Case No: 1302031/2022

EMPLOYMENT TRIBUNALS

Claimant: Mrs V Stacey

Respondent: The Dudley Group NHS Foundation Trust

Heard at: Midlands West

On: 4, 5, 6, 7, 8, 11, 12, 13 and 14 December 2023

Before: Employment Judge Faulkner
Mrs S Ray
Mr J Kelly

Representation: **Claimant** - In person
Respondent - Mr S Nicholls (Counsel)

JUDGMENT having been sent to the parties on 18 December 2023, written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, and time having been extended for her to do so, the following reasons are provided.

REASONS

Introduction

1. The Claimant was employed by the Respondent in community nursing at the Dudley Clinical Hub. In summary, this case was concerned with her alleged public interest disclosures, in relation to which she says she was subjected to various detriments, and other alleged conduct of the Respondent which the Claimant says, combined with the alleged protected disclosures, led to her being constructively unfairly dismissed.

Hearing

2. The Tribunal read statements prepared by and heard oral evidence from the Claimant and from the following witnesses for the Respondent:

2.1. Edliz Kelly (Clinical Hub Operational Lead for the Respondent's Rapid Response Service from August 2020 and at all relevant times the Claimant's line manager).

2.2. Bianca Mascarenhas (Community Lead, Nursing and ANP Services from March 2020 and Ms Kelly's line manager).

2.3. Dr Shaukat Ali (Medical Lead for the Respondent's Clinical Hub, the most senior clinical role in the Hub).

2.4. Francesca Reidy nee Bull (formerly an HR Business Partner).

3. We read an additional statement from Dr Nassir Ahmed Domun, formerly Associate Specialist in General Medicine and the Medical Lead at the Hub and thus Dr Ali's predecessor, but he did not give oral evidence and so we attached little weight to his statement. The bundle of documents was around 1,500 pages long and there was a bundle of additional documents produced by the Claimant. We made clear that we would only read those documents we were taken to explicitly by the parties either during oral evidence or in submissions. As ever, this was necessary to ensure that the case was concluded in the allotted time. Our findings of fact, unanimously made, are set out below and were reached on the balance of probabilities. We dealt only with those factual matters that seemed to us most relevant, rather than every matter rehearsed in the evidence. Our not referring to a matter does not mean we did not take it into account. References to page numbers below are references to the bundle (with references to the additional bundle denoted by "A" after the number) and alphanumeric references relate to the witness statements, for example VS21 is paragraph 21 of the Claimant's statement and EK22 paragraph 22 of Ms Kelly's.

Issues

Protected disclosures

4. The first issue was whether the Claimant made protected disclosures. The Tribunal was first required to determine what disclosures of information she made. Her case was that she had disclosed the following:

4.1. On 9 September 2020, she sent an email at 11:22 am to her line manager, Ms Edliz Kelly. In this email she wrote that she had received two referrals from the triage team, both concerning patients with significant mental health issues. She wrote that neither patient had been triaged appropriately and that key information had not been communicated to her. She asked whether it could be ensured that all staff complete the hazard/risk assessment section of the triage form properly. She wrote, "as you know we are lone workers in the community and this information is key to ensuring our safety". She stated that this was the second time she had raised this matter.

4.2. On 18 November 2020, she made a verbal disclosure during a triage meeting which took place on Microsoft Teams. The Claimant asserted that she

said there was a lack of appropriate telephone triaging, that no risk assessments were being conducted when referrals came into the service, that staff felt under pressure to accept referrals that were not suitable, and that staff were receiving multiple calls when they were out seeing patients which were taking their attention away from treating them. She further asserted that she said that patients were not triaged appropriately and that calls were not being prioritised properly to those that were urgent.

4.3. On 6 February 2021, she made a verbal disclosure to Ms Kelly that she had received a referral from a triage nurse in which a patient with a history of asthma was described as breathless and unable to speak in full sentences and this patient was allocated to the Claimant for her to see within a 4-hour period. The Claimant asserts that she went on to say that having spoken to the patient she immediately made a 999 call and that the patient could potentially have died.

4.4. On 11 March 2021, she wrote a "Datix report" (which is automatically sent to the Respondent's CEO, the individual's line manager and the Respondent's risk management team). In this she said that the service had taken on 1,100 additional care home patients but no additional staffing or resource had been provided. She stated that the ward rounds carried out by staff were disjointed and a care home manager had complained to her that different clinicians were constantly coming in to visit patients, there was thus no continuity, and clinicians had no idea how to manage the patients and medical information was being missed. She also reported that the care home manager had said that staff were turning up at mealtimes which was impacting patient nutrition. She further reported that no one was taking responsibility for end of life/palliative care patients and that end-of-life patients were not being identified in a timely manner, meaning that medication was not in place and patients were being admitted to hospital inappropriately.

4.5. On 2 May 2021 the Claimant submitted another Datix report. She reported that she had received a referral from triage that a patient was short of breath, coughing up blood and had heart failure and an irregular heartbeat. She recorded that the patient had been in a care home for 5 to 6 weeks but had not received a new patient check as required. She stated that she had been made aware that the patient had been referred by the GP urgently due to possible lung cancer and neither the patient's son nor the care home staff were made aware of this. She reported that the patient was not on an anticoagulant, ACE inhibitor or beta-blocker when he should have been. She stated that she had been advised to admit the patient to hospital, which she did.

4.6. On 9 August 2021, she submitted another Datix report. In this report, she recorded that she had received a referral from triage requesting that she visit a patient who had called 999 due to worsening shortness of breath and that this was redirected to the service without the patient's consent. She reported that the patient had an extensive history on long-term oxygen and was short of breath at rest and coughing up blood, which required an urgent admission. She reported that she had called 999 straightaway and that the referral should never have come to the service.

4.7. On or around 14 May 2021, she made a verbal disclosure during a meeting with Mrs Bull and Ms Mascarenhas. The Claimant asserts that amongst other matters she raised that medical notes were not being written by staff in a timely manner due to unrealistic workloads, that staff were feeling under pressure to

review patients when they did not feel confident and that referrals were poorly triaged, which was putting patients at risk.

5. The Tribunal was secondly required to determine whether the Claimant reasonably believed that the disclosures were in the public interest. The Claimant's case was that she did because:

5.1. The first disclosure concerned risks to herself and her team who were all lone workers going into service users' homes.

5.2. In relation to the remaining disclosures, the Respondent's service users were members of the public and it is important that members of the public receive a good quality of care.

6. If she did, the Tribunal was required to decide thirdly whether the Claimant reasonably believed that the information disclosed tended to show that the health and safety of any individual had been, was being, or was likely to be endangered (section 43B(1)(d) of the Employment Rights Act 1996 ("ERA")).

7. If any disclosure of information was a qualifying disclosure, because it met the tests outlined above, it was accepted that it was also a protected disclosure because it was made to the Respondent.

Detriments

8. If the Claimant made one or more protected disclosures, the Tribunal was required to determine whether she was subjected to a detriment by any act or failure to act on the part of the Respondent. She relied on the following:

8.1. On 5 October 2020, Ms Kelly gave her an unrealistic deadline to write a Covid policy. The Claimant's case was that Ms Kelly did this because of her disclosure on 9 September 2020.

8.2. On 11 November 2020, Ms Kelly told the Claimant she could not prescribe until she had completed her non-medical prescribing annual competencies. The Claimant's case was that Ms Kelly did this because of her disclosure on 9 September 2020.

8.3. On 24 November 2020 Ms Kelly requested the Claimant to attend a sick review meeting with her, 6 weeks after she had returned from sick leave. It was the Claimant's case that Ms Kelly did this because of her disclosure on 18 November 2020.

8.4. At the meeting on 24 November, Ms Kelly told the Claimant that she had been unprofessional in the emails that she had written about the non-medical prescribing review. It was the Claimant's case that Ms Kelly did this because of her disclosure on 18 November 2020.

8.5. On 25 November 2020, a written file note was placed on the Claimant's file recording that she had been unprofessional in her emails. The relevant decision maker was said to be Ms Kelly and once again it was the Claimant's case that Ms Kelly did this because of her disclosure on 18 November 2020.

8.6. On 4 March 2021, Ms Mascarenhas excluded the Claimant from an email

about a secondment opportunity. It was the Claimant's case that Ms Mascarenhas did this because of the disclosures on 9 September 2020, 18 November 2020 and 6 February 2021.

8.7. On 12 April 2021, during a one-to-one meeting Ms Kelly told the Claimant that her behaviour in respect of a complaint about her made by a nurse was unacceptable, without having investigated the complaint. It was the Claimant's case that Ms Kelly did this because of her disclosures on 9 September 2020, 18 November 2020, 6 February 2021 and 11 March 2021.

8.8. Ms Kelly then put a file note on the Claimant's personal record concerning this complaint in which it was recorded that the Claimant's behaviour was unacceptable despite the fact there had been no investigation of the incident. It was the Claimant's case that Ms Kelly did this because of her disclosures on 9 September 2020, 18 November 2020, 6 February 2021 and 11 March 2021.

8.9. On 6 April 2021, Ms Kelly falsely informed Dr Domun that there had been a complaint made against the Claimant by a colleague called Julie Latham. It was the Claimant's case that Ms Kelly did this because of her disclosures on 9 September 2020, 18 November 2020, 6 February 2021 and 11 March 2021.

8.10. On 12 April 2021, Dr Domun wrote that the Claimant was not competent to manage a patient with suspected deep-vein thrombosis. It was the Claimant's case that he did this because of the Claimant's disclosure on 18 November 2020 (which the Claimant asserted Dr Domun was aware of because she had sent him a copy of the minutes of the meeting).

8.11. During a meeting on 14 May 2021, Ms Mascarenhas started shouting at the Claimant. It was the Claimant's case that she did this because of her disclosures on 9 September 2020, 18 November 2020, 6 February 2021 and 11 March 2021, all of which the Claimant asserted were discussed again by her at this meeting.

8.12. On 21 September 2021, Ms Kelly telephoned the Claimant and said she should be in the office and told her to come in straightaway. It was the Claimant's case that Ms Kelly did this because of her disclosures on 9 September 2020, 18 November 2020, 6 February 2021, 11 March 2021, 2 May 2021 and 7 August 2021.

9. During her evidence, the Claimant said that another detriment had come to her attention during disclosure, related to Ms Kelly informing Ms Mascarenhas that the Claimant had upset the EHCT team in a meeting in November 2020. We explained that in order to pursue this matter, the Claimant would need the Tribunal's permission to amend the list of issues, and whilst we were not saying this would be denied, the Respondent confirmed it would be opposed. We offered to explain how the Tribunal would deal with the point, but the Claimant stated she would not pursue it.

10. If the Claimant could establish that she was subjected to any of the detriments on which she relies, and that there was a prima facie case that this was because of one or more protected disclosures, the Respondent was required to show the ground on which any act, or deliberate failure to act, was done – see section 48(2) ERA.

Time limits

11. All of the complaints of protected disclosure detriment were out of time. The Tribunal was thus also required to determine whether it was not reasonably practicable for the Claimant to bring her complaint about any of the detriments, or at least the last of them, in time and if so, whether any such complaint was brought within such further period as the Tribunal considered reasonable. As will appear below, it was not in the end necessary to determine whether any protected disclosure detriments were part of a series.

Unfair dismissal

12. The first issue in relation to unfair dismissal was whether the Claimant resigned as a result (at least in part) of an act or omission, or series of acts or omissions, by the Respondent.

13. She relied on the alleged detriments set out above and in addition the following allegations:

13.1. On 6 July 2021, Dr Ali said to the Claimant, "if we cannot do acute visits without reviewing patients then we are redundant as advanced nurse practitioners because if you can't do an acute visit without reviewing/following up patients you're no longer good for anything".

13.2. When the Claimant raised this incident with Ms Kelly and Ms Mascarenhas, neither addressed her concerns and Ms Mascarenhas' response was to say that Dr Ali was an asset to the service.

13.3. On 9 November 2021, Ms Kelly contacted the Claimant while she was off sick having already spoken to her the day before.

13.4. On 15 November 2021, the Claimant received a letter from Ms Kelly, whilst she was off sick, about a consultation process and changes to her job role and hours.

13.5. From April 2021, onwards the Respondent failed to reduce the Claimant's workload despite being told by the Claimant that her workload was overwhelming.

14. The next question was whether those act(s) or omission(s) amounted to a fundamental breach of contract. The Claimant relied on breach of the implied term of trust and confidence.

15. The next issue was whether the Claimant affirmed the contract following any breach.

16. If the Claimant was dismissed, the Respondent did not seek to argue that there was a fair reason for dismissal.

17. It would then need to be considered whether the reason or principal reason for dismissal was that the Claimant made one or more protected disclosures. In other words, was any protected disclosure the reason or principal reason the Respondent behaved in the way that gave rise to the Claimant's dismissal?

Facts

Background

18. The Claimant was employed by the Respondent from 4 September 2017 to 28 February 2022 as an Advanced Nurse Practitioner ("ANP") in the Community Response Team, which was part of the Community Nursing, Medicine & Integrated Care Division. Her role was an Agenda for Change (AfC) Band 8a post. The Team was responsible for providing a fast access home assessment service for people who were housebound or in care homes, including face-to-face and telephone care referrals, assessing and diagnosing patients with possible complex needs requiring unscheduled care, and planning, implementing and evaluating treatment plans and clinical care – thus reducing hospital admissions.

