EMPLOYMENT TRIBUNALS

Claimant: Mrs L Worrall

Respondent: Future Directions CIC

Heard at: Manchester **On:** 5-9 June 2023

Before: Employment Judge Phil Allen
Ms K Fulton
Ms S Moores

REPRESENTATION:

Claimant: In person
Respondent: Mr E Morgan KC

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not subjected to any detriment on the ground that she had made a protected disclosure. The claims brought under section 47B of the Employment Rights Act 1996 do not succeed and are dismissed.

2. The claimant was not (constructively) dismissed by the respondent as alleged. The claim for unfair dismissal under sections 94 and 95(1)(c) of the Employment Rights Act 1996 does not succeed and is dismissed.

3. The respondent did not fail to comply with the duty to make reasonable adjustments as alleged. The claims brought under sections 20 and 21 of the Equality Act 2010 do not succeed and are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a support worker providing support to people living at one of the respondent's supported living properties from 2004 or 2005 until 2 April 2020. The claimant resigned on 2 April 2020. The claimant alleged that: she had been unfairly constructively dismissed; she had been treated

detrimentally for having made a public interest disclosure or disclosures; and/or that the respondent failed to comply with its duty to make reasonable adjustments. The respondent accepted that the claimant had a disability at the relevant time and that she had made protected disclosures as alleged; but denied her claims.

Claims and Issues

2. A preliminary hearing (case management) was conducted on 26 July 2021 before REJ Franey. At the preliminary hearing a list of issues was identified and recorded in a schedule to the case management order. At the start of this hearing, it was confirmed with the parties that those issues remained the ones which needed to be determined. Two of the issues no longer needed to be determined as the respondent had accepted that: the claimant's emails of 30 and 31 March 2020 amounted to protected disclosures; and the claimant had a disability at the relevant time. This hearing was listed to determine liability issues only and not remedy issues. The list of issues, containing only the issues which needed to be determined, is appended to this Judgment.

3. The list of issues recorded that the fair reason relied upon by the respondent in defending the unfair dismissal claim (issue 4) was to be stated in the amended grounds of response. In the amended grounds of response (163) the reason was stated as being some other substantial reason, namely that the respondent had lost trust and confidence in the claimant's ability and/or willingness to perform her duties in the context of the extraordinary circumstances and challenges posed by the Covid-19 pandemic.

4. On the third day of the hearing, towards the end of the claimant's evidence, the claimant confirmed exactly what she was relying upon as detriment D4 in the list of issues. The claimant made clear that the alleged detriment upon which she relied was the allegation and investigation which she alleged Ms Clark had undertaken into the claimant visiting a service user at Birch Lodge on 8 July 2020 after the end of the claimant's employment. She was not relying upon anything done or said by Mr Alcock in his grievance appeal decision, including his statement about the claimant leaving work on 2 April 2020 (as the respondent had previously understood).

Procedure

5. The claimant represented herself at the hearing. Mr E Morgan KC represented the respondent.

6. The hearing was conducted in-person with both parties and all witnesses in attendance at Manchester Employment Tribunal.

7. An agreed bundle of documents was prepared in advance of the hearing. The bundle initially ran to 826 pages (with additions, it was 832 pages). Where a number is referred to in brackets in this Judgment, that is reference to the page number in the agreed bundle. On the first day the Tribunal read the pages in the bundle referred to in the witness statements and the pages referred to in a reading list provided by the respondent's representative. A document was added to the bundle during the third day. The Tribunal was also provided with an agreed list of key people and three chronologies: one prepared in conjunction with the claimant prior to the

hearing; a lengthier one prepared by the respondent's representative and provided on the first day; and a third one provided on the second day by the claimant (she had been asked to identify any dates with which she disagreed in the respondent's representative's chronology and produced that document as a response).

8. The Tribunal was provided with witness statements for each of the witnesses. The Tribunal read the witness statements on the first day. Ms Clark attended because she had been witness ordered to do so (the witness order having been sought and obtained by the respondent in advance of the hearing). The witnesses were: the claimant; Ms Clare Clark, formerly operational network manager; Ms Jennifer McDaid, deputy operational network manager from January 2020 and previously Team Manager at Birch Lodge; Ms Julie Parkinson, previously and at the relevant time an HR Officer, now an HR Advisor; Samantha-Jo Scarbrough-Lang, assistant director of operations; Mr Andrew Alcock, director of operations; and Ms Melissa Halliwell, deputy team manager at Birch Lodge 1 May 2017 to 21 October 2018 and Interim team manager at Birch Lodge from April 2020.

9. The Tribunal heard evidence from the claimant on the second day of the hearing and at the start of the third day. She was cross examined by the respondent's representative, before being asked questions by the Tribunal.

10. On the third day (after the claimant) and on the fourth day of the hearing, each of the respondent's witnesses gave evidence, were cross examined by the claimant, and were asked questions by the Tribunal (where required).

11. At the start of the hearing, it was emphasised to the parties (and to the claimant, in particular) that if a break was required, they were able to ask and a break would be taken at an appropriate moment. The claimant did not identify any other adjustments which were required to the way in which the hearing was to be conducted to assist her. The hearing ended earlier on the second day, to ensure that the claimant remained fully able to give evidence. Additional breaks were also taken to assist the claimant at other times during the hearing. An adjustment to the location of the witness table was made to assist one of the respondent's witnesses.

12. After the evidence was heard, each of the parties was given the opportunity to make submissions. Arrangements were made for written submissions to be provided on the morning of the fifth day, with time available for them to be read prior to the hearing re-commencing. Both parties provided written submissions. The respondent's representative also made oral submissions in addition to the document he provided. The claimant chose not to make any further oral submissions, she relied upon the written document which she had prepared and provided.

13. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below.

Facts

14. The respondent is a not for profit supported living service. It provides care and support to people living in supported living settings, so that they can live as independently as possible. The claimant was employed as a support worker

providing support to people living at one of the respondent's supported living properties, Birch Lodge.

15. The claimant had continuity of employment from 4 January 2004 or 2005 (the respondent claimed 2005, the claimant 2004). She transferred to the respondent by 2015 at the latest (there was a dispute about exactly when that occurred). The Tribunal was provided with two statements of terms and conditions for the claimant, one which commenced on 1 May 2013 (164) and one which commenced on 1 April 2015 (167). An amendment document signed on 16 July 2015 was also provided (171). A job description for the role of personal assistant detailed the requirements of the role (173). The claimant emphasised that required an individual to act as a key worker when requested. The document recorded that the individual should support service users to express their choices and independence as valued members of the community, supporting service users to have a voice. Under the job description, the role-holder was required to adhere to the relevant body's code of practice. The code of conduct for healthcare support workers and adult social care workers in England (274) was also provided to the Tribunal, a document which emphasised the importance at all times of promoting and upholding the privacy, dignity, rights, health and wellbeing of people who use health and care services.

16. The Tribunal was provided with a grievance procedure (199). That contained some indicative timescales including that: the grievance hearing would be held as soon as reasonably practicable and, subject to any need to carry out prior investigations, within ten working days of receipt of the written complaint; that the individual would be informed in writing of the outcome following the meeting within ten working days; and that the individual would be informed of the outcome of the appeal meeting within ten working days "*wherever possible*". The grievance procedure contained a standard section on the right to be accompanied, detailing that the individual had the right to be accompanied by a fellow worker or trade union official at any grievance meeting or subsequent appeal. The procedure also said:

> "*Before proceeding to a full grievance hearing, it may be necessary to carry out investigations of any allegations made by you, although the confidentiality of the grievance process will be respected, wherever possible. If any evidence is gathered in the course of these investigations, you will be given a copy long enough in advance of the hearing for you to consider your response"*

17. The grievance procedure provided for a right of appeal and an appeal process. The procedure did not address its overlap or interrelation with any other procedures (including the whistleblowing policy).

18. The respondent also had a speak up - whistleblowing policy (213). That emphasised that the respondent took relevant allegations seriously. All employees were encouraged to be open about their concerns. It provided a process to raise concerns and said that if the employee raised concerns, the respondent would treat the individual with respect at all times. It detailed that if matters were not resolved quickly with the line manager "*we will carry out a proportionate investigation; using someone independent and we will reach a conclusion within a reasonable timescale and keep you updated at regular intervals*". The claimant, when answering questions, stated that she believed that independence required somebody external to the organisation. The whistleblowing policy did not detail that there would be a

meeting, it did not contain a right to be accompanied, and there was no provision for appeal. At the end of the section on investigation it said "*We may decide that your concern would be better looked at under another process; for example, our process for dealing with bullying and harassment or grievance. If so, we will discuss this with you*".

19. The respondent's documents record that it operates a number of values. These were set down in a document called the Future Directions way (216). These were summarised as being: to put people first; to be transparent; to go the extra mile; to be creative; and to be adaptable. The respondent's witnesses emphasised that the respondent encouraged its employees to raise issues of concern.

20. The claimant worked at Birch Lodge, a residence which included a number of self-contained flats in which service users lived. The premises included a staff area in which staff would sleep at nights and at least one of the flats had its own staff sleeping room. Six service users lived at Birch Lodge. Ms Scarbough-Lang's evidence was that some of the service users could be challenging to work with. Birch Lodge had a dedicated service team of about fifteen people who worked on a rota. The claimant was the key-worker for JM. JM and AH shared a flat. Prior to the pandemic, during the day, each of JM and AH were allocated a separate support worker. JM's support plan detailed supporting strategies to assist JM to cope with working with new people, which detailed how he would familiarise himself with them, including allowing the new staff-member to work with JM's co-tenant first (441). DS was the only tenant in his flat. The claimant clearly knew the service users and their needs well, as was clear from her evidence. She had worked at Birch Lodge for a long time.

21. Ms McDaid was a Team Manager from 2012 until the end of 2019, when she was promoted to deputy operational manager. As Team Manager Ms McDaid managed three properties, including Birch Lodge. She was based at Birch Lodge and managed the claimant throughout the time she was Team Manager. It was clear that both the claimant and Ms McDaid believed that they had had a good working relationship and there was a degree of respect between them. It was also clear that in 2020, even after Ms McDaid's promotion to deputy operational manager, Ms Clark relied upon Ms McDaid when addressing issues at Birch Lodge, because of Ms McDaid's knowledge of the residence, the staff, and the service users.

22. There was no dispute that the claimant was committed to her job and to assisting service users. In her witness statement, Ms McDaid stated that she considered the claimant to be good at her job and proactive at advocating for the needs of the people supported. In the supervision record provided for the claimant from 16 July 2019 (184), Ms McDaid recorded that the claimant "*has done some amazing work alongside Ryan chairing the Tenants meeting – You have really empowered and enabled the gents to voice what is working and not working for them and then cascading this to the team to make the appropriate changes in support to meet the PWS needs*".

23. In her witness statement the claimant provided evidence about matters which had arisen in 2017. It was clear that the claimant remained unhappy about what had occurred at that time and the processes which had been followed. The Tribunal did not need to make any determination about what had occurred in 2017 or 2018, save

to the extent that it impacted upon the respondent's knowledge of the claimant's disability. The respondent admitted that the claimant was disabled at the material time by reason of a mental impairment resulting from anxiety, stress and depression (161).

