EMPLOYMENT TRIBUNALS

Claimant: **Miss Jacqueline Henshall**

Respondent: **Guy's and St Thomas' NHS Foundation Trust**

By CVP On: **25 October 2022 – 7 November 2022 and 13 February 2023. 14 – 16 February 2023 in chambers.**

Before: **Employment Judge Martin**
Mr W Dixon
Ms F Whiting

Representation:
Claimant: **In person**
Respondent: **Ms Casserley - Counsel**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's claim of unfair dismissal fails and is dismissed

2. The Claimant's claims of disability discrimination fails and is dismissed

3. The Claimant's claim of detriment for making a protected disclosure fails and is dismissed

4. The Claimant's claim for unauthorised deduction from wages fails and is dismissed.

5. The Claimant withdrew her claims for reasonable adjustments and age discrimination and these claims are dismissed.

RESERVED REASONS

1. By claim form presented on 8 March 2020 the Claimant made claims of discrimination on the protected characteristics of disability, detriment for making a public interest disclosure, unfair dismissal, unauthorised deductions from wages and age discrimination. The Respondent defended the claims in a response. ACAS early conciliation lasted from 7 February 2020 to 5 March 2020.

2. The Tribunal had before it witness statements from:

   For the Claimant

   a. The Claimant
   b. Mary Siobhan Ford (statement taken as read)
   c. Ms Bharti Bhoja (Senior Finance Manager for Private Patients)

   For the Respondent

   a) Ms Georgina Charlton (Organisational Change Lead)
   b) Ms Marie MacDonald (Trust's Director of Quality and Assurance)
   c) Mr Shaun Holsgrove (Head of Payroll & Pensions)
   d) Mr Andrew Hodge (External investigator)
   e) Professor Adam Fox (Consultant in Paediatric Allergy and as Deputy Medical Director for Trust)
   f) Mr Mark Hudson (Deputy Director of Workforce)
   g) Mr Martin Shaw (Finance Director)
   h) Ms Victoria Cheston (Commercial Director)

3. The Tribunal had a chronology, cast list and various separate electronic bundles of documents consisting of well over 2000 pages. Both parties provided written submissions which were presented orally. These submissions were considered in some detail by the Tribunal during its deliberations. They are not set out in full for proportionality.

4. These findings of fact and conclusions are made on the balance of probability. The Tribunal heard a substantial amount of evidence. Not all evidence heard is referenced in this judgment. The reasons are confined to the list of issues and what is necessary to explain the decision reached. It should not be inferred that the Tribunal has ignored evidence if it is not specifically mentioned in this judgment.

5. One of the main issues discussed in the various case management hearings were the particulars of the Claimants claims. The Claimant had not provided full particulars of her claim and it was not clear precisely what issues she required to be determined for her various claims.

6. Despite there being several preliminary hearing, there were numerous

matters which had to be dealt with before the evidence was heard. The first issue was in relation to without prejudice communications which the Claimant had included in her witness statement. This was included despite Employment Judge Cheetham KC explaining in a preliminary hearing and in his order what without prejudice meant and that without prejudice matters should not be placed before the Tribunal. The Respondent had asked for another Judge to consider this before this hearing started but there was no other Judge available. The Claimant refused to redact her statement. The Tribunal therefore had the without prejudice information before it but ignored it and this did not play a part in its deliberations or judgment.

7. There was also an outstanding issue in relation to disclosure from the Claimant in relation to a personal injury claim which she had brought against the Respondent arising out of the same accident which is a subject matter of this hearing. During that litigation various medical reports were prepared and the Claimant agreed during a case management hearing to contact her solicitors so they could be disclosed in these proceedings. She did not do so. They were therefore not before the Tribunal even though they were of relevance.

8. The Claimant had said that she had issues using a computer for long periods of time and this was something raised by the Respondent who was concerned that as this hearing had to be heard by CVP (there was no panel available to hear it in person) that this might cause her difficulties. This was discussed at the outset and the Claimant was encouraged to tell the Tribunal if she needed a break and the Tribunal during the hearing on many occasions offered her a break most of which we refused. It was recognised that using CVP can, for some people, be more difficult then attending a hearing in person.

9. The Claimant asked if she could record the hearing. She referred to a case which Employment Judge Martin had heard where recording had been allowed. Judge Martin explained that this was in a very specific situation where the Claimant was paying for the proceedings to be transcribed and the transcription service, which had a secure recording system, wanted to record so they could check their transcript was accurate. In that case, recording was allowed on the proviso that the recording was deleted at the end of each day and that the transcription service confirmed in writing that it had been so deleted. These circumstances did not arise in this case and there was no method available of securely recording the proceedings.

10. Having read the witness statement of the Claimant, it was noted that she referred to victimisation. Victimisation was not something that had been pleaded and therefore not something that the Tribunal could consider. This was explained to the Claimant.

11. The Respondent made an application to strike out various parts of the Claimants claim. This was in relation to aspects of the claim which the

Claimant had not yet particularised. Employment Judge Cheetham KC had ordered the Claimant to provide the particulars in her witness statement. This was after several attempts to get the details from the Claimant both by the Respondent and by Judges in various preliminary hearings. It was highly unusual, and of benefit to the Claimant that Judge Cheetham gave her one more chance to provide the details in her witness statement. Notwithstanding the very clear directions given to her, the Claimant did not provide these details. This resulted in the Tribunal striking out paragraphs 29.3 - 29.6 and 29.8 - 29.11 of the list of issues.

12. On day 2 the Claimant applied for reconsideration of the Tribunal's decision on the strikeout application. This was dismissed on the basis that the Claimant had had many opportunities to clarify her claims but had failed to do so. This is despite the generous order of Judge Cheetham KC that she could add in particulars in her witness statement. Whilst the Tribunal appreciated she was representing herself; this had already been acknowledged in the various case management orders already made. The Respondent was entitled to know the case it faced before the hearing began.

13. The Claimant withdrew her claim of direct age discrimination at the start of the hearing. On day five of the hearing the Claimant withdrew her claim for failure to make reasonable adjustments.

14. The Claimant complained that the Respondent had failed in its duty of disclosure as it had not included in the bundles some policy documents. She alleged that a fair trial was not possible. The Tribunal decided that a fair trial was possible and that a copy of the relevant procedures could be provided to all parties and the Tribunal if necessary. Whilst it might have been unfortunate that it had not been included (the Respondent had not thought it was a relevant policy, and the Claimant, despite having had the bundle for some time had not asked for it to be included) it did not come close to rendering a fair trial not possible.

15. During the hearing the Claimant referred to her memory which she said had been impaired due to the accident which she had at work. The Tribunal ensured that the Claimant had time to consider evidence and the questions that she wanted to ask the Respondent witnesses and offered regular breaks.

16. On the first day of the hearing, Judge Martin advised the Claimant that she would need a clean copy of her witness statement and the bundle. Just as the Claimant was about to give evidence, Judge Martin noticed that her witness statement was heavily marked and annotated. They therefore had to be an adjournment so that a clean copy of the statement and bundles could be got to the Claimant.

