerate stress and lack of sleep, which caused her epileptic seizures and meant she was advised by a doctor to resign. For a complaint of discrimination arising from disability to succeed, the unfavourable treatment must be because of something arising in consequence of disability. We accept that the "something arising" identified by the claimant was in consequence of disability. However, the claimant has failed to prove facts from which we could conclude that the flawed grievance process and the reference, which were the basis for the constructive dismissal, were because of this something arising. We agree with the respondent's submission that the claimant is seeking to rely on the alleged effect of the respondent's conduct, not the cause of its alleged conduct; the claimant is considering matters the wrong way round. We conclude that this complaint is not well founded.

Complaint of failure to make reasonable adjustments

280. The claimant relies on a provision criterion or practice of not expediting the resolution of grievances. There is no evidence that there is a general practice of not expediting grievances. The claimant relies on the facts in her own case and the delays in that case. We agree with the respondent's submission that there is no provision criterion or practice here, since there is no evidence of an element of repetition, which is required for there to be a provision criterion or practice. Since we conclude that there was no provision criterion or practice, we conclude, if we have jurisdiction, that the complaint is not well founded.

281. We would have found that the claimant was put at a substantial disadvantage by the failure to expedite the grievance, if it had been a provision criterion or practice. Delay was stressful to the claimant and this could increase the risk of seizures. She did not start to suffer seizures until December, but we accept that there may have been a buildup of stress leading to this.

282. We would have concluded that the respondent had actual or constructive knowledge of this substantial disadvantage based on the doctor's letter dated 20 May 2019 (page 424).

283. The claimant received the outcome of the grievance on 11 October 2019. If there was a failure to make reasonable adjustments, it ended with the delivery of the grievance outcome. The claim for failure to make reasonable adjustments is presented out of time unless it forms part of a continuing act of discrimination. We conclude that it did not form part of a continuing act of discrimination with any subsequent act of discrimination. We do not consider there is any basis on which to find it would be just and equitable to consider the complaint out of time. The claimant had access to trade union advice throughout the relevant period. We, therefore, conclude that we do not have jurisdiction to consider this complaint.

Employment Judge Slater
Date: 4 May 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
5 May 2022

FOR THE TRIBUNAL OFFICE

ANNEX

List of claims and Issues

CLAIMS

1. The Claimant claims:

   a) Unfair Dismissal (Constructive) pursuant to the Employment Rights Act 1996 (ERA);

   b) Whistleblowing detriments pursuant to the Employment Rights Act 1996;

   c) Direct disability discrimination under section 13 of the Equality Act 2010;

   d) Discrimination arising from disability under Section 15 of the Equality Act 2010;

   e) Failure to make reasonable adjustments under section 21 of the Equality Act 2010;

   f) Automatically unfair dismissal s103 Employment Rights Act 1996

TIME LIMITS

2. It is agreed that the Claimant initiated ACAS Early Conciliation on 30 December 2019, that the ACAS Early Conciliation Certificate was issued on 31 December 2019 and that the Claim was presented on 13 March 2020.

   a) Regarding the discrimination claims,

      (i) in respect of any act or omission complained of that occurred before 13 December 2019, the same is prima facie out of time. In this regard: was the act part of a course of conduct extending over a period that was ongoing after 13 December 2019 and/or in relation to any deliberate failure to do something when did the person in question decide on it and/or in the absence of evidence to the contrary that person is to be taken to decide

on any failure to do something when they do an act inconsistent with doing it, or, if there is no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it; and/or

(ii) If not, would it be just and equitable in all the circumstances to extend time in respect the complaint(s) in question?

b) In relation to the whistleblowing claims:

(i) was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one of them and/or in relation to any deliberate failure to do something when did the person in question decide on it and/or in the absence of evidence to the contrary that person is to be taken to decide on any failure to do something when they do an act inconsistent with doing it, or, if there is no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it? In this regard, anything before 13 December 2019 is prima facie out of time;

(ii) With regard to any complaint presented out of time, would it have been reasonably practicable to present it in time?

(iii) If not, did the Claimant present the claim within a reasonable period of time thereafter?

SECTION 47B ERA 1996 (WHISTLEBLOWING DETRIMENTS)

Qualifying Disclosures (section 43A and 43B ERA 1996)

3. Did the Claimant make a qualifying protected disclosure as defined by sections 43A and 43B of ERA? In particular, C relies upon:

a) In February or March 2015, her raising concerns about a health care assistant 'Samantha Robinson' who was prescribing and reviewing medication without the appropriate qualifications and training (verbally).

