EMPLOYMENT TRIBUNALS

Claimant: **Ms Sarah Squires**

Respondent: **Cardiff and Vale University Local Health Board**

Heard at: **Cardiff** **On: 14, 17, 18, 19, 20, 21 and 24 April 2023; 25, 26 and 27 April 2023 (in chambers) and 28 April 2023**

Before: **Employment Judge S Jenkins**
Mrs J Beard
Mr A Fryer

Representation:
Claimant: Ms A Johns (Counsel)
Respondent: Mr G Graham (Counsel)

JUDGMENT having been sent to the parties on 2 May 2023, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Background

1. The hearing was to consider the Claimant's two claims. One, brought whilst she was still employed, raised issues of protected disclosure detriment, health and safety detriment, and disability discrimination. The other, brought after her employment had ended, raised a complaint of unfair dismissal.

2. We heard evidence from the Claimant on her own behalf, and from the following witnesses on behalf of the Respondent: Carol Preece, Locality

Lead Nurse for South and East Cardiff; Wendy Durham, formerly Senior Nurse for North and West Cardiff; Tracey Valade, Senior Nurse for North and West Cardiff; Kay Jeynes, formerly Director of Nursing for the Primary, Community and Integrated Care ("PCIC") Clinical Board; Amanda Rees, Team Leader and formerly Deputy Team Leader for the Splott District Nursing Team; Helen Donovan, Lead Nurse for North and West Cardiff; Lynne Topham, Locality Manager for South and East Cardiff; Jacqueline Westmoreland, Senior Nurse for Emergency and Acute Medicine; and Richard Desir, Director of Nursing for the PCIC.

3. We also took into account the written witness statements of Andrew Crook, Head of People Assurance and Experience; and Andrew Jones, Director of Nursing for the Children and Women's Clinical Board, the contents of which were uncontested. Finally, we also considered the written statement of Lynda Roberts, Nursing Informatics Lead. She did not attend to give oral evidence due to personal difficulties. Whilst we would normally give limited weight to the statement of a witness who did not attend to be cross-examined, much of her evidence was a recitation of written documents and therefore could largely be accepted.

4. We considered the documents in a bundle spanning 2,280 pages to which our attention was drawn, and we considered the parties' agreed cast list, chronology, and limited agreed facts. We also took into account the parties' closing submissions.

Claims

5. The Claimant confirmed at the outset of the hearing that she was withdrawing her claims against two named individual Respondents, Ms Preece and Ms Valade, who had been included as Respondents to her first claim, and a separate Judgment has been issued in relation to that.

6. The Claimant had previously withdrawn certain other specific claims which then left the following claims for consideration: Protected disclosure detriment, pursuant to Section 47B of the Employment Rights Act 1996 ("ERA"), health and safety detriment pursuant to Section 44(1)(c) or (e) ERA; discrimination arising from disability, pursuant to Section 15 of the Equality Act 2010 ("EqA"); and unfair dismissal, pursuant to Section 94 ERA.

7. The issues to be determined, which had been agreed between the parties, were as follows:

LIST OF ISSUES

Protected Disclosures Detriment

A. *It is common ground that disclosures 6, 7, 8, 9, 12, 13, 14, 16, 17, 18 and 19 in the Claimant's Section 47B Scott Schedule constituted protected disclosures. Disclosure 2 is no longer relied upon by the Claimant.*

B. *Did the remaining disclosures (1, 3, 4, 5, 10, 11 and 15) in the Claimant's Section 47B Scott Schedule constitute protected disclosures?*

C. *Was the Claimant subjected to a detriment on the ground that she had made a protected disclosure? The Claimant relies on the following allegations:*

    1. *The Claimant being made to feel ostracised and isolated from her team as a result of Tracey Valade and Carol Preece's behaviour towards her*

    2. *Colleagues of the Claimant being ordered not to communicate with her*

    3. *The Claimant's position and role being varied without her consent or other legal basis*

    4. *An unfounded disciplinary procedure being instigated against the Claimant*

Health and Safety Detriment

D. *In respect of each of the disclosures set out in the Claimant's Section 44 Scott Schedule (with the exception of disclosure 2, which is no longer relied upon by the Claimant):*

    1. *Did the disclosures set out in the Claimant's Section 44 Scott Schedule constitute a reasonable means of bringing to the Respondents attention circumstances the Claimant believed were harmful or potentially harmful?*
    2. *If so, would it have been reasonably practicable for the Claimant to have raised those matters via a Trade Union Health and Safety Representative, or the Respondent's Safety Committee?*

    3. *In the alternative, were there circumstances of danger which was serious and imminent?*

    4. *If so, did the disclosure constitute and appropriate step to protect the Claimant, colleagues or patients?*

E. Was the Claimant subjected to a detriment on the ground that she had done a protected act? The Claimant relies on the following allegations:

1. The Claimant being made to feel ostracised and isolated from her team as a result of Tracey Valade and Carol Preece's behaviour towards her

2. Colleagues of the Claimant being ordered not to communicate with her

3. The Claimant's position and role being varied without her consent or other legal basis

4. An unfounded disciplinary procedure being instigated against the Claimant

Discrimination arising from disability

F. It is common ground that the Claimant was disabled at the relevant time by virtue of her disability of psoriasis.

G. Was the Claimant subjected to unfavourable treatment because of something arising from her disability, namely the requirement to shield? The Claimant relies upon the following allegations:

1. The Claimant being made to feel ostracised and isolated from her team as a result of Tracey Valade and Carol Preece's behaviour towards her

2. Colleagues of the Claimant being ordered not to communicate with her

3. The Claimant's position and role being varied without her consent or other legal basis

4. An unfounded disciplinary procedure being instigated against the Claimant

H. If so, was that unfavourable treatment a proportionate means of achieving a legitimate aim?

Constructive (unfair) dismissal

I. Was the Respondent in repudiatory breach of the Claimant's contract of employment? The alleged acts relied upon by the Claimant as contributing to the breach are those set out in paragraph 46 of the Particulars of Claim.

J. If so, had the Claimant affirmed to the contract?

K. If so, was there a final straw relied upon by the Claimant which was capable of revitalising any earlier breach?

L. If so, did the Claimant resign in response to the breach?

M. If the Claimant was constructively unfairly dismissed, ought any award to be reduced to reflect the Claimant's contributory conduct?

8. We noted that the legitimate aims the Respondent advanced in relation to the Section 15 EqA claim were; maintaining patient safety, and maintaining staff wellbeing.

9. The hearing was confined to liability only, i.e. whether or not the claims succeeded.

Law

Protected disclosures

10. Section 43B ERA provides as follows:

"*43B.— Disclosures qualifying for protection.*

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

11. In deciding whether a disclosure is protected by law therefore, a Tribunal has to have regard to:

- Whether there has been a disclosure of information.
- The subject matter of disclosure in accordance with Section 43B ERA 1996, asserted by the Claimant in this case to be health and safety endangerment and breach of legal obligation.
- Whether the Claimant had a reasonable belief that the information tended to show one of the relevant failures in Section 43B ERA 1996.
- Whether the Claimant had a reasonable belief that the disclosure was in the public interest.

12. With regard to disclosure of information, the Employment Appeal Tribunal ("EAT"), in *Cavendish Munro Professional Risks Management Limited -v- Geduld* [2010] ICR 325, drew a distinction between the making of an allegation, which would not be said to disclose information, and the giving of information in the sense of conveying facts. However, the Court of Appeal in *Kilraine -v- London Borough of Wandsworth* [2018] ICR 1850, noted that the two categories are not mutually exclusive, and that the key guidance from *Geduld* was that a statement which was devoid of specific factual content could not be said to be a disclosure of information.

13. With regard to reasonable belief, we needed to be satisfied that the information tended to show a relevant failure in the reasonable belief of the worker, i.e. in this case the Claimant. The EAT, in *Korashi -v- Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4, directed that that involved applying an objective standard to the personal circumstances of the discloser. The EAT also noted, in *Darnton -v- University of Surrey* [2003] ICR 615, that the claimant does not need to be factually correct and need only demonstrate that they have a reasonable belief.

14. With regard to public interest, we were mindful of the guidance provided by the Court of Appeal, in *Chesterton Global Limited -v- Nurmohamed* [2017] EWCA Civ 979, that noted that the following matters would be relevant:

a. The numbers in the group whose interests the disclosure served.
b. The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed.
c. The nature of the wrongdoing disclosed.
d. The identity of the alleged wrongdoer.

Health and safety matters

15. Section 44(1)(c) ERA provide as follows:

> "*44.— Health and safety cases.*
>
> *(1) An employee 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—*
>
> *…*
>
> *(c) being an employee at a place where—*
>
> *(i) there was no such representative or safety committee[1], or*
>
> *(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,*
>
> *he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.*"

16. In *Balfour Kilpatrick Ltd v Acheson and ors* [2003] IRLR 683, the EAT, whilst addressing a claim of unfair dismissal on health and safety grounds under section 100(1)(c), identified three requirements that need to be satisfied for a claim under S.44(1)(c) to be made out:

    a. It must have not been reasonably practicable for the employee to raise the health and safety matters through the safety representative or safety committee.
    b. The employee must have brought to the employer's attention by reasonable means the circumstances that he or she reasonably believes are harmful or potentially harmful to health or safety.
    c. The reason, or principal reason, for the dismissal must be the fact that the employee was exercising his or her rights.

Section 44(1)(e)

17. Section 44(1)(e) provides as follows:

> "*44.— Health and safety cases.*

[1] i.e. a representative or safety committee specified at section 44(1)(b)

(1) An employee 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—

…

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."

18. The EAT, in *Oudahar v Esporta Group Ltd* [2011] ICR 1406, again assessing the identical unfair dismissal provision set out at section 100(1)(e), noted that a two-stage approach is appropriate under S.44(1)(e). First, the tribunal should consider whether the criteria set out in that provision have been met as a matter of fact. Were there circumstances of danger that the employee reasonably believed to be serious or imminent? Did he or she take or propose to take appropriate steps to protect him or herself or other persons from the danger or take steps to communicate these circumstances to the employer by the appropriate means? If these criteria are not satisfied, then S.44(1)(e) is not engaged. However, if the criteria are made out, the second stage is for the tribunal to consider whether the employer's sole or principal reason for its action was that the employee took or proposed to take appropriate steps.