17. Notwithstanding the numerous preliminary hearings in the directions given the Tribunal was still unsure what disclosures the Claimant was

relying on as being protected disclosures for the purposes of her whistle blowing claim. The Tribunal therefore requested that the Respondent prepared a document setting out all possible matters which could be disclosures relied on. This was a 9-page document. The Claimant annotated this document to show what parts of it were the disclosures she wanted to rely on. At the end of the hearing and just before submissions were given, the Tribunal went through this list once again to ensure that all parties agreed what the alleged protected disclosures were.

18. The original list of issues is set out in an appendix to this Judgment and has been annotated to show the claims which have been withdrawn and those which had been struck out. The list of disclosures relied on by the Claimant as agreed during the hearing is set out below.

a. Grievance letter 3 April 2018

"1. Failure by Victoria Cheston to discharge her duty of care under the 1974 Health and Safety at work Act by notifying the Health and Safety Executive of a workplace accident as identified and investigated by Steve Copping. GSTT Health and Safety Manager on 21st November 2017." ERA 43(b)

"2. Failure by Victoria Cheston to ensure the HSE carried out a mandatory investigation as identified under the 1974 Health and Safety at Work Act due to the nature of my workplace injury i.e. loss of consciousness". ERA 43(b)

"3. Negligent estates management by Victoria Cheston and GSTT with far wider issues and implication for further injuries" ERA 43(d)

"4. Failure by Victoria Cheston to lead on identifying and removing Cambridge Fasteners (top shah window opening mechanisms) that have been incorrectly installed to an unspecified number of Counting House double-hung sash windows and were the main contributory factor to my workplace accident." ERA 43(d)

b. Email from the Claimant to Ms Diane Summers 6 November 2018 with attached photographs x 4. ERA 43(d)

c. Email from the Claimant to Ms Diane Summers 6 November 2018 with attached photographs x 6. ERA 43(d)

d. Email from the Claimant to Ms Diane Summers 7 November 2018 with attached highlighted photographs. ERA 43 (b) and 43(d)

"reflective of operational needs, which also includes supporting Essentia on risks owned by them. The windows in my area should have been flagged as safety risks and evidence by prior

and remaining broken mechanisms and my wholly avoidable workplace accident. Even today the Commercial Meeting Room windows, with broken Cambridge fasteners still evident, could easily sop off an operatives fingers and 2 months later, there is no safe working opening and closing mechanism to the large double-hung sash windows". ERA 43 (d)

"As of today there does not exist a GSTT policy that covers Workplace Fall Risks for staff." ERA 43 (d)

"GSTT Policy document of "loss of consciousness caused by head injury". ERA 43 (b)

"According to GSTT's own policy this is a criminal offence". ERA 43(b)

"There was no Risk Register for the Commercial DMT offices so subsequently this is yet another GSTT policy that not only was not followed but was completely disregarded. As a consequence of my workplace accident on 19 September 2017 a mandatory Risk meeting was held for all Commercial staff on 28 February 2018 introducing all staff to the concept of GSTT Risk Management Policy and introducing them for the first time to the Commercial DMY offices Risk Register". ERA 34(d)

"The Risk Register Hierarchy (8) and the Quality Assurance of Risk Registers (10) were neither followed, adhered to, evidence or of value as the double-hung sash windows along with several other health and safety risks e.g. frequently leaking ceilings including from toilet pipes, falling ceiling tiles, flying debris etc within these offices were simply not identified. This culminated in minor workplace injuries and then one serious workplace accident with major injuries on 19 September 2017." ERA 43(d)

e. Transcript excerpt with Claimant's handwritten annotation of grievance investigation meeting on 30 May 2018.

"But I don't know if one has bee removed, but there's one in the boardroom that's still got all the ropes attached to it, although they're broken. So when there's up to 40 of us sitting in that boardroom having training, we have to lift that window up and stick one of those silly little wooden things to hold the window open". ERA 43(d)

"So there's never been any ongoing preventative maintenance around these pulley systems". ERA 43(d)

"I had to move staff away from the area, and then when this Essentia came back in, they said "who said there was an issues with this?" and I said, "The guy that was here last week". They

> said "no, there's not issue. It's safe". And I said "Well let's get it fixed and then we'll agree its safe". That's all I remember from this particular one. That's all documented an email-exchanges as well". ERA 43(d)
>
> "There'd been so may issues in commercial that were happening on a not infrequent basis, particularly around ceiling tils and flooding […] I particularly relevant to a specific person being hurt, my assumption, rightly or wrongly, was it was being taken care of by the office seniors, not the individual characters. ERA 43(d)

19. The Respondent's grounds of resistance set out the Claimant's role. "The Claimant was employed by the Respondent from 14 December 2015 until 30 November 2019 as the Head of Private Patients. The private patient facilities at the Respondent include an inpatient ward, an outpatient facility and private maternity, paediatric and assisted conception services. All profits from private patient services go towards the funding of core NHS services and the profit generated is critical to the finances of the Respondent. The Claimant had both strategic and operational responsibilities which included oversight of all private patient activity across the organisation as part of a senior leadership role". The Claimant was employed at a senior level at band 8d.

20. The Claimant was initially line managed by Ms Cheston. Ms Cheston explained to the Tribunal that when the Claimant was employed there were some concerns about her references. During her employment and crucially before her accident on 19 September 2017, Ms Cheston had meetings with the Claimant about her performance. This was denied by the Claimant who referred to her getting a pay rise which she said reflected her good performance. Ms Cheston explained that at that time the pay rises were automatic and not related to performance. The Tribunal has no reason to disbelieve her.

21. As with many NHS buildings, there are some maintenance issues at the Respondent. It appears that the fixings to a window may have been defective which led to the Claimant having an accident in which she suffered an injury to her head. It is this accident which is the catalyst for the substance of her claims to the Tribunal. The Claimant also had a stroke. Initially she said that this was caused by her accident. She said this in her disability impact statement which she made on 23 July 2021. However she then said that she had been told that the stroke was not related to her head injury. It later transpired that the Claimant knew of this when she wrote her impact statement. Many of her symptoms were referred to as being part of her head injury and stroke. There was no medical evidence from which the Tribunal could determine what symptoms related to which issue.

22. By way of an overview before getting into the details of the individual issues (as set out in the appendix) after her accident, the Claimant went to Accident and Emergency, and had a scan. She went to work the next day and over

the next few weeks and then took time off. She also went to Greece on holiday. The Respondent asked her to let it know whether that time off was to be treated as holiday or as sick leave. She did not respond to this for some time which led to issues arising in relation to her pay.

23. The Respondent referred the Clamant to occupational health on several occasions and the Claimant also visited her GP. The Claimant raised a grievance whilst on sick leave on 3 April 2018. While she was on sick leave other members of staff told Ms Cheston that they had difficulties with the Claimant and felt that they were being bullied. One member of staff had resigned, and another indicated she would also resign if the Claimant returned to work. This resulted in an investigation being started with an external independent investigator. When the Claimant was due to return to work in April 2018, she was put on suspension pending the outcome of the investigation which was considered necessary given the type of complaints received about her. The outcome was that the Claimant's employment was terminated on 9 December 2019 for some other substantial reason or in the alternative conduct or capability. The Claimant appealed but did not attend the appeal hearing despite being offered the opportunity to do so. The appeal was dismissed.

24. The Tribunal considered the issues as they were set out in the list of issues. For a detailed chronology reference can be made to the chronology in the appendix. This was prepared by the Respondent and was before the Tribunal. The Claimant did not dispute any aspect of this chronology despite being invited to.

