



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Nos: 4101258/2020

Held in Edinburgh on 27, 28, 31 October and 1, 3, 4 ,7, 10, 14 and 17  
November and Members' Meeting on 18 November and 7 December  
2022

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Employment Judge M Sutherland  
Tribunal Member A Brown  
Tribunal Member A Mathieson

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**Mandy McClements**

**Claimant**  
**In person**

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**Scottish Ambulance Service**

**Respondent**  
**Represented by:**  
**Mr T Pacey of Counsel**  
**(instructed by Mr G**  
**Fletcher, Solicitor)**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous judgment of the Tribunal is that the complaints of protected disclosure detriment, constructive dismissal, automatically unfair dismissal and harassment related to disability do not succeed and are therefore dismissed.

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**E.T. Z4 (WR)**

## REASONS

### Introduction

1. The Claimant made complaints of protected disclosure detriment, disability related harassment, constructive unfair dismissal and automatically unfair constructive dismissal by reason of protected disclosure. The complaints were denied by the Respondent.  
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2. This final hearing was listed on liability only (with a hearing on remedy to be listed subsequently if required). Following discussion, it was determined that any evidence pertaining to contributory conduct and/or *Polkey* (chances of her dismissal had she not resigned) would be heard at this hearing to avoid recalling witnesses. To this end the Respondent introduced further particulars which were not opposed and were accordingly allowed.  
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3. The Claimant applied for and was granted a witness order.
4. Following detailed discussion, it was agreed that the issue of time bar fell to be determined in respect of any complaints of detriment or harassment arising prior to 25 September 2019.  
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5. A joint bundle of documents was agreed and lodged. The Claimant sought to introduce additional documents which were allowed following discussion.
6. The Claimant gave evidence on her own behalf and called Andrew Smith, (Trade Union Representative) and Lindsay McLeod Kerr (Area Service Manager) to give evidence. The Respondent called the following witnesses to give evidence: Linda Douglas (HR Director), Matt Cooper (ex-Deputy Regional Director, West Division), Donna Higgins (Head of Service), Jacqui Loye (Head of HR, West Division) and Pauline Howie (Chief Executive).  
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7. Both parties made submissions.  
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8. The following initials are used in this judgment by way of abbreviation –

Initials	Name	Job Title
AG	Andrew Graham	Head of Ambulance Services
DH	Donna Higgins	Head of Service
JL	Jacqui Loye	Head of HR West Division
LD	Linda Douglas	Director of HR & OD
LMK	Lindsay McLeod-Kerr	Area Service Manager
MC	Matt Cooper	Deputy Regional Director, West Region
PH	Pauline Howie	Chief Executive

### List of Issues

5 9. Following discussion, the issues to be determined were agreed as follows:

#### Public interest disclosure detriment (section 47B Employment Rights Act 1996)

1. Did the Claimant make a verbal disclosure of information to LD on 18 June 2019 as described in paragraph 7 of her Claim and as further specified in disclosures numbered 4,7,11(4), 8 and 9 of the terms of amendment in summary that –
  - a. A named paramedic was extremely tired on duty because she drove a delivery van all day before and after going out to do her nightshift?
  - b. A named colleague would book himself as unavailable for emergencies when he was available?
  - c. A name student technician from Lanarkshire Station was incompetent but his named mentor was ordered to pass him?
  - d. A persistent culture of bullying and harassment by management was causing high levels of stress amongst staff including named persons from Motherwell and Coatbridge Stations?
2. Did the Claimant reasonably believe the disclosure was in the public interest and tended to show that the health or safety of any individual has been, is being or is likely to be endangered?
3. Was the Claimant subject to a detriment by her employer as described in paragraph 12 of her claim and as further described in paragraphs 25, 26(1),

(2) of the terms of amendment, and in the table at page 77 as regards LD, in summary that –

- a. Her complaints of bullying and harassment of 1 July 2019 and 2 August 2019 were not investigated or taken seriously by LD?
- 5 b. At the appeal meeting on 23 September 2019 MC and JL behaved as described?
- c. In late September 2019 MC put pressure on LMK to formally report an alleged door kicking incident involving the Claimant?
- d. LD failed to investigate the neighbour's complaint of 31 August 2019; 10 and DH failed to put in place steps to ensure the Claimant's welfare after the incident of 26 August 2019?
- e. PH failed to action or investigate her complaints of 16 and 24 August or to meet with her until 7 October 2019?
- f. On 7 November 2019 LMK told the Claimant that MC had put pressure 15 upon him to report the incident with a view to upsetting her? (the last straw)
- g. After her resignation on 17 November 2019, PH failed to support or meet with the Claimant or investigate the issues raised?

[The Claimant advised that the alleged failure to breakdown her door on 20 26 August 2019 was not being relied upon as a detriment or in respect of her claim for constructive unfair dismissal (automatic or ordinary).]

4. Was the detriment done on the ground that the Claimant had made a protected disclosure?
5. Was the complaint of detriment presented before the end of the period of 25 three months beginning with the act or failure to act, or the last of any series of such acts or failures? Where it was not reasonably practicable to do so, was it presented within such further period as the tribunal considers reasonable? (ACAS Early Conciliation commenced 24 December and accordingly time bar potentially affects acts prior to 25 September 2019.)

30 Constructive dismissal (sections 95 and 98 Employment Rights Act 1996)

6. Did the detriments considered together constitute a course of conduct which amounted to a repudiatory breach of the implied term that the employer will

not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties?

- 5 7. For automatically unfair constructive dismissal only: was the sole reason or principal reason for that conduct that Claimant had made a protected disclosure?
8. If so, was the repudiatory breach an effective cause of the Claimant's resignation?
9. If so, did the Claimant affirm the breach?
- 10 10. If not, did the Respondent have a potentially fair reason for the breach, namely the Claimant's conduct on 23 August 2019?
11. If so, was the reason fair in the circumstances?

Harassment related to disability (section 26 Equality Act 2010)

- 15 12. It was accepted by the Respondent that the Claimant was disabled by reason of anxiety at the time of the appeal meeting on 23 September 2019.
13. At the absence management appeal meeting on 23 September 2019, did MC engage in the conduct described in paragraph 12(b) of her Claim and as further specified in paragraph 26(1) of the terms of amendment?
14. Was that conduct unwanted conduct related to her disability?
- 20 15. Did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
16. In considering its effect -
- a. what was the Claimant's perception?
- 25 b. what were the other circumstances of the case?
- c. was it reasonable for that conduct to have that effect?
17. Was the complaint brought within the period of 3 months starting with the date of the act or such other period as the tribunal thinks just and equitable?

**Findings in fact**

- 30 10. The Tribunal makes the following findings in fact:

11. The Respondent provides ambulance services across Scotland which is divided into three Operating Regions. The Respondent employs around 5,000 staff and has a dedicated HR function. The Claimant was employed as an ambulance technician from 6 January 2014 to 15 December 2019. The Claimant was initially based at Law Station. She worked alongside paramedics as part of an ambulance team which included a Team Leader. The ambulance team was managed by an Area Service Manager who was responsible for 3 or 4 stations. The Area Service Manager reported to the Head of Service for the Regions who in turn reported to a Deputy Regional Director for each of the 3 Divisions.

*Disciplinary procedure*

12. On 23 July 2018 the Claimant was advised that two members of staff had raised complaints of bullying and harassment against her and that there was to be a formal investigation. On 30 July she was transferred to Motherwell Station to facilitate the investigation where she reported to LMK as Area Service Manager. The Claimant was absent from work by stated reason of stress from 15 August to 30 September 2018.

13. In October 2018 the Claimant raised counter-allegations of bullying and harassment. The Respondent undertook investigations which the Claimant considered to be inadequate. On 22 February 2019 the Respondent advised the Claimant that there was no case to answer in respect of the counter allegations made by her.