Detriment

19. The claims of detriment under both section 47B and section 44 ERA involved two elements; there must have been a detriment, and that must have been "on the ground" of the disclosure or the health and safety matter, i.e. there must be a causative connection.

20. "Detriment" is not defined within the ERA, but the House of Lords, in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, noted, in relation to similar claims under the Equality Act 2010, that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. The court noted that an unjustified sense of grievance cannot amount to a detriment, but emphasised that whether a Claimant has been disadvantaged is to be viewed subjectively. The Court of Appeal confirmed the same test applies in relation to detriments in protected disclosure cases in the case of *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] IRLR 374.

Causation

21. In relation to the question of whether detriment is "on the ground of" the disclosure of a health and safety matter, the Court of Appeal in *Manchester*

NHS Trust v Fecitt [2012] ICR 372 noted that section 47B "*will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*" (paragraph 45).

22. Again, the House of Lords had previously examined similar provisions within the Equality Act 2010 where treatment was required to be "by reason that". In *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065, Lord Nicholls noted that the test of assessing whether treatment had arisen "by reason that", involved questioning, "*why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason?*". The Court of Appeal in *Jesudason* endorsed that approach and we bore it in mind, changing "alleged discriminator" to "alleged causer of a detriment".

23. In any detriment claim, section 48(2) ERA provides that it is, "*for the employer to show the ground on which any act, or deliberate failure to act, was done*".

24. Section 48(2) however, does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure or health and safety matter, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure or raised the health and safety matter.

Discrimination arising from disability

25. Section 15(1) of the Equality Act 2010 (EqA), which is headed 'Discrimination arising from disability', provides that a person (A) discriminates against a disabled person (B) if:

    a. A treats B unfavourably because of something arising in consequence of B's disability, and
    b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

26. Section 15(2) goes on to state that '[S.15(1)] does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.' In other words, if the employer can establish that it was unaware — and could not reasonably have been expected to know — that the claimant was disabled, it cannot be held liable for discrimination arising from disability.

27. In *Pnaiser v NHS England and anor* [2016] IRLR 170, the EAT summarised the proper approach to establishing causation under S.15. First, the tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then establish whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

28. With regard to legitimate aims, the Respondent contended that its aims were the protection of patient and staff safety, and the EAT in *Islam v Abertawe Bro Morgannwg Local Health Board* (UKEAT/0200/13) noted that the protection of patients can be a legitimate aim.

29. With regard to proportionality, in *Gray v University of Portsmouth* (UKEAT/0242/20), the EAT made it clear that, in the context of a S.15 claim, a tribunal must carry out a critical evaluation on the question of objective justification, entailing a weighing of the needs of the employer against the discriminatory impact on the employee.

Constructive unfair dismissal

30. In a constructive unfair dismissal case such as this, the touchstone authority remains *Western Excavating (ECC) Limited -v- Sharp* [1978] ICR 221, which noted that three matters fall to be considered:

    (i) Was there a repudiatory breach of contract?
    (ii) If so, did the Claimant resign in response to that breach and not for another reason?
    (iii) If so, did the Claimant nevertheless affirm the contract, whether by delaying too long in resigning, or by words or actions which demonstrated that she chose to keep the contract alive?

31. The breach in this case was asserted to be a breach of the implied term of mutual trust and confidence. Whilst the ability to pursue a constructive dismissal claim based on that implied term had been established by the Employment Appeal Tribunal as far back as 1981 in the case of *Woods -v- WM Car Services (Peterborough) Limited* [1981] ICR 666, it was expressly approved by the House of Lords in *Malik -v- BCCI SA (in compulsory liquidation)* [1997] ICR 606, where Lord Steyn confirmed that it 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".

32. It has been clear, since *Woods* in 1981, that any breach of the implied term of mutual trust and confidence will be a repudiatory breach. However, as noted in *Malik*, the conduct has to be such that it is likely to "destroy or seriously damage" the relationship of trust and confidence.

33. The prevailing law of constructive dismissal has been more recently summarised by the Court of Appeal in *Omilaju -v- Waltham Forest London Borough Council* [2005] ICR 481, where Dyson LJ explained it, at paragraph 14, as follows:

> "*1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.*
>
> *2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H—35D (Lord Nicholls) and 45C—46E (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.*
>
> *3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, per Browne Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to* destroy or seriously damage *the relationship (emphasis added).*
>
> *4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik, at p 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at* objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).*
>
> *5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para DI [480] in Harvey on Industrial Relations and Employment Law:*

"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to terminate a deteriorating relationship.""

34. Dyson LJ continued at paragraph 15:

"*The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd [1986] ICR 157. Neill LJ said (p167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p169F:*

"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?" (See Woods v W.M. Car Services (Peterborough) Ltd. [1981] ICR 666.) This is the "last straw" situation."

35. With particular reference to the "last straw", Dyson LJ went on to say, at paragraphs 19 and 20:

"*…A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a

series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred."

36. In this case, the Claimant's contention, as noted in her resignation letter, was that the Respondent's notification that the disciplinary allegations were proceeding to a disciplinary hearing was the final straw.

37. The approach to be taken in last straw cases was considered further by the Court of Appeal in *Kaur -v- Leeds Teaching Hospitals NHS Trust* [2019] ICR 1, where Underhill LJ stated, at paragraphs 45 to 46:

"*If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the Omilaju test), it should not normally matter whether it had crossed the Malik threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so.*

"Fourthly, the "last straw" image may in some cases not be wholly apt. At the risk of labouring the obvious, the point made by the proverb is that the additional weight that renders the load too heavy may be quite small in itself. Although that point is valuable in the legal context, and is the particular point discussed in Omilaju, it will not arise in every cumulative breach case. There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)."

38. Underhill LJ then set out, at paragraph 55, a number of questions that the Tribunal should ask itself in a constructive dismissal claim:

"*I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been*

constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

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

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

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

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

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

None of those questions is conceptually problematic though of course answering them in the circumstances of a particular case may not be easy."

39. Underhill LJ also noted, at paragraph 75, in relation to the facts of the *Kaur* case, that, "*…a fair disciplinary process cannot, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee*".

Findings

40. Our findings, reached on the balance of probability where there was any dispute, are set out below. Ultimately, there were few relevant areas of direct dispute between the parties as to the events that occurred.

41. Whilst we have set out our reasons broadly in the usual chronological order, we have dealt with some elements by reference to specific themes.

Background

42. The events giving rise to the claims took place from March 2020 onwards. In terms of background, the Claimant qualified as a nurse in 1989 and worked as a nurse from that point onwards up to the termination of her employment in August 2021. The Claimant commenced her latest employment with the Respondent in April 2005, and, in September 2018,

she was appointed to her latest post of Team Leader (Band 7) of the Respondent's Splott District Nursing Team.

43. By the time of the events in this case, the Respondent operated its District Nursing Services in Cardiff by splitting them into two localities; North and West, and South and East. Each locality comprised a Locality Manager and Assistant Locality Manager, and, on the patient-facing side, a Lead Nurse and a Senior Nurse. Each locality was then sub-divided into districts, led by a Team Leader, supported by Deputy Team Leaders at Band 6, other nurses at lower bands, and Healthcare Support Workers. The Claimant was the Team Leader of the Splott District Team, based in the South and East locality. She led a team of some 22 staff, supported by three Deputy Team Leaders; Amanda Rees, Samantha Dodd, and Katie Luff.

44. In early 2020, the Lead Nurse for the South and East locality left employment, and Carol Preece, the Senior Nurse for the locality, took on the role of Lead Nurse, initially on an interim basis, and then substantively from March 2020. By that stage, the Senior Nurse role in the North and West locality was shared between Tracey Valade and Wendy Durham, and it was decided that they would undertake the role of Senior Nurse in the South and East locality in addition to their existing shared role, on a temporary basis. Ms Valade and Mrs Durham split the South and East teams between them with Ms Valade taking on responsibility for the Splott team.

45. Also early in 2020, the Locality Manager for the South and East locality left. Lynne Topham took up that role, initially on an interim basis, in January 2020.

46. Our only other background observations were that the Claimant was a professionally effective Team Leader, who strived for high standards of patient care. She was however viewed as a challenging and assertive individual, with strong views and opinions. The Claimant in her own witness statement confirmed that she recognised that she could be perceived by others as "direct".

<u>March 2020 – The Claimant's concerns</u>

47. By March 2020, the COVID-19 pandemic had started to take hold. The Claimant was off sick, due to a virus, for two weeks, and returned to work on 24 March 2020, the first lockdown having been announced the day before.

48. The pandemic placed significant demands on Health Boards, having to deal with a situation for which they were ill prepared. Advice and guidance as to how to deal with patients whilst avoiding infection was being produced on a

constantly changing basis, often being updated within hours, reflective of the constantly changing understanding of how COVID-19 was transmitted. Also at that time, the need for PPE, and the ability to procure it, constantly changed.

49. The services provided by Health Boards also changed, with resources being focussed on frontline care, particularly of patients with COVID-19. Staff were then redeployed to provide that frontline care where possible.

50. In relation to the District Nursing Services provided by the Splott Team, whilst some activities were put on hold, there remained a need for nurses to visit patients in their homes to provide care.

51. On her return to work, the Claimant examined guidance produced by Welsh Government, Public Health Wales and the World Health Organisation and produced a 24-point guide for her team, relating to matters from the use of the team's office base through to visits to patients and their aftermath.

52. The Claimant also began contacting her managers with queries and concerns over the guidance and advice provided, and the availability of PPE.

53. Many of these contacts were asserted by the Claimant to amount to protected disclosures and/or to involve the raising of health and safety matters, and, as noted in the List of Issues, many, although not all, of them were accepted by the Respondent as amounting to protected disclosures. Ultimately, during the course of these proceedings, the Claimant asserted that she made 18 protected disclosures during the period 24 March 2020 to 3 July 2020, of which the Respondent accepted that 11 were indeed protected disclosures. As the Claimant's Counsel accepted that none of the asserted detriments were related to any specific disclosures, we did not consider it appropriate to record each and every one of them. We did however note the main themes arising from them, and the nature of them.

