EMPLOYMENT TRIBUNALS

Claimant:	**Mrs D Spencer**
Respondent:	**Unison Leicestershire Health Branch**
Heard at:	Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
	Hybrid hearing
On:	17 January 2022 (by video)
	16, 17, 18, 19, 20 January 2023 (hybrid hearing)
	13 March 2023 (by video link)
Before:	Employment Judge Adkinson sitting with
	Mr C Bhogaita
	Mrs D Newton
Appearances	
For the claimant:	Mr J Fireman, Counsel
For the respondent:	Ms E Hodgetts, Counsel

JUDGMENT

UPON hearing from Counsel for the claimant and Counsel for the respondent AND UPON considering the evidence presented IT IS ORDERED THAT all claims are dismissed.

REASONS

1. The claimant (Mrs Spencer) presents claims against the respondent (UNISON Leicestershire Health Branch, to whom we will refer as simply "The Branch") for constructive unfair dismissal and being subjected to detriments for making protected disclosures. The Branch denies these allegations.

2. In summary, the claims are not made out on the facts. What happened in our opinion arose not from any breach of contract or detriments for protected disclosures, but rather Mrs Spencer taking whatever steps she could think of to ensure The Branch would let her continue to work from

home, rather than requiring her to return to work, and then pursuing her claim only when those steps did not produce the result she wanted.

Hearing

3. Mr Fireman represented Mrs Spencer. Ms Hodgetts represented The Branch. Both have done a thorough job presenting their client's cases, making all the reasonable points that could be made, and have been particularly helpful and cooperative dealing with the various problems that arose. We are grateful to both for their help they have given to the Tribunal.

4. As for the hearing, it has an unfortunate procedural history.

5. The hearing was listed to take place over 5 days between 17 and 22 January 2022. Initially it was listed to take place in person. The claimant applied for the hearing to take place by video link. The respondent did not object. The judge who chaired the hearing directed therefore the hearing take place by video link.

6. On the morning of the first day, the Tribunal pre-read the statement and key parts of the bundle.

7. At the start of the hearing, the Tribunal considered an application from The Branch to adduce the contents of an investigation into Mrs Spencer on the grounds it related to her credibility and also added factual context to the respondent's case. Mrs Spencer opposed the application. The Tribunal refused permission. The date for disclosure was 3 September 2021. It was disclosed only in January 2022 because it was completed only in late December 2021. It was far too late in the day and proximate to the hearing. The report was written about Mrs Spencer but without input from Mrs Spencer. That was far too late in the day. It would expand the factual issues which would expand the time estimate of the hearing and may necessitate an adjournment. It is not directly relevant. Finally Mrs Spencer had not had a fair opportunity to consider it and her position in relation to it. To admit it would not further the overriding objective.

8. For the rest of the first day, the Tribunal heard part of Mrs Spencer's evidence.

9. On 18 January 2022 the judge fell ill with Covid-19. Regulations in force at the time mandated he stay at home and isolate for a period, which turned out to be 10 days. The hearing was adjourned therefore to be relisted

10. Mrs Spencer remained on oath. Mrs Spencer's solicitors applied for her to be released from her oath. The respondent objected. The Tribunal considered the matter remotely and, with limited exceptions, it declined to release her from her oath. It gave reasons that were sent to the parties on 18 January 2022. It also permitted her to be released from her oath in relation to any matter if the respondent consented. No further application for release was made.

11. Because of the effects of the Covid-19 pandemic on the Tribunal and the availability of everyone involved, the earliest date that the case could be

relisted was for 5 days on 16 January 2023. Before the relisting, neither party applied for the case to be vacated or reheard ab initio.

12. The morning of the first day of the resumed hearing was set aside to enable the Tribunal to refresh its memory. Unfortunately there were issues with the lay members access to the bundles and statements. The respondent kindly provided electronic copies of the documents, though this too was not without difficulty because of a computer issue at the Tribunal's side. The Tribunal therefore postponed the first day.

13. The Tribunal then continued to hear the claimant's case by video link. At the respondent's request, its witnesses gave evidence in person. When the respondent's witnesses attended the hearing, respondent's Counsel also attended. The claimant and her Counsel attended by video throughout. No objection was taken to this. Therefore the 2nd day of the resumed hearing was by video. The remainder was a hybrid hearing.

14. There was again insufficient time to hear submissions because of the problems starting the resumed hearing. This is not the fault of the parties. The Tribunal therefore listed a further hearing for submissions, which were delivered over video link. The Tribunal therefore reserved its decision. It then used the remaining time to deliberate and reach its decision.

15. The Tribunal heard evidence from the following people, which we have taken into account:

    15.1. For Mrs Spencer,

        15.1.1. Mrs Deborah Spencer herself,

        15.1.2. Mr John Spencer, her husband,

        15.1.3. Mr Michael Valentine, her son.

    15.2. For The Branch,

        15.2.1. Mrs Mandy Marsden, at all relevant times Branch Secretary but employed by University Hospitals Leicester NHS Trust,

        15.2.2. Mr Neil Crane, at all relevant times Branch Chair but also employed by the said hospitals,

        15.2.3. Mr Andy Phipps, at all relevant times Branch Vice-Chair and Health and Safety Officer but employed by the said hospitals as their Health and Safety Manager,

        15.2.4. Ms Kim Craig, at all relevant times The Branch Treasurer but also employed by the hospitals.

16. The Tribunal was presented with a main bundle of 977 pages. There was a separate remedy bundle of 284 pages. The bundle was excessive. This is shown by the fact that nearly $^{2}/_{3}$rds of the first 500 pages were never referred to. As we indicated would be the position to the parties, we have taken into account those pages to which the parties have referred us.

17. Each party presented written closing submissions supplemented by oral submissions. We have taken those into account.

18. The parties agreed a note on the relevant legal principles. We comment further on that below. We thank Mr Fireman and Ms Hodgetts for their work preparing and agreeing this note.

19. The parties agreed we should deal with liability first (to include arguments under **Polkey** and contributory fault if appropriate), with remedy to follow if appropriate. This is the approach we have taken.

20. No party submitted that the hearing has been unfair. While there is an unfortunate procedural history, the Tribunal is satisfied after careful consideration that it was a fair hearing.

Issues

21. The parties agreed a list of issues. After consideration the Tribunal is satisfied this represents the issues we must determine.

22. Earlier in the proceedings Mrs Spencer had attempted to amend her claim to withdraw words like “threatened” and “deliberately” etc. On 9 April 2021, Employment Judge Hutchinson refused permission for these amendments, giving written reasons at the time.

23. Therefore, we agree with The Branch that Mrs Spencer must be adjudged by reference to the list of issues as it is, because it accurately reflects her pleaded case. We note that from the moment her claim was presented she has been legally represented throughout. We therefore assume, as we are entitled to do, that the claim was pleaded, and the issues raised on the basis of instructions she gave.

24. We add only one other issue, that both parties addressed in written and oral submissions: When did Mrs Spencer decide to resign?

Constructive Unfair Dismissal

25. The Claimant relies, and only relies, on the implied term into her contract of employment of trust and mutual confidence.

26. What were the acts or omissions on the part of the Respondent that the Claimant says caused her resignation? The Claimant says they were:

27. being threatened with a demand to return to the office despite being able to work effectively at home and living with people who were shielding due to COVID-19, by Mrs Marsden which occurred on 22nd and 26th May 2020.

    27.1. On 22nd May 2020, Mrs Marsden called the Claimant to demand that she returned to working from the office from 8th June 2020 onwards;

    27.2. On 26th May 2020, Mrs Marsden emailed the Claimant to clarify that, “…there is no reason why you cannot return…”.

28. being threatened with intimidating and unnecessary behaviour e.g. being given an ultimatum of taking annual/unpaid leave or being removed from

the payroll if the Claimant did not return to the office, by Mrs Marsden which occurred on 22nd and 26th May 2020.

28.1. On 22nd May 2020, Mrs Marsden stated, “I’m not prepared to argue, you have three choices, return to the office, take annual leave or take unpaid leave.”;

28.2. On 26th May 2020, Mrs Marsden emailed the Claimant to state that, the Claimant's choices were either to return to work or use annual leave/unpaid leave.

29. being threatened with ‘Furlough’ pay or Statutory Sick Pay (when the Claimant was entitled to sick pay at her normal salary rate), by Mrs Marsden which occurred on 23rd June 2020.

29.1. On 23rd June 2020, Mrs Marsden emailed the Claimant to request a copy of the Claimant’s contract to confirm she should receive full pay and not SSP during her sick leave.

30. being accused of deliberately cancelling meetings, by Neil Crane which occurred on 13th July 2020 and 20th July 2020.

30.1. In a letter dated 13th July 2020, Neil Crane alleged that the Claimant had now cancelled three meetings.

30.2. In an email on 20th July 2020, Neil Crane maintained how he believed the Claimant had cancelled three meeting dates.

31. being threatened to attend meetings without a representative, by Neil Crane which occurred on 13th July 2020 and 17th July 2020.

31.1. On 13th July 2020, Neil Crane provided alternative dates for a grievance meeting and stated this was the Claimant’s last opportunity however these were still dates which the Claimant’s representative was not available on.

31.2. On 17th July 2020, Neil Crane advised that the meeting could take place in the following week however the Claimant had to reiterate that Neil knew her representative would not be available at the suggested dates thus she was being given no alternative but to attend the meeting alone.

32. being accused of not wanting her pay slips despite previous requests, by Kim Craig, The Branch Treasurer which occurred on 21st July 2020;

32.1. On 21st July 2020, Kim Craig, The Branch Treasurer claimed that the Claimant’s payslips were at The Branch office as the Claimant had allegedly advised her that she did not want them as they stated the same amount each month;

33. not provided her and/or delaying in providing her with a copy of the grievance meeting recording despite being promised this, by Neil Crane on 12th August 2020 and on 24th August 2020 which occurred;

33.1. In emails dated 12th August 2020 and on 24th August 2020 both advised the Claimant that Neil Crane had made a disc copy for

the Claimant and he would send this via recorded delivery the next day. However, the Claimant did not receive this until mid-September 2020;

34. not being provided with an outcome to her grievance despite 12 weeks having passed since this was first raised, by Neil Crane which occurred on 22nd July 2020 and 12th August 2020;

34.1. At the grievance meeting on 22nd July 2020, Neil Crane advised the Claimant that he would send the outcome to the Claimant withing the next 14 days;

34.2. In an email on 12th August 2020, Neil Crane advised that he was due to meet Mrs Marsden on 14th August 2020 and he would then be in a position to make a decision;

35. Did the Claimant affirm the contract since any of those acts or omissions?

36. If not, were any of the acts or omissions by themselves a repudiatory breach of contract?

37. If not, was it part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a repudiatory breach?

38. Alternatively, did the Claimant unduly delay before resigning?

39. Did the Claimant resign in response to that breach?

40. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of **Employment Rights Act 1996 section 98(4)**? The Respondent relies on the potentially fair reasons of conduct, capability and/or some other substantial reason.

Whistleblowing Detriment - Protected Disclosure 1

41. What is the alleged protected disclosure? The Claimant asserts this was her email to Mrs Marsden on 22 May 2020, which alleged:

41.1. The Clamant did not believe that returning to work at The Branch was in accordance with the current Government COVID-19 ‘lockdown’ and Unison guidelines which required employers to support employees who can work from home, to continue working from home.

41.2. The Claimant was concerned about her husband's health as he fell in the “at risk” category and was currently shielding. She was not prepared to risk his health where there were simple and effective measures which were currently working for everyone, including herself by working from home and there were not adequate health and safety measures in place at the office.

41.3. The Claimant knew that it was practically impossible to enforce the requisite two metre distance between the desks and then allow for movement around the office. The Claimant raised how the risk assessment allegedly (to date the assessment has still not been seen) carried out by Andrew Phipps, the health and

safety officer was in breach of the current social distancing guidelines as he had recommended that one metre was sufficient. This was also in breach of the Respondent's own guidelines as well.

42. Is Mrs Marsden the Claimant's employer or other responsible person under **Employment Rights Act 1996 section 43C**?

43. Was the Claimant's email making the allegations in 41.1, 41.2 and 41.3 above to Mrs Marsden on 22 May 2020 a disclosure of information?

44. In the reasonable belief of the Claimant, was that disclosure made in the public interest?

45. In the reasonable belief of the Clamant, did that disclosure tend to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject - breaches of the Covid-19 guidance on working from home and social distancing under **Employment Rights Act 1996 section 43B(1)(b)**.

46. In the reasonable belief of the Clamant, did that disclosure tend to show that there had been, was, or would be the endangerment of the health and safety of any individual– namely - breaches of the Covid-19 guidance on working from home and social distancing under **Employment Rights Act 1996 section 43B(1)(d)**.

47.

47.1. Is the Claimant's complaint in relation to each of these detriments within time for **Employment Rights Act 1996 section 48** purposes?

47.2. If not, was it reasonably practicable for the Claimant to present her complaints within time?

47.3. If not, did the Claimant present her complaints within such further time as was reasonable?

48. Does the Tribunal find as a matter of fact that the following events occurred?

48.1. The Claimant being threatened with 'Furlough' pay or Statutory Sick Pay (when the Claimant was entitled to sick pay at her normal salary rate) on 23rd June 2020 by Mrs Marsden.

48.2. The Claimant not being provided with / refused an outcome to her grievance by 24 August 2020 despite 12 weeks having passed since this was first raised.

49. In respect of those matters that the Tribunal finds occurred and in time, do these events amount to a detriment?

50. Did the Respondent subject the Claimant to one or more of those detriments because she made a protected disclosure?

Whistleblowing Detriment - Protected Disclosure 2

51. Does the Tribunal find that the Claimant reported the following to Neil Crane on 3 June 2020:

    51.1. That she was being forced to return to The Branch despite being able to work from home effectively and the Respondent knowing that it was impossible to enforce the requisite two metre distance within the office which was in breach of the government's and the Respondent's COVID-19 guidelines.

52. Is Neil Crane the Claimant's employer or other responsible person under **section 43C Employment Rights Act 1996**?

53. Was the Claimant's email alleging the above to Neil Crane on 3 June 2020 a disclosure of information?

54. In the reasonable belief of the Claimant, was that disclosure made in the public interest?

55. In the reasonable belief of the Clamant, did that disclosure tend to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject namely - breaches of the Covid-19 guidance on working from home and social distancing under **Employment Rights Act 1996 section 43B(1)(b)**.

56. In the reasonable belief of the Clamant, did that disclosure tend to show that there had been, was, or would be the endangerment of the health and safety of any individual– namely - breaches of the Covid-19 guidance on working from home and social distancing under **Employment Rights Act 1996 section 43B(1)(d)**.

57.

    57.1. Is the Claimant's complaint in relation to each of these detriments within time for **Employment Rights Act 1996 section 48** purposes?

    57.2. If not, was it reasonably practicable for the Claimant to present her complaints within time?

    57.3. If not, did the Claimant present her complaints within such further time as was reasonable?

58. Does the Tribunal find as a matter of fact that the following events occurred?

    58.1. The Claimant being threatened with 'Furlough' pay or Statutory Sick Pay (when the Claimant was entitled to sick pay at her normal salary rate) on 23rd June 2020 by Mrs Marsden.

    58.2. The Claimant not being provided with / refused an outcome to her grievance by 24 August 2020 despite 12 weeks having passed since this was first raised.

59. In respect of those matters that the Tribunal finds occurred, do these events amount to a detriment?

60. Did the Respondent subject the Claimant to one or more of those detriments because she made a protected disclosure?

Adjustments to any remedy

61.

61.1. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant? If so, to what extent?

61.2. Would it be just and equitable to reduce the compensatory award because of any conduct of the Claimant? If so, to what extent?

62. If the Tribunal finds that the dismissal was procedurally unfair, would the Claimant have been dismissed in any event and if so, should there be a reduction in any award for compensation accordingly as per the principles set out in the case of the **Polkey v AE Dayton Services Ltd [1987] ICR 142**?

Facts

The witnesses

63. We begin with our view of the witnesses.

Mrs Spencer

64. Mrs Spencer is an unreliable witness. We were very much left with the view that she wanted to work from home, would say what it took to secure that objective and, when she did not get her way, she would present things in as favourable light to her as possible to secure compensation.

65. We have not determined if she had lied – we do not need to do so, because her evidence is, generally, so flawed it cannot be relied on. Why it is so flawed does not assist us. However, we are quite satisfied that she has exaggerated matters or presented things in a misleading light, at best, carelessly, i.e., indifferent to whether what she was saying was true or false. This is supported by the evidence generally and in particular the attempt to row back from the accusations she made in her claim (both in an application to amend and in the hearing) and attempts to make the evidence fit the accusations when that attempt was not successful.

66. The list of issues is littered with accusations of being “threatened” and other examples like “being refused” an outcome to her grievance and “being accused” of not wanting payslips. These issues derive directly from her own pleaded case. In her application of 14 January 2020 to amend her claim, she sought (unsuccessfully) to remove these phrases. When she presented her claim she was represented and so the accusations must have been made on instructions – there is no evidence to suggest otherwise and we are entitled to assume her solicitors acted on instructions. She must have known what she believed were the facts when she set out her case. If there were no such threats, refusals or accusations, then it is surprising why the claimant chose to include these in her claim. The fact that she was prepared to make these accusations in the first place and then, later, seek to withdraw them, in our view shows that (a) she knows they are not correct

or at the very least exaggerations, (b) how freely she is prepared to say things that she knows or ought to know are not correct or exaggerated, or is indifferent to saying such things and (c) how unreliable therefore her own recount of matters can be. In the Tribunal's view, this goes to the heart of her credibility.

67. Her evidence also is littered with numerous examples of where she has exaggerated things, made misleading statements and said things that are not correct. She also contradicted herself in her evidence. There are numerous examples of this and we will deal with them as we go through our findings of fact.

68. In addition she suffered what we believe is inexplicable amnesia over when she instructed her solicitors. This is important because it is relevant to when she had actually decided to resign. Her apparently clear recollection of other events is in contrast to her inability to remember when she approached solicitors or to see any significance in the date 6 August 2020, which is when her solicitors actually opened their file for her case, and so must be when she contacted them at the latest.

69. Therefore, in general, and except where we say otherwise, where there is conflict between Mrs Spencer's evidence and that of others, we unhesitatingly prefer the other evidence.

Mr Spencer

70. Mr Spencer was a credible witness. We were impressed that in his cross examination he made numerous concessions about the limits of his knowledge and his experience of the matters in dispute. He did not try to fill obvious gaps and was not fully supportive of his wife's case. However, except in relation to certain matters that we deal with below, we do not feel that his evidence assists to take the case any further forward because of the limits of his knowledge about relevant matters.

Mr Valentine

71. We found Mr Valentine to be an unreliable witness. In our view he had come not to assist the Tribunal to find the true facts but to say whatever he felt might help his mother. He adopted his witness statement as his evidence in chief. His evidence-in-chief is replete with strong opinion evidence about Mrs Marsden and its impact on his mother, even though he has no direct experience of relevant matters, and conceded he relied entirely on his mother's account. He exaggerated and said things indifferent to their truth. He reported for example that Mrs Marsden is the "classic bully". As the respondent points out, that is in contrast to even his own mother's evidence that she had a good working relationship with Mrs Marsden until the request to return to work (or until the grievance – Mrs Spencer said both during her questions and we are none the wiser as to which she settled on).

72. His evidence-in-chief gave the strong impression that he has some qualification in mental health (he referred to "systemic alienation" for example) and suggested he had a lot of direct knowledge of and experience of Mrs Marsden. Cross-examination revealed this to be no more than

working in an administrative role in a medical setting on 6-month rolling contracts in which he met Mrs Marsden a few times on a cigarette break, and 2 times in The Branch Office over a 11-year period. He had never worked directly with Mrs Marsden.

