EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs A Ford	**v**	Healthcare Safety Investigation Branch

Heard at:	Reading (and by video (CVP))	**On:** 19 - 27 April 2023 & 28 April & 15 May 2023 (in chambers)
Before:	Employment Judge Anstis Mrs R Watts Davies Mr F Wright	

Appearances
For the Claimant: In person
For the Respondent: Mr T Cordery (counsel)

RESERVED JUDGMENT

The claimant's claims are dismissed.

REASONS

A. INTRODUCTION

1. The claimant was employed as a maternity investigator by the respondent.

2. The claimant says that she was constructively dismissed by the respondent and subject to detriments for having made protected disclosures. The respondent does not accept this. The respondent says that there was no constructive dismissal, the claimant did not make any protected disclosures and was not subject to any detriments.

B. THE HEARING

Mode of hearing

3. The hearing proceeded on a hybrid basis owing to access difficulties at the Reading Tribunal Hearing Centre. One of the tribunal panel attended by CVP throughout. Mr Cordery attended by CVP for the first day and the claimant's witnesses Kathryn Whitehill and Laura Pickup gave evidence by CVP. From 26

April 2023 onward, by agreement with the parties, the hearing moved to be entirely by CVP.

4. Observers who attended by CVP were given, on request, view-only access to the tribunal bundle and the statements of any witnesses who had by then given their evidence. That access was provided by the respondent's solicitors.

Day 1 - 19 April 2023

5. On the first day, following introductions, there were discussions about the claim. The claimant identified where in the bundle or her witness statement the alleged protected disclosures and detriments were recorded. She applied to amend her claim by the addition of the events of a further one-to-one meeting (previously excluded from the claim) as a detriment. Having agreed a timetable that started with one day's reading and then both parties' evidence being for two days each, the tribunal floated the idea of a rule 45 order limiting cross-examination to the agreed period, in an attempt to ensure that the hearing could be completed (through to a judgment and reasons) in the time allocated. Some apparently minor questions on the contents of witness statements and the bundle were left to be dealt with the following day, if not resolved earlier by the parties.

Day 2 - 20 April 2023

6. On the morning of 20 April 2023 we gave our decision allowing the claimant's application to amend, and later that day (without opposition from the parties) made a rule 45 order limiting both sides to two days of cross-examination each. Reasons for those decisions were given at the time and will not be given in writing unless requested by either side within fourteen days of the date this record of the decision is sent to the parties.

7. Overnight, two of the claimant's witnesses had written to the tribunal expressing some concerns. With their consent, their emails were shared with the parties. Now that they were at tribunal to give their evidence, they said that they felt they could give their evidence freely. The claimant did not wish to take the matter any further and, in the circumstances, we considered that the interests of justice were better served by proceeding rather than by investigating their concerns of our own motion and risking the claim overrunning the time allocated to it.

8. Once this had been dealt with, we took an early lunch break and the claimant commenced her evidence around 13:30.

Day 3 - 21 April 2023

9. On the morning of 21 April 2023 the claimant's four witnesses were interposed in her evidence. Mr Cordery chose not to question three of them, and had a bare minimum of questions for the fourth. He explained that this was not because the respondent accepted their evidence, but because it was the respondent's position that their evidence was not material to the case. Around

mid-morning the claimant resumed her evidence, which continued to the end of the day.

10. We were concerned that having the claimant on oath over the weekend would make matters very difficult for her. After discussion between the parties and with a warning having been given to the claimant, we released her from her oath for the weekend, with the intention that she would be sworn in again to complete her evidence on resuming the case on Monday.

Day 4 - 24 April 2023

11. On returning after the weekend, the claimant was sworn in again and her evidence was completed by 12:30, within the two days allowed for Mr Cordery's questioning of the claimant and her witnesses.

12. Before the lunch break, the claimant canvassed the possibility of an amendment to her claim to include detriments she said had arisen after she submitted her resignation. We considered that any such amendment was bound, if successful, to mean that the claim could not be dealt with within the current listing of the claim. After consideration over the lunch break, the claimant did not pursue this application.

13. In the afternoon we heard evidence from Amanda Morgan, for the respondent. The claimant's questions to Ms Morgan were completed by 15:30. After discussion about arrangements for the rest of the week, the tribunal then broke for the day.

Day 5 - 25 April 2023

14. Further documents were produced by the respondent on the morning of 25 April 2023. The claimant did not oppose them being introduced into evidence. Maria Patterson then commenced her evidence.

15. Shortly before the lunch break the claimant told us that she had an audio recording of the meeting of 4 February 2020. Her case was that during this meeting she had made a protected disclosure and been subject to a detriment. This recording had apparently been disclosed to the respondent on 14 April 2023, but it was not in evidence before us nor was there any transcript of it. It was not clear whether the claimant wanted the recording to be considered by us. After a break she said that she did want us to listen to the recording, and we considered the point over the lunch break.

16. On our return after lunch we indicated to the parties that we felt we should consider the audio recording, given the possible significance of that meeting. However, we wanted to do this in a way which caused the least possible delay and disruption to the hearing. For the time being, we asked the claimant to continue with her cross-examination of Ms Patterson, putting off the question of what to do about the recording.

17. By mid-afternoon it was apparent that the claimant would not complete her cross-examination of Ms Patterson that day. The limit of two days that we had imposed would take her to the middle of the following day. In discussion with the parties it was agreed that: (i) the claimant would attempt to obtain a transcript of the recording overnight, (ii) the claimant would provide a copy (or a further copy) of the recording to the respondent, and (iii) the claimant would identify any passages from that that she considered were particularly relevant. The following day was intended to be devoted to completing Ms Patterson's evidence and any relevant issues around the recording, with a view to the parties making their closing submissions at the start of the day on Thursday. It was recognised that this was likely to then result in a reserved judgment.

Day 6 - 26 April 2023

18. On resuming the case on 26 April 2023 the claimant had, overnight, obtained a transcript of the recording. However, it was her position that the transcript was unsatisfactory and that it added nothing to the evidence she had previously given about the meeting. She was concerned that simply listening to extracts from the meeting might not give the full context, and was also concerned about delays that may be cause by listening to the whole of the recording. On that basis, she said to us that she was not now asking us to listen to the recording. Neither party was now asking us to listen to the recording (or read the transcript) and in those circumstances, after further consideration, we decided that we should not do so of our own motion.

19. Ms Patterson's evidence was completed on the morning of 26 April 2023, within the two-day time limit that had been given for the respondent's evidence.

20. In discussion with the parties it was agreed that the tribunal would then finish for the day, with the parties having the afternoon to finalise their submissions. Since both sides indicated they would be preparing written submissions it was agreed that those would be exchanged by 09:00 the next day, with oral replies to start at 11:00 and to be limited to 30 minutes each.

Day 7 - 27 April 2023

21. Written submissions were exchanged as envisaged, with oral submissions following. We reserved our decision, with a provisional case management preliminary hearing set for further directions in case a remedy hearing was necessary. The tribunal deliberated for the remainder of the day.

Day 8 – 28 April 2023

22. 28 April was a day of deliberations for the tribunal panel.

Day 9 – 15 May 2023

23. We were not able to finalise our decision and reasons on 28 April 2023, so we reconvened on 15 May 2023 for a final chambers discussion, during the course of which this decision and reasons were unanimously agreed.

C. THE ISSUES

Introduction

24. The claimant's claim is a whistleblowing claim. It is a claim that she made protected disclosures and as a result was subject to detriments. It was also her case that her resignation was a constructive dismissal and the reason or principal reason for that constructive dismissal was her protected disclosures.

25. There are ten alleged protected disclosures. They can be found in case management orders made by EJ Allen (on 10 December 2021) and EJ Spencer (on 5 September 2022). There are four alleged detriments set out in the order made by EJ Allen. At the start of the hearing we worked through these with the claimant, putting them in chronological order and giving labels to them. Each alleged protected disclosure is referred to as PD followed by a number, and an alleged detriment is D followed by a number.

26. The respondent does not accept that any alleged protected disclosure is a protected disclosure and does not accept that any alleged detriment is a detriment (or a detriment resulting from a protected disclosure). It does not accept that the claimant's resignation should be treated as a constructive dismissal, nor that any protected disclosure was the reason or principal reason for the claimant's resignation or (constructive) dismissal.

Alleged protected disclosures

27. Full details of the alleged protected disclosures and detriments will be set out at the appropriate points later in our judgment, but they are described in the following way in the case management orders.

28. If an alleged protected disclosure is preceded by the number 2, it is taken from the case management order of EJ Allen. If it is preceded by the number 15 it is taken from the case management order of EJ Spencer. All alleged detriments are from the order of EJ Allen. In some cases the order identifies the particular form of protected disclosure alleged, and where that is done we have included it in the list below.

29. These are the alleged protected disclosures:

2.1.1.1. 5 December 2019 - in an email to her line manager, Maria Patterson, she made a disclosure about safety issues to mothers and babies arising on the maternity unit she was investigating. Health and Safety; ***[PD1]***

15(a) On 10th December 2019 the claimant says that she verbally informed her line manager Maria Patterson at a one to one meeting about the

safety issues to mothers and babies arising on the maternity unit he was investigating (i.e. the claimant repeated the same concerns she had raised in her email to Maria Patterson on 5th December 2019) ***[PD2]***

2.1.1.2. 18 December 2019 - a verbal disclosure to her line manager, Maria Patterson, repeating the issues she raised on 5 December above, together with tampering/amending of medical records. Breach of legal requirement. ***[PD3]***

2.1.1.3. 20 December 2019 - further report sent by email to line manager, Maria Patterson, repeating the disclosure made on 5 December above. ***[PD4]***

2.1.1.4. Between 25 December 2019 and 1 January 2020 - further report by telephone to Ms Patterson's line manager, Lisa Marshall repeating issues raised on 5 December above. [Said by the claimant in her witness statement to have occurred on 31 December 2019.] ***[PD5]***

15(b) On 14th January 2020 the claimant says that she verbally informed her line manager Maria Patterson that she still held the same concerns and also raised concerns about tampering/amending of medical records (i.e. the claimant repeated/escalated the same concerns that she had already raised on 5th, 10th, 18th, and 20th December 2020) ***[PD6]***

2.1.1.5. 29 January 2020 - disclosure made by email to line manager, Maria Patterson, that there were issues of conflict of interest with investigators. [an investigator had confided to the claimant she was friends with the head of unit she had been assigned to investigate]. This was a breach of para 6.6 of the conflict policy and statement of aims sent to parents which asserts the independence of the investigation and breach of the code of conduct. ***[PD7]***

2.1.1.6. 3 February 2020 - disclosure of tampering/amending of medical records at the same unit. Breach of legal requirement. ***[PD8]***

15(c) On 4th February 2020 the claimant says that at a Skype meeting with Maria Patterson and Amanda Morgan she raised concerns/issues regarding conflict of interest (i.e. the claimant repeated the same concerns that she had raised on 29th January 2020). ***[PD9]***

2.1.1.7. 6 April 2020 - disclosure to chief investigator Mr Conradi as above. ***[PD10]***

30. PD10 is a disclosure on 6 April 2020 to Mr Conradi. The parties agree that this is a misprint for a communication the claimant sent to Mr Conradi on 8 April 2020. However, by 8 April 2020 all the alleged detriments had occurred and the claimant has submitted her resignation. Although the claimant makes complaints about what occurred after she had submitted her resignation and even after her resignation had taken effect there are no detriments alleged after

6 April 2020 (see below – D3e) and everything that led her to resign must already have happened by the date of her resignation. On that basis we do not see that PD10 can add anything to the case and we will not address it in any detail.