24. The Tribunal was provided with an occupational health report regarding the claimant which had been prepared on 8 August 2017 (108). The claimant had been absent from work for a period of time in 2017. The report recorded that the claimant had described symptoms of anxiety. It said that she had scored moderately for low mood and highly for anxiety, consistent with the symptoms that she had described. The report was addressed to Ms McDaid, but it was Ms McDaid's evidence that she personally was absent on maternity grounds for twelve weeks in 2017 and, based upon the date of the birth of her daughter, it would appear likely that the report was received when Ms McDaid was absent on maternity leave. Ms Halliwell was deputy team manager at that time and Ms McDaid's evidence was that Ms Halliwell supported the claimant on her return to work on 21 July 2017, albeit that Ms Halliwell herself provided no evidence whatsoever about that time. The occupational health report recommended counselling for the claimant. That was facilitated by the respondent. Ms McDaid agreed in evidence that the therapy was taken into account when rotas were prepared. A discharge report of 14 November 2017 recorded that the claimant had made good progress in her therapy (156).

25. There was a dispute in the evidence between the claimant and Ms McDaid about what had been said by the claimant to Ms McDaid about her health in meetings after her return to work in 2017. The claimant alleged that she frequently spoke to Ms McDaid about her health (including stress, anxiety and difficulties sleeping). Ms McDaid denied that she ever did so. A collective grievance in October 2017 referred to the claimant as having been made unwell by the matters raised and detailed that she had needed to seek medical assistance and counselling. There was no dispute that the claimant was absent for five days in October 2019 and that stress was the given reason (343). Ms McDaid accepted that there would have been a return to work interview with the claimant, when the reason for absence would have been discussed. Only three supervision records were provided for the claimant, all dated 2019 or 2020. Ms McDaid accepted that (as the claimant asserted) there would have been a number of other supervision meetings which she had held with the claimant, and they would have been documented at the time. The claimant asserted that ongoing health issues would have been recorded in those supervision records. The record of 16 July 2019 (184) recorded that the claimant informed Ms McDaid, in answer to the question how she was, "*Alright – feel better than has done*".

26. A CQC report into the respondent from 11 January 2020 was provided to the Tribunal (264). That recorded that "*Without exception everyone we spoke with was full of praise for the service and its staff*". The report also recorded of the respondent's values that "*we saw that the service truly put these values into action*". The claimant's view of the report was that the inspectors had not spoken to all of the respondent's staff, and there were people who would not have agreed.

27. The issues in this case arose shortly after the Government first imposed significant restrictions arising from the Covid-19 pandemic. The Government first announced restrictions on movement and social distancing on 16 March 2020 and

the first national lockdown was announced on 20 March. Restrictions were applied to the country generally, but particular recommendations were made for those operating in adult social care. The Tribunal was provided with guidance for supported living provision dated 19 March 2020 (345) and advice provided about responding to Covid-19 and the ethical framework for adult social care published on the same date (352). That latter document addressed the ethical values and principles to be applied, emphasising that when resources are constrained and there are surges in demand, it might not be feasible to consider all the principles. It was emphasised that each principle was to be considered to the extent possible in the circumstances.

28. The respondent introduced a business continuity plan in March 2020 (293). Amongst other things, that identified that disease was one of the areas of greatest threat to the respondent. The policy addressed risk assessment, implementation, testing and review. It detailed that a major incident plan would be instigated when there was (amongst other things) a communicable disease outbreak which had a significant impact upon more than thirty percent of staff or people the respondent supported in accommodation for more than seventy-two hours or which impacted upon their health and wellbeing. That plan emphasised the need to involve stakeholders such as the local Clinical Commissioning Group, the Local Authorities and the CQC into the decisions made in the event of a major incident. It was the respondent's evidence that it addressed the pandemic under this plan. Importantly, the plan not only addressed the broader issues which would needed to be considered, but it also detailed the minimum staffing levels required for individual services in the relevant area (312) and addressed individual service users where required (321). Both Ms Scarbrough-Lang and Mr Alcock in their evidence emphasised the steps which the respondent undertook to coordinate a response to the Covid-19 pandemic, including emphasising the work undertaken with stakeholders and the work required to adapt to a fast-changing situation with particular risks for the respondent's service users and social care providers generally.

29. The Tribunal was provided with the minutes of the Birch Lodge team meeting on 9 March 2020 (360). The claimant attended the meeting. The detailed notes recorded that, amongst other things, Covid-19 was discussed and the need for hand washing and hand sanitiser emphasised.

30. The Tribunal was provided with a specific briefing update issued by the respondent about Covid-19 on 12 March 2020 (372). When asked about this document, the claimant could not recall having seen it. That provided detailed advice about what was required at the time to address the risks associated with Covid. It recorded that the people who the respondent support are more susceptible to certain illnesses. It recorded the common symptoms of Covid-19 (as identified at that time). It said that if a person being supported displayed symptoms, the staff were advised to dial 111. Health and safety advice was included, which emphasised the importance of hand-washing. Advice on what to do if there was a confirmed case of Covid was included. Guidance on facemasks was included, which reflected the national advice at the time (until 20 April 2020), which said:

> "*During normal day-to-day activities facemasks do not provide protection from respiratory viruses, such as COVID-19 and do not need to be worn by staff in*

> *the places that we support people to reside. Facemasks are only recommended to be worn by infected individuals when advised by a healthcare worker, to reduce the risk of transmitting the infection to other people. PHE recommends that the best way to reduce any risk of infection for anyone is good hygiene and avoiding direct or close contact (within 2 metres) with any potentially infected person"*

31. A further email was sent to staff from the respondent's Managing Director on 13 March 2020 (494). That addressed in some detail the pandemic and the steps being taken. The claimant did agree that she had received that email. It provided important advice. It included the statement "*I want you to know that myself, all the senior team and managers, are all over this. We are very well prepared for how we can deal with the impact of this on our teams, people we support, finances and the running of the organisation. We have plans in place for each scenario*". In her questioning of witnesses, the claimant put to them that in the light of that statement an employee of the respondent would have reasonably expected the respondent to have plans in place for anything Covid related which arose at the time.

32. The claimant, along with the respondent's other staff, was required to watch a training video about the use of PPE. She did so whilst working on 28 March 2020. As part of the video, staff were shown how to use face masks. The claimant became concerned that face masks were not readily available. At the time there was a general shortage of face masks and, prior to 20 April 2020, the Government was not recommending the wearing of face masks, save where someone had been infected with Covid-19. In answering questions, the claimant could not recall whether the training advised when PPE was to be worn. It was the respondent's case that the training explained about the use of PPE, but not when it was to be used. It was clear that the video raised concerns for the claimant about the availability of PPE and face masks.

33. It was the claimant's evidence that there was a shortage of some of the things required at Birch Lodge. She explained that there was a shortage of soap, and, due to people buying the stocks available, there had been none at the supermarket. The claimant had herself purchased soap at Costco when she had found that the store had stocks. She stated that there was also a lack of hand sanitiser. It was also her evidence that there were no face masks at Birch Lodge until Mr Cooper (the acting manager) himself purchased some on Amazon. The respondent's evidence was that, in summary, there was a genuine shortage of face masks at the time with a large proportion of those available being prioritised for the NHS. The respondent's decision was that the face masks available were to be retained at head office so that they could be made available to locations when the need arose because of actual Covid-19 cases. Face masks were not delivered to individual locations at the time. That information was provided to Mr Cooper (at least by 31 March) and the intention was that the information should be cascaded to the staff at Birch Lodge. The claimant's evidence was that what she understood from Mr Cooper was only that the PPE had been retained at head office, she was not provided with the explanation about why or when it could be accessed.

34. On 29 March 2020 the claimant was approached by a colleague who was working with service user DS, as she had concerns about his health. They discussed the matter. DS' temperature was 37.4. The claimant described DS as looking hot and

having beads of sweat on his forehead. DS was administered paracetamol. At the time of the conversation, the colleague had already phoned 111 for advice, but had received an automated response saying that if someone had shown any of the main symptoms of Covid they should be isolated, with medical assistance sought only if the individual had trouble breathing. The claimant advised the colleague to ring the respondent's own on-call provision.

35. The colleague rang the person on-call. After doing so, she again spoke to the claimant. She advised the claimant that the person on-call had initially advised that they needed to speak to the senior person on-call, who had in turn advised that 37.4 was not a high enough temperature to meet the guidance at the time as indicating that the person had Covid.

36. The claimant suggested to the colleague again ringing the person on-call. The colleague did so, with the claimant in the room listening on speaker phone. The advice was repeated that 37.4 was not classed as a high temperature, but the colleague was advised that if she was worried then the colleague could remain in the office and offer the service user support from there. The claimant was not happy about this advice. Her evidence was that she believed it to be dismissive and she felt that if DS had Covid the advice risked Covid being spread to others who would also be in the office with the colleague. The claimant stated to the on-call adviser "*oh right if we all die then I'm sure we can all just come back and haunt you*". The claimant accepted that what she said was totally inappropriate and unprofessional and had been a flippant remark, but she explained it with reference to feeling scared and worried at the time. The Tribunal fully understood that the claimant would have felt scared and worried at what was a very difficult time for everyone (particularly those who worked in roles supporting others).

37. DS recovered from his symptoms, and it transpired that he did not have Covid-19 on 29 March.

38. Mr Cooper was at the time the temporary acting manager for Birch Lodge. It was a role he held for a very brief period of time. In answer to a question, Ms Clark stated that the appointment had not been a success. He was also, at the time, the boyfriend of the claimant's daughter (as he had been for a number of years). Mr Cooper subsequently chose to stop being the acting manager in early April 2020, albeit that Ms Clark could not recall precisely when that occurred.

39. The claimant sent an email to Mr Cooper at 2.48 pm on 30 March 2020 (385). It was copied to Ms Clark, at the time the operational network manager. The respondent accepted that the content of the email constituted a protected disclosure. The claimant asked: "*what good is a video if we haven't got the required equipment on hand should we need it?*" She expressed the view that staff should have everything on hand ready to be used. She referred to the importance of familiar staff for service users. She referred to the video, the risk of catching Covid, and the need for the required equipment shown in the videos to be available. The claimant apologised for her comment on the previous day (quoted in paragraph 36) and explained that everyone was doing their best to manage the situation in which they found themselves. She explained why she was unhappy with the previous day's advice and said that the advice provided meant that the colleague was left to sit in the office where others also slept, with the risk of infecting the other staff.

40. Ms Clark responded to the claimant's email within half an hour of it being sent (384). She thanked the claimant for her email and said she had asked Ms McDaid to call at Birch Lodge first thing the following day. Ms Clark telephoned Ms McDaid that afternoon, while Ms McDaid was on leave, and it was agreed that Ms McDaid would visit Birch Lodge the next morning to discuss the matters raised.

41. Ms McDaid visited Birch Lodge in the morning of the 31 March. The claimant had not yet arrived for her shift when she did so. Ms McDaid spoke to Mr Cooper. It was her evidence that it became clear that Mr Cooper lacked confidence in the measures which were in place and he may have struggled to clearly communicate them to his team. The issue of deployment of face masks and goggles was explained. Mr Cooper confirmed to Ms McDaid that when he had assessed DS himself on 30 March he had been satisfied that the symptoms fell short of those required under the national guidelines in place to indicate Covid-19. They discussed staffing levels. After the meeting, Ms McDaid updated Ms Clark and Ms Scarbrough-Lang.