73. He told us in evidence in chief that:

"[The Branch] shrugged off responsibility the moment the words 'whistleblowing' were first uttered, with a swiftness and callousness I have never witnessed in all my years of work"

74. This is a stark and strong statement. It gives the impression of an event that would stick in the mind. More starkly was the contrast between that statement and the answers to the questions in cross-examination seeking detail. He was asked when the words were first uttered. We appreciate that a precise date or time is unlikely to be forthcoming. However we would expect some event, occurrence or precision the assertion could be linked to. Instead he told us only that they were said

"Through conversations, we talk quite a lot."

75. When asked when, he replied

"[I] can't pin down a date, when she was first asked to return to the office."

76. When asked who said them, he replied "I wouldn't recall."

77. Moreover, the assertion is seriously undermined by the fact that there is no references to protected disclosures until the claim itself is presented. It is inconceivable that a trade union convenor would not mention whistleblowing in her grievance if Mr Valentine's evidence were correct.

78. Subject to one matter that we deal with in the following paragraph, we conclude we cannot rely on his evidence in any way and reject it.

79. That exception is on what was occurring at home. He revealed they talked about whistleblowing and the legal consequences, constructive dismissal and the possibility of making allegations. This in our view tallies with the way Mrs Spencer has exaggerated matters and the phraseology used in some correspondence to which we will come. Taken together it suggests again embarking on a course of action to bring a claim and say what will secure victory rather than embark on a claim to vindicate a legal right.

Ms Craig

80. We found Ms Craig to be a reliable witness. She came across to us as genuinely trying to do her best in the circumstances. She answered questions straightforwardly and honestly. She conceded for example that she could have emailed payslips to Mrs Spencer but lacked the technical skills to do it easily. We believe she lacked a sophistication with technology, but the concession is apposite and to her credit.

Mr Phipps

81. We found Mr Phipps also to be a credible witness. When he gave evidence about the health and safety assessment it was readily apparent, he

understood how to carry out the assessments and what he was and was not assessing. He conceded and did not attempt to cover up matters outside his knowledge or role (e.g. consulting with Mrs Spencer about the assessments). He was also clear he was assessing the office (because that is what he was asked to do) and not the risk an individual faced, and that if he were concerned with Mrs Spencer's personal risk, he would have followed a different line of enquiry.

Mr Crane

82. On balance we find Mr Crane to be a credible witness. There are concerns about his grievance outcome letter. For example, he repeats the same particular and distinct spelling mistake in one paragraph that Mrs Marsden makes and for some reason all but one letter of the first part of her email address appears in the middle of the letter. There are also no notes of his meeting with Mrs Marsden. However against that he appeared to follow the grievance process and make appropriate lines of enquiry. He moreover though appeared to give evidence in a straightforward manner and did not try to cover up the weaknesses in it or in the process he followed.

Mrs Marsden

83. Mrs Marsden was a credible witness. She was clear, precise, clearly understood Mrs Spencer's role and explained clearly and coherently why Mrs Spencer had to return to work. In our view she did not exaggerate anything. She answered questions in a straightforward manner.

84. Mrs Spencer criticises Mrs Marsden for suggesting that Mrs Spencer was a "key worker". Whether she was or was not is unclear to us – and does not matter. What is important is the suggestion was made for the first time in cross-examination. We have considered this carefully. On balance we do not think Mrs Marsden can be criticised for raising this. Mrs Marsden has been clear about why Mrs Spencer needed to return to work: to support their members (who were healthcare workers or care workers and, on any definition, key or critical workers) and that they had limited access to technology, and to perform her administrative tasks. We believe "key worker" is no more than a shorthand for why it was important for Mrs Spencer to return to the office. The use of the label does not in our view undermine the genuineness of the reasons advanced, anyway. Unlike Mrs Spencer, Mrs Marsden was not prone to exaggeration or saying things that plainly are not correct. Therefore except where we say otherwise, we prefer her evidence over Mrs Spencer's.

About The Branch

85. The Branch is part of, but distinct from UNISON. The exact structure was not clear to us but does not matter. The Branch is one of many in the city. Each caters for a different category of workers. For example there was one for workers in the local authorities, a separate one for workers in the police and so forth.

86. During the Covid-19 pandemic, when most workplaces were ordered to close, so did many of those associated branches. However those whose

members were expected to continue to work throughout the pandemic remained open. The Branch's membership comprised healthcare workers and social care workers. They continued to work so The Branch continued to operate too.

87. It is agreed that The Branch had about 4,500-5,000 members.

88. The Branch's members are often those working in lowly paid roles, perhaps at national minimum wage. They may be described as "unsophisticated" when it comes to access to technology like e-mail, websites and the like. It was accepted that not all had email addresses, for example. Some may have smartphones though we accept that not all will. Even if they did have access to smartphones, we accept they may not be able to access the relevant sites or understand how properly to research matters or to make contact or how to e.g. email documents. Mrs Spencer suggested in cross-examination this was not likely to be true, which Mrs Marsden denied. We accept Mrs Marsden is correct. Generally we preferred her evidence anyway. As Branch Secretary she is in a better position to understand the technological barriers her members face. It accords with the Tribunal's own experience of people in such employment trying to manage Tribunal proceedings (often unsuccessfully) from a smartphone or unable to take part in video hearings because they lack the technology. The lay members have found regularly that workers like those whom The Branch represents are simply not as sophisticated as one might expect. The judge also readily accepts this, based not-only on his experience of litigants in this Tribunal but also in other jurisdictions. Besides, we accept there are many workers who simply are uncomfortable with the technology and so unable to deal with these sorts of matters other than face to face.

89. It is also the case that some employers were not equipped to use IT to its maximum efficiency and depended heavily on paper.

90. Therefore some items had to be posted out to relevant bodies and to members. For example Mrs Spencer accepted that, while before lockdown she was sending 4-6 letters per week, that number likely increased with the imposition of the various restrictions with the commencement of the Covid pandemic. Some members also required meetings.

91. The Branch's methods of working were technologically unsophisticated at the time. It kept files in both electronic and paper formats. Paper files were not allowed to leave the office and were, quite properly, kept locked away. Mrs Spencer accepted she never had paper files outside of the office.

About the claimant

92. The Branch employed Mrs Spencer as a convenor and as an administrator. She was The Branch's only employee.

93. Her employment began 9 August 2010 in a temporary role as "administrative assistant/branch convenor"

94. It was extended and on 4 April 2011 the role became permanent.

The claimant's contract

95. The Branch banded its employees using the same bands as those in the National Health Service (NHS). At the time of the fixed term contract, NHS was implementing "Agenda for Change" (AfC). The bands reflected this. It was also a term under AfC that NHS workers received full pay for the first 6 months of sickness. This was expressly reflected in the terms of her fixed-term contract.

96. However her permanent contract implemented AfC banding but had different terms in relation to sick pay. It provided:

"Disciplinary, sickness, grievance policy: The Branch will adhere to these in line with the Staff Handbook, copy enclosed."

97. The handbook in turn provided:

"PROCEDURE FOR REPORTING ABSENCE DUE TO SICKNESS

"… You qualify for Statutory Sick Pay and the rates will at all times reflect and be in line with current legislation in force from time to time.

"How Statutory Sick Pay (SSP) is worked out;

"o The first 3 days qualifying days in a period of entitlement are called waiting days and don't qualify for SSP.

"o The rate of SSP as of the August 2010 is £79.15 per week

"…"

98. Mrs Spencer agreed to this term and signed the contract on 30 March 2011. It is conceded that she was therefore entitled only to SSP when she was absent through sickness. There is no evidence that there was any sort of misrepresentation about the terms relating to sick pay. There is no suggestion that she was not afforded an opportunity to read it and consider it before signing. We take into account she is a trade union convenor who advises members on employment matters. We are satisfied we can therefore conclude she read the contract and knew what she was signing up for. This is supported by Mrs Marsden's evidence that Mrs Spencer and she discussed the need for the handbook to be updated to reflect the correct sick pay terms (i.e. SSP only).

The claimant's job

99. Mrs Spencer's role is described in a job description. It reads as follows:

"Job Description

"To provide a comprehensive and high quality, professional administrative and secretarial service to The Branch. This is a varied post and involves contact with managers and staff of all levels and various disciplines and will provide effective communication to a variety of people outside of The Branch including staff of the wider Unison organisation both regionally and nationally."

100. Under Branch Administrator Duties she had to do a number of tasks. These included the following particular ones which we are satisfied could only be done at The Branch itself, and not remotely:

"• Scanning of legal cases and cases for registered bodies (NMC/ HCPC) within the specified time limits and could include unforeseen events and may need to take priority with guidance from The Branch Secretary.

(The only place to scan these would be at the office because the records were there. There was no electronic filing system.)

"• To be responsible for ensuring the safe storage of all members records /case forms and other confidential documents at The Branch office and to maintain an efficient locked filing system ensuring confidential records/ case forms are destroyed when necessary and in line with Data Protection.

(The files were at the office. Plainly this could not be done remotely.)

"• To maintain the office infrastructure by ensuring all faults are reported to The Branch Secretary, ensuring repairs are actioned in a timely manner.

"• Be the first point of contact at The Branch office, answer telephone calls and face to face enquiries ensuring that they are dealt with efficiently and professionally or referred to others as appropriate. This may include angry or distressed callers. Any sensitive contentious callers by telephone or face to face may need to be discussed with relevant Branch officers.

(We have referred already to the members. Many could only realistically access The Branch in person. Therefore face-to-face presence was essential.)

"• Develop, implement and maintain electronic and paper record systems for The Branch so that records can be readily accessed. This will include logging all calls through the office, visitors to The Branch office and allocated representatives.

(The Branch had unsophisticated information technology. It was a mix of paper and desk computer. It was not a cloud-based database.)

"• Maintain membership data base, Data cleansing, contacting members to update their details and also to enquire about lapsed members. DOCAS, including notifying the employers payroll. All of which would be in written form on our official letter headed paper under and in line with Data Protection.

"• Preparing and distributing a range of documentation including letters, emails and Case forms, welfare forms, electronically and by post.

"• Develop and implement effective administration systems eg: case management systems, recording all allocated cases, dates, themes, contact and updating appropriately.

"• Maintain and replace stock as required, publication and other materials complying with relevant Branch procedures.

"• General day to day running of the office, including housekeeping, hospitality, incoming and outgoing mail.

"• Arranging for office maintenance as required and deliveries of stock, recruitment materials, Members case files etc.

"• To use highly developed interpersonal skills with the ability to exchange confidential, sensitive or contentious information clearly and effectively at all levels, ensuring that the integrity of all documents and records are maintained in line with quality standards and Data Protection procedures.

101. Her convenor duties were as follows:

"Convenor Duties

"• To represent and provide initial advice and guidance in the private and voluntary sector as required by The Branch Secretary.

"• To actively recruit members by developing a variety of recruitment activities in the private and voluntary sector as well as assisting with lead convenors in the core employers.

The list is rather curt and appears to be cut off in the bundle. We think it is not the complete list. The list on the form used to assess her suitability is longer. For our purposes it suffices that it is agreed the convenor's duties also included advising trade union members in relation to their employment concerns and preparing for, advising and representing them in disciplinary and grievance proceedings.

102. Mrs Spencer's role was not that of convenor full-time, therefore. We accept she split her role, effectively doing 3 days as administrator and 2 days on her convenor role. In her cross-examination, Mrs Marsden disagreed when Mrs Spencer suggested to her this was how her role was split. Mrs Marsden suggested it was 75/25 towards administration. However we prefer the evidence of Mrs Spencer on this issue. The role of convenor is an important role. It reflects one of the main purposes of The Branch in the first place. She was employed as one. The Branch represents a large employment sector. We think the 3/2 split is more credible. We do not accept Mrs Marsden was deliberately trying to underplay Mrs Spencer's role since she was not prone to exaggeration. However we do think she was wrong on this point.

103. As a convenor, Mrs Spencer advised members on employment issues and represented those employees, like one might expect from a trade union. She was therefore familiar with basic concepts of employment law, if not expert.

104. Either way, even on Mrs Spencer's case 60% of her time was to be dedicated to administration, and we conclude a significant proportion required her to be at the office to do it.

Covid-19

105. In late 2019 an illness called Covid-19 emerged and reached the United Kingdom. It became a pandemic. The virus that caused Covid-19 was easily

transmissible and could have serious adverse effects including long-term effects, respiratory difficulties requiring hospital admission and in some cases death. Certain people with particular conditions were particularly vulnerable.

106. The Government took various steps and issued emergency regulations and guidance. In March 2020 the government ordered all but essential workplaces to close, and where possible for everyone to work from home.

107. Hospitals, care homes and the like remained open. Most (if not all) of their workers were permitted under the regulations and guidance to attend work. Therefore most of The Branch's membership were still working.

108. If the worker could not work from home but equally could not go to the office, there was a scheme developed by the government in which they would reimburse 80% of the worker's wage to the employer, provided the worker concerned remained employed but was excused attending work. An employee of such leave was said to be furloughed. The system was more complex but that simplified description of furlough suffices for the purposes of this claim.

The regulations and guidance during the Covid-19 pandemic

109. The regulations and guidance are dense to get through, to say the least. In an effort to aid understanding which parts we think particularly significant, we have emphasised them by **emboldening** them. They do not appear emboldened in the original.

110. In short, they required or encouraged people to stay at home where possible, but that requirement, encouragement relaxed as time went on. The requirement to stay at home was often referred to as "lockdown" and where it affected a limited geographical area, "local lockdown" or similar.

The regulations

111. The **Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 regulation 6** provided as follows:

"Restrictions on movement

"6.—(1) During the emergency period, no person may leave the place where they are living without reasonable excuse.

"**(2) For the purposes of paragraph (1), a reasonable excuse includes the need—**

"…

"**(f) to travel for the purposes of work** or to provide voluntary or charitable services, **where it is not reasonably possible for that person to work**, or to provide those services, **from the place where they are living**;

"…"

112. Therefore from the start, a worker such as Mrs Spencer was entitled legally to travel to and from work. Over time this **regulation 6** was relaxed. From

1 June 2020, **regulation 6** was rewritten merely to prohibit staying away from home. It read so far as relevant :

"6.—(1) **No person may, without reasonable excuse**, **stay overnight at any place other than the place where they are living**.

"(2) For the purposes of paragraph (1), the circumstances in which a person ("P") has **a reasonable excuse include cases where**— …

"(d) it is reasonably necessary for P to stay elsewhere—

"(i) **for work purposes**, or for the provision of voluntary or charitable services;"

113. Unfortunately Covid-19 continued to spread. The government subjected Leicester to special regulations to contain the spread of Covid-19. These were set out in **The Health Protection (Coronavirus, Restrictions)(Leicester) Regulations 2020** and took effect from 4 July 2020 for the remainder of the time material to this case. This local lockdown covered the location where The Branch was situated. **Regulation 3** required businesses listed in **Schedule 3 Part I** to close, and those in **Part II** of the schedule also to close, subject to exemptions. The Branch did not fall within either **Part I** or **II** and so was not required to close.

Guidance

Guidance on shielding

114. The government issued the following guidance, which was updated on 17 April 2020 (we have highlighted the parts we think significant):

"Guidance on shielding and protecting people who are clinically extremely vulnerable from COVID-19

"…

"Background and scope of guidance

"**This guidance is for people who are clinically extremely vulnerable**, including children. **It's also for their family**, friends and carers.

"People who are clinically extremely vulnerable should have received a letter telling them they're in this group or been told by their GP.

"…".

115. The guidance had a list of clinically extremely vulnerable people. We note that Mr Spencer had a medical condition but did not fall into that list. It continues

"Staying at home and shielding

"**You're strongly advised to stay at home at all times and avoid any face-to-face contact if you're clinically extremely vulnerable to protect yourself**.

"This is called 'shielding'.

"**Shielding means**:

"**1 . Do not leave your house**.

"2. Do not attend any gatherings. This includes gatherings of friends and families in private spaces, for example, family homes, weddings and religious services.

"3. Strictly avoid contact with someone who is displaying symptoms of coronavirus (COVID-19). These symptoms include high temperature and/or new and continuous cough.

"The Government is currently advising people to shield until the end of June and is regularly monitoring this position.

"..

"Letters to clinically extremely vulnerable people

"The NHS in England has contacted clinically extremely vulnerable people with the conditions listed above to provide further advice.

"If you have not received a letter or you have not been contacted by your GP but you're still concerned, you should discuss your concerns with your GP or hospital clinician.

"**Living with other people**

"**The rest of your household do not need to start shielding themselves**, but they should do what they can to support you in shielding and to carefully follow guidance on social distancing […]"

116. This guidance did not change at any material time.

Relaxation of guidance

117. Towards the summer of 2020, the government relaxed the rules and guidance. It is clearly aimed at returning things to normal . The steer is that people should return to work in the workplace. Thus on 11 May 2020 they published the following guidance:

"Staying alert and safe (social distancing)

"…

"The government has set out its plan […] to return life to as near normal as we can, for as many people as we can, as quickly and fairly as possible in order to safeguard livelihoods, but in a way that is safe and continues to protect our NHS.

"As part of this plan:

"**• People and employers should stay safe in public spaces and workplaces by following "COVID-19 secure" guidelines**. **This should enable more people to go back to work, where they cannot work from home**, and encourage more vulnerable children and the children of critical workers to go to school or childcare as already permitted

"…

"1. Protecting different groups of people

"This guidance is for the general public who are fit and well. There is separate, specific guidance on isolation for households with a possible coronavirus infection.

"Some people, including those aged 70 and over, those with specific chronic pre-existing conditions and pregnant women, are clinically vulnerable, meaning they are at higher risk of severe illness from coronavirus'.

"As we begin to ease restrictions, **this group who are clinically vulnerable - see section 8 - should continue to take particular care to minimise contact with others outside their household**.

"There is a further group of people who are defined, also on medical grounds, as clinically extremely vulnerable to coronavirus - that is, people with specific serious health conditions. They are advised to continue shielding […] measures to keep themselves safe by staying at home and avoiding all contact with others, except for essential medical treatment or support.

"2. Staying at home

"It is still very important that people stay home unless necessary to go out for specific reasons set out in law.

"These include:

"**• for work, where you cannot work from home**

"…

"The government has also identified a number of critical workers […] whose children can still go to school or their childcare provider. **This critical worker definition does not affect whether or not you can travel to work - if you are not a critical worker, you may still travel to work if you cannot work from home.**"

118. The guidance set out a list of businesses and venues the regulations required to remain closed. The Branch was not within that list. It continued

"**6. Going to work**

"**You should travel to work**, including to provide voluntary or charitable services, **where you cannot work from home and your workplace is open.**

"With the exception of the organisations covered above in the section on closing businesses and venues, **the government has not required any other businesses to close to the public - it is important for business to carry on**.

"**All workers who cannot work from home should travel to work** […] **if their workplace is open.** […] **As soon as practicable, workplaces should be set up to meet the new COVID-1 9 secure guidelines.**

"These will keep you as safe as possible, whilst allowing as many people as possible to resume their livelihoods. **In particular, workplaces should,**

where possible, ensure employees can maintain a two-metre distance from others, and wash their hands regularly."

119. Section 8 defined "clinically vulnerable" people. Mr Spencer fell within this list. They were advised to stay at home as much as possible and to minimise contact with others outside the household.

Guidance on working safely

120. On the same date the government published separate guidance called "Working safely during coronavirus (COVID-19)". The guidance said employers should carry out a risk assessment specifically relating to Covid-19 and act on it accordingly. It also said the employer should consult employees. It advised that staff should work from home if possible. It gave an example of someone who may be required to attend work as

"**Workers in roles critical for business and operational continuity**, facility management, or regulatory requirements in which cannot be performed remotely."

121. It also advised that workers should, wherever possible, maintain a 2-metre social distancing from each other.

Guidance on furloughing workers

122. The government published guidance called "**Check your employer can use the Coronavirus Job Retention Scheme**". This is the scheme underpinning furloughing. We were referred to the updated version published 14 May 2020. It says

"If you're on sick leave or self-isolating because of coronavirus (COVID-19) speak to your employer about whether you're eligible to be furloughed- you should get statutory sick pay (SSP) as a minimum while you were on sick leave or self-isolating. **Your employer can furlough you at any time- if they do, you will no longer receive sick pay but should be treated as any other furloughed employee.**

"If you are shielding in line with public health guidance or required to stay at home due to an individual in your household shielding and are unable to work from home, then you should speak to your employer about whether they plan to place staff on furlough."