31. It will be apparent from the list above that although there are ten alleged protected disclosures often they are repeats of disclosures previously made. An alleged disclosure made in writing will be repeated verbally, or vice versa. PD2 is said to be a verbal repeat of PD1. PD3 is said to be a verbal repeat of PD1, with the addition of tampering with medical records. PD4 is said to be a written repeat of PD1. PD5 is a verbal repeat of PD1. PD6 is a verbal repeat of PD1, with the addition of tampering with medical records. PD7 is said to be an email disclosure concerning conflicts of interest. PD8 is an email disclosure of tampering with medical records. PD9 is said to be a verbal repeat of PD7.

32. From the case management order it appears that all verbal disclosures were either repeats of previous written disclosures or were later encapsulated in written disclosures. That is not quite how it came out in evidence, as we will describe below.

33. The disclosures fall into three broad categories, and all relate to the claimant's investigation or investigations into a maternity unit in Somerset. The first is "themes", or broad criticisms of systems within that unit. The second is that medical records at the unit had been tampered with by staff there. The third was that the second investigator who had been assigned to work on an investigation at the unit with her had a conflict of interest.

34. Of these, the first two disclosures were matters that were well within the remit of the claimant as a maternity investigator. The whole point of her role was to identify and explain how and why things had gone wrong. Both were disclosures in relation to the actions or inactions of a hospital trust, not the respondent. It was acknowledged by everyone that where such matters contributed to the incident in question, they would be expected (after proper investigation) to appear in the report the claimant was employed to prepare for the respondent. It is only the third disclosure (the alleged conflict of interest) that related to the internal affairs and governance of the respondent.

Alleged detriments

35. The alleged detriments are:

    3.1.1. In one to ones with her line manager between 28 November 2019 and 6 April 2020 her line manager Maria Patterson consistently told her she was not performing well and was not doing her job. All one to ones ~~except the one held on 27 February 2020~~ were consistently negative all held by line manager Ms Patterson. [The dates of the one to ones were 28 November 2019, 10 December 2019 ***[D1a]****, 14 January 2020* ***[D1b]****, 27 February 2020* ***[D1c]*** *and 6 April 2020* ***[D1d]****.]*

3.1.2. On 6 December 2019 Ms Patterson sent an email to the team criticising the claimant. ***[D2]***

3.1.3. Emails from Ms Patterson to the claimant were negative and critical of her including her attitude when visiting the unit under investigation. In particular emails sent on the following dates: 23/12/19 ***[D3a]****; 31/1/20* ***[D3b]****; 4/2/20* ***[D3c]****; 28/2/20* ***[D3d]*** *and 6/4/20* ***[D3e]****.*

3.1.4. On 4 February 2020 the claimant was invited to a meeting with Ms Patterson and Ms Morgan to discuss the issues she had disclosed about the unit she was investigating. During the meeting she felt they were not taking her concerns seriously and she asserts they were more concerned with reprimanding her. She felt ambushed and bullied. ***[D4]***

36. The strike-through of wording in D1 reflects the successful application by the claimant to amend her claim.

37. D1 ostensibly starts with the one-to-one meeting on 28 November 2019, but as we pointed out to the claimant, that pre-dates the first of her protected disclosures and we see no basis on which anything that occurred on 28 November 2019 could be said to relate to protected disclosures that have not occurred. We have started numbering D1 from the second one to one meeting on 10 December 2019.

Alleged constructive dismissal

38. The claimant resigned on notice on 16 March 2020, with her notice expiring on 16 June 2020. She served out her full notice but was on sick leave from 4 April 2020.

Further detriments after the claimant's resignation?

39. Much of the claimant's evidence referred to matters that post-dated her resignation. As we have noted above, there was talk of her making an application to amend her claim to encompass that period, but in the event no such application was made. If such an application had been made, we consider it highly unlikely that it would have succeeded, particularly given that amendment had previously been discussed before EJ Spencer and given that it seemed likely that any substantial amendments (if granted) would have required an adjournment and relisting of the hearing.

D. THE FACTS

General observations

40. Evidence from the claimant's witnesses suggested that the respondent was at the relevant time a troubled organisation, and particularly so within the part of the respondent that dealt with maternity investigations. The claimant and her witnesses held strong opinions of the respondent and its managers. We were

referred to reports commissioned by the respondent that referenced bullying and other causes for concern. However, our task in deciding this case is to determine whether the claimant made protected disclosures and, if so, whether they led to the detriments she claimed and/or were the reason or principal reason for the termination of her employment.

41. As we pointed out to the claimant during the hearing, this is a task that is distinct from the question of whether the claimant's disclosures were accurate, were justified or whether the respondent took steps to correct matters in response to the claimant's disclosures. There is nothing in whistleblowing law to say that the respondent must respond to or make corrections on receipt of a protected disclosure. The obligation is a negative one: they must not subject an individual to detriments (or dismissal) for having made protected disclosures. There is no obligation in whistleblowing law for them to do anything in particular in response to the disclosures. What they must not do is to subject the individual to detriments (or dismissal) for having made protected disclosures.

42. We recognise the strong public interest in the work and governance of the respondent, and in it carrying out its investigations to appropriate professional standards. It is difficult to say that any one area of the respondent's work is more important than any other, but we also recognise the particular importance of the respondent's work in maternity care, which is an area of acute public concern with historic incidents of women, babies and families being let down within the NHS. However, we are not conducting a general enquiry into the respondent. The experience of others and general allegations or findings of bullying are only relevant to the extent that they may show that the claimant was subject to detriments and/or constructive dismissal on account of protected disclosures.

43. In what follows we will set out a number of occasions where the claimant's oral evidence has a lack of consistency with or exaggerates the contents of the contemporary documents. As we will explain, in general where there is such a conflict we do not accept the claimant's characterisation of those materials in her oral evidence, and prefer to look at the contemporary documents for the true position.

Introduction

44. The respondent was established (at least so far as maternity inspections were concerned) in April 2018. At the time of the claimant's appointment it was a new and developing organisation. We understand it is presently being reconstituted as the "Health Services Safety Investigations Body". It is not clear if it is a legal entity in its own right or simply a division of another NHS body – but neither party made any substantial submissions on that point and the claim was brought against the Healthcare Safety Investigation Branch.

45. Its role was to investigate serious healthcare incidents within the NHS. The approach it took to this was derived from what we heard was the practice in the

air transport industry. Where incidents occurred, the respondent was not seeking to apportion blame, but to investigate underlying systemic matters that may have led to the incident in question. Learning points arising from that were to be implemented without seeking to criticise or blame individuals. The respondent called this a "just culture".

46. The respondent was organised along regional lines and areas of specialism. The claimant was appointed as a maternity investigator in the south west region. She reported to a the south west regional maternity team leader (Maria Patterson), who in turn reported to Amanda Morgan (regional lead for maternity investigations in the south). Amanda Morgan reported to Lisa Marshall (head of investigations for the south region). The claimant worked from home, and her work involved extensive travel, as the necessary interviews were (at that time) conducted face to face on location in the relevant healthcare settings.

47. The respondent aimed to produce reports within six months. In practice this would mean at least first drafts of a report being prepared by the investigator within around four months, as the report had to go through various processes before final approval. At the time we are dealing with this timescale was often not met, and we heard of reports being outstanding for a year or more.

48. In carrying out their investigations the respondent's investigators worked in pairs, with lead and secondary investigators being appointed for each investigation. An investigator could typically expect to hold a caseload of five investigations as lead investigator at any one time. Investigators would typically be senior and experienced medical practitioners, but it was not necessary to hold a medical qualification in order to be an investigator. We heard that some investigators were from other backgrounds such as former police officers or from the insurance industry. Medical advice for the investigations was provided by experts in the field who formed panels to advise the investigators. There were typically two meetings between investigators and these experts during an investigation. These meetings were called SMA1 and SMA2.

49. Critical incidents at a trust would be subject to an investigation by the relevant trust within 72 hours. This investigation would be expected to address any immediate operational corrections that may be needed. To some extent that immediate investigation would inform the later investigation by the respondent. What happened with matters that had not been identified in that 72-hour investigation but were identified at an early stage in the respondent's investigations (and in the claimant's view could not wait for the conclusion of the official report six months or more later) was a central issue in the alleged protected disclosures made by the claimant.

50. Some of the evidence we heard suggested that this local 72-hour investigation did not occur in maternity cases, but even so the point remains that the respondent's investigations were intended as thorough and in-depth investigations, looking beyond immediate causes to systemic failings. They

were intended to be more than an immediate or superficial response to an incident.

The claimant's recruitment and training

51. The claimant is a senior and experienced midwife with a wide variety of experience. At one point she had worked for the Care Standards Commission, a predecessor of the CQC. Her professional qualifications and standing made her well qualified for the role of maternity investigator.

52. The claimant told us that on appointment (her employment started on 16 September 2019) she attended three weeks' training for her role, particularly emphasising the non-judgmental aspect of the work and the fact that they were supposed to establish underlying causes without seeking to blame. She was on a fixed-term one year contract although nothing in the liability aspect of the case depends on the nature of her contract.

Late 2019

Initial matters

53. Following her training, on 14 October 2019 the claimant started work. She was allocated work including as a second maternity investigator to investigate an incident at Yeovil. Initially the claimant had three cases – two as lead and one as a second. Two of those cases were at Yeovil. The Yeovil trust and investigations at Yeovil were central to the claimant's alleged protected disclosures.

54. On 30 October 2019 the claimant had her first one-to-one meeting with Ms Patterson. The notes of that meeting are, understandably, brief, but record that the claimant was "*enjoying but not feeling on top of*" her new role.

55. The first incident of note is on 5 November 2019, when for the first time the claimant met her manager, Maria Patterson, face to face. She, Ms Patterson and other maternity investigators met the Head of Midwifery at the Yeovil trust for a "quarterly review meeting" or QRM. QRMs were held with each of the trusts in the south west region.

56. The claimant describes herself as being "*uncomfortable due to the informality of this meeting*". It was a theme of her evidence that relations between the respondent and the trusts it was investigating (particularly Yeovil) were informal and unprofessional. In contrast, Ms Patterson emphasised the need for a collaborative approach between the respondent and the trusts it was investigating, in order to get the best out of any interviews and investigations. She says it was important to be "*open minded and humble in our approach, and to seek to understand the pressures that staff and services face*".

57. Ms Patterson's view was that maternity investigators were not "inspectors", and that trusts should not fear that the respondent was there to apportion blame or point the finger in relation to any incidents. For Ms Patterson, that also involved the respondent's staff not suggesting that they knew better than the trust's managers, nor interfering with or contributing to matters outside their remit. She says "*Our role is to be fair and non-biased, and to investigate events with the aim of improving services for patients and for staff (as the second victim), rather than critiquing the staff. Staff within the maternity units need to feel that they can trust HSIB so that they feel safe to share and disclose information.*"

58. The purpose of a QRM included providing initial feedback to the trust on areas of concern that had been identified at the early stages of any investigation.

59. The claimant reports three conversations during that meeting. The first was her pointing out that the SMA for the investigation she was second investigator on had found that the death of a baby at the unit had occurred through failings at the trust, and not through any underlying ill-health of the baby. The second was what she described as a conversation about "*consultant cover in the unit and escalation*". Finally, a question of safeguarding came up, on which the claimant gave what she described as "*professional advice*". She had previous experience in safeguarding.

60. Ms Patterson says in her witness statement:

> "*At the Yeovil meeting, Amanda started to ask questions of trust members regarding her investigation including around consultant relationships, which was not appropriate. If there are questions as part of an investigation, they should be saved for the investigation setting where staff have consented. She also started to advise the attendees on a clinical safeguarding matter which was related to a specific case, which was outside the remit of the meeting and of her role. We are there to talk about HSIB's role as a safety investigator and to highlight possible themes and trends from our evidence, not to advise the attendees regarding safeguarding, as they are professional and the experts in their field. The Director of Governance, and Safeguarding Lead from the Trust were both present and I did not feel it appropriate that Amanda had tried to advise them if how to undertake their jobs, as they may not appreciate Amanda implying that she had more knowledge than them.*"

61. Ms Patterson says she felt "*very uncomfortable*" during that meeting. The claimant uses similar words, although both attributed the source of their discomfort to different things. For the claimant it was the informality and what she saw as the unprofessional approach from the respondent. For Ms Patterson it was the claimant stepping outside the proper confines of her role, risking damaging the relationship between the respondent and the trust.