19. In September 2020, there were six ANPs and four Care Home Nurse Practitioners ("CHNPs") in the Team, the CHNPs visiting care homes regularly, assisted by ANPs where necessary. Any referral to the Team was triaged to determine whether to refer it to an ANP on shift. From October 2020, as part of an NHS five-year plan and the development of integrated health and social care, the Respondent was commissioned to provide a Direct Enhanced Service ("DES") for care homes, in addition to what it had already been providing. Whilst the patients in the care homes were already within the scope of the Team's work, DES introduced a requirement to provide a more proactive service, which ANPs were to become more involved in. Ms Mascarenhas told us that the rapid response service was high-cost and that there had been regular concerns about it not being fully utilised, with ANPs seeing on average two or three patients per day in the summer of 2020, which was not felt to be enough. DES was therefore taken on to increase the care on offer and to increase the Respondent's income.

20. The Claimant says at VS21 that she started off working satisfactorily with Ms Kelly, who appeared supportive, but that this quickly changed when the Claimant began to raise patient safety concerns and questioned poor practice. Ms Kelly says that the Team's former manager described the team as lazy and told her to be careful of the Claimant who had raised an allegation of racism. Ms Kelly told us that she wanted to get to know the team herself, although at EK17 she describes how she formed the view when joining the team that the Claimant was someone who asked a lot of questions, was opinionated and was not afraid to challenge colleagues. She adds at EK20 that there were a number of strong personalities in the Team, who were unhappy about changes in management, the introduction of DES and new ways of working. Ms Mascarenhas had worked with the Claimant at another Trust, and they had spent time together socially during that time.

21. As Ms Kelly records at EK22ff, in June 2020 she received a complaint from a care home about how the Claimant had spoken with staff (pages 354 to 356). A few months later, in November 2020, she says she was made aware that the Claimant had upset staff in another team (ECHT) at an online meeting by asking them repeatedly what they did (we watched minutes 26 to 30 of the recording of that meeting at the Claimant's request). Ms Kelly herself saw nothing untoward in the Claimant's conduct on that occasion. We concur, based on what we were asked to view. The Claimant insists Ms Kelly was making up these concerns. We preferred Ms Kelly's account, not just because she recorded it contemporaneously but because she would have been taking a significant risk to raise with more senior managers (page 1100) something that she knew to be

untrue, which could of course have been investigated by them given that the complainants were named.

22. Ms Kelly says that she had to address these issues as the Claimant's manager, and always did so informally, though her email regarding the ECHT at pages 1099 to 1100 was sent to Ms Mascarenhas, Dr Domun and the Deputy Director of Operations (who was working with the Team on service improvement), without saying that she saw nothing untoward in the Claimant's conduct during the meeting. Ms Kelly says at EK26 that she had no issue with the Claimant raising clinical issues; her concern was the way it was done and its impact. She says at EK29 that she actively encouraged staff to raise concerns immediately, especially related to clinical matters and patient care, stating that "it is vitally important and central to the Trust's primary purpose" to do so.

Disclosure 1 – 9 September 2020 ("PID1")

23. The Claimant's email to Ms Kelly on 9 September 2020 concerned the triage process for two patients, specifically that a new member of staff, Julie Latham, had failed to complete the hazard/risk section of the triage form for a new referral – pages 359 to 360. The Claimant says at VS35 that she had to report this because it was putting her and the rest of the team at risk, so that she raised it to protect colleagues working in the same community environment. Ms Kelly replied (page 359) and confirmed she would speak to Ms Latham, which the Claimant accepts was an appropriate response. Others also complained about completion of triage forms (VS54 to 55). As well as speaking to Ms Latham, Ms Kelly suggested that this issue be fed into a working group (EK32) and on the same date sent an email reminding staff of the importance of fully completing triage forms. A meeting including ANPs was also arranged in due course to discuss triage and the referral sheet was at some point revised. Ms Kelly says at EK35 that it was part of the Claimant's role to raise such matters. It is accepted that this was a protected disclosure.

Detriment 1 - October 2020

24. By an email at page 366, on 5 October 2020 Ms Kelly asked the Claimant to draft a Community Statement of Practice ("SOP") relating to Covid-19. Her view was that it was something the Claimant could do because she was in isolation and thus had minimal other work to do (EK77), though she says she did not stipulate a timescale. The email said, "Can I please task you to do the Community SOP whilst on ISO [isolation]". In its Response, the Respondent said that preparing the SOP was about 2 hours' work but in Ms Kelly's oral evidence she said she thought it would take 6 or 7 hours. It was not drafting from scratch because the Respondent already had a similar policy in place for the main hospital and this was about adapting it for community work. She made clear to the Claimant that a colleague called Emma Fulloway would be able to assist, and passed on some kind of template. It is not unusual for ANPs to be asked to draft SOPs.

25. The Claimant replied to say that she was only isolating for one more day, was then not on shift until 10 October, and might need more guidance. She confirmed later that day to Ms Kelly and Ms Fulloway that she would start preparing a generic home-visiting SOP – page 363. In an email the next day she said to Ms Kelly that she would not have time to start and complete it then, adding that if it remained her task, "I will also need to know the date for

completion". She says that this was because she had already said she could not complete it in her isolation period.

26. The Claimant's case was that there was a timescale for completion of this task because Ms Kelly had said she could do it whilst she was in isolation, which was only one more day, and that this is confirmed by EK66 where Ms Kelly says that the Claimant could complete or at least start it on 5 and 6 October, and that it would take no longer than a day. The Claimant says it was bound to take much longer than that to research and draft a brand-new policy, whilst still working as normal, and that Ms Kelly was thus setting her up to fail. She told us she did not raise any concerns at the time because she wanted to be professional and avoid repercussions. She also said in oral evidence she had been given the task without a deadline.

27. The responsibility to draft a clinic setting SOP was given to someone else at the Claimant's request, as she and Ms Fulloway had identified that in fact two policies were required. On 9 November, Ms Kelly had circulated an action plan to the Team (pages 382 to 384), which identified that the Claimant had not completed the SOP, it was overdue as the deadline was 2 November, the Claimant had not updated her and so she would seek an update.

28. It is correct that the Claimant had not updated Ms Kelly since early October, though the Claimant says she was not aware of the 2 November deadline. As can be seen from page 377, when the Claimant questioned the content of the action plan on 11 November, Ms Kelly asked if she would complete it on 20 November when the Claimant would get protected time, and said she would issue an updated plan, which she did the next day (pages 390 to 391). Ms Kelly stated in the revised plan that the delay in completing the SOP was due to short notice, isolation, and annual leave. On the same date (page 387), Ms Kelly confirmed the time for the Claimant to complete the work, writing "Definitely granted [protected time] to allow time for completion".

29. The Respondent subsequently decided the SOP was not needed. It seems clear that this was a surprise to Ms Kelly, as at page 443 she asked colleagues why that was the case. The Claimant says that Ms Kelly giving her this task was connected to PID1 because Ms Kelly's behaviour started to change after PID1 had been made. She says Ms Kelly had written SOPs herself and knew the amount of work that was required. The only thing she could think of to explain Ms Kelly's instruction was the concerns she had raised, specifically regarding DES.

30. The Claimant in fact completed the SOP in December 2020. She was not able to identify any detrimental treatment she received because of that further delay.

Detriment 2

31. Registered nurses are required by the Respondent to carry out an annual non-medical prescribing review ("NMPR"). Ms Mascarenhas says at BM48 that in or around early November 2020 she was made aware by the Deputy Chief Nurse ("DCN") that three ANPs had not done their reviews. The Claimant does not accept that Ms Mascarenhas spoke with the DCN, saying there is no evidence of her doing so, though she accepts that Ms Mascarenhas asked Ms

Kelly to address the issue. We had no reason to doubt that Ms Mascarenhas spoke to the DCN about this matter as she says, and so we accept that she did.

32. The Claimant received three emails about her NMPR. The first was from Dawn Acton, Non-Medical Prescribing Lead Support Nurse (page 380) on 5 November 2020, asking her to complete her competency update which had been due in October. Louise Storey, Team Leader Out of Hours Service, then emailed on 6 November (page 379) asking the same, and then Ms Kelly emailed on 9 November (page 379) asking the Claimant to inform her when she would do the review, adding that it needed to be actioned asap and that she needed an update when the Claimant was next on duty.

33. The Claimant replied on 9 November and said she would set aside time for completing her NMPR. She also said that this was the third email on the topic and asked that in future one person contact her rather than her receiving multiple emails. In her view the system for NMPRs was a mess, though she accepts she had previously completed reviews annually. She also accepts that Ms Kelly's reply was supportive (page 378), in that it said the Claimant should let her know if Ms Kelly could support her on her return to duty to allow time for her to do the review.

34. On 10 November, Ms Mascarenhas emailed the Claimant (page 378) to apologise for the multiple emails and to say she would inform the DCN that the Claimant had not done her review because it had not been brought to her attention. The Claimant says that the matter being raised with the DCN caused her stress. Ms Mascarenhas says she had been asked to report to the DCN (BM48) and that what she said was to assure the Claimant that she would explain to the DCN why the Claimant was late. At a meeting with Ms Kelly on 20 November (page 397) the Claimant said she felt the matter had been escalated because she had asked that only one person communicate with her about it. Ms Mascarenhas also said in her email of 10 November that the DCN had stated that if the review was not done, the Claimant should not be prescribing. Ms Kelly repeated this in her email of 11 November – page 377. The Claimant replied (page 376) to say that some of her colleagues had been out of date for some time but were still prescribing. She was referring to Diana Milligan and Dave Weston.

35. The Claimant says that this alleged detriment was connected to PID1 because unlike those other colleagues, the matter of the NMPR was "heavily handled" with her. She says Ms Kelly was unhappy about PID1 and the only reason she can think of for being treated differently was that she had started to raise concerns. Ms Kelly told us (EK92) that Ms Milligan and Mr Weston did not show up as out of date on the database; the Claimant says there is no evidence of that. We preferred the Respondent's evidence on this point. First, it is clear the Claimant was not the only person contacted by the Respondent about the issue and secondly, it seems to us inconceivable that the Respondent would deliberately let someone who was out of date continue to prescribe. Accordingly, we conclude that Ms Mascarenhas flagged up for contact all of those who she was told by the DCN were out of date. The Claimant completed her NMPR on 12 November. In practice, her prescribing rights were never suspended, because in the period between being asked to do it and actually doing it, she was between shifts.

Disclosure 2 – 18 November 2020 ("PID2")

36. The Claimant chaired a triage meeting on 18 November 2020, at which the Respondent accepts various issues were raised both by the Claimant and others. The Claimant circulated minutes of the meeting, including to Dr Domun and Ms Kelly, on 24 November – see pages 410 to 413. She confirmed to us that she relied on the following parts of the minutes as constituting PID2:

36.1. Her statement that some referrals were unsuitable so that she was having to triage again to risk assess the referral before undertaking a face-to-face visit, due to the Covid-19 pandemic.

36.2. The reference to "stacking" of visits (that is multiple calls from triage whilst out on visits) – the minutes record this being raised by Mr Weston, but the Claimant says she wrote the minutes and escalated the issue by circulating them.

36.3. The Claimant's statement that the triage form needed to be revised so that triage could screen for Covid symptoms when accepting referrals. She said this was important to assist the clinician when undertaking their own risk assessment and when deciding whether to assess a patient face-to-face or by other means.

37. Dr Domun says at NAD6 to 7 that he has no special recollection of the minutes, stating that various areas for improvement in the triage system were identified, which he regards as entirely standard process. Ms Kelly acknowledged the Claimant's email and said she would discuss the meeting with Dr Domun. As a result, the triage SOP was reviewed and circulated to the Team for review, following which the criteria for referrals were clearly set out. The Respondent does not accept that this was a protected disclosure because the Claimant was simply forwarding minutes.

Detriments 3, 4 and 5

38. Ms Kelly and the Claimant met on 20 November 2020 – see the note from page 434. It is accepted that this was the date of the meeting in question. Detriment 4 is that at this meeting Ms Kelly described the Claimant's email about the NMPR (the email of 9 November at page 379) as unprofessional. What the meeting note says is that Ms Kelly told the Claimant that her email "came across as unprofessional". Ms Kelly's view was that instead of taking responsibility for her NMPR or recognising the importance of the issue, the Claimant had been defensive and deflected the issue away from Ms Kelly's request, though she accepts that the email "eventually acknowledged" that the request would be actioned. She felt that the Claimant had blamed administration for being out of date with her NMPR and in her 11 November email she had referred to others also being out of date rather than focusing on herself. The Claimant says that Ms Kelly was not amenable to constructive feedback but accepts that it was genuinely Ms Kelly's view that the 9 November email was unprofessional. Ms Mascarenhas shares Ms Kelly's view, highlighting to us that the Claimant did not acknowledge her omission or its seriousness and adding that it was "ridiculous" that the Claimant had to be chased.

39. Ms Kelly also made clear at the meeting that she would be seeing others who had not done their NMPRs, so that the Claimant was not being singled out. The Claimant did not accept she had been unprofessional, nor that she had been treated like others. She says that Ms Kelly describing her as unprofessional

related to PIDs 1 and 2 because it was the Claimant who had sent the 9 November email.

40. Detriment 5 is that Ms Kelly placed a note of the discussion of 20 November on the Claimant's file. The Claimant relied on PID2 as the reason why Ms Kelly did so but accepts that Ms Kelly was not at the meeting on 18 November when PID2 was made and did not get the notes until 24 November, that is after their meeting on 20 November took place. The Claimant says that putting the note on her file was a detriment because it included the word "unprofessional" and recorded that Ms Kelly was "disappointed", which the Claimant says was putting her down. She describes it as Ms Kelly gathering inaccurate information about her, with a view to formal proceedings in due course. In support of that assertion, she refers to Ms Kelly's much later email of 21 September 2021 (page 1416) sent to various colleagues, in which Ms Kelly said that she was going to meet with the Claimant formally and set expectations, because the Claimant had not come into the office to work. We return to this below.

