EMPLOYMENT TRIBUNALS

Claimant: **Mrs F Holding**

Respondent: **Gloucestershire Hospitals NHS Foundation Trust**

Heard at: **Bristol** **On:** **10, 11 & 12 January 2022**

Before: **Employment Judge Livesey**

Representation
Claimant: In person
Respondent: Mr Isaacs, counsel

JUDGMENT having been sent to the parties on 18 January 2022 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim

1.1 By a claim dated 27 December 2020, the Claimant brought complaints of unfair dismissal and detriment on the grounds of having made public interest disclosures claims under ss. 47B and 103A of the Employment Rights Act.

2. The evidence

2.1 The Claimant gave evidence in support of her case and produced two written, signed witness statements from Ms Greening and Ms Jones which were read. On behalf of the Respondent, the following witnesses were called;

2.1.1 Mrs Gordon, the Administration Manager for Unscheduled Care;
2.1.2 Mrs Link, Receptionist in the Respondent's Emergency Department ('ED');
2.1.3 Miss Mulhall, former Receptionist in the ED;
2.1.4 Mrs Pett, Administration Coordinator in the ED;
2.1.5 Miss Roche, Deputy General Manager of Unscheduled Care;
2.1.6 Mrs Sivyer, Clinical Lead for Temporary Staffing.

2.2 The following documents were produced;
- R1, an agreed hearing bundle;
- R2, the Respondent's reading list (agreed);
- R3, a list of abbreviations;
- R4, the Respondent's written closing submissions;
- C1, the Claimant's written closing submissions.

2.3 The bundle, R1, comprised 427 pages. Apart from the documents read in the reading list, it was made clear to the parties that other documents were not read unless they were referred to during the course of the hearing. As with so many cases of this sort, a very small proportion of the documentation was actually referred to.

3. The hearing

3.1 The hearing was conducted in a hybrid form, with the Respondent's counsel and witnesses attending remotely by video (CVP) and with the Claimant present in person.

3.2 The claim was heard by a Judge sitting alone with the parties' consent.

4. The issues

4.1 The issues in the case were discussed, agreed and recorded in the Case Management Order of 15 July 2021 by Employment Judge Midgley.

4.2 It was clear from the Case Management Summary that the Claimant relied upon five disclosures (paragraph 2.1.1); she alleged that she had disclosed information about potential or actual criminal offences having been committed. Further, she alleged that she had sustained five detriments (paragraph 4.1) and was constructively dismissed (paragraph 3).

4.3 The Respondent asserted that some of the Claimant's claims of detriment were out of time (paragraph 1).

4.4 Those issues were revisited at the start of the hearing and the parties confirmed that they still represented the matters which fell to be determined at the hearing.

5. The facts

5.1 The following factual findings were reached on a balance of probabilities. Any page references provided in these Reasons are to pages within the hearing bundle, R1, unless otherwise stated. Page numbers have been cited in square brackets.

5.2 The Claimant was employed by the Respondent from 3 February 2020 as a Receptionist within the A&E Reception Team at the Cheltenham General Hospital, otherwise known as the Emergency Department ('ED'). The Respondent is a publicly funded NHS Trust which employs about 8,000 people at three main sites, the Gloucester Royal Hospital, the Cheltenham General Hospital and a site in Stroud.

5.3 The key personnel within the ED team were Mrs Gordon (the Administration Manager for the EDs at both the Gloucester Royal and Cheltenham General Hospitals), Mrs Pett (Administration Coordinator and Mrs Gordon's deputy) and Miss Roche (Mrs Gordon's Line Manager). Mrs Link and Miss Mulhall, who were referred to extensively in the evidence, were two other receptionists who worked within the Claimant's team.

5.4 The Claimant's contract [85-93] contained a flexibility clause in the following terms [86];

> "*Your appointment is to the Gloucestershire Hospitals NHS Foundation Trust and you may be required to work anywhere the Trust provides services*."

5.5 It was clear from the Claimant's evidence that she felt that she had got on well with certain members of the team, but not all, particularly Miss Mulhall (paragraph 2 of her witness statement). She felt excluded by her from the very outset and was aware of her close friendship with Mrs Link. It was clear that she developed some level of personal animosity towards Miss Mulhall and sought to question the veracity and/or severity of an arthritic condition that she claimed to suffer from.

Staff shifts and rotas

5.6 The Claimant's case was that, on 6 May, Mrs Gordon sent an email to the team informing them that it was important that shifts were adhered to and that leaving a shift early constituted potential fraud [113];

> "*Please ensure that you arrive on time and leave at the appropriate time (the end of your shift). Staff should not be claiming for time when they are not at work, this is fraud and the Trust will not look at this favourably. If for any reason you do not work your whole shift you need to email Jill and I to inform us*".