14. The disciplinary investigation into the allegations made against her took an extended time to complete. On 7 January 2019 the Claimant was advised that the investigation had concluded and that there was a disciplinary case to answer. She was aware that the disciplinary process could result in her dismissal. The Claimant was absent from work with stated work-related stress from 14 January until 24 July 2019 which she attributed to the disciplinary process, her counter-allegations of bullying and harassment, and a number of personal issues. A disciplinary hearing took place on 2 April 2019 and the Claimant was advised that no disciplinary sanction would be imposed. She

was permitted to return to Law Station but remained in Motherwell Station at her request.

*Communication with LD*

- 5 15. On 9 May 2019 the Claimant emailed LD, Director of Human Resources, seeking to “meet with you to verbally blow the whistle under the PIDA 1998 and would like to request anonymity. My concerns are around breaches of Health and Safety, institutionalised bullying and harassment from management and the deliberate act to conceal. If possible, I would also like to share with you my own personal experience of service management. 10 Although not under the PIDA...”
- 15 16. On 18 June 2019 the Claimant met with LD with a view to discussing her whistleblowing concerns. The meeting lasted around 2 hours. The majority of that meeting was taken up with discussing the Claimant’s concerns about the disciplinary and absent management processes affecting her and agreeing a number of actions. The Claimant also raised what she considered to be whistleblowing concerns. She advised that a named paramedic had told her that she was so tired because she was out driving her husband's delivery van all day before doing her night shift and then driving the delivery van the next day, that when she reported this to management they turned a blind eye, that 20 the paramedic was obviously exhausted, and this was a danger to the public. She also advised that a named colleague and union rep would regularly book himself off by falsely stating his uniform was contaminated, rendering himself unavailable to respond to emergencies. She advised that other members of staff from a Lanarkshire station had raised concerns that a student technician 25 was not competent, but his mentor was ordered to pass him as competent. She advised that there was a persistent culture of bullying and harassment from management that was causing high levels of stress and absence. LD explained to the Claimant that her concerns did not amount to whistleblowing concerns because they did not amount to an issue of health and safety.
- 30 17. On 28 June 2019 LD wrote to the Claimant to confirm the agreed actions from the meeting, namely that the Claimant had fixated on the risk of dismissal and

5 the Respondent would therefore review the wording of its templates, that the Respondent moves too quickly to the formal disciplinary stages and training and guidance would therefore be reviewed to ensure managers are aware of the benefits of the informal stages, that there was unreasonable delay in the disciplinary process, and that stress management training should be improved. The letter also noted "During the course our meeting you alluded to action or behaviour of staff that was unacceptable. You didn't provide specifics, however we agreed that if you want to proceed to raise concerns then you can and would be able to do so by providing the information to me and I would arrange for the matter to be handled through the appropriate processes". The letter noted "In conclusion, I hope this outlines the substance of our discussion".

18. On 1 July 2019 the claimant wrote to LD raising a complaint of bullying and harassment, and stating that she has no trust in her employer. The letter extended to 7 close typed pages and described how she (and her complaints including her counter allegations) were treated under the disciplinary and absence management procedures. She considered that her counter-allegations had not been investigated properly. The Claimant stated: "I raised complaints with regard to the investigation, processes and procedures but was informed the service would not be looking back over the case". Aside from generalised references to management bullying and harassment the Claimant did not reference her whistleblowing concerns.

19. From at least July 2019 the Claimant was aware of her legal rights and the relevant time limits for submitting an employment tribunal claim in respect of her complaints.

20. On 4 July 2019 LD arranged to meet with the Claimant on 2 August to discuss her letter of 1 July. On 8 July the Claimant replied by email advising that her letter of 1 July was a grievance and expressed concerns that this date would take her out with legal time frames. She also requested an extension to her full sick pay. On 9 July 2019 LD wrote to the Claimant asking whether she wanted to raise a grievance which would then be allocated to a manager



under stage 1 of the policy. LD then emailed the Claimant on 13 July 2019, noting that her letter of 1 July appeared to cover much of the same information as covered in their meeting of 18 June and that they were meeting to discuss this again on 2 August.

5 21. On 2 August the Claimant met with LD. Their discussion was wide-ranging and included her concerns regarding the disciplinary and absence management processes raised in her letter of 1 July. At that meeting LD advised the Claimant that they had discussed at their last meeting that her concerns did not appear to be whistleblowing disclosures. LD explained to the  
10 Claimant that in respect of some complaints she had exhausted their procedures, and conveyed the sentiment that she should “let it go”.

22. On 7 August LD wrote to the Claimant summarizing the matters discussed, noting “our discussion was wide ranging, but we particularly focused on the concerns you have about how you have been treated related to the handling  
15 of an investigation and delivering the outcomes and, more recently, the absence management meeting conducted by your head of service”. It noted that “we agreed again, that the issues you describe do not fall under whistleblowing. We tested this, particularly in the area of Health and Safety at Work”. It noted procedural steps the Claimant was considering taking in  
20 relation to absence management, dignity at work (“relating to matters not previously addressed”) and extension of sick pay.

23. On 7 August 2019 the Claimant wrote to LD thanking her for meeting with her on 18 June and 2 August. The claimant said that her sick pay should be extended because her absence was due to stress caused by the way she  
25 (and her complaints) had been treated under the disciplinary and absence management procedure. She advised that “my grievances and complaints will be getting submitted to the most appropriate person. I have not given a full version of events as I do not find it appropriate at this moment in time with future action that may be taken” and “It is my opinion that there have been  
30 numerous counts of abuse of power from the service and the response from

numerous members of senior management and HR to 'let it go' and to 'just accept it' I do not deem acceptable or appropriate".

24. The Claimant's letter of 7 August 2019 was sent by LD to JL, HR Manager for comment. JL provided detailed written comment to LD on 22 August including that "unfortunately Mandy seems to want to go over and over the same issues time and time again with numerous people (repetitive and unfounded); this is very resource intensive. She is saying in her letter that she will be raising more grievances. If these are in relation to issues previously dealt with I think we need to take a firm stance and advise that these matters are closed as far as SAS is concerned as they have previously been addressed." On 30 August LD advised the Claimant that her application for an extension of full sick pay had been refused. LD provided a detailed response to the points raised in her application regarding the disciplinary procedure including an explanation for the delay in the investigation. LD noted that at each meeting it was explained to the Claimant how to progress any complaint or concern she has, encouraged the Claimant to raise her concerns and noted that she was seeking advice from her union on this..
25. On 2 September 2019 the Claimant wrote to LD, copied to PH, noting that "my issues have been ongoing for two years and the service has failed to deal with the issues I have been having with information covered up as I have previously discussed with you. My formal complaints have been ignored. The continuous institutionalised bullying and harassment is having a serious detrimental effect on my health which resulted in an overdose last week... Due to the ongoing bullying I had to once again book off sick. I am now on zero pay. I am now at a stage where I will be contacting ACAS." On 3 September LD replied, advising that she would provide the West Region management team with a copy of her email in order that they can action.

*Application for part-time work*

26. In around June 2019 the Claimant had made an application to work part-time in order to study for an HNC in legal services, and to pick up extra shifts as suited her. LMK had initially indicated to her that it was likely to be approved.

27. The Claimant considered that her application for part-time work had been outstanding for an unreasonable period of time, and on 23 August 2019 she attended Law Station with a view to discussing it with LMK. It was her day off and LMK was not expecting her. LMK was somewhat distressed having just spent hours attending to someone who was suicidal. The Claimant followed LMK into his office and pointed out that that her application had been outstanding for weeks. Both the Claimant and LMK were frustrated and their voices were raised. LMK explained that he was still within the time limits and had two months in which to consider and respond. He stated it also needed to be considered at a meeting with HR present and warned her that she might not get it. The Claimant became distressed and angry at the lack of progress and left the room with the door of his office banging shut behind her. LMK then heard loud bangs against the door from outside and he believed that the Claimant had kicked the door multiple times in anger. The Claimant denied that she had done so. The Claimant was not on duty and LMK suggested to her that she should go home, which she did. The Claimant was then absent from work with stated work-related stress and anxiety from 23 August until 15 September 2019.