54. The first protected disclosure was in fact made just after midday on the Claimant's return to work on 24 March 2020. The Claimant emailed Mrs Durham and Ms Valade, referring to having been told to contact them by Mrs Preece. In the email the Claimant questioned the need to take precautions in relation to all patients and not just those suspected of having COVID. She also pushed for an increased stock of Clinell wipes[2], and referenced the use of goggles.

55. Mrs Durham replied to the Claimant, half an hour later, noting that masks and wipes were held centrally, that further deliveries were being arranged, and that no staff had been issued with goggles. She also confirmed that the

[2] A brand of cleaning and disinfectant wipes.

advice given to all staff was that PPE was to be worn only when a patient presented with symptoms or had been confirmed as having COVID.

56. Subsequent emails sent by the Claimant generally involved similar topics; the need to wear PPE over and above face masks, principally goggles, and the poor quality of the goggles provided; the need to ensure a greater supply of Clinell wipes due to the increased likelihood that the nurses in the Splott team would not have access to washing facilities when visiting patients; risk assessments; and access to testing for members of her team. The Claimant was also insistent on raising her queries and concerns by email, and was keen to have a response by email so that she could pass relevant information on to her team. By contrast, those managing her, principally Ms Valade and Mrs Preece, for understandable time-related reasons, preferred to deal with queries over the telephone.

57. The Claimant sent further emails raising the same matters on 30 March 2020 to Mrs Preece and Ms Valade.

58. On 6 April 2020, Mrs Jeynes, the Director of Nursing for the PCIC Clinical Board, sent an email to Lead Nurses, Senior Nurses and Team Leaders, thanking them for their work in the exceptional circumstances that prevailed. The Claimant, who although managerially several tiers below Mrs Jeynes had known her for many years, replied to that email, noting that she had raised several issues around inadequate PPE, stating that the goggles that had been provided were not fit for purpose. She also referenced that her team had sourced their own goggles. Mrs Jeynes replied promptly, commenting that she was "*a little concerned*" that staff had sourced their own PPE, noting that it was better for the issue to be raised and for PPE to be sourced centrally. Mrs Jeynes then emailed Ms Valade, Mrs Durham and Mrs Preece, noting that she was "*concerned about Sarah's behaviour escalating again, which isn't helpful*".

59. On the same day, 6 April 2020, the Claimant had an email exchange with Ms Valade around the availability of Clinell wipes and masks, and the suitability of goggles.

60. The responses provided to the Claimant's emails were understandably brief and generally answered the Claimant's specific questions without expansion. We were conscious, from our general knowledge, that the early days and weeks of the pandemic were fraught for everyone, with the understanding of the transmission of COVID developing constantly. At that stage those undertaking managerial roles were constantly receiving queries from those undertaking patient-facing work, relating to patient and staff safety.

61. The Claimant was not satisfied with the information she received in relation to her concerns, and therefore, on 17 April 2020, sent an email to Mrs Jeynes, Mrs Preece and Ms Valade. The Claimant attached to the email a document setting out the Splott team's concerns and asked for a concise response in order to alleviate some of their fears. The attachment covered the areas previously addressed in the Claimant's emails, and also dealt additionally with the verification of death of patients, with nurses seemingly being required to get involved with that.

62. Mrs Jeynes replied to the Claimant the following day, 18 April 2020, noting that, given how busy everyone was, it would be better for the Claimant to contact her Senior Nurse or Mrs Preece rather than to send emails which might not be able to be reviewed for several days. Mrs Jeynes confirmed that she was happy to speak to the Claimant, whether over the telephone or in person, and that she had asked Mrs Preece to arrange a time to speak to the team in the presence of their Trade Union Representative, Mike Jones, although she observed that she did not think that that would be a good use of Mr Jones' time.

63. A meeting then took place on 23 April 2020. Present were the Claimant and her three deputies, Mrs Preece and Mr Jones. The meeting covered the issues that had been raised previously. It was agreed that regular meetings would be helpful, and that one would take place two weeks later.

64. Notwithstanding that, the Claimant sent an email to Mrs Preece on 30 April 2020, noting that she was yet to receive any answers to the points and questions raised at the meeting on 23 April 2020. Mrs Preece replied, within minutes, noting that she was in the process of responding, although it does not appear that a response was subsequently provided.

65. On 5 April 2020, the Claimant received a letter from the Welsh Government, formally advising her to shield due to a pre-existing health condition. As a consequence, she did not physically attend her workplace from that point onwards. She informed Mrs Preece of that immediately by telephone, and Mrs Preece agreed to make arrangements for a laptop to be provided to the Claimant in order that she could work fully from home. The Claimant could undertake most of her duties from home, other obviously than any patient-facing ones, by using a netbook that she already had. At this stage, the Claimant was therefore continuing to undertake her role as Splott Team Leader, and there was no suggestion from Mrs Preece at that point that she should do otherwise.

66. The next meeting took place on 7 May 2020, with the same persons in attendance, but with the Claimant participating via FaceTime. Again the same issues were discussed.

67. On 12 May 2020, the Claimant then sent an email to Mrs Jeynes, copied to her Trade Union Representatives, but, unlike previous emails, not copied to the Claimant's deputies. The Claimant commenced the email by asking for it to be considered as a formal grievance. The Claimant divided her concerns into four areas, "*Eye-protection*", "*Expiry dates*" (i.e. of PPE), "*Risk assessment*", and "*Legislation*". She then asked several questions regarding the adequacy of PPE and risk assessments. She concluded by saying, "*We feel as a team that our health, safety and welfare at work has been seriously compromised*", and asking for a constructive response.

68. Mrs Jeynes replied to the Claimant some 15 minutes later and said, "*I am very disappointed that you have sent this email to me and I'm not sure registering a grievance is the correct process in which to raise your issues that you believe have remained un resolved. I believe there are alternate routes to discuss the issues you have raised*". Mrs Jeynes confirmed in her oral evidence that her disappointment related to the fact that the Claimant had submitted the grievance and not that it had been submitted to her.

69. The Claimant replied, again some 15 minutes later, noting that she felt that she had had to raise the issues formally as they remained unresolved despite her having raised them numerous times previously. She confirmed however that if there were alternate routes to resolve her concerns she was willing to discuss them informally.

70. Mrs Jeynes then responded the following day, noting that a Skype call would be arranged. She noted however that she was aware that a number of people had met with the Claimant over the previous few weeks and had provided the Claimant with answers to most of her queries but that she remained dissatisfied. She observed that everyone had tried to be open and honest with the Claimant and that she was not sure that anything she could advise the Claimant would provide any further assurance, but that she was very happy to speak with her. It was then arranged that the discussion of the grievance would be linked in with the next fortnightly meeting on 21 May 2020.

71. That meeting took place with the same attendees as previously, with the addition of Mrs Jeynes. The Claimant again attended remotely. No notes were produced by anyone on the Respondent's side of this meeting, or indeed of the previous ones, with the only notes being produced by the Claimant. In those she described Mrs Jeynes as being hostile from the beginning and having been directly confrontational, although we felt that that was, in fact, unlikely to have been the case in the context of a meeting where other staff, and indeed a Trade Union Representative, were present. No other person indicated that Mrs Jeynes had been hostile or confrontational.

72. The Claimant herself recorded in her note that the meeting ended after Mr Jones asked if there were any other issues to be resolved and nobody raised any other issues. From the Claimant's perspective however matters generally remained unresolved. That contrasted with the view of Mrs Jeynes and Mrs Preece, and indeed Mrs Rees, who felt that matters had been resolved. That also was subsequently established as the view of Mr Jones who, in his interview with Ms Roberts in October 2020 as part of her grievance investigation noted, "*On 2 occasions, it was agreed that the matters had been resolved. Sarah needed to raise the issues as a team leader, and on both occasions we agreed that the matters had been resolved and I thought that was the end of it*".

73. There seemed to us to be different perspectives about what "resolved" involved. Management, principally Mrs Jeynes and Mrs Preece, felt that an explanation of why things were as they were, for example in relation to the goggles, was sufficient. By contrast, the Claimant appeared to require the matters to be completely resolved, e.g. by the provision of effective goggles, before she would agree that a resolution had been reached.

The Claimant's role

74. As we have noted, the Claimant was unable to attend work from 6 May 2020 onwards due to her need to shield. She therefore worked from home from that point onwards.

75. Prior to the onset of the pandemic, the Claimant had undertaken a significant amount of patient facing work, more than would be the case with other Team Leaders. The Claimant was obviously not able to visit patients whilst shielding, but was able to undertake the other aspects of her role, and initially did so. She was however unable to access the Respondent's electronic personnel system without a laptop.

76. The Claimant arranged with her deputies that one of them would call her between 9.30am and 10.00am each morning to discuss the day's workload. Some nurses would then speak to the Claimant and seek advice and guidance throughout the day, similar to the way they would have done so previously, albeit that it was now exclusively by telephone.

77. Prior to the pandemic, nurses would discuss the handover of patients, i.e. where further visits would be required, towards the end of each day. As the number of staff in the Splott district office was being kept to a minimum, the handover was instead done by way of a conference telephone call. The Claimant initially participated in those calls, but as the number of participants was limited to ten, with later callers not being able to get through, the Claimant then stopped participating to maximise the number of nurses who would be visiting patients being able to attend.

78. The leader of another district nursing team was also required to shield and it appears that she, by agreement with her managers, continued to undertake the administrative and managerial elements of her role, such as rostering, completion of root cause analyses ("RCA") and the investigation of Datixes i.e. incident reports, together with other project duties allocated to her. No discussion took place with the Claimant however, when she started to work from home, about any modification to her duties.

79. Within some two weeks however, the Claimant's deputies became concerned that her continued involvement in clinical discussions was making their job difficult. We only heard directly from Mrs Rees about that, but both Ms Dodd and Ms Luff mentioned similar concerns in their interviews with Ms Roberts in September 2020. The deputies were concerned that the Claimant was undermining the decisions they were making. We noted however that the only concrete example of that provided by Mrs Rees, both at the time and in her evidence before us, related to the arrangements for a phased return to work of a member of the team. The Claimant accepted that she had overruled the proposals put forward by her deputies, feeling that they did not adequately cater for the staff member's needs.