The Claimant asserted that she was concerned that shift rotas were not being adhered to. She was particularly concerned about Mrs Link's and Miss Mulhall's conduct in that respect.

5.7 The staff rotas were displayed on notice boards within each ED but they were also stored electronically, with the master copy held on a shared drive. It was only capable of being amended by Mrs Gordon, Mrs Pett, Miss Mulhall and Mrs Link but it could have been viewed by the entire team. Rotas did change often due to illness, people taking annual leave or the changing needs of the business across the sites. Upon completion of a shift, a timesheet had to be completed by each member of staff in order to generate a pay claim.

5.8 In relation to annual leave, the Respondent had a local policy about the granting of leave to ensure adequate cover was provided at its sites [94]. The policy stipulated that, if annual leave was requested within two weeks of the date that it was to have been taken, it was up to the employee requesting the leave so late to find cover.

The first three disclosures and subsequent events

5.9 The disclosures which were relied upon were set out in paragraph 2.1 of the case management order of 15 July 2021 [47-48].

5.10 The first disclosure was said to have been made in an email dated 14 May 2020 to Mrs Gordon in which the Claimant alerted her to the fact that Miss Mulhall had not worked her full hours on a particular shift [110]. In reply, Mrs Gordon indicated that Miss Mulhall had been granted two hours of annual leave and that she had been entitled to leave when she had [110]. She did, however, say that the Claimant ought to have been informed that Miss Mulhall would have been using some leave that day. The confusion seemed to have arisen from the Respondent's approach to the Working Time Regulations' requirement for workers to take a rest break after six hours or work [110].

5.11 The second disclosure relied upon was a further email to Mrs Gordon on 27 May [115] which repeated matters covered in the one of 14 May, but it also contained a complaint that Mrs Link had been treated differently from her in respect of the granting of annual leave. She asserted that Mrs Link had been granted some annual leave late despite the requirements of the local policy. In reply, Mrs Gordon explained that, if someone wanted a few hours off during a quiet period by way of leave, it was capable of being accommodated outside the policy but, if they had requested a whole shift, the policy would have applied [116]. She went on;

> "*I find it disappointing that you feel staff are being treated differently, I can assure you they aren't and trust the above answers your questions.*"

5.12 Despite those replies, the Claimant was clearly not satisfied or placated and she started to compile a diary of what she thought were further breaches of the annual leave policy.

5.13 The third disclosure relied on was an alleged verbal disclosure made at a meeting on 25 August 2020. The Claimant had been called to that meeting by Mrs Gordon, with Mrs Pett in attendance as a notetaker [175-7]. A number of matters were raised with her; Mrs Gordon stated that she appeared to have upset members of staff by watching and recording what they did, by constantly complaining about the rota, by complaining about annual leave allocation and by questioning how her line manager delegated her own work in her absence [175].

5.14 The Claimant maintained that she made further disclosures about rota breaches at that meeting. She said that she had been compiling a whistleblowing complaint and alleged that Mrs Gordon and Mrs Pett then became defensive. She claimed that Mrs Pett called her "*intense"* and "*judgmental*". She also alleged that Mrs Pett's notes were inaccurate in that they did not refer to her having explicitly stated that she was whistleblowing *at* that meeting.

5.15 The Respondent's case was rather different. Mrs Gordon and Mrs Pett claimed that the Claimant was merely asked to make more of an effort to get on with her team and not to show so much negativity. Whilst that had been the intended purpose behind the meeting, as matters developed, the Claimant attempted it around so that she was making allegations about others. It was accepted that Mrs Pett had referred to her having been

'judgmental' on one occasion, but the Claimant used the meeting to air a number of concerns about the rota and staff non-adherence:

> "*Fliss stated she is not happy and is raising a formal complaint. She feels that she has been treated unfairly, ignored and that other staff are able to get away with a lot. She accused Andrea of not adhering to her own local annual leave policy where certain members of staff were concerned…*
> *Fliss went on to stating specific times and dates when the rota had been changed by 2 members of staff to favour their own advantage and accused a member of staff of committing fraud by claiming to have been at work when she had left the department as she was sick. Andrea stated 'fraud' is a serious allegation. Fliss referred to an email sent to all staff by Andrea reminding staff to record working times and enhancements correctly and to attend work and leave on time and that failing to do this would be fraudulent…*
> *Fliss stated that there had been irregularities in recording s/l, c/l and a/l…*
> *Fliss accused Andrea of not answering WhatsApp messages during a weekend…*
> *Fliss stated that she often felt that her colleagues treated her badly and on occasions this behaviour could be seen as bullying. Andrea asked for names of individuals concerned, but Fliss was unwilling to give any information…*
> *Fliss became repetitive in her allegations, quite confrontational and used the words bloody several times. Jill asked Fliss to moderate her use of language, Fliss stated that in her opinion 'bloody' was an acceptable word to use. Fliss went on to accuse a member of staff of stealing a packet of crisps from a vending machine by rocking the machine, when this member of staff claims to have debilitating arthritis. Jill remarked that this was judgemental and in the scheme of things a small matter.*"