Direct Disability Discrimination

25. S6 of the Equality Act 2010 sets out the definition of disability under the Act.

"a person has a disability if he or she has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities".

26. In Goodwin v Patents Office 1999 ICR 302 the EAT gave guidance on the proper approach to adopt. Although this pre-dates the Equality Act 2010, the guidance is relevant when deciding matters under the Equality Act 2010. The guidance requires a Tribunal when determining disability to look at the evidence by reference to 4 different questions or conditions.

    a. Did the Claimant have a mental or physical impairment?

    b. Did the impairment affect the Claimant's ability to carry out normal day-to-day activities?

    c. was the adverse effect substantial?

    d. Was the adverse condition long-term?

27. In Wigginton v Cowrie and others t/a Baxter international (A partnership) the EAT held that these four questions should be dealt with sequentially and not

together.

28. In Cruickshank v VAW Motorcast Limited 2002 ICR 729 the EAT held that the time to assess the disability is the date of the alleged discriminatory act. In Richmond Adult Community College v McDougall 2008 ICR 431 the Court of Appeal held that the date of the discriminatory act is also the material time when determining whether the impairment has a long-term effect.

29. The burden of proof is on the Claimant to show that he or she has satisfied the definition.

30. Turning to the four elements of the definition:

    a. An impairment can be physical or mental. There is no requirement for the impairment to have a specific diagnosis.

    b. The words “substantial adverse effect” is defined in section 212(1) Equality Act as meaning "more than minor or trivial". Whether a particular impairment has a substantial effect is a matter for the Tribunal to decide. The focus should be on what the Claimant cannot do, or can only do with difficulty as set out in Leonard v Southern Derbyshire Chamber of Commerce 2001 IRLR 19 EAT.

    c. Appendix 1 of the EHRC Employment Code states that "normal day-to-day activities are activities that are carried out by most men and women on a fairly regular and frequent basis, and gives examples of walking, driving, typing and forming social relationships. Account should be given of how far the activities are carried out on a normal frequent basis. The guidance emphasises that in this context, "normal" should be given its everyday meaning. In Goodwin v Patent Office the EAT considered that there was no need to specify what constitutes a day-to-day activity on the basis that, whilst it is difficult to define, it is easily recognised. In this case the ET stressed that the enquiry is focused on normal daily activities, not on particular circumstances.

    d. Paragraph 2(1) of schedule 1 of the Equality Act 2010 says that the effect of impairment is "long-term" if it:

        - has lasted for at least 12 months;
        - is likely to last at least 12 months; or
        - is likely to last the rest of the life of the person affected.

    "Likely" in this context has been defined by the House of Lords in the case of SCA Packaging Ltd v Boyle 2009 ICR 1056 as something that is a real possibility in the sense that it "could well happen" rather than something that is probable or "more likely than not".

31. There is no doubt that the Claimant sustained an injury in the accident. However, sustaining an injury in itself if not sufficient to meet the definition in the Equality Act 2010. This definition is a legal definition rather than a medical definition and is decided considering the medical information and

other information available.

32. The issues in this case are not whether the Claimant sustained an injury but how that injury manifested itself on her day-to-day activities, whether any adverse impact was substantial, how long this lasted for or was expected to last for, and finally whether the Respondent had actual or constructive knowledge that all the elements of the definition of disability had been met. It is not sufficient for some of the elements to have been met, all the parts of the definition must be satisfied.

33. In relation to day-to-day activities, these are confined to those activities people do on a day-to-day basis, for example, using public transport, reading a book, being able to attend to personal care. It does not mean that a person who can not do something after an accident or illness will necessarily fit the definition. It all depends on what the activity was. Therefore, the reference in the Claimant's disability impact statement about being able to sail, having a private pilots licence and riding a motorcycle before the accident and not being able to after is not relevant. These examples are not something most people do on a day-to-day basis. However, other matters she mentioned in her impact statement would be classed as day-to-day activities. For example, sleep, concentration etc.

34. The Tribunal accepts the submission by the Respondent that there are contradictions in the Claimant's evidence. For example, she says she was sleeping all the time, whereas the medical evidence is that she was not sleeping and was prescribed amitriptyline to help her sleep. The Tribunal has not made a final determination as to whether the Claimant's impairment following the accident had a substantial impact on her day-to-day activities as it has determined that the impairment was not long term at the relevant time, and that the Respondent did not know she had a disability.

35. The approach the Tribunal took in considering this was to assume in the first instance that the Claimant's injury did have an adverse effect on her ability to carry out normal day to day activities thereby taking her case at its highest. It first looked at whether any adverse impact met the definition in terms of the length of time it had lasted. The Tribunal considered this in two parts. First events happening up to the time the Claimant was to have returned to work after her extended period of sick leave (18 April 2018) and then from that date to the date her employment was terminated.

36. The time until the Claimant was able to return to work from the date of her accident was a period of 7 months. Therefore, at that time any impairment had not lasted for twelve months. The Tribunal therefore went on to consider whether at that time the impairment was expected to last for over twelve months. The Tribunal looked at the Claimant's fit notes, the occupational health reports, what she said to the Respondent and a medical report that the Claimant commissioned privately.

37. The fit notes do not give any indication of how long the Claimant's condition would last. They give a variety of reasons for absence including head injury and concussion; concussion neck pain; head injury; head injury; head injury

traumatic brain injury and head injury stress at work. The last fit note was dated 7 March 2018 and covered the period from 7 March 2018 to 3 May 2018.

38. The following Occupational Health reports were received by the Respondent.

    a) On 13 October 2017 Dr Hashtroudi from Occupational Health wrote to Ms Cheston: "*Her symptoms are consistent with concussion syndrome which is expected to completely resolve, although I reminded her that the timescale may vary between different individuals*".

    b) On 1 November 2017 Dr Hashtroudi reported that the Claimant seemed better and was fit to return to work on a phased basis with some adjustments. There was no indication that her symptoms would be long term.

    c) On 20 December 2017 Dr Hashtroudi reported that he had seen the Claimant who was feeling worse, and he did not think she should be at work. There was no indication in this report that the condition was long term.

    d) Following an assessment on 7 February 2018 Dr Hashtroudi said the Claimant was fit to return to work with adjustments.

    e) On 4 April 2018 Dr Hashtroudi wrote to Dr Fox about the Claimant's return to work. There was no mention of her condition being long term in this letter.

    f) On 10 April 2018 Dr Hashtroudi wrote in response to a specific question asked by Dr Fox, that he did not think that the Claimant would be considered disabled as her symptoms were expected to resolve within a twelve-month period.

39. Taking all this into account, the Tribunal finds that as of 18 April 2018, the Claimant was not disabled as defined by the Equality Act 2010. Her condition had not lasted twelve months, and it was not expected to last twelve months or more. This means that any detriments said to have happened in the period from the date of the accident (9 September 2017) to 18 April 2018 were not because she was a disabled person as defined.

40. The second period the Tribunal considered was from 18 April 2018 to the date of termination of employment (9 December 2019). The twelve-month mark would be 8 September 2018. There are no medical reports or fit notes relating to this period. The Tribunal considered the Claimant's impact statement and a private neuro-psychologist report which the Claimant commissioned. They appear to be contradictory. The report concluded that there was no evidence of cognitive impairment, consistent with recovery from a mild brain injury. The Respondent referred to the evidence the Claimant gave in cross examination on this point, and this was in accord with Judge Martin's notes taken at the time. The Claimant attempted to discredit this report (despite her paying for it herself) saying *"I don't believe this is correct.*

Snapshot in quiet room for 4 hours doing tests."