The guidance clearly sets out that a person can be furloughed even if in receipt of SSP. It also encourages furlough for those staff who are not able to attend work because a cohabitant is shielding.

Guidance on social distancing

123. On 29 May 2020, the government published guidance called "Staying alert and safe (social distancing)". It said

"**It is still very important that people stay home unless necessary to go out for specific reasons set out in law**. […] **These include**:

"**• for work, where you cannot work from home**…

"…

"**6. Going to work**

"**You should travel to work**, […] including to provide voluntary or charitable services, **where you cannot work from home and your workplace is open.**

"With the exception of the organisations covered above in the section on closing businesses and venues, **the government has not required any other businesses to close to the public - it is important for business to carry on**.

"**All workers who cannot work from home should travel to work if their workplace is open….**

124. This guidance was updated repeatedly through June and in early July but, so far as relevant, did not change from what it initially said.

125. On 17 July 2020 it was updated with the following change:

"**6. Going to work**

"In order to keep the virus under control, it is important that people work safely. Until 1 August, people who can work from home should continue to do so. Where it is decided that workers should come into their place of work then this will need to be reflected in the risk assessment and actions taken to manage the risks of transmission in line with COVID-19 Secure guidelines…

"From 1 August, it will be at the discretion of employers as to how staff can continue working safely. Working from home is one way to do this, but workplaces can also be made safe by following COVID-19 Secure guidelines. Your employer should consult with you on how you can work safely, and must ensure workplaces are safe if they are asking you to return, as above.

"**All workers who cannot work from home should travel to work** […] **if their workplace is open**. Workplaces should be set up to meet the COVID-19 […] before operating. …. **Businesses should maintain 2m distancing wherever possible, or 1m with additional mitigations**."

Acas guidance

126. Acas issued guidance on what a reasonable employer could do if a worker declined to return to work. It was applicable at all relevant times. It said:

"Some people might feel they do not want to go back to work, or be unable to return.

"For example this might be because they're:

"o worried about catching coronavirus

"o at height risk of getting a severe illness if they catch coronavirus

"o caring for children

"o living with someone who is 'shielding'

"An employer should listen to any concerns staff may have and should take steps to protect everyone…. **if someone still does not want to go back to work they may be able to arrange with the employer to take time off as holiday or unpaid leave. The employer does not have to agree to this**.

UNISON guidance

127. UNISON also issued guidance called "Bargaining on workplace practices during the Covid-19 pandemic". We do not consider it says anything beyond that which the government's own guidance says, except perhaps to repeat and thereby emphasise it.

Mrs Spencer's familiarity with the guidance and regulations

128. Mrs Spencer gave the impression that she was familiar with the regulations and guidance and only seeking to follow it. After all she was advising union members on issues to which the regulations and guidance related. She told us in cross-examination that she was carrying out research into the guidance on a daily basis. Mrs Spencer, rightly, pointed out it changed regularly. She also reminded us that there were regular televised evening briefings with a government minister and experts on the issue.

129. In fact we conclude that she was not carrying out the research on a daily basis. It more evidence of her unreliability as a witness. Our reasons are as follows.

129.1. In questioning, Mrs Spencer eventually conceded that her source of information was those briefings, and not the guidance or regulations themselves. She did not look at them. This is quite apparent to us. Her answer to questions about what the guidance, e.g. about shielding, said was often to the effect

"Well, if that's what is says"

If she had been researching and reading the guidance, this dismissive answer is surprising since one would expect her to have some idea of what it said (even if she could not recall the exact words) or to be able to refresh her memory on re-seeing it and to recall her understanding when she read it.

129.2. During cross-examination she was taken to the regulations and guidance and demonstrably was unfamiliar with the wording and unable to understand the regulations. She confirmed in fact that she had not read the legislation at the time and did not understand it. She said she relied on updates from "regional".

129.3. She reported in cross-examination that she had assumed other branches had closed and, when asked if she had looked at the regulations, did not answer that question directly but said only that she "did ring round".

129.4. If she had read the guidance, she would have been clear her husband was not required to shield, she was not required to shield and The Branch could reopen.

129.5. In relation to the lockdown local to Leicester, she confirmed in questioning that she relied entirely on what the news broadcasts said.

Mr Spencer and shielding

130. Covid-19 could have a potentially devastating or fatal impact on those with certain medical conditions that made them particularly vulnerable to illness. They had to shield themselves from contact with others lest they caught Covid-19. The government wrote to those who should shied.

131. Mr Spencer was not one of those people. He has a medical condition that required him to take extra care. However he was not in the category of people told to shield. The government never wrote to him to tell him he needed to shield. Mr Spencer confirmed in evidence that in fact it was his employer who told him to work from home. While no doubt concerned for his health, he felt safe enough to leave the home to drive Mrs Spencer to and from the office. While it is true he would only be in contact with Mrs Spencer, she was clearly at risk of transmitting the virus to him if she acquired it when out of the car in the office.

132. The reality of Mr Spencer is very different to that image that Mrs Spencer painted. If she were to be believed, he had to be almost isolated away from anyone lest he catch the infection that was likely to kill him. Mr Spencer, fairly, confirmed that was not correct. This too undermined her reliability.

133. There was also some debate about whether Mr and Mrs Spencer went away on holiday while he was allegedly shielding. We have read some WhatsApp messages from Mrs Spencer that we see could be interpreted as suggesting they did. We think it unlikely because the Tribunal is aware that so many places closed and so it is difficult to see how it might have happened. However in light of Mr Spencer's own evidence that the government did not require him to shield, we do not need to resolve the issue.

The requirement to work from home

134. We have alluded already to the requirements to work from home above.

135. On 16 March 2020, Mrs Spencer commenced a period of annual leave. During this annual leave, regulations came into effect that required all non-essential workplaces to close. It is common ground The Branch's office was at this time required to close.

136. On about 23 or 26 March 2020 (the date is not clear since evidence points to either date, but it does not matter for our purposes) Mrs Marsden and Mrs Spencer spoke by telephone. Mrs Marsden told Mrs Spencer she needed to work from home when she returned to work after her annual leave on 30 March 2020.

137. Cross-examination on this point illustrated another example of Mrs Spencer's unreliability. The simple question was asked: whether she had suggested to Mrs Marsden that The Branch should close. She repeatedly said she could not recall whether she had said that or not, before eventually

conceding that she had not made the suggestion. The refusal to answer the question initially and concede what might be seen as a weak point (though we comment we do not think it is) shows Mrs Spencer's reluctance to assist and shows her selective memory, both of which undermine her credibility.

138. Mrs Spencer returned to work on about 30 March 2020. The exact date is not clear but does not matter. On 30 March 2020 Mrs Marsden instructed Mrs Spencer to work from home. If Mrs Spencer were to work from home, it is obvious she could do only her convenor duties. The office administrative duties could not be done by her. We accept that Mrs Marsden took on the responsibility for doing those.

The lack of IT equipment for working from home

139. The Branch did not provide a laptop or other computer equipment to Mrs Spencer to enable her to do her job. We think it obvious it should have done so. However this failure did not present an issue. In cross-examination Mrs Spencer conceded that her husband provided a laptop to her at no expense to her or to The Branch. She also had to supply her own phone.

140. We pause here to observe that in her grievance of 3 June 2020, Mrs Spencer wrote

"I have not been supplied with either a laptop or work phone for work purposes and have been left to purchase my own laptop and use my personal phone at my own expense..."

141. This was the first occasion that Mrs Spencer raised the issue.

142. Mrs Spencer conceded in cross-examination this might be perceived as misleading. We think it is plainly misleading. It is correct of course that The Branch had not supplied her with the equipment. It is also correct that before her grievance she had never raised the issue. The wording "have been left to purchase" implies a situation continuing into the present and in particular the need to buy the equipment, and expense therefore on her part.

143. She knew she had not bought a laptop. She knew she had been provided with one for free by her husband. She could have raised it earlier if it prevented her from working. She could have fairly made the point that it was only thanks to her husband she was able to do her role. She did not. In the circumstances her statement in the grievance is misleading and undermines her credibility.

Work being done at home

144. We conclude Mrs Spencer was not effectively performing her work from home. In the grievance investigation meeting on 22 July 2020, Mrs Spencer told Mr Crane that she was representing members 5 days each week. She repeated that assertion to us in her evidence.

145. We reject that. Our reasons are as follows:

145.1. If correct, then her job would have been full-time convenor because she would lack time to perform any administrative role.

The assertion is in direct contradiction to the job for which she was employed and the division of her role between convenor and administrator.

145.2. As we discuss below, Mrs Spencer says she kept a log of her work that she told the respondent in an email of 22 May 2022 and would make it available. However she never did make it available and when in the grievance Mr Crane asked to see it, she refused. She told us that it was in note form and difficult to follow. That may be so. However we see no reason why the log could not be provided even if it was in a distinctly personalised format.

145.3. When Mrs Spencer did send a list of cases (but not the log), it identified only 8 or 9 live cases. Compared to the total membership and bearing in mind they were working throughout lockdown, this is a strikingly small number.

145.4. Mrs Marsden told us that The Branch had received complaints about Mrs Spencer from members and some had quit as a result. We have indicated we consider Mrs Marsden more reliable in general and accept this was true.

145.5. We have alluded above to her alleged research and the fact it appears she was not researching things to anything like the extent she said.

145.6. Taken together, and her general lack of credibility, these factors undermine her allegation that she was able to work well from home.

The risk assessment of The Branch office

146. Before the office reopened, Mr Phipps carried out a risk assessment of the office to ensure it complied with the guidance. He met with Mrs Marsden to discuss it.

147. Mrs Spencer said in evidence-in-chief that she believed the risk assessment was only carried out in July 2020. It appears as a bare belief unsupported by evidence. It is an example on an allegation made for the sake of it, in our view. It undermines her credibility further.

148. In any case her assertion, and credibility, are undermined by the following:

148.1. She has general hostility to Mr Phipps. She told us in cross-examination that “I just don’t like the man.”

148.2. She never asked for a copy of the risk assessment even when she was aware that Mr Phipps had carried out the assessment (she refers to it in her email of 22 May 2020).

148.3. She did not ask for a copy because, as she accepted in cross-examination that the risk assessment, and in evidence -in-chief that the layout and space in the office were not issues.

148.4. She queried why Mr Phipps was being invited to the grievance meeting since he had nothing to do with her grievance (see below).

148.5. In her grievance hearing she said she was not disputing health and safety or the risk assessment.

148.6. She does not seem to raise any issue about the risk assessment or health and safety until she prepared her witness statement.

149. To demonstrate the assessment was unreliable, Mr and Mrs Spencer prepared their own plan of the office to show social distancing was impossible. It was based on measurements of the building from outside and on her recollection. She had not been inside the office since March 2020 and so must have been many months later if she were truly staying at home as she alleged. We reject it – it does not in our view begin to suggest Mr Phipps did not carry out a risk assessment or do a proper assessment. Her assessment is simply not credible because it is not compiled in a credible or reliable manner. In any case it depends on her recollection and provision of information about the office layout to her husband for him to create the plan. She is far from a reliable historian and prone to say what benefits her rather than the truth.

150. On the other hand, we have Mr Phipps credible evidence, with clarity about what he was and was not assessing and it was signed by both him and Mrs Marsden on 19 May 2020. It also appears to be a considered and thought-through document.

151. It is correct that The Branch did not consult with Mrs Spencer about the assessment. The guidance is clear: The Branch should have done so. However given that it was a genuine assessment and Mrs Spencer's own disinterest at all relevant times, we think nothing turns on that.

22 May 2022 – Mrs Spencer required to return to the workplace

152. Mrs Marsden had been carrying out the administrative work in The Branch to this point. It was across the way from the Leicester Royal Infirmary where she worked and so easy for her to visit. At this time however, her own workload increased because she had to return to her workplace in the hospital. The effect was she could no longer dedicate time to perform the administrative functions that Mrs Spencer was employed to perform.

153. On 22 May 2020 Mrs Marsden instructed Mrs Spencer to return to work with effect from 8 June 2022.

154. We have highlighted the regulations and guidance above. This was clearly in line with the regulations and guidance issued on 11 May 2020 (see paragraph 118 above and guidance that "You should travel to work, … where you cannot work from home and your workplace is open."). No longer was there a requirement for The Branch to close, and it is clear Mrs Spencer could not work effectively from home. She was not performing her convenor role satisfactorily and clearly could not do her administrative role from home either.

155. Mrs Marsden and Mrs Spencer spoke by telephone about the request. After the conversation, Mrs Spencer wrote the following email the same day (so far as relevant):

"Just a quick follow up to our conversation this afternoon regarding me returning to The Branch office to work.

"Although I really do appreciate that my place of work is The Branch office on Welford Road and I also appreciate that me working from home is not the way things have usually been, we find ourselves in very strange times.

"I have now been working from home following government guidelines for 8 weeks and I have to say, in my opinion, that it has worked incredibly well….

"Following on from our conversation where you have made your position absolutely clear that despite this new working practice working very well you want me back in the office. I can only presume that this is frustrating you as you did come across as very heated and angry at the situation despite it being just a discussion regarding me returning.

"Unfortunately I have to disagree with you that the situation renders me unable to work from home simply because 'Viking deliveries need to be received' and I don't believe this is in keeping with government and Unison guidelines that require employers to support employees who can work from home, to work from home.

"I understand you stated that I 'can't work from home because I've told you you can't' and that you 'have to come into the office 5 days a week and it's not fair'' however from my understanding the generally accepted, interpretation of the government and Unison guidelines doesn't include the unilateral opinion of line managers irrespective of health and safety, government and Unison guidelines.

"Additionally, as you are aware, I am concerned for my husband's health who is in the at 'risk category' and currently shielding. He has received a letter advising him to work from home due to his underlying conditions and I have done my best to shield him for 8 weeks now and I am not prepared to risk his health where there are simple and effective measures that are currently working very well for everyone.

"Furthermore, I don't believe that we have a 2 metre space between desks and allowing for movement around the office, despite you insisting that Andy Phipps the health and safety officer has done a risk assessment and recommending that 1 metre is sufficient social distancing despite government and Unison guidelines…

"As you stated in the call I will be taken off the pay roll after 8th June which I feel will only add to a bad situation as clearly I will not be working from home at that point.

"At the moment I am working efficiently and effectively full-time and working incredibly hard as this is a really busy time. I'm trying to understand your position to take me off the payroll and how this would be of benefit to the

office and indeed our members as all it will achieve is putting me into financial difficulty, reducing the capacity of The Branch and greatly impacting the available support to our members.

“If you do make this unilateral decision to override the guidelines you will be increasing the workload for yourself and other representatives as the private and voluntary sector workload will also need picking up. I will of course send you my activity log that I have been completing daily so that my cases can be passed on.

“I know that this situation is difficult and I am very keen to return to normal working as soon as the government and Unison support the return to work as normal but at this point in time I can clearly work from home with no impact on my workload and I cannot understand why you would be so eager to insist that I put my husband's health at risk to travel to an office when I really can and have been doing the same work from home.

“I have managed all this with no help at all as I have never been given a laptop or work mobile and I have had to use my personal equipment and personal phone to make all calls on and hold meetings. This has come with an additional expense to myself but I was happy to do that as it enabled me to protect John and keep working to support our members which is my number one priority as a passionate Unison Representative. But if you insist on taking me off the payroll then that is your decision as my manager.

“For clarity, the Unison guidelines states:

“Employers should make every reasonable effort to enable staff to work from home in the first instance.

“and the government guidelines state:

“Your employer should take all reasonable steps to allow you to work from home. If you can work from home If you live with someone who is shielding and it is at all possible for you to work from home, then you should. The impact that working from home has on your employer's business should not be taken into account when making the decision about whether or not you can work from home, as it would be for a normal flexible working request — the government has advised that anyone who can work from home should do so.

“If you cannot work from home and your employer is asking you to come into

work (although this clearly doesn't apply in this situation)

“Furlough: The government guidance also makes it clear that employees can be furloughed if you are shielding_ in line with public health guidance or need to stay home with someone who is shielding and you are unable to work from home.

“I should be allowed to and if you believe that I can't work from home, despite proving for the last 8 weeks that I clearly can and have remained busy from 9-5 daily, then I should be furloughed and not taken off the payroll.

"I am sure that you can appreciate that this situation, and the unpleasant tone of the phone call, is causing an undue amount of stress in an already stressful situation.

"I hope we can discuss this reasonably and with all the guidelines and facts in consideration to come to a rational decision on continuing working from home."

156. We have already mentioned that, contrary to what this letter suggests

156.1. Her husband was not shielding,

156.2. He was not in any risk category in the relevant guidance,

156.3. She was not required to shield herself to protect him,

156.4. The guidance in fact pointed very much towards going to work if the workplace was open and one cannot work from home

156.5. She knew of the risk assessment but did not ask for a copy,

156.6. She referred to an activity log that she said she could pass on but, later, refused to do so,

156.7. She implied she had had to purchase her own equipment. She had not done so.

156.8. She had been busy from 9 until 5 each day which cannot be true.

These all are things that show she is unreliable as a witness for reasons given above.

157. However, the email also shows that she wanted to continue to work from home. The references to how she can work from home, how successful it is and repeated explanations of why she should continue to be allowed to work from home all show that to be the case.

158. The fact she wanted to continue to work from home is also supported by her own transcript of the grievance meeting, where she recorded that she told Mr Crane that

"I would love to have stayed working from home but that's not going to happen and then lockdown will end and I'll be forced to go back to the office… and obviously... but I don't, don't, I don't know what you can offer what you can suggest."

159. It points to a clear refusal to return. The suggestion she was refusing to return is further supported by Mrs Spencer's own (unsuccessful in this regard) application to amend. She had applied to add a claim under **Employment Rights Act 1996 section 100(1)(d) and (e)**. The exact details do not matter. It is important to note however that Mrs Spencer said:

"(25). It is also plain that the claimant is making a claim that she feels she was treated poorly on the ground that she took the step of not returning to the office. Paragraph 26 states as follows the claimant 'thus believed [Mrs Marsden] was deliberately making the situation more difficult for her as a result of her refusal to return to the office and the grievance that she had raised.'"

160. These contemporaneous statements, and her own application to amend her claim where she relied on a refusal to return to the office all significantly undermine her evidence to the Tribunal that she was “gagging” to return to work at The Branch, and evidence-in-chief that she never refused to return to the office. They again show Mrs Spencer is an unreliable witness.

161. In the circumstances we conclude that Mrs Spencer did not want to return to The Branch office to work and was prepared to exaggerate in order to achieve that outcome. She wrote and was motivated to write what would achieve her aim. She never considered other things e.g. whistleblowing.

162. We conclude in addition, so far as relevant, that Mrs Marsden was polite but firm in this call because we prefer her evidence and in the conversation, Mrs Spencer made her refusal to return to the workplace well-known to Mrs Marsden.

163. We also conclude from this letter and other evidence about the circumstances:

163.1. There was no intimidation by Mrs Marsden,

163.2. There was no threat to remove her from the payroll, and

163.3. It was Mrs Spencer herself who first raised the possibility that she be furloughed. This undermines Mrs Spencer’s own evidence in chief where she told us that she never suggested furlough or understood she did not qualify for it.

164. There may well have been a suggestion she would not be paid. That accords with the Acas guidance however and we can see no issue with that. A worker who does not turn up for work when they should have cannot complain they are unpaid for not doing what they should have been doing.