41. The Claimant accepts that Ms Kelly's note included the Claimant's own comments made at the meeting as well as her own but maintains that the note was unfair. She also accepts that Ms Kelly told her that making the note was her standard approach (EK107) when discussing any such matters with her team. As Ms Kelly says at EK108, the Claimant told her that she felt the note was being made because the Claimant had made the comment about one person co-ordinating the NMPR process. The Claimant's case is that this was just one of the reasons and that PID2 was the other.

42. We return in our analysis below to the question of whether the note was in fact put on the Claimant's file. We record here that other employees who were out of date with their NMPR had notes put on their files as well, as can be seen from page 435, a note of Ms Kelly's meeting with an unidentified colleague dated 25 November 2020. The Claimant says at VS178 that Mr Weston told her on 2 December 2020 (page 437) that he had not had the NMPR mentioned to him at his one-to-one meeting, even though he was considerably longer out of date than the Claimant. As noted above however, Mr Weston did not show up as out of date on the database.

43. On 30 November 2020, Ms Kelly sent the Claimant a draft note of their meeting. The Claimant replied with comments on 2 December and Ms Kelly sent a further reply the next day. On 8 December, the Claimant acknowledged that she was responsible for her prescribing practice and said (page 440), "I am truly sorry that you felt offended by my email", then adding that the file note was excessive. Ms Mascarenhas advised in response that the note would not be placed on the Claimant's file (page 438) and Ms Kelly said something similar on 9 December (page 440). On 10 December, the Claimant said that this was "very much appreciated", which she says was only because she wanted things to settle down. She appeared to accept in oral evidence that the note was not placed on her file but says that she was wrongly informally disciplined (VS155).

44. Detriment 3 relates to Ms Kelly asking the Claimant, on or around 13 November 2020, to attend a sickness review meeting. The Claimant agrees that this was standard process after a week's absence. She expressed uncertainty about how to word this complaint on reviewing it during her evidence but at no point returned to clarify it, despite more than one prompt to do so. It seemed to us that what she was complaining about was the fact that the meeting on 20

November was not in fact a sickness review meeting but dealt with other matters. She also focused on the six-week delay in holding the meeting, which she says was in breach of the Respondent's sickness policy, adding that no support was put in place for her. She says that Ms Kelly had three other occasions when they could have met, including 21 and 22 October, which were dates mentioned in Ms Kelly's own email of 24 November (page 398) as days when they were both at work. The Claimant does not accept that the delay was due to work pressures as Ms Kelly contends (EK95), saying it was related to her PIDs because the meeting was not a sickness review but an opportunity to raise the NMPR. The only reason for this, she says, was that she was raising significant concerns.

45. Ms Kelly and the Claimant met again for a sickness review on 24 November, as Ms Kelly had said on 20 November that she did not have the Employee Sickness Record available to complete the review then. She emailed the Claimant to say that the purpose of the 24 November meeting was to check on the Claimant's wellbeing and see if she needed any support – page 398.

Disclosure 3 – 6 February 2021 ("PID3")

46. This alleged protected disclosure is described at VS191 to 194. The background is that Ms Latham had taken a call from someone who worked at a care home who had raised a concern about her mother-in-law who it appears lived in her own home. Ms Latham said that someone would attend. The Claimant phoned the referrer immediately, and having done so advised a 999 call. She says she spoke with Ms Kelly about this matter, who said she would speak with Ms Latham, but in fact Ms Kelly was not at work on this day as it was a Saturday; the Claimant suspects the conversation was on 8 February. Ms Kelly says she became aware of the matter when she read the email from Ms Latham dated 7 February 2021 which is at page 463. Accordingly, the Respondent does not accept that there was a protected disclosure on this occasion, as there is no record of the conversation and, as noted, Ms Kelly says it could not have taken place on the date alleged.

47. The Claimant accepts that there was nothing unusual about her raising this matter, and whilst Ms Kelly thinks the hospital admission was unnecessary, she accepts that clinical situations are not always black and white. Ms Latham reported to her that she had been crying about what had happened and about the Claimant's criticisms of her conduct. Ms Kelly spoke with the Claimant on 11 February (EK47) and said that Ms Latham had done her best and was upset that the Claimant had said she was unsafe. To Ms Kelly's mind, the Claimant was focused on the situation having been handled badly and did not acknowledge the impact of her conduct on a colleague. On 8 February, Ms Kelly had emailed the Claimant, Dr Domun and others congratulating her on her "simply great work" after feedback from a patient's relative, which Ms Kelly says is evidence that she did not consider treating the Claimant detrimentally as a result of her raising this matter. The Claimant says that Ms Kelly was simply advertising the service.

Detriment 6

48. On 4 March 2021, a secondment opportunity arose for a Clinical Lead in District Nursing (an AfC Band 8a position). The Respondent ringfenced it for District Nursing Team Leads given that they had the specific skillset for the role, as a development and promotion opportunity. The Claimant accepts that no ANP was sent the email that Ms Mascarenhas circulated to several colleagues at page

505, but says she was more than capable of doing the job, and some ANPs were not, and that she wanted the opportunity to get away from the rapid response team. She did not apply for the role when it became permanent, nor complain that she was not included in the email. As Ms Mascarenhas explained to us, it was the Respondent's standard practice to offer a secondment opportunity whilst the permanent recruitment process was ongoing.

Disclosure 4 – 11 March 2021 ("PID4")

49. Datix is the Respondent's internal incident reporting process via which any member of staff can report any adverse incident that they consider has a consequence or learning point for the organisation. A Datix report is disseminated to the appropriate incident management team depending on where the incident occurred and what happened.

50. On 11 March 2021 (see page 530), the Claimant visited a care home to undertake DES work, and the care home manager raised various concerns with her about the service, saying that there was no continuity with ward rounds due to various clinicians visiting each week, that she was having to repeat herself because staff did not know patients, that staff were turning up unannounced, that the same patient concerns were being raised with the service weekly as action points were not being addressed, and that residents were not getting support from doctors. The Claimant was thus reporting what the nursing home manager had told her, but says that the Respondent would not have liked her doing so because it identified that DES was not working properly and created more work for Ms Kelly and others. Ms Kelly (EK52 to 53) did not think the Datix of particular note, and it was not her responsibility to investigate it. The investigation was done by someone else and essentially identified that GPs were not doing what they should have been doing. The Respondent accepts that this was a protected disclosure.

Detriments 7 and 8

51. Detriment 7 concerns Ms Kelly saying to the Claimant in a meeting on 12 April 2021 that her behaviour, complained about by a colleague, was "unacceptable". The invitation to the meeting (page 598) was sent on 19 March 2021 and said that it was to discuss the Claimant's self-referral to Occupational Health ("OH") and the Datix referral. It did not refer to the need to discuss a complaint about the Claimant. The complaint in question was set out in the email at page 475 from Vikki Thompson, Lead Nurse AEC/Discharge Lounge, written on 11 February 2021 and forwarded to Ms Kelly on 15 February by Hayley Traverse, Lead for the Enhanced Care Home Team.

52. The background was that on 11 February, the Claimant was asked by a care home manager to see a patient. The Claimant recommended Ambulatory Emergency Care ("AEC") but Ms Thompson determined that the patient could be seen in the community. Ms Thompson was specifically annoyed that the Claimant had asked her, "Do you call yourself a nurse?" The Claimant denies making this comment. We did not need to decide whether it was said. Dr Domun called the Claimant and asked her to give the patient Dalteparin. The Claimant refused, believing it would be unsafe. She says that Dr Domun then put pressure on her to do so, was cross with her, and was asking her to work beyond her abilities (VS238 to 242). On receipt of Ms Thompson's email (EK123 to 124) Ms Kelly spoke to Ms Thompson to get her version of events. She also asked Dr

Domun for his views, having learned from Ms Thompson that he had been involved.

53. It is clear from the notes prepared by Ms Kelly (pages 599 to 601) that the meeting on 12 April dealt with much more than the Claimant's sickness absence. In fact, the Claimant herself raised points about such matters as recruitment and training. When Ms Kelly read out Ms Thompson's email, the Claimant asked why it had not been raised with her before. Ms Kelly told her that she had obtained further information before raising it. Ms Kelly stated that this was the third complaint about the Claimant and asked how she could support her to ensure it was not repeated. The Claimant says she was so upset that she could only reply, "I don't know, you tell me".

54. According to Ms Kelly's notes, it was when she said that the complaint was about the Claimant's attitude and behaviour, and again asked how this could be improved, that she described it as unacceptable. What the notes specifically record is a comment that it was unacceptable that there had been three complaints. Ms Kelly could not recall in her oral evidence when in the discussion this comment was made. The Claimant's evidence was that it was made twice, the first time right at the start of this part of the discussion, although she acknowledges that the meeting was a long time ago. We concluded on the balance of probabilities that the contemporaneous note is the most reliable evidence of when the comment was made and thus that the word was used where the note says it was as outlined above. The Claimant accepts it would be reasonable to say the behaviour was unacceptable, but only if Ms Kelly had obtained the Claimant's version of events first. She also accepts that a manager should be able to speak informally to a team member about such matters but says this should not have been done at a sickness review meeting with an employee who had work-related stress.

55. The meeting ended with Ms Kelly saying that she would schedule a further appointment to allow them both to reflect on the complaints. The Claimant left the meeting and broke down in tears with Ms Milligan who told her to go home. When told about this, Ms Kelly said that the Claimant could not just walk out, as it would be a disciplinary matter to do that with two patients waiting to be seen. At EK132 she says that she said this in the heat of the moment.

56. On 19 April 2021 (page 928), Ms Kelly sent the Claimant a copy of Ms Thompson's complaint, a draft file note of their meeting on 12 April and a statement made by Dr Domun – see detriment 10 below. The Claimant does not accept that putting the meeting note on her file (detriment 8) was simply standard practice as Ms Kelly asserts (EK135), saying that this was only done with her and no-one else. It does seem to have been Ms Kelly's standard practice in our view – the discussions with the Claimant and others on the NMPR issue show that to be the case.

Detriments 9 and 10

57. The background to detriment 9 is set out above (PID3) and concerns Ms Latham's email to Ms Kelly of 7 February 2021 (page 463) and an email to Ms Kelly from Dr Domun dated 6 April 2021 (pages 606 to 607). As set out at EK149, Ms Latham told Ms Kelly that she had discussed the matter with Dr Domun, which is why Ms Kelly contacted him about the matter. Detriment 10 concerns Ms Thompson's email at page 475, also referred to above. As Dr

Domun says, he was asked by Ms Kelly to provide his recollection of that matter as well; his email of 6 April therefore dealt with both.

58. In relation to the matter involving Ms Latham, there was some confusion before us as to whether Dr Domun's email was in fact referring to the same incident, given that he referred to the patient being in a care home when the patient referral (page 461) makes clear that she was in fact in her own home. We were clear that this was just an error on Dr Domun's part. This error is what the Claimant says represents the falsity of what Ms Kelly communicated to Dr Domun (detriment 9), her point being that Ms Kelly was making things up. What the Claimant objects to in Dr Domun's comments about the matter raised by Ms Thompson, which formed the bulk of his email to Ms Kelly, is his reference to the Claimant not being competent to manage a patient with DVT. What he said was:

58.1. The Claimant could not give Dalteparin as she had not done this for a while, was not up to date with things and was "not competent" to give a subcutaneous injection.

58.2. He advised the Claimant that she must do DVT competencies and use the DVT pathway when required and expressed concern as to why she could not do the injection.

59. The Claimant acknowledges that Dr Domun's email was more than 5 months after PID2 but cannot think of any other reason why he would have said what he did and says she had also continued to raise issues regarding DES. Her case is that she did not say she could not administer Dalteparin but that she disagreed with doing so in this instance. She also denies saying she was not up to date and could not do a subcutaneous injection. It was not necessary for us to decide what she did and did not say to Dr Domun on this occasion.

60. The Claimant says that in writing that she was not competent, Dr Domun meant that she did not understand the Dalteparin medication or its side-effects. In fact, however, emails such as that from Ms Kelly to various colleagues on 2 June 2021 at pages 476 to 477 suggest that the use of the term "competency" and its derivatives was widespread – this email referred to staff DVT competency. The Claimant herself said in her 1 May 2021 response to Ms Thompson's complaint (page 629) that she could not be signed off on DVT competencies at that point. She thus eventually agreed in evidence that Dr Domun was simply saying that she was not up to date with the competencies, but added that him saying this "stressed her out". She also used the word competency about herself when making submissions about the NMPR issue.

61. Dr Domun emphasises in his statement that his email did not state that the Claimant was not competent to manage the patient, but rather set out his recollection of his discussions with her on 11 February 2021. He says he was thus referring to the Claimant's own assessment.

Informal grievance

62. On 27 April 2021, the Claimant raised a grievance, informally, telling Ms Reidy that she was experiencing work related stress and bullying, and that she felt she had no choice but to leave her role – page 615. The Claimant says she did not leave the job at this point because she did not want to, hoping things

would get better. It was having a week off that had allowed her to reflect, conclude she could not go on in the same way, and thus raise her complaint.

63. She met Ms Reidy on 30 April 2021, online, raising numerous concerns – about DES and a lack of staff, that nurses were writing up clinical notes on days off, a lack of SOPs, poor referrals from triage, and so on. Ms Reidy says (FR16) that the Claimant also felt she was being singled out in respect of her conduct, said that excessive notes had been put on her file, and believed that Ms Kelly was not checking complaints before bringing them to her attention.

64. On 4 May 2021, Ms Kelly wrote to Ms Reidy (page 15A) requesting a meeting and saying, "As you are aware I have been dealing with our two staff, [an unnamed individual and the Claimant], both have been receiving complaints from relatives, patients and colleagues and I have spoken with [unnamed colleague] about [them] with the difficulties we are facing with their attitude and behaviour". Ms Kelly was not sure whether this was her email (the details are redacted), but Ms Reidy was clear that she did and we agreed with that. Whilst she accepts that the email was not accurate as there were no complaints from patients or relatives about the Claimant at all, Ms Reidy says that Ms Kelly had simply elided the two sets of complaints in an inelegant expression. In Ms Reidy's note of her meeting with Ms Kelly on 12 May 2021 (pages 657 to 658), Ms Kelly made clear that the complaints about the Claimant were from colleagues.