28. After her return to work LMK sought advice separately from other managers and HR on whether to proceed with a formal complaint about his belief that she kicked the door multiple times in anger. MC had suggested he should take advice from HR but he did not put any pressure upon him to put in a formal complaint. (A formal complaint may possibly have resulted in a disciplinary investigation and a possible finding of misconduct but no risk of dismissal.) Having considered the advice LMK decided that he did not want to go down the formal route.

29. On 26 August 2019 the Claimant texted a team leader to advise that she had drunk a bottle of spirits. A paramedic was dispatched to her home with a view to undertaking a welfare check on the Claimant but could not gain access. It was stood down by control instead of entry being forced. The Claimant's husband had advised control that there was no cause for concern.

30. The Claimant consulted her GP on 29 August 2019 regarding work-related stress and anxiety noting fleeting thoughts of self-harm and on 10 September 2019 regarding her depressed mood. The Claimant had a significant trough in her mental health in August 2019.

5 31. On 31 August 2019 the Claimant's neighbour submitted a complaint asserting that the Claimant was unconscious on 26 August and the failure to force entry amounted to a near miss and asking that the matter be investigated. DH, Head of Service and LMK had been on call that night. DH discussed the incident with LMK and confirmed that steps were in place to ensure the  
10 Claimant's welfare. Another ASM was in contact with the Claimant as a support measure and to progress her part time working application. Having seen the complaint DH decided to call the neighbour to assure her that steps had been put in place to ensure the Claimant's welfare. The complaint was understood to have been resolved.

15 32. The ASM referred her to OH and progressed her application for part-time work. The Claimant's part-time working application was granted in early September 2019 and the Claimant also commenced studying for an NHCC in legal services (which she was awarded in June 2020).

*Communication with PH, Chief Executive*

20 33. On 16 August 2019 the Claimant had a brief informal conversation with PH, Chief Executive, in passing when she happened to be visiting the station. The Claimant told PH how she had been treated and that she was discussing it with LD. On 19 August the Claimant sought to meet with PH to elaborate on the issues raised. PH confirmed with LD that she was in discussion with the  
25 Claimant about her concerns under the whistleblowing procedure but there was no discussion of any specifics.

34. On 20 August PH wrote to the Claimant noting that she was in communication with LD about these issues, that LD was ensuring these are being progressed with the west region, and that LD should accordingly remain her point of  
30 contact.

35. On 24 August 2019 the Claimant wrote to PH again asking to meet, and advising that “I have been in communication with LD however I have not found our communication helpful in resolving my work issues”, that LD had advised her “just to ‘Let it go’”, that “Linda did not believe the information I shared fell under whistleblowing and I was prevented from sharing other information I had. I believe the information I shared/ had does fall under whistleblowing”, that “I am now at a stage where I am considering constructive dismissal due to the impact on my health.” She enclosed a copy of the letter to LD of 1 July explaining that it does not contain “the information I believe falls under the Public Interest Disclosure Act”. She continued “I would appreciate the opportunity to discuss the issues I have been having. I seek your help in reaching a resolution”.
36. Having confirmed with LD that she was progressing matters, PH replied to the Claimant advising her that LD should remain her point of contact.
37. On 2 September 2019 the Claimant wrote to PH advising that LD would not allow her to discuss her whistleblowing concerns (“I was told I could only discuss my own situation and not stories involving others”). The Claimant wrote that when she expressed unhappiness with this and went to leave the room “LD grabbed me back”. The Claimant said she would therefore not be discussing her concerns with LD. PH did not reply until 27 September when she asked the Claimant to document her whistleblowing concerns.

*Absence management appeal*

38. On 27 May 2019 the Claimant wrote to MC (Deputy Regional Director) advising that following the disciplinary process and her absence on half pay she was considering filing for early conciliation. She complained that she had been put on Stage 2 absence management monitoring by Andrew Graham while still off sick, and he ought to have awaited her return to work. She also advised that she would not be attending any further absence management meetings with AG because she has unresolved issues with him. MC proposed that she give AG an opportunity to review his decision.

39. On 24 July 2019 the Claimant attended an absence management meeting with AG, Head of Ambulance Services. She was placed on a revised Stage 2 monitoring period for 9 months, noting that she had been absent in 2018 for 69 working days and in 2019 for 101 working days, which were all recorded as anxiety/ stress. On 23 August the Claimant submitted an appeal on the basis that AG had misunderstood the reason for her absence. He had referenced a dignity at work investigation concluding in April 2018 when he should have referenced the disciplinary action starting in July 2019 which she considered to be an industrial accident.
40. The Claimant was absent from work with stated work-related stress from 23 August until 15 September 2019. The Claimant was referred to occupational health in early September who advised “due to Mrs McClements caring responsibility, and her own health issues, she may well be covered by the [Equality] Act.”
41. On 4 September 2019 the Claimant wrote to MC asking when she would be given a date for the Stage 2 absence monitoring appeal and noting “future action I will be taking is dependent upon the meeting”. On 19 September the Claimant met with Remploy, who provide employment support to employees with disabilities. At the Claimant’s request, their written advice was forwarded directly to MC on 21 September. (Remploy subsequently noted on 4 October that in stating a reason for her absence they had overstepped their boundaries).
42. On 23 September the Claimant together with AS, her union companion, attended the Stage 2 absence management appeal meeting held by MC who was accompanied by JL, HR Manager. (AS, a union rep, attended as her companion but not as her union rep because the events arose prior to her union membership.) There were no formal or informal minutes of the meeting other than MC’s outcome letter. The meeting lasted about 2 hours. MC was aware that the Claimant was suffering from anxiety and stress. The Claimant was very upset in the meeting and had to leave the room temporarily. The Claimant explained she had been unfairly put on monitoring whilst she was

still off sick. Her union companion explained that AG had misunderstood the reason for her absence which was worked related stress caused by the disciplinary process. The Claimant tried to describe in detail her complaints regarding the disciplinary process. JL explained that this was not relevant because the focus was now on her attendance at work. JL explained that she had been in contact with others in HR who had confirmed that the internal processes had been exhausted. MC considered the steps that had been taken to support her in sustaining her attendance at work and advised that he would ensure that the relevant manager would continue to provide that support. The Claimant conveyed information she had received from Remploy about other Ambulance Service staff. JL said this was a breach of data protection which she intended to raise with Remploy.

43. On 26 September 2019 MC wrote the Claimant to confirm the outcome of the appeal hearing. He noted that her union companion felt AG had failed to consider that her most recent sick absence was due to stress caused by the formal processes. He noted "You informed me that you feel that you have had no closure in relation to the investigation and subsequent hearing. You are concerned that this lack of closure will impact on your ability to maintain your attendance at work. JL explained that we have now exhausted all the internal procedures in relation to the concerns you have about the investigation and subsequent disciplinary hearing. You are currently receiving support which has been arranged by the service for your health issues and will be reviewed by our OH service again in the near future". He determined that "AG did consider that your most recent absence was work-related stress and made adaptations to your role, working location and hours of work", and that accordingly AG's decision was fair and proportionate.

44. The appeal was therefore refused and the Claimant was to remain on Stage 2 absence management monitoring until April 2020. A failure to improve her attendance would trigger a Stage 3 review which would result in further monitoring or dismissal depending upon her future prospects for improved attendance.