80. The deputies were also concerned that the requirement that they call the Claimant between 9.30am and 10.00am each day was onerous, as that was a busy period for them. They also felt that the Claimant was less able to advise on clinical matters as she was not in the office and could not therefore fully appreciate the issues under consideration. The deputies also felt that morale within the team had improved whilst the Claimant had been at home, with more junior members of the team being more at ease.

81. The deputies did not raise their concerns with the Claimant to try to seek adjustments to the working arrangements. Instead they raised their concerns initially with Mrs Preece, and then with Mrs Jeynes, at a meeting arranged on 21 May 2020 just prior to the meeting in which the Claimant participated.

82. Following that discussion, Mrs Jeynes directed Mrs Preece to let the deputies run the team whilst the Claimant was shielding and to find other work for the Claimant to do. Mrs Preece spoke to other members of the Splott team, without raising the Claimant directly, and formed the view that staff would be more productive if the deputies took over the running of the team.

83. We observed that the evidence of Mrs Preece and Mrs Jeynes was not completely at one over the rationale for that decision. Mrs Jeynes in her witness statement noted that the reason for putting the deputies in charge

of the team was because they had said that the Claimant was interfering and making their roles difficult. Mrs Preece by contrast in her witness statement, noted that "we" (we presumed Mrs Preece and Mrs Jeynes) were concerned about the Claimant's anxiety levels, but also wanted to ensure that the deputies were being allowed to manage the day to day running of the team.

84. With regard to the Claimant's anxiety levels, we observed that she had complained of experiencing heart palpitations in April 2020, but that her health had improved when she started shielding.

85. Mrs Preece then telephoned the Claimant on 26 May 2020 to inform her of the decision that had been taken to ask her to step down from managing the team. Mrs Preece confirmed the content of her discussion in an email to the Claimant that evening, which we were satisfied was an accurate reflection of that discussion.

86. Mrs Preece made no reference to concerns having been raised by the Claimant's deputies, only noting that they felt that staff would be more productive and effective if they were to take over the running of the caseload and the team on a day to day basis.

87. Mrs Preece's focus was on the Claimant's health, and she noted her concern that managing the team remotely was more challenging and stressful and would impact on the Claimant's own health and wellbeing. She commented that she felt that it would be in the Claimant's own best interests to have a complete break from her Team Leader responsibilities for a period. She outlined options as to how that could be achieved which were; taking time off to recharge batteries, undertaking some specific projects at home, and being seconded to the track and trace service. Mrs Preece did not, in this conversation and email, make any reference to the Claimant continuing with the administrative or managerial elements of her Team Leader role.

<u>The Claimant's Grievance</u>

88. The Claimant sent an email to her Trade Union Representative, Mr Jones, following her conversation with Mrs Preece. She noted that Mrs Preece's focus had been on her health and wellbeing, but that she had responded by saying that her stress levels had been greatly reduced following shielding. She confirmed that she had told Mrs Preece that she wanted to remain in charge of the team and could work on projects in addition to that.

89. The following day, 27 May 2020, the Claimant emailed the Splott team, noting that she was still working from home as their Team Leader, and was available, as always, to be contacted about any issues. On 28 May 2020,

she then emailed her deputies, reminding them that they still needed to call her every morning. Those emails were passed up the line to Mrs Preece and Mrs Jeynes.

90. The Claimant then replied to Mrs Preece's email of 26 May 2020 on 29 May 2020. She confirmed that she was feeling well and healthy, and was fit to undertake her role, but would be happy to attend an Occupational Health appointment. She confirmed that she wished to continue to be employed in her Team Leader role and was not interested in the other options that had been proposed. She also noted that she was concerned that the proposal to remove her from her role had arisen in direct response to her disclosures regarding health and safety.

91. The Claimant was on annual leave the following week, and, having had no reply from Mrs Preece, sent a further email to her on 12 June 2020. She noted that she had not received any contact from her team, and therefore that the only tasks she was undertaking were to forward external emails to her deputies for them to action. She noted that the situation was having an impact on her mental health and asked to be allowed to revert back to her role.

92. Mrs Preece then responded to the Claimant on 15 June 2020. She noted that the Claimant continued to be employed as the Splott Team Leader but could not fully undertake her role due to the fact that she was shielding, and that, as a result, she had suggested that the Claimant should focus on project or testing work on an interim basis. She also reiterated her concern over the Claimant's health and wellbeing.

93. In response to the Claimant's statement that she was not interested in any of the proposed options, Mrs Preece confirmed that the Claimant could take a complete break whilst shielding, or alternatively could undertake the administrative and managerial elements of her role.

94. Mrs Preece observed that the proposal that the Claimant undertake alternative work had been based on patient and service need and had not been in response to the Claimant's health and safety concerns.

95. No further communication took place between Mrs Preece and the Claimant at this time. Mrs Preece's direction that the Claimant should step back from her Team Leader role appears to have been implemented in practice, as the Claimant continued not to receive calls from her team, and therefore continued to have very little to do. The Claimant was then certified as unfit for work from 22 June 2020, and did not return to work.

96. On 26 June 2020, the Claimant emailed her Trade Union Representatives, Mr Jones and Stuart Egan, noting that, since 26 May 2020, she had been

completely ostracised from the running of her team on the instruction of Mrs Preece, and that she believed that that had been as a result of protected disclosures she had made. She observed that, unsurprisingly, her mental health had been adversely impacted. She confirmed that it was her intention to raise a grievance about the way that she had been treated. She then submitted that grievance on 3 July 2020.

97. In that, the Claimant set out a timeline of events, and concluded that she had: raised legitimate health and safety complaints and protected disclosures; suffered detrimental treatment in response; and had suffered an exacerbation of stress and anxiety as a result of that treatment. The grievance was acknowledged by the Respondent's HR Team on 6 July 2020.

Disciplinary Issue

98. Running parallel to the matters we have noted, was a disciplinary process. That originated from the treatment by the Claimant of a patient on Saturday 4 April 2020. The Claimant had attended the patient, someone seen regularly by the Splott team, and who received regular visits from carers several times each day. The patient had an indwelling catheter which he had pulled out, and the carers had requested a visit from a district nurse.

99. The Claimant attended the patient and did not take full observations of him, noting that there was no change to his normal condition and that he was not acutely unwell. She also decided not to re-catheterise the patient, but for that to be reviewed depending on the patient's urine output.

100. The patient was next visited by other members of the team on Tuesday 7 April 2020, a regularly scheduled visit, when the patient was observed as being unwell with possible sepsis. He was then transferred to hospital by ambulance, but regrettably died early the following morning.

101. As a result of the incident a Datix was completed and was passed to Ms Valade, who in turn passed it to Mrs Jeynes. She initially noted that a thorough investigation into the treatment of the patient would be needed, and, when it was subsequently noted that the patient had died, requested a full RCA. It seemed to us that that action was entirely appropriate in the context of an incident of that type.

102. Ms Valade commenced the RCA. She undertook some investigations later in April, including meeting the Claimant and raising a query about the treatment of the patient with the Respondent's Director of Continence Services. She had not however completed her work before she commenced a period of absence from 4 May 2020.

103. The RCA was then completed by Mrs Preece. We saw and heard no evidence about how that came about, but we observed that the only suitable persons in the South and East locality would have been Mrs Preece as the Lead Nurse, and Mrs Durham the other job-sharing Senior Nurse from the North and West locality who was assisting with the management of the South and East locality at the same time as managing the North and West locality. Given Mrs Durham's workload, which would no doubt have increased following the absence of Ms Valade, we did not consider that there was anything surprising or objectionable about the fact that the RCA was completed by Mrs Preece.

104. Mrs Preece completed her RCA on 18 June 2020 and passed it to Mr Desir, who by then had taken over from Mrs Jeynes as Director of Nursing for PCIC on 1 June 2020 following her retirement. He replied to Mrs Preece on 25 June 2020, copying in Mrs Topham the Locality Manager, noting that the disciplinary process should be instigated in relation to the Claimant's actions.

105. We noted with regard to the Respondent's procedures, that the RCA process is not connected to the disciplinary process. It focuses on understanding the root causes of how an incident occurred and on what lessons can be learned. If however it is considered that the actions of a staff member in relation to an incident investigated under an RCA merit consideration from a disciplinary perspective, then the disciplinary process is implemented.

106. That involves an initial assessment or "fact finding" stage, which does not involve a comprehensive investigation, but does include a discussion with the employee and the consideration of preliminary information. That leads to a view being taken as to the action that should be taken, which could be no further action, could be an informal discussion, or could be a formal investigation. If a formal investigation is recommended, a detailed investigation will be undertaken with witnesses being interviewed and documentary evidence being collected. The investigation report is then passed to a Disciplining Officer who decides whether the matter should be progressed to a disciplinary hearing.

107. In this case, although Mrs Preece was undertaking an RCA, and there is a specific form for recording that, she mistakenly used the initial assessment, or fact finding, form. That only became apparent when Mrs Topham, who had been absent due to sickness for several weeks, returned to work at the end of June 2020. She, thinking that the disciplinary initial assessment stage had been completed by Mrs Preece, asked her to consider the disciplinary allegations that would be investigated in line with Mr Desir's direction. It was only when she saw Mrs Preece's document, and noted that it did not contain the level of detail that would usually be seen in an initial

assessment, that it became apparent that only an RCA had been carried out, and that it had been recorded on the incorrect form.

108. Mrs Preece then transferred her report into the correct form and provided that to Mr Desir on 30 July 2020. He then confirmed, on 31 July 2020, that a fact-finding investigation i.e. an initial assessment, should be undertaken into the Claimant's conduct on 4 April 2020. He allocated Mrs Donovan, the Lead Nurse from the North and West locality, to undertake the independent assessment. The Claimant was informed of that by Mrs Topham in a letter dated 19 August 2020.