65. On 6 May 2021, Ms Reidy met with Ms Mascarenhas. They discussed how management had asked staff in the Team to raise specific concerns so that they could be addressed, and that it was felt no specifics had been forthcoming. She also met Ms Kelly on 6 and 12 May 2021, the latter noted as set out above. Ms Kelly mentioned a pattern of complaints against the Claimant. Ms Reidy suggested that she take a more investigative approach when raising such matters with her staff.

Disclosure 5 – 2 May 2021 ("PID5")

66. On 2 May 2021, the Claimant submitted another Datix report, this one a concern about a patient she saw on a DES ward round; there had also been no new patient check. The Respondent accepts that this was a protected disclosure. The Claimant says she never got any response, though it seems clear from the Respondent's evidence that this was not unusual and it may well have been impractical to provide responses to those who submitted such reports, given the numbers received. The Claimant says that Ms Kelly would not have liked her flagging yet more concerns about DES, thus creating more work for her. In fact, although Ms Kelly (EK56) was responsible to sign it off, a colleague investigated the matter and concluded that the Claimant had identified proper concerns, so that steps were taken to communicate the need for all care home patients to have a new patient check within a week of arrival. No other actions were required. Ms Kelly would have been concerned if the Claimant had not raised this point. She is notified of around ten Datix reports daily.

Disclosure 7 – 14 May 2021 ("PID7") and Detriment 11

67. On 14 May 2021 Ms Reidy met with the Claimant and Ms Mascarenhas (Ms Milligan was also present) online, to discuss the Claimant's informal grievance. As Ms Mascarenhas puts it (BM19) the meeting was to see if the issues between Ms Kelly and the Claimant could be resolved informally. It transpired on day 6 of

this Hearing, during Ms Mascarenhas's evidence, that Ms Kelly had raised a grievance against the Claimant, but the Claimant was not informed of it because it was felt best not to do so whilst the Respondent worked towards an informal resolution.

68. The Claimant did not raise PIDs 1 to 3 at this meeting, as she accepted in oral evidence. What she did raise is listed from VS384 to VS398, around fifteen complaints in all. There was nothing unusual about staff raising concerns about the service – as Ms Mascarenhas says at BM23, it is in line with their employment responsibilities and a requirement of their code of practice. She goes on to say at BM26 however that the Claimant also criticised management. The Claimant does not accept that, saying that Ms Mascarenhas took it personally, when she was just trying to sort out service issues.

69. The essence of detriment 11 is that the Claimant says Ms Mascarenhas became angry and shouted at her. Her evidence is that Ms Reidy and/or Ms Milligan stopped the meeting after 20 minutes as a result, they took a break, and that Ms Mascarenhas was much calmer on her return which she says indicates that Ms Reidy had spoken to her about her behaviour. Ms Mascarenhas's account from BM26 is that she started to feel under attack and so she accepts that at times she became defensive. She felt she had answers for the Claimant's concerns – whether administrative support, the use of electronic patient records or provision of laptops for visits – which demonstrated management had put in place solutions or was working towards them, but whatever she said did not seem to her enough for the Claimant. She denies shouting (BM35), says she has quite a loud voice and tone, and that it would have been very foolish to shout with witnesses present. The Claimant accepts Ms Mascarenhas is passionate and can be quite loud.

70. Ms Reidy's account (FR49) is that both Ms Mascarenhas and the Claimant became louder and more emotional as the discussion progressed. She did not tell Ms Mascarenhas she had any concerns, either during the break or afterwards. She told us the dialogue was fast-paced, that neither the Claimant or Ms Mascarenhas were giving each other time to respond, and that the discussion was not focused on resolving the issues being raised. When she was interviewed as part of the investigation of the Claimant's later formal grievance, Ms Reidy described Ms Mascarenhas's response to the Claimant at this meeting as "not gold standard" (page 1016, paragraph 106), which she told us was a reflection on Ms Mascarenhas's defensiveness. After the meeting, Ms Milligan and Ms Mascarenhas exchanged emails, agreeing that the Claimant and Ms Kelly should meet to resolve the issues that had arisen about the complaint from Ms Thompson. Ms Milligan said, "I agree that as colleagues we should be supportive of each other and so far, you have given constructive feedback and actions planned to safety net further progress" (pages 673 to 674). Given that exchange and given that there was no complaint at the time, neither Ms Reidy nor Ms Mascarenhas accept Ms Milligan's and the Claimant's later accounts of the meeting given during the investigation of the Claimant's formal grievance (see page 1199, where Ms Milligan described what happened as "bullying").

71. In resolving this evidential dispute, we effectively had two witnesses saying Ms Mascarenhas did not shout and two – albeit Ms Milligan's evidence could not be tested by the Tribunal – saying that she did. The contemporaneous email from Ms Milligan and the absence of any complaint by either her or the Claimant at the time are however telling. Immediately after the meeting, Ms Milligan did

not suggest there had been any shouting; in fact, to the contrary, she referred to constructive feedback. We concluded therefore that both the Claimant and Ms Mascarenhas raised the volume of their voices as the meeting became more difficult, but that Ms Mascarenhas did not shout as the Claimant alleges.

72. Ms Mascarenhas was unaware of PID1 until the Claimant's later grievance process (BM37), and was not sent PID2 nor PID3 because of a system error, though she regards Datix reports as the bedrock of how the Respondent improves and learns. After meeting the Claimant, she met with Ms Kelly to outline points for reflection in terms of managing and communicating with staff. There was then a meeting between the Claimant and Ms Kelly (both accompanied) on 20 May 2021, at which they talked through the complaint from Ms Thompson, and ultimately agreed that no further action would be taken. It is agreed that things improved thereafter, and that there were no further issues of note between Ms Kelly and the Claimant until September.

73. There was also a follow up meeting on 26 May 2021 between the Claimant, Ms Mascarenhas and Ms Reidy. As Ms Mascarenhas says at BM42, the Claimant said that she felt much better now there had been opportunity to clear the air. Ms Mascarenhas was open about where Ms Kelly could have done things differently acknowledging, as the Claimant says, that the relationship between the Claimant and Ms Kelly had broken down (page 712) though she went on to say (page 713) that it was not completely broken. Ms Reidy says that Ms Kelly and the Claimant having met in the interim seems to have started to rebuild things. No follow up actions were identified. The Claimant says she felt reassured by what had been said, though looking back now, she believes there was no clear plan which is why further difficulties arose. At this point, she was satisfied to be left alone to do her job.

5 July 2021

74. On 5 July 2021, the Claimant was asked in the office by Dr Ali why she had been to review a patient. She replied that the patient was frail and had been followed up for her own safety. She alleges that Dr Ali then said to her, in front of colleagues, "if we can't do acute visits without reviewing patients then we are redundant as ANPs, because if you can't do acute visit without reviewing/following up, you're no longer good for anything" – see VS458.

75. Dr Ali made a note (page 739) of what he regarded as a brief and unexceptional exchange. He says he questioned the need to visit a patient for review purposes, which is something that CHNPs or GPs should do and the Claimant said it was the Respondent's policy that she should follow up if she prescribed medicine, which he was not aware of. His account is that in response to that comment he said that if clinicians were doing follow up reviews, "we cannot meet the demands of our acute rapid response service". He told us that if a review was going to be done, he needed to know, so that he could keep track of capacity.

76. In her oral evidence, the Claimant said that Dr Ali waved his hand at her dismissively when speaking, though this was not mentioned in her witness statement or indeed the allegation itself. On 6 July 2021, the next day, she wrote an email recounting the discussion (page 741) in which she quoted Dr Ali as saying, "if we can't do acute visits without reviewing patients then we are

redundant as ANP's because if we can't do acute visits, we are no good for anything". There is no reference to "you" (i.e., the Claimant) in that email.

77. Dr Ali was not surprised the Claimant was offended by their discussion, as "it was difficult to ask the ANPs anything" (SA28) – this is why he made a note at the time – but denies saying the words the Claimant attributes to him. At his interview for the Claimant's grievance (page 989, paragraph 60), the investigator said, "Another witness puts this in similar but slightly different terms as follows – 'You should be able to do this, and if you cannot do it, then what are you doing here, as an ANP?'". Dr Ali says no name was ever given to him, so that he was unable to comment further. He has had no other complaints about his conduct whilst with the Respondent. There were complaints about his conduct at a previous Trust, but it was concluded that they were not proven – see pages 930 to 941.

78. We concluded again that both parties' contemporaneous record should be preferred, so that as the Claimant said in her email complaining about the conversation, Dr Ali did not direct his comment to her personally but referred to ANPs as a whole – "we" rather than "you". For reasons that will become clear in our conclusions, we did not deem it necessary to decide whether Dr Ali used the word "redundant" or said, "what use are we?" (we are clear he did not say "what use are you?"). We also did not need to decide whether he waved his hand at the Claimant.

79. After the Claimant emailed Ms Mascarenhas about this conversation, Ms Kelly spoke to the Claimant and then with Dr Ali and Ms Mascarenhas. Ms Mascarenhas's view (BM74) was that what Dr Ali said was not inappropriate. She emailed the Claimant on 7 July 2021 (page 740) to say it was appropriate for him to contact her, and that the Claimant should think about his capacity management role and whether she might benefit from him attending one of her visits. She also suggested the Claimant meet with him to understand why he was questioning her, rather than take offence, and at the same time put forward how the situation made her feel, adding that either she or Ms Kelly could also be present at any such meeting. Ms Mascarenhas did not say in this email that Dr Ali was an asset. Rather she said that the Claimant had previously said how good he was. The Claimant agrees that is what was said. Her point is that her complaint was not acknowledged and addressed. She did not reply to Ms Mascarenhas's email, considering it dismissive. Ms Mascarenhas did not want to get into a "he said, she said" discussion. She did not consider at that informal stage asking more junior staff who had apparently witnessed the conversation to recount their recollections, as in her mind that was for any more formal process.

Disclosure 6 – 7 August 2021 ("PID6")

80. The Claimant filed another Datix report on 7 August 2021 – page 764. She had visited a patient, who had a young child and had called 999 due to worsening shortness of breath and coughing up blood. The patient was directed to the service without her consent but triage nevertheless accepted the referral. On arrival at the person's home, the Claimant called 999. This Datix report was also allocated to Ms Kelly to sign off – see EK59ff. She fully agrees that the Claimant was right to raise the matter and would have been concerned if she had not. Investigation revealed it was an issue for the West Midlands Ambulance Service which had refused to send an ambulance to the patient. The Claimant says again that this would have created more work for the Respondent, though she

accepts that receiving a Datix report does not necessarily mean Ms Kelly or Ms Mascarenhas had to action it themselves. It is accepted that this was a protected disclosure.

Detriment 12

81. As the Claimant says at VS26, on 13 May 2020 Ms Kelly completed a Covid-19 risk assessment (page 348), which said that because the Claimant is of mixed heritage, she was not to visit care homes. It appears to have been updated in October 2020 – page 371. It said patients should only be visited if absolutely necessary and (page 372) that the Claimant should continue to work remotely.

82. On 2 September 2021, the Respondent issued a communication saying that Covid-19 cases were on the rise at the Hub where the Community Team was based. Ms Mascarenhas explained to us that the Respondent's analysis made clear that this was the result of relaxation of national rules, not anything about the Hub itself, which we accepted that as unchallenged evidence. On the same day, Ms Mascarenhas emailed the Community Team (pages 768 to 769) to say that they were required to start each working day at the Hub at 8.00 am unless seeing a patient at that time. This was on instruction from the Divisional Chief Nurse. Ms Mascarenhas says at BM66 that this was to help manage the service more effectively. She told us that having everyone in at the start of the day was to enable management to understand where extra support might be needed, for example on triage. She also told us that the Respondent was generally requiring staff to attend their place of work, and that not knowing staff whereabouts made deployment arrangements more unwieldy.

83. On 6 September 2021, the Claimant emailed Ms Mascarenhas and Ms Kelly (page 767) to say that her father had Covid, also saying that she was concerned about being asked to go into the office given the increase in Covid rates amongst staff, which might further impact poor staffing levels. She said that "our current risk assessments, which are in place to minimise the risk of us contracting Covid" had kept her free of infection to that point. In reply Ms Kelly emailed the Claimant on 10 September (page 778), to say she had spoken with Ms Mascarenhas and Mary Sexton (the DCN) and it was deemed that the Claimant did not work with extremely vulnerable patients and so could come into work and visit patients face to face. An exemption from isolation assessment was completed for the Claimant at around this time (page 786), focused on whether she was a risk to others, not on whether she was herself at risk. The Claimant then requested carers' leave, which was declined, Ms Kelly saying in evidence (EK161) that it was not an emergency for the Claimant.

84. On 14 September 2021, the Claimant told Ms Kelly that she had been contacted by track and trace. The usual procedure was to get a PCR test, which Ms Kelly regarded as a priority in order to maintain staff capacity. There is a handwritten note by Ms Kelly at page 787 at the end of the exemption from isolation assessment which records that she spoke with the Claimant on Friday 17 September 2021 arranging a return-to-work Covid-19 risk assessment. The note said that the Claimant had advised no changes from her previous assessment and was happy for Ms Milligan to discuss it with her. This was because she was returning to work over the weekend when Ms Kelly would not be present.