42. The claimant arrived for her shift shortly before 9 am on 31 March 2020. Mr Cooper informed the claimant that all PPE was at head office. The claimant sent a further email at 12.34 on 31 March 2020 (383). That email was also accepted by the respondent as being a protected disclosure. The claimant explained that she was grateful for the reassurances given by Ms Clark and Mr Cooper, and their support. The claimant repeated her view that the equipment should be sent to the house to be on-hand. She explained that PPE had not been offered in the call which she had had with those on-call, and she felt that was an example of when PPE should have been deployed. She stated that she was putting her family and herself at risk in the uncertain times. She stated that they needed all aspects of the PPE. She emphasised the need to keep staff safe. The claimant did not receive a response that day to the email. It was addressed to Ms Clark, but copied to Mr Cooper and Ms McDaid. The email started "*Hi Jenny*", which suggested it had been intended to be addressed to Ms McDaid. Ms McDaid's evidence was that she did not respond to it because it was addressed to Ms Clark and Ms McDaid thought that Ms Clark had responded to it (or would do so).

43. The claimant arrived at work for a further shift on Thursday 2 April 2020. After doing so, she identified from the rotas that the staffing arrangements for Birch Lodge were to change from Monday 6 April 2020. Where two service users shared a flat, a single support worker was allocated to the shared flat. So on the new rota, JM and AH were not allocated a support worker each (as had previously been the case). The claimant also identified that what she described as new staff were being placed in areas which she believed required experienced staff who were known to the service user. The staff allocated were those who had been recruited by the respondent to work at a new service which had not commenced and had been delayed by the pandemic, but they were trained staff employed by the respondent.

44. The respondent's evidence about the changes was (in summary) that the change was part of the necessary steps taken to comply with the obligation to keep service users safe and to minimise the risk of infection. It was considered preferable to have one support worker working in a relatively small flat, rather than having two support workers with the increased risk of infection. The need for two support workers was reduced due to the fact that the service users were unable to undertake

their usual routines as a result of the national lockdown and were largely restricted from leaving their flat. Some arrangements were subsequently put in place to assist with the allowed daily exercise. The use of the additional staff was part of the respondent's contingency planning to ensure that there were sufficient staff available and familiar with the residence and the service users, so that illness absence and shielding of existing staff would not have the same impact upon the service. The respondent prioritised avoiding the use of agency staff who were considered to have increased infection risk as they would have worked at various premises. The new staff were being introduced into the rotas at the time, in part, to ensure that service users knew the staff if/when future staff shortages occurred.

45. The claimant telephoned and spoke to Ms Clark on the morning of 2 April. Ms Clark asked the claimant if she could telephone her back. A short time later, she did so. Both Ms Clark and the claimant gave lengthy accounts of what was said during the call. Those accounts were not entirely consistent. There was no dispute that the claimant put forward her views about the changes in rotas and the impact upon service users that she believed would result.

46. It was the claimant's evidence that Mr Cooper was in the room with her when she spoke to Ms Clark. The claimant's evidence was that Ms Clark asked the claimant to put Mr Cooper on the call first so that she could speak to him. There was a dispute between Mr Cooper and Ms Clark. The claimant said that Mr Cooper resigned from his temporary management position on the call. The claimant's evidence was that she then went on to speak to Ms Clark herself. Ms Clark did not evidence such a conversation and, when asked about it, she could not recall when Mr Cooper resigned from the management role.

47. The claimant's evidence was that Ms Clark was instantly dismissive in the call. She believed that Ms Clark talked over her and had used an aggressive tone. The claimant stated that when she challenged the changes to the rota and asserted that it was to suit the company and not the service users, she believed that Ms Clark avoided the statement by stating that she was going to end the call as the claimant was questioning her ability to do her job.

48. Ms Clark's evidence was that the aim of the call was to address the issues raised in the claimant's emails of 30 and 31 March. Ms Clark wished to explain to the claimant the bigger picture and why decisions had been made. DS and his symptoms on 29 March were discussed. The claimant asserted that DS had coughed and sneezed everywhere all over the walls, something which had not been raised with the on-call advisers on 29 March and which Ms Clark said she would need to investigate. There was a discussion about JM, the rota and minimum staffing. The claimant said that JM was very upset and had episodes of not eating or drinking, although Ms Clark understood that the claimant then retreated from what she said and confirmed those were not JM's actions the previous day but rather were what she hypothetically thought would happen. Ms Clark was clear that the claimant was genuinely concerned about JM and resolved to investigate. Ms Clark's evidence was that she explained the purpose of minimal staffing. The claimant stated that she was ashamed to work for the respondent and said the company's actions amounted to abuse. Ms Clark's view was that the claimant became increasingly agitated, so she said that she would speak to HR and ended the call. Ms Clark acknowledged in her verbal evidence that the call had not achieved what she hoped, and she ended

the call when it became clear that rather than helping the claimant to understand, the claimant was becoming more agitated. Ms Clark did not agree with the claimant's assertion that she was dismissive.

49. The claimant resigned in an email sent at 10.54 on 2 April 2020 (391). The email was sent to both Ms Clark and Ms McDaid. It said simply that the claimant was giving four weeks' notice to terminate her contract. No reason was given in the email.

50. In her disability impact statement (75) the claimant recorded that she didn't choose to resign because she wanted to, she said she was "*in the fight or flight moment*". She also said that resigning "*wasn't a rational decision, it wasn't a decision I chose … It was my mental illness effecting my abilities to cope in stressful situations something I have to accept*".

51. In her witness statement the claimant said that she felt that she had no choice but to resign, as she felt that the new ways of working were against the service users support plans and her employment contract and could result in the claimant being complicit in abuse. When asked about why she resigned by the Tribunal, the claimant referred to the call with Ms Clark, and referred to the service users and the changes which were being made, emphasising her duty to speak up on their behalf.

52. The claimant subsequently spoke to Ms McDaid on 2 April. The claimant's evidence was that she informed Ms McDaid that she was not in the right frame of mind to finish her shift and said: "*this place will be the death of me*". Ms McDaid spoke to Mr Cooper to ensure the shift was covered. The claimant's evidence was that Ms McDaid then informed the claimant that she did not think that the claimant was in the right frame of mind to resign and asked her to take till Monday 6 April to think it over and if she still wanted to resign then Ms McDaid would accept it. It was the claimant's evidence that she then rang her husband to ask him to come and collect her from work and, after he arrived, the claimant left work with him.

53. Ms McDaid's evidence was that there were at least two telephone calls with the claimant and a separate one with Mr Cooper in between. Included as part of the investigation report was a note prepared by Ms McDaid on 8 April 2020 which provided a record of what she believed had occurred from closer to the time. That recorded (461) that "*Lisa called me, she was crying and clearly upset, she stated that she needed to leave shift, she was stressed out and Birch Lodge was going to be the death of her*". Ms McDaid recorded that she asked the claimant to take ten minutes before she went anywhere and she would call her back. Ms McDaid's notes recorded that she spoke to Mr Cooper who confirmed that he had covered the claimant's shift and he said that the claimant had gone home.

54. Ms McDaid's investigation note (461) recorded a second telephone conversation after Ms McDaid telephoned the claimant back. The claimant stated that she had emailed her resignation. Ms McDaid questioned whether she felt this was the right time for her to be making such a big decision. The note recorded "*I suggested that she give it some thought and that I could call her back in a couple of days*".

55. Ms McDaid and Ms Clark subsequently visited Birch Lodge and spoke to the staff and service users on 2 April 2020. There was a discussion about the service users not being happy about not going out, but they understood why.

56. Ms Parkinson, HR Officer (at the time), also spoke to the claimant on the afternoon of 2 April. It was the claimant's case that, prior to Ms Parkinson's call with the claimant, the senior management at the respondent had discussed the claimant and decided that Ms Parkinson should contact the claimant whilst she was still upset in the hope that the claimant would not take the time to Monday 6 April to reconsider. In practice this allegation was directed at Ms Clark. There was a discrepancy between the evidence of Ms Clark and Ms Parkinson about what occurred prior to Ms Parkinson's call to the claimant. Ms Clark stated in her witness statement that she discussed matters with Ms Parkinson and they agreed together that it would not be appropriate to hold the claimant to her notice period. Ms Parkinson made no reference to such a conversation in her statement and when asked about it was very clear that no such conversation occurred and that the decision to send the email of 3 April and not to require the claimant to work her notice was Ms Parkinson's alone. The Tribunal preferred Ms Parkinson's evidence to that of Ms Clark on this dispute. The Tribunal accepted that the decision to call the claimant on 2 April was Ms Parkinson's, as was the decision to send her email of 3 April. It was clear that Ms Parkinson was perfectly capable of making her own decision and she explained what occurred and why she did so. Ms Clark's evidence was less reliable as she appeared to have very limited recollection of what actually occurred and was only able to answer straightforward questions about what happened by referring to the content of her witness statement (which she appeared otherwise unable to recall). Accordingly, the Tribunal accepted Ms Parkinson's account of what occurred, why she made the call to the claimant, and why she said what she did in the email. On that basis the Tribunal did not find that the call was made for the reasons the claimant alleged.

57. Ms Parkinson's evidence was that Ms McDaid contacted Ms Parkinson to tell her about the claimant's resignation and to ask her to contact the claimant to discuss her resignation and to see if she could persuade the claimant to reconsider. It was also Ms Parkinson's evidence that she telephoned the claimant to see if she could persuade the claimant to reconsider her resignation. The Tribunal accepted that evidence having found Ms Parkinson to be a genuine and credible witness.

58. There was no dispute that the claimant spoke to Ms Parkinson on 2 April 2020. The claimant's evidence was that it was not too long after she had arrived home. Both Ms Clark and Ms Parkinson confirmed that they spoke about the claimant's resignation, and that was why Ms Parkinson rang the claimant. Ms Parkinson's evidence was that she asked the claimant whether she would reconsider her resignation. The claimant denied that she did so. Ms Parkinson's evidence was that the claimant told her that she had made up her mind. It was Ms Parkinson's evidence that she got a strong sense that the claimant was completely finished with the respondent and, when asked if she wanted to take the weekend to think about it, was adamant that she did not want to do that. The claimant said that working at the respondent was making her ill.

59. Ms Parkinson decided that the claimant would not be required to work her notice. Her evidence was that this was in recognition of the fact that the claimant had

left her shift and appeared not to be in an appropriate frame of mind to work and had clearly expressed a wish not to do so.

60. At 4.36 pm on 3 April Ms Parkinson emailed the claimant (390). The email ended by confirming that the organisation would accept the claimant's resignation. Ms Parkinson thanked the claimant for her hard work and wished her the best in the future. The claimant was informed that the respondent did not expect her to work her notice and therefore her last working day was the 2 April. Within the email, Ms Parkinson provided her account of what had been discussed and the position. Notably the three points recorded as being those raised by the claimant related to the rota changes and the impact which it had upon service users (coupled with Ms Clark's approach); the matters detailed as having been referred to were not about PPE.

61. It was common ground that the claimant and Ms McDaid spoke on the evening of 3 April although the evidence about what was said differed. Ms McDaid's evidence (confirmed in her note (462)) was that she told the claimant that she had been tasked with looking at the rotas and feeding back to the service users. Ms McDaid's evidence was that neither Ms McDaid nor the claimant mentioned the claimant's resignation nor was there any reference to the suggestion that the claimant should reconsider. The claimant's evidence was that she telephoned Ms McDaid and asked her if she knew that the option to take time to reconsider her resignation had been withdrawn, with Ms McDaid being vague and not really answering her.