22 May 2022 – The first three alleged protected disclosures

165. The claimant asserts that in this email she made 3 protected disclosures. It is worth therefore picking them out here. It is pertinent to note, that though she is a convenor for a trade union, nowhere does she even hint at whistleblowing. As we set out above, though these are now identified as protected disclosures, we are satisfied the complete lack of mention of whistleblowing and sole motivation of saying and spinning matters to allow her to continue to work from home, lead us to conclude she did not intend to and did not consider herself as making protected disclosures. She never applied her mind to matters that would show a reasonable belief in the public interest or reasonable belief they tend to show the relevant conduct. The reason she did not apply her mind to issues that could be identified as those matters was that she was not considering that she was making protected disclosures.

166. The disclosures are:

166.1. The first protected disclosure (PD1):

“Unfortunately I have to disagree with you that the situation renders me unable to work from home simply because 'Viking

deliveries need to be received' and I don't believe this is in keeping with government and Unison guidelines that require employers to support employees who can work from home, to work from home. "

166.2. The second protected disclosure (PD2):

"Additionally, as you are aware, I am concerned for my husband's health who is in the at 'risk category' and currently shielding. He has received a letter advising him to work from home due to his underlying conditions and I have done my best to shield him for 8 weeks now and I am not prepared to risk his health where there are simple and effective measures that are currently working very well for everyone."

166.3. The third protected disclosure (PD3):

"Furthermore, I don't believe that we have a 2-metre space between desks and allowing for movement around the office, despite you insisting that Andy Phipps the health and safety officer has done a risk assessment and recommending that 1 metre is sufficient social distancing despite government and Unison guidelines…"

26 May 2020 – Mrs Marsden's further email to Mrs Spencer

167. On 26 May 2020 Mrs Marsden emailed Mrs Spencer. Mrs Marsden wrote:

"I have picked up your email today that you sent on Friday evening regarding our telephone conversation and I have to say Debbie I am really shocked and disappointed with the tone of your email and your interpretation of my conversation. I actually thought we had a good working relationship.

"For clarity, the original decision for you to work from home on a temporary basis was made by me due to the coronavirus situation at the time and although this was not ideal due to confidentiality, I felt it was the best solution under the circumstances and until the full facts of the coronavirus were established. Regarding the equipment at home, Due to your annual leave directly before lockdown I were unable to give you your office mobile to use or any other equipment you might need but to be fair Debbie this is the first time you have raised it with me and only since our recent telephone conversation informing you of your return to the office on 8th June.

"However The Branch would have no problem paying any expenses incurred for phone calls to members on receipt of those calls.

"As you are aware Debbie things have moved on since March and lockdown is slowly lifting, for example: children going back to school on 1st June and also for people that can go back to work, to return. I am well aware of what both Government & Acas guidelines state and as long as there are measurers in place at the office then there is no reason why you cannot return.

"Whilst I appreciate your concern for your husbands [sic.] health, I was under the impression from you that both your husband & Son were working from home and it had nothing to do with his diabetes but then I may have misunderstood what you said. However this is not about putting him at risk nobody wants that and this is the reason why measures have been considered, to ensure everyones [sic.] safety 27 May 2020

"The Government have said 2 metres / 6ft and the distance between our desks is 6ft so is fine. Hand gel and antibacterial wipes will also be provided and as you know we have an intercom for when people come to the door. We will also be providing masks just as a precautionary measurer [sic.]. That said and taking on board your concern about working in the office with me, for the time being I am going to base myself upstairs and use the side entrance so not to cause you any undue anxiety.

"I also want to point out that as things are at present and as you also say, meetings could be held using Microsoft Teams. We have ordered a new computer for that purpose as the Apple Mac is not compatible that should be set up by the time you return. For clarity on pay, Taking Government & ACAS advice which states "if someone does not want to go back to work, they may be able to arrange with their employer to take, annual or unpaid leave. The employer does not have to agree to this."

"I do recall saying to you that should you feel you do not want to return on the 8th then you have the option of using annual leave or taking unpaid leave and I said don't rush, have a think about what you want to do and let me know. So I am a bit disappointed in your email when I was trying to be helpful. I would rather you return to the office Debbie because as you say it would make it difficult for me as well as The Branch because I cannot cover everything and will be working a lot from the LRI now some restrictions have been lifted. However if it still causes you anxiety, then these options still stand should you wish to take it Debbie.

"Please let me know what you want to do Deb."

168. Mrs Spencer characterises this as a demand and being threatening. We do not accept that and think such an allegation is yet another example of Mrs Spencer exaggerating at best the situation to achieve her aim. The letter is thorough, considered and explains the difficulties of her continuing to work from home. It reflects Mrs Spencer's concerns, shows an open approach to potential issues like shielding and explains why she needs to return. The last paragraph invites Mrs Spencer to make a choice.

169. We add also that we accept Mrs Marsden's explanation in this letter of what steps had been taken to make the office safe and why the claimant needed to return. Mrs Marsden's evidence tallied with this letter and she was a more credible witness. The reasons advanced are also inherently plausible when compared to the job for which Mrs Spencer was employed.

27 May 2020 – Mrs Spencer's reply

170. Mrs Spencer and Mrs Marsden exchanged emails. On 27 May 2020 Mrs Spencer wrote a further email to Mrs Marsden. Much of it repeats in

substance what was set out on 22 May 2020. We add only that she this time she appeared to quote the guidance, but again spun it in a way that was beneficial to her rather than set it out accurately. For example she wrote

"The government guidelines clearly say: 'if you can you should'. People should only go to work 'where this is absolutely necessary and cannot be done from home,' I believe that I have evidenced that this can be done from home even without the assistance of any back up and support."

171. In fact the guidance of 11 May 2020 (set out above) says instead:

171.1. One may leave the house for work, where one cannot work from home;

171.2. "if you are not a critical worker, you may still travel to work if you cannot work from home."

171.3. "You should travel to work, including to provide voluntary or charitable services, where you cannot work from home and your workplace is open."

171.4. "the government has not required any other businesses to close to the public - it is important for business to carry on."

171.5. "All workers who cannot work from home should travel to work"

172. Mrs Spencer ignored the fact her job could not be done at home. She also in effect made up the restriction that one should go to work only where it was "absolutely necessary". That did not appear in the guidance she implied she had read by writing her email as though she was quoting from the guidance itself. It also supports the conclusion she was not reading the guidance like she alleged. It is another example to show Mrs Spencer is unreliable as a witness.

173. She again said she would send over her activity log after finishing work on 5 June 2020. She also suggested again that she should be allowed to work from home because of her husband. She quoted from Unison's guidance, "**Bargaining for workplace practices during the easing of Covid-19 lockdown**" as follows (our emphasis added):

"Workers who live in the same household as a vulnerable person or indeed a clinically extremely vulnerable person who is shielding, may be particularly concerned about returning to the normal workplace because of potential risks of bringing Covid-19 exposure to their family member or housemate. **An employer can decide to furlough an employee who lives with someone who is extremely vulnerable and 'shielding'**. … Best practice is for the employer to allow the employee to work from home or to take special paid leave."

174. We repeat what we have said about Mr Spencer and that he was not in fact shielding, and what the guidance says about how shielding impacts on other family members. The part we emphasise shows Mrs Spencer putting forward the suggestion of furlough, and in context, the implication she could be furloughed. This also undermines Mrs Spencer's own evidence in chief

where she told us that she never suggested furlough or understood she did not qualify for it. It again undermines suggestions The Branch threatened her with furlough. It is further evidence that Mrs Spencer is not a credible witness and cannot be relied on.

3 June 2020 – Claimant's grievance to Mr Crane

175. On 3 June 2020 Mrs Spencer lodged a grievance with Mr Crane. She had first tried to raise with the national body of Unison but was told that in fact it needed to be raised locally, because The Branch was her employer, as her contract made clear.

176. Mrs Spencer told us in her evidence-in-chief that she raised it with the national body because she wanted to invoke the whistleblowing policy", and suggested this may have been a source of hostile animus towards her. We reject that. There is no evidence that in our views supports the suggestion that the fact she had approached the national body first had any impact on what happened in this case. Moreover though, it is pertinent that nowhere in the grievance that Mrs Spencer raised with Mr Crane does she mention whistleblowing. It is notable also that the passages in earlier correspondence she relies on now as protected disclosures make no mention of whistleblowing. She is a convenor. The lay members and judge would expect any convenor to know the basics of the law about whistleblowing, even if they need guidance or legal advice on the specifics. In this grievance she chose specifically to spell out a potential claim of constructive dismissal. It is a significant contrast therefore that she makes no mention of whistleblowing in her grievance to Mr Crane.

177. Her failure to mention whistleblowing, and general tendency to say whatever best suited her case, and inherent unreliability as a witness leads us to conclude further as a fact she did not even consider whether she was making protected disclosures in May 2020. She never even thought about whether she was saying things that tended to show one of the protected subjects about which disclosures can be made, yet alone about whether it was in the public interest. Rather, we think this is another example of saying something to paint her case in a good light. Rather, we conclude as a fact that she was motivated simply and only about being allowed to continue to work from home and would say whatever was needed to secure that outcome. We conclude that whistleblowing is an afterthought of how she might enhance her case.

178. In her grievance she wrote (so far as relevant):

"Formal Grievance.

"It is with deep regret that I find myself in the unfortunate position of having to raise a formal grievance against Mrs Marsden who is my Manager/ Unison Leicestershire Health Branch secretary/Unison Leicestershire Health Branch Manager.

"…

"Mrs Marsden has instructed me to stop working from home and she has given me 3 options, to either return to The Branch office or take annual

leave or unpaid leave as from Monday 8th June. I have responded via email and given, what I believe are valid reasons why this is unacceptable at this present time. To date I have had no response and will therefore be on annual leave from 8th June, under duress….

"Mrs Marsden is bringing Unison into disrepute by her actions which goes against Government guidelines and against Unison guidance, both against the spirit of the guidelines and indeed the word of the guidelines that I was recently asked to send out to our members.

"…

"I have evidenced that working from home has the same results as working from the office, if not better as I am getting far more done. This has all been achieved with no support from Mrs Marsden as my Manager. I have not been supplied with either a laptop or work phone for work purposes and have been left to purchase my own laptop and use my personal phone at my own expense and although Mandy Marsden states in her email of 26th May that this is the first time I have raised this, as my Manager, and a Unison representative she would have known that this was needed to enable me to work from home. Also it was not the first time that I had raised this issue as I had offered, in week one of lockdown, to go to The Branch office and pick up the equipment that I would need and also transfer the phone line. This offer was declined.

"…

"Now I have been told, without any discussion, that despite the country still being on lockdown, me still shielding my husband and the government still advising 'if you can work from home, you should' as stated above I am being given 3 options, return on June 8th, take annual leave or take unpaid leave. This goes not only against government advice but also unison advice that I am passing on to the membership.

"…

"I feel that I am being pushed down the route of being constructively dismissed as I have lost trust and confidence in The Branch which is a breach of my contract. After 11 years working for Unison Leicestershire Health Branch I am appalled that a member of staff can be treated in this manner.

179. We conclude this is another example of Mrs Spencer writing what she believed would best benefit her, careless as to whether it presented a true or false impression. It again is another thing that undermines her credibility. We come to that conclusion because

179.1. Contrary to her assertion, Mrs Marsden requiring the claimant to return to work was not against either government guidance or the relevant regulations or Unison's own guidance, which Mrs Spencer would have realised if she had read them;

179.2. Mrs Spencer refused to acknowledge the whole of her job cannot be done from home. She cannot administer the office without being there.

179.3. The options presented to her were in line with Acas's own guidance.

179.4. She implied again she had purchased her own laptop. That is untrue.

179.5. Her husband was not shielding, but she implies he had to. She also ignores the fact that even if he were required to shield, the guidance to which she refers says she is not required herself to shield.

180. We also think it significant that at this point she is expressly mentioning "constructive dismissal" and a "loss of trust and confidence". We infer that, coupled with the way she chooses to spin matters to suit her and that she was a convenor, and she clearly wanted only to work from home, she was in effect throwing down the proverbial gauntlet to the respondent, and setting in motion this legal claim if she did not get her way.

181. We also note the words

"I feel that I am being pushed down the route of being constructively dismissed I have lost trust and confidence in The Branch which is a breach of my contract" (our emphasis added).

The use of the past tense leads us to conclude that she was setting the foundations to say that the respondent has already fundamentally breached her contract. Her reference to being pushed towards constructive dismissal leads us to conclude that she also knew she had the right to resign in response to that breach.

182. Mr Crane acknowledged the grievance on 4 June 2020.

3 June 2022 – The fourth alleged protected disclosure

183. Mrs Spencer alleges that her letter to Mr Crane contains the following protected disclosure (PD4):

183.1. That she was being forced to return to The Branch despite being able to work from home effectively and the Respondent knowing that it was impossible to enforce the requisite two metre distance within the office which was in breach of the government's and the Respondent's COVID-19 guidelines.

184. We do not accept that the grievance says this.

184.1. There is no mention in her grievance of the 2-metre distance.

184.2. She did not say she was forced to return to the office. What she said was:

"Mrs Marsden has instructed me to stop working from home and she has given me 3 options, to either return to The Branch office or take annual leave or unpaid leave as from Monday 8th June."

184.3. She did not say she the actions breached the guidelines. She said only that they "went against" the guidance.

184.4. She said only that she had evidence that working from home produced the same results as working from the office.

185. We repeat what we say above about her beliefs and thoughts. The comments that apply to PDs1, 2, and 3 apply equally to 4. She did not even consider issues such as belief it was in the public interest or whether it tended to show relevant conduct. Rather, she did not even think she was whistleblowing. She was saying only what she considered necessary to get the outcome she wanted.

5 June 2020 - Claimant insists on taking leave

186. On 5 June 2020 there was a leak in The Branch office. Mrs Spencer is sceptical this is true. Having heard the evidence and given our view of the witnesses, we are not sceptical and accept there was such a leak. We can see no real reason to make it up.

187. Mrs Marsden proposed that Mrs Spencer be excused from physically attending work for 8 June while the leak was repaired. This was to avoid too many people being in the building and so to maintain social distancing. Her absence would not be unpaid and would not be deducted from holiday entitlement. Mrs Spencer emailed Mrs Marsden on 5 June 2020 saying that "under duress" she would take 8 June 2020 as annual leave. Mrs Marsden replied as follows:

"Hi Debbie

"I am not sure if you have misunderstood my previous email which says you do not have to return to work on Monday [8 June 2020]? only when the floor has been sorted. So you don't need to use your annual leave Debbie and don't forget, you have only accrued 5 days so far because we are only just in June. Surely you would want to keep those?

"But it's up to you. Just let me know.

"Thanks

"Mandy"

188. We cannot see how this email could have been any clearer. Mrs Spencer wrote in reply (so far as relevant):

"I am taking annual leave from Monday 8th June as instructed by you. You have given me 3 options, return to the office on Monday 8th June, take annual leave or take unpaid leave, I recall your exact words were 'I'm not prepared to argue about this Debbie'. Therefore, as previously stated, due to not wishing to be forced into financial hardship as a result of your unilateral abandonment of Government and Unison guidelines, you have given me no real choice but to take annual leave, under duress.

"On this basis, to reiterate, I have informed you that I will be on forced annual leave from Monday 8th June and as lockdown guidelines still require employees who can work from home to continue doing so (particularly

those shielding) with no expectation for this to change within a week, I will need to continue to remain on annual leave for the foreseeable future.

"Whilst you are correct that I have only accrued 5 days of annual leave to date, as you are aware, over the 10+ years of employment with Leicestershire Health branch there are numerous examples of both you and I utilising the years entitlement and not operating off of an 'accrued annual leave' system.

"Honestly Mandy, to approach me on this subject shortly before the end of the working day on a Friday and to make this accrual claim now is beyond unacceptable! Have you any idea the levels of stress and anxiety that you are causing for not just me but my family!

"As previously stated, in my unanswered email of 27th May, I will be forwarding all of my cases over to you later today so my members are not left in limbo as a result of this shambolic situation."

189. We conclude that Mrs Spencer's reaction is unreasonable. It is another example of Mrs Spencer setting out matters in a way that does not represent reality. Mrs Marsden was specifically not requiring – or "forcing" to use Mrs Spencer's words – Mrs Spencer to take 8 June 2020 as leave. It is plain she was being excused the need to do so. We have already mentioned that the regulations, guideline etc. do not support was Mrs Spencer says about them. Mrs Spencer did not need to stay on annual leave: She could legally and in accordance with the guidelines have gone to work once the leak was repaired, and would have, properly, been paid for her forced absence.

9 June 2020 – grievance and claimant's illness

190. On 9 June 2020 Mr Crane wrote to Mrs Spencer saying that he required more time to consider her grievance. He needed to take some advice on how to conduct the investigation, because it was his first one. We think there is nothing improper or untoward about that – rather we think it a sensible step.

191. From 9 June 2020 until the end of her employment Mrs Spencer was away from work on sick leave. The doctor's Statements of Fitness for Work cite "work-related stress" as the reason.

9 June 2020 onwards – sick pay

192. As she now concedes, she was contractually entitled only to statutory sick pay. There are no arguments about implied terms or a change based on custom or use. We set out as an aside that, in our view, the concession is correct and properly made. We are certain it would have been our conclusion in any event, given the lack of claim that there are implied terms or a variation deriving from custom and use.

193. Our view was that the contract is clear and unambiguous on the point. Her entitlement to SSP alone would have been clear to Mrs Spencer when she read her contract.

194. In the past Mrs Spencer may well have been given full pay while on sick leave, when she was contractually entitled only to SSP. In the absence of a variation of the contract or an implied term, we cannot see how anything turns on that. Here, she was paid what she was entitled to, and no more. Her complaint is that she could have received more favourable treatment. That as may be, but as her case concedes that is not something she was legally entitled to.

195. Mrs Spencer therefore received no more than what she was contractually entitled to. Therefore, as a fact she was not entitled to pay at her normal rate.

196. We have considered the circumstances in which she came to be paid sick pay. In our view there is nothing in the documents to point to a threat, like she alleges. Rather her employer told her no more than the factual truth: she was entitled only to SSP. We do not see how that could be described reasonably as a threat. We do not believe that is how she perceived it in any case. We repeat our many observations that Mrs Spencer will say what suits her, and on balance believe that is what happened here.

18 June 2020 – First invite to a grievance meeting and 1st cancellation

197. On 18 June Mr Crane invited Mrs Spencer to a grievance meeting to discuss her grievance. The meeting was to be on 24 June 2020. The invite was however not clear as to its purpose. On 22 June 2020 Mrs Spencer received the email – the delay was that she had not been checking her emails while on sick leave. She asked its purpose and said, if it were to discuss her grievance, then it was insufficient notice. The meeting was cancelled.

19 June 2020 – 22 June 2020 – claimant's refusal of offer of furlough

198. On 19 June 2020 Mrs Marsden decided that a solution to the impasse might be to furlough Mrs Spencer. On the proposed terms, it would have the advantage of Mrs Spencer still being employed, paid 80% of salary but not having to work, and for The Branch to be able to recoup its outlay from the government.

199. Mrs Marsden emailed Mrs Spencer that day as follows (so far as relevant):

> "I have looked into the matter of Furlough and we are in a position to Furlough you from the 9th of June. You are currently on sick leave and as you are aware your contract Terms & Conditions only allow you to be paid SSP after the first 3 days. So to ensure fairness and giving regards to your sheilding [sic.] situation, The Branch has decided to Furlough you from the 9th June 2020.
>
> "This means that you will still be employed by us (although on a lower rate of pay). You will not do any work for us during the Furlough period. …
>
> "If you agree to be placed on Furlough, your contract of employment will be temporarily varied. You will need to sign to confirm your agreement to the variation in the section at the end of this letter headed "confirmation of agreement" and return a copy to me at The Branch office.

"…. Unless we agree otherwise…, the temporary variation will come to an end on the date when you return to work at The Branch office.

"We have agreed to start your period of Furlough from 9th June 2020 and it will continue until the scheme has ended but can be extended by us accordingly.

"During your Furlough leave, you may not work for any other person, employer or your own account. If you do then you must tell us immediately and may be liable to repay any sums we paid you under the scheme and if we become liable to repay it to the Government.

"To Summarise.

"Your Furlough will be backdated to the 9th of June 2020.