41. The investigatory process which ultimately led to the termination of the Claimant's employment was put in place around 18 April 2018 when the Claimant was suspended from work pending the outcome of the investigation. At this time, as already found, the Claimant did not meet the definition of a disabled person. The investigation concluded on 4 September 2018. At this time the Respondent was not in receipt of medical information or any other information indicating that her condition was then likely to last for over twelve months. As far as the Respondent knew, the Claimant had been fit to return to work for seven months, but was not at work while the investigation was completed.

42. On 9 January 2019 Dr Hashtroudi from Occupational Health provided a report on the Claimant. In that report he said "*The question of the Equality Act is not straight forward. In my view, her day-to-day activities have not been affected substantially for more than 12 months therefore in my opinion the Act is unlikely to apply in her case. Please be advised that this is ultimately a legal question and the situation may change in the future.*" This was the last Occupational Health review.

43. Ultimately the Claimant's employment was terminated on 9 December 2019. The Tribunal finds that there was nothing that changed from the Occupational Health reports. As far as the Respondent's knowledge of disability was concerned there was no indication that anything had changed. The Tribunal finds that based on the information it had, there was no indication that the Claimant met the definition of disability as the information it had said that the effects of the accident did not substantially affect her normal day to day activities for over twelve months as the Act requires.

44. Even had the Claimant met the definition of a disabled person in this period, the Tribunal finds that the Respondent did not have the necessary knowledge of this.

45. The Tribunal went on to consider what its decision would be had it found that the Claimant was disabled, and that the Respondent should have reasonably known about this. What the Tribunal was looking for was a causal connection between what the Respondent did and the Claimant's disability.

46. The catalyst for the investigation conducted by Mr Hodge and the ultimate termination of the Claimant's employment were complaints received when the Claimant was absent from work following her accident. However, Ms Cheston had concerns about the Claimant's performance and behaviours from before the accident.

47. For example, on 2 September 2016 when the Claimant had only been effectively working for the Respondent for about 6 months (she took extended leave when she started her employment) Ms Cheston sent the Claimant an email. This email concerned a presentation that the Claimant and a colleague gave to senior management. The subject matter of the presentation had not been signed off by Ms Cheston and it was not to be

shared at that time. The Tribunal heard that there were some ramifications following this presentation. Concerns were raised in this email about the Claimant not taking responsibility and trying to blame others.

48. The Claimant was due to have an appraisal at about this time, however in light of the issues surrounding the presentation, Ms Cheston decided to convert the appraisal into a 1:1 to discuss matters with the Claimant before doing the formal appraisal. Ms Cheston confirmed what had been discussed with the Claimant in a letter dated 12 September 2016. In this letter she said:

"*I agreed to write to you following our one to one meeting this morning in which I alerted you to the concerns that l have regarding your current level of performance in relation to your role and responsibilities as Head of Private Patients and also the values and behaviours you display.*

In relation to the level at which you are currently fulfilling your role, I explained that it was my perception that this was not at the level that I would expect from someone as senior as yourself in a leadership role.

……

In relation to the values and behaviours you display, I initially raised this concern with you in June. I asked that you research the Trust values and behaviours framework and attend one of our workshops. You acknowledged that you have not done that. l sighted (sic) evidence as to why I hold this view including your appearing to blame the finance team for issues regarding the presentation both in emails and in the Senior Management Team meeting, your reaction to basic management instructions such as the office moves and your behaviour towards me over a delayed freedom of information response….."

A plan was set out to address the issues raised.

49. The Claimant says she tendered her resignation during the meeting in September 2016, but that Ms Cheston persuaded her to stay. Ms Cheston denies this saying that had the Claimant resigned she would have accepted the resignation given the issues that had already arisen with the Claimant's performance and behaviours. She also gave evidence that in August 2016 she had contacted HR to see if the Claimant's contract could be terminated as at that time she believed that the Claimant had been employed on a one year fixed term contract. She was told that by mistake the Claimant had been employed on a substantive contract. Taking all this into account the Tribunal prefer the evidence given by Ms Cheston. Had the Claimant tendered her resignation the Tribunal find that Ms Cheston would have readily accepted it. Although there is a letter in the bundle purporting to be a resignation letter, the Tribunal find that this was not sent to Ms Cheston.

50. Ms Cheston held an appraisal meeting with the Claimant on 14 September 2017. This process was not completed because of the Claimant's absence from work. Ms Cheston gave evidence that she would have given a 2:2 rating

had this appraisal been completed. She explained that *"Performance is measured against 1) objectives for which I would have given Jacqui a rating of 2; and 2) values and behaviours for which I would also have given her a 2. A grading of 2 for objectives means that performance is inconsistent and requires improvement and for values and behaviours means that they are sometimes demonstrated. The grading of 2:2 would have tripped Jacqui into a formal capability management process"*.

51. When the Claimant went on long term sick leave following her accident, concerns were raised by members of her team about her behaviour which they described as bullying. One member of the team had resigned and another threatened to resign if the Claimant returned to work. Ms Cheston described this person as being frightened of the Claimant and being upset that management had not seen what was happening. This coupled with previous concerns about the Claimant's performance and behaviour led to the Respondent initiating an investigation.

52. By this time, Ms Cheston had ceased to be the Claimant's line manager with Dr Fox taking over this role on 6 March 2018. In the period leading to him taking on his role as Medical Director in Private Patients, Dr Fox visited the department to acquaint himself with it. The Matron was due to leave shortly and told Dr Fox that the reason she was leaving was because of the Claimant. His evidence, which the Tribunal has no reason to disbelieve, is that the Matron told him that she had significant concerns about how the Private Patients Services was being managed by the Claimant who, she said, acted in a way that undermined her authority. Other members of the team also expressed their concerns about the Claimant's behaviour finding her management style challenging and undermining.

53. Dr Fox also received an email on 17 March 2018 in which a number of allegations about the Claimant were made. The email said that a number of staff within the Private Patient team had asked to meet the writer and had explained they felt "worried, frightened and anxious" about the prospect of the Claimant returning to work. It was reported that they considered the Claimant to be controlling, rude and unpleasant and gave a number of examples were given. It said that if the Claimant returned to work a number of staff would have no option but to leave. There was also information about external relationships saying that there were a number of occasions where the Claimant's behaviour had led to disengagement with or exclusion of the Trust's Private Patient service from opportunities with external organisations.

54. Dr Fox therefore decided to start an investigation about these complaints. The Tribunal finds that this was not related to the Claimant's disability but to matters which had arisen before the Claimant's accident which were expressed when she was not there and more particularly when it was thought she might be returning to work. In the Tribunal's experience this not an unusual thing. Often people only feel able to complain about their managers when they know that their manager is not around.

55. Mr Hodge was appointed the investigator. He is a non-practicing solicitor who now undertakes investigations such as this. He is not affiliated with the

Respondent although Ms Cheston had met him some four years earlier during a different investigation when she was interviewed by him. The Tribunal is satisfied that he was independent and carried out the investigation without having any vested interest in the outcome. Suspending the Claimant was discussed, and it was decided that suspension was necessary as members of the team were very concerned about the Claimant returning to work without these matters being sorted out and had threatened to resign if this happened.