62. On 7 November 2020 Ms Patterson emailed all the respondent's attendees at that meeting, including the claimant. She said:

"Morning ladies, I meant to message yesterday to thank you for attending this meeting.

I felt the meeting went well and we are beginning to develop a positive and collaborative relationship with Yeovil and to generate trust.

My feedback would be that it was a little uncomfortable asking questions of the team regarding consultant relationships etc. We do not want to pre-judge and these are questions I suggest we may want to ask at interview with staff who have consented. Also I feel we are not there in a midwifery capacity – so I feel we should not be advising on actions the trust should take with families etc.

Difficult but we need to be mindful of boundaries and our role.

Best wishes

Maria"

63. The claimant replied to everyone on the email:

"Hi Maria,

I take on board the advice about the consultant issue as that was me that brought up that issue … its really hard to know how much we should and should not be saying with at the same time you feel you want to help them, but then it was my first meeting, so next time just kick me under the table and I will keep quiet!

X Amanda"

64. The email from Ms Patterson is consistent with her evidence that the claimant had improperly stepped out of line during that meeting. In her oral evidence the claimant was critical of this email from Ms Patterson, but it does not seem from her emailed reply that she thought Ms Patterson had done anything wrong at the time. In any event, this exchange of emails predated the claimant's first alleged protected disclosure by almost a month.

65. On 28 November 2019, on the way back from a training course, while travelling together by train, Ms Patterson discussed progress with the claimant. Ms Patterson says that this was not a formal one-to-one meeting, but the claimant says "*I feel extremely uncomfortable to do this as we will have to openly discuss sensitive confidential material … I say "its difficult to talk Maria on the train", but she literally forces me into a meeting by ignoring my concerns and gets out her laptop on her knee and asks me where I am with my cases …*". By this time the claimant had five cases, including one in Hillingdon, London.

66. One outcome of this discussion is that later the same day Ms Patterson emails others in the team prompting them to make arrangements for interviews on the

claimant's cases. At the same time she complements the claimant for being "*very lovely supporting others*".

PD1

67. The claimant's first alleged protected disclosure is in an email of 5 December 2019 to her manager. The email is:

> *"Dear Maria,*
>
> *I am just finishing my Timeline/Chronology and gap analysis on my second case in* [Yeovil] *and appear to be finding some themes. However only one of these themes came up in my 1st SMA last week as possibly being causal (the other case is yet to have its 1st SMA).*
>
> *The themes that I feel/believe are evident in my 2 cases at* [Yeovil] *are the following;*
>
> 1. *Use of Locum Registers or specialist Dr's to perform emergency obstetric procedures without Consultant (senior obstetric staff present) being informed or present.*
> 2. *No escalation or consultation to Consultant early enough when obstetric plan and decision making required.*
> 3. *Appears to be chaotic in both emergencies – poor timeline documentation of emergency and neonatal resus. Poor leadership in the emergency – appears chaotic.*
> 4. *One theatre busy and Locum Reg busy no escalation to call Consultant in.*
> 5. *Overall my feeling/believe is that there appears to be an air of optimism that they are not prepared when things do go wrong!*
>
> *When they have an emergency the unit appears to cope and not actively manage the situation.*
>
> *Not sure where I document these emerging themes? and I realise that they appear to be themes that I see and not necessarily been causal but the 'human factors' of it may have contributed to the outcome.*
>
> *I am due to interview one of the consultants for the first case and will explore these areas further at staff interviews and obviously raise them at the SMA's.*
>
> *Just wanted to share these thoughts and my observations so far with you as I am aware this is a new Trust we have.*

I have copied in [other MIs] *as they are both my second MI's and I need to discuss with them if they also see similar themes emerging.*

Thanks

Amanda"

68. In her oral evidence the claimant framed this as whistleblowing of the utmost urgency – identification by her of critical failings in the relevant trust that required immediate escalation and corrective action.

69. This is not how it appears on a simple reading of it. It appears that the claimant is thinking aloud in the email, updating her manager on some "emerging themes". The only question asked or action she requires of her manager in this email is where she should document these emerging themes.

70. Identification and analysis of such themes was, of course, the essence of the claimant's role as a maternity investigator, albeit with a focus on matters that had caused or contributed to the events in question – as to which the claimant at this stage only considered one possible theme to be relevant.

71. The need for "escalation" was also a theme in the claimant's evidence. There is or was a clear issue within the respondent's processes concerning how corrective action could be put in place before the final report on the incident was issued, which would often be many months after the incident in question.

72. We know that the respondent's work was not about immediate or urgent corrective action in response to incidents. That would have to be dealt with within the relevant trust. Nevertheless, it is not a surprise that investigators would be able to identify matters of concern at a very early stage, and may consider that corrective action should not depend on waiting for the final report months later. If so, what should they do about it?

73. In the claimant's oral evidence, she said that she considered this should be done by her reporting the problem to Ms Patterson, who could then take it up with the relevant trust.

74. By the time of her oral evidence, as we have described, this came to be described by the claimant as being matters of the utmost urgency and obviously amounting to points that Ms Patterson should take immediate action about. However, the contemporary documents do not read like this. The tone is that the claimant is thinking aloud or asking for advice, not asking for immediate action. In a number of cases where Ms Patterson writes back to query whether any further action should be taken, the claimant does not reply and certainly does not put things as she now puts them – that it is obvious that immediate action needs to be taken.

75. For Ms Patterson, the point was more nuanced. She accepted there were no formally documented processes on escalating early identification of concerns (at least at that point – we were told that there now is). Preliminary feedback could be given in the QRM. Any particularly urgent points could, in practice, be fed back to the trust via her, but a theme of her evidence and correspondence at the time was that it was important not to jump to conclusions too early. We accept that a constant stream of feedback to a trust during an investigation was likely to distract and may well detract from the formal, reasoned and evidenced, conclusions to be found in the final report.

76. It is consistent with that approach that we see a number of times when the claimant's raises points of concern with Ms Patterson her response is to the effect that the claimant should continue to investigate and evidence those concerns in preparing her report.

D2

77. The claimant's email was sent late in the evening. Early the following morning (6 December 2019) Ms Patterson replied as follows:

> *"Thanks Amanda,*
>
> *Also be careful of our own bias about what is the appropriate way to escalate.*
>
> *At interview explore what the expectation is for locum Drs when an emergency occurs etc as your expectation may not be what happens. So just explore no judgement. It is a challenge in the SW and in particular small units to recruit at reg level in obs - so this impacts regionally (and nationally).*
>
> *Escalation to consultant what is the practice (work as done) and you can then check what the policy says for the report.*
>
> *Air of optimism or expectation bias we see often as staff can tend to expect things to go well and be surprised when not.*
>
> *Documentation can be poor – but its not causal.*
>
> *Hope all goes well, Maria"*

78. This email is said to be the second detriment: "*On 6 December 2019 Ms Patterson sent an email to the team criticising the claimant*".

79. The reference to sending it to the team must be to the email being copied to another maternity investigator who the claimant was working with at Yeovil. That same investigator had been copied into the claimant's email of 5 December 2019, so Ms Patterson was replying to those who had received the claimant's original email.

PD2 & D1a

80. Ms Patterson held a one-to-one meeting with the claimant on 10 December 2019. The claimant says that during this meeting she made her second protected disclosure and was subject to the detriment of being told that she was not performing well and was not doing her job, along with the one-to-one meeting being "*consistently negative*".

81. These are the notes of the meeting:

> *"Amanda is feeling that the job is not achievable in terms of hours and expectations.*
>
> *Amanda is leading 4 cases and we have held off a 5th to enable cases to progress and for Amanda to become familiar with the process.*
>
> *We discussed that with her first cases Amanda has interviewed more people than required this has placed additional pressure on her times and led to more time away from home. The impact of this for organisations is that staff are pulled out of clinical areas and it is unlikely that their perspective will be evident in the report as not causal. Amanda feels that with her latest investigation she is becoming leaner – focusing on key staff only and can request others for interview if all information not obtained.*
>
> *We discussed that with Amanda's next case to consider carefully who to interview and discuss with second MI. We also discussed completing chronologies which have taken Amanda sometimes a week to complete. Reviewed a chronology together that Amanda had written and it was appropriately detailed – we both agree best and most efficient approach to aim to complete when in trust.*
>
> *Discussed report writing – Amanda needs to be mindful not to go too wide, focus on causal factors only in analysis and present key lines of enquiry at SMA2. Populate template post interviews.*
>
> *Maria shared feedback from an SMA - Amanda had been tearful and stayed on the line to discuss concerns re workload and support for half and hour. The SMA felt that Amanda's SMA document was appropriate and at the expected standard. Maria discussed not going into too much detail – and to always consider what the added value of extra detail would be.*
>
> *Be mindful where to bring these professional issues to, appreciate I was on leave but the SMA is external and cannot resolve for you.*
>
> *We discussed that Amanda has concerns re Yeovil culture – advised that we need to use our investigation to prove/disprove such theories*

and have the evidence to back up. Important to be self-aware of our own biases, to listen and not judge and not to use leading questions or prompts in interview or when undertaking SMA. Email to external SMA could be interpreted as seeking a certain answer.

We discussed that the team are very supportive, and that Amada should use this as a resource. The cohort WhatsApp group can be negative, and it is easy to get sucked into a culture of complaining – NHS style. Please use me or your colleagues to off load as we can help :-)

The team have worked really hard to establish a positive reputation and to engage locally – this has not been easy and we have all had challenging feedback. Don't take anything to heart or overthink :-)

Key message – switch off at night, switch off at the weekend there will always be tasks to do. Prioritise what are important tasks and the rest can wait.

Next steps - report writing begin this now to progress cases - the next lead case will be Amanda's.

Areas for development: To become leaner with investigation process."

82. The claimant says in her witness statement, "*Again, I voice my patient safety concerns regarding Yeovil Hospital. Specifically, I raise the issue around Yeovil not having enough neonatal resuscitation and fetal monitoring equipment in the maternity theatre.*"

83. PD2 is said to be "*repeating the same concerns*" as PD1, but there is nothing in PD1 about Yeovil having insufficient equipment in the maternity theatre.

84. In his closing submission Mr Cordery said that the claimant had confirmed in oral evidence that no new information was disclosed in PD2 as opposed to PD1. That does not appear to be the case from her witness statement and we cannot find in our notes of the hearing the claimant saying that there was nothing new in PD2. What was in her witness statement was not challenged by the respondent. Ms Patterson does not mention PD2 one way or the other in her witness statement. In those circumstances we find that the claimant did raise "*the issue around not having enough neonatal resuscitation and fetal monitoring equipment in the maternity theatre*" during that meeting.

85. These notes identify a theme that recurred across the one-to-one meetings – that the claimant was feeling overwhelmed by her workload and Ms Patterson was encouraging her not to "*go too wide*" and overdo the work. Ms Patterson wanted the claimant "*to become leaner with investigation process*". It was the claimant's evidence during the hearing that her training with the respondent had encouraged a wide view of matters, and that Ms Patterson's desire for an approach focussed on causes of the problem was not consistent with her

training. We do not need to address this in any detail. On the whole we would have thought that in such a situation it is the manager's view of the role that would usually prevail. That is the nature of line management, but if Ms Patterson had a different (and incorrect) view of the scope of the role, there is nothing to suggest that she specifically applied the view to the claimant (and the claimant alone) on account of her being a whistleblower.