"We will pay the current rate at 80% that can be claimed under the scheme although this could change under Government review.

"This amount is subject to deductions of tax and national insurance in the usual way.

"Your contract of employment will continue with the Leicestershire Health Branch Unison but terms & conditions under the job retention scheme require that you do not do any work for us.

"You are not allowed to work for any other employer, person or on your own account or you will be liable to repay any pay any sum paid to you under the scheme.

"Your statutary (sic.) rights are not affected by this variation to contract under the scheme.

"If you agree to Furlough please sign & date your letter and return to me The Branch Secretary by Monday 22nd June. Should you not wish to accept to Furlough please confirm this to me in writing by the same date."

200. Therefore, if accepted, Mrs Spencer would have received furlough pay which it is agreed would be higher than the SSP she otherwise would be entitled to. It would mean her absence did not count as sick leave. The Tribunal does not accept that this letter could be in any way described as threatening the claimant with furlough. We have heard no evidence that begins to suggest to us there was anything else about the circumstances that could be described as The Branch "threatening" Mrs Spencer with furlough.

201. Mrs Spencer described in her evidence in chief that the letter was Mrs Marsden writing to advise she would be placed on furlough. This is objectively and plainly untrue. She conceded that characterisation was unfair in cross-examination, as she was bound to do so. That she made the accusation at all is another example of Mrs Spencer's unreliability as a witness.

202. Mrs Spencer refused furlough. She wrote on 22 June 2020 to Mrs Marsden as follows by email (so far as relevant):

"I do not agree to go on furlough as I am currently on sick leave with work related stress. Also, you state that my contract terms and conditions only allow me to be paid SSP which is incorrect and therefore is a moot point.

"My contract clearly states, and history dictates that my terms and conditions come under Agenda for Change as implemented by UHL.

"When you gave me the 3 options, either return to the office or take annual leave or unpaid leave, leaving me and our members in a dilemma, had I been offered furlough at that point I may have agreed as I am continuing to shield but as I am now off work with work related stress furlough cannot be offered until I return.

"The HM Treasury Direction on the Coronavirus Job Retention Scheme, which was revised on 20 May 2020, provides that, if an employee is entitled to statutory sick pay (SSP), the furlough period that the employer can claim for under the scheme cannot begin until the employee's period of incapacity for work has ended."

203. We re-echo our observations about her alleged "shielding" and say that this is another example of her unreliability.

204. We also have considered the Direction to which Mrs Spencer referred. It said (so far as relevant)

"6.1 An employee is a furloughed employee if-

"(a) the employee has been instructed by the employer to cease all work in relation to their employment,

"(b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and

"(c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.

"…

"6.3 Where Statutory Sick Pay is in payment or due to be paid in respect of an employee at the time when the instruction in paragraph 6.1(a) is given, the period described in paragraph 6.1(b) in respect of the employee does not begin until immediately after the end of the period of incapacity for work for which the Statutory Sick Pay is in payment or due to be paid (provided that the time of the end of that period of incapacity for work is determined by an agreement between the employer and employee)."

205. Whether The Branch could backdate furlough to 9 June is unclear (other guidance to which we have not been referred might permit that). However the proviso in paragraph 6.3 of the direction clearly contemplates that the employer and employee agree that the employee stops their sickness absence and is furloughed.

206. We see no reason why Mrs Spencer refused to be furloughed – particularly when she had suggested it previously, twice. In light of everything else, this is on balance an example of Mrs Spencer seeking to create some

advantage for herself, rather than refusing for genuine reasons. It is further evidence of her unreliability.

23 June 2020 – Mrs Marsden requests the claimant provide a copy of her contract

207. Mrs Marsden acknowledged Mrs Spencer's refusal of furlough by email on 23 June 2020. She also wrote that, after "double-checking" her copy of Mrs Spencer's contract of employment, she believed that Mrs Spencer was entitled only to SSP. She asked Mrs Spencer to provide a copy of her contract and highlight where it said otherwise.

208. Mrs Spencer has taken exception to this. She wrote on 24 June 2020 as follows:

"I agree that our respective copies of my employment contract should indeed align in terms and conditions, please kindly furnish me with a copy of the contract that you have on file as I cannot see how there could be a discrepancy. A scanned and emailed copy would be sufficient.

"I can see clearly from my contract that I am entitled to sick pay as per UHL policy and agenda for change but that aside, over the last 10 years when I have been on sick leave for extended periods on a few occasions e.g. my eye operations and when I broke my ankle I received full sick pay as per my contract.

"Why now are you alleging that I am only entitled to SSP? What could have

changed? I can only conclude that this sudden departure from, at the very least the adopted custom and practice, of paying sick pay is a further attempt to bully me into accepting the latest offer you propose.

"With regards to the offer of furlough, to reiterate, not only would furlough be inappropriate due to my being on sick leave, as per the HM Treasury Direction quote in my previous email, but I also find it both morally and legally reprehensible to fraudulently fabricate the claim that I had been furloughed prior to the scheme being end-dated when I was indeed still working, purely as a means to shoehorn me into the scheme and as a result illegally deduct 20% of my salary."

209. Therefore rather than simply highlight the paragraph in her copy of the contract and send it through, which would have solved matters quickly, Mrs Spencer took a position that we believe can be described as deliberately obstructive for no good reason. There was no reason not to send a copy of the contract she was reading to Mrs Marsden. We note the real reason she could not send a copy of her contract showing she was entitled to sick pay above SSP is because that is not what her contract showed. Rather than concede the point though, she turned matters into a battle. She also freely alleged The Branch wanted to commit fraud and deduction of 20% of her salary would be "illegal" (though of course if she had agreed to it, that may not be correct, and in any case SSP was lower than what she would have been entitled to if she were furloughed). It is further illustration of Mrs Spencer's approach to taking a position and saying she believes will benefit her, and which again undermines her credibility in our view.

23 June 2020 onwards – attempts to arrange a grievance meeting

210. Mr Crane cancelled the first meeting on 23 June 2020, saying he would send dates of availability which had to fit around his full-time job.

211. On 29 June 2020 Mr Crane wrote to Mrs Spencer to rearrange the meeting. The earliest dates he was available was 14, 16 or 20 July 2020. He asked for any documents, name of trade union representative and any request it be recorded to be sent 5 days before the meeting.

212. In the letter he wrote:

"Unfortunately as you cancelled the last date I offered, the earliest I will be available is mid-July."

213. It is not correct that Mrs Spencer cancelled the last meeting. In cross-examination Mr Crane accepted he took the decision and accepted readily that this characterisation of what happened was incorrect. He accepted the first cancellation therefore could not be attributed to Mrs Spencer herself cancelling the meeting. Rather it was necessary from the circumstances.

214. Mrs Spencer emailed to Mr Crane on 7 July 2020 saying that

"I would like to schedule the earliest date offered of 14th July. I will email my representative to check their availability."

215. She also said that she had lost trust and confidence in The Branch and took issue with the suggestion she had cancelled the last meeting. Finally she did not accept 1 month delay from raising the grievance to the hearing was reasonable, even in light of the pandemic. In the circumstances of the Covid-19 pandemic, that Mr Crane was a healthcare worker with significant demands on his time and that there is no suggestion the delay led to any particular unfairness or disadvantage, we disagree.

216. On 9 July 2020 Mrs Spencer emailed Mr Crane to ask the meeting to be rearranged to 16 July 2020 because her union representative was not available on 14 July. Mrs Spencer suggested it was not fair to say she cancelled the meeting on 14 July because it was due to her representative's availability. We think it can be fairly categorised as her cancelling the meeting: she requested it on 14 July 2020, then asked for it be rearranged to 16 July 2020. That is a cancellation of 14 July. However to be fair to Mrs Spencer, we think that it could equally fairly be said that her acceptance of 14 July 2020 was provisional since she indicated she needed to check her representative's availability. Whether technically she did cancel the meeting or not, we do not think the allegation she did is an unfair or unreasonable one – at best it may simply not be right.

217. On 10 July 2020 Mr Crane confirmed the date of the meeting would be 16 July. He also said that Mr Phipps would be in attendance. Mrs Spencer responded to this as follows:

"I notice that you have invited Andrew Phipps to my grievance meeting. Can you please let me know why. Andrew Phipps has got nothing to do with my grievance. …

"If you need to ask Andrew any questions regarding my grievance then the correct procedure would be to investigate this after you have heard the grievance. As Andrew is not mentioned in my grievance I can see no reason why he should attend the meeting."

Mr Phipps carried out the health and safety assessment, of course. As noted above, Mrs Spencer has sought to make a big issue of the health and safety assessment in this case. As noted above, none of her grievance concerns the man who did the health and safety assessment. Mr Crane thought it may be relevant. Her objection to Mr Phipps presence and that he had nothing to do with her grievance show to us that health and safety was a non-issue raised simply to bolster her case.

218. On 13 July 2020, Mrs Spencer wrote to Mr Crane to say that her representative was not available on 16 July after all. She asked that the matter be rearranged to 21 or 24 July 2020.

219. Mr Crane replied

"Thank you for your email I received today. I note that once again you are wanting to cancel & change the agreed date of your grievance meeting.

"Unfortunately I am unable to make either of the dates you have put forward and the only dates I have available in the next few weeks are 22nd July between 10- 1pm and 23rd of July between 10-1pm.

"Please can I remind you that 1 will be accompanied by Mr Andrew Phipps Senior branch Health & Safety officer and to remind you that as an employee of The Branch it is not for you to specify who assists me in this meeting. After all, your concerns were based around safety and returning to work so this should be helpful to you.

"I appreciate that you want your Trade union representative with you for support however as you have already cancelled three dates and in the best interests of all concerned these dates will be our final offer."

220. The letter clearly offers alternative dates he will be available and does not stop Mrs Spencer having a trade union representative. Rather it says that the meeting will proceed on the next date and the representative will have to accommodate Mr Crane rather than the other way around. Mrs Spencer alleges that she was "threatened" to attend the meeting without a representative. We do not agree. She was told no more than there would be no further alternatives. She was not told she could not bring her representative to the next meeting.

221. Mrs Spencer also alleges she was accused of "deliberately" cancelling meetings. Our factual conclusions are as follows:

221.1. Nowhere does Mr Crane ever say that Mrs Spencer deliberately cancelled the meetings. Even Mrs Spencer cannot point us to him making this allegation

221.2. It is not clear what "deliberately" was meant to add in any case. Mrs Spencer never explained it.

221.2.1. In relation to the first meeting, it is correct Mr Crane wrongly said Mrs Spencer cancelled it. We note he never used the word "deliberately" – rather he appeared to be under the impression the only reason it could not proceed was Mrs Spencer's choice rather than there being too little notice.

221.2.2. Insofar as she consciously cancelled the second meeting and third meeting, then that was deliberate. Therefore saying she cancelled those meetings is merely a statement of fact, not an accusation. There is no evidence of an accusatory tone.

221.2.3. If "deliberately" is meant to imply that the respondent suggested to her that she had done wrong or there was some bad faith on her part in the cancellations, we reject that. There is no evidence the respondent made any such express or implied assertion.

222. Correspondence continued about whether the claimant had or had not cancelled meetings. We have read it. It sheds no further light on this issue. Therefore we consider nothing turns on that correspondence and so put it one side.

20 July 2020 – Claimant's complaints about payslips

223. As we mentioned, Mrs Spencer was the only employee. She was paid monthly through a payroll. However if anyone else claimed expenses for performing their role, they too were reimbursed their expenses through the payroll. Mrs Spencer appeared to doubt this in evidence. We accept it is perfectly credible and sensible and accords with what we have seen in many cases and the lay member's own experience in the workplaces.

224. The payroll processer would email the payslip data to Ms Craig. It was then up to Ms Craig to pass the payslip to Mrs Spencer. All of the payslips for a month relating to people in The Branch were sent to Ms Craig electronically in one document. It was for Ms Craig to extract the information for an individual a put it into another document and then forward that to the payee.

225. Ms Craig had not provided a payslip to Mrs Spencer for nearly 2 years. She told us that it was because Mrs Spencer had said that she did not want to receive payslips, because the amount and deductions were the same each month, and she did not need the information in it.

226. On 20 July 2020 Mrs Spencer wrote to Ms Marsden as follows:

"As you are aware, I have still not received a single payslip since June 2018 so we are now on the cusp of two years with no payslip.

"I don't want to sound like a broken record for having to ask yet again but can you please arrange for my payslips to be sent to me from July 2018 onwards. I would be most grateful.

"I have queried on numerous occasions why my personal payslips were being emailed to Kim Craig and not sent directly to myself via a secure

portal but have never been given a reasonable explanation. This is a massive GDPR breach as several identifying and personal details are on payslips. The last time I requested my payslips Kim Craig bought a huge wad to The Branch office but these were printed on portrait so obviously only half of the information was visible. I asked her to reprint them on landscape but this never happened. It would be good to have some idea of where I am with tax, pension and all the other details I have been in the dark on for so long.

"For clarity, as the last one I received via email from Kim Craig was June 2018 I will need 24 payslips. May I also ask that they be sent via a secure portal and not from Kim Craigs hotmail to my gmail as has happened in the past."

227. There is no prior correspondence about payslips before this email. Mrs Spencer told us she had repeatedly been requesting her payslips.

228. After the request, Ms Craig took steps to ensure payslips were printed and placed in the office (in the filing cabinet, as she confirmed in her email of 23 July 2020). She did not have access to "a secure portal" to transmit the information to Mrs Spencer. Likewise on 30 July 2020 Mrs Craig reiterated in an email that they were available in the filing cabinet, and that Mrs Spencer had repeatedly said she did not need them or want them.

229. We reject Mrs Spencer's evidence and conclude it was not a real issue, but something said to support her position. We do not accept that there was a genuine issue: Mrs Spencer had requested she not be provided with payslips because they are for the same amount, and that is why she never received them. Our reasons are as follows:

229.1. Whereas Mrs Spencer's evidence was generally unreliable, Ms Craig was clear and consistent. We were strongly left with the impression she was acting only on Mrs Spencer's request and acted differently when requested. Ms Craig has a condition that makes her use of computers more difficult than otherwise might be expected. She also asked what to do and followed the instructions.

229.2. If payslips have not been provided for 2 years or thereabouts, we are surprised the matter was not raised formally beforehand.

229.3. If Mrs Spencer's allegation about payslips is correct, then it most surprising it was not mentioned in her emails of May 2020 to Mrs Marsden or in her grievance to Mr Crane. This requires an explanation of why she did not raise something with either of them if it were a problem for 2 years! However no credible explanation has been provided to us.

229.4. Mrs Spencer is a convenor. The lay members point out that in their experience, competent trade union representatives know about basic employment rights, even if they require guidance or legal advice on the specifics. The email of 31 July 2022 (set out below) also suggests she knew this aspect of the law. The right

to an itemised payslip is one of the most basic rights. Mrs Spencer never suggested she was not aware of the right. We do not think it credible that Mrs Spencer would delay 2 years before raising it, if it were an issue like she alleged.

230. This also undermines her credibility in our opinion.

22 July 2020 – the grievance meeting

231. Despite Mrs Spencer wanting to rearrange the meeting, it proceeded, in any event, on 22 July 2020. Mrs Spencer's chosen trade union representative attended. Mr Phipps also attended.

232. The meeting took place on Zoom. It was recorded on Zoom, with a copy to follow to each party.

233. The meeting lasted for just over one hour. Each party produced their own notes of the transcript, but the claimant's is the one used for the most part by the parties without suggestion of inaccuracy. Therefore we quote from that. In the meeting the following exchanges took place (so far as relevant) (DS – Mrs Spencer; NC – Mr Crane; AP- Mr Phipps; RP – Roo Peake, trade union representative):

"DS: Most of my admin work at home, I have to be honest it's been members constantly ringing or being sent through from Donna because unison direct are closed because of Covid so they have been going through mainly through Donna and they go online and send queries direct. I have been picking up all them. My email has literally not stopped. I've kept an activity log which I said that I would send to Mandy. She never asked for one, but I kept it because I was so busy. I can honestly say, hand on heart, I have worked harder from home than I have ever done in the office. I have had no travel time so I'm in the office at 8am, I don't leave, I don't switch off till 6pm, I work weekends, there was a couple of bank holidays I think and I was working all over 1 that, so yes teams meetings, zoom meetings.

"NC: Yea Ok. Can you explain the guidelines for shielding your husband.

"DS: The guidelines?

"NC: Yes

"DS: **I've just kept him at home.** He's stayed at home. **His company has absolutely insisted he has to stay at home.** But his company has been absolutely totally different. They have set his office up. They have given him a chair; they've sorted his laptop out. They set up teams. They have a weekly welfare call with all their staff. They have been absolute polar opposites; they have been brilliant. But me shielding John has been easy because we have home delivery of food, disinfect it on the step. He hasn't seen sight or sound, he's got 2 young children and he's not set eyes on them at all. He's set eyes on his eldest through the window once, so yer we have shielded him to the max and I am not putting him at risk.

"AP: Can I just ask a question Debbie? **Has your husband had a letter from the government to say that he should work from home?**

“DS: **No. He’s not in that risk, but because he’s diabetic he’s got to stay at home. He’s not in the you must**, he’s not had a letter no. He’s not in the high high risk, but he’s a diabetic he’s been told to stay at home.

“AP: **Was that by his company?**

“DS: **No, it was by the government**. If you have got diabetics you don't go out, you're more at risk.

“AP: The government were sending letters out for people who were high risk telling them to stay at home, but **he didn't get a letter?**

“DS: **No**. He's not in that category, he's diabetic and he's at risk, which is why his company have set his office up. But no he's not had a government letter.

“…

“NC: Debbie what resolution would you like from this grievance?

“DS: I honestly don't know what you can do because Mrs Marsden can't even claim ignorance. You know I'm getting things from the regional officer Carol Brown, because I'm the only person who operates the warms [sic.] system I'm sending this out to my members, we are, as reps going in there and defending our members, we know the rules and regulations, we're not some tin pot company, we are a union, we know exactly what should happen, and she's The Branch secretary she knows more than anybody so what can you say.

“RP: What do you want Debbie?

“DS: I honestly don't know, what can you do? What can they do that's better?

“RP: Do you want to remain working from home?

“DS: **I would have loved to have stayed working from home.** My members were mortified when I told them I was going on annual leave. I didn't tell them anything else just that I've got to take annual leave. I'm in the middle of cases and I've got a case that massive, I've been with her for like 6 months and I've got to hand over all that paperwork to somebody else. It's just not fair on the members, forget me, it wasn't fair on the members. But yes **I would have loved to have stayed working from home but that's not going to happen and then lockdown will end and I will be forced to go back to the office after all this.** I don't know, what can you offer, what can you suggest?

“…

“DS: [after discussion about social distancing in the office and the risk assessment] OK Andy, I actually don’t really want to discuss the risk assessment, I didn’t have sight of it, **it’s not part of my grievance so it’s not really relevant.**

“…

“DS: [after further discussion about the risk assessment and social distancing in the office]: **OK Andy, we’ll leave that one there. That’s not part of my grievance anyway. The grievance is that I won’t, I can’t** [come back to work at the office], I’m on lockdown.”

“…

“RP: I think there’s been a breakdown in communication isn’t it as soon as someone’s back comes up then your back comes up and you do. That changes things and that’s probably where this grievance has come from actually we’ve got a bit of one against the other we’ve got to break that down and **actually I think you are key to this Andy you are the expert in health and safety. You’ve got Debbie’s best interest, Mandy’s best interest and The Branches best interest at heart** and it’s for you I feel to go through that risk assessment and go through what’s currently working really well, that we can keep and actually what needs to change we’ve all been working in the dark ages how much printing did we do that we didn’t need to

“AP: I think going forward the first thing that needs to be done is that you both need to view and have a look at the risk assessment that was completed um over 6 weeks ago now and I don’t know why you've not been partial to that but that's your starting point. From a health and safety point of view

“RP: Could they not do that between them because I really feel, sorry I'm talking on your behalf Debbie but you know could you be the person to mediate to be that person to bring 2 parties together to look at the approach, could you be that person that talks through the thinking

“NC: You mean like a mediator

“RP: **A bit, but also you are the expert of health and safety you wrote that plan so what's behind it**. Why did you think you needed 3 metres in the office? did you put a pile of masks by the door? There's loads of things you can talk about. You're the person that can talk through Mandy's and Debbie's concerns and worries

“AP: That's something that can be done, but at the same time Debbie and Mandy have got to be able to communicate

“DS: I have communicated

“AP: I don't believe its actually happening correctly at the moment

“DS: I have communicated with Mandy. I have explained the whole situation and **the response I got back was ‘it was my decision to allow you to work from home’** that's rubbish it was the government who told me to work from home not Mandy.