56. By this time, the Claimant had raised a grievance on 3 April 2018. It was addressed to Ms Pritchard the Chief Executive. Ms Cheston did not know when she saw the grievance. Dr Fox did not see the grievance and could not recall when he first knew about it. It may well have been after the investigation was set up given it was only sent two days before Ms Cheston, Dr Fox and Mr Hodge met to discuss the parameters of the investigation on 5 April 2018. Presumably the decision to investigate had been made before the grievance was made.

57. Given that issues arose significantly before the accident which were addressed and recorded by Ms Cheston, and that the behavioural issues raised by members of the Claimant's team arose before her accident (the Claimant only returned to work for a very short time after the accident) the Tribunal concludes that the reason for the investigation was not related to any disability but was because of concerns raised by staff and issues relating to the Claimant's performance.

58. The Tribunal heard the Claimant's evidence that she considered that she got on well with members of her team and did not recognise the behaviours complained of, however, complaints were made which needed to be acted on. The Respondent has a duty of care towards all its staff and this type of issue can not be left.

59. The investigation took a long time by any standards. This was something out of the control of the Respondent. There is correspondence in the bundle where Dr Fox recognises this and once he has the report is keen to take the next steps expeditiously.

60. The Tribunal then considered the decision to terminate the Claimant's employment which was made by Dr Fox. All the matters set out above in relation to the investigation are pertinent. There was a long period of time between the finalisation of the investigation report and the final decision to terminate the Claimant's employment although Dr Fox does say that he spoke to the Claimant about her continued employment in 19 March 2019. On 4 December 2019 Dr Fox sent a letter to the Claimant terminating her employment. This letter recapped what had been said at the meeting on 19 March 2019. Dr Fox's witness statement says this:

"*I had advised Jacqui that I had come to the view that it would not be possible for her to return to work within the Commercial Directorate due to the real risk that her return would result in the loss of key staff at an important time of development in the PP Services and cause significant disruption to what was*

now a well-functioning team that provided a vital income stream for the Trust. Albeit this was subject to the on-going process which had stalled. I also reminded Jacqui that several staff members had stated an intention to leave if she were to return in a leadership capacity, including key staff in business development, marketing, operational and clinical".

61. There had been various discussions both by email and in person between March 2019 and December 2019 about the possibility of resolving matters and whether redeployment was an option. Redeployment was not considered an option as the Claimant had only ever worked within private patient departments and not in the wider NHS. The termination letter concluded:

"Given the length of time, and the extent to which, we have discussed the matters relating to your performance in role and absence from work, and the unusual circumstances of this case I do not think it would be appropriate to arrange a disciplinary or other hearing to discuss this further. Instead, this letter confirms my decision to dismiss you with effect from 30 November 2019. This termination is on the grounds that we are unable to return you to your original role (for the reasons given to you previously and above) and we have been unable to agree redeployment".

62. The Tribunal is satisfied that the reason for dismissal was as set out in Dr Fox's letter and not because the Claimant was disabled.

63. The list of issues has other detriments that the Claimant says were done because she was a disabled person. All of what has already been said is relevant to these issues too.

64. The Tribunal has made brief findings on each of the detriments set out in the list of issues. Given its decision given above, it is not proportionate or necessary to go into detail.

    a. Issue 18.1 – The Claimant complains that Ms Cheston was not visible after her accident until 5 October 2015. At this time as set out above the Claimant would not have been classified as a disabled person. In any event on a factual basis this detriment is not made out. Ms Cheston was in Dubai on a work trip a few days after the accident and the evidence both given by Ms Cheston and corroborated in the bundle is that she did contact the Claimant after the accident and was concerned by the circumstances of the accident and the injury sustained. She helped the Claimant obtain an expedited medical consultation, arranged for Occupational Health referrals and checked in with the Claimant.

    b. Issue 18.2 – Ms Cheston denies telling the Claimant that if she had to take sick leave this was one week at a time. The Tribunal finds that it was not said but that even if it was, it did not amount to a detriment and was not said because the Claimant was a disabled person.

    c. Issue 18.3 – this relates to an allegation that Ms Cheston did not

undertake mandatory health and safety reporting after the accident. Ms Cheston disputes this saying that she liaised with health and safety at the Respondent and reported when she was told she should. In any event the Tribunal can not see how this would be a detriment to the Claimant and as set out above the Claimant was not a disabled person at this time so even if it happened as alleged it was not done on the ground that she was a disabled person.

d. Issue 18.4 – This is an allegation that on 23 November 2017 Ms Cheston told the team not to contact the Claimant. The Tribunal for reasons already stated does not find this was on the grounds that the Claimant was a disabled person. The Tribunal finds the allegation to be factually incorrect in any event, as the email said that she had told the Claimant not to contact the team while she was on sick leave. This was because the Claimant needed to rest and Ms Cheston did not want a muddled line management situation between the Claimant and the person doing the Claimants work whilst she was on sick leave.

e. Issue – 18.5 - This relates to an allegation that on 20 November 2017 Ms Cheston told the Claimant not to return to work as she needed more time to recover against expert advice. Ms Cheston disputes that she said this, but concedes she told the Claimant to take more time as she was concerned about her health. The Tribunal does not find this to be detrimental but considers it was intended to be a supportive move. Ms Cheston wanted to ensure that the Claimant was medically fit to return to work. In any event the Claimant would not be considered a disabled person at this time.

f. Issue 18.6 – This is the allegation about Ms Cheston removing access to the Claimant to her work emails. This was disputed by Ms Cheston. Even if it happened, it was not on the basis of the Claimant being a disabled person as at this time (23 November 2017) the Claimant did not meet the definition of a disabled person.

g. Issue – 18.7 – This relates to Ms Cheston holding a long-term sickness absence meeting with the Claimant even thought the Claimant had been asking repeatedly to return to work. The Tribunal finds that this meeting was held in accordance with Trust policy on long term sickness. By that time the Claimant had been off work for four months. The Tribunal finds that it would have been beneficial to the Claimant to have such a meeting given that it would have considered her fitness to return to work and whether any adjustments needed to be made. The Tribunal notes that later Dr Fox agreed that the Claimant could return to work on a phased basis, but as it happened she was suspended and did not return to work.

h. Issue 18.8 – this relates to pay and the allegation that Ms Cheston told payroll to stop the Claimant's salary and not mentioning at the meeting on 25 January 2018. Ms Cheston says she did not tell payroll not to pay the Clamant and that is why she did not mention it. This relates back to when the Claimant took a holiday in Greece on 5 October 2017

to 7 November 2017 and was asked to specify whether she wanted this absence classified as sick leave or as holiday. The Claimant had not made this election, and this led to a confused situation regarding pay. The Tribunal is satisfied that Ms Cheston would not have been involved in this as this was the responsibility of the payroll department.

i. Issues 18.9 – 18.12 – These issues have been dealt with above.

j. Issue 18.13 and 18.15 - This is an allegation that the Respondent did not put in place a rehabilitation plan that included an office move. The Tribunal finds that the basis for this allegation is not correct. The evidence was that Dr Fox had looked to see if the Claimant could work in another office and had identified a desk for her to use. The Claimant was not satisfied and wanted to use another desk in a different office that was being used by another employee. Dr Fox told the Claimant that she should try the desk he had identified before saying no, as he considered that this desk was suitable. Given that the Claimant did not return to work, there was no detriment to her in any event. Similarly, the Tribunal finds that there was discussion about what work the Claimant would be expected to do and her working hours. Given that she did not return to work there was no detriment. Even if there was a detriment the Claimant was not disabled at this time so the reason for the detriment was not that she was a disabled person.

k. Issue 18.16 – This relates to not offering the Claimant a mentor or support. The suggestion of a mentor came from Occupational Health at a time when Ms Cheston was line managing the Claimant and there were difficulties in their relationship. As Dr Fox then took over line management of the Claimant mentoring was no longer necessary. Even if it was, and this was a detriment to the Claimant it was not done because she was a disabled person as she had not met the statutory definition.