86. Another theme through these notes is that it is the claimant rather than Ms Patterson who raises problems with doing the job and doubts about whether she is able to fulfil the role to the respondent's expectations. As with possible different views of the scope of the role and investigation it is another question whether the respondent's expectations were reasonable, but it is clear from these notes that discussions about difficulties the claimant was having with the role were, on the whole, prompted by the claimant rather than Ms Patterson.

PD3 and the SMA1 meeting

87. On 18 December 2019 the claimant had her SMA1 meeting in respect of the Yeovil incident she was lead investigator on. While practitioners such as the claimant would have their own knowledge of proper practices within maternity units, the SMA1 meeting was the first opportunity in an investigation to seek expert opinion on what had occurred. The experts could give a preliminary view and suggest lines of enquiry at the SMA1 meeting, with the SMA2 meeting providing final input ahead of a draft report.

88. Expert opinion at the SMA1 meeting would be informed by the results of the investigation so far. The SMA1 meeting would typically be between the two investigators on a case and two subject matter experts. This meeting was just the claimant and one expert: Prof Alan Cameron. The other allocated expert, Sophie Windsor, had fallen ill at the last minute and could not attend, and the secondary investigator could not attend the meeting either.

89. The claimant recorded this meeting and was at pains to point out that the respondent appeared to have lost or destroyed both the recording and the notes of this meeting. The respondent gave no explanation of this, but it seems to us that this recording is not material to our decision, as it is the claimant's subsequent protected disclosure (if any) that is the significant point, not the actual contents of the meeting. Ms Patterson was not a party to that meeting.

90. This is how the claimant describes her discussions with Prof Cameron in her witness statement:

> *"In the meeting, on tape, he confirmed that my concerns were justified, he thought the notes had been amended/tampered (which breaks rules/legislation of medical note taking). He confirmed that this unit has been on the Royal College of Obstetricians and Gynaecologists (RCOG) radar for a while now and that I should escalate to my line manager, he also confirmed that in his opinion – care had been appalling and there*

was also an agreement if I recall that the care had been third world. He said let's see what also comes out at the interviews. He agreed with my lines of enquiry and concerns and to escalate to my line manager, team leader (Maria Patterson)."

91. The claimant says that she passed this on to Ms Patterson verbally at the team Christmas lunch later that day. That is PD3. In her oral evidence she confirmed that there was nothing more in that than what she later disclosed in PD4, so we can concentrate on PD4 for this.

PD4 and D3a

92. PD4 comes about two days later.

93. The day after the SMA1 meeting, Sophie Windsor (who had been unable to attend the meeting through illness) sent an email to the claimant apologising for her absence and giving bullet point observations on the materials she had seen. Presumably these were points she had intended to make if she had been able to attend the hearing. She sent this email from her personal (i.e. non-NHS) email address. On the whole these appear to be technical medical matters that Ms Windsor has identified as areas for further enquiry. Although she references the medical notes she does not suggest there is anything untoward in them.

94. The claimant replied to Sophie Windsor (at the non-NHS email address Sophie Windsor had written from) the following day, saying:

"Hi Sophie,

Thank you and glad you are now well.

Sorry I have not responded sooner but yesterday had my head engrossed writing another case Chronology and gap analysis.

Re this case was my Chronology/gap analysis and pulse ok ?

Just asking because this is my second case since starting the job in Sept.

Re your SMA information/advice; this is really helpful thank you. I was with Alan Cameron and he was appalled at the care this women received. He thought that both the drs and midwives notes had been altered after the incident!

There is a area were the op notes have been amended.

Alan wanted me to explore if the uterus had ruptured or dehisced when the LSCS started. I will obviously interview the Consultant and Locum Dr that initiated the LSCS.

It is a shame we couldn't have more opportunity to discuss this case as I had a lot of concerns over the whole management of this women's care given at this Trust.

Alan said see what comes from the interviews and possibly escalate.

What are your thoughts/advice Sophie ?

Kind regards

Amanda"

95. Sophie Windsor replied later the same day:

"Hi Amanda,

I felt your report was good. I wouldn't have known it was your second.

I know what Alan is saying I didn't think the care was great and I did wonder whether it was particularly busy and they left a student midwife looking after a high risk patient hoping she would deliver vaginally. I maybe wrong. Interviews will be crucial. Would also be good to have a documented capacity/acuity document from them to see if the business of the unit is a contributing factor if not that's worrying.

Notes being altered would be an immediate red flag for escalation in my opinion. Have you discussed it with your team leader to help you approach the trust?

With serious concerns such as these I would say an appointment with the hom should be made. Have the trust had other similar issues that you know of? That may give you mounting concerns to put forward to them?

More than happy to look at the final report.

Again so sorry to have missed the call.

I hope you have some time off over Christmas.

Best

Sophie"

96. That evening the claimant forwarded her correspondence with Sophie Windsor to Ms Patterson under cover of an email saying:

"Hi Maria ,

I know you are on A/L but just needed to ping this email to you before I go off on my A/L.

I have forward you the email from Sophie. As I mentioned at our Christmas meeting, I need to touch base with you after the SMA I had on Thursday with Prof Alan Cameron. He had some concerns re Yeovil which I have mentioned below.

Have a fab Christmas Maria. I am back on New Years Eve. But if needed you can always call me on my personal mob ...

BW Amanda"

97. This is said to be PD4, although if there is a protected disclosure here it must be in the email chain with Sophie Windsor, rather than in the covering email sent by the claimant to Ms Patterson. As with some other points, the claimant presented this in her oral evidence as being a matter of the utmost urgency that required immediate action and escalation. As she accepted, that is not something the email said at the time, nor is it the impression we get on reading the email.

98. While this has been categorised by the claimant as an allegation of "tampering" with notes, that is not the language that she used at the time. What was described in her oral evidence as verging on criminal conduct was alluded to at the time as Prof Cameron having "*some concerns … mentioned below*".

99. It was agreed between the parties that while the ideal would be notes that were prepared at the same time as the events recorded, there were many good reasons why notes may only be written up after the event, and that itself would not be a breach of any protocol. It was also possible for notes to be legitimately amended after the event, though this would require the amendment to be identified, dated and initialled or signed by the relevant practitioner. An allegation of "amending" notes does not necessarily carry the pejorative implications that would go with "tampering with" notes.

100. The email had been sent on a Friday, and on the following Monday Ms Patterson replied as follows (this is D3a):

"Hi Amanda,

Did Alan want to escalate immediate concerns or were they areas to explore in during your investigation? Reading your e mail it looks like see what comes out at interview and escalate following that if needed. This sounds sensible so that we can be clear re information and evidence.

Please be mindful of sending emails with the trust name to non NHS address as you have some sensitive info detailed here.

Can you book a 1:1 for your return from leave and we can discuss then?

Many thanks Maria"

101. In her oral evidence the claimant says that she is being "*unfairly criticised and castigated*" for sending an email to a non-NHS email address when Sophie Windsor didn't have an NHS email address and when there was no sensitive information in the email.

102. We can see no way in which what appears to be at most gentle admonishment by Ms Patterson could properly be characterised as "*castigating*" the claimant.

103. This was one of the occasions on which the claimant's oral evidence was very difficult, if not impossible, to reconcile with the contemporary documents.

104. We understand that there may be matters of context that do not appear from the documents, and it was part of the claimant's case that her treatment was, as she put it, a "*drip-drip*" of multiple ostensibly minor matters or micro-aggressions that together became intolerable pressure. It was also her position that what might at first glance appear to be friendly remarks in emails were actually passive-aggressive.

105. We went to great lengths during the hearing to enable the claimant to explain this, and why something apparently so mild could be viewed as "*castigating*" her. We are conscious that documents will seldom tell the full story and that apparently small incidents can add up, but having heard all the evidence we still do not see how this could properly be called "*castigation*" of the claimant.

PD5

106. The claimant described herself as being very disturbed and worried over the Christmas break about what her investigations were revealing. On the day she returned to work after her Christmas break (31 December 2019) she phoned Lisa Marshall. This is what she says she said to Ms Marshall:

> *"I explained to her what I had found both in the unit and the conflicts and all the concerns around the severity of the substandard care and note tampering, what Professor Cameron had said and also how I was finding the job role – workload etc."*

107. The claimant does not explain what she meant by "conflicts". The only "conflict" that is said to be the basis of any protected disclosure is the relationship between her fellow investigator and the head of midwifery at Yeovil, although we also note that the claimant had concerns that investigators were in general too close to the units they were investigation. The claimant was asked whether she had mentioned her colleague as having a conflict of interest, and said she could not remember saying that. The "conflicts" point must have been a general comment about connections within the world of midwifery. We have previously observed that "tampering" was not a word that the claimant had used in writing in referring to the changes in the notes, so we do not accept she used it on this

occasion. We find that PD5 adds nothing to the previous written disclosures at PD1 and PD4.

108. On 31 December 2019 the claimant wrote to Ms Patterson by way of reply to the D3a email saying:

> *"Hi Maria,*
>
> *I understand where you are coming from with regards to the IG concern.*
>
> *I returned from A/L today after having my first week of A/L away from the job since starting in September and opened your email and needed to speak to someone about this issue along with my feelings in general about the job.*
>
> *Lisa was very helpful and supportive with her advice etc and I am sure will tell you what we discussed.*
>
> *Catch up when you get back from your leave next week ...*
>
> *Happy New Year to you.*
>
> *Best wishes*
>
> *Amanda."*

109. Of note in this email is firstly that the claimant gave no response to Ms Patterson's question as to whether Prof Cummings had wanted matters escalated immediately or simply explored in the investigation. She is also not in any way critical of Ms Patterson's response.

110. That is quite a difficult point for the claimant given that it was her oral evidence that, despite PD4 not expressly saying so, it was so obviously a matter of concern that it required immediate escalation to the trust.

111. The claimant said that she had expected that on receipt of PD4 Ms Patterson would immediately recognise a serious concern and of her own motion retrieve and consider the relevant medical notes, spot obvious problems with them and take up the matter with the trust. If that was the case, we do not see why the claimant did not do the apparently obvious thing and reply to Ms Patterson saying that (as she now says) Prof Cummings required immediate escalation.

112. The second point of note is that she says "*Lisa was very helpful and supportive*". This does not match with the oral evidence she gave which was that Lisa Marshall was, at best, dismissive of her concerns. The claimant explained that in saying Lisa had been very helpful and supportive she was simply being polite. We do not accept this. While politeness may be an explanation for, for instance, the tone of her resignation letter, there was nothing about this email that

required her to be polite or even mention her discussion with Ms Marshall, let alone go so far as describing her as "very" helpful and supportive.

113. There is nothing in the documentation so far which supports the claimant's position that anyone at the respondent was being hostile to her, responding badly to protected disclosures or subjecting her to any detriment.

Early 2020

PD6 & D1b

114. PD6 and D1b both relate to the one-to-one meeting with Ms Patterson on 14 January 2020. The claimant says in her oral evidence that by that time she had spoken to a midwife who was planning to resign at Yeovil because of poor standards there and also met a locum anaesthetist who considered that the unit was unsafe for his wife to give birth there. However, in cross-examination the claimant accepted that PD6 offered "*no significant new information*" to that which had already been disclosed, so we do not need to look at that in any detail. The notes of this meeting are agreed by both sides to be unsatisfactory, given that they appear to derive largely from those of the meeting on 10 December 2019. The claimant says in her witness statement that "*the general tone through the meeting is negative and overly critical of me*" and "[Ms Patterson] *wanted … me to get to report writing stage and take on more cases*" but there is nothing in her evidence to the effect that Ms Patterson said she was not performing well and was not doing her job.