“I'm not a keyworker, if you can work from home you should. It wasn't Mandy's decision, and then suddenly on 8th June, I've changed my mind, you're still on lockdown, **the government are still advising the same thing but I want you back. No, It’s not Mandy's decision, It's the government's decision, we were on lockdown.**

"… Then she offered me furlough, then she offered to back date the furlough which is not legal. **You only furlough people if they can't work, I can work**. My members are wanting me to work but because someone has made this decision that you can only do that function in the office. Come to the office drive to Leicester and sit in the office and do a teams meeting. Where on earth is the logic behind that? You can't defend it, and I've asked the question, its not been face to face and the response I got was its my decision, I'm your manager. Its my grievance. Talking to her is not going to change it. That's what she said.

234. The parts we have highlighted show important factors in our view that undermine the claimant's credibility and show her flexibility with what she is prepared to say:

234.1. Her comments about Mr Spencer tend to support the fact that she knew he was not required to shield when she wrote earlier correspondence suggesting he was and had been told to do so. It shows in our view that Mrs Spencer was aware that she was twisting her earlier representations about Mr Spencer.

234.2. Her comments that she would love to have stayed at home and what appears to be a lament that lockdown will end and she will be "forced" back to the office disclose her real feelings, that she wanted to work from home because she much preferred it. None of her reasons related to Mr Spencer.

234.3. Her 2 comments that the risk assessments are not relevant to her grievance undermine her allegations about concerns about the risk assessments. We repeat what we have already said about that.

234.4. However Ms Peake (correctly in our view) spotted its importance and that it alone was the only practical reason Mrs Spencer could not return to the office. However in our view Mrs Spencer then sought to kybosh Ms Peake's helpful suggestion. Mrs Spencer misrepresented what Mrs Marden had said, the government guidelines and the furlough guidance.

235. Mr Crane said he would require 14 days to consider matters.

22 July 2020 – Ms Peake's report

236. Ms Peake prepared a summary report of the meeting. The report is a proforma. In that report there is the following section:

"MEMBER SIGN OFF

"Any request for Unite legal assistance to Employment Tribunal must be made immediately to your Regional Officer.

"Failure to do so may result in insufficient time for the union to properly consider the merits of your case and an inability to assist further with your application.

"Your complaint to an Employment Tribunal must be received at the Tribunal Office within strict time limits. In most cases this is three months minus one day from the act complained of. It is your responsibility to ensure that any claim is submitted in good time and within any statutory time limits.

"I confirm that Unite has informed me of my rights and I acknowledge that it is my responsibility to ensure that time limits are adhered to at all times.

"Date act complained of:

"Signed (Member) D Spencer Date: 22-07-20"

We found no evidence that her union did not properly advise Mrs Spencer on her complaints. Mrs Spencer was in any case clearly aware of the implied term of trust and confidence and the right to claim for constructive unfair dismissal. In our view, even if there were doubt before (which we do not think there is) there is no doubt that by 22 July 2020 Mrs Spencer knew of the potential claims, steps she must take and options available. In simple terms, she was by this date at the latest fully informed.

Events subsequent to the grievance meeting

237. There were issues uploading the recording of the meeting to MS Teams. This would have allowed each party to view and (presumably) download a copy for their own records.

238. On 22 July 2020 Mrs Spencer chased a copy of the recording from Mr Phipps, because she could not access it on MS Teams. He replied the same day that he too was having the same issues. He passed the matter over to "IT" to advise and resolve. By 24 July 2020 he informed Mrs Spencer that he had asked Mr Crane to burn copies to a compact disc (CD) and post it out to Mrs Spencer, because the file was too large for email and could not be made accessible in MS Teams.

31 July 2020 – The claimant accuses Mrs Craig of perjury

239. The issue about payslips continued. We have set out above (out of chronological order admittedly, but hopefully in a way that aids clarity) the action that Mrs Craig took. We pick out this email of 31 July 2020 because we feel it is again something that undermines Mrs Spencer's credibility. She emailed Mrs Craig as follows (so far as relevant):

"We are both aware that those conversations you allege took place are an invention of your own but of course I do fully expect you and your friends to close ranks even to the point of perjuring yourselves, such is the culture. "For the record, I have actual credible witnesses to my asking you on several occasions for my payslips and subsequent numerous conversations.

Employers must give all their employees and workers payslips, by law.

"…"

240. The use of the word "perjure" in our views suggests that Mrs Spencer was again well aware of legal rights and wrongs. It is not a word used in ordinary discourse to describe lying – at least not in circumstances outside of court.

We conclude it was deliberately chosen to be provocative and threatening. It is an example of Mrs Spencer saying what would help her rather than simply trying to resolve an issue.

241. The email also confirms that Mrs Spencer suggests to us that she knew the law about payslips. As we set out above, this makes her claim that this had been an issue for many years implausible.

6 August 2020 – claimant decides to resign

242. Mrs Spencer's solicitors, Lawson West Solicitors, opened their file on her case on 6 August 2020. This was confirmed to the Tribunal by Mr Fireman on instructions. While not confirmed on oath, it has not been challenged by the respondent and we accept it as correct. With this information, the reference in her grievance to "constructive dismissal" and having already lost trust and confidence in her employer, this strongly points to the fact that she had decided already she was going to resign and bring a claim. We are persuaded this is the real situation by the following additional factors:

242.1. The whole tenor of this case was that she wanted to continue to work from home, and was determined not to come back to the office,

242.2. In addition there is a clear theme that she would put things in whatever way she felt best helped her case,

242.3. Everything points to the inference in our view that if she were not going to get her way, she would seek compensation. This is supported not just by the way she has spun her case and evidence to make a claim but also by the support from her son, on whom we commented earlier. What we do know is they appear to have discussed matters,

242.4. From the start of her grievance about being asked to come to work she was setting out the legal basis for her claim and suggesting constructive dismissal,

242.5. She started early conciliation on 13 August 2020,

242.6. There is no obvious event that marked 24 August 2020 as the day to resign,

242.7. When she was asked questions about instructing solicitors, she could not give any details at all. Given the significant length of her statement and apparent recollection of other matters, and general lack of credibility for reasons given elsewhere, we consider this forgetfulness is simply not genuine.

243. We find as a fact therefore that by 6 August 2020 she had decided to resign and to claim constructive unfair dismissal. Mrs Spencer was using the time from then to her resignation to ensure everything was in order for her to present her complaint. This is backed up by the contents and timing of the resignation letter (see below).

12 August 2020 – Mr Crane updates Mrs Spencer

244. Mr Crane updated Mrs Spencer on 12 August 2020 that he was meeting with Mrs Marsden on 14 August 2020 to discuss the grievance. He also said that he had burnt a copy of the meeting to CD and would be sending it to Mrs Spencer by recorded delivery. While he did not give a deadline, there was nothing in his correspondence to suggest there would be a delay beyond normal posting times (with allowance for the impact of the pandemic).

14 August 2020 to resignation

245. On 14 August 2020 Mr Crane met with Mrs Marsden. There are no notes of the meeting. He did not make any. We think this a serious and surprising lapse. The grievance outcome letter, to which we will refer below, clearly shows he accepted what Mrs Marsden told him. This was put to him in cross-examination and, to his credit, he unhesitatingly accepted this as correct: he preferred Mrs Marsden's version of events.

246. It is apparent that they discussed whether Mrs Spencer was able to do her full job from home. At the time Mr Crane concluded she could not. However before making his decision he emailed Mrs Spencer on 19 August 2020 as follows:

"Please can you send me your activity logs from the 30th of March until the 5th of June, Including all emails phone calls and meetings please?"

247. As we set out above, Mrs Spencer had already promised at her own volition (i.e. without The Branch requesting her to do so) to send her activity logs to the respondent for activity up to 5 June 2020. In fact she never sent them. However, rather than send the logs she had already said she would send, she replied on 21 August as follows:

"Firstly, I was never asked to complete an activity log whilst working from home, however fortunately I did complete one for my own records and in the spirit of best practice to record all my on-going cases.

"Can I ask what relevance this has to my grievance? Also, why you are only now asking to see it some 12 weeks since my grievance was initially raised? Also request an explanation as to why this is taking such an unreasonably long time to investigate such a simple matter?

"I note that the only person to whom I mentioned that I was making activity logs was "[Mrs] Marsden, so presumably this query is as a result of conversations with her. I ask why this has been requested as a result of said conversations with [her]. The investigation is with reference to the demand that I return to The Branch office during lockdown, as per my grievance and not my workload. [Mrs] Marsden has already been sent my on-going cases when I initially went on enforced annual leave.

"I'm disheartened and distressed that you appear to still only be in the preliminary stages of this investigation which according to policy should have been investigated and completed many weeks ago. (given that my output was to many degrees higher during lockdown, due to virtual

meetings and concentrated protected time to focus on my workload, I can't see that the lockdown could be impacting and be the cause of this process being dragged out so interminably."

248. We think it was obvious why the logs were needed. It went to the issue of productivity about working from home, and its efficacy. Given the guidelines and regulations did not say what Mrs Spencer (even here) suggests they said, it is clearly relevant to assessing the reasonableness of Mrs Marsden's request. For example if they show Mrs Spencer working flat out 5 days per week as a convenor, then a realistic outcome may have been she continued to work from home, or for part of the week. She herself said in her grievance she had evidence that working from home was as good as working from the office. This is a request for what is part of, if not the whole of, that evidence.

249. We cannot in any case see a good reason therefore for not supplying them. Mrs Spencer had already offered to supply them. They would demonstrate the work she was doing on her employer's behalf. There was nothing to stop her supplying then and at the same time arguing they are not actually relevant.

250. Mrs Spencer provided us with no credible reason for her stance. She said they would be unintelligible to others. We cannot see why that means they cannot be disclosed. She could always have accompanied it with an explanation.

251. Mrs Spencer did not disclose them in these proceedings, which is surprising if they showed she was working well at home 5 days per week.

252. In light of her approach generally and our views of her, we consider this is an example of Mrs Spencer saying whatever she thinks will best help her, and indeed it appears to go so far as to try to control the grievance procedure itself and dictate its outcome. We also conclude that because of the way Mrs Spencer tries to spin things and her holding back of disclosing something she herself said she would provide, and which are obviously relevant, the real reason she did not want to disclose them was because they did not show she was working from home to anything like the extent she alleged. This is also supported by Mrs Marsden's evidence, which we accept, that The Branch received complaints from members about Mrs Spencer's performance and that indeed some members quit as a result.

24 August 2020 – Resignation

253. No events occurred between 21 August 2020 and this date. On 24 August 2020 at 09:04 Mrs Spencer sent the following letter (our emphasis added):

"Resignation

"I hereby confirm that as of today, 24th August 2020, I resign from my position as Unison Branch Convenor/Admin Assistant following the events that have occurred over the last 12 weeks.

"In accordance with my contract dated 9th August 2010 I am giving you 4 weeks' notice so that I expect my last day of employment to be 18th

September 2020. Please arrange for my final payslip and P45, together with any other relevant materials to be sent to my home address.

“As I have not been given a payslip for over 2 years now, despite requesting on countless occasions to receive one monthly, I would appreciate the backlog of payslips as well. The fact that these were sent to the treasurer instead of direct to myself has always bewildered me as I have said on several occasions that it breaches GDPR to be sent direct to her email account and not through a secure portal to myself. This was not the case when I first started working for UNISON when they were sent to my home address and not to the previous treasurer’s email address. As a union I am shocked that this was ever allowed to happen as the law clearly dictates that everyone should receive a payslip. For clarity, my last payslip was received June 2018.

“Reason for my resignation

“I raised a grievance on 3rd June 2020 (copy attached for your information) which sets out the basis on which I believe you have grossly breached my contract. The grievance was eventually heard 7 weeks later, on 22 nd July. There were claims by the investigating officer, Neil Crane, that I had cancelled 3 dates, this is incorrect and can be evidenced.

“To date I have still not received an outcome to my grievance, and it is now 12 weeks since I raised the issues.

“I now consider that my position at Unison Leicestershire Health has been rendered untenable and my working conditions intolerable, leaving me no option but to resign in response to your breach and behaviours.

“You should be aware that I am resigning in response to **a repudiatory breach of contract by yourself and I therefore consider myself constructively dismissed**. **I have lost all trust and confidence** with UNISON and more importantly, yourself as you put me in an impossible situation during the Covid-19 lockdown. As the unions say, staff should not be forced to choose between safety and poverty. This was the choice that I was given when you declared on 22nd May that I was to either return to working in The Branch office or take annual or unpaid leave. There was no discussion or agreement, it was merely a fait accompli.

“I am quite frankly disgusted by the attitude and lack of empathy and knowledge shown by my manager in making those decisions which I find grossly unfair and unjustified in all the circumstances.

“At the very beginning of lockdown, I offered to transfer the phone to my home phone number and collect my computer and mobile phone from the office to facilitate my working from home, which you refused.

“To continue to work from home after your refusal to allow me to take equipment from the office **I had to purchase a laptop to allow me to continue working at great expense to myself**.

“It was an expectation that I would just carry on without any assistance or support. Furthermore, you then demanded, after 8 weeks of working very

well at home, and in the middle of lockdown, that I return to the office, without any discussion.

“I find this appalling given that we work in the public service sector protecting people's rights and jobs. You went against everything that we stand for as a union and everything that we were doing for our members, and which would have been against government and unison guidelines and would have been a risk to my health and safety.

“You informed me that Andrew Phipps had conducted a risk assessment and he had declared that 3 feet was enough for social distancing which clearly is not what the guidelines stated at the time. I would question Mr Phipps skills, knowledge, and competence on the subject of health and safety if he did indeed conduct a risk assessment, which remains **uncertain as despite requesting a copy** and being told I would be sent one, to date I have seen no evidence of this risk assessment being conducted even though it relates to my position within that office. The guidelines on risk assessments also clearly dictate that the employees should be involved in the assessment and not just merely informed that one has taken place.

“At my grievance meeting with Neil Crane and Andrew Phipps on 22nd July I was informed by Andrew Phipps that the risk assessment should have been shared with me and he would ensure that I received a copy, **to date I have still not received a copy**. I can only deduce that the risk assessment never took place as it could easily be shared with me via email yet 12 weeks later and I still find myself in want of a copy. Indeed when I asked the question of whether I would still be expected to travel into Leicester during the local lockdown, Mr Phipps stated that we were not still on lockdown, despite lockdown still being in effect and Leicester having been returned to full lockdown following increasing cases of COVID-19, I found that very disturbing coming from the health & safety manager.

“I believe that your actions also put our fee-paying members at a detriment as I was instructed to either return on 8th June or take annual leave. There was no discussion regarding my return to the office, as per Acas guidelines, just an instruction and given that I was working incredibly hard at home and dealing with the entire private and voluntary sector alone, as I always have done, with no help during a particularly difficult time for the members and myself, this left little time to hand over cases.

“I am quite frankly disgusted by the attitude and lack of empathy and knowledge shown by my manager in making those decisions which I find grossly unfair and unjustified in all the circumstances.

“Care homes were hit especially hard during the pandemic and l was never offered any help or support let alone the use of a laptop or phone, Yet you deemed that I could no longer work from home as you wanted me back in the office, ‘in case we get a Viking delivery’. No discussion and no thought or consideration for my health and safety or the lockdown.

“As a result, I therefore believe that I have been constructively dismissed from my position as there has been a severe breakdown of my trust and confidence with yourself.

“Furthermore, it is clear and apparent that you have failed to follow the necessary grievance procedure following the instigation of my grievance on 3rd June 2020. Given that I have found this such a stressful matter, and the fact that it is now some 12 weeks later and, as per the email sent by Neil Crane on 19th August 2020 and received 21st August 2020, preliminary requests for evidence have literally only just begun and even more concerning, said request is of no relevance to my grievance but rather seemingly looking to examine my performance whilst working from home. Had this ever been raised as an issue by either Mandy at the time or within my grievance, then this request for evidence could be justified but as it was never raised, I can only see this as further evidence of unreasonably and unacceptably protracting the grievance and/or the continuation of bullying behaviour with the intention of causing further distress and anxiety to myself, which has proven successful and I no longer have any confidence in the system.

“To date I have still not received a copy of the grievance recording which is a breach of the grievance policy 6.3.15. I am entitled to a copy and should have received it directly after the meeting as policy dictates. I received an email from Neil Crane, the investigating officer on 12th August 2020, 3 weeks after the meeting, to say that he had managed to burn it to a disk and it would be sent to me, to date I have still not received it.

“Furthermore, as already mentioned, to date I have still not received my pay slips since June 2018 despite asking on numerous occasions. I have emailed and requested them again whilst being off work with work related stress and the only assistance I have received has been emails from Kim Craig, The Branch treasurer claiming that 1 had told her that I didn't want to receive my payslip. This is further evidence that I am being bullied and that you will all close ranks on me and are prepared to perjure yourselves with your falsehoods.

“When Kim Craig replied on 30th July, she informed me that I would receive my payslips within the next 2 weeks. Firstly, why does it take 2 weeks to press forward on an email? And secondly, why, 4 weeks later have I still not received a single payslip since June 2018? I now feel that whatever I say or do they will not be sent to me. Which begs the question why are these being withheld? Is this purely incompetence, or is this just another bullying tactic? I afforded you the opportunity to put this right. In the last communication with Kim Craig where I again requested my payslips, I advised I would not make further requests for my payslips as it was clear there was no intention to fulfil your statutory duty to provide me with them.

“**The final straw for me has been that after waiting for over 7 weeks for the grievance to be heard and a further 5 weeks for the outcome, I am still left in limbo not knowing where I stand.** I have been off work for 11 weeks with work related stress with no offer of support from The Branch or

UNISON, and for my own health and well-being and since there is clear evidence that my grievance is not being heard or investigated appropriately or with impartiality, I need to resolve this and walk away from such a dreadful situation that is not of my making. The stress, anxiety and developing depression that you have directly caused is now taking on physical manifestation and I am becoming scared about how this is affecting me, not to mention the concern of my family and friends who have made comments on the change to my physical appearance and toll this is taking on my mental health.

"It is now evident to me now that no-one either within The Branch office or within unison itself cares about my mental health and well-being so I must look after myself. I fear, due to cronyism, there is nowhere else I can take my grievance to be resolved leaving me with no other option than to resign from my position within The Branch.

"You have even sent me an email stating that your copy of my contract was different to my copy and that I was only entitled to SSP while on sick leave for work related stress caused by this sad situation of your making. Of course, this was just another bullying tactic by yourself as clearly your copy and my copy are identical, and I was paid full pay as stated in my contract.

"Whilst, as you are well aware, the issues raised in this resignation letter are by no means an exhaustive list of the all the bullying, unfair treatment, and unacceptable behaviours I have experienced at your hands, those issues mentioned all contribute towards my loss of trust and confidence with The Branch office and as this is also a breach of my contract I have no other choice than to resign from my position as branch convenor as I have been constructively dismissed."

254. We set out above that we believed that Mrs Spencer decided to resign on 6 August. The above letter supports that conclusion, we believe. It is not a letter that has simply been written in haste that morning. The length, numerous allegations and use of legal terminology shows it had been deliberately constructed with thought about what to say and by reference to the law.

255. It also again though demonstrates Mrs Spencer's unreliability and preparedness to say what she thinks will best help her:

255.1. She says that she had to purchase a laptop to allow her to work at great expense to herself. As described earlier, this is simply not true.