85. On 17 September 2021, Ms Kelly informed Ms Mascarenhas (page 780) that she regarded it as a conduct issue that the Claimant had still not had a PCR test, as ANPs working remotely could not undertake their full duties, thus affecting capacity. Ms Kelly said in the email, and insists, that the Claimant had told her she had been unable to get the test due to car problems, which the Claimant denies. We did not see the need to resolve that conflict of evidence either. On 18 September, the Claimant told Ms Kelly the test was negative.

86. On 21 September, Ms Kelly called the Claimant, asking where she was. She did not review the Claimant's October 2020 risk assessment before making the call. During the call, she said that the Claimant should be working from the office and according to the Claimant (VS515) "demanded and shouted at [her] to come into the office now". This appears to have been at around 8.30 am. Ms Kelly says at EK155 that the Claimant did not have a patient appointment first thing (which is agreed) and so she would have called any ANP in that position. She denies shouting, saying she was in a room full of staff at the time. Having seen her give evidence, we are inclined to accept her account.

87. The Claimant was the only ANP on shift. She explained she was working remotely, still in isolation after contact with her father and said that she did not feel safe permanently working from the Hub because of the risk of Covid-19. The Claimant says that Ms Kelly could not explain why she needed to go in. She then went off sick. Ms Kelly wrote to HR on the same day (page 1416) to say that she was going to write to the Claimant to meet her formally and set expectations. She also said, "the return-to-work risk assessment has been completed [this was the Covid-19 exemption assessment done by telephone as above] as she had returned to work on a Sunday". The Claimant connects Ms Kelly's request to the protected disclosures because she says that what Ms Kelly asked her to do was not rational. Ms Mascarenhas's own risk assessment (she is also a BAME person) was changed at around this time.

Contact during sickness absence

88. On 2 November 2021 (not 7 November 2021 as stated in the list of issues), Ms Kelly texted the Claimant to see if she was available for a chat – page 799 – also providing details of the Respondent's Health and Wellbeing Service. Having had no reply, on 3 November she called the Claimant and left a voicemail. A week later, on 9 November, she sent a similar text – page 807. At this point the Claimant replied to say that she had a sick note to 26 November and asked for space. Ms Kelly agreed. The Claimant accepts that this was not an unreasonable level of contact. There appears to have been a telephone review between the Claimant and Ms Kelly on 11 November and Ms Kelly then sent the Claimant a letter to attend a review meeting on 19 November.

Workload

89. The Claimant was keen to emphasise to us that when DES was introduced there was no consultation and no increase in staffing levels, even though it added around 1,100 additional elderly, frail patients with complex needs to the team's workload – though as stated above, the patients were already within the Team's remit, just not in relation to the proactive care which the DES represented. Ms Kelly confirms that about 6 months into the DES contract she realised they were short-staffed, though in her interview for the Claimant's grievance she said there was a service impact from the outset – page 1042, paragraph 231. She

escalated her concerns about workload to Dr Domun on 25 November 2020 and later to Ms Mascarenhas on 9 December 2021 – page 1043, paragraph 240. The Respondent acknowledges that the introduction of DES was handled poorly by management – page 1337 – and Dr Ali sought to terminate the DES contract from the time he was appointed (page 997), on the basis that he found ANPs and CHNPs reluctant to do the work, which in his view is what created the capacity issues.

90. As the Claimant says at VS291 to 292, on 15 March 2021 she met with Ms Kelly for a sickness review meeting, at which she said she was feeling stressed at work, was not sleeping, and had self-referred to OH (pages 570 to 571), saying that the DES work was unsustainable. The self-referral is at pages 564 to 567, though this was not seen by management. It mentioned stress levels increasing since DES began, that the Claimant had concerns around patient safety, and that she was being singled out for raising those concerns. Ms Kelly's note of the meeting at page 570 refers to the Claimant raising the requirement to contact homes at 8.00 am to ascertain patient needs. The Claimant accepts that of itself this did not cause any stress, but added that the note does not reflect the full conversation.

91. Ms Kelly agrees that the number of patients seen by ANPs per day increased markedly after DES was introduced, though if there were several referrals for one care home, they were timetabled together so that the staff member would not visit more than a couple of homes a day, and whilst doing DES work, staff would not be given urgent referrals. Ms Kelly also agrees (EK193ff) that several staff raised concerns about workload after DES was introduced and because the pandemic inevitably reduced staffing levels. She was never told however that staff could not do their work in working hours or were not going home on time. In response to the concerns, she increased the use of bank staff and successfully requested more funding for staff recruitment – EK193.

92. On 18 March 2021 there was a team meeting about DES, led by Ms Mascarenhas, at which concerns were raised about workloads. It was agreed that eight patients per day was reasonable on average. As the note of that meeting shows at page 576, the Claimant agreed with that. In her email to Ms Kelly of 20 March 2021 at page 579, she said she was feeling a bit better since the meeting, knowing everyone had an opportunity to express their concerns. She said, "I think it's helped because I have had a manageable workload, which has led to a couple of nights better sleep. I think the unmanageable daily caseloads and lack of staffing have definitely been a significant trigger to my stress".

93. At their meeting on 12 April 2021 (page 599), Ms Kelly asked about the Claimant's self-referral to OH and was told she was completing a stress risk management questionnaire. Ms Kelly's note then records, "I asked Vikki in the interim is there anything I can do as her line manager to alleviate work related stress; she replied 'I don't know', I asked how you feel coming to work. Vikki replied, 'multitude of stuff too much to discuss in this meeting, I just come to work and I am looking for a job'". What the Claimant then went on to refer to was essentially about the culture of the team and issues with management, not references to her workload, and certainly not to it being overwhelming.

94. Ms Reidy says at FR21 that she does not recall the Claimant saying at their meeting on 30 April 2021 that she was overwhelmed or unable to cope. Rather,

her concerns were about DES and writing notes on days off which were general to the team. The Claimant also referred us to her email to Ms Reidy at page 616 sent on 27 April 2021, although this refers to bullying, not to workload. The Claimant's statement suggests workload was one of the issues she raised at her meeting with Ms Mascarenhas and Ms Reidy on 14 May 2021 (see above) but this was in general terms related to the team, her point being that the team wanted clarity about the writing up of notes "due to unrealistic workload". The Claimant confirmed in oral evidence that she only ever worked her usual three 12-hour shifts, and that staff were allocated to DES each day, but says that staff sickness absence made it worse and that all staff had too much work because of DES.

95. The tables at pages 836 and 1374 indicate that the Claimant had the second highest number of urgent patient referrals amongst ANPs in August 2021, seeing 30; two colleagues saw 29; one saw 40. This plainly does not include any DES work the ANPs did that month. Dr Ali does not think seeing 8 to 12 patients a day would be unfeasible, though he acknowledged that if they were each spread around the borough, that would be problematic, but as already indicated steps were taken to avoid that. Patients in care homes are generally seen with minor conditions that take very little time to address, whilst the rapid response service often requires more time to be spent with the patients. Dr Ali did some of the DES work himself in an attempt to help.

96. The Claimant undertook eight bank shifts voluntarily after the introduction of DES in October 2020 – page 766. The Respondent terminated the DES contract in 2022 as the rapid response service demand had tripled. It continues to increase.

"Last straw"

97. On 15 November 2021, the Claimant and others received notification of the launch of a formal 30-day consultation at a meeting to be held on 24 November 2021 – see pages 820 to 822. Page 812 shows twelve staff were involved in it. The Claimant says that the proposal was to change her job role and hours to meet the needs of a completely different role and service and that a change in hours was the last straw for her, as Ms Kelly was fully aware her hours were important to her and her family, specifically because she was caring for her disabled son. The change process was later aborted and not followed through, leading the Claimant to conclude that it was a fabrication because it was withdrawn after she resigned, though she accepts the Respondent was entitled to ask staff what they thought about it and that it was right to send her the letter if she was affected by the proposal.

98. Ms Mascarenhas flatly denies that the consultation was a sham. She said that because of the hours of CHNPs, there were days on which there were insufficient staff at work. Further, referrals were concentrated into the middle part of the day, with few referrals at the beginning and end of ANP shifts, hence the wish to change ANP hours of work. Ms Kelly for her part explains (EK190) that the catalyst for the consultation was that the rapid response team was not operating as effectively as it should. The Respondent's case is that the consultation ended because it transpired that some of the data on which it relied was inaccurate – see Ms Kelly's email to relevant staff of 15 December 2021 (page 857). The Respondent acknowledged that the management of change process was handled poorly – page 1337 – being launched based on incorrect

data, though it was halted shortly thereafter. We will return to the parties' respective cases about the consultation in our conclusions.

99. The Claimant resigned on 26 November 2021 – see the email and letter at pages 849 to 851. The letter said little, giving notice to take effect on 28 February 2022, saying it had been an absolute pleasure working with the team who the Claimant would miss and wishing them all the best. It said nothing about her reasons for leaving. She remained employed through her notice period. She says she was worried that if she did not, Ms Kelly would report her to the NMC. As the Claimant says at VS652, most of the original team have left. Dr Ali explained that this was largely due to the proposed change in hours.

Time limits

100. ACAS Early Conciliation began and ended on 16 March 2022, and the Claim Form was presented on 15 April 2022. The Claimant told us she could not have made a Claim about the protected disclosure detriments in October to December 2021 because of her poor mental health, for which she says she was having counselling with the RCN who also gave her advice on her employment situation. At page 905 there is a GP record from 24 September 2021 which refers to the Claimant being stressed and having raised blood pressure, which the Claimant says disrupted her concentration. There is no other medical record of relevance. On 7 January 2022 (page 878) she filed the formal, ten-page grievance referred to above (pages 865ff) which was dated 20 December 2021. The Claimant agrees that she "maybe could have" copied the grievance text into a Claim Form and submitted it.

Law

Protected disclosures

101. For reasons that will become clear in our Analysis below, it is not necessary to set out a summary of the law in relation to what constitutes a qualifying disclosure under the ERA.

Detriment

102. As will also become clear in our Analysis, it is not necessary to set out a summary of the law in relation to protected disclosure detriments either.

Time limits

103. Section 48(3) ERA provides, "*... an employment tribunal shall not consider a complaint under this section unless it is presented - //(a) before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or // (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months*". Where, as in this case, the complaints of detriment were presented to the Tribunal after the primary time limit has expired (even accounting for the impact of ACAS Early Conciliation), the Tribunal must answer two questions in order to determine whether the complaint should nevertheless be allowed to proceed. The

first is whether the Claimant has established that it was not reasonably practicable to present the Claim in time and, if she has, the second is whether she presented it in such further period as was reasonable.

104. On the first question, there has been extensive case law over many years. In **Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53, CA**, it was said by the Court of Appeal that the statutory wording should be given a liberal construction in favour of the employee. Mr Nicholls drew our attention to the decision in **Cygnet Behavioural Health Ltd v Britton [2022] EAT 108** in which the Employment Appeal Tribunal ("EAT") said that this does not reflect the way the legislation has been interpreted and applied by the Court of Appeal in more recent cases, describing the test as a strict one so that there is no basis for giving it a liberal construction in favour of the Claimant. One of the Court of Appeal cases cited by the EAT was **London Underground Ltd v Noel [1999] IRLR 621** in which it was said that the power to disapply the statutory period is "very restricted".

105. In **Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119**, the Court of Appeal held that the test to be applied was not what was reasonable, nor at the other end of the spectrum what was physically possible, but whether it was "reasonably feasible" for the employee to present the complaint in time. This has to be assessed in all the circumstances of the case, the Court indicating that potentially relevant factors might include the manner of and reason for dismissal (as it was in that case), the substantial cause of the Claimant's failure to comply with the time limit, whether there was any physical impediment preventing compliance such as illness, whether during the limitation period the Claimant was seeking to resolve her disputes with the Respondent using the latter's procedures, whether (and if so when) the Claimant knew of her rights, whether the Claimant had been advised, and any fault on the part of the adviser. It is well-established that mere ignorance of time limits will not suffice to excuse failure to comply with them, though it might if the ignorance is of itself reasonable.

106. Where illness is said to be the reason for not presenting the claim in time, the tribunal must assess its effects in relation to the overall limitation period but as the Court of Appeal made clear in **Schultz v Esso Petroleum Co Ltd [1999] ICR 1202** the weight to be attached to a disabling illness will be greater where it falls during the crucial later weeks of the overall limitation period. The Tribunal can also legitimately expect a claimant to produce evidence of the illness and how it prevented her from presenting the claim.

107. As for the second question, which only arises if the Claimant establishes that it was not reasonably practicable for her to present the Claim in time, there is no particular period that will be "reasonable" in all cases. Again, the Tribunal is required to look at all the circumstances of the delay, and at how promptly the Claimant acted once any impediment to presenting a complaint had been removed. The point is not whether the Claimant acted reasonably but in all the circumstances of the case what extended period it is reasonable to allow for presentation of the complaint.

Unfair dismissal

108. Section 95(1)(c) of the ERA provides that an employee is dismissed for unfair dismissal purposes if "*the employee terminates the contract … (with or without notice) in circumstances in which he is entitled to terminate it without*

notice by reason of the employer's conduct". Widely known as "constructive dismissal", the test for establishing dismissal in these circumstances is that given in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**. It is not necessary to refer to this and subsequent approving authorities in detail. It is sufficient to say that they make clear that in order to establish constructive dismissal there must be a repudiatory breach of contract by the Respondent – in other words, conduct going to the root of the contract or which shows that the Respondent no longer intends to be bound by it; the Claimant must have resigned in response to that breach; and if the Claimant has affirmed the contract after the breach, which may for example arise as a result of delay in resigning, constructive dismissal will not be made out.

109. The Claimant relies on the key implied term of trust and confidence. The term is implied into every contract of employment to the effect that an employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (**Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666** and **Malik v BCCI SA (in liquidation) [1997] ICR 606**).