62. It was clear from the evidence that the claimant was very unhappy with Ms Parkinson's email of 3 April. The claimant sent a lengthy response to Ms Parkinson in an email on 6 April (388) which started by stating that Ms Parkinson's email had caused the claimant "*a great deal of pain*". From her response, it was clear that the claimant was upset by the fact that she had been asked not to work her notice. The email concluded by requesting that the concerns the claimant had raised should be investigated under the whistleblowing policy (it was the respondent's case that this was the first time that the claimant asked for her issues to be addressed under that procedure).

63. Ms Scarbrough-Lang, the assistant director of operations, was asked by Ms Foster on or around 3 April 2020 to investigate the concerns which the claimant had raised. On 8 April the claimant spoke to Ms Scarbrough-Lang (585). A note of what was said was taken and included as an appendix to the investigation report. The claimant also telephoned and spoke to Ms Scarbrough-Lang on at least two other occasions during the investigation, for an update on the investigation's progress. Ms Scarbrough-Lang investigated under the grievance procedure and not the whistleblowing policy, although her evidence to the Tribunal was that it would not have made any difference which procedure she had used (save for the right of appeal).

64. On 9 April Ms Parkinson responded to the claimant by email (388). She stated that the only reason that the claimant had been advised that she did not need to work her notice was out of concern for her health and as a "*supportive measure due to concerns you had raised regarding your health and well-being on Thursday 2nd April, stating that working at the house, Birch Lodge was causing you stress and*

anxiety". She emphasised that the call of 2 April had been intended as a supportive measure. She explained what she believed had occurred and said: "*I asked if you would reconsider your decision, you told me that Jenny had asked you on that morning and you had told her the same, that you had made your mind up and you could not work for a company that did not follow its own values and you wouldn't change your mind"*. In the email Ms Parkinson also confirmed that the concerns raised were to be investigated.

65. The claimant responded by email to Ms Parkinson on 10 April (387). She said she took comfort from the explanation of why the claimant was not being required to work her notice. The claimant also explained again her concerns about JM and the impact that the rota changes would have on him.

66. It was Ms Parkinson's evidence that had the claimant sought to retract her resignation, she would have been treated in the same way as any other employee. Ms Parkinson was asked to explain what this meant, and her evidence was that she had allowed other employees to retract their resignations when they had sought to do so (giving at least two examples of when she had done so).

67. It was the evidence of Ms Scarbrough-Lang that she did not contact the claimant to provide updates on the investigation process, however she stated that she was contacted by the claimant herself seeking an update. She spoke to the claimant and confirmed the position. Neither Ms Scarbrough-Lang nor the claimant was able to evidence precisely when the conversations occurred or exactly what was said. When asked about the time taken, Ms Scarbrough-Lang emphasised the pandemic and the need to carry out her duties (including those arising from the pandemic), which explained why the investigation took the time that it did, a timescale which she felt to have been appropriate in the circumstances.

68. The claimant submitted an application for new employment with an NHS Trust on 18 April 2022 (827). Ms McDaid and Mr Cooper were named as referees. The role was offered to the claimant on 22 May, and she started the new employment on 6 July 2020.

69. On 1 May Ms Scarbrough-Lang produced a report detailing the investigation which she had undertaken (414). The report was very lengthy and appended a large number of documents collated during the investigation. It included a detailed time line of events. It also included a number of findings on the matters raised. It ended with a number of recommendations. The entire report is not produced in this Judgment, but of the contents the following matters were noted:

a. An extract from JM's notes was included in the report. That included an entry from 3 April 2020 (431) when the service user had stayed in his room and refused medication "*Raised about quarantine and having to share 1 staff with AH, Said it was making feel unwell and might need to go to hospital*". The entry for 6 April recorded "*JM informed about changes to rotas. Accepted out of his control. No issues*";

b. The report identified (434) that one of the issues raised by the claimant with Ms Parkinson on 2 April 2020 was that there had been (at that time) no consultation with the people supported about the changes, of

which Ms Scarbrough-Lang recorded "*This unfortunately is true. The communication re changes had gone through RC the day before and unfortunately it appears that due to his decision to resign this was not been discussed and/or communicated with/to the people supported. However due to this being raised, CC and JMc went to Birch Lodge on the afternoon of 2nd April 2020*";

c. An extract from JM's support plan was included (441) which detailed the ways in which JM had been shown to develop strengthened coping strategies for working with staff who were new to him, including those individuals first working within the same flat with JM's co-tenant (AH) to allow JM to familiarise himself with them. It did not provide that JM had the option to choose which staff member was to support him; and

d. One of the recommendations made was that "*Where changes in support are planned and it would be deemed appropriate to ensure that people supported are informed, anxieties managed and staff briefed on how best to support*".

70. The report itself was not provided to the claimant (prior to these proceedings). It was Ms Scarbrough-Lang's evidence that she never provided such reports to the individual as she had been advised not to do so. When Ms Scarbrough-Lang was questioned by the claimant about her use of the grievance procedure rather than the whistleblowing policy, she gave evidence that it would not have made any difference to her investigation which of the procedures she had used, she believed she had fully investigated all of the matters raised.

71. A letter dated 11 May 2020 providing a summary of the outcome of the investigation was sent by Ms Scarbrough-Lang to the claimant (586). That was a relatively detailed letter, albeit not as detailed as the report and appendices which it summarised. The letter emphasised the unprecedented times which had arisen from the pandemic. It provided a detailed explanation of the decisions made about PPE and the changes to the rota and support provided to service users. The conclusion reached was that none of the concerns raised had been substantiated. The claimant's right of appeal was also confirmed.

72. It was Ms Scarbrough-Lang's evidence that she was unaware of the claimant's health issues and disability.

73. The Tribunal was provided with an occupational health report which the respondent obtained regarding the claimant, dated 20 May 2020 (that is the report was obtained and provided after the claimant's employment had ceased) (111). That report emphasised that the claimant had loved her job. The report recorded that the results of the questionnaire undertaken identified that the claimant had depression to a moderately severe level and anxiety to a severe level. The report also recorded that the claimant reported a GP diagnosis of anxiety and depression.

74. The claimant appealed against the grievance outcome. It was the respondent's case that had the issues raised by the claimant been addressed under the whistleblowing procedure, there would have been no right of appeal. As the issues had been addressed under the grievance procedure, the appeal process

under that procedure was followed. There was an issue with the claimant's appeal and the document attached, but the grounds of appeal were eventually sent in a numbered document.

75. Mr Alcock, the director of operations (and someone who has both nursing and management qualifications), was asked to hear the claimant's appeal. It was his evidence that he was unaware of any issues about the claimant's health or of her disability. He sent the claimant a letter on 1 June inviting her to an appeal hearing on 17 June (604). The claimant was informed that Mr Alcock would chair the panel and Ms Foster, the Head of HR, would also be on the panel. That letter notified the claimant of the right to be accompanied by a colleague or trade union representative. Ms Foster was identified as the person to be notified if the claimant required any reasonable adjustments or special requirements for the meeting.

76. There were exchanges of emails between the claimant and Ms Foster about submitting evidence for the hearing and accompaniment. The emails included the claimant asking Ms Foster in an email of 9 June (607):

> "*I have requested my union rep to attend but still haven't had a response. If they are available to attend, would it also be possible to bring a work colleague with me for support?*"

77. Ms Foster replied on 10 June (606):

> "*Please be assured you can change the date if needed to get UNISON support. Otherwise policy states you can be accompanied by a work colleague, however this could not be a witness.*"

78. Later on 10 June, the claimant replied:

> "*I've spoken to Geoff today, it is my understanding he will be attending the hearing with me, but I haven't had it confirmed yet"*

79. It was Mr Alcock's evidence that when he chaired the appeal hearing there was no comment raised in respect of additional support being required. The claimant attended the appeal meeting in the room in which it was conducted in a socially distanced way. The trade union representative attended remotely by video link. It was the claimant's evidence that the representative did not say much in the meeting, and she was clearly not entirely satisfied with his assistance. Mr Alcock's unchallenged evidence was that if the claimant had said at the start of the hearing that she was unhappy in any way with the support that she had, he would have rearranged the meeting.

80. The appeal hearing lasted two and a half hours. Mr Alcock undertook some further investigations following the hearing. His evidence was that he told the claimant in the appeal hearing that he would be doing so and that doing so would require additional time to complete and provide his final response. The appeal outcome was provided in a letter of 14 July 2020 (626). The claimant did contact Ms Foster to request confirmation of the outcome (622/5). Mr Alcock explained the delay with reference to: being extremely busy because of the pandemic; having been on

holiday; and determination to address the claimant's concerns seriously and thoroughly.

81. Mr Alcock's decision was to uphold the original response, that none of the concerns were substantiated. His decision letter was detailed and addressed each of the paragraphs of the claimant's appeal. He emphasised the organisation's duty of care to ensure that protecting life was a priority. He stated that the focus was directed towards protecting life. With regard to the claimant's issues about the lack of opportunity for her and the service users to be part of the decision making process he said "*The organisation had to focus on protecting people under new and exceptional pressures with limited time, resources or information. Prioritising the protection of life in an unprecedented situation required a change in the way in which we would usually work. This changed the way in which we would usually take time to consult and engage with people: we were in a pandemic situation with a need to respond swiftly to protect life*". He also explained the national shortage of PPE and face masks at the time and the decision made, to hold the limited resources available at head office.

82. In his evidence to the Tribunal, Mr Alcock emphasised that the respondent prided itself on involving the people it supports in all aspects of their care, as far as possible, but explained that the exceptional circumstances of the pandemic made that very difficult. Making staff changes for the common good for everyone had needed to take priority over consultation with individuals. Nonetheless Mr Alcock had found that there had been adequate care taken to talk to service users at Birch Lodge and no significant issues had arisen as a result of the changes. Mr Alcock also provided in evidence the outcome of a retrospective analysis which he had undertaken of the support hours provided at Birch Lodge and the hours for which funding was received. It was his evidence that, for the relevant period, staff were deployed for more hours on average that the number of hours for which funding was received. That was an issue which the claimant had raised in her appeal, and which had not been addressed at the time by Mr Alcock (but was in his evidence to the Tribunal). Mr Alcock's evidence was largely unchallenged in cross-examination by the claimant.

83. In his evidence Mr Alcock confirmed that he had not treated the claimant any differently because she had raised concerns. It was Mr Alcock's evidence that he was unaware that the claimant had suffered from anxiety. His evidence was that had the claimant said at the beginning of the hearing that she was unhappy in any way with her support, he would have rearranged the hearing. There was no evidence that the claimant raised any issue with accompaniment or support at the grievance appeal hearing.

84. At the time when she resigned, the claimant had some belongings in a draw in a flat at Birch Lodge. The draw was not locked. The claimant did not recover the belongings immediately after resigning. The claimant also has some toiletries in a bathroom used by staff. Ms Halliwell asked staff to have a clear out of the bathroom. She did not know that any of the toiletries were the claimant's. Ms Halliwell understood that another staff member had emptied the claimant's personal belongings into a bag, possibly because of the request to clear the bathroom. Mrs Halliwell advised Mr Cooper to arrange for the bag to be given to the claimant's son. The claimant was informed by a former colleague that her possessions had been

placed in a bag and the claimant arranged to collect them herself. In evidence she said that she had done so by 8 July 2020. From the claimant's evidence it appears that a refuse bag was used to collect the belongings. The claimant explained what the belongings were when she was asked about them, and they were predominantly (although not entirely) documents such as those required for a DBS check. Whilst the claimant's witness statement referred to there being some damage to some items, no evidence was given about any specific damage to any particular item.