PD7

115. PD7 is an email written by the claimant to Ms Patterson on 29 January 2020 headed "*Re; my concerns*". This is what it says:

> *"Dear Maria,*
>
> *We spoke via skype on Monday (27th February)* [this must mean January] *about the situation that has come to light regarding* [colleague]*'s communication and relationship with … the Head of Midwifery at Yeovil. I expressed concerns about this potential conflict of interest and that I feel concerned as the lead in the investigation where* [colleague] *is the second MI in that investigation.*
>
> *As you are aware since I started the investigations at Yeovil I have received negative comments about my approach and conduct. You advised me that … the head of midwifery at Yeovil has made these comments and I have also received negative feedback from* [colleague].
>
> *Whilst I encourage feedback that is constructive and developmental, I consider that these comments are misplaced as I have consistently undertaken the investigations with professionalism and integrity.*

In light of the knowledge of a friendship/relationship between [colleague] *and* [the head of midwifery] *I query weather it is appropriate for* [colleague] *to be investigating incidences at Yeovil.*

My concerns are that there could be a perception of bias which could affect the integrity of the investigation in so far as an MI has a current or historic, professional or personal relationship with a senior member of the midwifery management team who has decision making powers in that organisation.

We have been trained to be alive to the risks of subconscious and conscious bias influencing the investigation and which could affect the findings and recommendations. I am raising this with you as I am concerned that the relationship … could affect the integrity of the report and consequentially the reputation and integrity of the organisation.

For these reasons, as my line manager I am expressing my concerns as to whether it is appropriate for [colleague] *to continue as my second MI.*

I query weather [colleague] *has a conflict of interest in this investigation into this Trust.*

I appreciate we discussed this informally on Monday, but on reflection I am uncomfortable to continue as is. I welcome your response and consideration on this matter and fully appreciate that this may require escalation for guidance within HSIB.

I am happy to be part of that conversation.

Kind regards

Amanda"

116. Ms Patterson replies the same day:

"Dear Amanda,

Thank you for your e mail.

As you are aware [colleague] *is on leave so I cannot discuss your e mail with her until Monday at the earliest.*

All staff are asked to complete conflict of interest documentation when they identify a conflict of interest.

[colleague] *has not expressed any conflict of interest at Yeovil. HSIB are clear in our advice to staff that if they have worked at a trust within 5 years this is considered a conflict. We advise staff to flag professionally*

if they feel there is a conflict for other reasons. [colleague] *has not done this in relation to Yeovil.*

Personally having worked with [colleague] *for almost 2 years I have the highest regard for her integrity and professionalism and the ability of all members of the team to recognise and flag a conflict of interest if one exists.*

HSIB are investigating from a safety perspective why events happened and how we can improve and whilst the trust culture and practice may impact on this we are not investigating the trust itself.

As you recognised due to the nature of maternity work there can be connections between HSIB staff and trust staff but these do not mean investigators cannot and do remain impartial and professional.

The fact that you have a second investigator reduces bias and offers support, as does the 2 SMA panels and the report panel.

I do not think it would be helpful for the families at this stage to change investigators unless there was a clear issue.

The main thing is to focus on the evidence collection and report writing - this is where we need to focus our energy in order to gain answers for the families as we agreed on Monday.

I would like to take the constructive approach of facilitating a conversation between yourself and [colleague] *which we will do that next week.*

I know [colleague] *is wanting to support you in your new role and providing feedback to you directly is an element of her trying to support you. As outlined in training HSIB as an organisation undertake peer feedback as a routine practice and have to date found this to be a valuable approach.*

Regarding the feedback from Yeovil – we have all received feedback and whilst you may have appreciated [head of midwifery] *speaking with you directly, sometimes feedback comes via other routes.*

I am happy to have a conversation with [colleague] *to gain her perspective when she returns from leave.*

Thank you,

Maria"

D3b

117. D3b is an email dated 31 January 2020. The sender and recipient(s) have been redacted. This is what it says:

> *"I have reflected on the situation with Amanda Ford and I have spoken with* [redacted] *this am as* [redacted] *is on leave.*
>
> *I am concerned that Amanda has possibly lost sight of the families being the main focus of her investigation and has become distracted with whether she is liked as an individual by the trust. She has also made some fairly strong statements about colleagues being biased - I have no evidence to support this and indeed I am worried that Amanda herself may have made judgements regarding individuals and a specific trust.*
>
> *I feel I need to have a conversation with Amanda to remind her of the importance of the HSIB values/purpose and the need to obtain evidence not just "feelings". Amanda can blur her boundaries in terms of appropriate conversations and I have discussed this with her in the past.*
>
> [redacted] *agrees and suggests that I do this with* [redacted] *I really feel I need to put a line in the sand now. I want to support Amanda but do not want the team destabilised and I feel there is a risk of that.*
>
> *I have spoken with* [redacted] *today to advise her of the issues Amanda has flagged as I have covered* [redacted] *interviews with Amanda.* [redacted] *is happy to meet with Amanda to discuss and to still work with her to support her to generate reports.*
>
> *I am wondering if I have a conversation with Amanda and 1 of you and then* [redacted] *maybe can continue to support her.*
>
> *I would be grateful for your support.*
>
> *Thanks"*

PD8

118. PD8 is an email dated 3 February 2020 from the claimant to Ms Patterson, copied to Amanda Morgan. The case management order identifies the significance of this as being in relation to "*disclosure of tampering/amending medical records*". In this regard it says:

> "*There is also the concern that Alan Cameron … raised about the notes being altered both obstetric and midwifery – what do I do about that?*"

PD9 and D4

119. PD9 and D4 both relate to a Skype meeting between the claimant, Maria Patterson and Amanda Morgan on 4 February 2020.

120. In cross-examination Mr Cordery put it to the claimant that during that meeting she was "*adding little in terms of information to* [PD7]" (this would seem to follow from the definition of PD9 which refers to the claimant "repeating the same concerns"). The claimant accepted that, saying "*I was just going over it yet again*".

121. D4 is being "*ambushed and bullied*" in the meeting, as Ms Patterson & Ms Morgan were "*not taking her concerns seriously and … were more concerned with reprimanding her*".

122. This seems to be concerned with the question of a complaint that had arisen in respect of the claimant's work at Plymouth. Both the "ambush" and "reprimand" are about that.

123. There is a string of correspondence between Ms Patterson and the claimant during 3 February 2020. At one point the claimant asks "*what is the Skype meeting one to one for tomorrow with Amanda Morgan?*" and Ms Patterson replied "*I would like to meet with you tomorrow as we need to discuss the email you sent last week regarding Yeovil, the issues you have raised and other concerns I would like to discuss with you.*"

124. Ms Patterson had prepared some notes ahead of the meeting. The first item on her agenda was "*To raise feedback received in Plymouth yesterday from risk lead: 'I had several complaints relating to attitude from the community office staff an maternity receptionist. If at any time facilities are not found to be of the expected standard I will always ensure this is addressed with the appropriate person and therefore would ask that any feedback is brough to me. Staff found the unit tour to be uncomfortable.'*"

125. The essence of this is that Ms Patterson had received a complaint from the hospital at Plymouth of the claimant's behaviour on a visit. It was the claimant's case in cross-examining Ms Patterson that Ms Patterson had been fishing for complaints about the claimant's work. That was based on an email Ms Patterson had sent to the trust at Plymouth on the morning of the meeting saying "*sorry to chase but I am meeting with the investigator at 09:30 and would like to share the information you raised – have you any time to do this? I think you mentioned the tour – what was the issue with the unit tour?*". Fishing for complaints was not alleged as a whistleblowing detriment, and we read this as a request for more information on something the trust itself had volunteered, not soliciting complaints about the claimant. The claimant recognised the incident in question (while being clear that she had done nothing wrong). We accept that this was a genuine complaint and something that it was appropriate for Ms Patterson to raise with the claimant.

126. Ms Patterson's notes set out her intended approach to the claimant about this, recording "*Can Amanda reflect on this? The risk to HSIB reputation and how staff trust us and feel that they are not being judged … Our role is to forge relationships with trusts … We would not expect investigators to judge or look*

down on a trust – evidence is needed. Because you work autonomously I need to be clear regarding these expectations. I can support and guide you if you request this."

127. Another element of D4 is "*not taking her concerns seriously*". Both agreed that matters the claimant had raised – in particular in relation to conflicts – were discussed at the meeting.

D3c

128. D3c is an email dated 4 February 2020 at 17:04. The sender and recipient are redacted. The subject is "Re: staff notice period". It reads:

> *"If this enquiry relates to AF, then she is required to give us 12 weeks' notice and we would need to give the same, but we would need to go through the true reasons for termination i.e.:*
>
> - *Contract truly ends: Termination because her fixed term contract due to end on 15 September 2020 has come to an end. This is unlikely because none of our fixed term contracts to date are really 'fixed'. Meaning that when it comes to an end we would not recruit further to it.*
> - *Capability: We would need to take her through the capability process if there are concerns with performance. Outside of a Probation Policy which we do not have, we would need to follow this policy.*
> - *Disciplinary process: We would need to take her through the disciplinary process if her conduct is of concern and meets the threshold for dismissal - see policy*
> - *The other two fair reasons for dismissal wouldn't come into play as we they are not applicable.*
>
> *In summary, I would negate the first bullet point because we have not terminated any fixed term contracts to date. Although staff are on fixed term contracts, they seemed to be renewable once funding is determined.*
>
> *Happy to discuss.*
>
> *Regards"*

D1c

129. D1c is the 27 February 2020 one-to-one meeting, which was originally excluded from the claimant's complaints about the one-to-one meetings but had been

included following her successful application to amend her claim. The notes are as follows:

> *"Amanda emailed to say that she felt overwhelmed and overwhelmed with workload, worried about getting behind. Has spoken to* [redacted] *who offered support.*
>
> *Amanda has 5 lead cases- the first of which is from October. Amanda cancelled SMA2 as she felt not ready. We discussed this being a key point to progress/ narrow findings to the report stage.*
>
> *Together we went through the progress of each case …*
>
> *Actions agreed to support Amanda …*
>
> *Remember do not go in depth into too much detail on non-causal factors.*
>
> *Amanda is not sure the job is for her, may drop hours. We discussed the role is independent need to be able to manage own time and work in isolation at times but colleagues all available to support. Amanda needs to reflect if the job is what she expected and wants to do long term."*

130. As before, we note that suggestions that the claimant was having difficulties with her job seem largely to have been prompted by the claimant, not by Ms Patterson.

131. The claimant wrote an email following this meeting. The recipient is redacted. The claimant proposes a couple of correction in relation to individual cases and continues:

> *"Regarding my feelings/anxiety some of the team members have also said that there have been times when they too have felt overwhelmed and have struggled with the isolation etc. I appreciate the changes you have instigated [redacted] – which has helped me feel less overwhelmed. I think getting some reports out will hopefully make me feel better about the job and I may well ask to reduce my hours by a day. I am not sure how quick the dropping of one day can be undertaken though from a management/HR admin process?"*

D3d

132. D3d is the reply to that email the same day:

> *"That's fine just amend the 1-1 to what you feel fits.*
>
> *Re dropping hours I think lets get you feeling comfortable that you are on top of the work and then make a view maybe in a month when you feel on top of things?*

I think as a team we are open that we can feel at times overwhelmed, but this can be the case in any jobs. For this job you manage your own time and workload, the skill is to keep it moving forward – be proactive, appropriate no's of staff interviewed etc. I am not suggesting it is not a big job, it is but there are peaks and troughs for all of us. You are at a peak as all 4 were at the same stage and you need to clear a report to make you see it is manageable.

It's a high band and that is reflective of the responsibility and independence."

The claimant's resignation

133. The claimant submitted her resignation on 16 March 2020. Her resignation letter is addressed to Ms Patterson and says:

"As from Monday 16th March 2020 I wish to give notice to terminate my one-year fixed term contract as a Maternity Investigator with The Healthcare Safety Investigation Branch.

I understand that this notice period is three months.