The claimant alleges the information disclosed is: account taken from JA timeline "During [a] meeting Samantha Robinson (SR) confirmed she independently increases decreases patients' medication this was after asked her what would you do if a patient came to clinic is having seizures. Expecting her to say I would give safety advice etc. while I am speaking with me she leans forward and says "I don't see my role any different to your role". I advise SR to prescribe medications you have to be a registered nurse with a prescribing qualification or doctor. I then ask her to look at the NMC or RCN website (it was one of these). I verbally informed JK (my line manager) [of this conversation]. Later I verbally informed FD.

b) Via incident form, Incident Number 2015224196 [p249] Disclosure of information: Incident description first 6 sentences- to Fiona Dixon);

c) Via incident form, Incident number 2015224201 [p250] Disclosure of information: first 6 sentences to Jonathan Kenworthy;

d) Submission of incident forms between January 2018 and 10 December 2018

(i) Incident Number 2018248153 [p286]. Disclosure of information: First three sentences under 'incident description' (made to Fiona Dixon)

(ii) Incident 2018248557 [288] Disclosure of information: First two sentences under 'incident description' (made to Jacqueline Monlyeux);

(iii) Incident 2018248784 [289] Disclosure of information: First 6 sentences under 'incident description' (made to Jacqueline Molyneux);

(iv) Incident No. 2018250623 [290] Disclosure of information: First 6 sentences under 'incident description' made to Jacqueline Monlyeux.

(v) Incident No. 2018251512 [292] Disclosure of information: First 5 lines under 'incident description.

4. Regarding the above, did the Claimant make a disclosure of information?

5. If so, did the Claimant reasonably believe that disclosure of information tended to show any of the matters referred to in section 43B(1) (b),(d) or (f) of ERA 43B? Namely:

a) as per ERA 43B(1)(b) - that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (the Claimant relies on the legal obligation of patient safety and/or care, as provided under section 3 of the National Health Service Act 1946 ("NHS Act"); and/or

b) as per ERA 43B(1)(d), that the health or safety of any individual has been, is being or is likely to be endangered, and/ or

c) in relation to the submission of the incident forms only, as per ERA 43B(1)(f) that information tending to show any matter falling within one of the paragraphs above has been, is being or is likely to be deliberately concealed ERA 43B(1)(f).

6. If so, did the Claimant reasonably believe that the disclosures were made in the public interest?

7. If so, were the disclosures made to the Claimant's employer/the Respondent and therefore qualifying / protected?

Detriments

8. Did the Respondent subject the claimant to any of the following alleged detrimental acts/ deliberate failures to act? The Claimant alleges as follows:

    a) In December 2015, without C's consent or knowledge, Fiona Dixon informed the Claimant of her intention to seek advice from the psychology department about her in response to a complaint about the Claimant.

    b) In or around March 2017, following a patient death, Fiona Dixon was directly critical of the Claimant's involvement. Ms Dixon informed the Claimant she had sought feedback from the deceased patient's partner and that he had told her both he and the patient had found the Claimant "quite a challenge".

    c) In or around the summer of 2017 Sue Leech (non-nursing staff) – made a comment to the Claimant - "Oh, I have heard you are difficult to work with".

    d) Ms Dixon advised the claimant that there had been incidents lodged against her but did not provide details or follow up on these.

    e) From late 2017, after C's involvement in the case she took over from Graham Bickerstaff in 2017, Mr Bickerstaff gradually disengaged from C and avoided contact with her. Scheduled meetings were cancelled by Mr Bickerstaff.

    f) Between June 2017 and June 2018, when she was the Claimant's line-manager, Jacquie Molyneux ("Ms Molyneux") subjected the Claimant to unprofessional/ hostile conduct. The Claimant alleges as follows:

        (i) At meetings between July 2017 and June 2018 Ms Molyneux deliberately undermined C in front of other members of staff

        (ii) December 2017, Ms Molyneux became quite annoyed with the Claimant, raised their voices and spoke to the Claimant in a patronising manner in a meeting;

        (iii) Over-bearing and intimidating supervision

        (iv) Criticising the clinical and other recommendations the Claimant put forward for best practice

        (v) Ms Molyneux informed the Claimant that Wendy Turl no longer wanted to meet with her. No guidance was given as to how to address the situation.