85. The bundle of documents included the House of Commons Public Accounts Committee report into Covid-19: Government procurement and supply of personal protective equipment, published on 10 February 2021. The report included the following (670):

> "[The BMA and the RCN] *also told us that NHS organisations came very close to (sometimes within hours of) running out of PPE and Care England told us that some social care providers actually did run out of PPE and staff did not have the PPE they needed.*"
>
> "*Between March 2020 and July 2020, the Department provided NHS trusts with 1.9 billion items of PPE, equivalent to 80% of their estimated need. Over the same period, it provided 331 million items to the adult social care sector, equivalent to 10% of its estimated need. Of the total PPE distributed between March and July, trusts received 81% and social care 14%"*

The Law

86. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95 of the Employment Rights Act 1996. Section 95(1)(c) provides that an employee is dismissed by her employer if:

> **"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

87. The principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat herself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

88. The respondent's representative submitted that a perception that the employer has acted unreasonably is not enough, an actual or anticipatory breach of contract must be established. He submitted that required an examination of the respondent's conduct; not the perception or reaction of the claimant. It required the Tribunal to consider the contractual relationship. He referred to **Spafax Ltd v Harrison [1980] IRLR 442** and submitted that lawful conduct is not capable of founding the basis of a constructive dismissal. The respondent's representative also included in his written submission an extract of what was said **in Courtalds**

Northern Spinning Ltd v Sibson [1987] ICR 239 when highlighting that, whilst the question of breach remains the core issue, the reasonableness of the employer's position may point to the fact that there was no breach.

89. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term, and the Court approved a formulation which imposed an obligation that:

> *"The employer shall not without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

90. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. The Tribunal is required to look at all the circumstances. Not every action by an employer which can properly give rise to complaint by an employee, amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust.

91. In his submissions the respondent's representative referred to some other cases regarding the duty, the exercise of discretion, and the need for the employee to resign in response to the breach in question. He submitted that what was necessary was that the claimant resigned in response, at least in part, to the fundamental breach by the respondent. It is not necessary to refer to all of those cases in this Judgment.

92. Whilst in some cases, the breach of trust and confidence may be established by a succession of events culminating in a "last straw" which triggers the resignation, that was not something which was argued in this case. If an individual delays too long in resigning, they will have affirmed the contract and waived the breach. The respondent's representative's submissions also contained some (limited) reference to the law as it applied to the argument that any dismissal was otherwise fair. In determining whether any resultant dismissal was fair, the Tribunal needed to apply what was said in section 98 of the Employment Rights Act 1996 and decide: whether the claimant was dismissed for one of the potentially fair reasons; and, if so, whether the dismissal was fair. The latter test must be determined in accordance with equity and the substantial merits of the case and requires determination of whether in the circumstances the respondent acted reasonably or unreasonably in treating the given reason as sufficient reason for dismissing the claimant.

93. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to be subjected 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. Under section 48(2) it is for the employer to show the ground on which any act, or deliberate failure to act, was done (where it is asserted that it was on the ground of having made a public interest disclosure). The respondent's representative

submitted that the Tribunal needed to consider in turn: (i) the detriment relied upon; (ii) the character of the act; and (iii) the requirement of causation.

94. As confirmed in **Jesudason v Alder Hey Children's NHS Foundation Trust [2020] ICR 1226** (the respondent's representative provided a copy of that case):

> **"***In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment."*

95. As confirmed in the respondent's submission, the law makes clear that a detriment may arise following the cessation of the employment relationship (**Woodward v Abbey National plc [2006] IRLR 677**).

96. In determining whether a claimant has suffered a detriment as a result of having made a public interest disclosure, the Tribunal must focus on whether the disclosure had a material influence, that is more than a trivial influence, on the treatment - **NHS Manchester v Fecitt [2012] IRLR 64.** The respondent's representative submitted that the Tribunal's focus should be on the deliberative processes of the person who made the decision or did the act (relying upon **Harrow London Borough v Knight [2003] IRLR 140**). It is not sufficient to demonstrate that 'but for' the disclosure, the respondent's act or omission would not have taken place. The protected disclosure must have materially influenced the respondent's treatment of the claimant.

97. Section 20 of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20(3) provides that the duty comprises the requirement that where a provision, criterion or practice of the employer's puts a person with a disability at a substantial disadvantage in relation to a relevant matter in comparison with people who do not have a disability, to take such steps as it is reasonable to have to take to avoid the disadvantage. As the respondent's representative submitted, that requires not only the existence of a disability, but also: identification of a PCP; and knowledge (actual or constructive) on the part of the employer.

98. Section 21 of the Equality Act 2010 provides that a failure to comply with the requirement set out in section 20 is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

99. The matters a Tribunal must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of the respondent;

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage suffered by the claimant.

100. The requirement can involve treating people with a disability more favourably than those who are not disabled.

101. The respondent's representative placed particular emphasis upon the Judgment in **Ishola v Transport for London [2020] IRLR 368** and provided a copy to the Tribunal. He, in particular, relied upon what was said at paragraphs 34-37 of that Judgment about PCPs. What was said in the Court of Appeal's Judgment was the following (including what was said in the following paragraph (38)):

> *"I do not accept Mr Jones' submission that* all *one-off acts and decisions necessarily qualify as PCPs. His submission goes too far and distorts the purpose of the PCP in the context of both statutory provisions. My reasons follow.*
>
> *The words 'provision, criterion or practice' are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. As a matter of ordinary language, I find it difficult to see what the word 'practice' adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means 'done in practice' begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be 'done in practice'. It is just done; and the words 'in practice' add nothing.*
>
> *The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.*
>
> *In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular*

> *employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.*
>
> *In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."*

102. The respondent's representative's submission was that a one-off decision cannot amount to a PCP and that was what was found in **Ishola**. The Tribunal has quoted the full passage from the Judgment above because it does not find that to be a correct statement of the law, nor does it agree that was what was decided in **Ishola**. The Tribunal did take into account when considering the PCPs below what was said by Simler LJ as quoted above in each of the circumstances being considered. It is very clear that a PCP will not (usually) be a one-off decision about an individual's own circumstances which did not and would not apply to others. Nonetheless the Tribunal did not agree that a one-off decision cannot amount to a PCP and did not agree that is what the **Ishola** Judgment said.

103. The Tribunal also noted and drew in support of that decision that the EHRC Code of practice on employment, to which the Tribunal is required to have regard, records at 6.10 that:

> *"The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions"*

104. In terms of knowledge of disability and reasonable adjustments, the duty only applies if the respondent: knew or could reasonably be expected to know that the claimant had the disability; and knew or could reasonably be expected to know that the claimant was likely to be placed at a substantial disadvantage compared with persons who are not disabled (that is aware of the disadvantage caused by the application of the PCP). The question of whether the respondent could reasonably be expected to know of the disability and/or the substantial disadvantage is a question of fact for the Tribunal. The focus is on the impact of the impairment and whether it satisfies the statutory test and not the label given to any impairment.

Conclusions – applying the Law to the Facts

Issues 1 and 2 – protected disclosure detriments

105. There was no dispute that the claimant's emails to the respondent of 30 and 31 March contained public interest disclosures. The issue to be determined, as identified in the list of issues, was whether the claimant was subjected to a detriment by any act or deliberate failure to act by the respondent done on the ground that she had made a protected disclosure. Four alleged detriments were set out in the list. The Tribunal approached the single recorded issue as in fact having two distinct parts. First, was the claimant subjected to the detriment alleged and was it a detriment? Second, was that on the ground that she had made one or both of the protected disclosures which she made on 30 and 31 March 2020?

D1

106. The first alleged detriment (D1) was alleged to be the respondent denying the claimant the chance to reconsider and withdraw her notice by 6 April 2020. The Tribunal did not find that the claimant was subjected to the detriment alleged. There was no evidence that the claimant had ever actually sought to withdraw her notice. It was Ms Parkinson's evidence that had the claimant sought to do so, she would have been treated in the same way as any other employee. As Ms Parkinson explained in evidence, she had allowed other employees to retract their resignations when they had sought to do so. The claimant was not in fact denied the chance to reconsider and withdraw her notice; she did not actually seek to withdraw her notice, whether on 6 April 2020 or at all.

107. Following the claimant's resignation, on 2 April, Ms McDaid spoke to the claimant, attempted to persuade her to withdraw her resignation, and suggested that she gave herself the chance to calm down before making such a big decision. The 6 April was mentioned.

108. Ms Parkinson then spoke to the claimant later that day. There was a dispute between the evidence of the claimant and that of Ms Parkinson as to whether Ms Parkinson also sought to persuade the claimant to reconsider. On this dispute of fact and in terms of what was said in that call, the Tribunal found the evidence of Ms Parkinson to be more reliable. Ms Parkinson was a genuine and credible witness whose evidence was clear. There was no dispute that the claimant was very upset at the time of the call, and she did not make notes of what was said. It is unsurprising that she was unable to recall all that was said, and it is entirely possible that she did not fully take in what was said to her during the call. The Tribunal accepted Ms Parkinson's evidence that the claimant was adamant in the call that she was not returning, and that Ms Parkinson's interpretation of what was said was that she was in no doubt that the claimant wanted to resign and that she had no interest in taking more time to consider her decision. That decision and discussion was reflected in the email sent by Ms Parkinson the following day (390). Whilst the claimant responded at some length in an email (388) and addressed issues such as why she was no longer required to work her notice, she did not state that she wished to withdraw her resignation.

109. It was the claimant's case, as stated in her written submissions, that prior to Ms Parkinson's call with the claimant, the senior management at the respondent had discussed the claimant and decided that Ms Parkinson should contact the claimant whilst she was still upset in the hope that the claimant would not take the time to Monday 6 April to reconsider. In practice this allegation was directed at Ms Clark. As addressed in the facts section above, there was a discrepancy between the evidence of two of the respondent's witnesses about what occurred prior to Ms Parkinson's call. The Tribunal preferred Ms Parkinson's evidence to that of Ms Clark, for the reasons explained. It accepted that the decision to call the claimant was Ms Parkinson's own, as was the decision to send her the email. The Tribunal accepted Ms Parkinson's account of what occurred, why she made the call to the claimant, and why she said what she did in the email of 3 April. The Tribunal did not find that the senior management discussion had occurred as the claimant alleged. It also did not find that the reason why Ms Parkinson made the call to the claimant was as the claimant alleged.

110. In his submissions, the respondent's representative submitted that it was clear that the reason for the conclusions drawn by Ms Parkinson was the manner, tone and content of her conversation with the claimant. He submitted that her conclusions were not on the grounds of the claimant having made any protected disclosure. The Tribunal entirely agreed with those submissions. Even had the Tribunal found that the claimant was treated detrimentally by Ms Parkinson's approach to the claimant's resignation and/or what was said in her email of 3 April, the Tribunal would not have found that the protected disclosures made by the claimant had any influence on what Ms Parkinson said or did in response to the claimant's resignation.