65. The Claimant's claims of direct disability discrimination are therefore dismissed.

Discrimination arising from disability

66. This claim is dismissed as the Claimant was not a disabled person as set out above. The matters complained of are the same as for her claim of direct discrimination and are dealt with above.

Whistleblowing

67. The relevant law is:
Employment Rights Act 1996

68. s47B(1), a worker has the right not to be subjected to a detriment by any act "done on the ground that [he or she] has made a protected disclosure".

69. s103A, makes a dismissal automatically unfair where the reason or principal reason is that the employee has made a protected disclosure.

70. Disclosures qualifying for protection are defined by s43B, the material provisions being the following:

    (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following – …

71. (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …

    (d) that the health and safety of any individual has been, is being or is likely to be endangered

72. Qualifying disclosures are protected where the disclosure is made in circumstances covered by ss43C-43H. These include where the disclosure is made in good faith to the employer (s43C) or to a prescribed person (s43F).

73. The Tribunal is given jurisdiction to consider complaints of PID-based detriments by s48(1A). Subsection (2) stipulates:

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

74. The PID regime came under scrutiny from the EAT in Cavendish Munro Professional Risks Management Ltd-v-Geduld [2010] ICR 325. Giving judgment, Slade J stressed that the protection extends to disclosures of *information*, but not to mere allegations. Disclosing information means conveying facts.

75. In Fecitt-v-NHS Manchester [2012] IRLR 64, the Court of Appeal held that, for the purposes of a detriment claim, a claimant is entitled to succeed if the Tribunal finds that the PID materially influenced the employer's action.

76. The test is the same as that which applies in discrimination law. This, in the context of the PID jurisdiction, separates detriment claims from complaints for unfair dismissal under s103A: there, as we have stated, the question is whether the making of the disclosure is *the* reason, or at least the principal reason, for dismissal.

77. The question of the burden of proof in claims under the 1996 Act s103A was addressed by the Court of Appeal in *Kuzel-v-Roche Products Ltd* [2008] IRLR 530 CA. Giving the only substantial judgment, Mummery LJ made the following observations (paras 56-60):

    "The employer knows better than anyone else in the world why he dismissed the complainant. Thus, it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by

Roche, there was no burden on her to disprove them, let alone positively prove a different reason.

I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

Having heard the evidence of both sides … it will then be for the [Employment Tribunal] to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences …

The [Employment Tribunal] must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the [Tribunal] that the reason was what he asserted it was, it is open to the [Tribunal] to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the [Tribunal] *must* find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

… it may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side."

78. As a starting point the Tribunal considered these issues on the basis that all the disclosures were protected, thus taking the Claimant's case at its highest and considered whether the detriments she relied on were because of her protected disclosures or for any other reason.

79. During her evidence, it was put to the Claimant that the detriments except her dismissal, predated the disclosures relied on. She was invited to withdraw these aspects of her claim but declined to do so. The Tribunal started by considering the detriments and whether they were causally connected to the disclosures.

80. The first disclosure relied on is the Claimant's grievance dated 3 April 2018. The detriments which remain live before this Tribunal as follows:

    a. Issue 29.1 - "the Respondent not finalising the Claimant's return to work until 13 April 2018 where upon her arrival the Claimant was formally suspended".

        i. Given the short period of time between the disclosure and the date the Claimant was due to return to work the Tribunal does not find that any delay in finalising the return to work was because of her disclosure. The Tribunal notes that the Claimant said that the earliest she could return to work was at the end of March 2018.

b. Issue 29.2 - "the Claimant was not allowed to return to her job to rehabilitate and to attempt to resume her former life as her return to work was obstructed at every opportunity for 2 years".

    i. The wording of this detriment is very vague, and it is difficult to understand what the matters are that the Claimant is referring to. If the reference to rehabilitation is to her physical and mental rehabilitation, then this is a clinical matter and not an employment matter which Ms Cheston or Dr Fox in their capacity as the Claimant's line manager could assist with. Ms Cheston and Dr Fox did assist the Claimant in obtaining medical assistance.

c. Issue 29.7 - "On 23 December 2017, Victoria Cheston having the Claimant's access to her Trust emails removed without advising her.

    i. There was a dispute in the evidence as to whether the Claimant's email access was removed or whether, as Ms Cheston said, that others who were standing in for her whilst she was off sick were given access to her emails. The Tribunal does not have to determine this as the detriment occurred some months before the disclosure and therefore there can be no causal connection between the two. This part of her claim is dismissed.

d. Issue 29.12 – The Claimant's dismissal on 9 December 2019.

    i. This is dealt with when discussing the unfair dismissal issues below.

Unfair dismissal

81. The relevant law is as follows (together with s103 ERA set out above).

82. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.

83. Where an employee has been dismissed, an employer has to show one of the prescribed reasons for dismissal contained in sections 98(1) and (2). It is trite law that the reason for dismissal is a set of facts known to, or beliefs held by, an employer at the time of dismissal, which causes that employer to dismiss the employee. The reason for dismissal does not have to be correctly labelled at the time of dismissal and the employer can rely upon different reasons before an employment tribunal (**Abernethy –v- Mott, Hay and Anderson** [1974] IRLR 213, CA).

84. If there is a permissible reason for dismissal, the Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4):

"the determination of the question whether the dismissal is fair or unfair (having

> regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case"

85. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well substantive aspects of the decision to dismiss. A Tribunal must adopt an objective standard and must not substitute its own view for that of the employer. (**Iceland Frozen Foods –v- Jones** [1982] IRLR 439, EAT as confirmed in **Post Office –v- Foley** [2000] IRLR 234, CA; and **Sainsbury's Supermarkets Ltd –v- Hitt** [2003] IRLR 23, CA).

86. The circumstances leading to the termination of the Claimant's dismissal are set out above and are not repeated. The Tribunal finds that the reason for dismissal did not relate to disability and that the reason for dismissal was some other reason justifying dismissal, namely her performance, conduct and relationships with staff and external bodies. This led to a breakdown in trust and confidence.

87. There was no dismissal meeting. Dr Fox sent a letter to the Claimant terminating her employment giving full reasons. The Tribunal appreciates what he says about the level of conversation between them from March 2018 to the date of this letter, however, does consider that it would have been better to hold a final meeting where the Claimant could have been accompanied. There was an appeal, and the Tribunal finds that any defect in the procedure on termination was rectified by this appeal. The Claimant was given every opportunity to attend the appeal hearing so she could answer any questions the panel wanted to ask and could put forward her reasons for appeal more fully. The first appeal hearing was to be heard on 5 February 2020 however it did not take place. The appeal heard on 16 March 2020. Again, the Claimant did not attend. The appeal was therefore heard in her absence and her appeal was dismissed. If there had been any procedural irregularity in the termination of the Claimant's employment then the appeal rectified this.