*Resignation*

45. On 3 October 2019 the Claimant emailed PH advising that she had whistleblowing concerns which she was reluctant to document in writing and sought anonymity. She stated that she was passionate about working for the service however “as it stands just now I have no trust in my employer and therefore I am giving myself a year to decide whether or not I wish to remain an employee.” PH emailed the Claimant on 7 October, offering to meet face to face on 16 October on a confidential basis. The meeting was rearranged at the Claimant’s request to 31 October. The Claimant expressed reluctance to attend with HR present as “my concerns I am raising involve many members of HR” and PH made alternative arrangements.
46. By October 2019 the Claimant had exhausted her entitlement to sick pay.
47. On 22 October the Claimant contacted Whistleblowing Protect Helpline (an external body) to obtain advice on her whistleblowing concerns. On 25 October the Claimant advised PH that she has concerns around the meeting which she sought to postpone “until my advice comes through”. The Claimant had obtained legal advice from Protect on whistleblowing detriment and dismissal.
48. On 7 November 2019 LMK had a meeting with the Claimant to discuss her return to work. He told her he had sought advice on what to do about the door-kicking incident. He told the Claimant that MC had tried to get him to put in a formal complaint about it but that he had decided against it.
49. On 15 November around 3 pm the Claimant texted LMK to say “Won’t be at work tonight. Very bad thoughts in my head”. He replied stating “Sorry to hear that is there anything I can do”. She replied stating “I don’t know what can be done. I was doing well up til last week when you told me MC tried getting you to put in a formal complaint against me after my stage two appeal meeting with him. I told him during that meeting that I'd had suicidal thoughts when I was off sick due to the unjust investigation against me and how I was being treated by the service. Senior management knew I lay unconscious having



overdosed yet they try putting me under investigation again. I have told the service time and time again my mental health isn't good as a result of the past two years but they just make it worse. I sat in the ambulance for the last half hour of my shift last night wanting to overdose. That's why I'm not coming to work tonight. I don't see a way forward with work.” LMK replied immediately explaining to the Claimant that “I asked some other people in and out of work, but had anonymized the scenario to get additional [perspective] and that helped me get to the point that a formal process was not the way to go forward. Don't get held up in others thoughts, look after yourself and taking some time is a good thing.”

50. On 15 November, around 4pm, PH emailed the Claimant asking whether she wanted to reschedule the meeting with her. The Claimant replied around 5pm advising that “I have since decided to resign from the service. I have had further issues with management over the past couple of weeks with regard to my own personal grievances (not any of the information I had that falls under whistle blowing, just my own individual problems). The continuous bullying and harassment from management and HR has become too much, my mental health has suffered massively as a result. At times I have pleaded with the service for their actions to stop but it just worsens. For me it is time to walk away. I will be working my four weeks notice as of Monday. Should PH wish, I am willing to share the reasons behind my resignation in the hope that improvements can be made for others in the future however will not be requesting any further dates for whistleblowing.” The Claimant took informal advice from her union on the terms of her resignation.

51. On 18 November 2019 the Claimant intimated her formal resignation with 4 weeks' notice to LMK on the basis of “a fundamental breach of contract - including, but not limited to, not carrying out grievance procedures and subjecting me to undue, disproportionate and harsh treatment, breach of trust and confidence and last draw doctrine. My mental health has suffered severely as a result of these behaviours that I feel I am left with no choice but to resign.”

52. The Claimant was absent from work with stated work related stress from 15 November until 15 December 2019.

*Events Post termination*

53. On 19 November 2019 the Claimant was advised by LMK that MC would be inviting her to an exit interview. On 19 November the Claimant emailed MC, copying in PH, advising that she would not be attending with him “as you are partly the cause of my resignation. LMK informed me last week you put a lot of pressure on him to raise a formal complaint against me (for something I did not do) but he refused to do it. LMK informed me you put pressure on him to do this after that stage two appeal meeting you had with me. During that meeting I broke down in tears and stated the unjust investigation against me had caused suicidal thoughts. I wished to discuss the institutionalised bullying and harassment but you and JL prevented me from doing so. After stating I had suicidal thoughts caused by the investigation against me you left the meeting and pressured LMK to raise a complaint which would have resulted in a further investigation. The service also removed my Remploy support worker from me whom I found very helpful in my recovery. As a result of your actions I, under no circumstances, will be attending an exit interview with you or JL present.” On 20 November MC advised the Claimant that he would arrange for the interview to be conducted by another member of the senior team in the West. The Claimant advised that she would not be attending any exit interview with senior management.

54. The Claimant had a significant trough in her mental health in November 2019. The Claimant took steps to obtain legal advice from end November 2019. In December 2019 and January 2020 the Claimant undertook some limited training and voluntary work with the Citizens’ Advice Bureau. The Claimant was in receipt of legal advice from a solicitor from early December 2019 to around February 2020. The Claimant consulted her GP on 19 December 2019 regarding low mood, noting no thoughts of self-harm.

55. On 20 January 2020 the Claimant provided her solicitor with 3 pages setting out in writing details of disclosures and detriments. The Claimant researched

her claims online. The Claimant ultimately made a complaint regarding their legal advice.

56. The Claimant commenced ACAS Early Conciliation on 23 December 2020.

57. On 28 February 2020 the Claimant lodged a tribunal claim. It was drafted with  
5 the assistance of an accredited specialist in employment law.

58. From around February to October 2020, the Claimant raised her concerns about the service externally in writing with a number of individuals including with two Members of the Scottish Parliament, Health Improvement Scotland and the Scottish Public Services Ombudsman.

10 59. In March 2020 the Claimant was deemed unfit to work by the DWP and was placed in the Support Group category such that she was not expected to engage in work-related activity for 12 months.

### **Observations on the evidence**

15 60. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

20 61. The Respondent and Claimant witnesses on the whole came across as generally credible and reliable in their testimony which was fair and measured, and consistent with the other evidence. The Claimant's own testimony was however not wholly credible or reliable for the reasons noted below.

#### *Communication with LD – meeting on 18 June 2019*

25 62. There were no informal or formal notes of the meeting on 18 June 2019 other than LD's outcome letter. The Claimant and LD were therefore dependent upon their recollection of a meeting which had taken place over 3 years ago. It was agreed that the meeting lasted around 2 hours. LD asserts that the majority of the meeting was taken up with discussing the Claimant's personal

concerns about the recent disciplinary and absent management process and agreeing a number of actions. The Claimant asserts that the majority of the meeting was taken up with her articulating her whistleblowing concerns about other people.

5 63. The Claimant's whistleblowing concerns largely stemmed from 2017 and 2018. LD's outcome letter of 28 June was intended as a summary of that meeting (to "outline the substance of our discussion"). LD's letter does not describe or allude to any of the whistleblowing concerns the Claimant asserts were raised at that meeting. The Claimant did not contact LD to advise that  
10 the letter failed to outline the substance of their discussion. The letter also noted "During the course our meeting you alluded to action or behaviour of staff that was unacceptable. You didn't provide specifics, however we agreed that if you want to proceed to raise concerns then you can and would be able to do so by providing the information to me and I would arrange for the matter  
15 to be handled through the appropriate processes".

64. The Claimant responded to that letter on 1 July by providing detailed specifics of how she was treated under the disciplinary and absence management procedures. She did not document any whistleblowing concerns other than to note the outcome of survey reports which say that bullying from management  
20 is high. Having considered her letter, LD noted in response "your subsequent letter appears to contain much of the same information covered in our previous meeting and therefore addressed by the actions we agreed on 18 June". It is therefore considered likely that the majority of the meeting on 18 June was taken up with discussing the Claimant's concerns about the disciplinary and absent management process affecting her and agreeing a  
25 number of actions.

65. The Claimant gave evidence that during the course of the meeting on 18 June 2019 LD told the Claimant that she could not discuss other people's situations, only her own. LD disputed this. The Claimant's assertion is not considered  
30 credible because LD had arranged that meeting to discuss the Claimant's whistleblowing concerns, and whistleblowing concerns often pertain to other

5 people's situations. Further, this asserted approach is not reflected in the  
correspondence summarising the meeting which the Claimant did not  
challenge as inaccurate. However, it is considered likely that LD as an HR  
professional was only interested in events which either directly affected the  
Claimant, or were directly witnessed by the Claimant, rather than second-  
hand rumours. Accordingly, it is considered likely that LD did not permit the  
Claimant to give further detail. As the Claimant stated in evidence "I gave little  
snippets of different stories about Lanarkshire" and as the Claimant put it in  
correspondence to PH "I was told [by LD] I could only discuss my own  
10 situation and not stories involving others".