D2

111. The second alleged detriment (D2) was allowing colleagues to go through the claimant's personal items after her resignation rather than getting her son (who was also employed by the respondent) to do so. The facts that the Tribunal found in relation to this allegation were that some time after the claimant's employment had ended, her belongings were put in a bag. The claimant herself had neither asked her son to collect her belongings, nor had she contacted the respondent about doing so herself. The claimant collected her belongings in the bag. In her witness statement the claimant referred to damage to some items, but no specific evidence about any damage was given. When asked what the belongings were, the claimant detailed mainly documents. The claimant objected to the use of a rubbish bag and stated that the belongings could have been emptied from the draw in a more dignified way. She also stated that there was no reason to collect her personal belongings. The Tribunal did not find that the collection of the claimant's belongings in a bag amounted to a detriment at all. Where an individual has left employment, an employer is perfectly entitled to gather those belongings together. The items had remained in a service-user's home after the employment had ended and it appeared that the claimant gave little, or no, thought to arranging for their collection herself. Collecting and returning those items was not a detriment, even if they were returned in a refuse bag.

112. In her submissions the claimant contended that the collection of the claimant's belongings and the fact that there were put in a rubbish bag, were intended to humiliate and intimidate the claimant. The Tribunal found no evidence that was why

it was done. The Tribunal did not find the collection of the claimant's belongings after she left, was a detriment at all.

113. In any event, had the Tribunal needed to determine whether the fact of and/or method of collection of the claimant's belongings was on the grounds that the claimant had made either or both of the protected disclosures relied upon, the Tribunal would not have found that those disclosures had any influence on the items being collected or placed in a bag. Ms Halliwell provided evidence about the collection of the items and why she believed it occurred. The Tribunal accepted that evidence. The protected disclosures had no influence on the claimant's belongings being collected, or the fact that they were collected into a refuse bag.

D3

114. The third alleged detriment (D3) was failing properly to investigate the concerns which were raised in the two emails, including by treating them as a grievance rather than as complaints under the whistleblowing policy. In practice this allegation consisted of two parts: the alleged failure to investigate the concerns; and the use of the grievance procedure rather than the whistleblowing policy.

115. The Tribunal did not find that the respondent failed to properly investigate the claimant's concerns. Ms Scarbrough-Lang, a senior employee, undertook a very thorough investigation into the matters raised. The investigation evidenced by the letter sent to the claimant, the report, and Ms Scarbough-Lang's evidence, was detailed and would have been a very full and thorough investigation in any circumstances. In the circumstances of the first few weeks of the Covid lockdown, whilst Ms Scarbrough-Lang was also undertaking a full-time role, with the challenges of addressing the pandemic for the respondent (and the sector generally), the Tribunal found the investigation to be thorough and undertaken in a timely way.

116. In accordance with the respondent's grievance procedure, Ms Scarbrough-Lang should have provided the claimant with the full report and the materials collated (potentially with confidential information redacted), prior to a grievance hearing. The Tribunal accepted that the reason why Ms Scarbrough-Lang did not do so, was because that was not her usual practice. It was not related to the disclosures. There should also have been a meeting with the claimant as set down in the procedure, after the investigation had been undertaken. However, the Tribunal did not find that those failures to comply with the procedure meant that the concerns were not properly investigated. The shortcomings were not because of the protected disclosures which the claimant made. To the extent that there were any failures to properly investigate or to follow the respondent's procedure, the Tribunal did not find them to be because of the protected disclosures made (or to have been materially influenced by them).

117. The Tribunal did not find that the use of the grievance procedure rather than the whistleblowing policy was a detriment for the claimant. Under the grievance procedure she was afforded the right of appeal, something which did not apply under the whistleblowing policy. As Ms Scarbrough-Lang confirmed in evidence, there was no difference whatsoever in the conduct of the investigation because it was under the grievance procedure and not the whistleblowing policy. The same things would

have been investigated in the same way. As that was the case, whichever procedure was used, use of one procedure could not and did not amount to a detriment.

118. In her written submissions, the claimant explained that it was her case that the respondent used the grievance policy to keep all the information in-house and to sweep it under the carpet, rather than to address the concerns under the organisation's whistleblowing policy and have someone independent investigate the concerns. The Tribunal understood that submission to be based upon the use of the word independent in the whistleblowing policy (215) (see paragraph 18 above). There was no evidence that the use of the word independent in that policy meant that someone external to the organisation would undertake the investigation. Indeed Ms Scarbrough-Lang's evidence was that the investigation undertaken by her would have been the same whichever policy was used. She was independent to the extent that she was someone within the organisation who had not been immediately involved in the matters complained of at Birch Lodge. The Tribunal did not find that the respondent would have used someone external to the organisation had the whistleblowing policy been used and did not find that the reason why the grievance procedure was used was to avoid doing so.

119. In any event, the Tribunal would not have found that the use of the grievance procedure was because the claimant had made the protected disclosures which she had (nor was it materially influenced by the fact that such disclosures had been made). Ms Scarbrough-Lang endeavoured to fully investigate the matters raised in the way she believed to be right. The grievance procedure was used as that was believed to be the correct policy to use, in circumstances where neither policy made clear which should be used in circumstances where they overlapped and where the claimant only asserted reliance on the whistleblowing policy in her email of 6 April, after Ms Scarbrough-Lang had been asked to investigate. The choice of the procedure was not because of (or influenced by) the protected disclosures which the claimant had made.

D4

120. The fourth alleged detriment (D4) was Ms Clark allegedly making a false allegation that the claimant had been in breach of COVID guidelines. This was a detriment which was clarified during the hearing, as the respondent had believed it related to part of Mr Alcock's appeal decision (and the claimant confirmed that it did not).

121. The claimant visited service user JM at Birch Lodge on or around 18 July 2020 (after her employment had ended). The claimant's evidence was that she had been informed by a former colleague that Ms Clark had asked her questions about the claimant's visit. As confirmed in the respondent's submissions, Ms Clark confirmed to being alerted to a concern on account of a visit occurring during Covid measures. That was a matter she was obliged to look into, but it went no further. The Tribunal did not find that Ms Clark asking questions about a visit was a detriment. No formal steps were taken. No reasonable employee would consider such a question being asked to constitute a detriment. Had it needed to have done so, the Tribunal would also not have found that any questions were asked because of (or were influenced by) the claimant's protected disclosures. The questions were to do with the Covid-related requirements in place at the time and were an appropriate

response on the part of Ms Clark, where the respondent had a duty to keep the service users safe.

Issue 3 – constructive dismissal

122. The claimant claimed unfair dismissal. The first issue to be determined for that claim, was whether she was dismissed. The claimant relied upon what she said was a breach of the duty of trust and confidence which she said entitled her to resign and treat herself as having been dismissed. Two alleged breaches of the duty of trust and confidence were relied upon. The Tribunal addressed each of the alleged breaches separately, as explained below. Having done so, the Tribunal also considered the two alleged breaches collectively, but doing so did not alter the decision reached.

PPE

123. The first alleged breach relied upon was the respondent allegedly failing to provide proper PPE, during March and early April 2020, to ensure the safety of staff in the event of a suspected case of COVID-19.

124. This allegation in practice arose from the events of 29 March and DS's ill health. The claimant and her colleague were concerned whether DS had Covid, a concern which was understandable. Their response in part reflected the fact that this was during the early days of the pandemic. Applying the guidance in place at the time, it was confirmed that DS was not showing what were considered to be the symptoms of Covid, something addressed and considered by those on-call for the respondent including a medical professional. The respondent had a shortage of PPE (in practice in this context face masks) in common with many social care providers as the provision of PPE was, at that time, prioritised for the NHS. The organisation needed to prioritise how that limited PPE would be used. It determined that it should be used only for those for whom the relevant symptoms of Covid had been identified at the time. That was not DS. The PPE was retained at head office so that it could be distributed rapidly when required, it was not distributed to locations where it might not have been required. The Tribunal found the respondent's approach to PPE to be a perfectly appropriate and sensible response to the situation at the time and the limited availability of PPE to the respondent. The Tribunal did not find the respondent's approach to PPE to be a breach of the duty of trust and confidence.

125. As recorded in the list of issues, a second question in determining whether the claimant was constructively dismissed was whether that alleged breach was the reason for the claimant's resignation (issue 3(b))? The Tribunal did not find that the reason why the claimant resigned was the respondent's non-provision of PPE. The claimant did not resign after the non-provision of the PPE. She emailed raising the issue. She returned to work. She resigned after she saw the rotas. Whilst the claimant's case and evidence were not entirely consistent about what exactly it was that caused her to resign, when she was asked that specific question by the Tribunal, her answer focussed upon her concerns about the service users and the rota which had been put in place, it was not the provision of PPE. That was consistent with what the claimant said in her witness statement and what Ms Parkinson recalled the claimant saying in their telephone conversation of 2 April (as confirmed in her email of 3 April). The Tribunal found that the reason for the

claimant's resignation was the second alleged breach relied upon (the rota) and not the first (the PPE).

126. The list of issues also included a third question in relation to constructive dismissal, which was whether the claimant lost the right to resign by affirming the contract by delay, or otherwise (issue 3(c))? The Tribunal would not have found that the claimant did so in circumstances where the issue with the provision of PPE first arose on 29 March and the claimant resigned on 2 April.

The rota and concerns about service users

127. The second alleged breach of the duty of trust and confidence was the respondent changing the rota for support workers with effect from 6 April 2020 without proper consultation with service users or taking into account their capacities and needs. As the Tribunal has already addressed when looking at the first alleged breach, the Tribunal did find that this issue was the reason for the claimant's resignation. That was clearly evidenced by the timing of the resignation which occurred shortly after the start of the claimant's shift on 2 April when she saw the rota which had been put in place to commence on 6 April. It was also what was said by the claimant to the Tribunal, in her witness statement and (according to Ms Parkinson) in the claimant's telephone call with Ms Parkinson on 2 April (as confirmed in Ms Parkinson's email of 3 April).

128. It was clear to the Tribunal that the claimant was very focussed on the needs of the service users to whom she provided support. The claimant genuinely perceived that the changed rotas, the removal of dedicated support staff, and the variation in the staff supporting JM, were all concerns which she needed to raise in accordance with her duties. The claimant was fully able to explain her concerns, focussed as they were on the service users' rights and requirements. However, the Tribunal did not find that the claimant demonstrated any objectivity or understanding of the bigger picture, either at the time of her resignation or at the Tribunal hearing. She did not consider the organisational needs and responsibilities (and its wider duty to make difficult decisions) at a critical time when everybody's rights were being restricted to ensure that the spread of Covid was limited. The Tribunal accepted that the respondent needed to, and did, make tough decisions. The Tribunal accepted that the decisions made were the right ones at the time. The restrictions applied to the number of support workers working in a flat at the time made perfect sense and were consistent with the need to limit the risk of the spread of Covid. The Decisions made about the use of the other employees and the wish to limit the use of agency workers, were also reasonable and sensible decisions.