5.16 Having heard and considered all of the evidence in relation to this meeting, I concluded that the notes were likely to have been a reasonably accurate account of what was said, although somewhat concise in that they spanned just over two pages and the meeting had lasted for more than an hour.

5.17 The Claimant had not asserted in her own witness statement that she had been whistleblowing at that meeting (see paragraph 43). Mrs Gordon clearly and firmly denied the suggestion, as did Mrs Pett. I did not consider it likely that those words had been used. There was certainly a discussion about her intention *to* bring a formal complaint, but that was not the same thing. Further, amongst an array of matters the Claimant raised, she clearly did claim that Miss Mulhall had committed fraud "*by claiming to have been at work when she had left the department as she was sick*" [176]. In evidence, she further stated that she had left work on 9 July at 11.45 am because of sickness, but the rota had shown her having left at 12.30 pm. She accepted, however, that she had not herself been at the department at the time and had not seen when Miss Mulhall had actually left. Further, she had no idea what hours of work Miss Mulhall had actually claimed for on her timesheets for that day. She accepted that there would

only have been a potential fraud if a claim had been made for time that she had not actually worked, but she simply did not know.

5.18 After the meeting on 25 August, the Claimant left the Hospital and was found to have been talking to a colleague in the clinical team, Ms Jones, outside near the car park. Mrs Gordon walked past her and, according to the Claimant, she "*starting shouting loudly at* [her]*, saying that she had heard* [her] *and that she was going to make a complaint about* [her]" (page 2 of the annex to her Claim Form). Her account was corroborated by Ms Jones in her witness statement.

5.19 The Claimant accepted in cross-examination that she was expected to have kept the contents of the meeting of 25 August confidential. Put simply, the Respondent's case was that Mrs Gordon had heard the Claimant use the word 'judgmental' in her discussion outside as she had passed which she clearly understood to have been part of a discussion about the meeting. Mrs Gordon accepted that she did say that she was to have made a complaint about the Claimant's conduct, but denied having shouted.

5.20 I found that the Claimant clearly had been discussing the events of the meeting with Ms Jones, as Ms Jones' own statement confirmed. She told Ms Jones what she had said to Mrs Gordon and Mrs Pett, despite understanding that their discussion was supposed to have been confidential. I did not find that Mrs Gordon had shouted, but she had needed to raise her voice in order to have been heard. It was noteworthy that the Claimant did not actually cross-examine Mrs Gordon on that issue at all.

5.21 The following day, 26 August, the Claimant then set out her complaints to Mrs Gordon in writing by email [184-5]. She focussed upon the events of the meeting of 25 August and Mrs Gordon's management of the rota in more general terms. There were several complaints about non-adherence to procedures, but no allegations of criminality were made.

5.22 Mrs Gordon then discussed the matters with Miss Mulhall and Mrs Link who were both upset by the Claimant's accusations.Arrangements were made for Miss Mulhall to have been rostered on shifts to avoid the Claimant in the short-term because of her level of upset. Mrs Link was prepared to continue to work with her. Brief notes were kept of those discussions [181].

5.23 Mrs Gordon also forwarded the Claimant's email to her own line manager, Miss Roche, who she considered was the most appropriate person to have dealt with it since the complaint also raised concerns about her own conduct.

Changes in the ED

5.24 Due to the Covid-19 pandemic, it was decided by senior management that Gloucester Royal Hospital's ED should continue to run as normal, but that the Cheltenham General Hospital's ED should have been downgraded to a Minor Injuries Unit on a temporary basis. The proposal was originally discussed and widely known of as early as May 2020 (see the email [41]

and meeting notes [423]). In practical terms, that meant that there was a reduction in the hours of reception work at the Cheltenham site and an increased need at Gloucester. The Claimant's hours were reduced in her rota from August [140]. She and her colleagues were kept abreast of the changes as they occurred [427].