88. Even if the Tribunal had found that the dismissal was unfair, it would have reduced compensation by 100% because of the Claimant's contributory fault. The reason for dismissal was of the Claimant's own making, in particular her management style and interpersonal relations with both internal staff and external bodies. In the alternative the Tribunal finds that had Dr Fox held a termination meeting the outcome would have been the same given the extensive communications prior to him terminating the Claimant's employment and the nature of the complaints against the Claimant. In these circumstances applying the principles **in Polkey v AE Dayton ServicesLtd [1987] IRLR 503** the Tribunal would have reduced compensation by 100%.

Wages Claims

89. The relevant law:
Section 13 of the Employment Rights Act 1996 states an employer shall not

make a deduction from wages of a worker employed by him unless – the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

90. There is a three-month time limit in which to present a claim to the Employment Tribunal. There is a discretion to extend time if it was not reasonably practicable to have brought the claim in time. It is for the Claimant to demonstrate it was not reasonably practicable.

91. The Claimants claim for salary from 8 February 2018 to 12 April 2018 is clearly out of time. Her ET1 was presented on 8 March 2020. This claim is therefore approximately two years out of time. The Tribunal notes that the Claimant had legal advicve for her personal injury claim and also assistance from her union. The reason she has given for not presenting her claims in time was that she did not want to rock the boat as she wanted to return to work. Whilst this may be understandable it is not sufficient to render it not reasonably practicable to have presented her claim in time. Time is therefore not extended and this part of her claim is dismissed as out of time.

92. The Claimant claims for 8 days annual leave. She was asked to particularise this in the order made by Judge Cheetham KC by putting the particulars into her witness statement. She did not do this. It is for the Claimant to show what she says she is owed and she has failed to do so. This part of her claim is therefore dismissed.

93. The Claimant makes a claim for a higher raite of pay for the payment in lie of notice for the period from 14 December 2019 to 1 March 2020. The Respondent submits that payment in lieu of notice is not something that can be claimed under the unauthorised deductions from wages provisions of the Employment Rights Act and cited Delaney v Staples Delaney v Staples [1992] ICR 483, where the House of Lords held that a (non-contractual) payment in lieu of notice did not amount to wages. It held that " wages" are payments made in connection with the provision of services during employment. There is no contractual right to a payment in lieu of notice in the Claimant's contract and therefore this aspect of the Claimant's claim is dismissed.

94. The Claimant claims recovery of an alleged of repayment of £613.25 (net) in January 2020 more than two years after the alleged overpayment was made. The Claimant's contract which she signed, contains a clause allowing the Respondent to recover by deduction from salary any over payment. The deduction was therefore not unauthorised. This aspect of the Claimant's claim is dismissed.

95. In all the circumstances, the Claimant's claims are unfounded and dismissed.

Employment Judge Martin
Date: 21 February 2023

APPENDIX 1
LIST OF ISSUES

Preliminary and jurisdictional issues

Disability

1. Was the Claimant a disabled person in accordance with the Equality Act 2010 at all material times with one or a combination of the following conditions:

1.1 functional cognitive disorder; and
1.2 post-concussion disorder?

2. Was the Respondent aware or ought the Respondent reasonably have been aware that Claimant was disabled by reason of any of the above impairments at all material times?

Time Limits

Discrimination

3. Has the Claimant's claim been presented after the end of the period of three months starting with the date of the act to which the complaint relates (allowing for any extension under the Acas Early Conciliation process)?

4. If any of the alleged acts of discrimination appear to be out of time, do they amount to conduct extending over a period?

5. If the claim has been brought out of time, is it just and equitable to extend time?

Whistleblowing

6. Has the Claimant's claims for detriments for having made protected disclosures been presented before the end of the period of three months of the act complained of (allowing for any extension under the Acas Early Conciliation process)?

7. If any of the alleged public interest disclosure detriments appear to be out of time was there a series of acts?

8. If the claim has been brought out of time, was it reasonably practicable for the Claimant to present her claim within the three month time limit?

9. If not, did the Claimant present the claim within such further period as was reasonable?

Unlawful deduction of Wages

10. Have the Claimant's claims for unlawful deduction of wages been presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made, or where there has been a series of deductions, the date of the last deduction (allowing for any extension under the Acas Early Conciliation process)?

11. If not, was it reasonably practicable for the Claimant to present her claim within the three month time limit? 12. If not, did the Claimant present the claim within such further period as was reasonable?

SUBSTANTIVE ISSUES

Unfair Dismissal

13. Was the Claimant dismissed for a fair reason namely some other substantial reason?

14. In the alternative, was the Claimant dismissed for reasons relating to her conduct and/ or capability?

15. If so, was the dismissal reasonable in all the circumstances of the case.

Direct Age Discrimination

16. withdrawn on day one of the hearing.

Disability Discrimination

Direct Discrimination

17. The Claimant has identified the following actual comparators:
- her predecessor "Colleague C" who the Claimant says was allowed three months off following a stroke; and
- a second colleague (Claimant to confirm identity of comparator in witness statement) who had a stroke in 2014 and was appointed a support colleague, physiotherapy treatment and other therapies.

18. Did the Respondent treat the Claimant less favourably than it treats or would treat others because of disability by:

18.1 Victoria Cheston being barely visible following the Claimant's accident on 19 September 2017 until 5 October 2017 including whether the Claimant was told by Victoria Cheston that she would call in to see the Claimant before she went on sick leave but that Victoria Cheston did not do so;

18.2 On either 2 or 3 October 2017, Victoria Cheston requesting that if the Claimant had to take sick leave that this be one week at a time;

18.3 Victoria Cheston failing to follow the mandatory legal reporting for an accident at work to the Health & Safety Executive in relation to the Claimant's accident on 19 September 2017. The Claimant says that Victoria Cheston was made aware of the Claimant's loss of consciousness and long-term sick leave by no later than 13 October 2017;
18.4 On 23 November 2017 at 10.23, Victoria Cheston writing to the Claimant's team instructing them not to contact her;

18.5 On Wednesday 29 November 2017, Victoria Cheston calling the Claimant at home and telling her not to come back to work as she "needed more time to recover" against expert advice;

18.6 On 23 December 2017, Victoria Cheston having the Claimant's access to her Trust emails removed without advising her within 3 weeks of her being off work;

18.7 On 25 January 2018, Victoria Cheston holding a long term sickness absence meeting with the Claimant although the Claimant had been asking repeatedly to return to work since early December;

18.8 At least ten days before the meeting on 25 January 2018 Victoria Cheston notifying payroll to stop the Claimant's salary and not mentioning this at the meeting of 25 January 2018 with the Claimant;

18.9 The Respondent keeping the Claimant away from her place of work for a period of 7 months following her accident and not allowing for the Claimant's return to work until Friday 13 April 2018;

18.10 The Respondent suspending the Claimant on 13 April 2018 upon her return to work;

18.11 In respect of the investigation by Andrew Hodge:

18.11.1 the investigation not being independent due to the investigator being known to Adam Fox and/ or Victoria Cheston;

18.11.2 Andrew Hodge not contacting the Claimant's witnesses;

18.11.3 The Respondent not providing the Claimant with any of the witness statements.

18.11.4 the report being one sided, inaccurate and mostly written by Victoria
Cheston; and

18.11.5 the Respondent not keeping the Claimant informed or updated and making false promises and assumptions about the progress of the investigation by
Andrew Hodge, which took 7 months from April to November 2018.