129. The respondent could have initially introduced the rota changes better, by discussing with the service users the changes to be implemented, before the rotas were issued. Ms Scarbrough-Lang recorded that in her investigation report (434) (see paragraph 69(b) above). The respondent was working very quickly to make the changes in a tight timescale, reacting to the risks. In fact (after the claimant resigned) the respondent did talk to the service users before the rota changes started to apply (after the claimant had raised it). At the Tribunal hearing, the claimant did not appear to understand that consultation about changes did not mean a requirement for consensus. The decision made to change the rotas was one the respondent made quickly, risk assessed with the stakeholders, and it was clearly a rational and

sensible approach. The way it was implemented was imperfect, but the need for conversations was addressed and resolved by the 6 April when the rota came into effect.

130. The respondent's representative submitted that this alleged breach could not be a breach of the claimant's contract with the respondent. It was not part of her contract with the respondent that there should be consultation with the service users. The Tribunal accepted that submission. What was alleged could not have been a fundamental breach of the duty of trust and confidence in the contract between the respondent and the claimant. What was proposed was not done without reasonable and proper cause; the reasons for the respondent making the changes were reasonable and proper. They were clearly reasonable in unprecedented and critical circumstances. The Tribunal also found that nothing about the proposed changes to the rota could (or did) amount to the respondent conducting itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

131. The final question included in the list of issues was whether the claimant lost the right to resign by affirming the contract by delay, or otherwise (issue 3(c)). The claimant resigned immediately upon seeing the rota. Had it been found to have been a fundamental breach of the duty of trust and confidence, it was clear that the claimant did not affirm the contract. In practice, in this case, it was perhaps unfortunate that the claimant did not delay longer before resigning, to enable her to work with the respondent to address, resolve, or at least further consider her concerns (in the wider context of the need to ensure that service users were kept safe and the respondent complied with its legal obligations and operational duties arising out of Covid).

Issues 4 and 5 – the fairness of the dismissal

132. The respondent contended that if the claimant was constructively dismissed, the dismissal was otherwise fair. The Tribunal did not need to determine those issues, having found that the claimant was not dismissed. The fair reason relied upon was some other substantial reason, namely that the respondent had lost trust and confidence in the claimant's ability and/or willingness to perform her duties in the context of the extraordinary circumstances and challenges posed by the Covid-19 pandemic.

133. The Tribunal would not have found any dismissal to have been fair (had a dismissal been found). Had the Tribunal found that the claimant's concerns about PPE and/or her concerns for the service users in the light of the rota, amounted to a fundamental breach of the duty of trust and confidence (and the claimant had resigned in response to the breach), it would not have found that the reason for that breach was a fair one. Such a finding would have been inconsistent with the breach which would have been found. In any event, the respondent had not lost trust in the claimant, as demonstrated by Ms McDaid's suggestion to the claimant that she took time to consider her resignation and Ms Parkinson's evidence that had the claimant sought to withdraw her resignation she would have been treated in the same way as any other employee and would have been allowed to retract her resignation. That evidence was inconsistent with the fair reason relied upon by the respondent, and it

needing to be a fair reason for dismissing the claimant in all the circumstances of the case.

Issues 6 to 10 – disability and reasonable adjustments

134. The respondent accepted that the claimant had a disability at the relevant time as a result of her stress, anxiety and depression.

Knowledge of disability

135. The Tribunal considered the issue of the respondent's knowledge of the claimant's disability (part of issue 9) first, before it considered the other issues. The question of knowledge applied to the respondent organisation as a whole, it was not specific to any one individual or to any single decision-maker.

136. In 2017 the respondent received an occupational health report which informed it that the claimant had anxiety and that she had scored highly for anxiety, consistent with the symptoms that the claimant was describing. The claimant also received counselling paid for by the respondent. As recorded at paragraph 25 above, there was a dispute about what was discussed between Ms McDaid and the claimant at supervisions meetings between 2017 and 2019 and whether the claimant raised health issues in those meetings. On that dispute the Tribunal preferred the claimant's evidence to that of Ms McDaid. The claimant was clear in her evidence that the discussions had included the claimant raising concerns about her health. That was supported by what was said in the record of 16 July 2019 (184) which clearly suggested previous discussions about her not feeling well. On this issue, Ms McDaid's answers were felt to be evasive and there was a notable lack of any records recording earlier supervisions, even though documents must have existed (at least at some time). The claimant had a period of absence on ill health grounds due to stress in October 2019, which it was accepted would have been discussed with Ms McDaid on her return. The claimant worked very long hours for the respondent, but the Tribunal does not find that working long hours necessarily precluded the respondent having knowledge of the claimant's disability (which the respondent accepted that the claimant had at the relevant time).

137. In practice the respondent was put on notice of a potential disability in the report in 2017. It was aware that the claimant suffered from anxiety, which had scored highly. The report did not provide explicit advice on disability, but the one element for which evidence was lacking at the time was whether the condition was long term (or a short-term reaction to events at that time). By 2018 or at least 2019, when the claimant had discussed her ongoing issues with anxiety with Ms McDaid and had been absent due to stress and discussed that absence with Ms McDaid on return, the respondent was also on notice that in fact the impairment had been long term because it has lasted for more than twelve months. Accordingly, the Tribunal found that the respondent (as an organisation) could reasonably have been expected to know that the claimant had a disability prior to the date when the alleged failures to comply with the duty to make reasonable adjustments occurred.

138. In any event, by the date of the occupational health consultation undertaken on 20 May 2020, the respondent knew that the claimant had a disability. The report following that consultation recorded that the claimant had depression to a moderately

severe level and anxiety to a severe level, as well as the claimant having been diagnosed by her GP with both anxiety and depression. Whilst that report also did not record a view on whether the definition of disability was met, it was clear from what was said that the claimant did have a disability by that date (and even if that were not the case, the respondent could reasonably have been expected to know from that report, particularly when taken together with the previous report and the claimant's supervisions with Ms McDaid).

139. Whether or not the respondent knew or could reasonable have been expected to know that the claimant was likely to be placed at the substantial disadvantage contended when compared to someone without a disability, was considered by the Tribunal for each of the PCPs and adjustments relied upon.

Issues 7-10

140. The Tribunal considered all of issues 7-10 together for each of the PCPs relied upon. That is the Tribunal considered for each the relevant PCP, substantial disadvantage, knowledge of the disadvantage, and reasonable adjustment proposed. RA1 and RA4 were considered separately. RA2 and RA3 were considered together, as the issues significantly overlapped. The claimant did not succeed in any of these claims. The reasons are explained below.

The resignation and allowing retraction as a reasonable adjustment (RA1)

141. The first provision criterion or practice (PCP) which the claimant contended that the respondent applied was: accepting the resignation of a member of staff with immediate effect.

142. Legally there is no such concept as accepting a resignation. When someone chooses to give notice to end their contract of employment, the respondent does not have the ability to reject the notice given. However, in practice, the concept of acceptance of resignation is something which is often referred to. An employer does have the ability to bring employment to an end with immediate effect, where the decision is made not to require the claimant to work her notice, as occurred in this case (although not immediately).

143. In this case following the claimant's resignation, Ms McDaid suggested to the claimant that she give herself the time to calm down before making such a big decision. The claimant understood that Ms McDaid had suggested thinking about her resignation until Monday 6 April. Ms McDaid did not accept the resignation with immediate effect.

144. It was Ms Parkinson's evidence, which the Tribunal accepted, that when she telephoned the claimant on 2 April she did do so to try and persuade the claimant to withdraw her resignation. She also did not accept the claimant's resignation with immediate effect.

145. Ms Parkinson's evidence was that had the claimant sought to retract her resignation, she would have treated the claimant in the same way as she would have treated any other employee. When asked about this, Ms Parkinson gave examples of two other employees who had resigned and been allowed to retract their

resignation when they asked to do so. It was her evidence that the claimant would have also been allowed to retract her resignation had she asked to do so. The Tribunal accepted Ms Parkinson's evidence. Accordingly, the Tribunal not only found that the respondent did not accept the claimant's resignation with immediate effect, it also found that had the claimant actually asked to retract her resignation (which she did not), the respondent would have allowed her to retract her resignation.

146. Based upon the evidence of Ms Parkinson, the Tribunal did not find that the respondent applied the PCP relied upon, as it did not have a practice of accepting an employee's resignation with immediate effect. It had a practice (as evidenced by Ms Parkinson) of allowing employees to retract their resignation, where they sought to do so.

147. The respondent's representative submitted that none of the PCPs relied upon were legally capable of constituting PCPs. He submitted that, properly considered, they each represented singular decisions which were not PCPs. As explained in the section on the law above, the Tribunal did not accept that the **Ishola** decision meant that a one-off decision could never be a PCP as contended, but it did accept that there was an important distinction made in that Judgment between those decisions which can be summarised as: genuinely one-offs; and those which are part of a genuine continuum and can be a PCP because they either were applied to others or would have been in future if a hypothetical similar case arose. For the decision whether to allow employees to retract a resignation, the Tribunal found that there was a practice which was applied, but as addressed in the previous paragraph that was not the practice which the claimant contended. However, when considering the decision of Ms Parkinson to email the claimant on 3 April and confirm that the claimant's employment would end without her needing to work her notice, the Tribunal found that the decision was made for the reasons Ms Parkinson evidenced, based upon what the claimant had said in the telephone call on 2 April and based upon Ms Parkinson's view of whether the claimant was in a frame of mind where she would be able to work her shifts. For that decision, the Tribunal accepted the respondent's representative's submission that the decision was not a PCP at all. It was a one-off act which did not fall within the definition of a PCP, as it was not a state of affairs indicating how similar cases would be treated (as required and explained in **Ishola**).

148. Issue 8 asked, did the application of the PCP place the claimant at a substantial disadvantage in comparison with those without her disability? In the list of issues, it was recorded that the claimant was more likely to become stressed and upset and take a decision in haste which she would later want to withdraw. The Tribunal accepted that broad proposition as being correct for someone with anxiety and/or depression. However, whether the PCP applied placed the claimant at a substantial disadvantage also turned upon the PCP being considered. The claimant was not placed at a substantial disadvantage in comparison with those without a disability simply by reason of her not being required to work her notice. The claimant would have been placed at a substantial disadvantage (in comparison to those without a disability) if the respondent would not have allowed her to retract her resignation when she sought to do so (had she done so).

149. For issue 9, the Tribunal accepted that the respondent would reasonably have been expected to know that someone with anxiety and/or depression was more likely

to become stressed and upset and take a decision in haste which she would later want to withdraw. As a result, if the respondent had had a policy of not allowing a resignation to be retracted, it would reasonably have been expected to have known that the claimant would have been placed at a substantial disadvantage as a result.

150. The final question in the list of issues, was whether the respondent failed in its duty to make reasonable adjustments which it could have made in order to avoid the disadvantage suffered. The reasonable adjustment which the claimant said the respondent should have made in relation to the first PCP was allowing her until 6 April 2020 to consider retracting her resignation. The claimant did not retract her resignation and therefore this reasonable adjustment did not arise. If the claimant had endeavoured to retract her resignation on 6 April and the respondent had refused (having applied a PCP that it would not allow employees to do so), it is entirely possible that this would have been found to have been a reasonable adjustment which the respondent was under a duty to make. As the claimant did not in fact seek to retract her resignation, it was not such a reasonable adjustment.

The grievance investigation

151. The second PCP which the claimant contended that the respondent applied was: failing to follow the grievance procedure and timelines when investigating a grievance. The Tribunal considered that PCP alongside the third alleged PCP: not keeping a person who has brought a grievance up-to-date on the progress of the investigation.