255.2. Having said in the grievance meeting the risk assessment was irrelevant, she has now elevated it to an allegedly significant reason for her resignation. There is no reason for her change in position. We conclude, given what we make of Mrs Spencer, she saw it as advantageous to be able to rely on its alleged inadequacy and that she was not consulted.

255.3. She complains about not having a copy of the grievance interview. She makes a fair point the delay is unjustified.

However because she was at the meeting and represented, we cannot see how it really causes her any prejudice. She knows what was said and discussed. Any delay does not impact on her.

255.4. She has now elevated the issue about payslips to a reason for resigning accusing Mrs Craig of bullying. We reject the suggestion Mrs Craig bullied the claimant. Her demeanour suggested the accusation was not credible. In addition, Mrs Spencer is unreliable as a witness and we think it telling that neither the lack of payslips nor the alleged bullying were ever raised in the grievance process.

255.5. We do not accept the final straw was as described. We observe it was clear where she stood: She needed to return to the office to work. Rather, she was hoping for a different outcome.

256. The resignation was acknowledged on 28 August 2020.

Outcome of grievance

257. Mr Crane eventually sent the CD of the interview to Mrs Spencer on about 11 September 2020. There is no good reason for the delay. We accept that work pressures would interfere with his voluntary union role but we do not see how that justifies the length of delay in this case. However as we set out earlier, we fail to see what real prejudice results from his failure.

258. On 9 October 2020 Mr Crane produced the outcome to Mrs Spencer's grievance. The letter is lengthy and detailed. There are however two curiosities.

258.1. In the letter Mr Crane spelt the word "measures" as "measurers", twice. We think this a distinctive typographical error and note it appears to be one regularly made by Mrs Marsden. However on other occasions he spelt the word "measures" correctly.

258.2. The second is that all but the last letter of part of Mrs Marsden's private email address that precedes the "@" sign appears after a complete sentence, at the end of a paragraph. (We have not quoted it here to maintain privacy). The part of the email address stands alone.

259. Mrs Spencer alleges this is evidence that Mrs Marsden was using a private email, in short, to write the grievance outcome from Mr Crane and that he just cut and pasted it.

260. We have considered the allegation. We cannot deduce any explanation for these two matters. We cannot see any logical reason why the word "measures" would have a distinct mistype in one part but not elsewhere, if Mr Crane were merely reproducing what Mrs Marsden had written for him to send out. We also can see no reason why all but one letter of the first part of Mrs Marsden's email address would appear stood alone, attached to the end of a paragraph. If Mrs Marsden had written that paragraph, it would seem highly improbable she would type all but one letter at the end. If Mr Crane were cutting and pasting we cannot see how only that part of

the email address would be caught, rather than the whole of the first part, the whole address or some other details. When asked Mr Crane simply said that he was unable to explain it.

261. On balance we conclude that the letter represents Mr Crane's own views and conclusions and he is its author. He may have cut and pasted from other documents to complete his letter, though we do not know what, but he still took the role of author and the final product he adopted as his words. We come to that conclusion for the following reasons:

261.1. The spelling error "measurers" appears only in some locations and not others. It implies cutting and pasting in some parts but self-authorship in others. If he were cutting and pasting in only some parts, we conclude that the correct inference is that he believed those parts to state the facts correctly.

261.2. He readily accepted that he accepted Mrs Marsden's version of events.

261.3. He carried out a lengthy meeting with Mrs Spencer that was not superficial. Rather he sought to go into detail and in particular into health and safety which everyone except Mrs Spencer appeared to see and relevant, and which Mrs Spencer then decided was relevant when trying to justify her resignation.

261.4. We know he spoke to Mrs Marsden. It was logical he should do so. While we have no notes of that meeting, it is clear he was not there simply to take dictation of the outcome. He followed up the meeting with a logical and proper enquiry for Mrs Spencer's activity log.

261.5. The letter is detailed and thorough and shows a full consideration of the issues raised.

261.6. The presence of most of the first part of Mrs Marsden's email address is curious. However we cannot draw any conclusions from it either way. It is an unexplained mystery. However on balance it and the spelling errors are not enough in our view to lead us to be unable to accept the outcome of the letter.

262. On our view there is no good explanation for the delay. However we note that Mrs Spencer had resigned by this point so neither the outcome nor delay from 24 August 2020 can be any relevance to whether there had been a fundamental breach of contract.

Overall conclusion on the facts

263. The above is lengthy. In general, taking into account those facts and our views of the witnesses, our overall impression is no-one in The Branch bullied, threatened, intimidated or otherwise acted improperly towards Mrs Spencer. She wanted to continue to work from home, even after the regulations and guidance said she could properly return to work. She could not do the whole of her job from home. She then set out to twist and say whatever was necessary to allow her to work from home. She clearly had

in mind a claim for constructive dismissal from the moment she lodged the grievance. She decided to pursue that when she concluded she was not going to get her way.

Law

264. We indicated above the parties agreed a note of the law. We have considered it and see no reason not to rely on it. We therefore adopt it in full and rely on it and the law stated therein. We annexe a copy to this judgment.

265. We add only the following matter

265.1. In her written submissions, Mrs Spencer added this addition, which we accept as a correct statement of the law:

"This addition is with respect to the issue of a reasonable belief in the breach of a legal obligation, for the purposes of the Protected Disclosure Detriment claim. The Claimant would emphasise that a worker will still be able to avail herself of the statutory protection even if she was in fact mistaken as to the existence of any legal obligation on which the disclosure was based (**Babula v Waltham Forest College [2007] ICR 1026 CA**). This is particularly important in this instance, where the Claimant's belief in the existence of a legal obligation arose from government guidance rather than a statutory provision."

265.2. When considering it is reasonable for someone to believe a disclosure is in the public interest, the following factors are likely to be relevant:

265.2.1. The number in the group whose interest is served by the disclosure,

265.2.2. The nature of the interest,

265.2.3. The extent to which they are affected,

265.2.4. The nature of the wrongdoing disclosed,

265.2.5. The identity of the alleged wrongdoer.

See **Chesterton Global Ltd v Nurmohamed [2018] ICR 731 CA**.

265.3. "Legal obligation" under the **Employment Rights Act 1996 section 43B(1)(b)** does not cover a breach of mere guidance or best practice, or moral failures: **Eiger Securities v Korshunova [2017] ICR 561 EAT**.

265.4. **Acas Code of Practice 1** says this about the employee's right to be accompanied at a grievance meeting concerning their grievance:

"38. If a worker's chosen companion will not be available at the time proposed for the hearing by the employer, the employer must postpone the hearing to a time proposed by the worker

provided that the alternative time is both reasonable and not more than five working days after the date originally proposed."

Conclusions

266. Based on the findings of fact and on the law as we understand it to be, these are our unanimous conclusions that we need to reach to dispose of this case. We have reordered the issues to make our conclusions clearer.

When did Mrs Spencer decide to resign?

267. We refer to our findings of fact above. We found as a fact that on 6 August 2020, Mrs Spencer had decided that she was going to resign and pursue a claim for constructive unfair dismissal. It follows that anything that occurred after 6 August 2020 had no influence on her decision to resign.

Conclusions on constructive unfair dismissal

268. We first address the question on which acts or omissions occurred.

Did the following act or omissions occur?

Being threatened with a demand to return to the office despite being able to work effectively at home and living with people who were shielding due to COVID-19, by Mrs Marsden which occurred on 22nd and 26th May 2020: (a) On 22nd May 2020, Mrs Marsden The Branch Secretary called the Claimant to demand that she returned back to working from the office from 8th June 2020 onwards; (b) On 26th May 2020, Mrs Marsden emailed the Claimant to clarify that, "…there is no reason why you cannot return…".

269. We conclude this did not happen, based on our findings of fact above. There was no threat as described or at all – it is a mischaracterisation of the exchange. We do not consider that there was a "demand" she return to the office, which seems to be used in a pejorative sense. She was merely told her work was to resume there and given options if she did not want to return.

270. But even if there were a demand, we see nothing wrong with the employer telling their employee to return to the workplace they were employed to work from when it was both lawful and did not contravene guidance.

271. We also note that her role involved administration. It could not be done at home. She was not living with "people" who were shielding. It was one person and in fact they were not shielding. Neither the law nor guidance justified her having to work from home because of her husband's condition.

272. We note that in any case there was in place a proper risk assessment that concluded it was safe for her to return. Mrs Marsden also relocated her place of work.

Being threatened with intimidating and unnecessary behaviour e.g. being given an ultimatum of taking annual/unpaid leave or being removed from the payroll if the Claimant did not return to the office, by Mrs Marsden which occurred on 22nd and 26th May 2020. (a) On 22nd May 2020, Mrs Marsden The Branch Secretary stated, "I'm not prepared to argue, you have three choices, return to the office, take annual leave or take unpaid leave."; (b) On 26th May 2020, Mrs Marsden emailed the Claimant to

state that, the Claimant's choices were either to return to work or use annual leave/unpaid leave.

273. Based on our findings of fact, the behaviours complained cannot be described as threats, intimidating or unnecessary. The accusation did not happen, therefore. Mrs Spencer has significantly mischaracterised what occurred. The actions in our view are not threats, not intimidating and not unnecessary. The reasons are

273.1. At no time did Mrs Marsden suggest even that Mrs Spencer might be removed from the payroll. That is a mischaracterisation of what occurred.

273.2. Mrs Spencer's immutable position was that she wanted to work from home. That is apparent from the facts and her intransigence, and her reliance on falsities like asserting her husband was shielding when he was not. That is not the basis on which she was employed and she could not do all her tasks from home.

273.3. In those circumstances, it was perfectly proper that Mrs Marsden made Mrs Spencer aware of the consequences of her decision to refuse to return to work at the office. They were to use annual leave or to take unpaid leave. There was no other realistic option. They are the options that Acas itself advises. Therefore making the statements was necessary.

273.4. Mrs Marsden did no more than tell Mrs Spencer the reality of her position and the consequential position of The Branch. We do not accept that it was done in an intimidating or threatening way. It cannot sensibly be characterised as unnecessary. It may have been said firmly. That is not enough in our view to make it unreasonable conduct.

Being threatened with 'Furlough' pay or SSP (when the Claimant was entitled to sick pay at her normal salary rate), by Mrs Marsden which occurred on 23rd June 2020: (a) On 23rd June 2020, Mrs Marsden emailed the Claimant to request a copy of the Claimant's contract to confirm she should receive full pay and not SSP during her sick leave.

274. Based on our findings of fact, Mrs Marsden did not threaten Mrs Spencer with furlough or SSP. This is a mischaracterisation of what happened and therefore the pleaded accusation is not made out.

275. Mrs Spencer was the first person to raise the possibility of furlough. She was then placed on furlough but declined when offered it.

276. As for SSP, we see make these observations:

276.1. She was not "threatened" with SSP;

276.2. Her contract expressly provided she was entitled to receive only SSP, which she agrees is the case. The basis of the allegation therefore is false.

276.3. We therefore do not accept that an employer paying what the parties agreed she would be paid in the event of illness is unreasonable. We do not accept any prior payment of full pay when Mrs Spencer was sick makes any difference, because it cannot affect the contractual obligation. In any case we know nothing about when, for how long, or in what circumstances such payments were made. We cannot see how realistically a party can complain they were paid/offered what contractually they were entitled to.

276.4. If The Branch's copy of the contract showed that Mrs Spencer was entitled to receive only SSP when absent through illness, but she thinks otherwise, then it is both sensible and logical to ask Mrs Spencer for a copy of her contract. We see nothing wrong with the request. We note it would have been easy for Mrs Spencer to provide a copy and it demonstrates her unreasonableness that she responded as she did.

Being accused of deliberately cancelling meetings, by Neil Crane which occurred on 13th July 2020 and 20th July 2020: (a) In a letter dated 13th July 2020, Neil Crane alleged that the Claimant had now cancelled three meetings; (b) In an email on 20th July 2020, Neil Crane maintained how he believed the Claimant had cancelled three meeting dates.

277. We conclude this allegation is a mischaracterisation of the case. Nowhere did Mr Crane accuse Mrs Spencer of "deliberately" cancelling meetings. We conclude that the accusation as pleaded did not happen.

278. In any case, we note that

278.1. The second and third meetings were cancelled because Mrs Spencer's representative could not attend. She requested the rearrangement of them. That could quite reasonably be characterised as a "cancellation" by Mrs Spencer. If that is what is meant by "deliberately cancelling" then it is no more than a statement of fact.

278.2. The first meeting was cancelled because Mrs Spencer did have sufficient notice. It had to be cancelled. It was not Mrs Spencer's fault and to say she cancelled it was, as the respondent concedes, incorrect. However there was no accusation she did it "deliberately" and certainly no accusation she was wrong or acting in bad faith when he objected to the first meeting. This is at worst a mistake, at best an argument about semantics.

Being threatened to attend meetings without a representative, by Neil Crane which occurred on 13th July 2020 and 17th July 2020: (a) On 13th July 2020, Neil Crane provided alternative dates for a grievance meeting and stated this was the Claimant's last opportunity however these were still dates which the Claimant's representative was not available on; (b) On 17th July 2020, Neil Crane advised that the meeting could take place in the following week however the Claimant had to reiterate that Neil knew

her representative would not be available at the suggested dates thus she was being given no alternative but to attend the meeting alone.

279. Mrs Spencer was not "threatened" to attend the meeting without a representative. The accusation therefore is not made out. That is a mischaracterisation.

280. The second meeting was cancelled because her representative was unavailable.

281. The Acas Code of Practice at [38] makes it clear that an alternative date must be both reasonable and not more than 5 days after that proposed. She knew the dates she suggested were dates that Mr Crane was not available, and in any event were more than 5 days after the proposed date. Mrs Spencer did not accommodate that wish.

282. It is notable that in any event the meeting went ahead and Mrs Spencer attended with her trade union representative of choice. No prejudice resulted from the exchanges.

Being accused of not wanting her pay slips despite previous requests, by Kim Craig, The Branch Treasurer which occurred on 21st July 2020: (a) On 21st July 2020, Kim Craig, The Branch Treasurer claimed that the Claimant's payslips were at The Branch office as the Claimant had allegedly advised her that she did not want them as they stated the same amount;

283. Mrs Spencer was not "accused" of not wanting her payslips. It is a mischaracterisation. The accusation as pleaded did not happen.

284. In correspondence Mrs Craig did no more than state facts. As we found, Mrs Spencer had said she did not want her payslips because they were always for the same amount. The use of the word "allegedly" is incorrect therefore.

285. While it is therefore correct she was not provided with payslips, this was at her request. It cannot be unreasonable for an employer to accede to an employee's request.

Not provided her and/or delaying in providing her with a copy of the grievance meeting recording despite being promised this, by Neil Crane on 12th August 2020 and on 24th August 2020 which occurred: (a) In emails dated 12th August 2020 and on 24th August 2020 both advised the Claimant that Neil Crane had made a disc copy for the Claimant and he would send this via recorded delivery the next day. However, the Claimant did not receive this until mid-September 2020;

286. We firstly point out none of this influenced Mrs Spencer's decision to resign because she had decided to do so on 6 August 2020. That is sufficient to dispose of this allegation as an irrelevance. In any case we comment as follows.

287. We are unclear why Mrs Spencer pursued her case as both not providing and delaying in providing. However that makes no difference in outcome in our opinion.

288. Mrs Spencer accepted that there were issues with accessing the recording. That accounts for the delay to 12 August 2020, when Mr Phipps managed to download and burn a copy to a CD. This is not ideal. However given the unfamiliarity with the IT and that Mr Crane and Mr Phipps have full time roles too, and no obvious prejudice to Mrs Spencer from the delay, we think it reasonable in the circumstances.

289. From 12 August to 24 August 2020 is a different matter. Mr Crane accepted he could have sent the disc out in time. There is no justification for the delay. However we note that she was at the meeting and so had knowledge of what was discussed. Her representative had been there and would have been able to assist also on details of the meeting if necessary. We have not seen any prejudice result from the delay. Secondly it did not adversely impact on any right to appeal.

Not being provided with an outcome to her grievance despite 12 weeks having passed since this was first raised, by Neil Crane which occurred on 22nd July 2020 and 12th August 2020: (a) at the grievance meeting on 22nd July 2020, Neil Crane advised the Claimant that he would send the outcome to the Claimant withing the next 14 days; (b) In an email on 12th August 2020, Neil Crane advised that he was due to meet Mrs Marsden on 14th August 2020 and he would then be in a position to make a decision;

290. We firstly point out nothing after 6 August 2020 influenced Mrs Spencer's decision to resign because she had decided to do so on 6 August 2020.

291. We think that Mrs Spencer's complaint is unreasonable. Mrs Spencer has ignored the fact that there was the pandemic that was adversely impacting on the health and social care sector. Mr Crane had a full time job in healthcare and significant demands were placed on his time, as well on Mrs Marsden's time.

292. In any case the chronology is instructive to show that while the grievance was raised on 3 June 2020, the hearing did not take place until 22 July 2020 because Mrs Spencer cancelled a number of meetings. The chronology and facts also show that at the meeting he said he would return to Mrs Spencer within 14 days, and within that period he advised Mrs Spencer he needed to speak to Mrs Marsden. He kept Mrs Spencer abreast of when he was meeting Mrs Marsden. We also note that part of the delay related to the request for the case logs. While Mrs Spencer had promised to send these before, she then flatly refused and was obstructive when Mr Crane requested them after meeting with Mrs Marsden.

293. We conclude that the elapsed time is not unreasonable.

Did the Claimant affirm the contract since any of those acts or omissions?

Alternatively, did the Claimant unduly delay before resigning?

294. It is convenient to take these two questions together.

295. It is our understanding that we must focus on the most recent act that caused resignation and work back from that (**Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1 EWCA**). The last act is not being provided with the grievance. The delay is from 14 days after 22 July 2020.

That is 5 August 2020. She decided to resign on 6 August 2020. Waiting a day is not unreasonable and is not affirmation.

296. However we consider the delay from 6 August 2020 to 24 August 2020 shows she had chosen to affirm the contract. We recognise that delay itself is not enough, but delay may be such to show that a person has consciously decided to affirm the contract. The facts show that as early as when she presented her grievance (3 June 2020) she knew she might have a claim for constructive dismissal and asserted that, in her opinion the respondent had already breached the implied term of trust and confidence, and so breached her contract. She was therefore well aware of her rights and choices. Having decided to resign on 6 August 2020 in circumstances where she believed there was a breach of contract, a delay of 18 days is excessive. There is no justification for the wait.

If not, were any of the acts or omissions by themselves a repudiatory breach of contract?

If not, was it part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a repudiatory breach?

297. We take these allegations together for convenience.

298. We first note that the following allegations were not made out on the evidence:

298.1. Being threatened with a demand to return to the office despite being able to work effectively at home and living with people who were shielding due to COVID-19;

298.2. Being threatened with intimidating and unnecessary behaviour e.g., being given an ultimatum of taking annual/unpaid leave or being removed from the payroll if the Claimant did not return to the office;

298.3. Being threatened with 'Furlough' pay or SSP (when the Claimant was entitled to sick pay at her normal salary rate);

298.4. Being accused of deliberately cancelling meetings;

298.5. Being threatened to attend meetings without a representative;

298.6. Being accused of not wanting her pay slips despite previous requests.

We have set out above our conclusions. The respondent either did not do what the claimant accuses them of or was only acting reasonably because they did what reasonably had to be done. In our opinion no reasonable person aware of the factual matrix and the implied term would conclude that what actually happened was a breach of contract, let alone a fundamental breach of contract.

299. We note that the following allegation did not affect the claimant's decision to resign, and so is irrelevant:

299.1. Not provided her and/or delaying in providing her with a copy of the grievance meeting recording despite being promised this, by Neil Crane on 12th August 2020 and on 24th August 2020 which occurred

In any case, we do not consider this is a fundamental breach of the implied term. It is not ideal. However the accusation is that they failed to keep a promise (there is no right to a recording after all). That is not ideal. However it would have had no real effect in any case since it would cause no real prejudice. It would have added nought to the totality of the conduct and not turned a case where there was no breach to one where there was a breach.