66. The Claimant asserted in evidence that she articulated her whistleblowing  
concerns at the meeting of 18 June 2019 including mentioning people by  
name. She asserted she had attended the meeting with a list of names to act  
as a prompt for her whistleblowing concerns. LD denied that the Claimant  
15 articulated her whistleblowing concerns and denied that she had mentioned  
anyone by name. LD accepted that her recollection was dependent upon her  
written response and her written response did not refer to the Claimant having  
raised any whistleblowing concerns. It is considered likely that the Claimant  
did give some information about her whistleblowing concerns but that LD did  
20 not consider them to be whistleblowing concerns because they were in her  
view historic, secondhand, unspecified, or not a matter of health and safety.  
As LD put it in evidence "we stepped through together" / "we tested together"  
why these were not whistleblowing concerns.

67. The Claimant stated in evidence that she did not put her whistleblowing  
concerns in writing for a number of reasons. She asserted that she struggles  
25 to document things but that was not considered credible given the length of  
her written complaint. She asserted that she was concerned about her  
anonymity (that a letter could be passed around) and that reluctance was  
evident with her repeated insistence on proceeding verbally. She asserted  
that LD had discouraged her from documenting her whistleblowing concerns  
30 and, whilst there was no explicit discouragement, LD had repeatedly  
explained to the Claimant why her concerns did not amount to whistleblowing.

68. The Claimant gave evidence that during the course of the meeting on 18 June 2019 she stated that a named paramedic had told her she was so tired because she'd been out driving her husband's delivery van all day before doing her night shift and then driving the delivery van the next day and that when she reported this to management they turned a blind eye, and this was an obvious danger to the public. The Claimant explained that she had witnessed this. LD disputed that she had said this. It is considered likely that the Claimant said this, but LD did not recall it because she did not consider it to be a whistleblowing concern.
69. The Claimant gave evidence that during the course of that meeting that she had said that other members of staff from a Lanarkshire station had raised concerns that a student technician was not competent, but his mentor was ordered to pass him as competent. LD disputed that she said this. It is considered likely that the Claimant said this, but LD discounted it as mere rumour.
70. The Claimant gave evidence that during the course of that meeting a named colleague and union rep would regularly book himself off from emergency calls as unavailable by falsely stating his uniform was contaminated. She explained that she had witnessed this first-hand. LD accepts this was said, but denies that he was named. It was apparent from LD's evidence that she did not consider this to be whistleblowing – LD said she explained to the Claimant at the time that this was a conduct issue and not a health and safety issue because having a soiled uniform is a hazard of the job. It is noted that although LD recalls the discussion the outcome letter does not capture it - presumably because LD did not regard this as a whistleblowing concern.
71. The Claimant asserted that during the course of that meeting she had given information about a named paramedic from Motherwell whom she'd heard was stealing morphine from ambulances for self-administration and about another named paramedic from Coatbridge whom she'd heard had been inappropriately made to wash vehicles. LD denied this. It is considered likely

that LD did not permit her to give detailed information about something the Claimant had only heard second-hand.

*Communication with LD – meeting on 2 August 2019*

5 72. The Claimant asserted that she raised her whistleblowing concerns at the meeting on 2 August. LD denied this noting that she only raised general unspecified concerns about others. The purpose of that meeting had been to discuss her letter of 1 July which did not contain her whistleblowing concerns. It is considered unlikely that the Claimant raised her specific whistleblowing concerns at that meeting.

10 73. The Claimant asserted in evidence that during the course of the meeting on 2 August LD became angry towards her and physically grabbed her by the arm as the Claimant went to leave, that LD advised her that there would be no investigation into her personal grievances, no investigation into her whistleblowing disclosures, that the Claimant was young and she was older, 15 knew better and the power lay with her, and that she should just 'let it go'. LD disputed this.

74. The Claimant's assertion is not considered credible because LD is a senior HR professional of significant experience and the Claimant did not make any complaint at the time that she had been physically assaulted by LD or 20 harassed by her. (Her reference in correspondence to PH that "LD grabbed me back" falls far short of that.) LD in correspondence was entirely supportive of the Claimant pursuing her concerns under the relevant policies provided it related to matters not previously addressed. LD stated in evidence that she had said to the Claimant that in respect of some complaints she had 25 exhausted their procedures ("had reached their natural conclusion"), and to that extent she would have been conveying the sentiment that she should "let it go" i.e. that she should move on. LD stated that she could see that the Claimant was still very upset by the disciplinary procedure but had noted to her that the ultimate outcome (no disciplinary sanction) was one she could 30 move forward from.

75. The Claimant asserted that MC overheard her blowing the whistle at the meeting on 2 August because he is in the next room and the walls are paper thin and she could tell by the sheepish look on his face when she saw him afterwards. MC disputed this. It is not considered credible that MC overheard the content of their meeting though the wall and in any event it was not accepted that she raised her specific whistleblowing concerns at that meeting.

*Communication with PH in August 2019*

76. PH stated in evidence that in August 2019 she confirmed with LD that she was in discussion with the Claimant about her concerns, and that these were being raised under the whistleblowing procedure but there was no discussion of any specifics. LD confirmed this in evidence. There was no evidential basis upon which it could reasonably be inferred that PH knew the details of LD's discussions with the Claimant.

*Incident on 26 August 2019*

77. The Claimant asserted that LD ought to have investigated the neighbour's complaint of 31 August 2019. The neighbour's complaint was not made to LD. LD gave evidence that the Claimant had mentioned the incident to her but that she had no duty or locus to investigate the neighbour's complaint which the Claimant did not dispute.

78. DH stated in evidence that she was not aware that the Claimant was in discussion with LD regarding her whistleblowing concerns and there was no evidence which contradicted this.

*Appeal meeting on 23 September 2019*

79. The Claimant asserted in evidence that MC had stated "Different if you came in here and said you'd had a difficult year and apologised for being off, but you haven't". MC and JL both disputed this. AS, her union companion had no recollection of this being said and could not recall any behaviour that was inappropriate or untoward at the meeting. The Claimant's assertion is not considered credible because no other attendee can recall this or anything



inappropriate being said and the Claimant did not make any complaint at the time.

5 80. MC stated in evidence that he would have access to the OH report and was aware at the time of the appeal that the Claimant had been absent from work due to stress and anxiety. He was also aware that the Claimant considered that this was work-related stress caused by the disciplinary process.

10 81. JL stated in evidence that she was aware that the Claimant had raised issues regarding the disciplinary process in the context of seeking full sick pay (JL had been asked to comment on the Claimant's letter of 7 August) but she was not aware that the Claimant was raising whistleblowing concerns with LD.

82. MC stated in evidence that he was not aware that the Claimant was raising whistleblowing concerns with LD. The Claimant asserted that MC knew because JL had been in contact with LD but our finding JL was not in fact aware.

15 *Incident on 7 November 2019*

20 83. The Claimant asserted in evidence that on 7 November 2019 LMK told her that he had been put under pressure by MC to report the Claimant in respect of the alleged door-kicking incident. (Not 8 November 2019 as plead.) LMK accepted in evidence that he may have said this. On 15 November 2019 the Claimant texted LMK stating "I was doing well up til last week when you told me MC tried getting you to put in a formal complaint against me". LMK replied trying to explain it rather than refute it. Given the significant passage of time those texts are likely to be the most accurate account. Accordingly it is considered likely that on 7 November 2019 LMK told the Claimant that MC had tried to get him to put in a formal complaint but he had decided not to do so.