I know I mentioned in our meeting last week that I was unhappy in the job.

There are many reasons why I do not wish to continue to see out my contract until September.

This decision has been made after much consideration and I know that this decision may still come as a shock to you.

I await to hear what the calculation of my final date of leaving will be.

Hopefully by my early resignation, will give you clarity as to the number of MI's required to be recruited into your team prior to the next recruitment drive for HSIB.

I would like to say thank you for your support."

Events after the claimant's resignation

D1d

134. D1d is the one-to-one meeting on 6 April 2020. Following the claimant's resignation she was removed from second investigator duties to concentrate on the cases in which she was lead investigator. The notes of the meeting include the following:

"We discussed Amanda's last day looking at 15/6. Maria to confirm leave available.

Maria raised that Amanda appears to have struggled with progressing multiple cases at the same time and juggling different priorities. Maria wanted to discuss and agree a plan for what is reasonable.

Amanda wanted to feedback that she feels the number of cases is too much, that there is too much familiarity in the teams in terms of relationships with trusts, we are not doing enough for families and could do more. These are not new issues that Amanda has raised, and I am happy to feed this back to Lisa Marshall and the senior team and have done so previously.

My priority as TL is and remains to agree a plan to finish the cases for families and staff and to support Amanda where possible to achieve this.

Going forward: Maria will ask Mandy or Lisa to join the 1-1's in future. These need to be every 2 weeks.

I would like to see progress re

1910-1255 – back with me this week please.

1910-1269 and 1356 – to update on progress please each week.

As you have 11 weeks left please can you progress 1642 and take through SMART 2?

We can then handover at report stage.

Regarding the SMART 2 for your Yeovil case I have spoken with Lisa Manning for a second time and she has manage to arrange cover."

135. Much of the rest of the one-to-one meeting material is about the claimant pressing on with her reports ahead of the end of her employment.

136. The claimant wrote to Ms Patterson after the one-to-one meeting in these terms:

"Dear Maria,

I was left feeling really upset and demoralised after our 1-1 today and am now tearful and unable to concentrate. I have felt consistently undermined since my commencement in this job by you as my TL, you constantly say I am struggling and yet compare my production of reports against others in the team and make out that the team take my workload and 'carry' me.

You, as my TL are aware of the difficulties there has been over my first cases in Yeovil and the criticism I have received by the HOM , around which I raised a conflict of interest regarding a team member, which was not upheld. This negativity towards me at an already stressful time is very sole destroying.

We are all doing our best to the best of our abilities at what is already a difficult time for all.

I have over my employment have called out when I thought things were not right and have in return received criticism for doing so and received NO positivity from you as my TL.

In my 1-1 today I said how inappropriate I felt you telling the HOM at Yeovil in the last QRM meeting was about my resignation (which had only been given 1 week prior). I felt this was even more inappropriate considering, I had a further 3 months to work for the organisation and taking into consideration the issues that had gone on with the difficulty for me conducting two lead investigations there.

I feel totally not listened too and feel like you are trying to performance manage me at an already difficult and stressful time.

Today was my first day back from a week's A/L and within a few hours of being back to work and having a 1-1 Skype meeting with you at your request I have been left feeling totally demoralized and upset.

I will not be working the rest of today Maria .

Regards

Amanda"

D3e

137. D3e is an email that Ms Patterson wrote to follow up on the 6 April 2020 one-to-one meeting. It was sent following the email from the claimant set out above and says:

"Dear Amanda,

Please find attached a summary of the 1-1 today. I regret that I felt the need to end the meeting before we had completed all our business. I recognise that you are frustrated with HSIB and that the organisation and role has not been what you imagined. I have listened to your perspective today and when raised on previous occasions and have shared your comments with our leadership team in order to be as transparent and open as possible. You have shared that you are leaving HSIB as the processes are not right. I am sorry that you feel this way and I will ensure

that when we complete your exit interview your views are captured and shared.

Over the previous months I have sought to reduce your workload by delaying the allocation of new cases for as long as possible and I have to be truthful with you that this has resulted in your colleagues taking a higher workload. Your colleagues have not raised this as an issue but I am aware of this in terms of equity going forward.

We both agreed today, and you have highlighted in the past that you feel the workload in HSIB is too high and multiple cases at once is too much. I can confirm that you now have 4 lead cases as Hillingdon has moved back to London to reduce your workload. You have highlighted that your cases are complex, again I feel I must be honest with you they are no more complex than cases undertaken by other investigators.

In terms of 2nds you now have no "live" 2nd cases as 1650 has closed and 1642 has gone to the North team with Jill supporting she was going to take the lead. The Hillingdon report will be shared with you for FA review in a few weeks- this should be a couple of hours work.

This leaves you the 4 cases above. I hope that you feel this is manageable and achievable.

Regarding you feeling "pissed off" and that I have implied you are "shit". I don't not feel this language is helpful, hence we needed to end the call rather abruptly today. You asked why I advised the trust you are working at that you are leaving the HSIB – this is an update I have provided to all trusts as we have a significant change over of staff, over half the team and I want to be clear in my communication with trusts for their expectations. I was able to advise and reassure the trust in your case that you would be in a position to complete their investigations.

I feel I have a duty to be honest with you, in line with HSIB values I feel you have and continue to require additional support and have been distracted at times from being able to progress your cases. I hope that when you finish at HSIB you will have achieved and completed the 3 lead cases and progressed the 4th case to a position that your 2nd can draft it. I know this is your intention.

I will do my utmost to help and support you as best I can during this challenging time. I am sorry that you are feeling upset and recognise that your family has been under increased pressure over the past couple of weeks and that this is a worrying time for you.

Thank you, Maria"

Subsequent matters

138. On 8 April 2020 the claimant wrote a detailed complaint to Mr Conradi. That is PD10, although as previously identified there are no relevant detriments that post-date PD10 and by that time the claimant had resigned, so we do not need to deal with it in any detail.

139. That complaint prompted a complex sequence of events. It was initially investigated under the respondent's grievance procedure, and there was a hearing at which the claimant's complaints were partially upheld by the grievance panel. The claimant appealed this decision. The appeal panel considered that the respondent had been wrong to address the complaint as a grievance. It found that it should have been dealt with as a whistleblowing complaint under the Freedom to Speak Up policy. As a result, the complaint was referred for reconsideration as a whistleblowing complaint.

140. The outcome of this reconsideration as a whistleblowing complaint was Susan Newton's report of March 2021, which was highly critical of the respondent's handling of the claimant's complaint, and in particular with it having been dealt with as a grievance rather than as whistleblowing. Subsequently a further report by the King's Fund was also critical of the respondent.

141. During this period the claimant attempted to rescind or revoke her resignation, but that was not permitted by the respondent.

142. These reports were taken by the claimant as a vindication of her position, and a number of her witnesses drew on these reports and similar themes to criticise the respondent's actions.

143. This was not comfortable reading or listening for the respondent, but we could not see how this evidence particularly assisted the claimant in her claim. Her protected disclosures are (or are not) protected disclosures regardless of whether they are true or not. Any detriments and her resignation had already occurred. At times the evidence seemed to be that all maternity investigators were treated badly by the respondent which, as we pointed out to the claimant, did not assist her in showing that she had been treated badly because of whistleblowing. On the whole the witnesses were reluctant to criticise Maria Patterson, seeing any problems as having arisen in levels of management above her. Since 90+% of the claimant's allegations were against the actions of Maria Patterson this did not seem to assist the claimant either.

144. In her witness statement, Dawn Benson said: "*It was becoming clear to me that bullying, gaslighting and victimisation of maternity investigators, who challenged the senior teams' decisions or practice, was widespread, particularly in the south region but not exclusively.*" This was about as close as any other witness came to saying that it was whistleblowing that led to problems for the claimant, and we will consider this separately in our discussion and conclusions.

E. THE LAW

Protected disclosures

145. A protected disclosure is a qualifying disclosure made in a particular way (s43A Employment Rights Act 1996).

146. The respondent accepts that if there are qualifying disclosures made by the claimant they will be protected disclosures.

147. According to 43B(1) of the Employment Rights Act 1996:

> *"…a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one of the following …*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …*
>
> *(d) that the health and safety of any individual has been, is being or is likely to be endangered …"*

148. The respondent accepts that in making any disclosure the claimant had a reasonable belief that the disclosure was in the public interest. The disputed points are whether there is disclosure of information and whether the claimant reasonably believed that that information tended to show the matters set out in s43B(1)(b) or (d).

149. Martin v London Borough of Southwark (UKEAT/0239/20) sets out the five elements required to establish a protected disclosure. The respondent disputes the first, fourth and fifth of these. That is: "*First, there must be a disclosure of information … Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.*"

150. The requirement for "information" is of "conveying facts", or containing "specific factual content" (Cavendish Munro [2010] ICR 325). This is to be contrasted with the making of a bare allegation, though the test is simply whether there is information disclosed, not whether the disclosure amounts to information or an allegation.

151. The worker has to reasonably believe that the disclosure tends to show one of the matters in sub-paragraphs (a) to (f) at the time they make the disclosure. They must actually believe it, and that belief must be reasonable (Babula v Waltham Forest College [2007] IRLR 346).

152. For the category of breach of a legal obligation, "*the identification of the obligation does not have to be detailed or precise but it must be more that a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation*" (Eiger Securities v Korshunova [2017] IRLR

115). It is not necessary for the disclosure to state the legal obligation in question, nor for the claimant to have recognised at the time the precise legal obligation she considered had been breached. The IDS Handbook on Whistleblowing puts it like this at para 3.58:

> *"… a worker need not always be precise about what legal obligation he or she envisages is being breached or is likely to be breached for the purpose of a qualifying disclosure under S.43B(1)(b). In cases where it is 'obvious' that some legal obligation is engaged … the absence of specificity will be of little evidential relevance. However, in less obvious cases, a failure by the worker to at least set out the nature of the legal wrong he or she believes to be at issue might lead a tribunal to conclude that the worker was merely setting out a moral or ethical objection rather than a breach of a legal obligation."*

153. It is for the claimant to prove on the balance of probability that she made protected disclosures.

154. As was discussed during the course of the hearing, it appears that the NHS Freedom to Speak Up policy takes a wider view of what would amount to a protected disclosure or whistleblowing, but we are concerned with the statutory definition, not that in the Freedom to Speak Up policy.

Detriments

155. Under s47B(1) of the Employment Rights Act 1996:

> *"A worker has the right not to be subject to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."*

156. Something will be a detriment if "*a reasonable employee might consider the relevant treatment to constitute a detriment*" (Jesudason v Alder Hey [2020] ICR 1226. It is for the claimant to establish (on the balance of probabilities) that there has been a detriment.

157. If there are protected disclosures and detriments: "*it is for the employer to show the ground on which any act, or deliberate failure to act, was done*" (s48(2)), and the relevant test is whether "*the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*" Fecitt v NHS Manchester [2011] EWCA Civ 1190 (para 45).

Dismissal

158. Section 103A of the Employment Rights Act 1996 provides that "*An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the*

dismissal is that the employee made a protected disclosure." It is not necessary for the employee to have two years' service to bring such a claim.

F. DISCUSSION AND CONCLUSIONS

Protected disclosures

Introduction

159. In considering whether the claimant has made any protected disclosures, we are working from our findings of fact on what has or has not been said, looking to see whether anything that was said amounted to information that the claimant reasonably believed (at the time of saying it) tended to show either that health and safety was being endangered or that there was a breach of a legal obligation (depending on the disclosure).

160. In her closing submissions the claimant sought to expand the categories of disclosure beyond those previously identified in the case management orders. She said, for instance, that the protected disclosures might tend to indicate concealment, or that a protected disclosure that had previously been identified as a breach of a legal obligation was also raising health and safety issues.