109. Mrs Donovan met the Claimant on 7 September 2020, and also met Ms Dodd, who had been in work on the relevant weekend, and spoke to the Respondent's Director of Continence Services. She also considered the RCA and the statements and documents collated as part of that.

110. Based on the information she reviewed, Mrs Donovan felt that a formal investigation should take place. She considered that it had not been appropriate to leave the patient un-catheterised without seeking medical advice.

111. Mrs Donovan provided her initial assessment report to Mrs Topham, who had been designated as the Disciplining Officer for the purposes of the Respondent's Disciplinary Procedure. The report was initially provided on 6 October 2020, but was subsequently slightly amended to take account of some suggestions from the Respondent's HR Team.

112. Mrs Topham then wrote to the Claimant on 12 October 2020, having spoken to her over the telephone that morning, noting that a formal disciplinary investigation would be undertaken into allegations that the Claimant had failed in her duty of care to the patient in a number of ways, set out in six separate bullet points, as follows:

- "*you did not complete a robust clinical assessment of the patient based on the symptoms that were reported by the care agency staff on 4 April 2020 and his known clinical history*
- *you did not seek medical advice on 4 April 2020 in respect of the patient's reported symptoms, your concerns regarding the need for antibiotics and potential difficulties regarding re-catheterisation*
- *despite suspecting that the patient may have had a urinary tract infection, you chose not to seek medical advice and treatment vis the GP Out of Hours Service on 4 April 2020, instead you emailed the patient's GP requesting provision of antibiotics on 6 April 2020. You did not arrange for a repeated clinical assessment of [the patient] on the 6 April 2020 to support your request for antibiotics*

- *you failed to make direct contact with the care staff who attended [the patient] on 4 April 2020 to get details of the level of bleeding associated as a result of him pulling out his catheter and also failed to speak directly to the care agency to ensure that they were clear on instructions for ongoing monitoring*
- *you failed to ensure that this patient had his catheter reinserted without delay, even though the patient had a long history of urinary retention and intermittent catheterisation and was at risk of not being able to pass urine properly*
- *you failed to arrange appropriate levels of district nurse assessment on 5 and 6 April, when you knew that [the patient] was without his catheter and you suspected he may have had a urinary tract infection*"

113. Mrs Topham noted in her letter that the allegations were serious, and, if proven, could be considered to amount to gross misconduct.

114. The Claimant was informed that an Investigating Officer would be appointed who would make contact with her. Jacqueline Westmoreland, Senior Nurse for Emergency and Acute Medicine, was appointed as the Investigating Officer, and the Claimant was notified of that by Mrs Topham in a letter dated 19 October 2020.

115. Mrs Westmoreland had been contacted about the prospect of acting as an Investigating Officer, without knowing the individual involved or the circumstances of the case, in September 2020, in readiness for the possible next step. At the time, with the impact of COVID having diminished, she was satisfied that she had capacity. However, by the time she had been formally appointed and had received documentation from HR on 19 November 2020, the second wave of COVID was well underway, and Mrs Donovan, a Senior Nurse for Emergency Medicine, was heavily involved in dealing with it. She was not therefore in a position to take any meaningful steps in relation to her investigation until the second wave started to ebb towards the end of January 2021. No communication around those circumstances was provided to the Claimant by Mrs Westmoreland or by the Respondent's HR Department.

<u>Subsequent management of the grievance and disciplinary processes</u>

116. By that stage delays had also arisen in relation to the investigation of the Claimant's grievance, although for different reasons. A letter had been sent to the Claimant by the Respondent's Assistant Head of Workforce on 22 July 2020, noting that her grievance would be dealt with under Stage 2 of the Raising Concerns Procedure, and that Lynda Roberts (then known as Lynda Jenkins) would investigate.

117. Ms Roberts met the Claimant, together with her Trade Union Representative, on 24 August 2020. She then met 20 other individuals, predominantly members of the Splott team, but also Ms Valade, Mrs Preece, Mrs Jeynes and Mr Jones, the Trade Union Representative, over the following two months, the last interview taking place on 3 November 2020. Ms Roberts also considered a number of documents.

118. The Claimant herself provided a number of documents to Ms Roberts, although there were difficulties in Ms Roberts accessing them. The Claimant initially provided them in zip files attached to emails on 28 August 2020, but Ms Roberts was unable to access them. She notified the Claimant of that on 1 September 2020. She commented that it was likely that the Claimant would have to send paper copies but that she would check with the Respondent's IT Department.

119. Three weeks later, on 21 September 2020, Ms Roberts emailed the Claimant to say that she was still waiting to hear from the IT department with a different option in relation to the receipt of the zip files, and asked if the Claimant could send through paper copies for her care of the Respondent's office in Woodland House, Maes-y-Coed Road, Cardiff. The Claimant replied the same day, noting that she did not have a printer but could ask a family member to print the documents. She also queried why she had been asked to send the documents to Woodland House as Ms Roberts was based in Llandough Hospital. The Claimant was concerned that Woodland House was the base of several of the Respondent's managers and its HR team, with whom she had been in communication in relation to her protected disclosures.

120. Ms Roberts replied the following day, noting that whilst her office base was Llandough, she generally worked from home, which was closer to Woodland House. She confirmed that if the Claimant preferred to send the documents to Llandough she was more than happy, and noted that she would continue to contact the IT department, and would contact the Claimant by 28 September if printed documents were required.

121. Ms Roberts emailed the Claimant again on 30 September 2020, noting that she had heard from the IT department and asking the Claimant to re-send an email with the zip files. The Claimant did that in three separate emails the same day, but the zip files were unable to be accessed. Ms Roberts alerted the Claimant to that on the same day, and the Claimant confirmed that she would arrange for hard copies to be sent to Ms Roberts care of Woodland House.

122. Ms Roberts then completed her investigation report, although it was not clear precisely when that had occurred, and, as Ms Roberts did not attend to give evidence it could not be confirmed. The copy of the report in the

bundle was stated to be "October 2020", but that cannot have been accurate as, as we have noted, Ms Roberts did not complete her interviews until early November. The report does not in fact seem to have been finalised until early February 2021, as there was correspondence in the bundle from the Claimant to Ms Roberts dated 30 January 2021, noting that she had not heard from her since 2 November 2020, when Ms Roberts had informed her that she was in the process of writing the investigation report. Ms Roberts did not in her witness statement explain why three months had elapsed.

123. In her report Ms Roberts considered that the Claimant's concerns had been listened to and resolved, and that the reason why she had not been informed that the reason for the passing of the leadership of the team to the deputies had been to try to maintain their future working relationship. She did not consider the action had been taken to punish the Claimant for raising concerns.

124. Ms Roberts took advice from HR as to how she should respond to the Claimant's query of 30 January 2021, and was told that she should reply confirming that the report would be finalised by the end of the week and that she would then meet with Mrs Topham the following week to provide feedback. That was, it transpired, incorrect advice, as although Mrs Topham, as the Locality Manager, would ordinarily be the appropriate person to receive a grievance report and to decide on next steps, it was not appropriate for her to do so in this case as she was acting as the Disciplining Officer under the Respondent's Disciplinary Procedure.

125. Ms Roberts then emailed Mrs Topham on 8 February 2021, in light of the HR advice, to arrange a meeting to discuss the report. Mrs Topham replied, saying that, while she was happy to meet with Ms Roberts, she wanted clarity from HR that her involvement in the disciplinary process did not compromise her involvement in the grievance process. After some to-ing and fro-ing between Mrs Topham and HR, it was confirmed that Mrs Topham would not be involved in the grievance, and that Mr Desir would deal with that issue.

126. The Claimant having been informed, as it transpired incorrectly, by Ms Roberts that Mrs Topham would provide feedback on her grievance, sent an email to Mrs Topham on 9 February 2021, asking her to provide that feedback by email as opposed to a telephone call. She did not question the appropriateness of Mrs Topham providing feedback. The Claimant then sent a further email to Mrs Topham on 16 February 2021, asking when she could expect the feedback.

127. Mrs Topham then replied to the Claimant the following day, 17 February 2021, noting that the grievance process was separate to the disciplinary

investigation, and that she would not provide feedback in relation to it. She confirmed that she understood that it would be given by Mr Desir.

128. The Claimant replied to Mrs Topham on the same day, noting that she agreed that it would be inappropriate for Mrs Topham to meet with Ms Roberts to discuss her report and feedback to her, and querying why it had been the plan for that to happen. Mrs Topham replied on 18 February 2021, explaining that, whilst she would normally be involved, as Locality Manager, in managing a grievance, which had led to the Claimant being informed that that would happen, given the ongoing disciplinary investigation, that would not be appropriate.

129. As well as chasing progress in relation to the grievance investigation at the end of January 2021, the Claimant also chased progress in relation to the disciplinary investigation, where she again had heard nothing for over three months. She wrote to Mrs Topham on 30 January 2021, pointing out that she had had no contact on the matter since 19 October 2020, and that the Respondent's Disciplinary Procedure stated that she should expect regular updates.

130. The Claimant confirmed in her evidence, which was not challenged and which we therefore accepted, that her mental health had suffered during the delays in progressing the grievance and disciplinary issues, and in communicating with her.

131. Mrs Topham, being unaware that Mrs Westmoreland had not been able to make substantive progress with her investigation, sought clarification of the position from HR, who in turn checked with Mrs Westmoreland. It was reported to Mrs Topham that Mrs Westmoreland had considered documents in the case and had been working on a chronology of events. In her email to the Claimant on 2 February 2021 however, Mrs Topham only noted that Mrs Westmoreland had been working on a chronology. That, fairly understandably, caused the Claimant to query how a chronology of an incident spanning four days and involving six members of staff could have taken 15 weeks to prepare.

132. The situation was further exacerbated when the Senior Nurse for the South and East Locality, who had by now been appointed, told the Claimant, in a sickness absence meeting on 16 February 2021, that the disciplinary investigation had not even been started before the Claimant had contacted Mrs Topham at the end of January, leading to the Claimant to complain to Mrs Topham about that in an email on that day.