110. We raised with the parties the decision of the EAT in **Mostyn v S&P Casuals Ltd** in which it was said that the phrase "without reasonable and proper cause" in the formulation of the implied term adds little and is likely to introduce a reasonableness test to what is recognised to be a contractual test for determining whether a claimant has been dismissed. That does seem to go against other cases – see for example **Hilton v Shiner Ltd – Builders Merchants [2001] IRLR 727** in which the EAT said that a suspension for example will be an act capable of destroying trust and confidence but cannot be such if the employer had reasonable and proper cause for it. It is also important to note that EAT's comment in **Mostyn** came in the context of an obvious breach of an express term.

111. The Claimant argues that there was a series of issues which taken together destroyed her trust and confidence in the Respondent. Any breach of the trust and confidence term is fundamental and repudiatory (**Morrow v Safeway Stores plc [2002] IRLR 9**). Whether there has been a breach has to be judged objectively: in the **Woods** case, it was said that Tribunals must "look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is that the employee cannot be expected to put up with it".

112. It is also well-established that the matter which finally results in the employee deciding to resign (usually referred to as "the final straw"), does not have to be of itself a fundamental breach of contract, and in fact does not even have to be blameworthy behaviour by the employer at all. It must nevertheless be an act in a series whose cumulative effect is to breach the implied term, and must contribute something to that breach, however slight, although what it adds may be relatively insignificant. An entirely innocuous act will not be sufficient – **Omilaju v Waltham Forest London BC [2005] ICR 481**. **Omilaju** says in relation to final straw cases, "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 … 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 … it must contribute something to that breach,

although what it adds may be relatively insignificant … If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach … there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect".

113. Again for reasons that will become clear in the Analysis below, there is no need to set out a summary of the law in relation to affirmation of the contract after a fundamental breach, nor need anything be said about another case to which we drew the parties' attention at the start of the Hearing, namely the decision of the EAT in **Salisbury NHS Foundation Trust v Wyeth [2015] UKEAT/0061** which set out the approach to be taken to addressing whether a protected disclosure was the reason for dismissal in a constructive dismissal case.

Analysis

General

114. Our task was to decide the case before us as set out in the list of issues above, discussed at an earlier case management hearing and agreed with the parties. A list of issues is not set in stone, and tribunals can be flexible about them particularly where matters are referenced in a claim form but have not been distilled into the list. The list is nevertheless the basis of preparations for a final hearing for both parties, and as should be standard practice was rehearsed again on day 1 of this Hearing and agreed to be a correct list of what we had to decide. We mention this because several times during this Hearing the Claimant referred to other matters in some detail. We made clear on those occasions that such matters might shed light on the issues to be decided but pointed out that they were not part of the list of issues, which would thus require to be revisited if further matters were to be relied upon either as a detriment complaint or part of the list of matters said to have given rise to a constructive dismissal. The Claimant did not seek to do so at any point.

115. We dealt first with the detriment complaints, specifically the question of time limits, as if those complaints failed on that basis, there was no need for us to go further and consider them as detriment complaints as such.

Detriment complaints – time limits

116. The last detriment complained of occurred on 21 September 2021 and each alleged detriment, including that one, related to a discrete date. ACAS Early Conciliation did not commence until 16 March 2022, nearly six months after the last detriment and the Claim Form was presented on 15 April 2022, nearly seven months out of time.

117. The effects of ACAS Early Conciliation on time limits can therefore be ignored, as all of the complaints fell much more than three months before Early Conciliation was commenced. The position was thus as follows:

117.1. Putting aside for the moment the question of whether there was a series of detriments ending with that on 21 September 2021 and how that interacts with time limits, there were two questions we had to consider. The first was whether it was not reasonably practicable to bring the complaint about the last detriment (or

any of them) in time and if it was not, the second was whether it/they were brought within such further period as we considered reasonable.

117.2. The burden was on the Claimant in respect of both questions, that is she had to prove that it was not reasonably practicable to bring the complaint(s) in time and that she brought it/them within such further period as was reasonable.

117.3. As discussed above, reasonable practicability is a strict test, notwithstanding what was said in **Dedman**.

117.4. Our task was to identify the substantial cause of the Claimant's failure to comply with the time limits set out in the ERA, which she clearly stated was her health, specifically her mental health during the primary limitation period and thereafter.

117.5. The test is not what was reasonable, which would be too generous for the Claimant, nor what was physically possible, which would be too demanding, but whether it was reasonably feasible to present the complaints in time.

117.6. If we concluded that compliance with the time limit was not reasonably practicable, we had then to consider objectively all the circumstances of the case in deciding whether the complaints were brought in such further period as was reasonable, considering why the further delay occurred.

118. The deadline for bringing a complaint about the last detriment would have been 20 December 2021, plus any extension resulting from ACAS Early Conciliation. The Claimant says it was her poor mental health which prevented her from bringing a complaint by that deadline. Whilst Tribunals need not insist on medical evidence in support of such a contention (though it would be usual for some to be available), and whilst we accepted that she was receiving counselling via the RCN during this period, the limited medical evidence in this case did not support the Claimant's position.

119. There was one GP record dated 24 September 2021, thus right at the start of the limitation period. This states that the Claimant was stressed and had raised blood pressure, which the Claimant says disrupted her concentration. We saw no reason to doubt that it did, but particularly as we were to focus on the later part of the limitation period, it was telling that there was no other medical evidence of relevance at all, other than sick notes which add very little.

120. The Claimant says that her poor mental health continued beyond that discussion with the GP, and whilst we did not see any reason to doubt that evidence either, it plainly did not prevent her from submitting a 10-page grievance on 7 January 2022 which, if there had been ACAS Early Conciliation in the initial limitation period, would probably have been towards the end of the period in which a complaint should have been presented. It seemed to us abundantly clear therefore that the Claimant could have brought her complaint(s) then, even if only by attaching or copying in her grievance. She essentially accepted that was the case. We noted too that she was being advised at this point by the RCN regarding her issues at work, which must have included some or all of the alleged detriments.

121. It was thus plainly reasonably practicable for the Claimant to present her complaints about the last detriment, and indeed the preceding ones, in time, based on the evidence before us. It was no answer to that to say, as the Claimant understandably did, that time should be extended because her case is

that the detriments caused her constructive dismissal, given that unfair dismissal and protected disclosure detriments are separate causes of action. Nor was it any answer that the detriments continued to the end of her employment, when no detriment beyond 12 September 2021 was dealt with in this Hearing as a detriment complaint because it was not in the list of issues and the Claimant did not suggest it should be.

122. In any event, given the presentation of the grievance, there appears to have been no reason why a Claim including the detriment complaints could not have been presented much sooner after the time limit expired than 15 April 2022. Even if we had concluded that it was not reasonably practicable to bring the Claim in time, we would have concluded that it was not brought within such further period as we considered reasonable.

123. Given the conclusions set out above, any question of the various alleged detriments being a series of similar acts or failures (section 48(3)(a) of the ERA) did not arise. The Tribunal had no jurisdiction to hear the Claimant's complaints of protected disclosure detriment, which failed on that basis.

Unfair dismissal

124. We dealt next with the complaint of unfair dismissal as it was only if the Claimant was dismissed that it was necessary to consider the disputed protected disclosures, given that the detriment complaints had failed as set out above. Notwithstanding the disposal of the detriment complaints on a jurisdictional basis, it was necessary for us to consider each factual matter said to have given rise to a detriment, as part of what the Claimant says contributed to her decision to resign. We also left aside the question of whether any of the Respondent's conduct relied upon for the unfair dismissal complaint was sufficiently influenced by any protected disclosure, until the question of whether the Claimant was dismissed had been analysed, as again that would only have been relevant if she was.

Did the Claimant resign in part because of acts or omissions of the Respondent?

125. The resignation letter said little. It was positive about the team the Claimant had been working in, but she was clearly unhappy with what had happened at work over a period of time. Whether this amounted to a fundamental breach of contract is addressed below, but in relation to this question we noted that the Claimant had previously indicated she was looking for another job because of how she felt about events at work and although it appears she only finally did so when she had another job lined up, that does not mean she left for reasons unrelated to the Respondent's acts or omissions. Those acts or omissions do not have to be the sole reason for the resignation. We were satisfied that they were a reason for it. We saw nothing which suggested another reason as the sole basis for her decision.

By those acts or omissions, was the Respondent in fundamental breach of contract entitling the Claimant to resign?

126. The relevant law can be summarised as follows:

126.1. The implied term of trust and confidence was clearly spelt out in **Malik**. Any breach of that term is fundamental and the conduct in question does not have to have been aimed at the Claimant to breach it.

126.2. **Mostyn** was an unusual case in that it was decided in the context of an obvious breach of a key express term of the contract (relating to pay) and does seem to go against the grain of other cases. It is thus permissible for Tribunals to consider whether any conduct calculated or likely to breach trust and confidence was with reasonable and proper cause.

126.3. Whether the implied term was breached must be judged objectively – our task was to look at the Respondent's conduct overall and determine whether it was such that its effect, judged reasonably and sensibly, was that the Claimant could not be expected to put up with it.

126.4. The final straw does not have to be a fundamental breach of contract or even blameworthy, but must contribute something to the breach and not be entirely innocuous.

127. Our approach was to take in turn each of the seventeen matters on which the Claimant relied (the twelve which were pleaded as protected disclosure detriments and five other matters) and assess whether sensibly and reasonably they could contribute to breach of the implied term, focusing on the Respondent's conduct, not on how the Claimant felt about it, then look at the picture overall. We took them essentially in date order.

1. On 5 October 2020, Ms Kelly instructed the Claimant to complete a SOP – the Claimant's case being that Ms Kelly gave her an unrealistic deadline

128. The Claimant's evidence was somewhat confused on this point, in that she referred to being given a deadline and then said (in oral evidence) that she had not been. Ms Kelly was also somewhat confused in her evidence about how long the work would take, ranging between a couple of hours and a whole day. We certainly thought that in all likelihood it was more than a couple of hours of work. That said, what we had to focus on was the email in question which said, "Can I please task you to do the Community SOP please whilst on ISO [isolation]".

129. On its own terms, the email did ask – we noted that it very much asked, it did not demand – that the Claimant complete the SOP whilst isolating. In that sense, Ms Kelly envisaged it being done then. The email cannot be viewed independently of other communications on the subject however, particularly those sent at around the same time; the subsequent communications are important. The Claimant replied on the same day to say she was only in isolation for one more day and would then be off shift, also asking for more guidance. She then engaged in positive correspondence about the task with Emma Fulloway, giving no indication whilst doing so of any concern about a deadline. Still on the same day, she said she would start work on the document and asked Ms Kelly to give the clinic setting SOP to someone else, which Ms Kelly agreed to do. In our judgment, the Claimant saying that she would start work on the document does not support her case that she felt she was labouring under an unrealistic deadline to complete it.

130. We were confirmed in this view by the fact that on the next day, she said she would not have time to do so and would need protected time and a date for

completion. Accordingly, even if she felt she had been given a one-day deadline, which as indicated above we thought a highly doubtful interpretation of the email exchanges in question, she clearly felt able to seek more time and gave no indication at all of being unhappy with any timescale she understood she was working under, whilst being confident enough to ask if the second SOP could be done by someone else. On the evidence to which we were taken, and as the Claimant rightly pointed out, there was no more communication about this matter – apart from circulation of the work plan – until November, doubtless partly because the Claimant was on sick leave and then on annual leave, at which point Ms Kelly confirmed that she could have protected time. In the end, the Claimant completed the document in December without any adverse repercussions.

131. The key question was whether there was anything in Ms Kelly's email of 5 October 2020 which, objectively and sensibly assessed as the case law puts it, could be said to contribute to a breach of the implied term. Ms Kelly could have stipulated or agreed a deadline with the Claimant at the time of sending the email – that would have been ideal – but we concluded that there was nothing in the email which could properly be said to contribute to a breach of the implied term, for the following reasons:

131.1. It was a polite request, not a demand.

131.2. It was obvious why Ms Kelly asked the Claimant to do the work – she was in isolation and thus, at least in Ms Kelly's view, not able to perform her full duties.

131.3. The request was made with the offer of substantial support.

131.4. Ms Kelly appears genuinely to have thought it could be completed in the isolation period, given that to her mind the Claimant would simply need to adapt an already-drafted document. Whether that was correct or not, she did not explicitly tell the Claimant how long she thought the work should take.

131.5. It seems Ms Kelly may have been unclear about how long the Claimant would be isolating, as her email refers to the end of that period in general terms, rather than a specific date.

131.6. The Claimant's own communications around 5 and 6 October did not suggest that she felt under pressure to produce the document immediately. It was only when she got the work plan from Ms Kelly, circulated to the Team, that she explained why she had not been able to do it.

131.7. Ms Kelly's circulating the plan with a deadline the Claimant did not know about was inadvisable, but we see nothing inappropriate in the initial email which is the focus of this particular issue.

131.8. There was at no point any suggestion of any adverse repercussion for the Claimant, either in the email itself or subsequently, if she could not get the work done whilst isolating.

2. Ms Kelly told the Claimant on 11 November 2020 that she could not prescribe until she had completed her NMPR

132. It was not ideal that the Claimant received three emails on the same subject in a short space of time, but that was not the point we had to consider. Our focus was on what the Claimant says led her to resign, namely being told by Ms Kelly that she could not prescribe until her NMPR was completed. In our judgment, that could not properly contribute to a breach of the Respondent's duty of trust and confidence either. We note the following:

132.1. It is irrelevant whether completion of an NMPR is the policy of other Trusts or a requirement for professional registration, or even clearly stated in the relevant guidance or policy produced by the Respondent itself. The evidence was clear that completing the NMPR was the Respondent's policy for everyone. The fact that other staff were approached about non-completion showed that to be the case, as did the fact that three managers wrote to the Claimant about her review, and the fact that the Claimant had done such reviews annually before.