152. The Tribunal found that the respondent did predominantly follow its grievance procedure (the failings having already been addressed at paragraph 116). As already explained, in the circumstances, the Tribunal found that the investigation was thorough and undertaken in a timely manner. The Tribunal found that Ms Scarbrough-Lang did relatively well, in the circumstances of the early weeks of the pandemic, to complete her detailed investigation in the time that she did. The indicative timescales in the respondent's grievance procedure were not met, but that was unsurprising and was not a failure to follow the procedure.

153. The claimant was kept updated about the progress of the investigation, because she was spoken to on the occasions when she telephoned the respondent and was provided with an update. Additional updates were not provided, but those were not required because the claimant had contacted the respondent and been provided with updates when she did so.

154. The Tribunal also accepted the respondent's representative's submission that neither of the PCPs relied upon were in fact capable of being a PCP, applying the Judgment in **Ishola.** The very way in which the two PCPs were expressed showed that what was alleged arose from the claimant's complaints about the unique person-specific way in which things occurred. The PCP relied upon for RA2 was in fact a failure to follow the procedures which the respondent normally would, rather than a complaint about a PCP which was applied.

155. Did the application of the PCPs place the claimant at a substantial disadvantage in comparison with those without her disability? In the list of issues it was recorded that the claimant was more likely to become anxious and upset by a

failure to deal with matters in accordance with the policy and timelines and/or by a failure to keep her up-to-date on the progress of the investigation. The Tribunal accepted those propositions as being correct (had it considered that the matters relied upon were PCPs and were PCPs applied to the claimant). In terms of knowledge and on the same basis, the respondent could reasonably have been expected to have known that someone with anxiety would be placed at the substantial disadvantages relied upon had the PCPs alleged been applied. For the shortcomings which the Tribunal found did in fact occur in adherence to the grievance procedure as detailed at paragraph 116, the Tribunal did not find that either those shortcomings placed the claimant at a substantial disadvantage when compared to people without a disability, or that the respondent could reasonably have been expected to know that they would.

156. The final question in applying the tests set out in the list of issues, was whether the respondent failed in its duty to make reasonable adjustments which it could have made in order to avoid the disadvantage(s) suffered? The reasonable adjustments which the claimant said the respondent should have made in relation to the second and third PCPs were complying with the procedures and timelines in the grievance procedure and/or keeping the claimant updated as to the progress of her investigation. For the reasons already explained, the Tribunal did not find that investigating the grievance more quickly was an adjustment which was reasonable (as it was addressed timeously), nor did it find that updating the claimant about the progress of the investigation undertaken more frequently than updates were provided, was reasonable. The Tribunal found that, particularly where the claimant was a former employee and in the first few weeks of the Covid lockdown, the investigation was undertaken quickly and thoroughly, and the claimant was kept appropriately informed.

Additional accompanier

157. The fourth PCP which the claimant contended that the respondent applied was: not allowing a person bringing a grievance to be accompanied in person at a meeting by someone else if the individual's union representative was attending remotely.

158. The respondent's grievance procedure stated that an employee had the right to be accompanied by a fellow worker or a trade union official (200). The Tribunal was provided with an exchange of emails between the claimant and Ms Foster of 8-10 June 2020 in which accompaniment was raised. On 9 June in an email the claimant said that she had requested her trade union representative attend, but hadn't had a response (607). She asked, in general terms, if they were available to attend, would it be possible to also bring a work colleague for support. Ms Foster responded on 10 June (606), without actually answering the specific question asked. She re-stated the policy that the claimant could be accompanied by a work colleague. She explained who it was she thought was the trade union official. The claimant responded on the same day to explain it was her understanding that the specific named trade union representative would be attending. The claimant attended the grievance hearing in person, with the seating having been arranged to ensure social distancing. She was not accompanied by a colleague. The trade union officer attended the meeting remotely by video link. It was Mr Alcock's evidence that he was unaware that the claimant had suffered from anxiety. Had she said at the

beginning of the hearing that she was unhappy in any way with her support, he would have rearranged the hearing. There was no evidence that the claimant raised any issue with accompaniment or support at the grievance hearing.

159. The Tribunal considered that there were two components to the issues being considered for this complaint. There was the respondent's policy (consistent with standard practice and the ACAS code) that an attendee at a grievance hearing could only be accompanied by either a trade union official or a work colleague. As a separate issue there were the specific arrangements in place at the time which meant that the claimant's accompanier only attended remotely and was not in the meeting with her.

160. The Tribunal found that the respondent's policy of an employee being entitled to be accompanied by either a work colleague or a trade union official was a PCP applied by the respondent. It was the application of its standard policy. It was what Ms Foster re-stated in the email which she sent.

161. The Tribunal did not find that the specific arrangements put in place for the claimant's own grievance hearing where her trade union official attended by video link, were a PCP. As the respondent's representative submitted and following **Ishola**, they were unique one-off arrangements which were not a state of affairs indicating how similar cases would generally be treated or how a case would be treated if they occurred again.

162. Did the application of the PCP place the claimant at a substantial disadvantage in comparison with those without her disability? In the list of issues, it was recorded that the claimant was more likely to become anxious during the meeting if not accompanied in person by a friend who was also a work colleague. The Tribunal did not find that the requirement that an attendee should only be accompanied by either a trade union official or a work colleague, did place the claimant at a particular disadvantage when compared with someone without her disability. It did not find that having a second attendee, in and of itself, placed someone with anxiety or depression at a disadvantage when compared with someone without a disability. For the more specific arrangements (found not to be a PCP) the Tribunal would have found that being accompanied only by a remote representative and not by someone present in the room and able to provide personal support, would be more likely to place someone with anxiety and/or depression at a substantial disadvantage than someone without a disability.

163. The Tribunal did not find that the respondent knew or should reasonably have been expected to know that the claimant would be placed at the disadvantage suffered as a result of the application of the PCP. The claimant did not inform the respondent of this, and the Tribunal did not find that it was something which should otherwise have been self-evident to the respondent, that the claimant being limited to one accompanier (even if a remote one) would place the claimant herself at the disadvantage relied upon. The claimant's email to Ms Foster in which the enquiry was made, did not spell this out or make any link to her disability or disadvantage suffered as a result. The claimant did not raise the issue at all in the meeting. The claimant's trade union representative did not raise it either. The Tribunal found that the requisite knowledge was not present for this alleged failure to make a reasonable adjustment.

164. The last question was whether the respondent failed in its duty to make reasonable adjustments which it could have made in order to avoid the disadvantage suffered? In the light of the previous findings, this was not an issue which the Tribunal needed to decide, as the claimant could not succeed in her claim whatever was determined about it. Nonetheless the Tribunal did consider the issue separately as it had heard evidence and argument about it. The reasonable adjustment which the claimant said the respondent should have made in relation to the fourth PCP, was by allowing the claimant to be accompanied in person by a friend who was also a work colleague. The Tribunal did not find that being accompanied by two people in the circumstances of this case and based upon the request made and the information provided by the claimant, was a reasonable adjustment which the respondent was under a duty to make. If the claimant had expressly sought the adjustment of being accompanied by someone present in the room itself as well as the trade union representative who attended by video link, that is something the respondent would have needed to have considered in the circumstances and in the light of the social distancing requirements in place at the time. In this case, based only upon the limited request made by the claimant in her email to Ms Foster and in circumstances where neither the claimant nor her trade union representative made the request (or explained it) to Mr Alcock, the respondent was not in breach of the duty to make reasonable adjustments by not facilitating it.

Summary

165. For the reasons explained above, the Tribunal did not find for the claimant in any of her claims.

Employment Judge Phil Allen
13 June 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 19 JUNE 2023

FOR THE TRIBUNAL OFFICE

Annex
List of Issues

Protected disclosure detriment – section 47B Employment Rights Act 1996

1. [The respondent accepted that the claimant had made protected disclosures in her: email of 30 March 2020; and email of 31 March 2020. Issue 1 did not need to be determined]

2. If so, was the claimant subjected to a detriment by any act or deliberate failure to act by the respondent done on the ground that she had made a protected disclosure in the following alleged respects:

D1: In denying the claimant the chance to reconsider and withdraw her notice by 6 April 2020;

D2: In allowing colleagues to go through her personal items after her resignation rather than getting her son (who was also employed there) to do so;

D3: In failing properly to investigate the concerns which she raised in those two emails, including by treating them as a grievance rather than as complaints under the whistleblowing policy; and/or

D4: In making a false allegation that she had been in breach of COVID guidelines?

Unfair Dismissal – Part X Employment Rights Act 1996

<u>Dismissal</u>

3. Can the claimant show that her resignation on 2 April 2020 should be treated as a dismissal in that:

(a) The respondent breached the implied term of trust and confidence by the following matters, either individually or cumulatively:

(i) Failing to provide proper PPE during March and early April 2020 to ensure the safety of staff in the event of a suspected case of COVID-19; and/or

(ii) Changing the rota for support workers with effect from 6 April 2020 without proper consultation with service users or taking into account their capacities and needs;

(b) That breach was a reason for the claimant's resignation; and

(c) The claimant had not lost the right to resign by affirming the contract after that breach, whether by delay or otherwise?

Fairness

4. If the claimant establishes that her resignation was a dismissal, has the respondent shown a potentially fair reason for that dismissal? The "some other substantial reason" on which the respondent relies was specified in the amended response form.

5. If so, was the constructive dismissal fair or unfair under section 98(4)?

Disability discrimination – Equality Act 2010

Disability

6. [The respondent accepted that the claimant had a disability at the relevant time by reason of a mental impairment resulting from anxiety, work-related stress and depression. Issue 6 did not need to be determined]

PCPs

7. If so, were any of the following provisions, criteria or practices ("PCPs") applicable to the claimant and others?

RA1: Accepting the resignation of a member of staff with immediate effect;

RA2: Failing to follow the grievance procedure and timelines when investigating a grievance;

RA3: Not keeping a person who has brought a grievance up-to-date on the progress of the investigation; and

RA4: Not allowing a person bringing a grievance to be accompanied in person at a meeting by someone else if the individual's union representative was attending remotely.

Substantial Disadvantage

8. If so, did the application of any PCP put the claimant at the substantial disadvantage identified below in comparison with a person without her disability?

RA1: The claimant was more likely to become stressed and upset and take a decision in haste which she would later want to withdraw;

RA2: The claimant was more likely to become anxious and upset by a failure to deal with matters in accordance with the policy and timelines;

RA3: The claimant was more likely to become anxious and upset by a failure to keep her updated as to progress;

RA4: The claimant was more likely to become anxious during the meeting if not accompanied in person by a friend who was also a work colleague.

Knowledge Defence

9. If so, can the respondent nevertheless show that it did not know and could not reasonably have been expected to know that:

(a) The claimant was a disabled person; and

(b) That the claimant was likely to be at the disadvantage identified in relation to each PCP?

Reasonable Adjustments

10. If not, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken in order to avoid the disadvantage? The adjustments for which the claimant contends are as follows:

RA1: Allowing her until 6 April 2020 to consider retracting her resignation;

RA2: Complying with the procedures and timelines in the grievance procedure;

RA3: Keeping the claimant updated as to the progress of her investigation;

RA4: Allowing the claimant to be accompanied in person by a friend who was also a work colleague.

Remedy

11. [As the hearing was determining liability issues only, the remedy issues did not need to be determined]