133. At Mrs Topham's instigation, and in view of Mrs Westmoreland's greater availability, progress was then made with the disciplinary investigation. Mrs Westmoreland met with other witnesses in February, intending to leave her

meeting with the Claimant until last. A meeting with the Claimant was arranged for 5 March 2021, but was cancelled due to the Claimant's ill health and was rearranged for 13 April 2021.

134. Mr Desir had also attempted to arrange a meeting with the Claimant to provide feedback on her grievance on 15 March 2021, but that was also rearranged to April due to the Claimant's ill health.

135. An Occupational Health Report was obtained in relation to the Claimant on 7 April 2021, two earlier ones having been produced in July and September 2020. The report noted that the Claimant had been participating in a formal HR process, which had led to deterioration in her mental health, and that, until recently she had not felt well enough to participate. It was recorded that the Claimant felt that her emotional wellbeing had improved, and that she considered herself fit enough to participate in the HR process. The Occupational Health Practitioner observed that she urged that the investigation process be completed as swiftly as possible.

136. The Claimant met remotely with Mr Desir on 12 April 2021 for him to provide the outcome to the Claimant's grievance. He confirmed that in a letter dated 19 April 2021. The letter spanned 12 pages, and Mr Desir confirmed that he did not consider that the Claimant's concerns around the availability and suitability of PPE had been well founded, that risk assessments had been made available, and that there was no evidence that the Claimant had suffered any detriment as a result of the concerns she had raised. The Claimant, having by now commenced her first Tribunal claim, did not appeal the grievance outcome.

137. On 13 April 2021, the Claimant then remotely attended an investigation meeting with Mrs Westmoreland. The meeting was recorded and subsequently transcribed.

138. A further delay ensued due to some confusion between the Claimant and Mrs Westmoreland. At the end of the meeting, the Claimant had indicated that she would provide additional documents to Mrs Westmoreland, which led Mrs Westmoreland to consider that she would not provide the transcript of the meeting to the Claimant before that happened. The Claimant was however expecting that the transcript would be provided in any event. Mrs Westmoreland chased the Claimant for the documentation on 29 April 2021, which was produced the next day. Mrs Westmoreland then took time to review those documents, and also had to wait for the transcript to be typed, before sending it to the Claimant on 21 May 2021. The Claimant then returned the statement and a supplemental statement to Mrs Westmoreland on 27 May 2021.

139. Mrs Westmoreland was also, at that stage, waiting for the accuracy of statements of other witnesses to be confirmed, which took place in June. She then completed her report on 30 June 2021. She concluded that there was evidence to support the allegations. She particularly noted the conflict of evidence between the Claimant and Ms Dodd over what the Claimant had asked Ms Dodd to do on 5 April 2020.

140. By this stage, the Respondent's Executive Nurse Director had changed the procedure for the management of disciplinary cases involving nursing staff, such that all potentially serious misconduct cases were to be considered by a director of nursing rather than a manager. Rather therefore than the report being sent to Mrs Topham, it was sent to Andrew Jones, the Director of Nursing for the Respondent's Children and Women's Clinical Board. He then wrote to the Claimant on 7 July 2021, advising that he had been appointed as the Disciplining Officer, and that, having reviewed the investigation report he had decided that the allegations needed to be considered further at a disciplinary hearing. He noted that that would be arranged as soon as possible, taking into account the need for the Claimant to have the disciplinary pack three weeks prior to the hearing in order to prepare.

141. The Claimant however wrote to Mr Desir on 23 July 2021 giving notice of her resignation. She stated that her notice was, "*a culmination of the way I have been treated, with a notification that the disciplinary launched against me was proceeding to a Disciplinary Hearing being the last straw*". She provided four weeks' notice of the termination of her employment.

142. Mr Desir replied to the Claimant on 29 July 2021, giving the Claimant the opportunity to reconsider her decision. He also pointed out that the Claimant's contractual notice was, in fact, eight weeks, but that the Respondent was willing to accept four weeks' notice, which would mean that her employment would end on 22 August 2021. He confirmed that if he did not hear from the Claimant by 6 August 2021, he would assume that she wished to continue with her resignation. He also confirmed that, as a qualified nurse, the Respondent had an obligation to consider whether her case should be referred to the NMC, and therefore, the disciplinary hearing, which had been arranged for 31 August 2021, would still go ahead. He encouraged the Claimant to attend to respond to the allegations.

143. The Claimant did not wish to rescind her resignation, and did not attend the disciplinary hearing. She did however provide a statement to be considered at the disciplinary hearing.

144. The hearing took place as scheduled. Mr Jones was the Decision Maker, and he was supported by an HR Adviser and had the assistance of the Senior Nurse from the Vale Locality in relation to district nursing matters.

The management case was presented by Mrs Westmoreland, and Mr Jones heard evidence from Ms Dodd, the member of the Splott team who had liaised with the patient's care agency on 6 April 2020, and the Director of Continence Services.

145. In relation to the six allegations, Mr Jones considered that four of the six numbered allegations were substantiated, finding the third and sixth allegations unproven, on the basis that, without being able to question the Claimant, it was not clear that the point which underpinned those allegations, i.e. that the Claimant suspected that the patient may have had a urinary tract infection, could be established.

146. Mr Jones confirmed in his statement that, as the Claimant was not present at the hearing, she was effectively given the benefit of any doubt where there was any uncertainty.

147. With regard to what appeared to us to be the Claimant's primary contention about the events of the weekend of 4 April 2020, that she had directed Ms Dodd to review the patient on 5 April, Mr Jones noted, in his statement, that the other colleagues, Ms Dodd and the nurse who worked the late shift on 4 April, were not clear when asked, and therefore he could not, on balance of probability, say whether or not that had been the case.

148. We observed that that had also been the conclusion of Mrs Westmoreland in her investigation report, although she had recorded that the Claimant had made no mention of giving any instruction to Ms Dodd in her RCA interview with Ms Valade in April 2020. Indeed Mrs Westmoreland had also recorded that the Claimant, when asked by Ms Valade why no visit was undertaken on the night of 4 April or on 5 April, had stated that they, i.e. the district nurses, would not do that unless there was an identified issue, and that they depend on family and carers who are instructed to contact them if any problems arise.

149. Mr Jones concluded that although the offences he had found substantiated amounted to gross misconduct, there were mitigating factors. Notably there was additional pressure on the service due to the onset of the pandemic, and the Claimant's catheter training had not been updated when it should have been. He therefore concluded that, had the Claimant remained in employment, a final written warning would have been issued.

150. Mr Jones advised the Claimant of her right to appeal his decision, and she submitted her appeal on 12 September 2021. The appeal hearing took place on 29 November 2021, the Claimant submitting a statement and supporting documents, but not attending.

151. The Appeal Panel was chaired by Mr Dan Crossland, Interim Director of Operation of the Respondent's Mental Health Clinical Board, and also comprised Diane Walker, Interim Deputy Director of Nursing for PCIC, and Rebecca Marsh, Assistant Head of Workforce and Organisational Development. Mr Jones attended to present the management case.

152. The panel concluded that the sanction proposed by Mr Jones, of a final written warning, was a correct and fair decision, and should be upheld.

153. The only other findings we needed to record were that the accepted evidence of Mr Crook was that the Respondent has a statutory Health and Safety Committee, and that on the Trade Union side there was a lead Health and Safety Representative who at the relevant time was Mr Stuart Egan. He was at the time the lead Trade Union Representative for PCIC, and was someone to whom the Claimant copied or forwarded several of her emails.

Conclusions

154. Considering our findings and taking into account the relevant legal principles, our conclusions in relation to the issues we had to decide were as follows.

Protected disclosures

155. As was clear to us during the hearing, and as was accepted by Ms Johns on behalf of the Claimant in her closing submissions, none of the asserted detriments derived from any specific disclosure. In those circumstances, we did not see that it was necessary to evaluate whether the disclosures which were not accepted as constituting protected disclosures were indeed disclosures. The accepted protected disclosures were sufficient to bring the Claimant within the ambit of Section 47B ERA.

Health and Safety matters

156. With regard to whether the Claimant could bring herself within the ambit of Section 44 ERA, we noted that the Claimant asserted that both sub sections (1)(c) and (e) applied.

157. With regard to Section 44(1)(c), two elements are required to be satisfied. The second element is that the employee must have brought to their employer's attention by reasonable means circumstances connected to their work which they reasonably believed were harmful or potentially harmful to health and safety.

158. That is similar to the test for protected disclosures under Section 43B ERA, that the employee disclosed information, which, in their reasonable belief, was in the public interest and tended to show that the health and safety of any individual had been, was being, or was likely to be endangered. In the same way that many of the Claimant's emails amounted to protected disclosures, we were satisfied that they also amounted to her bringing to the Respondent's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful.

159. However, the first element of Section 44(1)(c) requires that the bringing to the employer's attention of those circumstances must arise in circumstances where either there is no safety representative or committee, or there is such a representative or committee but it was not reasonably practicable for the employee to raise the matter by those means.

160. In this case, the accepted evidence of Mr Crook was that the Respondent had a Health and Safety Committee, and that Mr Egan was a Health and Safety Representative. In order therefore for the Claimant to fall within Section 44(1)(c), we had to be satisfied that it had not been reasonably practicable for her to have raised her health and safety concerns to the Committee or the Representative.

161. In that regard, we noted that the Claimant had brought her concerns to Mr Egan's attention by copying him in on many of her emails, or by forwarding emails to him that she had sent to the Respondent's management. In the circumstances, there did not seem to be any reason why the Claimant could not have raised all her concerns to Mr Egan directly. We did not therefore consider that the Claimant fell within Section 44(1)(c).

162. Section 44(1)(e) focuses on whether, in circumstances of danger, which the employee reasonably believes to be serious and imminent, they took (or proposed to take) appropriate steps to protect themself or other persons from the danger.

163. In this case, we were satisfied that the Claimant had reasonably believed that there were circumstances of serious and imminent danger, in the form of the COVID pandemic and the potential transmission of a deadly disease. We were also satisfied that the Claimant had taken appropriate steps to protect herself and others, the members of her team, from that danger, by pressing the Respondent to assess risk and provide effective PPE.