132.2. Very obviously, for that reason and as a matter of principle, it cannot be said that the requirement to complete the NMPR was itself in some way inappropriate. The Claimant does not seem to contest that.

132.3. As set out in our findings of fact, we did not think she was treated differently to others, including those who were not approached about their NMPR notwithstanding being out of date, because we have accepted the Respondent's evidence that the database did not show that they were.

132.4. Ms Kelly's email when the Claimant had written to her about the review was supportive in asking if she needed time to complete it. That was instructive of the approach taken by Ms Kelly in relation to this matter.

132.5. The relevant part of the email in question stated, "It is required that you do not prescribe at the moment until this has been completed". This was both polite and professional and Ms Kelly was simply implementing the Respondent's reasonable policy.

132.6. As to the substance of that statement, given in particular that the Claimant was not singled out, we can see nothing improper about it. Very arguably, to have told the Claimant (or given her the impression) that she could have continued to prescribe would have been a breach of trust and confidence, potentially putting her at risk of adverse consequences, at least in relation to her employment, if something had gone wrong in her administering medication. Emphasising the seriousness of not completing the review urgently could very much therefore be seen as looking out for her interests, as well as those of the Respondent.

132.7. We also noted that in practice the Claimant's prescribing rights were never affected.

3. On 20 November 2020, Ms Kelly requested that the Claimant attend a sickness review meeting, six weeks after the Claimant had returned to work

133. As already indicated, the Claimant remained unclear and unsure about the nature of this allegation, right up to and including her closing submissions. She said two things:

133.1. The meeting ended up being about something else, namely the NMPR, but that cannot be said to be part of the allegation, given that it is the request to attend the meeting that is said to have been a detriment contributing to a breach of the implied term.

133.2. There was a delay in arranging the meeting. That was clearly part of the allegation and was therefore the focus of our attention.

134. There can be no suggestion that holding a sickness review meeting was in itself in any way inappropriate. It was the Respondent's standard policy to do so, as the Claimant accepted, and a perfectly ordinary and sensible policy at that. Ms Kelly's delay in convening the meeting can be criticised and – although we were not taken to the relevant provision – may well have been in breach of the Respondent's policy, though we recognise that this is likely to have been an extremely busy time at the height of the second Covid-19 lockdown. In any event, the Claimant did not identify any specific adverse consequence arising from the delay. She told us that no support was put in place for her, but did not say what that might have been or how she was disadvantaged as a result of it. It must be kept in mind in this regard that at this juncture she had only been off work for a very short time and that the delay in convening the meeting was not overlong. Furthermore, there was no evidence we were taken to that the Claimant pushed for a review meeting to be held sooner than it was, or indeed at all.

135. For all of these reasons, viewed objectively and sensibly, whilst the delay was regrettable, we do not think it could be said to contribute to a breach of the implied term. Alternatively, if it could, it was with reasonable and proper cause, namely Ms Kelly's busy schedule at a difficult time.

4. On 20 November 2020 Ms Kelly told the Claimant that she had been unprofessional in the emails she had written about the NMPR

136. We have already set out that what Ms Kelly actually said, as set out in the note at page 434, is that the Claimant's email came across as unprofessional. What we had to decide was whether in saying that Ms Kelly did something which could objectively be said to contribute to a breach of the duty of trust and confidence.

137. Having read the Claimant's email, we would not for ourselves have used the word "unprofessional" to describe it, and we can understand why the Claimant did not like that comment, but:

137.1. As just noted, Ms Kelly did not describe the Claimant herself as unprofessional (as a person or in her role). What she said is that this is how her email came across. It was accordingly a careful comment.

137.2. Again, it has to be taken in context – this was part of a discussion between two senior medical professionals, one managing the other.

137.3. Notwithstanding our own view of the Claimant's email, what Ms Kelly said was not without foundation. We can understand her concerns about how the Claimant responded to the requests that she complete her NMPR and those concerns are objectively reasoned, in that the Claimant had focused on the Respondent not going about things properly rather than her own responsibility.

137.4. We agreed with the Respondent that to find that this careful and specific comment could contribute to a breach of the implied term would risk stultifying proper management conversations with staff when concerns arise. We accept that in a professional context the word has to be used carefully, so as not to improperly impugn a professional's conduct, but concluded that it was used carefully in this case even though we would not have described the Claimant's email in the same way.

137.5. We also noted the Claimant's reflection in her email to Ms Kelly of 8 December 2020 (page 441) which, whilst it did not agree that her email communication was unprofessional, was somewhat apologetic.

138. For these reasons, we find that what Ms Kelly said could not contribute to a breach of the implied term when objectively assessed.

5. On around 25 November 2020 Ms Kelly placed a written note on the Claimant's file recording that she had been unprofessional in her emails

139. The first and fundamental question we had to determine was whether the note was in fact placed on the Claimant's file. In Mr Nicholls' written submissions it was conceded that it was, but in his oral submissions – which we took as the authoritative statement of the Respondent's position – he said that it appears not to have been placed on the file at all. We agreed with that for the following reasons.

140. Ms Kelly sent the note to the Claimant on 30 November 2020 (page 433). The Claimant commented on it and raised questions on 2 December 2020. Ms Kelly responded to those comments on 3 December 2020 which resulted in what can be seen at page 434 – a note with the Claimant's comments marked on it and Ms Kelly's response to those comments. There was a further exchange on 8 and 9 December 2020, in which both Ms Mascarenhas and Ms Kelly agreed that the note would not go on the file.

141. It seems likely therefore that contrary to the Claimant's allegation the note was not in fact placed on her file at all. Ms Kelly's email to Ms Mascarenhas of 8 December 2020 (page 440) makes clear that the Claimant had not signed the note, and it seems to us highly unlikely Ms Kelly would have put the note on the file until that was done, at least not until a period of time had elapsed and the Claimant had not responded further. Accordingly, the factual basis of this matter was not made out and cannot have contributed to a breach of the implied term.

142. Even if that were wrong, at the most the note was on the Claimant's file for a very short period. The date on which Ms Kelly sent the Claimant a response to her comments (3 December) was a Thursday, Ms Kelly does not work weekends, and 8 December, when Ms Mascarenhas said the note should not go on the file, was a Tuesday. At the outside therefore, the note would have been on her file from the Thursday to the Tuesday and – if it was – in all likelihood for a shorter time than that. We do not see how the note being on the file for such a short period could be said properly to contribute to a breach of the implied term.

6. On 4 March 2021 Ms Mascarenhas excluded the Claimant from an email about the secondment opportunity

143. It is true that the Claimant was excluded from this email, but so were many others, including all ANPs. This was not therefore something directed at the Claimant. That is not the end of the matter of course, because a breach of the implied term can be something an employer does generally which is not directed at the employee in question. Here however, the Respondent had ringfenced the role to a few staff whose profiles best fitted it, and had a sensible reason for doing, namely because it represented a promotion and development opportunity for the employees in question. Ms Mascarenhas's email did not have to say that in order for it to be the case – everyone would have known it was. We do not see how the decision to send the email, objectively assessed, can be said to contribute to a breach of trust and confidence. The fact that the Claimant did not apply for the role during the recruitment exercise demonstrates that her being excluded from the email circulation list was not something she herself regarded as problematic at the time.

7. On 12 April 2021 Ms Kelly told the Claimant that her behaviour in respect of the complaint by Vikki Thompson was unacceptable, without having investigated it

144. It is agreed that the word "unacceptable" was used in this conversation, at the point in the meeting we have discussed above. The Claimant accepts that a manager should be able to speak informally about such matters with the staff for whom they are responsible, and we agree with that. We also noted the following:

144.1. The fact that this was an informal discussion is important to recognise. It was wholly appropriate to deal with the matter in that way, and is demonstrative of Ms Kelly wanting to take a light touch approach.

144.2. Ms Kelly had in fact spoken to Ms Thompson, and then (in the meeting itself) obtained the Claimant's views, before making the comment.

144.3. Ms Kelly's note makes clear that what she was driving at was that the pattern of behaviour she had observed concerning the Claimant was unacceptable, with three complaints having been made.

144.4. The comment was made in the context of asking the Claimant about what support could be put in place to ensure it did not happen again.

144.5. Other managers may have taken a different view or even a different approach, but that does not mean that what Ms Kelly did was without proper and rational foundation.

145. In an ideal world, Ms Kelly would have sent the Claimant a copy of Ms Thompson's email beforehand, discussed it with her at the meeting, gone away after the discussion, thought about what both parties had said, and then made the comment, but it is asking too much of managers, operating in an informal context, to say that only that approach would avoid contributing to a breach of the implied term. It was not a complex issue and was properly amenable to informal conversation. For these reasons we concluded that objectively assessed and put in its proper context, what Ms Kelly said could not contribute to a breach of that term. Again, we agreed with the Respondent that to say otherwise would stultify proper management prerogative to raise such matters, hear an employee's response and deal with the matter informally. We add for completeness that we did not deem it necessary to take into account or assess further what happened immediately after the meeting, when the Claimant left work, as this was not part of what she says contributed to her resignation.

8. A file note of the Claimant's 12 April 2021 meeting with Ms Kelly was put on the Claimant's file, including the comment that her behaviour was unacceptable, without any investigation

146. As we have just said, there was an investigation, albeit informal. It was entirely open to Ms Kelly to deal with the matter in that way as we have also just noted. Strictly speaking therefore, the Claimant has not established this element of the Respondent's conduct which she says led to her resignation, because the matter was informally investigated. In any event, in our judgment, it was not improper to put a note on the Claimant's file. Again, different employers could properly take different views about whether such discussions should be recorded in this way, but it was not inappropriate to do so, in case future such issues arose. The note also recorded the Claimant's responses to what had been said to her, and therefore a fair reflection of both parties' views could have been ascertained at a later date if someone else came to look at the note. Accordingly, we find that this could not be said to contribute to a breach of the implied term when objectively and sensibly assessed in its context. Even if it had been, it was plainly with proper cause, for the reason just given.

9. On 6 April 2021 Ms Kelly falsely informed Dr Domun that there had been a complaint made against the Claimant by Julia Latham

147. This matter can be dealt with briefly, in that what Ms Kelly told Dr Domun was not false. There had been a complaint from Ms Latham, mild perhaps, but a complaint nevertheless. Strictly speaking, that deals with this part of the Claimant's case.

148. The Claimant said in evidence that the falsity was that Ms Kelly told Dr Domun – or he seems to have understood – that the patient was in a care home when in fact she was in her own home. That is correct, but this was no more than a mistake on his part, as we have said; the referral can arguably be read both ways. More importantly, it made no difference to Dr Domun's ability to comment on the incident or to what he said in his email. It is plain that he would have given the same account and response even if this inadvertent error had not been made.

149. This matter cannot properly be said to contribute to a breach of the implied term.

10. On 6 April 2021 Dr Domun wrote that the Claimant was not competent to manage a patient with DVT

150. It was very definitely not for us to delve into the medical rights and wrongs of the different approaches to the patient in question. We must also record that it was not part of the Claimant's case that her being pressured – as she saw it – to do something she was unhappy with was part of what led her to resign, and so we say nothing further about that.

151. The Claimant disputes that she told Dr Domun she was not competent to do a subcutaneous injection. We thought there was force in the Respondent's submission that he only knew what he recorded in his email because it reflects what the Claimant told him, but we did not need to decide the point because what the Claimant complained of was not that Dr Domun said that as such, but that he

was saying she was incompetent to look after the patient, in other words that she was not capable of understanding the medication and its side-effects.

152. Even attaching little weight to his witness statement, as was required, that was plainly not what Dr Domun was saying. As we have already pointed out, the use of the word "competent" is widespread amongst the Respondent's employees, and in fact the Claimant herself used the word in different contexts, including in her submissions and in her response to Dr Domun's email at page 629. It is clear that the use of the words "competent" and "competency" is equivalent to something like "being authorised/certified" and that is the sense in which Dr Domun wrote what he did.

153. The Claimant thus eventually agreed in her oral evidence that Dr Domun was simply saying that she was not up to date with the competencies in question, though she added that him saying it "stressed her out". It may have done, but Dr Domun was making a statement of fact, and the Claimant has not asked us to consider her feeling stressed on this occasion as part of her reason for leaving the Respondent's employment.

154. Assessed objectively, even if Dr Domun misunderstood what the Claimant had said, his email cannot be said to have contributed to a breach of the implied term.

11. Ms Mascarenhas shouted at the Claimant in their meeting of 14 May 2021

155. As we have explored in our findings of fact, this was a tense, emotional meeting, with somewhat raised volume from both Ms Mascarenhas and the Claimant as the main participants. That is understandable from both parties' perspectives. Ms Reidy agrees that how Ms Mascarenhas responded in the meeting was not "gold standard" but that is not the test we have to apply. She has a louder than average, expressive tone, but having found that she did not shout, what the Claimant complains of was not made out on the facts and so cannot have contributed to a breach of the implied term.

12. The discussion with Dr Ali on 5 July 2021

156. We have set out above our conclusion that Dr Ali did not say what the Claimant alleges on this occasion. He did not direct any comment at her, whether that she personally was redundant or that she personally was no good for anything. In essence, that discounts this matter as capable of having made a contribution to a breach of the implied term.

157. Dr Ali's point was that if ANPs spend time doing reviews, they cannot do acute work, and if they cannot do that, it had to be asked what they were doing. That was a point he was perfectly entitled to make, particularly when he heard from the Claimant that there was a policy mandating review of patients, which he was unaware of or in truth did not believe existed. It is also very relevant context that he was the person responsible for keeping track of capacity in the team and that any review arrangements needed to be referred to him. That underlines the propriety of his making this point. What should be emphasised however is that whatever Dr Ali said was about the service as a whole, not about the Claimant personally. We note again that a general comment not directed at the Claimant could in principle contribute to a breach of the implied term, but in this case, for

the reasons we have given, it did not. Even if it was a comment likely to undermine trust and confidence – which we did not accept – it was made with good and proper cause.