300. The only accusation therefore is

300.1. Not being provided with an outcome to her grievance despite 12 weeks having passed since this was first raised, by Neil Crane which occurred on 22nd July 2020 and 12th August 2020.

When one reflects on the facts (pandemic and impact on the respondent's officers time from their daytime roles, difficulty arranging a meeting with the claimant when she cancelled two of them and that the claimant decided to resign on 6 August 2020) we do not accept that amounts to a breach of contract. It is notable that The Branch kept Mrs Spencer informed of steps being taken, requested information from her that she refused to provide and carried out an investigation. In the circumstances we conclude that the respondent acted at all times with reasonable and proper cause.

301. We have taken a step back and looked at the totality of what happened. We do not consider that what the respondent did was objectively a breach of the implied term of trust and confidence. Nothing that the respondent did was calculated or likely to destroy of seriously damage the trust and confidence between them and Mrs Spencer.

302. In short this case is Mrs Spencer raising issues and ultimately resigning because she could no longer have her way and work from home. There was no breach of contract.

Did the Claimant resign in response to that breach?

In the event that there was a constructive dismissal, was it otherwise fair within the meaning of ***Employment Rights Act 1996 section 98(4)****?*

303. These issues do not arise and we cannot sensibly make any comments about them.

Whistleblowing Detriment (PD1, PD2 and PD3)

Is Mrs Marsden the Claimant's employer or other responsible person under ***Employment Rights Act 1996 section 43C****?*

304. This has not been disputed. We therefore conclude she was.

Was the Claimant's email of 22 May 2020 a disclosure of information?

305. The respondent accepts that the following are disclosures of information:

305.1. PD1: “guidelines… require employers to support employees who can work from home, to work from home.”

305.2. PD2: “[my husband] is in the at ‘risk category’ and currently shielding. He has received a letter advising him to work from home due to his underlying conditions… I have done my best to shield him for 8 weeks now… I am not prepared to risk his health where there are simple and effective measures that are currently working very well for everyone.”

305.3. PD3: “…you insisting that Andy Phipps the health and safety officer has done a risk assessment and recommending that 1 metre is sufficient social distancing”

306. Mrs Spencer did not assert there was additional information in those parts.

In the reasonable belief of the Claimant, was that disclosure made in the public interest?

307. Based on our findings of fact, we conclude that Mrs Spencer did not have the belief they were in the public interest, yet alone a reasonable belief. She never even applied her mind to the issue. Mrs Spencer said these things purely and simply to promote her interest of being allowed to continue to work from home. She never even contemplated she was “whistleblowing”.

308. The claims therefore fail at this stage.

In the reasonable belief of the Clamant, did that disclosure tend to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject - breaches of the Covid-19 guidance on working from home and social distancing under ***Employment Rights Act 1996 section 43B(1)(b)****.*

309. The claimant never applied her mind to these issues. She never held any belief about whether PDs 1, 2 or 3 tended to show this conduct.

310. Besides, in relation to PD1 the claimant has not persuaded us that she ever thought the guidelines were a legal obligation. Applying the law, PD1 cannot be a breach of a legal obligation. In any case the claimant did not seem to read the guidance. Rather she relied on news reports. In any case Mrs Spencer cannot have reasonably believed she could do her full job from home. She needed to be in the office to do the full job. In summary PD1 does not pass this hurdle either.

311. In relation to PD2, we repeat the above. We also add that Mrs Spencer knew the government had not advised Mr Spencer that he needed to shield himself. We do not accept she even believed what she wrote since she knew she was twisting it. PD2 fails here too.

312. PD3 in addition is a twist of what Mrs Spencer was told. She did not believe it.

In the reasonable belief of the Clamant, did that disclosure tend to show that there had been, was, or would be the endangerment of the health and safety of any individual–

namely - breaches of the Covid-19 guidance on working from home and social distancing under ***Employment Rights Act 1996 section 43B(1)(d)****.*

313. The Tribunal concludes each PD fails here too. There was a risk assessment in place that the claimant did not want to see and said was not an issue as part of her grievance. We conclude she did not therefore believe there was a real risk because she would otherwise have wanted to explore that issue.

314. Besides this related to only one individual: her husband. He was not required to shield, and nor was she. She knew this. Also there is no evidence of any thought that her concern extended to believing his health would be endangered. In fact she was simply saying whatever she thought would enable her to work from home because that was her preference.

Does the Tribunal find as a matter of fact that the following events occurred?

(a)The Claimant being threatened with 'Furlough' pay or Statutory Sick Pay (when the Claimant was entitled to sick pay at her normal salary rate) on 23rd June 2020 by Mrs Marsden.

315. We repeat our conclusions above. There were no threats. We note that in any event being offered furlough cannot be described as a detriment. She could, and did, refuse it. We cannot see how being paid SSP in line with her contract is a detriment.

(b) The Claimant not being provided with / refused an outcome to her grievance by 24 August 2020 despite 12 weeks having passed since this was first raised.

316. We repeat the above. The claimant had decided to resign on 6 August 2020. We note the addition of the word "refused". There is no evidence of a refusal. That allegation is not factually made out. We conclude in the circumstances already alluded to this is not a detriment.

Did the Respondent subject the Claimant to one or more of those detriments because she made a protected disclosure?

317. We have considered the case carefully. The answer is no.

318. There is no evidence to show any link between Mrs Spencer raising these matters (whether protected disclosures or not) and what occurred. Indeed even Mrs Spencer's own evidence showed there was no link. Mrs Spencer's own evidence and thrust of her grievance was the unreasonable behaviour began on 22 May 2020. That is apparent from the documents in the case and the pleadings. Like much else, she appears to have a position that she considers best able to advance her case.

319. When cross-examined on the link, she told us that she thought The Branch subjected her to the alleged detriments because the grievance.

"had gone outside The Branch".

This shows even Mrs Spencer does not appear to believe there is a link. However there is no evidence that any alleged perpetrator was aware of the matter having gone "outside The Branch" in the first place.

320. We conclude therefore there is no link. The claims therefore fail.

Whistleblowing Detriment (PD4)

321. Does the Tribunal find that the Claimant reported the following to Neil Crane on 3 June 2020:

321.1. That she was being forced to return to The Branch despite being able to work from home effectively and the Respondent knowing that it was impossible to enforce the requisite two metre distance within the office which was in breach of the government's and the Respondent's COVID-19 guidelines.

322. The answer is no. As we found as a fact above, Mrs Spencer did not report the above. Rather what she reported was more subtle, except in the case of the 2 metre distance, which she did not mention. We consider this is enough to dismiss the claim. She had available to her the grievance of 3 June 2020 and chose to present the disclosure she relied on as above. She was legally represented throughout and presumably put it in the inaccurate way on advice. She has not made out her case.

323. However, if we had to go on, we would have held that Mrs Spencer made the following disclosures as identified by the respondent, and each which can be found in the letter:

323.1. PD4a: "Mrs Marsden has instructed me to stop working from home and she has given me 3 options, to either return to The Branch office or take annual leave or unpaid leave as from Monday 8th June."

323.2. PD4b: "[Mrs Marsden's] actions which go against government guidelines and Unison guidance".

323.3. PD4c: "I have evidenced that working from home has the same results as working from the office"

323.4. PD4d: "This not only goes against government advice but also Unison advice"

Is Neil Crane the Claimant's employer or other responsible person under section 43C Employment Rights Act 1996?

324. No-one has sought to argue otherwise. We accept that he is.

Was the Claimant's email alleging the above to Neil Crane on 3 June 2020 a disclosure of information?

325. The respondent accepts that PD4a and PD4c are disclosures of information.

326. Applying the tests about the distinctions between allegations and information, we think that PD4b and PD4d are allegations. They do not in context set out any information, but rather set out apparent belief.

In the reasonable belief of the Claimant, was that disclosure made in the public interest?

327. We repeat our findings of fact and repeat what we say in relation to PDs1, 2 and 3. Mrs Spencer never even considered whether the issue of the public interest, but rather focussed only on what would help her to achieve her ability to work from home.

In the reasonable belief of the Clamant, did that disclosure tend to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject namely - breaches of the Covid-19 guidance on working from home and social distancing under Employment Rights Act 1996 section 43B(1)(b)?

328. No. PDs 4a and 4c disclose no such tendency. What we said earlier about guidance and Mrs Spencer's familiarity with it applies equally to PD4b and 4d, if they are in fact disclosures of information. In any case, as we said earlier, Mrs Spencer never even applied her mind to this issue. She had no belief. Her sole focus and thought process was on getting her way.

In the reasonable belief of the Clamant, did that disclosure tend to show that there had been, was, or would be the endangerment of the health and safety of any individual– namely - breaches of the Covid-19 guidance on working from home and social distancing under Employment Rights Act 1996 section 43B(1)(d).

329. We repeat what we said above in relation to PDs1, 2 and 3. It applies equally here. We also repeat what we said about the breaches of guidance, in particular about her lack of belief.

Does the Tribunal find as a matter of fact that the following events occurred?

(a) The Claimant being threatened with 'Furlough' pay or Statutory Sick Pay (when the Claimant was entitled to sick pay at her normal salary rate) on 23rd June 2020 by Mrs Marsden.

(b) The Claimant not being provided with / refused an outcome to her grievance by 24 August 2020 despite 12 weeks having passed since this was first raised.

In respect of those matters that the Tribunal finds occurred, do these events amount to a detriment?

Did the Respondent subject the Claimant to one or more of those detriments because she made a protected disclosure?

330. In relation to the above questions, we repeat our earlier conclusions. For the same reasons, this claim must fail too.

Employment Judge Adkinson

Date: 12 May 2023

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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The parties' agreed note of the law

IN THE MIDLANDS EAST EMPLOYMENT TRIBUNAL

Case No: 2603287/2020

BETWEEN:

MRS D SPENCER

and

UNISON LEICESTERSHIRE HEALTH BRANCH

AGREED NOTE ON LAW

Constructive unfair dismissal

1. A dismissal for the purposes of section 95 Employment Rights Act 1996 ("ERA 1996") includes a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer's conduct.

2. **Requirement for fundamental breach of contract**. R's conduct must amount to a breach of the contract of employment which goes to the root of the contract of employment or shows that the employer no longer intends to be bound by an essential term of the contract: *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, CA, per Lord Denning MR, p227.

3. As section 95(1)(c) ERA 1996 provides, a constructive dismissal can take place whether or not an employee resigns with or without notice, if the resignation occurs in circumstances in which the employee is entitled to terminate it without notice by reason of the employer's conduct.

4. The implied term of mutual trust and confidence is characterised as follows: "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee": *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, HL, per Lord Nicholls, p35A. (The EAT subsequently confirmed that it is 'calculated or likely': Baldwin v Brighton & Hove City Council [2007] ICR 680)

5. **Course of conduct**. A course of conduct may cumulatively amount to a breach of the implied term in a contract of employment and therefore to a repudiation of that contract: *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666.

6. Following a breach or breaches, affirmation of the contract does not prevent an employee from later relying on those same breaches as part of a course of conduct amounting to a repudiatory breach; provided that there is subsequently something that adds to that breach: *Lewis v Motorworld Garages Ltd* [1986] ICR 157, CA, per Glidewell LJ [169F-170C]; restated in

Omilaju v Waltham Forest LBC [2004] EWCA Civ 1493, per Dyson LJ [15-16]; restated in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, per Underhill LJ [39-45, 51].

7. There is no proposition of law that there must be proximity in time or in nature "between the straws. What *Lewis's* case requires is a view in its totality of the whole course of conduct in order to see whether the actions of the employer constitute together a breach of the implied obligation of trust and confidence: *Logan v Customs and Excise Commissioners* [2004] ICR 1 [33].

8. **Last straw doctrine**. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1, CA it was clarified that the questions a Tribunal should ask in these sorts of cases are:

(a) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(b) Has he or she affirmed the contract since that act?

(c) If not, was that act (or omission) by itself a repudiatory breach of contract?

(d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

(e) Did the employee resign in response (or partly in response) to that breach?

9. Although the final act may not be blameworthy or unreasonable it has to contribute something to the breach even if relatively insignificant: *Omilaju v Waltham Forest London Borough Council* [2005] IRLR 35, CA, per Dyson LJ [19-21]

10. Similarly, if the last straw is entirely innocuous, such as the conclusion of a fair disciplinary and appeal procedure, it cannot add to a breach: *Kaur op cit* [39-41, 60, 75]. The mere fact that the outcome was not what the employee wanted is immaterial: the test is objective.

11. **Effective cause of resignation**. The employee must leave partly in response to a repudiatory breach committed by the employer: *Norwest Holst Group Administration Ltd v Harrison* [1984] IRLR 419; *Meikle v Notts CC* [2005] ICR 1, CA, per Keene LJ at [33].

12. **Affirmation following breach/last straw**. The employee must not have affirmed the contract following the fundamental breach / last straw prior to resigning: *Western Excavating v Sharp op cit* per Lord Denning at p226.

13. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: *W E Cox Toner (International) Ltd v Crook* [1981] ICR 823 at p828. These dicta are "guidelines to be applied to the facts of any particular case", *Bliss v South East Thames Regional HA* [1987] ICR 700, CA, per Dillon LJ @ 716F.

Detriments on grounds of Protected Disclosures

14. Section 47B ERA 1996 confers a right on workers not to be subjected to any detriment on the ground that they have made a protected disclosure.

15. **Meaning of qualifying disclosure**. In order for a disclosure to be a qualifying disclosure within s.43B ERA 1996:

(a) There must be a disclosure "of information"; that is, the conveying of facts: *Geduld v Cavendish Munro Professional Risks Management Ltd* [2010] ICR 325, EAT; *Goode v Marks and Spencer Plc* UKEAT/0442/09 and *Smith v London Metropolitan University* [2011] IRLR 884.

(b) The assessment as to whether there had been a disclosure of information in a case will always be fact-sensitive: *Western Union Payment Services UK Ltd v Anastasiou* UKEAT/0135/13; but the statute does not itself make a distinction between 'allegation' and 'information' and Tribunals should not focus on whether any putative disclosure is one or the other, given that 'information' and 'allegation' are often intertwined: *Kilraine v London Borough of Wandsworth* UKEAT/0260/2016. A grievance letter is capable of amounting to a disclosure of information for the purposes of a protected disclosure claim provided that it meets the other relevant criteria (*Learning Trust and ors v Marshall* EAT 0107/11).

(c) The employee must believe that the information disclosed tends to show one of the s. 43B matters; and the employee's belief must be objectively reasonable taking into account the personal circumstances of the discloser: *Babula v Waltham Forest College* [2007] ICR 1026, CA, upholding *Darnton v University of Surrey* [2003] ICR 615, EAT; *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4. In this case, the Claimant relies on:

(i) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which; and/or

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

(d) Further, save in obvious cases, before the Tribunal the source of the obligation should be identified and capable of verification by reference for example to statute or regulation: *Blackbay Ventures Ltd v Gahir* [2014] IRLR 416, EAT [42, (d)]; followed in *Eiger Securities LLP v Korshunova* [2017] IRLR 115, EAT; *Arjomand-Sissan v East Sussex Healthcare NHS Trust* UKEAT/0122/17. A more lenient approach is expected of C at the time of making the disclosure: *Bolton School v Evans* [2006] IRLR 500, EAT (upheld by the Court of Appeal, and cited in *Western Union Payment Services UK Ltd v Anastasiou* UKEAT/0135/13 (21 February 2014, unreported)) '.

(e) Further, the word 'legal' must be given its natural meaning, with the result that the fact that the individual making the disclosure thought that the employer's actions were morally wrong, professionally wrong or contrary to its own internal rules may not be sufficient: *Eiger Securities LLP v Korshunova* op cit. Where an employee is relying on an employer's being

'likely' to fail to comply with a legal obligation, the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation: *Kraus v Penna plc* [2004] IRLR 260, EAT (that part of the decision remains good law).

16. **Meaning of detriment**. The question is whether an employee in the claimant's position could reasonably regard the actions taken as detriments; from which it also follows that an unjustified sense of grievance cannot amount to a detriment: *Shamoon v Chief Constable of RUC* [2003] UKHL 11 [35, 105]; *Jesudason v Alder Hay Children's NHS Foundation Trust* [2020] EWCA Civ 73 [27, 28].

17. **On the ground of**. The words 'on the ground of' require a causal nexus between the fact of making a protected disclosure and the decision of the employer to subject the worker to the detriment: *Aspinall v MSI Mech Forge Ltd* 891/01/ EAT, applying the dicta of Lord Scott in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065, HL: 'for there to be detriment under S.47B "on the ground that the worker has made a protected disclosure" the protected disclosure has to be causative in the sense of being "the real reason, the core reason, the causa causans, the motive for the treatment complained of"'.

18. Similarly, the mere fact that the employer has taken a long time to answer a grievance, and that was "related to" a PD, does not answer the question whether the delay was "on the ground of" the PD: *London Borough of Harrow v Knight* [2003] IRLR 140, EAT.

19. The question is essentially whether the PD materially (in the sense of more than trivially) influenced the employer's treatment of the alleged whistleblower (*Fecitt and ors v NHS Manchester* 2012 ICR 372, CA)

20. **Separability**. In *Kong v Gulf International Bank UK Ltd* [2022] EWCA Civ 941, Simler LJ said in the leading Judgment (Underhill and Elisabeth Laing LJJ agreeing):

52. The principle of separability recognised in Martin (in a victimisation context), was expressly approved by this court in Page v Lord Chancellor [2021] EWCA Civ 254, [2021] ICR 912 ("Page"). In Page Underhill LJ confirmed as correct the principle recognised in Martin at [22], and in the analogous trade union activities cases, stating at [56] that in a case where it applies, the making of a protected complaint "is the context in which the reason for dismissal (or other detriment) arises, but it is not the reason itself."

[And referring to Fecitt]

56. I would endorse and gratefully adopt the passages I have cited as correct statements of law. They recognise that there may in principle be a distinction between the protected disclosure of information and conduct associated with or consequent on the making of the disclosure. For example, a decision-maker might legitimately distinguish between the protected disclosure itself, and the offensive or abusive manner in which it

was made, or the fact that it involved irresponsible conduct such as hacking into the employer's computer system to demonstrate its validity. In a case which depends on identifying, as a matter of fact, the real reason that operated in the mind of a relevant decision-maker in deciding to dismiss (or in relation to other detrimental treatment), common sense and fairness dictate that tribunals should be able to recognise such a distinction and separate out a feature (or features) of the conduct relied on by the decision-maker that is genuinely separate from the making of the protected disclosure itself. In such cases, as Underhill LJ observed in Page, the protected disclosure is the context for the impugned treatment, but it is not the reason itself.

57. Thus the "separability principle" is not a rule of law or a basis for deeming an employer's reason to be anything other than the facts disclose it to be. It is simply a label that identifies what may in a particular case be a necessary step in the process of determining what as a matter of fact was the real reason for impugned treatment.

21. **Burden of proof**. The correct approach to drawing inferences in a detriment claim is: *International Petroleum Ltd v Osipov* 0058/17/EAT (unchallenged on appeal), per Simler J as she then was:

[84] Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference: see by analogy Kuzel v. Roche Products Ltd [2008] IRLR 530 dealing with a claim under s.103A ERA 1996 relating to dismissal for making a protected disclosure.

[115] Mr Forshaw submits and I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows

(a) The burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.

(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight at para 20.

(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

22. Consistently with this, if a Tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default: *Ibekwe v Sussex Partnership NHS Foundation Trust* 0072/14/EAT, applying *Kuzel v Roche Products Ltd* [2008] ICR 799, CA, to a detriments claim. In *Ibekwe*, the EAT concluded that there were no grounds for interfering with the tribunal's unequivocal

finding that there was no evidence that an unexplained managerial failure to deal with an employee's grievance was on the ground that the grievance contained a protected disclosure.