5.25 Further reductions took place later in the year and, on 1 September, Mrs Gordon sent an email in which she proposed that the Claimant's day shift between 7.00 am and 3.00 pm at the Cheltenham General Hospital would have been moved to Gloucester as part of a temporary arrangement. Her later shift (1.00 pm to 7.00 pm) was to have been changed to 7.45 am to 3.45 pm ([194] and [203-4]).

5.26 On 2 September, the Claimant replied; she stated that she could work the amended shift at Cheltenham but that she could not work at Gloucester because of the care that she provided to her mother [205]. It was clear that the Claimant had never wanted to work at the Gloucester site; she had previously told Mrs Link that she would rather have been unemployed than work there [259].

5.27 Mrs Gordon replied to the Claimant on 4 September. Having considered the views of all receptionists, she thought that the fairest thing to do was to share the Gloucester shifts out equally, maintaining as much flexibility as possible for the Claimant to assist with her mother's care [210]. The shifts that were ultimately given to her on 8 September covered a three month period and, over a four week pattern, she was to have worked 7 shifts at Cheltenham and 5 at Gloucester [211-2]. Mrs Gordon was prepared to allow the Claimant to swap with other employees if and when she could and to use her annual leave to further reduce the time that she spent in Gloucester. She concluded her email of 4 September as follows:

> "*If working at GRH is something you cannot agree to I will contact HR for further guidance*."

Mrs Gordon also replied generically to other receptionists at the same time 4 September [208-9].

5.28 The Claimant described Mrs Gordon's emails at that time as follows (paragraph 59 of her witness statement):

> "*Andrea's behaviour felt duplicitous and orchestrated, appearing to exonerate herself from any blame. The situation felt constructive and executed with intent.*"

Having considered the evidence, I simply did not recognise that characterisation of the emails.

<u>Fourth and fifth disclosures and subsequent events</u>

5.29 The fourth disclosure relied upon by the Claimant was alleged to have been made on 2 September in a meeting with Miss Roche. This was an informal meeting in which she maintained that she had repeated her disclosures about the criminality of conduct in connection with the rotas and shifts (see paragraph 2.1.1.4 [47]), but that was not actually what she had said in her Claim Form or within paragraph 55 of her witness statement.

5.30 At the meeting, the Claimant alleged that Miss Roche asked her to delay her intended whistleblowing disclosure by a week. Again, the Claimant's stated position in the Case Management Summary at paragraph 4.1.3 [48] was rather different from her position in the Claim Form, her witness statement and her evidence.

5.31 Miss Roche stated that she just wanted to give her a chance to reflect upon her complaint and see whether a satisfactory informal solution could have been found which might have avoided a full investigation. The Claimant had agreed to that approach.

5.32 I saw no evidence of pressure having been applied to the Claimant on that day. That was not her case during her evidence and, as to the further allegation that a disclosure was made, the only evidence of such was in paragraph 5 of Miss Roche's own witness statement in which she indicated that the Claimant had broadly referred to fraud, but nothing more. Miss Roche then discussed the matters which the Claimant had raised with her with Mrs Gordon.

5.33 The Claimant then sent two important documents on 9 September, the first of which was her fifth alleged whistleblowing disclosure [214-225]. This was the formal complaint that she had discussed with Miss Roche the week before, under cover of an email [229]. It covered two main complaints which were identified at the start:

- "*Annual leave, Sick leave, Shift changes: Involving 2 x Department Employees…amending and falsifying staff rotas and timesheets for personal gain/advantage. Manager condoning/waving/ignoring of, thereby clearly endorsing the behaviour. Acting with intent; covert and selective behaviour; fraud by abuse of position.*
- *Manager and Colleagues allowing and displaying intimidatory, inappropriate, abusive, unequitable and demeaning behaviour to me, following my informing her of whistleblowing read the above.*"

5.34 The document cited a number of incidents of alleged rota infringements which were compiled in diary form. The only specific example of a matter referred to in terms of fraud was the entry for 9 July, a matter dealt with above. In relation to that incident, she concluded [219]:

> "*My suspicions were now verified re fraudulent and deceptive behaviour being carried out in respect of falsifying of rotas and subsequent timesheets for personal gain/advantage.*"

5.35 The second email that the Claimant sent shortly afterwards on 9 September was her resignation [230]:

> "*I am writing to inform you that I am resigning in response to a breach of contract by Andrea Gordon and consider myself to be constructively dismissed.*
> *My reasoning for this is as set out as follows:*
> *I made Andrea aware on 25/08 during our discussion that I would be submitting a formal complaint based on mal-administration/fraud relating to the CGH staff monthly rotas, with the two staff also responsible for these, amending the said rotas for their own gain/advantage, with Andrea appearing to condone this behaviour.*

Andrea allowed her colleague to verbally criticise me, casting aspersions during the discussion and then afterwards Andrea shouted at me in front of a colleague, this was not only demeaning, also abusive behaviour…
During and since discussions on 25/08 I believe I have been treated in an unacceptable and unequitable manner in relation to my colleagues. My submitted formal complaint describes this in more detail.
In consequence of the conduct of my manager and colleagues I consider my position at work to be untenable, leaving me with no option but to resign with immediate effect."