18.12 dismissing the Claimant from the Respondent on 9 December 2019;

18.13 not putting in place a rehabilitation plan that included an office move;

18.14 not looking at the Claimant's work or making adjustments to make allowances for Claimant's difficulties;

18.15 not holding a discussion around working hours with the Claimant; and

18.16 not offering the Claimant support or a mentor.

19. If there was less favourable treatment of the Claimant in respect of any of paragraphs 18.1 to 18.16 above, was this less favourable treatment because of the Claimant's disability?

Section 15 Disability Arising

20. Did the Respondent treat the Claimant unfavourably? The Claimant relies on the alleged treatment at paragraphs 18.1 to 18.16 above.

21. If so, was this treatment because of something arising in consequence of the Claimant's disability? The Claimant relies upon the following as "something arising" the Claimant's email of 13 July is appended to this list:

21.1 The Claimant's restricted duties via a fit note from her GP from 25/09/17 to 05/10/17 immediately after her accident;

21.2 On 6 October 2017 the Claimant's GP signed her off as unfit to work for an initial 4 weeks;

21.3 The Claimant returned to work on a phased from Monday 8 November 2017 (1 day a week) to Tuesday 28 November 2019 (3 days a week);

21.4 The Claimant was fatigued and had to move her days at work due to a lack of
concentration, memory, noise fatigue and chronic fatigue; and

21.5 The Claimant was struggling with her brain function.

22. If so, can the Respondent show the treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

23 - 27. Withdrawn by the Claimant on day 5 of the hearing

Whistleblowing

28. Did the Claimant make any protected disclosures? The Claimant is relying on the disclosures attached at Appendix 1 to this index[1].

[1] The disclosures relied on are set out in the body of the judgment

29. Did the Respondent subject the Claimant to any of the following detriments [Claimant to clarify alleged detriments in her witness statement]:

29.1 the Respondent not finalising the Claimant's return to work until 13 April 2018, where upon her arrival the Claimant was formally suspended;

29.2 the Claimant was not allowed to return to her job to rehabilitate and to attempt to resume her former life, as her return to work was obstructed at every opportunity for 2 years;

~~29.3 Victimised [Claimant to provide further detail];~~ [2]

~~29.4 Ostracised [Claimant to provide further detail];~~

~~29.5 Bullied and harassed [Claimant to provide further detail];~~

~~29.6 Denial of any brain rehabilitation [Claimant to provide further detail];~~

29.7 On 23 December 2017, Victoria Cheston having the Claimant's access to her Trust emails removed without advising her;

~~29.8 Stigmatised [Claimant to provide further detail];~~

~~29.9 Threatened with performance process [Claimant to provide further detail];~~

~~29.10 Threatened with disciplinary [Claimant to provide further detail];~~

~~29.11 Managed out for 2 years [Claimant to provide further detail]; and~~

29.12 The Claimant's dismissal from the Respondent on 9 December 2019?

30. If so, was this done on the ground that the Claimant had made one or more protected disclosures?

Wages Claims

31. Is the Claimant entitled to payment in respect of any of the following:

- salary from 8 February 2018 until 12 April 2018;
- 8 days' unpaid annual leave;
- a higher rate of pay for the payment in lieu of notice in respect of the period from 14 December 2019 to 1 March 2020;
- the recovery of an alleged overpayment of £613.25 (net) in January 2020 more than two years after the alleged overpayment was made?

32. Did the Respondent fail to make any such payment to the Claimant?

[2] Struck out by the Tribunal

Remedy

33. If the Claimant succeeds in any of her claims, the Tribunal will consider issues of remedy and in particular, if the Claimant is awarded compensation and/ or damages, will decide how much should be awarded.

34. Should any adjustments be made for the Claimant's contributory fault or according to the principle set out in Polkey?

APPENDIX 2
CHRONOLOGY

Date	**Event**
14 December 2015	C begins work with R
9 September 2016	VC meets with C to discuss performance concerns
12 September 2016	Letter from VC to C confirming contents of performance concerns
14 September 2017	Meeting VC and C to discuss appraisal
19 September 2017	C has accident at work
20 September 2017	C attends work as normal; goes to A & E in the afternoon/eve; completes Datix report about accident
22-28 September 2017	VC in Dubai on work trip
25 September 2017	C attends work with fit note advising attend with adjustments, reduced hours and flexibility to take frequent breaks
26 September 2017	VC asks NW to complete referral to OH for C to be reviewed
5 October 2017 – 7 November 2017	C in Greece for 2 weeks followed by 2 weeks of sickness absence
13 October 2017	C reviewed by OH
1 November 2017	C reviewed by OH
6 November 2017	C returned to work on phased return (working from home)
23 November 2017	VC emails KFP and EH to inform them of details of discussion with C about roles and responsibilities and copying to C and stating that “had asked Jacqui not to contact you when she is at home and use that time for rest and recovery”
21 November 2017	SC met with C and incident manager to discuss circumstances and lessons learnt
28 November 2017	Further one to one with C and VC

29 November 2017	VC telephones C at home and suggests that she rest at home pending assessments with a neurologist and OH
20 December 2017	C reviewed by OH – advised remained unfit for work
25 January 2018	Sickness review meeting
1 February 2018	VC emails OH to see if they could assist with a referral for Cognitive Rehabilitation Therapy
7 February 2018	OH Review – C ready to return to work on phased return
5 March 2018	C's line management transferred to AF new CMD
17 March 2018	KFP puts concerns regarding C into writing to AF and VC
21 March 2018	AF meets with C to discuss return to work
3 April 2018	AF meets with C for formal return to work meeting
3 April 2018	C raises grievance
5 April 2018	AF VC and AH meet with AH to discuss investigation
13 April 2018	Meeting between C and AF where C is suspended pending investigation into concerns
19 June 2018	AF emails C with letter inviting her to contribute to the investigation
4 September 2018	Revised and final copy of the investigation report sent to AF by AH
9 and 11 October 2018	AF emails to C – liaising with HR in relation to next steps and then MH will be in touch with her
29 October 2018	C asks GC through Linkedin for details of Trust FTSUG. GC passes message on to DS who texts C that day
18 November 2018	AF and MH meet with C to discuss outcome of AH investigation
27 November 2018	Grievance outcome sent to C
6 December 2018	C emails MH and AF – wishes to initiate discussions to return to work but not in position to do so due to the death of her mother
9 January 2019	OH review

8 March 2019	Meeting with AF, MH and C (C accompanied by ZF), C advised not possible for her to return to commercial directorate
14 November 2019	Meeting MH AF and C (C accompanied by friend KW) Discussed employment and SAR
4 December 2019	C sent a letter by email terminating her employment
18 December 2019	C appeals against dismissal
5 February 2020	Date of appeal hearing
16 March 2020	Appeal hearing
23 March 2020	Date of appeal outcome letter