164. We were therefore satisfied that the Claimant had brought herself within the ambit of Section 44(1)(e) ERA.

Detriments

165. Having concluded that the Claimant was within the scope of both Section 47B and Section 44(1)(e) ERA, such that she had the right not to be treated to her detriment on the ground that she had made protected disclosures and/or had raised health and safety matters, we moved on to consider whether she had, in fact, been treated to her detriment on those grounds.

166. In that regard, we considered the asserted detriments set out in the List of Issues, at paragraphs C and E, adopting a three-stage process. We first considered whether the asserted acts had happened in fact. We then moved on to consider whether, if the acts had happened, they amounted to detriments. Finally, if the acts occurred and amounted to detriments, we considered whether that had been on the ground that the Claimant had made protected disclosures or had raised health and safety matters.

167. In undertaking that analysis, we considered that the first three asserted detriments were related, in that they all involved steps taken in relation to the Claimant from late May 2020 onwards and all related to the Claimant undertaking her Team Leader role from home whilst shielding. We therefore considered those asserted detriments together. The fourth, the instigation of the disciplinary procedure, was of a different character, and we therefore dealt with that separately.

Job role detriments

168. As a matter of fact, the Claimant was consciously isolated from her team to a significant degree, which involved the cessation, or at least curtailment, of communication with her by her team, and the variation of her role.

169. We did not see that Ms Valade had any role to play in those matters. Whilst she was involved in correspondence with the Claimant in March and April, and commenced the RCA into the events of 4 April 2020, she was not in work after 4 May 2020 for a significant period, certainly the period when the acts asserted to amount to detriments took place.

170. Mrs Preece did however play a central role in the treatment of the Claimant at this time. It was she who indicated to the Claimant's deputies that they, at the least, did not need to speak to the Claimant about patient related matters.

171. Our ability to get to the bottom of Mrs Preece's precise directions to the deputies was hampered by the complete lack of any contemporaneous evidence, whether in the form of notes of discussions or email exchanges. Mrs Preece, in her witness statement, noted that she had not instructed the deputies not to contact the Claimant, but confirmed that she did say to them

that she did not expect them to run everything past the Claimant. Mrs Rees, in her statement, had a slightly different perspective, in that she noted that Mrs Preece had told her that it would be wise if they did not speak to the Claimant about work issues. She confirmed that they had never been told to stop contacting the Claimant socially.

172. The two other deputies provided similar evidence to Ms Roberts as part of the grievance investigation, with Ms Luff confirming that she was advised that it was best not to contact the Claimant with work related issues, and with Ms Dodd confirming that the deputies were "*strongly advised*" not to contact the Claimant.

173. Ultimately, whatever the precise nature of the instruction from Mrs Preece, we were satisfied that there had been an instruction by her to the deputies not to contact the Claimant in relation to patient facing issues, and, in practice, there was virtually no communication with the Claimant by the deputies from 26 May 2020 onwards. We could understand how that would have led to a feeling of isolation on the part of the Claimant.

174. With regard to the Claimant's assertion that her position and role was varied without her consent, we noted that Mrs Preece had been at pains to say to the Claimant at the time that her role had not changed. We noted that she said to the Claimant, in her email of 15 June 2020, that she wanted to allay the Claimant's concerns in that regard, saying, "*your role is unchanged and you have not been "side-lined".*" However, whilst the Claimant's job title remained unchanged, her role clearly had changed.

175. From 26 May 2020 onwards the Claimant had no involvement in patient care, even though such involvement could only, by then, due to the Claimant's need to shield, have been indirect, in the form of providing overall guidance and individual advice and mentoring. That removed a, if not in fact the, principal element of her role.

176. Having concluded that the first three asserted detrimental acts occurred in fact, we moved to consider whether they amounted to detriments.

177. We noted the guidance from the House of Lords in *Shamoon*, that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to their disadvantage. Taking that into account we considered that a reasonable worker would have taken the view that the changes to the Claimant's role, the direction to her deputies that they should not speak, or at least did not need to speak, to her, and her subsequent feeling of isolation, were to her disadvantage. Put another way, we did not consider that the Claimant unreasonably considered that those matters were to her disadvantage.

178. We then turned to consider whether those detriments had occurred on the ground of the Claimant's protected disclosures or her raising of health and safety matters. We noted the guidance of the Court of Appeal in ***Fecitt***, that Section 47B will be infringed if the disclosure materially influences the employer's treatment of the employee. We further noted that the Court of Appeal confirmed that a material influence only involves a more than trivial influence.

179. We also noted that Section 48(2) ERA provides that, once a Claimant has satisfied a Tribunal that there has been a protected disclosure or that a health and safety matter has been raised, and that there was a detriment, then the burden shifts to the employer to prove that the Claimant was not subjected to the detriment on the ground that they made the protected disclosure or raised the health and safety matter.

180. Taking those matters into account, we noted that the direct, or principal, cause of the change to the Claimant's role, the cessation of communication from her deputies, and the subsequent feelings of isolation, was the deputies' indications to Mrs Preece and Mrs Jeynes that they felt that the Claimant's input whilst working from home was problematic for them.

181. However, Mrs Preece seemed to us to have been very willing to take what the deputies were telling her at face value, and to act adversely to the Claimant as a result. There was, in fact, both at the time and before us, very little detail of the interference about which the deputies were complaining. Only one specific example of the deputies' decisions being overturned was provided, and that was a managerial matter rather than a clinical matter.

182. The deputies' comments that the Claimant requested them to telephone her between 9.30 and 10.00am was problematic for them due to the work demands they faced at the time may well have been accurate, but there was no attempt, whether by the deputies themselves or by Mrs Preece, to suggest that the calls take place at a different, more convenient, time.

183. Indeed, there was no attempt by Mrs Preece to perform a consultative or conciliatory role in terms of the relationship between the Claimant and her deputies by suggesting improvement to their methods of interaction. Instead, she moved swiftly to remove the Claimant from those interactions.

184. Whilst there may have been an element of simply wishing to ensure that services continued to be provided during clearly extremely challenging times, we found that Mrs Preece's approach was influenced by the fact that the Claimant had, for several weeks, been raising concerns, repeatedly and at some length about health and safety issues.

185. We felt that had the Claimant not raised those concerns, then it would have been likely that the deputies' concerns would have been assessed, and that dialogue would have taken place about resolving them, before any definitive action impacting on the Claimant had been taken.

186. Ultimately therefore, we considered that the Claimant's disclosures regarding health and safety concerns did materially influence the Respondent's treatment of the Claimant as outlined in the first three asserted detriments set out at paragraphs C and E in the List of Issues. We were therefore satisfied that the Claimant's claims of detrimental treatment under Section 47B and Section 44(1)(e) ERA were made out.

187. We formed a different view however in relation to the fourth asserted detriment, the instigation of disciplinary procedures. In that regard, we noted that a serious incident had arisen, which involved the death of a patient. As a result of that an RCA was ordered, and it seemed to us that this was a normal and expected step. Mrs Preece completed the RCA, following the absence of Ms Valade, and, in the circumstances of the managerial resources available in the South and East Locality, we felt that that was again a normal and expected step.

188. Mrs Preece then committed the error of recording her RCA on an incorrect form, but we did not consider that that had any impact on the subsequent decision to instigate disciplinary proceedings.

189. The RCA, in our view understandably, concluded that further investigation under the disciplinary process was required. Indeed, it seemed to us that the Claimant's own comments to Ms Valade in her RCA interview with her on 27 April 2020 justified the disciplinary investigation, in that it seemed to arise from those comments that the Claimant had not completed a robust clinical assessment of the patient on 4 April 2020, and had failed to make arrangements for the patient to be subsequently reviewed. Whilst we noted that the Claimant subsequently asserted that she had made such arrangements, that was not what she had said to Ms Valade.

190. Even if the RCA had been provided to the Claimant for factual review, as provided for by the Respondent's policy, and even if the Claimant had put forward the contention about directing others to review the patient that she subsequently did, those contentions were never accepted by the other nurses involved, and, in the absence of such an acceptance, would, in our view, have properly led to the disciplinary investigation and, as happened, the instigation of disciplinary proceedings.

191. We did not therefore consider that the instigation of the disciplinary investigation had been unfounded, and we were not therefore satisfied that this asserted detriment had been made out in fact.

Discrimination arising from disability

192. We noted that Ms Johns, in her submissions on behalf of the Claimant, indicated that the Claimant's claim under Section 15 EqA was pursued in the alternative, i.e. on the basis that if it was not considered that the detrimental treatment had been on the ground of the Claimant's protected disclosures or her raising of health and safety matters, then it should be considered that the acts concerned amounted to unfavourable treatment because of something arising from the Claimant's disability, namely because of the requirement to shield.

193. Having concluded that the first three acts asserted to be detriments were indeed detriments on the ground of the Claimant having made protected disclosures and raised health and safety matters, we did not therefore need to go on to consider them in relation to the Claimant's Section 15 claim.

194. With regard to the fourth asserted detriment, which we did not consider to have arisen on the ground of protected disclosures or health and safety matters, we considered whether it amounted to unfavourable treatment because of something arising from the Claimant's disability.

195. For similar reasons, we did not consider that it did. As we have already noted, we did not consider that the disciplinary procedure was instigated without foundation. However, regardless of that, we noted that Mrs Jeynes initially commissioned the RCA, from which the disciplinary procedure was instigated, on 8 April 2020. That was approximately a month before the something arising from the Claimant's disability, i.e. the need to shield arose. In our view therefore, the instigation of disciplinary proceedings could not have arisen because of something arising from the Claimant's disability.

Constructive unfair dismissal

196. We noted that the acts relied upon by the Claimant as contributing to the breach of the implied term of trust and confidence were those set out at paragraph 46 of the particulars of her second claim. That paragraph included eight numbered sub-paragraphs, the first of which included, by reference, the acts asserted to be detriments for having made protected disclosures. It was clarified by Ms Johns in her submissions that those acts were contended to form part of the asserted breach of trust and confidence, whether or not found to have occurred on the ground of the protected disclosures.