Other detriments

5.36 Other than those detriments already covered in the findings above, further findings were necessary in relation to the balance (paragraph 4.1 [48]).

5.37 The first detriment (the alleged incident in the car park on 25 August) had been dealt with.

5.38 The second was the allegation that Miss Mulhall and Mrs Link had ostracised the Claimant by leaving work as soon as she had arrived on shift on 29 and 30 August, prior to their shifts ending (paragraph 49 of her witness statement). As the case developed, however, this allegation seemed to have been more about the Claimant not having been *told* about the shift changes of her colleagues rather than about their own personal conduct towards her.

5.39 The Respondent's case was very simple; that, following the email [184-5] and Mrs Gordon's discussion with Miss Mulhall and Mrs Link, their hours were amended over the course of the subsequent weekend. On 29 August, Miss Mulhall had simply left at 11.00 am when the shift had changed and when she had been due to (paragraph 9 of her witness statement and [182]). The Claimant had in fact accepted in her own statement that Miss Mulhall had announced her departure (paragraph 49). Further, on 30 August, Mrs Link had also left at 11.00 am in accordance with her agreed changed shift that day.

5.40 The third detriment was Miss Roche's alleged request for the Claimant to have delayed her whistleblowing complaint by a week, which was addressed above. The fourth detriment had also been addressed; Mrs Gordon's request for the Claimant to work shifts in Gloucester.

5.41 The fifth and final detriment was the further allegation that Mrs Gordon did not consult with her, but did consult with others before her, about the shift changes. Specifically, she said in evidence that Miss Mulhall, Mrs Link and Ms Greening had been consulted before she had.

5.42 The Respondent's case was that, since this was a minor operational change, and since employees could have been required to work across both sites under their contracts, no formal consultation was required (paragraph 13 of the Amended Response). With a desire to manage the change well, Mrs Gordon nevertheless sought and took account of the views of the team before the shifts were finally allocated.

5.43 The evidence as to what the team knew and when was rather poor. Mrs Gordon did not recall speaking to anyone separately or ahead of the Claimant. There had certainly been no meetings arranged for that purpose. Mrs Link said that she could not remember when she became aware of the shift changes and the requirement for her to work at Gloucester. It certainly had not been at the meeting on 27 August [181]. Miss Mulhall said that, although there were lots of rumours about the requirement to work at Gloucester, nothing was confirmed until early September and, again, she denied that anything to that effect was discussed at their meeting on 27 August.

5.44 Mrs Greening did seem to remember having been spoken to by Mrs Gordon on 28 August, but she was not cross-examined. That evidence was not inconsistent with Mrs Gordon's; she did not consider it impossible that she had discussed any plans that she was aware of with anyone who had asked her on a casual basis.

5.45 Having considered all of that evidence, I was not satisfied that anyone received earlier notification of the confirmed need to have worked at Gloucester in any formal manner. Mrs Gordon may have spoken to staff informally as she became aware of the emerging situation, but the email to the Claimant of 1 September was sent at a similar time to other staff knowing about the confirmed need to work across the sites and all views were taken into account before Mrs Gordon's further emails of 4 September.

Events after the Claimant's resignation

5.46 On 10 September, Miss Roche met with the Claimant to discuss her resignation [241-3]. She tried to persuade her to retract it and to mediate, but she did not want to.

5.47 On 25 September, the Claimant set out the background to her resignation in more detail. The matter was ultimately treated as a grievance. It was investigated and dealt by Mrs Sivyer [399-407] and a grievance outcome letter was produced on 1 June [409-413]. It was not upheld.

5.48 In evidence, the Claimant accepted that she was aware of the Respondent's Whistleblowing Policy [79]. She also accepted that she knew that allegations of fraud ought to have been reported to Counter Fraud in accordance with that policy. No such report was made.