13. When the Claimant raised Dr Ali's comment, with Ms Kelly and Ms Mascarenhas, neither addressed her concerns

158. Our findings of fact make clear that what the Claimant alleges was not made out on the evidence before us. We have recounted what Ms Mascarenhas wrote on 7 July 2021. She invited the Claimant to consider Dr Ali's role, suggested that she meet him, indicated that this would help her get clarity as to his position (and express how the exchange had made her feel) and that either Ms Mascarenhas or Ms Kelly could accompany her at such a meeting. It is important context that again this was an informal, rather than formal, process and that Ms Mascarenhas's aim was to get two people to work together. It is difficult to see how she could have written a more balanced email. It was firm, but it was fair and helpful and a perfectly proper way of addressing the Claimant's concerns.

14. From April 2021, the Respondent failed to reduce the Claimant's workload despite being told by her that it was overwhelming

159. There was no record, in the evidence we were taken to, of the Claimant telling the Respondent that her workload was overwhelming from April 2021, though we note the following:

159.1. On 15 March 2021, she told Ms Kelly that she was stressed at work, not sleeping and had self-referred to OH. Specifically in relation to the issues she said DES was causing for her, she mentioned having to contact care homes at 8.00 am.

159.2. Three days later, on 18 March 2021, at a team meeting, everyone present, including the Claimant, agreed that seeing eight patients per day was a reasonable average.

159.3. The Claimant emailed Ms Kelly on 20 March 2021 saying she felt better, adding, "I think the unmanageable daily caseloads and lack of staffing have definitely been a significant trigger to my stress".

159.4. In the note of the 12 April 2021 meeting between the Claimant and Ms Kelly (page 599) there is a reference to work-related stress, but this seems very much to have been focused on relationships, work culture and management, not workload. The note also shows that Ms Kelly specifically asked whether there was anything she as the Claimant's manager could do to help.

159.5. The Claimant's email to Ms Reidy of 27 April 2021 was all about issues with Ms Kelly, not workload.

159.6. Ms Reidy accepts (FR46) that at their meeting on 30 April 2021, the Claimant raised concerns about staff writing up notes on their days off, but this was a general team concern she was raising and (see FR21) Ms Reidy does not recall the Claimant saying she was overwhelmed or unable to cope.

159.7. What the Claimant set out in her witness statement as a list of the issues she raised at the meeting on 14 May 2021 includes clarity being required about

the writing up of notes "due to unrealistic workload". She does not say however that she informed Ms Mascarenhas and Ms Reidy that she felt overwhelmed by her workload and Ms Reidy does not recall it being raised. At the very least, this suggests that her own wellbeing from a workload perspective was not something the Claimant particularly emphasised.

159.8. We also noted that on 26 May 2021, the Claimant attended the follow up meeting with Ms Mascarenhas and Ms Reidy about issues between Ms Kelly and herself. She felt much better having cleared the air. No actions were identified and the Claimant agrees things improved for several months. That is of course about her relationship with Ms Kelly, but it is telling that the Claimant accepts that things were satisfactory for the next few months overall.

160. In summary, there were thus some workload concerns before April 2021 but they do not seem to have arisen again after the meeting on 18 March. The Claimant's focus in the meetings which took place after that date was on other workplace issues, which she undoubtedly felt were causing her work-related stress.

161. What the Claimant did or did not say was not the full picture of course. We also had to look at the wider context to see if there was a failure to reduce workload for staff generally which could be said to contribute to a breach of the implied term because, as we have said several times, an employer's conduct does not have to be directed at an employee to breach the implied term in their individual contract.

162. We are in no doubt that work increased after the DES was introduced, though we also note that it was taken on because it was widely felt amongst management that the team was not fully utilised. Further, management did not introduce DES in the best possible way and there do seem to have been capacity concerns from the start. That said, in addition to the absence of any reference by the Claimant to an overwhelming workload after the meeting on 18 March, whilst we have no doubt that this was a challenging time for many employees in the NHS, including at the Respondent, because of the Covid-19 pandemic, objectively assessed the evidence does not show that the Claimant's workload was overwhelming:

162.1. As already noted, it was agreed that seeing eight patients per day was acceptable.

162.2. The Claimant did not work outside her three 12.5-hour shifts. As we have noted, there is some reference to employees writing up notes outside of hours, but we were given no indication or evidence as to the extent of that work.

162.3. There is no medical evidence referring to stress caused to the Claimant by her workload. The GP notes of April and September 2021 refer to issues with management, not with workload.

162.4. The data for August 2021 – which was all the data we had – shows that the Claimant's workload was not out of kilter with that of her colleagues, though we accept of course that this does not of itself mean that she was not overwhelmed by her work.

162.5. It was also noteworthy that the Claimant voluntarily undertook eight bank shifts after DES came in. That is not a huge number of additional shifts overall of course, but it was another indication that objectively her workload was not overwhelming.

163. As to what the Respondent did:

163.1. In relation to general staff concerns about workload, it increased the number of bank staff and apparently obtained some funding for new recruitment – see EK193.

163.2. After finding out that the Claimant had self-referred to OH, Ms Kelly did ask what she could do to help (on 12 April 2021).

163.3. We agreed with the Respondent that it was the Claimant's responsibility to complete a stress risk assessment, given that she alone could properly describe her response to work pressures and her wellbeing.

163.4. There seems to have been an issue with making a management referral to OH whilst the Claimant's self-referral was in train, but Ms Kelly did try to follow up on the self-referral and then – admittedly after some delay – referred the Claimant to OH herself.

164. In short, the Claimant has not made out what she has relied on, namely that her workload was overwhelming, that she made this clear to the Respondent and that it did not take steps to address it. It cannot therefore have contributed to a breach of the implied term.

15. On 21 September 2021 Ms Kelly told the Claimant she should be in the office and to come in straightaway

165. Ms Mascarenhas's instruction on 2 September 2021 is not the subject of this aspect of the Claimant's case, but it is relevant to repeat that we have found it was a well-reasoned decision on her part. The Respondent had analysed the situation and was satisfied that staff coming into the Hub did not increase Covid-19 infection risk. We may not have thought it was important to have staff in the office, but that is not the point: it was a rational and appropriate explanation to say that it made staffing deployment easier at a very challenging time overall.

166. In directing the Claimant to attend at the office, Ms Kelly was following through on what Ms Mascarenhas had set out in her email. Again, it is important to note the context.

167. On Monday 6 September 2021 (page 767) the Claimant's response to Ms Mascarenhas's mandate was to say she had been in the Hub over the preceding weekend and had been told to go into isolation because her father had Covid. Her concern was not expressed as a personal one, about her own health for example, but about the staffing levels for the team should she become unwell.

168. The next relevant contact seems to have been on 10 September 2021 (page 778) when the Claimant and Ms Kelly spoke by telephone. A risk assessment was completed, focused on the risk the Claimant might present rather than any risk to her, but the Claimant's response when asked to come into the Hub at that

point did not mention her own vulnerability at all. Rather, it focused on her childcare needs and the service impact of sickness rates in the team.

169. The next development was on 14 September 2021 (page 783) when the Claimant said she had been contacted by the track and trace service. Ms Kelly confirmed that as a result the Claimant could not return to work until she had a clear PCR test (page 781). By 17 September 2021 Ms Kelly was concerned about the delay in getting the test done. On 18 September 2021, the Claimant confirmed that the test result was negative – page 784. Meanwhile, on Friday 17 September 2021, as Ms Kelly's note shows (page 787), they had discussed the Covid-19 isolation exemption assessment and it was agreed that the Claimant would be going into work on the ensuing weekend. She appears to have done so on 19 September 2021.

170. When Ms Kelly contacted her on 21 September 2021, the Claimant explained that she was working remotely, still in isolation after contact with her father and said that she did not feel safe permanently working from the Hub because of the Covid-19 risk. She did not actually go into the Hub after that, because she went off sick.

171. We could not say that the Respondent's actions in this respect, objectively assessed, were such as could give rise to a breach of trust and confidence or contribute to the same. It may have been ideal if Ms Kelly had had the Claimant's 2020 risk assessment to hand, and had done an assessment of risk to the Claimant rather than just an assessment of the risk the Claimant represented to others, but:

171.1. The Respondent had conducted a risk assessment of the Hub itself and had properly determined that there were no concerns over and above the general risk that existed at the time.

171.2. The Claimant had not raised any concerns about her own vulnerability in the preceding weeks when Covid-19 issues had been discussed with her.

171.3. She had been in work on 19 September 2021, just two days before this conversation.

172. In summary, the Claimant may not have agreed with it, but seen in its context, Ms Kelly's instruction cannot be said to have been inappropriate and cannot have contributed to a breach of the implied term.

16. Ms Kelly sent text messages to the Claimant whilst the Claimant was off sick in November 2021

173. Ms Kelly's text messages clearly cannot have contributed anything to a breach of the implied term, as the Claimant agreed that two contacts in a week was acceptable. One of the texts asked if it was ok to contact her, and gave her details of the Respondent's Health and Wellbeing Service; the other was to check why the Claimant had not been in touch, and when she asked for space, Ms Kelly immediately agreed.

17. The Respondent issued a consultation letter on 15 November 2021

174. The Claimant's case is that this letter was a fabrication, as part of a conspiracy to force her to leave, as well as to engineer the departure of other staff the Respondent did not like. We could not accept her case:

174.1. This would have been a very high-risk strategy for the Respondent, at a difficult time in the NHS generally, in that it may well have meant being unable to provide the service at all if launching the consultation had engineered the result the Claimant says it was intended to produce. At the very least, it would have meant having to shore up the service with bank staff on a large scale whilst replacements were found. The Respondent is hardly likely to have wanted any of that to happen.

174.2. The Respondent has provided an explanation of why it launched the consultation, specifically the need to have more staff working in the middle of the day when the bulk of enquiries came in. That is a logical explanation of why it thought that change was required.

174.3. It aborted the consultation mainly because staff pointed out the data on which it relied was incorrect. Undoubtedly, managers should have carried out a more accurate analysis in the first place, but it is only fair to say that those responsible could have misunderstood the data at the outset as it significantly depended on input from the staff.

174.4. The letter of 15 November plainly initiated a consultation (which equally plainly took account of employees' views), which was to last for 30 days. In other words, the Respondent was not imposing any change at this stage.

174.5. A whole programme of consultation was spelt out in the letter. This was an awful lot of trouble to go to for a lot of people – and affecting twelve employees in total – if it was not genuine, when the Respondent's managers were doubtless already stretched.

175. In short, we think that the letter was an entirely proper way to launch a consultation on an entirely proper basis. Not to have written to the Claimant (who remained on sick leave) would have been a serious omission on the Respondent's part.

176. That conclusion was of itself fatal to the Claimant's case that there was a breach of the implied term, in response to which she resigned, as the last straw on which she relies was something which we regarded as entirely innocuous. In any event, it will be clear by this point that whilst of course the Respondent could have done certain things better, we found nothing in the matters on which the Claimant relied to establish that the Respondent was in fundamental breach of contract that supported her case, whether taken individually or assessed overall. There was clearly a strained relationship between the Claimant and Ms Kelly at times, but as we have said, our role is to objectively and sensibly assess what she and others did and we have found that their actions did not amount to a fundamental breach of contract either individually or collectively.

Other matters

177. For completeness, we also considered the following:

177.1. Ms Kelly's denial that she had formed a view of the Claimant on joining the team was somewhat unconvincing, but that did not alter our objective assessment of her conduct in relation to the issues on which the Claimant relied for constructive dismissal purposes.

177.2. As we have noted, Ms Kelly could have done certain things better, for example by saying in her email at page 1100 that she saw nothing untoward in the Claimant's behaviour at the ECHT meeting in November 2020. Her email at page 15A (dated 4 May 2021) where what she wrote suggested that the Claimant had been the subject of complaints from patients and relatives was particularly regrettable (though it is only fair to add that she clarified the position at her meeting with Ms Reidy very short afterwards). She did not however make up various matters to purposely portray the Claimant in a bad light.

177.3. The Claimant focused on Ms Kelly's email to an administrative colleague of 10 December 2020 at page 410 as a particular example of this, highlighting Ms Kelly's reference to abandoning a meeting. This was clearly not, as the Respondent tried to argue, a reference to Ms Kelly's one-to-one with the Claimant, given that it referred to minimal triage staff having to be present. Neither however was it a reference to the meeting of 18 November 2020 which Ms Kelly did not attend. The email has to be read in the light of page 409 where Ms Kelly had asked the same colleague on 24 November 2020 to set up the next triage meeting having just received the Claimant's notes of the one that took place on 18 November. It is that meeting – the next triage meeting – that appears to have been abandoned.

Conclusion

178. The Respondent was not in fundamental breach of contract. Accordingly, we did not need to consider the question of affirmation, the disputed protected disclosures or whether anything the Respondent did was influenced by any disclosures, though as a broad statement and without having completed any detailed analysis of the point, we saw no connection between the Respondent's actions and the protected disclosures. It was the Claimant's responsibility to make such disclosures, the Respondent was inundated with similar material and we agreed with the Respondent that the responses of Ms Kelly and others to the disclosures made by the Claimant show that to have been the case. PID1 is a paradigm example. The matters raised were looked into and steps were taken to address them.

179. For the reasons given above, the Claimant was not dismissed. Her complaint of unfair dismissal was accordingly not well-founded.

Note: This was in part a remote hearing (on 4 and 14 December 2023). The parties did not object to the case being heard remotely on those dates. The form of remote hearing was video.

Employment Judge Faulkner
Date: 20 February 2024