25 84. Whilst the Claimant asserts that LMK did this at the meeting on 7 November to cause her upset there is no evidence to this effect and in evidence the Claimant accepted this (although she subsequently wrote to the Tribunal seeking to withdraw this concession after this hearing). There was evidence

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that the Claimant was supported by LMK during her time at Motherwell station and that she felt supported by him (as described in her letter of 1 July). There had been an argument between them over the part-time working application on 23 August which had resulted in the alleged door-kicking incident. The Claimant was absent from work with stated work-related stress and anxiety from 23 August until 15 September 2019. A return to work meeting was arranged for 7 November. The reason for LMK's comments at that meeting was his desire to return to their good working relationship and this would have been apparent to the Claimant. He was making it clear that he would have been entitled to make a formal complaint about the door-kicking incident and that he was doing her a favour by deciding against it. This supportive approach is reflected in his decision not to proceed with a formal complaint which he made clear to her at the meeting. This supportive approach is also apparent in the subsequent text messages he sent to her on 15 November about the meeting.

85. LMK stated in evidence that he had sought advice from other managers on whether to proceed to make a formal complaint about his belief that she had kicked the door multiple times in anger. LMK initially stated in evidence that MC gave him his opinion which was to proceed. He explicitly described this as an "opinion" and "guidance" that was to inform his own decision. He accepted that he may have told the Claimant on 7 November that MC put him under pressure but he again stated in evidence "I didn't consider I'd been put under pressure". When asked why he may have said that to her he stated that perhaps after the meeting with MC he come to consider it as pressure. MC's evidence was that when LMK approached him for advice, he suggested he should take advice from HR but he did not put him under any pressure to put in a formal complaint in respect of an alleged incident many weeks earlier. The Claimant said in evidence that MC had previously said that his preference was to adopt an informal approach to conduct issues and MC accepted that in cross-examination. It is considered likely that whilst MC gave an opinion on taking HR advice he did not put pressure on LMK to formally report the Claimant.

86. AS, the Claimant's union companion stated in evidence that in his experience the Respondent was very fair in conduct hearings. He thought that if the alleged door-kicking incident had been formally reported it would warrant investigation but didn't think it would result in dismissal if there were no prior warnings. This view was supported by LMK in evidence.

87. LMK stated in evidence that he was aware that the Claimant had made complaints about how she had been treated during the disciplinary investigation but he was not aware that she had raised issues about other people.

*Resignation on 15 November 2019*

88. As the Claimant stated in evidence the reason for her resignation stemmed back to the disciplinary investigation for bullying and harassment which had a significant effect on her mental health, and what she perceived as the "bully boy tactics" in relation to the management of her absences and the alleged door kicking incident. She stated she was getting so wound up that she had to move on to focus on her health. In drafting her letter she said she had googled phrases to include for a potential constructive dismissal claim.

*Post Termination*

89. The Claimant asserted that upon leaving she had requested that she be able to speak to PH but this was ignored. This was not supported by the evidence. The Claimant had said she was willing to meet but she had not requested a meeting. The Claimant was offered an exit interview with senior management which she declined.

90. AS her union companion stated in evidence that he accompanied her to the disciplinary and capability hearings and that he would have advised on her employment rights to bring a claim to an employment tribunal and that he would have said "stand and sue".

91. The Claimant asserted in evidence that she didn't have the motivation to do anything for the first month after she resigned on 15 November but accepted she was fit to contact ACAS by mid-December.

5 92. The witnesses were consistent in evidence that someone on Stage 2 monitoring who was deemed unfit to work for 12 months would be moved to Stage 3, but the outcome of that meeting would depend upon a number of factors including likelihood of a full return to work and the scope to redeploy and would not necessarily result in their dismissal.

### **The law**

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#### *Protected disclosure*

93. Under Section 43A Employment Rights Act 1996 ('ERA') a protected disclosure is a qualifying disclosure made by a worker to his employer (Section 43C) or to a prescribed person (Section 43F). The burden of proving a protected disclosure rests upon the Claimant.

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94. Under Section 43B ERA 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 relevant wrongdoing including "(d) that the health or safety of any individual has been, is being or is likely to be endangered."

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#### Disclosure of information

95. The disclosure must be an effective communication of information but does not require to be in writing. The disclosure must convey information or facts, and not merely amount to a statement of position or an allegation (*Cavendish Munro Professional Risks Management Ltd v Geduld* 2010 IRLR 38, EAT). However an allegation may contain sufficient information depending upon the circumstances (*Kilraine v Wandsworth London Borough Council* [2018] ICR 1850, Court of Appeal).

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Reasonable belief

96. The worker must genuinely believe that the disclosure tended to show relevant wrongdoing and was in the public interest. This does not have to be their predominant motivation for making the disclosure (*Chesterton Global Ltd v Nurmohamed [2018] ICR 731, Court of Appeal*). Their genuine belief must be based upon reasonable grounds. This depends upon the facts reasonably understood by the worker at the time.

Relevant wrongdoing – (d) endangering health or safety

97. A qualifying disclosure arises where there is disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered. It does not necessarily entail breach of a legal obligation.

In the public interest

98. 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 relevant wrongdoing.

99. The worker must genuinely believe that disclosure is in the public interest. That belief must be based upon reasonable grounds which may be easier to satisfy where the wrongdoing amounts to a criminal offence or an issue of health and safety. Where the worker has a personal interest in the relevant wrongdoing, it may be relevant consider the number of other workers affected, the nature and importance of the interest, and the identity of the wrongdoer (*Chesterton*).

*Detriment*

100. Under Section 47B ERA a worker has the right not to be subjected to any detriment by their employer (or a fellow worker in the course of their employment) because they have made a protected disclosure.
101. A detriment is a reasonably perceived disadvantage (*Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*). It may arise from a deliberate failure to act which occurs when it is decided upon.
102. For a complaint of detriment the protected disclosure must be a material (i.e. more than minor) influence on the employer's treatment of the whistleblower. Accordingly, the actor (or their manipulator) must have knowledge of the protected disclosure (*Royal Mail Group Ltd v Jhuti [2020] ICR 731, SC*).
103. The reason for the detrimental treatment may be the means or manner of disclosure rather than the act of disclosure itself but such a distinction must be scrutinised carefully (*Shinwari v Vue Entertainment UKEAT/0394/14, EAT*).
104. Under Section 48(2) it is for the employer to show the reason for the detrimental treatment. If not the prohibited reason may be inferred.
105. Under Section 48(3) a complaint of detriment must be presented before the end of the period of three months beginning with the act or failure to act, or the last of any series of such acts or failures. Where it was not reasonably practicable to do so, it must be presented within such further period as the tribunal considers reasonable.

#### *Constructive dismissal*

106. 'Dismissal' is defined in s 95(1) ERA 1996 to include 'constructive dismissal', which occurs where an employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct (s 95(1)(c)).
107. The test of whether an employee is entitled to terminate their contract of employment without notice is a contractual one: has the employer acted in a way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the contract: (*Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*).

108. There must be a breach of contract by the employer which is “a significant breach going to the root of the contract” (*Western Excavating*). This may be a breach of an express or implied term. The essential terms of a contract would ordinarily include express terms regarding pay, duties and hours and the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (*Malik v Bank of Credit and Commerce International Ltd [1998] AC 20*).
109. The breach may consist of a one-off act amounting to a repudiatory breach. Alternatively, there may be a continuing course of conduct extending over a period and culminating in a “last straw” which considered together amount to a repudiatory breach. The “last straw” need not of itself amount to a breach of contract but it must contribute something to the repudiatory breach. Whilst the last straw must not be entirely innocuous or utterly trivial it does not require of itself to be unreasonable or blameworthy (*London Borough of Waltham Forest v Omilaju [2005] IRLR 35*).
110. Whether there is a breach is determined objectively: would a reasonable person in the circumstances have considered that there had been a breach. As regards the implied term of trust and confidence: “*The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of...*” (*Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT*).
111. The breach must be a factor (i.e. have played a part) in the Claimant’s resignation. The Claimant must not have affirmed the breach by any delay in resigning. It is open to the employer to establish that the reason for conduct amounting to breach was potentially fair and if so to consider whether the employer acted reasonably in all the circumstances.