6. Relevant legal principles

6.1 First, in relation to the disclosures themselves, it had to be determined whether there had been disclosures of '*information*' or facts, which was not necessarily the same thing as a simple or bare allegation (see the cases of *Geduld-v-Cavendish-Munro* [2010] ICR 325 in light of the caution urged by the Court of Appeal in *Kilraine-v-Wandsworth BC* [2018] EWCA Civ 1346). An allegation could contain '*information*'. They were not mutually exclusive terms, but words that were too general and devoid of factual content capable of tending to show one of the factors listed in section 43B (1) would not generally be found to have amounted to '*information*' under

the section. The question was whether the words used had sufficient factual content and specificity to have tended to one or more of the matters contained within s. 43B (1)(a)-(f) (see, further, *Simpson-v-Cantor Fitzgerald* UKEAT/0016/18). Words that would otherwise have fallen short, could have been boosted by context or surrounding communications. For example, the words "*you have failed to comply with health and safety requirements*" might ordinarily fall short on their own, but may constitute information if accompanied by a gesture of pointing at a specific hazard. The issue was a matter for objective analysis, subject to an evaluative judgment by the tribunal in light of all the circumstances.

6.2 Next, I had to consider whether the disclosure indicated which obligation was in the Claimant's mind when the disclosure was made such that the Respondent was given a broad indication of what was in issue (*Western Union-v-Anastasiou* UKEAT/0135/13/LA). A whistleblower did not have to have had the precise legal basis of the wrongdoing asserted in her mind before they were protected (*Twist DX-v-Armes* UKEAT/0030/20/JOJ).

6.3 I also had to consider whether the Claimant had a reasonable belief that the information that she had disclosed had tended to show that the matters within s. 43B (1)(a) had been or were likely to have been covered at the time that any disclosure was made because that was the provision relied upon (see paragraph 2.1.5 of the Case Summary [48]. To that extent, I had to assess the objective reasonableness of the Claimant's belief at the time that she held it (*Babula-v-Waltham Forest College* [2007] IRLR 3412, *Korashi-v-Abertawe University Local Health Board* [2012] IRLR 4 and *Simpson*, above). To that extent, it was a mixed objective and subjective test.

6.4 'Likely', in the context of its use in the sub-section, implied a higher threshold than the existence of a mere possibility or risk. The test was not met simply because a risk *could* have materialised (as in *Kraus-v-Penna* [2004] IRLR 260 EAT). Further, the belief in that context had to have been a *belief* about the information, not a doubt or an uncertainty (see *Kraus* above).

6.5 Next, I had to consider whether the disclosures had been '*in the public interest*.' In other words, whether the Claimant had held a reasonable belief that the disclosures had been made for that purpose. As to the assessment of that belief, I had to consider the objective reasonableness of the Claimant's belief at the time that she possessed it (see *Babula* and *Korashi* above). That test required me to consider her personal circumstances and ask myself the question; was it reasonable for her to have believed that the disclosures were made in the public interest when they were made? It was also therefore a mixed objective and subjective test.

6.6 The '*public interest*' was not defined as a concept within the Act, but the case of *Chesterton-v-Normohamed* [2017] IRLR 837 was of assistance. There was no need for the 'public interest' to have been the sole or predominant motive for the disclosure.

6.7 As to the need to tie the concept to the reasonable belief of the worker;

> "*The question for consideration under section 43B (1) of the 1996 Act is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest*" (per Supperstone J in the EAT, paragraph 28).

6.8 The position was to be compared with a disclosure which was made for purposes of self-interest only, as in *Parsons-v-Airplus International Ltd* UKEAT/0111/17).

6.9 Finally, I did not have to determine whether the disclosures had been made to the right class of recipient since the Respondent did not actively dispute that they had been made to the Claimant's 'employer' within the meaning of section 43C (1)(a).

6.10 The next question to determine was whether or not the Claimant suffered detriments as a result of the disclosures. Detriment was to have been interpreted widely as a concept (*Warburton-v-Chief Constable of Northamptonshire Police* [2022] EAT 42); although the test was framed by reference to a reasonable worker, it was not a wholly objective test. It was enough that a reasonable worker might have taken such a view. That meant that the answer to the question was not dependent upon the view taken by the tribunal itself *only*. The tribunal might have been of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test was satisfied.

6.11 The test in s. 47B was whether the act was done "*on the ground that*" the disclosure had been made. In other words, that the disclosure had been the cause or influence of the treatment complained of (see paragraphs 15 and 16 of the decision in *Harrow London Borough Council-v-Knight* [2002] UKEAT 80/0790/01).