161. Setting aside any question of whether this re-categorisation would require an application to amend her claim, we reject any attempt by the claimant during submissions to expand the categories her disclosures related to. That is because the question is what she thought she was saying at the time, not what she is later able to analyse it as. Where the case management order identifies it as being a particular category of disclosure, that must be what was in the claimant's mind (if at all) at the time of disclosure. We do not accept that, for instance, the claimant at the time thought she was referring to concealment, did not then raise that at case management stage and only eventually referred to it in closing submissions. It is what the claimant thought at the time that matters, not what she thinks now.

PD1

162. PD1 is the email of 5 December 2019. It is said to contain information that the claimant reasonably believed showed that the health and safety of individuals was being endangered.

163. The nature of this email is that it is in relation to health and safety matters. The more difficult question is whether it contains any "information".

164. The email itself concerns "themes", and on that basis it is not easy to discern what the specific information is said to be. If there is information, it is in the numbered bullet points. Looking at them in reverse order, saying that an individual has a "*feeling/believe that there is an air of optimism*" cannot be considered to be "information". There is nothing specific there. The same can

be said of "*one theatre busy … no escalation*", "*appears to be chaotic*" and "*no escalation … early enough*". While those would be causes for concern there is no meaningful information there.

165. Where we do have (arguably) specific information is in point (1) – the hospital is using locum registrars or specialist doctors to perform emergency obstetric procedure without consultants being informed or present. We consider that on balance there is sufficient information there for this to count as a protected disclosure, and that it was raised by the claimant in the reasonable belief that health and safety was being endangered. This was a protected disclosure, but nothing else in PD1 was a protected disclosure.

166. We note at this stage that we consider this is not at all an obvious protected disclosure. On balance we consider it was one, but it was a fine balance. As previously referred to, making such findings was a core part of the claimant's job, and it is not at all obvious to us how or why the respondent would take against her for saying such a thing.

PD2

167. PD2 adds to PD1 that Yeovil did not have enough neonatal resuscitation and foetal monitoring equipment in the maternity theatre. This is clearly information tending to show that health and safety is being endangered, and was a protected disclosure.

PD3

168. PD3 can be dealt with as PD4.

PD4

169. PD4 is essentially that Prof Cameron thought that the medical notes had been altered after the incident. This was said to be a breach of a legal requirement, although the claimant was in some difficulty in identifying what particular legal requirement she had in mind at the time.

170. The primary disclosure here is that of Prof Cameron, rather than that of the claimant, but we accept in principle that relaying someone else's disclosure could qualify as a disclosure it its own right.

171. There is information: that medical records have been altered. Did the claimant in making such a disclosure reasonably believe that it showed a breach of a legal obligation?

172. We have previously referred to the claimant not having used the word "tampered" in her written disclosure, and suggested that there is nothing inherently wrong with "altered". Ms Windsor saw it as a "red flag" and it certainly appears from her oral account that in saying this the claimant had intended to imply that there was something untoward.

173. Although as with PD1 we consider the point finely balanced, and far from obvious, we have concluded that this was a protected disclosure. There was information that medical records had been altered. In saying that the claimant intended to suggest that they had been altered in an illegitimate way. As for the legal obligation, in closing submissions the claimant suggested a number of possible legal obligations but this was the first time she had identified anything specific. We note that it is not necessary for an individual in making their disclosure to have a specific legal obligation in mind. We also consider it reasonable for the claimant (or any other clinical practitioner) to take the view that there were legal obligations in relation to the integrity of medical records.

174. In those circumstances, even without identification of a particular legal obligation, we find that this disclosure was made by the claimant in the reasonable belief that it tended to show a breach of a legal obligation.

175. As with PD1, we have found this to be a protected disclosure only on a fine balance. It is far from an obvious protected disclosure, nor is it something that we think the respondent could or would have viewed as being particularly difficult or provocative.

PD5

176. We have found that PD5 adds nothing to PD1 and PD4.

PD6

177. PD6 offered “no new information”, so we do not need to address that.

PD7

178. PD7 is the point about the claimant’s colleague’s possible conflict of interest.

179. There is clear information here. The case management order says “*this was a breach of para 6.6. of the conflict policy*”. But being a breach of a policy is not (in itself) a category of information that would amount to a protected disclosure.

180. Unsurprisingly the claimant was questioned about this by Mr Cordery. He asked the claimant whether it was intended as a matter of health and safety or a legal obligation (the only two categories of disclosure that had so far been identified). She agreed she was not saying in her disclosure that health and safety was being endangered. She also agreed that she had not identified the relationship in question as being a breach of para 6.6 of the respondent’s code of conduct. When Mr Cordery suggested to the claimant that the conflict policy (and policies more generally) are not legal obligations, she said she has assumed they were based around some kind of legal framework. When asked if anyone might get sued for breach of the conflict policy, the claimant said first that she thought so but later that she didn’t know.

181. This is another point where the claimant in her closing submissions identifies this as falling into categories she had not previously identified. For the reasons previously given we do not accept that.

182. This disclosure is, at most, information in relation to a potential breach of one of the respondent's internal policies. The claimant's difficulties in identifying what category this falls into suggests to us that at the time she made this disclosure she did not have any belief that it tended to show that health and safety was being endangered or that a legal obligation was being breached. This was not a protected disclosure.

PD8

183. PD8 is a repeat of PD4

PD9

184. Since PD9 was the claimant "repeating" or "going over … yet again" PD7 it does not require separate consideration from PD7.

Summary in relation to protected disclosures

185. The only protected disclosures are the claimant's disclosures in relation to the situation at the Yeovil trust. As we have repeatedly said, it was the claimant's role to investigate and raise these kinds of concerns. The respondent's investigators will be raising those kinds of concerns (and more) on a daily basis. It is an essential part of their role, culminating in an eventual report which is bound to contain such disclosures. Despite the emphasis on a "just culture" and not apportioning blame, providing information showing that health and safety has been endangered or (perhaps) legal obligations breached is the essence of the respondent's work.

186. That is by way of saying that there was nothing obviously surprising or untoward in the claimant raising these matters. She was not criticising the respondent. The only point she made against the respondent was not a protected disclosure. That is not to say that the respondent could not have subjected the claimant to detriments for such disclosures, but it is to say that given the nature of the disclosures (which were an inherent part of the claimant's job) it is not obvious that they were the kind of thing that the respondent would have taken offence at or sought to penalise the claimant for.

Detriments

Introduction

187. It is the claimant's right to specify the detriments she says she was subject to but, having done so, it is then her responsibility to establish that those detriments occurred.

D1

188. The first detriment is that across the one to one meetings (from 10 December 2019 to 6 April 2020) "*her line manager Maria Patterson consistently told her she was not performing well and was not doing her job*" and "*all one to ones … were consistently negative*".

189. It is clear that this detriment is not made out by the claimant. There is no evidence suggesting that Ms Patterson ever expressly told the claimant that she was not performing well or not doing her job. They were not consistently negative. As we have referred to in our findings of fact, where doubts were expressed about the claimant's work they were typically prompted by the claimant. The notes of the first relevant one to one meeting start "*Amanda is feeling that the job is not achievable in terms of hours and expectations.*" That is typical of the tone we see in the notes of the meetings, with Ms Patterson coaching the claimant through some of the difficulties she is finding with the work.

D2

190. D2 is "*on 6 December 2019 Ms Patterson sent an email to the team criticising the claimant*". On its literal terms this did not happen. The email in question is sent by Ms Patterson to the claimant and one other person. It is not sent to the team. It does not criticise the claimant. The most that can be said is that it contains a caution to "*be careful of our own bias about what is the appropriate way to escalate*". We don't think that can properly be described as criticism. The claimant has not established the detriment she alleges.

D3

191. D3 covers a number of emails which are said to be "*negative and critical of* [the claimant]". Some of these she was a party to and was aware of, but some only came to light following her subject access request.

192. D3a is Ms Patterson's reply to the claimant forwarding her correspondence with Ms Windsor to her. In the claimant's written closing submissions she says "*this wasn't a supportive email. I've got vast experience in the NHS and local government; I don't need to be told about information governance. It's a belittling and patronising email. This again showed the disproportionate focus on finding fault against me whilst failing to take action to prevent the public from serious risks."*

193. The only element there that could be considered either negative or critical of the claimant was "*Please be mindful of sending emails with the trust name to non NHS address as you have some sensitive info detailed here.*" We accept that this is criticism (albeit very mild) of an action the claimant did. The action was sending a work-related email to a SMA panel member at a non-NHS address. The claimant had done that, and accepted at least that this was not

best practice. Her argument was that there was nothing in the email with the trust name and that the respondent ought to have provided the SMA panel member with an NHS email address. She also suggested that Ms Patterson had later used a non-NHS email address for work related purposes.

194. We do not accept the claimant's characterisation of this as "*belittling and patronising*" or showing "*disproportionate focus on finding fault against me whilst failing to take action to protect the public from serious risks*". The reference to being mindful of sending email is a passing remark when the bulk of the email does address the claimant's concerns about the situation, replying in terms that we would have thought the claimant would have welcomed, asking what further action Prof Cameron wanted to be taken. As we have referred to before, the claimant did not reply to that element of the email.

195. Ms Patterson was correct and well within her rights to issue this reminder to the claimant, regardless of whether or not the trust was named. As the claimant accepted, work emails ought to be kept to NHS email addresses. Whether the SMA panel member had been issued with one or not was not Ms Patterson's responsibility. Her criticism was in the mildest possible terms. While the email is gently critical of the claimant, we do not see anything wrong with Ms Patterson doing this, and we do not consider that a reasonable person in the claimant's situation would have seen it as a detriment. Indeed, there is no suggestion that the claimant saw it as a detriment at the time. If it was a detriment, by its description of the events surrounding it the respondent has demonstrated that it was nothing to do with any protected disclosure that had been made by the claimant.

196. D3b was unknown to the claimant at the time. We accept that there is criticism of the claimant in that email. In particular, it says "*I am concerned that Amanda has possibly lost sight of the families being the main focus of her investigation.*" We also accept that a reasonable person could take this as being a detriment.

197. It is then for the respondent to show that the claimant's protected disclosures (that is, (PD1) her references to Yeovil using locum registrars to perform emergency procedures without consultants present or informed, (PD2) her reference to Yeovil theatres being insufficiently equipped and (PD4) medical notes being amended) had no effect or no more and a trivial effect in this detriment.

198. The email itself sets out the basis of the sender's concerns: the claimant has become distracted by whether she is liked by the trust and needs to be reminded of the need to obtain evidence rather than operate on the basis of feelings. There is nothing in that that suggests the claimant's disclosures have influenced the detriment. We also note that the conclusion of the email is a need to continue to support the claimant, rather than a need to ensure she leaves the organisation. This is clearly a frank email about some of the difficulties the claimant was having. The sender can have had no expectation in sending it that the claimant would later see it, so could speak freely, but we see nothing in this

to suggest that the protected disclosures had a material effect on it. This was a detriment but the protected disclosures played no part in causing it.

199. D3c was also an email the claimant had no knowledge of at the time. It is from HR in response to what seems to be an enquiry about the applicable notice period for the ending of the claimant's employment. We have not seen the enquiry that prompted this email.

200. There is nothing in that email that is negative and critical of the claimant. It appears to be a dispassionate account of the legalities around termination of the claimant's employment (or the non-renewal of her fixed term contract). The claimant says this was about dismissing her but the respondent says it was about her resignation. In either event there is nothing in this that personally criticised her or is negative about her. Notably under the heading "capability" it says "*if there are concerns about her performance*". It does not criticise her performance or suggest there were actually concerns about her performance. The claimant has not shown that the detriment of a negative and critical email occurred in respect of D3c.