*Automatically unfair constructive dismissal*

112. Under section 103A ERA an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

5 113. For a constructive dismissal to be automatically unfair the protected disclosure must be the principal reason for the conduct amounting to a repudiatory breach.

*Harassment*

10 114. Section 26(1) of the Equality Act 2010 provides that “A person (A) harasses another (B) if - (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of - (i) violating B’s dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B”.

15 115. The tribunal must determine whether the Respondent engaged in the unwanted conduct; and whether that conduct had the purpose or the effect of violating the claimant’s dignity or creating an offensive environment.

20 116. In deciding whether the conduct has that effect the tribunal must take into account “the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect” (Section 26(4) EA 2010). This entails both a subjective question (what did B perceive?) and an objective question (was it reasonable, etc?) (*Pemberton v Inwood [2018] EWCA Civ 564, CA*)

25 117. Section 136(2) of EA 2010 provides that “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions”.

30 118. These burden of proof provisions apply where the facts relevant to determining discrimination are in doubt. The burden of proof provisions are not relevant where the facts are not disputed or the tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board [2012] UKSC 37, SC*).



119. Under Section 123 a complaint of harassment must be brought within the period of 3 months starting with the date of the act or such other period as the tribunal thinks just and equitable.

**Claimants' submissions**

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120. During her submissions the Claimant withdrew the following complaints of detriment: detriment d. (DH failed to put in place steps to ensure the Claimants welfare), detriment f. (LMK told her with a view to upsetting her) and g. (PH failed to support or meet with her). After this hearing the Claimant wrote to the Tribunal seeking to retract the withdrawal of detriment f. (LMK told her with a view to upsetting her).

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121. The Claimants' submissions were in summary as follows –

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a. She attended the meeting with LD with a list of names to act as a prompt for her whistleblowing concerns. LD didn't understand whistleblowing.

b. She received external advice to put her whistleblowing concerns verbally and ultimately not to raise her concerns with PH.

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c. She had blown the whistle and the others knew about it. MC heard it through the walls. JL and PH knew she was using the whistleblowing procedure.

d. She was motivated by public health and safety, that's why she ultimately blew the whistle externally.

e. LD had initially been willing to act on her complaints but refused to act on her complaints after she had blown the whistle.

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f. The Respondent's pleadings and MC's evidence were contradictory regarding his knowledge of mental impairment. AS, union rep thought nothing untoward happened but that's because he simply couldn't recall what happened at the appeal hearing.

- g. PH failed to progress her complaints despite knowing LD has failed to act. She abdicates rather than delegates.
- h. Hearing that MC tried to put her under investigation again (which amounted to pressure) was the trigger for her resignation.

5 **Respondent's submissions**

122. The Respondent's submissions were in summary as follows –

- a. The Claimant's evidence was unreliable and should be rejected.
- b. LD's summary of the meetings do not describe her having made specified disclosures, the Claimant was invited to set out her disclosures in writing but did not do so, and in these circumstances it was not credible that she made disclosures. The onus of proof is upon the Claimant.
- c. Raising an unspecified concern regarding wrongly booking off for a soiled uniform does not provide grounds for a reasonable inference of a risk to health and safety.
- d. The Claimant's motivation for making any disclosures was not a concern about public safety otherwise she would have made the disclosures promptly and in writing and not in the context of her complaints being subject to disciplinary and attendance procedures.
- e. Any disclosures were not made in good faith given the substantial delay, the failure to make in writing, and their use as a tool in procedures affecting her.
- f. LD took her complaints seriously by inviting her to progress the complaints which had not already been dealt with.
- g. The corroborated and consistent witness evidence is that there was nothing untoward or concerning about the meeting of 23 September 2019 and there was no unwanted conduct related to disability.

- h. LMK's evidence was inconsistent and confusing regarding what MC had said. MC was entitled to provide LMK solicited advice in relation to the alleged door-kicking incident of 23 August 2019.
- 5 i. The neighbour's complaint of 31 August 2019 was followed up by DH to the complainant's satisfaction.
- j. There was no credible evidence that anything untoward occurred at the meeting on 23 September 2019.
- k. PH offered to meet with the Claimant which she declined. The complaints were wholly baseless.
- 10 l. The protected disclosures must be the real reason/ motive for the detrimental treatment (*Aspinall v MSI Mech Forge Ltd EAT891/01*). Only LD had knowledge of the detail of their meeting. It was evident that the witnesses were all motivated to help the Claimant. There was no basis to infer that her treatment was in any way related to her whistleblowing concerns. The Claimant made no mention of whistleblowing detriment in her letter of resignation.
- 15 m. There was no credible evidence of any breach of contract. The onus is upon the Claimant. The Claimant's willingness to remain in employment undermined the repudiatory nature of the alleged earlier breaches.
- 20 n. The last straw was not and did not contribute towards a breach. The Claimant failed to make any enquiries with MC himself. In any event it would have been legitimate for MC to firmly suggest that allegedly kicking a door in anger should be investigated (provided he was not motivated by a protected disclosure).
- 25 o. The effective cause of her resignation was that she had exhausted her sick pay entitlement and she remained very unhappy about the original disciplinary investigation.
- p. It was accepted that any repudiatory breach was not affirmed by any delay in resigning and that any repudiatory breach was unfair.

q. The Claimant's own conduct in kicking the door materially contributed to the circumstances of her resignation.

r. Had she not resigned the Claimant's employment would have been terminated by reason of incapacity in March 2020 given the DWP declaration.

s. The Claimant was aware of her legal rights and the time limits. The Claimant had access to a union rep who was able to provide appropriate advice. The Claimant was able to procure specialist employment solicitors. The Claimant was able to work during part of the period of delay. There was no good reason for the delay accordingly time should not be extended.

### **Discussion and decision**

#### *Did the Claimant make a qualifying disclosure to LD?*

123. On 18 June 2019 the Claimant made a verbal disclosure of information to LD, Director of HR, about a named paramedic who was driving whilst exhausted because she had another driving job and regarding another named paramedic who would render himself unavailable to respond to emergencies under false pretences.

124. Driving whilst exhausted presented an obvious risk to public safety. Reducing emergency response capacity presented an obvious risk to public health. The Claimant reasonably believed that the disclosures were in the public interest and tended to show that the health or safety of any individual was likely to be endangered.

125. It is irrelevant that the Claimant's predominant motivation for making the disclosures was the advancement her own personal grievances. Accordingly the Claimant made a qualifying disclosure to LD.

#### *Was the Claimant subjected to a detriment?*

126. The Claimant's complaints of bullying and harassment set out in her letter of 1 July 2019, and discussed at the meeting on 2 August 2019, were not ignored by LD. In respect of complaints which pertained to matters not previously  
5 addressed, LD encouraged her to utilise their grievance and dignity at work procedures. In respect of complaints where she had exhausted their procedures, LD conveyed the sentiment that she should 'let it go'. LD did not subject the Claimant to what could reasonably be perceived as a disadvantage.
- 10 127. At the absence management appeal on 23 September 2019 JL, Head of HR prevented the Claimant from describing in detail her complaints regarding the disciplinary process, explaining to her that the internal processes had been exhausted and that the focus was now on her attendance at work. MC, Deputy  
15 Regional Director did not seek her apology for being off. MC did not say that there were no medical grounds for her absence. MC and JL did not subject the Claimant to what could reasonably be perceived as a disadvantage.
128. In September 2019 MC did not put pressure on LMK, Area Service Manager, to report the Claimant in respect of the alleged door-kicking incident. When LMK  
20 approached him for advice, he suggested that he should take advice from HR. MC did not subject the Claimant to what could reasonably be perceived as a disadvantage.
129. LD did not fail to investigate the neighbour's complaint of 31 August 2019 because she had no duty to do so. The complaint was instead investigated by  
25 DH, Head of Service. DH confirmed that steps were in place to ensure the Claimant's welfare. LD and DH did not subject the Claimant to what could reasonably be perceived as a disadvantage. The complaint against DH was ultimately withdrawn.
130. PH, Chief Executive did not fail to action or investigate her complaints of 16  
30 and 24 August until she offered to meet with her on 7 October 2019. PH advised the Claimant that she was to continue progressing her complaints with LD. PH did not subject the Claimant to what could reasonably be perceived as a disadvantage.