6.12 Section 48 (2) was also relevant;

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

The section was easily misunderstood. It did not mean that, once a claimant asserted that she had been subjected to a detriment, the respondent (whether employer, worker or agent) had to disprove the claim. Rather, it meant that, once all of the other necessary elements of a claim had been proved on the balance of probabilities by the claimant (that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment) the burden shifted to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure. The test was not one amenable to the application of the approach in *Wong-v-Igen Ltd*, according to the Court of Appeal in *NHS Manchester-v-Fecitt* [2012] IRLR 64). It was important remember, however, if there was a failure on the part of the Respondent to show the ground on which the act was done, the Claimant did not automatically win. The failure then created an inference that the act occurred on the prohibited ground (*International Petroleum-v-Osipov* UKEAT/0058/17/DA and *Dahou-v-Serco* [2017] IRLR 81).

6.13 Since the Claimant lacked the requisite service to bring an ordinary unfair dismissal claim, the burden was on her to prove the reason for dismissal under s.103A on the balance of probabilities (*Smith v Hayle Town Council* [1978] ICR 996, CA and *Tedeschi v Hosiden Besson Ltd EAT 959/95*). It was a greater burden than the requirement to merely prove a prima facie case if she had two years' service under *Kuzel-v-Roche* [2008] IRLR 530; *Ross-v-Eddie Stobart* [2013] UKEAT/0068/13/RN. Here, she complained that she had been constructively dismissed because of her disclosures. In other words, that she had made disclosures, but they had caused detriments, that the detriments had constituted breaches of her contract which were fundamental and that she resigned because of those breaches.

7. Conclusions

The disclosures

7.1 The first disclosure was the email of 14 May [110]. The email contained a disclosure of information which was more than a bare allegation. As to the Claimant's reasonable belief in the allegation as one falling within s. 43B (1)(a), she was not alleging that a criminal act had occurred or was likely to have occurred within the text of the message. She did not refer to the email of 6 May, as suggested in the description of the disclosure in the Case Summary (paragraph 2.1.1.1 [47]) or allege fraud at all. In cross-examination, she accepted that her email had been more about fairness since she had considered that Miss Mulhall had not followed the same procedure expected of anyone else when obtaining annual leave. Further, she could not have reasonably believed that any fraud had been committed because she had not seen what hours Miss Mulhall had claimed for and/or been paid for.

7.2 During the Claimant's cross-examination of Mrs Gordon, she contended that non-adherence to the annual leave policy was itself a fraud because people were gaining an advantage that they were not entitled to. That was a more extreme case than had been suggested before. In my judgment, neither the Claimant nor anyone else could objectively have considered that the booking of annual leave other than in accordance with the policy was a potential criminal act and/or fraud. There would have been no financial loss or financial gain involved.

7.3 The second alleged disclosure was in the email of 27 May [115]. That also did not contain a public interest disclosure since there was no allegation of criminal activity made within it. Instead, the Claimant complained of differential treatment *vis* Miss Mulhall and Mrs Link. The email was, in reality, an attempt to put a slightly different spin on her first email of 14 May following Mrs Gordon's explanation of the 15th, and an attempt to raise a new matter concerning Mrs Link's apparent failure to follow the local policy on annual leave. She was not complaining that either Mrs Link or Miss Mulhall had received payment for work that they had not undertaken.

7.4 The third disclosure relied on was allegedly made on the 25 August. It was the *only* disclosure referred to in by the Claimant's closing submissions, C1.

7.5 On that occasion, there was no doubt that she did make a clear allegation of fraud against Miss Mulhall [176] in that she alleged that she had claimed for time that she had not worked on 9 July. That was a disclosure which would have had a public interest; the public would have had an interest in the misappropriation of public funds, but did she reasonably believe that a criminal act had been committed? In my judgment, she did not. She had not been present when Miss Mulhall had left work and had not been aware of what hours she had actually claimed for and/or been paid for on that day. She bore personal animosity towards her at that point because of complaints which were being addressed with her at the meeting of 25 August. She felt that she had not been properly welcomed onto the team, she had a sense that she benefitted from less favourable treatment than others and that, at least to some extent, Miss Mulhall was over playing the extent of her arthritic condition. This disclosure did not qualify under s. 43B.

7.6 The fourth disclosure was allegedly made on 2 September. The Claimant gave no evidence that any particular disclosure was in fact made at the meeting with Miss Roche in her witness statement. It was not a claim which had been made within her Claim Form either. Although Miss Roche accepted that fraud was referred to in a broad sense, there was no reason to believe that any information was disclosed as part of the allegation or, if it was, that the information went beyond that disclosed on 25 August which did not qualify in any event.