    g) On 8 August 2018 Beryl Roberts did not reply to telephone and email messages left by C. After this, Beryl Roberts disengaged from further contact with C. There were a number of occasions when C tried to call Ms Roberts and another member of staff answered and said "she's out at lunch" or "not around" – and C's calls to her were never returned. [POC 37 b]

h) On 22 October 2018, Fiona Dixon said to C "*you seem to annoy staff*." During a Management Supervision Meeting on 19 October 2018, Fiona Dixon said to the Claimant, "you seem to annoy staff". The Claimant requested examples so she could address them but none were given.

i) During October 2018 Sammy Henderson sent C emails which had changed to a hostile tone;

j) During a Management Supervision Meeting on 31st January 2019, Fiona Dixon criticised C's 'communication', and said *"… your communication seems to get lost in translation".*

k) The Claimant did not have her fuel or other expenses forms signed and suffered hardship as she was not paid for the same.

l) On 11th October 2019 and 17th December 2019 the Claimant was advised her grievances were not upheld and her second grievance 22nd October 2019 would not be addressed

m) On 18 December 2019, the C was informed that a job offer made by Spectrum Community Health CIC was retracted due to an unsatisfactory reference received from the Respondent.

9. If so, did the Claimant suffer any detriment?

10. In respect of any proven detriment, was the act or deliberate failure to act done on the ground that the Claimant had made one or more of the protected disclosures referred to above?

DISABILITY DISCRIMINATION

Disability

11. The Respondent has conceded that the Claimant has the protected characteristic of disability by reason of epilepsy.

Knowledge

12. Did the Respondent have knowledge of disability (actual or constructive) at the material time(s)? [This was conceded by the respondent during the hearing].

13. For the purpose of the reasonable adjustments claim, did the Respondent know or ought reasonably to have known of the alleged disadvantage the Claimant alleges she suffered as a result of any PCP?

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14. Did the Respondent subject the Claimant to less favourable treatment than to others? The alleged less favourable treatment is:

a) Fiona Dixon referred the Claimant for a psychological assessment about her, without her knowledge or consent;

b) Fiona Dixon's comment regarding the Claimant's communication style in the grievance procedure.

15. if there was any less favourable treatment, was the less favourable treatment because of the Claimant's disability? The Claimant relies on a hypothetical comparator.

Discrimination arising from disability (Equality Act 2010 section 15) [1 + 2]

a) Did the Respondent treat the Claimant unfavourably?

(i) The Claimant will say that her constructive (unfair) dismissal was unfavourable treatment

b) If so, was that unfavourable treatment because of something arising in consequence of the Claimant's disability? The Claimant alleges that the something arising was the Claimant's reduced ability to tolerate stress and lack of sleep, which caused her epileptic seizures and meant she was advised by a doctor to resign.

c) Did the Respondent have knowledge of the Claimant's disability (as above)?

d) If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

16. With reference to the allegedly unreasonable amount of time it took the Respondent to deal with the Claimant's grievance and/or failure to expediate the same to alleviate the effect of the stress upon her which led to a worsening of her epilepsy"):

a) Did the Respondent apply a provision, criterion or practice (PCP) to the Claimant (and others) in the form of a practice of not expediting the resolution of grievances?

b) If so, did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?

c) Did the Respondent have knowledge of the Claimant's disability (as above) and/or did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

d) If so, did the Respondent fail to take any steps that it would be reasonable for it to have to take to avoid the disadvantage?

UNFAIR (CONSTRUCTIVE) DISMISSAL

17. On 28 February 2020 (by her resignation dated 31 January 2020), was the Claimant constructively dismissed? In this regard:

    a) Was there a breach of the Claimant's contract of employment? In relation to any alleged breach of the implied term of trust and confidence:

        (i) Was there any conduct of the Respondent which was likely to destroy or seriously undermine the relationship of trust and confidence?

        (ii) Did the Respondent have reasonable and proper cause for the same?

        [C makes allegations at paragraph 50 of her Grounds of Complaints]

    b) If there was a breach, was the breach fundamental and going to the root of the contract of employment?

    c) If so, did the Claimant affirm and/or waive the breach?

    d) If not, was the alleged breach a cause of the Claimant resigning?

18. If the Claimant was dismissed, did the Respondent have a potentially fair reason? Did the Respondent act reasonably in treating that reason as a sufficient reason for dismissing the Claimant (taking into account the size and administrative resources of the Respondent's undertaking) and was the dismissal fair taking into account the equity and substantial merits of the case?

Automatically Unfair Constructive Dismissal (section 103A ERA 1996)

    a) If so, was the reason (or, if more than one, the principal reason) for the dismissal the fact that the Claimant has made one or more of the protected disclosures referred to above?