131. LMK did not tell the Claimant on 7 November 2019 that MC had put pressure on him to report the alleged door-kicking incident with a view to upsetting her. He told her he had sought advice on what to do about the door-kicking incident, that MC had tried to get him to put in a formal complaint, but that he had decided against it. It would have been apparent to the Claimant that his comments were not made with a view to upsetting her but rather to make clear that he would have been entitled to put in a formal complaint and he was instead doing her a favour with a view to restoring their good working relationship.
132. PH did not fail to support or offer to meet with the Claimant after her resignation on 17 November 2019 and this complaint was ultimately withdrawn.

*Was a detriment done on the ground that the Claimant made a protected disclosure?*

133. LD did not consider that there had been a protected disclosure and explained this to the Claimant. The focus of their meetings had been the Claimant's concerns about the disciplinary and absent management processes and their affect on her. The reason for her treatment of the complaints of 1 July was that LD wanted the Claimant to move on in respect of those complaints where she had already exhausted their procedures but to understand she could raise a grievance in respect of complaints which had not previously been addressed. LD did not investigate the neighbour's complaint of 31 August 2019 because she had no duty to do so. There was no reasonable basis upon which it could be inferred that the protected disclosures in any way negatively influenced her treatment of the Claimant. In any event LD did not subject her to a detriment.
134. Neither JL nor MC was aware that the Claimant had made a protected disclosure to LD on 18 June 2019, and they were not aware that she was raising whistleblowing concerns with her. At the appeal meeting on 23 September, the reason for JL's approach to the background complaints was that she wanted the Claimant to focus on her attendance, which was the purpose of the meeting. The reason for MC's approach was that he wanted the Claimant's attendance at work to improve. The reason behind the opinion

he expressed to LMK was that MC thought the alleged door-kicking incident should benefit from HR advice. There was no reasonable basis upon which it could be inferred that the protected disclosures in any way negatively influenced either JL's or MC's treatment of the Claimant. In any event, neither JL nor MC subjected her to a detriment.

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135. Neither DH nor LMK was aware that the Claimant had made a protected disclosure to LD on 18 June 2019 and they were not aware that she was raising whistleblowing concerns with her. After the incident on 26 August 2019, the reason for DH's conduct was that she wanted to help the Claimant by confirming that welfare steps were in place. The reason for LMK's comments to the Claimant at their meeting on 7 November 2019 was his desire to return to their good working relationship. There was no reasonable basis upon which it could be inferred that the protected disclosures in any way negatively influenced either DH's or LMK's treatment of the Claimant. In any event neither DH nor LMK subjected her to a detriment.

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136. PH was not aware that the Claimant had made a protected disclosure to LD on 18 June 2019, but she was aware that the Claimant was raising whistleblowing concerns with LD. PH sought to ensure that her concerns were being progressed by LD, and when the Claimant insisted that they weren't, PH arranged to meet with the Claimant to progress matters herself. There is no reasonable basis upon which it could be inferred that PH's awareness of her having whistleblowing concerns in any way negatively influenced her treatment of the Claimant. In any event PH did not subject her to a detriment.

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137. The complaints of whistleblowing detriment do not succeed and are dismissed.

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*Was the Claimant constructively dismissed?*

138. The Claimant asserts that the detriments considered together constitute a course of conduct which amounted to a repudiatory breach of the implied duty of trust and confidence. Since the Claimant was not subjected to any of the detriments there was no such repudiatory breach. The Claimant asserts that the last straw was being advised by LMK that he had been placed under pressure by MC to report her in respect of a spurious allegation of misconduct.

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LMK in fact had told her that MC had tried to get him to put in a formal complaint. Although MC did not do this, the Claimant reasonably believed he had, and he would have been entitled to have done this given that LMK had just advised him she had kicked a door multiple times in anger and he was seeking his advice. Considered objectively, there was no reasonable basis on which it could be said that the Respondent as employer had acted in a way that was calculated or likely to destroy or damage their relationship of trust and confidence.

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139. The reason for the Claimant's resignation was multifactorial. The Claimant continued to harbour concerns about the "unjust" disciplinary investigation and hearing held in April 2019 and about the inadequate investigation of her counter-allegations. In May 2019 the Claimant expressly advised that she was considering filing for ACAS early conciliation because of the disciplinary process and her absences on half pay. In August and September 2019 she was told that all internal procedures regarding her complaints about the disciplinary investigation and procedures had been exhausted, but she continued to feel that she had "no closure." During the disciplinary process the claimant had fixated on the risk of dismissal. She had significant periods of absence with stated work-related stress which she attributed to the disciplinary process and her counter-allegations. The Claimant was put on absence management monitoring. By early August the Claimant had begun to contemplate the "future action that may be taken" by her which was before any of the treatment relied upon as whistleblowing detriments. By late August she was expressly "considering constructive dismissal due to the impact on my health". By early September she advised of her intention to contact ACAS. In late September 2019 the extended absent management monitoring was confirmed and failure to improve her attendance would therefore risk her dismissal. The Claimant exhausted her entitlement to sick pay by October 2019. The reason for the Claimant's resignation was multifactorial but she did not resign because of the treatment relied upon as whistleblowing detriments.
140. The complaint of constructive dismissal does not succeed and is dismissed.

*Was there an automatically unfair constructive dismissal?*



141. The protected disclosure was not the reason for her treatment which in any event did not amount to a repudiatory breach.

142. The complaint of automatically unfair constructive dismissal does not succeed  
5 and is dismissed.

*Was the claimant subjected to harassment related to her disability?*

143. The Claimant was disabled by reason of anxiety at the time of the absence management appeal meeting on 23 September 2019. At the absence  
10 management appeal on 23 September 2019 JL, Head of HR prevented the Claimant from describing in detail her complaints regarding the past disciplinary process. The Claimant was expressly advised that her purpose in doing so was to focus the meeting on her attendance at work. MC, Deputy Regional Director did not seek her apology for being off. MC did not say that  
15 there were no medical grounds for her absence. There was no reasonable basis upon which it could be inferred that MC or JL subjected the Claimant to unwanted conduct related to her disability or that the purpose or effect of their conduct was to violate the claimant's dignity or create an intimidating or humiliating environment for her.

20 144. The complaint of harassment does not succeed and is dismissed.

*Were the complaints presented within the statutory time limits?*

145. The complaints rely upon alleged acts of detriment and harassment arising prior to 25 September 2019 and are accordingly affected by the time limits  
25 (since they arise more than 3 months prior to ACAS Early Conciliation on 24 December 2019).

146. The complaints of detriment pertain to the period August and September 2019. The Claimant was aware of her employment rights and relevant time limits for submitting a claim. Whilst the Claimant experienced a significant  
30 trough in her mental health in November 2019 she was in attendance at work from mid-September until mid-November. She took advice from her union companion in November and legal advice in early December. We therefore

considered it reasonably practicable for the Claimant to have presented the complaints of detriment arising prior to 25 September 2019 within the 3 month time limit.

5 147. The complaint of harassment pertained to the meeting of 23 September 2019. Had the complaint of harassment not been otherwise dismissed we would have found it just and equitable to extend the time limit for presenting that complaint given the significant trough in her mental health in November and the brief delay of a few days which arose immediately after the termination of her employment.

10 148. In conclusion, the unanimous judgment of the Tribunal is that the complaints of protected disclosure detriment, constructive dismissal, automatically unfair dismissal and harassment related to disability do not succeed and are therefore dismissed.

15 Employment Judge: Michelle Sutherland  
Date of Judgment: 14 December 2022  
Entered in register: 16 December 2022  
and copied to parties