7.7 The fifth disclosure was made on 9 September in the Claimant's complaint document [214-225]. There was no detail of any allegation of criminal activity set out within it save the one which has been referred to above at [119] which related to the same incident concerning Miss Mulhall which had been raised on 25 August and which, in my judgment, the Claimant could not have reasonably believed had constituted a criminal act at the time. To the extent that the document might be said to have disclosed criminality in the "*maladministration of rota management*" as described in the Claimant's closing submissions (C1), such generalised and amorphous allegations could not reasonably have been said to have identified allegations of a fraud or other criminal acts.

7.8 Even if this fifth disclosure had been one that qualified under the Act, it could not have been causative of anything because the Claimant resigned less than one hour later and there was no intervening detriment alleged.

<u>Detriments</u>

7.9 For the sake of completeness, the claimed detriments were also addressed briefly.

7.10 I was not satisfied that Mrs Gordon had shouted on 25 August as alleged. She may have addressed the Claimant's breach of confidentiality with her loudly so as to have been heard, but she did not do so because the Claimant had blown the whistle in the meeting of 25 August. It had occurred because Mrs Gordon had perceived her to have broken confidentiality in relation to their discussions with Ms Jones.

7.11 The second allegation was the Claimant's alleged ostracising by Miss Mulhall and Mrs Link on 29 and 30 August. As stated above, they left their shifts on those days at 11.00 am because that was when they had been scheduled to work up until. The complaint really appeared to have been about her lack of awareness of their changed hours. One could well understand why they might not have been particularly chatty with her, given what they had been accused of just a matter of days earlier. The accusations had arisen from the email of 26 August which Mrs Gordon had discussed with them the following day. That email was not itself a whistleblowing disclosure nor was it relied upon as such.

7.12 The third allegation was the request for the Claimant to have delayed her grievance by Miss Roche on 2 September. As previously stated, she did not allege that she was forced or pressured into delaying her complaint. There was no detriment in simply being asked to do so. Miss Roche's purpose was to see if she could resolve the matter informally, a potential advantage for everyone. Further, even if this was a detriment, there was no basis for a finding that the request was made because of any whistleblowing disclosure or the nature of any complaint that had been made on 25 August. The causative link was not apparent.

7.13 The fourth detriment was the requirement for the Claimant to have worked some of her time at Gloucester. The changes were not prompted by any whistleblowing disclosures. They were made at a high management level and affected all employees in the Claimant's position as a result of the downgrading of the Cheltenham General Hospital's ED.

7.14 Finally, there was the assertion that she was treated differently in relation to the dissemination of information about the need to work at Gloucester and/or the consultation over it. There was no compelling evidence that others, specifically Mrs Greening, Mrs Link or Miss Mulhall, had been consulted about Gloucester shifts before the Claimant. The best evidence came from Mrs Greening's witness statement, but the specific allegation that was made was of non consultation and that was not one which was proved; there clearly *was* consultation, albeit not in any formal way. No one was consulted formally. Mrs Gordon may have told other employees about the Gloucester shifts a day or two before the Claimant on 1 September, but only informally if she was asked. If that had occurred, it had not been because the Claimant was excluded from the information because she made whistleblowing disclosures.

Dismissal

7.15 For the Claimant's case to have succeeded, she would have needed to demonstrate that the detriments had occurred, that they had been causatively linked to the disclosures and that they had constituted fundamental breaches of her contract which entitled her to resign. She was not able to do so for the reasons given above.

7.16 It was clear why the Claimant had left her employment; she had never wanted to work at the Gloucester Royal Hospital, a fact that she confirmed in cross-examination in relation to her statement to that effect at [259].

Jurisdiction (time)

7.17 The jurisdictional time points set out in paragraph 1 of the Case Summary [47] were not addressed at all in closing submissions. They were academic in light of other findings but, had they required determination, I would have found that the detriments were not all part of the same series of similar acts. They were separate in nature and in terms of the personnel who had been involved. There was no evidence that it was not reasonably practicable for the Claimant to have brought them in time under s. 48 (3).

8. Delay in the provision of these Reasons

8.1 There has been a significant delay in the provision of these Reasons which warranted an explanation.

8.2 Written reasons were requested by the Claimant on 24 January 2002, just a few days after the Judgment had been sent out. That request was not responded to by the administration and/or referred to a judge. The Claimant repeated her request on 31 March. That was referred to me on 4 April. A query which was then raised with the Claimant about her request was answered by her on 6 April, but the file was not referred back to me until 25 April. These Reasons were then sent for typing.

Employment Judge Livesey
Date 26 May 2022

Reasons sent to the parties: 27 May 2022

FOR THE TRIBUNAL OFFICE