201. D3d is an email that was sent to the claimant. The section the claimant particularly objects to is "*It's a high band* [i.e. well paid] *and that is reflective of the responsibility and independence.*" In her closing submissions she says "*I found this was passive aggressive and patronising. Of course, I was happy to work independently I have a vast experience in the healthcare, taking on varied roles.*"

202. It does not seem to be in dispute that the job was paid to attract experienced and well-qualified people to it – whether that is people qualified as clinicians or with other professional backgrounds. It is also not in dispute that it was a role that brought with it considerable independence, autonomy and responsibility in conducting the relevant investigations.

203. To qualify as the detriment alleged by the claimant this would have to be "negative and critical". We don't see that it is. While the claimant has evidently taken against it we do not consider it to be negative and critical, and we do not think that a reasonable person would have considered it to be such. The claimant has not established this detriment.

D3e

204. We accept that the email alleged to be D3e was negative and critical of the claimant. In particular, it says "*I feel you have and continue to require additional support and have been distracted at times from being able to progress your cases.*" This could reasonably be viewed as negative and critical.

205. Has the respondent shown that the claimant's protected disclosures (as set out above) were no or no more than a trivial cause of this? We find that they have. It is apparent from what we have seen that the claimant was requiring additional

support and was not progressing her reports in line with Ms Patterson's expectations. Ms Patterson had, for instance, taken a day out of her diary to work with the claimant for a full day on planning her reports.

206. The claimant was at pains during the hearing to suggest that being behind on reports was a universal problem and that she was no further behind than her colleagues were. It is clear that there were significant problems within the respondent in completing reports within the target of six months. That does not mean that Ms Patterson should not be encouraging and urging the claimant to complete her work within the targeted time, particularly as the claimant was a relatively new starter and ought not to have in that time built up a large backlog of work.

207. This criticism was not improper criticism caused or materially contributed to by the claimant having made protected disclosures. It was a valid response to the claimant being behind with her work and needing to try to catch up with things before the conclusion of her time with the respondent. Her protected disclosures played no part in causing this detriment.

D4

208. D4 is the claimant feeling that Maria Patterson and Amanda Morgan were not taking her concerns seriously and were more concerned with reprimanding her. The claimant categorises this as being "*ambushed and bullied*".

209. When a detriment is framed in pejorative terms like this it can be difficult to assess whether it occurred or not without at the same time looking at the reasons for it, but we will endeavour to separate our analysis as far as we can.

210. There was a complaint from Plymouth that Ms Patterson raised with the claimant. She had not fished for or solicited that complaint, although she had, effectively, asked the trust to put it in writing so she could take it up with the claimant. Although the prior discussion of the meeting had mentioned "other concerns", the first the claimant knew of any complaint from Plymouth was during that meeting. In the sense that the claimant was not aware of it previously, it could be considered an "ambush".

211. The claimant accepted that the incident occurred. It had echoes of the claimant's original meeting with the Yeovil trust, during which Ms Patterson felt that the claimant had unhelpfully stepped outside her remit. The notes prepared by Ms Patterson ahead of the meeting are in terms of correcting and supporting the claimant, not (however the claimant may have seen it) bullying her and humiliating her with minor criticisms. It is true that the claimant did not have advance notice of this complaint, but this has never been spoken of as, say, a disciplinary matter or anything of that nature that may require formal advance notice. The incident in question did occur. The trust had objected to it and Ms Patterson was right to correct the claimant, which she did in an appropriately limited way. She did not make too much of this incident. Given all of that, no

reasonable employee could consider this correction to have been a detriment. This was not a detriment.

212. There was "*not taking her concerns seriously*". As we have previously said, there is no obligation on an employer to do anything in particular in response to whistleblowing complaints. We would be reluctant to create such an obligation indirectly by suggesting that not taking a complaint seriously could itself be a detriment. The nature of protected disclosures is that there may well be more than one way of looking at things. The individual making the disclosure would (if it is a protected disclosure) have a reasonable belief that it is made in the public interest, but they may be completely wrong either about the facts behind their disclosure or the implications of it. Perhaps the best way of looking at this as a possible detriment is in the second element of this – that Ms Patterson and Ms Morgan were "*more concerned with reprimanding*" the claimant. We do not accept that. Both parties' descriptions of the meeting show that there was discussion of her concerns. This was not all about reprimanding her. The fact that Ms Patterson and Ms Morgan did not share the claimant's concern (in particular about the possible conflict of interest) does not mean that there was a detriment. There was no detriment in this meeting.

Conclusions on detriments

213. As we have said, the claimant has the right to describe the detriments she has alleged, but having done so she has the responsibility of establishing that they occurred in the way she alleges.

214. She has not established that D1 occurred. She was not consistently told in the one to one meetings that she was not performing well and was not doing her job, nor were they consistently negative.

215. She has not established that D2 occurred. The email in question was not sent to the team and did not contain criticism of her.

216. D3a does contain (mild) criticism but a reasonable person would not have considered it to be a detriment in the circumstances it arose. It was not a detriment. D3b did contain criticism and was a detriment, but it was not caused (in the relevant way) by her protected disclosures. D3c is not negative and critical of her and is not a detriment. D3d is not negative and critical of her and is not a detriment.

217. D4 was not a detriment.

218. It is not necessarily the case that any detriments for whistleblowing have to be consciously decided upon, and there were elements of the claimant's case that suggested that any mistreatment was to do with her being seen generally as a troublemaker or stepping out of line, rather than being direct and conscious retaliation for whistleblowing. That was encapsulated in Dawn Benson's suggestion that "*bullying, gaslighting and victimisation or maternity*

investigators, who challenged the senior teams' decisions or practice was widespread, particularly in the south region but not exclusively."

219. We will consider this, although it is not at all clear what aspect of the claimant's behaviour in the role could be considered "*challenging the senior teams' decisions*". On the whole, when told particular things by Ms Patterson or others she does not seem to have challenged them. Perhaps her questions about conflicts of interests could be said to be a challenge to senior managers' practices, but the conflict of interest question is not a protected disclosure.

220. Taking all that we have seen and heard into account, we do not find that there was any such unconscious or sub-conscious mistreatment of the claimant as a whistleblower. There were plainly differences between the claimant and Ms Patterson on expectations of the role and how it should be carried out. The claimant was finding the role difficult. That is a theme through her one to one meeting and beyond to her leavers' questionnaire. The criticisms that we see in the detriments are about the claimant carrying out her role, and seem to derive from these different expectations, rather than any idea that the claimant is seen as a trouble maker or as standing up against management.

Dismissal

221. The claimant does not in her resignation letter identify herself as having been constructively dismissed. She does not have to. There are some indications in her resignation letter that there is no constructive dismissal. She says she is "*unhappy in the job*" and "*there are many reasons why I do not wish to continue to see out my contract*". She does not suggest that any of that is the respondent's fault. She thanks Ms Patterson for her support.

222. The claimant says that this was simply a matter of politeness. We accept that there is a certain etiquette around resignation letters, and it is seldom the case that someone will set out exactly what they think at the time of their resignation letter. Nevertheless, there is nothing in this letter to suggest that the claimant is resigning because of the respondent having breached her contract because of her protected disclosures.

223. We have also found that there were no detriments on account of whistleblowing.

224. With no detriments due to whistleblowing having been proven, and the claimant not having put forward any other potential breaches of contract in support of her constructive dismissal claim, we are bound to find that the claimant was not constructively dismissed and that her resignation was not a dismissal for having raised protected disclosures.

Conclusion

225. In our final review of the matter we have revisited what the claimant wrote in the "summary" section of her "leavers interview/questionnaire". This was completed by her on 16 June 2020, which was when her resignation took place. She says:

> *"I have been very disappointed in my experience of HSIB. I had high expectations and was very excited to be appointed. But my experience in the job has fallen very short of the values that were promoted for HSIB, both at interview and during the training.*
>
> *I feel there was constant pressure to get to report writing stage with hours worked more than the 37½ hrs per week. I was told to not scope wide and to focus on the casual aspects of the investigation and to get to the report writing stage. This conflicted with the ethos in the training where we were taught to scope wide look at systems, processes, human factors and cultures that would have caused or impacted on the casual aspects of the incident.*
>
> *I have experienced professional/personal loyalty conflicts which I believe may affect the integrity of investigations and the integrity of the organisation and its purpose to undertaken 'independent' investigations.*
>
> *The conflict of interest policy says that you cannot investigate a trust where you have worked for in the past 5 years. I found this point of the policy was adhered to, however I have found and believe that other parts of the conflict of interest policy are not actively adhered to.*
>
> *Many of those that are MI's are midwives employed in the region where they have practiced as senior midwives. Due to their seniority, professional relationships and personal connections have occurred with other senior midwives and Heads of Midwifery from other trusts in the region.*
>
> *There was a specific incident where I complained to my line manager where I thought there was a clear breech of point 6.6 of the conflict of interest policy (this has also formed part of my grievance) in one of the trust where we had 5 active investigations.*
>
> *I felt professionally uncomfortable as I did not feel that this situation was right. I did voice and document my concerns around safety and conflict issues in the investigations in this trust to my line manager and her seniors. In doing so I felt castigated, isolated, and unsupported when I tried to escalate.*
>
> *I have tried to raise my concerns to the highest level with no avail which has culminated in my early resignation of my fixed term contact and my grievance.*

> *To date I am still unsure if there is a process or system in place to address or allow for MI's to raise their concerns regarding safety and process concerns. I feel my confidence has been eroded by my line manager and I believe I have received unwarranted criticism by my line manager too.*
>
> *For all these reasons I have had sleepless nights, stress, and anxiety. My employment with the maternity side of HSIB has been detrimental to my health, wellbeing, and confidence.*
>
> *My experience of the organisation has been the exact opposite to what it professes to be."*

226. The first two paragraphs are to the effect that the job was not what she had been led to think it was, and was requiring much more work than the time allowed. Whatever the rights and wrongs of that it is not a matter of whistleblowing, nor is there any suggestion that this is a detriment due to whistleblowing.

227. The claimant moves on to talk about the possibilities of conflicts of interest – both generally and in the specific instance she had in mind at Yeovil. We have found that this did not amount to whistleblowing.

228. The claimant goes on to say that she felt "*castigated, isolated and unsupported when I tried to escalate*". This seems to be in reference to the conflicts issue, but perhaps goes beyond that in relation to her other concerns. Having reviewed the material before us, as we have said before, we do not see any such castigation. As for isolation and being unsupported, we have previously found that the claimant described Lisa Marshall as being "*very supportive*" and that this was not simply a matter of politeness.

229. She goes on to say "*I have tried to raise my concerns to the highest level with no avail which has culminated in my early resignation of my fixed term contact and my grievance.*" As we have previously pointed out, employment law imposes no obligation on a response to do anything in particular in response to a protected disclosure. If it is the case, as the claimant says here, that the reason for her resignation was that no-one was responding to her concerns, that is not a constructive dismissal for which the reason or principal reason was raising protected disclosures. The respondent is not obliged to do anything in particular in response to the claimant's disclosures, other than not to impose any detriments (or dismissal) on her as a result of those disclosures.

230. She then talks about processes for escalation being unclear. She is right that at least at that time they were. But a lack of processes for escalating concerns is not a detriment on account of whistleblowing. We have not found in this case any unwarranted criticism of the claimant by her line managers.

231. The claimant talks of the anxiety this has caused and the conclusion the claimant reaches is "*my experience of the organisation has been the exact opposite to what it professes to be.*" It does seem that the respondent was not living up to the claimant's expectations, but whatever the rights and wrongs of that there were, for the reasons we have given above, no whistleblowing detriments. Her resignation was not a constructive dismissal and the reason for it was not because of the respondent's actions in response to protected disclosures made by the claimant.

232. Given this decision, the provisional case management hearing that was listed to arrange for a remedy hearing will not now take place.

Employment Judge Anstis
Date: 22 May 2023

Judgment and Reasons

Sent to the parties on: 6 June 2023

GDJ
For the Tribunal Office