197. The particulars set out at paragraph 46 were as follows:

(i) "*The detriments for making whistleblowing disclosures summarised in paragraph 10 above;*

(ii) *The Respondent's failure to carry out a disciplinary process in accordance with their own polices, including a failure to let the Claimant check the RCA for factual accuracy before it was progressed to the IA stage, and the failure to inform the Claimant in any sort of timely manner that the matter was being progressed. The RCA was first seen by the claimant as part of the DSAR disclosure.*

(iii) *Failing to adequately support the Claimant and properly deal with the F2SU complaint between August and October 2020 by failing to properly deal with documentation in a timely manner and putting unnecessary stress on the Claimant.*

(iv) *Failing to progress the F2SU in a timely manner, and only updating the Claimant once she made contact on 31 January 2021;*

(v) *Telling the Claimant that the F2SU report would be reviewed by Lynne Topham, thus utterly undermining the Claimant's confidence in the process;*

(vi) *The Respondent's failure to communicate with her at all about the disciplinary between 19 October 2020 – 31 January 2021, and only then at the Claimant's prompting. It was further 3 weeks before Ms Westmoreland got in touch, leading to a further deterioration in the Claimant's mental health.*

(vii) *Taking 6 weeks from the Claimant's interview to provide her written statement for review (paragraph 27);*

(viii) *Taking yet another 6 weeks after this to tell the Claimant that the matter was not yet over, despite the Claimant having engaged in the RCA, the IA, and Ms Westmoreland's Investigation for over 15 months, and would now progress to a disciplinary hearing.*"

198. As we have already noted, we did consider that three of the four asserted detriments occurred in fact, and they did therefore fall to be considered as part of the Claimant's constructive unfair dismissal claim.

199. Similarly, some of the other acts set out in paragraph 46 as contributing to a breach of trust and confidence were made out on the facts, at least to some degree.

200. With regard to paragraph 46(ii), the Respondent did fail to let the Claimant check the RCA for factual accuracy, although we observed that that did not

fall within the Respondent's disciplinary procedure but was part of a separate RCA process. Whilst there was then a delay of some four months between the Claimant speaking to Ms Valade for the purposes of the RCA and its completion, and the Claimant was not informed of the progress of the RCA during that period, we noted that the period spanned the peak of the first COVID wave, and involved the change of RCA Investigator due to Ms Valade's absence. In the circumstances, we did not consider that the delay in progressing the RCA was, in the prevailing circumstances, unreasonable.

201. Similarly, with regard to paragraph 46(iii), whilst the handling of the Claimant's grievance between August and October 2020 could have been better, we noted that roughly half of the period was taken up with difficulties Ms Roberts had in accessing the documents the Claimant had sent her. Overall, we again did not consider that any delay was unreasonable.

202. We were however more critical of the subsequent delay in handling the Claimant's grievance as noted in paragraph 46(iv). Having met the Claimant on 24 August 2020, and having received her documents in early October, Ms Roberts did not complete her report until early February, having completed her interviews with witnesses in early November. As Ms Roberts did not attend this hearing, we were unable to ascertain the reason for the lengthy delay in the completion of her report, and no explanation was discernible from the documents. However, even if Ms Roberts had a compelling reason for taking as long as she did, there was no communication with the Claimant about the delay and she was left in limbo for some four months. Even then, information was only provided to her when she chased for it. We considered that the Respondent's actions in that regard had been unreasonable.

203. With regard to paragraph 46(v), Ms Roberts did initially tell the Claimant that her grievance would be reviewed by Mrs Topham. That was a mistake, caused by the HR advice to Ms Roberts focussing on what would usually happen, without taking into account that Mrs Topham already had a role to play, as Disciplining Officer, in relation to the disciplinary investigation.

204. However the Claimant did not seem to be at all perturbed about the fact that Mrs Topham was initially said to be the person to review the grievance report, as she twice asked Mrs Topham when her feedback would be provided without raising any concerns that it would be inappropriate for her to do so. It was only when Mrs Topham informed the Claimant that she would not be considering the grievance because of her involvement in the disciplinary process that the Claimant raised any concern about Mrs Topham's involvement. The misapprehension created by Ms Roberts's comment was quickly, and in our view satisfactorily, resolved by Mrs Topham, and we could not see how the Claimant could say that it had

undermined her confidence in the process, let alone that it had "utterly" undermined her confidence, as she asserted.

205. With regard to paragraph 46(vi), similar to our views in relation to paragraph 46(iv), we were critical of the Respondent's delay in progressing the disciplinary process and in communicating with the Claimant. The Claimant was informed on 12 October 2020 that an initial assessment would be undertaken, and was informed on 19 October 2020 that Mrs Westmoreland would be undertaking it. However the Claimant then heard nothing until she herself chased progress on 31 January 2021. It then transpired that very little progress had been made with the initial assessment.

206. Whilst Mrs Westmoreland provided an explanation to us for the delay in progressing matters from mid-November to the end of January, there did not appear to us to be a satisfactory explanation for the period of a month prior to that, when Mrs Westmoreland was waiting for documentation to be provided to her. However, even if there had been a cogent explanation for the delay over that period, as there was for the later delay, there was again no contact with the Claimant to inform her that the process was going to take longer, in fact significantly longer, than anticipated. We again therefore concluded that the Respondent's actions in that regard were unreasonable.

207. With regard to the six-week period complained about by the Claimant at paragraph 46(vii), we noted that the Claimant met Mrs Westmoreland on 13 April 2021, and that her statement arising from that meeting was not sent to her until late May. We noted however that approximately half of that period was taken up by the confusion between the Claimant and Mrs Westmoreland as to the additional material the Claimant was going to provide. In the circumstances, whilst matters could have been progressed more swiftly, we did not consider that the Respondent's actions were unreasonable.

208. Similarly, whilst we could understand that the Claimant would be anxious to know whether Mrs Westmoreland was recommending that a disciplinary hearing would take place, and whilst, again, the process could have been quicker, Mrs Westmoreland needed to consider the evidence she had received and to draw up her report. Mr Jones then needed time to consider whether the matter should proceed to a disciplinary hearing. Overall we did not consider that delay at this juncture was unreasonable.

209. Overall therefore, we were satisfied that there had been some acts, or failures to act, by the Respondent which could be said to have contributed to a breach of trust and confidence, notably the initial treatment of the Claimant in May 2020, and the delay in progressing the grievance and disciplinary investigations and the failure to inform the Claimant about those delays in the period from October 2020 to January 2021. We were

conscious that those matters occurred quite some time before the Claimant resigned on 23 July 2021, but we also noted the direction provided by Underhill LJ, at paragraph 45 in *Kaur*, that if we considered that the Respondent's conduct as a whole was repudiatory, and that the final act was part of that conduct, then it should not matter if the Claimant could be said to have affirmed the contract by not resigning at earlier points, the effect of the final act being to revive her right to do so.

210. We then considered the questions that Underhill LJ had noted, at paragraph 55 of *Kaur* (see paragraph 38 above), that a Tribunal should ask itself, and our answers were as follows.

211. With regard to the first question, the most recent act on the part of the Respondent which the Claimant said caused or triggered her resignation, was Mr Jones' letter to her of 7 July 2021, received by her on 9 July 2021, notifying her that the allegations needed to be considered further at a disciplinary hearing.

212. With regard to the second question, we did not consider that the Claimant had affirmed the contract since that act. She had done nothing to engage with the disciplinary process which might have indicated such an affirmation. She did take two weeks to provide notification of her resignation, but in the circumstances we did not consider that that was an unreasonable delay.

213. With regard to the third question, we did not consider that Mr Jones' letter was, by itself, a repudiatory breach of contract. It simply notified the Claimant of the step that would be taken, which was one of the possible steps that the Claimant could have anticipated.

214. With regard to the fourth question, we considered then whether Mr Jones' letter was nevertheless part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach. We were mindful that Underhill LJ expressly noted that the approach explained in *Omilaju* should be applied as part of that consideration.

215. In *Omilaju* Dyson LJ noted, at paragraph 20, that the "final straw" whilst not itself leading to a breach of contract, must contribute, however slightly, to the breach of the implied term of trust and confidence. He went on to say, at paragraph 21, that if the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

216. We also noted that Underhill LJ in ***Kaur***, with reference to the facts of that case, noted, at paragraph 75, that, "*a fair disciplinary process cannot, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee*".

217. We noted that the Claimant in the particulars of her second claim noted that the "final straw" was the unreasonably protracted disciplinary process, culminating, after 15 months, in a decision to progress to a disciplinary hearing. However, in her resignation letter the Claimant had said expressly that the notification that the disciplinary case against her was proceeding to a disciplinary hearing was the last straw. We considered that that was the accurate indication of what the Claimant had contended to have been her "final straw".

218. As we have already observed, we did not consider that there was anything improper or unreasonable about the instigation of the Respondent's disciplinary procedure, nor in the progress of that procedure to a disciplinary hearing. Other than the delay at the end of 2020 and the start of 2021, and acutely the Respondent's failure to inform the Claimant of the delay and the reasons for it, we considered that the disciplinary process was operated appropriately, and we considered that, throughout, it had been operated fairly.

219. Whilst the Claimant ultimately took issue with the allegations she faced, she accepted at this hearing that, with hindsight, she had not completed a robust clinical assessment of the patient when she visited him on 4 April 2020. Furthermore, whilst she contested the substance of the remaining allegations, notably that she had failed to arrange for further reviews of the patient to take place on the following two days, contending that she had, she had given no indication of that in her RCA interview, and, when she provided that indication during the disciplinary process, her contentions were contested.

220. It was, in our view, therefore, entirely appropriate for the allegations against the Claimant to be considered at a disciplinary hearing, and the Respondent, in arranging the disciplinary hearing, was simply managing its disciplinary process appropriately.

221. In the circumstances, we did not consider that Mr Jones' letter was capable of contributing to a series of earlier acts which cumulatively amounted to a breach of the implied term of trust and confidence, and, applying the guidance of Dyson LJ, there was no need for us to examine the earlier history to see whether the alleged final straw had had that effect.

222. Our conclusion was therefore that the Claimant's claim of constructive unfair dismissal failed and fell to be dismissed.

Employment Judge S Jenkins
Dated: 22 June 2023

REASONS SENT TO THE PARTIES ON 23 June 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche