EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Marium Asghar	**v**	Integrated Care 24

Heard at: Norwich (by CVP)

On: 29, 30, 31 May, 3 June and in Chambers 20 June 2024

Before: Employment Judge M Warren

Members: Mrs S Goding and Mrs G Bhatt

Appearances
For the Claimant: In person
For the Respondent: Mr P Gorasia, Counsel

RESERVED JUDGMENT

The Claimant's complaints of having been subjected to detriment for having made Protected Disclosures, of direct sex and race discrimination, of race related harassment, of the Respondent's failure to comply with section 80I of the Employment Rights Act 1996 and of constructive unfair dismissal all fail and are dismissed.

REASONS

Background

1. Mrs Asghar was originally employed by the Respondent as a Clinical Advisor from 29 February 2020. She was appointed to a Clinical Lead role commencing 11 October 2021. She resigned her employment by giving notice on 6 October 2022, notice expiring and her employment coming to an end on 9 January 2023. Early Conciliation was between 20 March 2023 and 1 May 2023. She originally issued these proceedings on 9 May 2023, the Claim Form was rejected, but then subsequently accepted and treated as received on 17 May 2023.

2. Mrs Asghar's claims are of having been subjected to a detriment for having made protected disclosures, (whistle blowing), direct discrimination on the grounds of race and sex, harassment related to sex and failure to comply with the statutory requirements in relation to a Flexible Working Request.

3. The case has been the subject of three Case Management Preliminary Hearings, before Employment Judge Skehan on 19 September 2023, Employment Judge A Matthews on 20 November 2023 and Employment Judge Hutchings on 18 April 2024.

4. An order for specific disclosure was made by Employment Judge Hutchings. A subsequent application by Mrs Asghar for reconsideration of that order was refused by EJ Hutchings.

The Issues

5. The issues in this case were identified at the Preliminary Hearing before Employment Judge A Matthews as set out below by way of cutting and pasting from the Case Management Summary of that hearing.

The Employment Judge discussed the issues with the parties and recorded that the matters between the parties which will fall to be determined by the Tribunal are as follows:

1. Time limits

1.1 The claim form was presented on 17 May 2023. The Claimant commenced the Early Conciliation process with ACAS on 20 March 2023 (Day A). The Early Conciliation Certificate was issued on 1 May 2023 (Day B).

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the detriment complaint made within the time limit in section 48 of the ERA? Was the section 80H of the ERA complaint brought within the time limit in section 80H(5) of the ERA? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of/relevant date?
1.3.2 In the case of detriment, if not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Constructive unfair dismissal

2.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches were:

2.1.1 Any or all the behaviour and detriments referred to below, whether or not it or they are found to be tainted by discrimination or whistleblowing detriment.
2.1.2 The failure by the Respondent to deal with the Claimant's flexible working request in a reasonable manner.

(The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

2.2 The Tribunal will need to decide:

2.2.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and
2.2.2 Whether it had reasonable and proper cause for doing so.

2.3 Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

2.4 Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.5 If there was a constructive dismissal, was it otherwise fair within the meaning of s. 98(4) of the Act? (See the above orders for the provision of further information.)

3. Protected disclosure ('whistle blowing')

3.1 Did the Claimant make a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

3.1.1 What did the Claimant say or write? When? To whom? The Claimant says the Claimant made a disclosure in or around June

2022 in an email to Ms Hatton-Shaw (People & Culture), Mr Betts, Ms Turner (Director of Quality) and Ms Harvey. The disclosure was to the effect that the Claimant was being pressurised to submit a document concerning a paramedic in the Claimant's team who had been arrested. The Claimant believed the Respondent was lying about the evidence available to the Respondent in the document.

3.1.2 Was the disclosure of 'information'?

3.1.3 Did the Claimant believe the disclosure of information was made in the public interest?

3.1.4 Was that belief reasonable?

3.1.5 Did the Claimant believe it tended to show that:

3.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation, and/or

3.1.5.2 a miscarriage of justice had occurred, was occurring or was likely to occur and/or

3.1.5.3 the health or safety of any individual had been, was being or was likely to be endangered and/or

3.1.5.4 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

3.1.6 Was that belief reasonable?

3.1.7 If the Claimant made a qualifying disclosure, was it a protected disclosure because it was made to the Claimant's employer?

4. Detriment (Employment Rights Act 1996 section 47B)

4.1 Did the Respondent do the following things:

4.1.1 Through Ms Robinson, inform the Claimant that Mr Betts felt the Claimant was refusing a reasonable management request in relation to the submission of the document, in effect threatening a disciplinary hearing.

4.1.2 During a coaching session in approximately November 2022 the Claimant spoke to Ms Robinson about alleged adverse treatment at the hands of Mr Betts during the Claimant's notice period, Ms Robinson told the Claimant that Ms Robinson did not want to hear anything about Mr Betts.

4.1.3 When Ms Howe and Ms Williams raised concerns with Ms Harvey about Mr Bett's treatment of the Claimant, Ms Harvey took no action.

4.2 By doing so, did it subject the Claimant to detriment?

4.3 If so, was it done on the ground that the Claimant had made the protected disclosure set out above?

5. Direct sex and/or race discrimination (Equality Act 2010 section 13)

5.1 The Claimant describes herself as of Pakistani ethnic origin.

5.2 Did the Respondent do the following things:

5.2.1 (Race only.) Start the Claimant on a salary of £43,000 when the Claimant became a Clinical Quality Lead in October 2021, whilst comparators were started on £45,000. The comparators were Mr Kurn, Ms Parkington and Ms Randlesome.

5.2.2 (Race and/or sex.) Around October/ November 2021, when the Claimant started as Clinical Quality Lead, Mr Betts did not permit the Claimant to take pre-booked annual leave. The comparator is hypothetical.

5.2.3 (Race and/or sex.) At the same time, Mr Betts told the Claimant that Mr Betts was not comfortable with the Claimant being on annual leave at the same time as Mr Betts. This contrasted with Mr Fisher (the comparator) who was not subject to the same restriction.

5.2.4 (Race and/or sex.) From October 2021, through Mr Betts, require the Claimant to work an average 60 hour week (contracted basic working hours being 37.5 a week) when Mr Kurn was not required to work such long hours.

5.2.5 (Race only.) In approximately December 2021 the Respondent sent the Claimant paperwork amending the Claimant's job title to Clinical Lead. The comparators were Mr Kurn and Ms Parkington, to whom no such change was applied.

5.2.6 (Race and/or sex.) From March 2022 Mr Betts made work adjustments for Mr Fisher. No such adjustments were made for the Claimant.

5.2.7 (Race only.) Around September 2022 and on multiple occasions thereafter, the Claimant requested study leave from Mr Betts. This was refused, Mr Betts giving the Claimant additional workload to ensure the Claimant had no availability. The comparator was Mr Fisher.

5.2.8 (Race and/or sex.) In October 2022 the Claimant submitted a flexible working request to Mr Betts. Mr Betts pressurised the Claimant into withdrawing the request. The comparator is hypothetical.

5.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether the Claimant was treated worse than someone else would have been treated. The Claimant says the Claimant was treated worse than the comparators named above.

5.4 If so, was it because of sex and/or race as specified above?

5.5 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to sex and/or race as appropriate?

6. Harassment related to race (Equality Act 2010 s. 26)

6.1 Did the Respondent do the following things:

6.1.1 At the end of November or the start of December 2021, through Mr Betts, tell the Claimant how Mr Betts managed "foreign nurses" who always wanted to "return back home for 3 weeks or more". Mr Betts stated that he would not agree any such request for 2 or more weeks off.

6.1.2 On the same occasion, Mr Betts said that he enjoyed refusing leave requests in such circumstances over Christmas especially if the nurses had told Mr Betts they were of another religion. Mr Betts said that he would inform them that if they were not Christian, they did not need Christmas off.

6.2 If so, was that unwanted conduct?

6.3 Did it relate to the Claimant's protected characteristic, namely the Claimant's ethnic origin?

6.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

6.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7. Section 80H ERA – flexible working request

7.1 Did the Respondent fail to comply with section 80G(1) of the ERA?

7.2 The Tribunal will decide whether the Claimant made an application within section 80F of the ERA and, if so, whether the Respondent failed to comply with section 80G(1) in relation to that application

8. Remedy

Unfair dismissal

8.1 The Claimant does not wish to be reinstated and/or re-engaged.

8.2 What basic award is payable to the Claimant, if any?

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

8.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

8.4.1 What financial losses has the dismissal caused the Claimant?

8.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

8.4.3 If not, for what period of loss should the Claimant be compensated?

8.4.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

8.4.5 If so, should the Claimant's compensation be reduced? By how much?

8.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

8.4.7 If the Claimant was unfairly dismissed, did the Claimant cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

8.4.8 Does the statutory cap apply?

Detriment (s. 47B)

8.5 What financial losses has the detrimental treatment caused the Claimant?

8.6 Has the Claimant taken reasonable steps to replace the Claimant's lost earnings, for example by looking for another job?

8.7 If not, for what period of loss should the Claimant be compensated?

8.8 What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

8.9 Has the detrimental treatment caused the Claimant personal injury and how much compensation should be awarded for that?

8.10 Is it just and equitable to award the Claimant other compensation?

8.11 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

8.12 Did the Claimant cause or contribute to the detrimental treatment by the Claimant's own actions and if so, would it be just and equitable to reduce the Claimant's compensation? By what proportion?

8.13 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the Claimant's compensation? By what proportion, up to 25%?

Discrimination or victimisation

8.14 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

8.15 What financial losses has the discrimination caused the Claimant?

8.16 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

8.17 If not, for what period of loss should the Claimant be compensated for?

8.18 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

8.19 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

8.20 Is there a chance that the Claimant's employment would have ended in any event? Should the Claimant's compensation be reduced as a result?

8.21 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

8.22 Should interest be awarded? How much?

Section 80I ERA

9. Is the Claimant entitled to a remedy by reference to this section?

Evidence

6. We had a witness statement from Mrs Asghar. She called no further witnesses on her behalf.

7. For the Respondent, we heard evidence from and had witness statements from:-

7.1. Miss Jenna Harvey, (People Advisor);

7.2. Mrs Rachel Robinson, (Executive Chief Nurse);

7.3. Mrs Lisa Hatton-Shaw, (People Partner);

7.4. Mr Alistair Betts, (no longer in the employment of the Respondent but at the time in question, Locality Director of Quality); and

7.5. Mr Dan Hubbard, (Regional Operations Director).

8. We had before us two bundles of documents. Both properly paginated and indexed in PDF format. The first was an agreed Joint Bundle running

to page 390 and the second a Supplemental Bundle containing additional documents the Claimant wished to refer to, running to page 358.

9. At the outset of the case we read the witness statements and read or looked at the documents referred to. We explained to the parties that we do not read all of the documents in the bundles and that we only have regard to those documents to which we are taken.

10. During the course of the hearing, on Day 3, we were provided with additional documents: print outs showing the metadata of two versions of Mrs Asghar's Contract of Employment in the Joint Bundle appearing at pages 84 and 101.

The Law

Constructive Dismissal

11. The right not to be unfairly dismissed is provided for at section 94 of the Employment Rights Act 1996, (ERA).

12. Section 95 defines the circumstances in which a person is dismissed as including where:

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

13. That is what we call constructive dismissal. The seminal explanation of when those circumstances arise was given by Lord Denning in Western Excavating(ECC) Ltd v Sharpe 1978 ICR 221:

" If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed."

14. The Tribunals function in looking for a breach of contract is to look at the employer's conduct as a whole and determine whether it is such that the employee cannot be expected to put up with it, (see Browne – Wilkinson J in Woods v W M Car Services (Peterborough) ltd [1981] IRLR 347)

15. A fundamental breach of any contractual term might give rise to a claim of constructive dismissal, but a contractual term frequently relied upon in cases such as this is that which is usually described as the implied term of mutual trust and confidence.

16. The leading authority on this implied term is the House of Lords decision in Mahmud & Malik v BCCI [1997] IRLR 462 where Lord Steyn adopted the definition which originated in Woods v W M Car Services (Peterborough)

Ltd namely, that an employer shall not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

17. The test is objective, from Lord Steyn in the same case:

"The motives of the employer cannot be determinative or even relevant…..If conduct objectively *considered is likely to destroy or seriously damage the relationship between employer and employee, a breach of the implied obligation may arise."*

18. Individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust & confidence, thereby entitling the employee to resign and claim Constructive Dismissal. That is usually referred to as, "the last straw", (Lewis v Motorworld Garages Ltd [1985] IRLR 465).

19. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA 978 the Court of Appeal, (Underhill LJ and Singh LJ) reviewed the law on the doctrine of the last straw and formulated the following approach in such cases

"In the normal case where an employee *claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

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

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

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

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

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

20. The last straw itself need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of mutual trust and confidence, see London Borough of Waltham Forrest v Omilaju [2005] IRLR 35. However, an entirely innocuous act can not be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of mutual trust and confidence.

21. A fundamental breach by an employer has to be, "accepted" by the employee, to quote Lord Browne-Wilkinson in the EAT in W.E. Cox Toner (International) Ltd v Crook 1981 IRLR 443 :-

"If one party (the guilty party) commits a repudiatory breach of the contract, the other party *(the innocent party) can chose one of two courses: he can affirm the contract and insist on its further performance, or he can accept the repudiation, in which case the contract is at an end…*

*But he is not bound to elect within a reasonable or any other time. Mere delay by itself (*unaccompanied *by an express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation…*

Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contractual obligation, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation…"

22. HHJ Burke QC in Hadji v St Luke's Plymouth UKEAT 0857/2012 summarised the law as follows:

(i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. Western Excavating v Sharp [1978] QB 761, [1978] 1 All ER 713, [1978] ICR 221 as modified by W E Cox Toner (International) Ltd v Crook [1981] IRLR 443, [1981] ICR 823 and Cantor Fitzgerald International v Bird [2002] EWHC 2736 (QB) 29 July 2002.

(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay – see Cox Toner para 13 p 446.

(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: Fereday v S Staffs NHS Primary Care Trust (UKEAT/0513/ZT judgment 12 July 2011) paras 45/46.

(iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the

Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: Fereday, para 44.

23. The employee must prove that an effective cause of his resignation was the employers' fundamental breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach, which must have played a part (see Nottingham County Council v Miekel [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13)

24. An employee is perfectly entitled to wait for a period of time to seek alternative *employment* before resigning, see for example Walton & Morse v Dorrington [1997] IRLR 488.

25. In Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908 the Court of *Appeal* held that a repudiatory breach cannot be unilaterally cured by the party in default. However, Lord Justice Sedley warned:

"A wronged party, particularly *if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends"*

Public Interest Disclosure

26. Mrs Asghar says that she was subjected to detriment for having made a protected disclosure, (whistle-blowing) and that her resignation was by reason of that detriment and that she was constructively dismissed because of that disclosure. The relevant law is derived from the Employment Rights Act 1996, (the "ERA").

Protected Disclosure

27. Lord Justice Mummery explained the purpose of the whistleblowing legislation in ALM Medical Services Ltd v Bladon [2002]IRLR 807 CA as follows:

The self-evident aim of the provisions is to protect employees from unfair treatment (ie victimisation and dismissal) for reasonably raising in a responsible way genuine concerns *about wrongdoing in the workplace. The provisions strike an intricate balance between (a) promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have early knowledge of them, and (b) protecting the respective interests of employers and employees.*

28. What amounts to a protected disclosure is defined in the ERA at Section 43A as a qualifying disclosure. That in turn is defined at Section 43B as:

"… Any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – …

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

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

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

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

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

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

29. In summary:

29.1. There must be a disclosure of information;

29.2. The worker must reasonably believe that the disclosure is in the public interest, and

29.3. The worker must reasonably believe that the disclosure tends to show one of (a) to (e).

30. The requirement is for the disclosure of information; i.e. conveying facts. It is not enough to make an allegation, see Cavendish Munro v Geduld UKEAT/0195/09. The mere expression of an opinion does not tend to show that the Respondent is likely to be in breach of any legal obligation, see Goode v Marks & Spencer Plc UKEAT/0442/09. However, there is a need for care; information can be disclosed within an allegation. The concept of "information" is capable of covering statements which might also be characterised as allegations. The correct question is to ask whether the disclosure contained information of sufficient factual content and specificity that it is capable of showing one of the matters listed in section 43B(1). This is a matter of evaluative judgment in light of the facts and the context in which it was made. See Kilraine v London Borough of Wandsworth [2018] ICR 1850 CA.

31. The disclosures need not be factually correct, nor amount to a breach of the law, provided that the claimant reasonably believed them to be so, see Babula v Waltham Forrest College [2007 IRLR 346. The words used in

relation to breach is, “tends to show” not, “shows”. A qualifying belief may be wrong but may be reasonably held.

32. The expression, “reasonable belief” must be considered having regard to the personal circumstances of the discloser, in particular their “inside knowledge”, what they know about the field in which they work, about their employer, about the subject matter to which the disclosure relates. The test is subjective as to what belief the discloser had and objective, in terms of the reasonableness of that belief, in context, see Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4.

33. The claimant must also reasonably believe that the disclosure is in the public interest; there must be genuine subjective belief at the time of the disclosure and such belief must be reasonably held. In Chesterton Global Ltd (T/A Chestertons) v Nurmohamed & Others [2017] EWCA Civ 979, the Court of Appeal held that there were no absolute rules in deciding whether a disclosure was in the public interest; the essential point was that the disclosure has to serve a wider interest than the personal or private interest of the discloser. Relevant factors are would include the numbers in the affected group, the nature of the interest affected, the extent to which they were affected, the nature of the wrongdoing and the identity of the alleged wrongdoer. That said, the number affected is not determinative; it is not a case of merely one other person being required to make it in the public interest. However, the larger the number affected, the more likely it is that it will engage public interest.

34. There is no requirement in the statute that the claimant’s motive for making the alleged disclosure must be that it is in the public interest to do so, although as Underhill LJ observed in Chesterton Global Ltd, it would be rare if a disclosure was believed to be in the public interest, that did not form at least part of the motive.

35. If the question arises as to whether one of the situations listed in section 43B(1) is, “likely” to arise, the test is whether it is, “more likely than not” to arise, see Kraus v Penna Plc [2004] IRLR 260.

36. A protected disclosure must, (per section 43A) be made to one of a number of specified persons set out at sections 43C to 43H. Section 43C provides for disclosure to the claimant’s employer.

Detriment

37. Section 47B of the ERA provides that a worker has the right not to be subjected to any detriment because she has made a protected disclosure.

38. A detriment may be inflicted by any act, or failure to act, (Section 47B(1)).

39. The term, “detriment” is not defined in the ERA. We look to the meaning attributed to that phrase in the discrimination case law, in particular as defined in the seminal case of Shamoon v the Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285: a detriment is where by

reason of the act or acts complained of, a reasonable worker would or might take the view that she has been disadvantaged in the circumstances in which she had thereafter to work. Detriment is not limited to some physical or economic consequence. However, an unjustified sense of grievance does not amount to a detriment.

40. It is possible in some circumstances that a detriment, (or dismissal) may be inflicted not because of the disclosure itself, but the manner in which it has been made. Care is needed to be sure that there is a sufficient degree of separation between the two, see Kong v Gulf International Bank (UK) Ltd [2022] EWCA Civ 941.

41. A worker has the right not to be subject to detriment for making a disclosure, by a co-worker or agents of the employer. The employer is vicariously liable for the actions of its worker's in the course of their employment, (section 47B(1A) and (1B). The employer has a statutory defence if it took all reasonable steps to prevent such detriment, (section 47B(1D).

Burden of Proof

42. Section 48(2) of the ERA provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. The claimant must still first prove on the balance of probabilities, that there has been a protected disclosure and that there was a detriment to which the claimant was subjected by the respondent. Then the burden shifts to the respondent to prove that the detriment was not because of the disclosure.

43. Thus where it is established that there has been a protected disclosure, in considering whether a worker has been subject to a detriment as a result, an Employment Tribunal must ask itself:

    43.1. Whether the worker has been subject to detriment; if so,

    43.2. Whether that detriment has arisen from an act or deliberate failure to act by the employer, and if so

    43.3. Whether that act or omission was done on the ground that the worker has made a protected disclosure.

    See Harrow London Borough v Knight [2003] IRLR 140).

44. The burden of proof on the question of whether there was a legal obligation and that information provided tends to show that there may be a breach, lies with the claimant, see Boulding v Land Securities Trillium (Media Services) Ltd UEKAT/0023/06, (paragraph 24).

45. As to the link between the disclosure and the detriment, ("on the ground that") one has to analyse the mental process, (conscious or unconscious) which caused the employer to act. We should not adopt the, "but for" test sometimes utilised in discrimination cases. The Court of Appeal

considered this in Fecitt v NHS Manchester [2012] IRLR 64 where it was held that there is a causal link if the protected disclosure materially influences, (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. It is not the same test as that for a causal link in respect of dismissal; in considering whether there has been an unfair dismissal by reason of a protected disclosure, the disclosure must be the sole or principal reason before it is deemed to be automatically unfair.

46. The respondent then, must prove on the balance of probabilities that the act, or deliberate failure, was not on the grounds that the claimant had done the protected act i.e. that the protected act did not materially influence, (was not more than a trivial influence on) the respondent's treatment of the claimant, see Fecitt, in particular at paragraph 41.

Unfair Dismissal and Protected Disclosures

47. Mrs Asghar says that she was constructively dismissed for making protected disclosures. Section 103A of the ERA provides that

"An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the *reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

48. Where an employee claims constructive dismissal contrary to s103A, the question must be whether the disclosure was the reason that the employer committed the alleged fundamental breach that led to the resignation. Were the matters complained of as amounting to breach of the implied term of mutual trust and confidence on the ground that the employee had made the disclosure?

Time

49. Section 48 (3) of the ERA requires that any complaint of detriment for having made a protected disclosure must be brought within 3 months of the detriment complained of, or if there was a series of similar acts or failure to act, the last of them. If it was not reasonably practicable to bring the claim within that time frame, it may be allowed, if brought within such further period as the Tribunal considers reasonable.

Discrimination

50. The relevant law is set out in the Equality Act 2010.

51. Section 39(2)(c) proscribes an employer from discriminating against an employee by dismissing the employee or, at (d) by subjecting the employee to any other detriment.

52. "Dismissal" includes constructive dismissal, (s39(7)(b)).

53. Section 40 prohibits harassment by an employer.

54. Race and sex are amongst a number of protected characteristics identified at s.4.

55. Race is defined at s.9 and includes colour, nationality, ethnic and national origins.

Time

56. Section 123(1) requires that a claim of discrimination shall be brought before the end of the period of three months beginning with the date of the act to which the complaint relates or such further period as the Tribunal thinks just and equitable. Conduct extended over a period of time is treated as having been done at the end of that period, (section 123(3)).

Direct Discrimination

57. Mrs Asghar says that she was directly discriminated against because of her race and sex. Direct discrimination is defined at s.13(1):

"A person (A) discriminates against another (B) if, because of a protected characteristic (A) treats (B) less favourably than (A) treats or would treat others".

58. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the Claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The Claimant must show that she has been treated less favourably than that real comparator was treated or than the hypothetical comparator would have been treated.

59. How does one determine whether any particular less favourable treatment was, "because of" a protected characteristic? There is no difference in meaning between the term, "because of" in section 13 and "on the grounds of", under the pre-Equality Act legislation, (see Onu v Akwiwu and Taiwo v Olaigbe [2014] IRLR 448 at paragraph 40).

60. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572 and in particular, the speech of Lord Nicholls of Birkenhead, (I quote from paragraphs 13 and 17):

"…in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases,

answering the crucial question will call for some consideration of the mental processes of the alleged discriminator…

I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn."

61. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

62. The treatment of non-identical comparators in similar situations can also assist in constructing a picture of how a hypothetical comparator would have been treated: Chief Constable of West Yorkshire v Vento (No. 1) (EAT/52/00) (8 June 2000) at [7].

63. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, see above.

Harassment

64. Harassment is defined at s.26:

"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

…

race;

…

sex;

…"

65. We will refer to that henceforth as the proscribed environment. There are three factors to take into account:

65.1. The perception of the Claimant;

65.2. The other circumstances of the case, and

65.3. Whether it is reasonable for the conduct to have that effect.

66. The conduct complained of that is said to give rise to the proscribed environment must be related to the protected characteristic. That means the Tribunal must look at the context in which the conduct occurred.

67. HHJ Richardson observed in Hartley v Foreign and Commonwealth Office Services UKEAT/0033/15/LA at paragraph 23:

"The question posed by section 26(1) is whether A's conduct related to the protected characteristic. This is a broad test, requiring an evaluation by the Employment Tribunal of the evidence in the round — recognising, of course, that witnesses will not readily volunteer that a remark was related to a protected characteristic. In some cases the burden of proof provisions may be important, though they have not played any part in submissions on this appeal. The Equality Code says (paragraph 7.9):

'7.9. Unwanted *conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.' …"*

68. The motivation and thought processes of those accused of harassment may be relevant to the question of whether their conduct amounted to harassment, see Unite the Union v Nailard [2018] IRLR 730 at paragraphs 108 -109.

69. The EAT gave some helpful guidance in the case of Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is a case relating to race discrimination, but the comments, (by Underhill P, as he then was) apply to cases of harassment in respect of any of the proscribed grounds.

"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred). It is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

70. Those sentiments were reinforced by Sir Patrick Elias in Grant v Her Majesty's Land Registry [2011] EWCA Civ 769. Of the words, "intimidating, hostile, degrading, humiliating or offensive" he said that Employment Tribunals, "*should not cheapen"* the significance of those words, they are an important control to prevent trivial acts causing minor upsets being caught up in the concept of harassment.

71. The person complaining of harassment does not have to have the protected characteristic, there simply has to be a connection between the conduct complained and the protected characteristic, that creates the proscribed environment for the person complaining. Thus in the ECHR Code of Practice on Employment, at paragraph 7.10 (b) gives as an example [4.91] a situation where a manager abuses a black worker, as a result of which a white colleague is offended; that white colleague has a valid claim of harassment. The prohibited environment is created and the conduct complained of is related to race.

Burden of Proof

72. Section 136 deals with the burden of proof:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if (A) shows that (A) did not contravene the provision.

73. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there

had been discrimination. If she does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination. The appeal courts' guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005[IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case.

74. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation.

75. Madarassy v Nomura International plc [2007] IRLR 246 CA also confirms that a mere difference in treatment is not enough, Mummery LJ stating:

> *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination, they are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"*

76. HHJ Tayler cautioned in Field v Steve Pye and Co limited & Others [2022] EAT 68:

> *"Although it is legitimate to move straight to the second stage, there is something to be said for an employment tribunal considering why it is choosing that option "*

77. In essence, one may as well set out the reasoning in the two stages as simply going straight to and accepting the Respondent's explanation.

78. In Denman v Commission for Equaltiy and Humand Rights and Others [2010] EWCA Civ 1279 Sedley LJ made the point though, that the something more which is needed need not be a great deal, it might for example be provided by a failure to respond to, or an evasive or untruthful answer to, a questionnaire or by the context in which the act has occurred. In other cases, that something more has been statistical evidence suggesting unconscious bias, inconsistent explanations or refusal to provide information.

79. In Commissioner of Police of the Metropolis v Denby UKEAT/0314/16 Kerr J said, (quoting Lord Nicholls in Shamoon) that sometimes the reason for the treatment is intertwined with whether the Claimant was treated less favourably than a comparator such that, *"the decision on the reason why issue will also provide the answer to the less favourable treatment issue".*

80. Tribunals are cautioned against taking too fragmented an approach when there are many individual allegations of discrimination. Although we should make individual findings of fact on each allegation and consider whether they amount to an instance of discrimination, we should also stand back, look at the bigger picture and adopt a holistic view on whether the Claimant has been subject to discrimination. See Quershi v Victoria University of Manchester [2001] ICR 863, Rihal v London Borough of Ealing [2004] IRLR 642 and Fraser v Leicester University EKEAT/0155/13/DM.

Flexible Working

81. The ERA 2016 sections 80F and 80G, (before 6 April 2024) provided as follows, inter alia:

80F Statutory right to request contract variation

(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—
(a) the change relates to—
(i) the hours he is required to work,
(ii) the times when he is required to work,
(iii) where, as between his home and a place of business of his employer, he is required to work, or
(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations,

80G Employer's duties in relation to application under section 80F
(1) An employer to whom an application under section 80F is made—
(a) shall deal with the application in a reasonable manner,
(aa) …
(b) shall only refuse the application because he considers that one or more of the following grounds applies—
(i) the burden of additional costs,
(ii) detrimental effect on ability to meet customer demand,
(iii) inability to re-organise work among existing staff,
(iv) inability to recruit additional staff,
(v) detrimental impact on quality,
(vi) detrimental impact on performance,
(vii) insufficiency of work during the periods the employee proposes to work,
(viii) planned structural changes, and
(ix) such other grounds as the Secretary of State may specify by regulations.
…

82. In dealing with a Flexible Working Request reasonably, the ACAS Code of Practice 5: Handling in a Reasonable Manner Request to Work Flexibly (2014) suggests that this entails discussing the request with the employee as soon as possible, allowing them to be accompanied, considering how the request might benefit the employee and the business, weighing

against that any adverse business impact, discussing any potential modifications to what has been requested, generally dealing with the request and providing a response promptly.

83. Section 80H of the ERA provides for the right to complain to an Employment Tribunal if the employer is in breach of s80G(1) and s80I provides for remedy if such a complaint succeeds.

Findings of Fact

84. The Respondent is a not for profit organisation providing out of hospital health and care services, employing in the region of one thousand employees at a number of locations.

85. The Respondent's Annual Leave Policy includes the following:

> "Our ability to continue to deliver excellent care to our patients means we have to plan for the number of colleagues taking holiday at any one time so we can continue to deliver our services. This means that if too many colleagues request the same dates or during winter pressures, we might have to restrict the number of colleagues off at any time. …
>
> You should not book a holiday until your request for annual leave has been authorised by your Manager in My Work Place. …
>
> We recognise that certain periods of the year are more popular for taking annual leave, e.g. school holidays. We therefore suggest, if practical, that you discuss your holiday plans with your immediate colleagues to ensure that there is sufficient cover on your team.
>
> In the event that a number of leave requests are submitted for the same period, the request may be considered on a first come, first served basis."

86. Mrs Asghar commenced employment with the Respondent as a Clinical Advisor on 29 February 2020.

87. On 29 July 2021, details of a vacancy were circulated by Mr Betts, Local Director of Quality, in an email of that date, (page 166) which refers to a post title "Norfolk Clinical Quality Lead". The narrative includes:

> "There are a number of options we can consider, within the recruitment process, and this could include a full-time equivalent job share, a fixed term arrangement and indeed an opportunity for one person to progress into this role".

88. The job description for this role published at the time included as the job title, "Clinical Quality Lead", (page 383).

89. Mrs Asghar applied for this role, she was interviewed on 9 September 2021 and was successful in her application, beating her then Line Manager to the appointment.

90. The role was formerly offered to her in writing on a Job Offer Form, (page 82) which states the job title as "Clinical Lead (Quality)" and the salary stated as being £43,000 to be reviewed after six months.

91. Mrs Asghar was issued with a contract of employment which starts at page 101, the job title being "Clinical Quality Lead". Under the heading of, "Probationary period" the contract expressly provided:

> "If you are an existing colleague moving to a new job you will not be subject to a further probationary period."

92. The signatures to this contract are recorded at page 115 as by Mrs Hatton-Shaw on 22 September 2021 and Mrs Asghar on 25 September 2021.

93. At this time, Mrs Asghar had secured approval for a period of leave in respect of which she had booked flights. She spoke to and corresponded with her new manager to be, Mr Betts, about this on 17 September 2021. At pages 175 – 173, we see an email chain in this regard. It begins with Mrs Asghar confirming to Mr Betts the period of leave:

> "It would be from February 10th 3pm onwards to 21 February. So I would be back to work on February 22nd. Please let me know either way."

94. Mr Betts replied:

> "Hi Marium, I have checked NWP and as I suspected it is not going to be possible unfortunately. This is because I am already due to be off from the end of Thursday 10th February and not returning until Tuesday 22nd February. Additionally Michael is off on Wednesday 16 Feb. I am really sorry about this. Is there another time you could look at to take your A/L?"

95. Mrs Asghar asked whether there was any time over the Easter holidays that she could take leave, in response to which Mr Betts confirmed that would be fine and Mrs Asghar then wrote:

> "How about 3pm onwards on Thursday 31st March returning to work on 13th April and I would then be working the rest of the week. … If you let me know if this is good and I shall get our flights moved forward."

96. Mrs Asghar commenced in her new role on 11 October 2021.

97. On 18 October 2021, Mrs Hatton-Shaw noticed that Mrs Asghar's job title had been incorrectly recorded on her Contract of Employment. She wrote instructions on 18 October observing that the correct job title had been provided on the job offer, not on Mrs Asghar's employment contract. She gave instructions for this to be corrected. For some reason the correspondent's name is redacted, but that person replied to say that the role had also been advertised with the title "Clinical Quality Lead" and that was the title appearing on the job description. Mrs Hatton-Shaw replied to say that she had not spotted that and that the job description should also be amended as well as the contract. Mrs Hatton-Shaw's explanation, which we accept, is that historically the role had borne the title "Clinical

Quality Lead" within the Norfolk and Waveney area, but elsewhere had carried the role title "Clinical Lead (Quality)". The Respondent had decided that the latter was the title that it would use going forward, in the interests of consistency. This is a decision that had been made before Mrs Asghar's appointment.

98. Mrs Asghar was issued with a new Contract of Employment, which is copied at page 84 and which bears the job title "Clinical Lead (Quality)". Mrs Asghar disputed the provenance of this document. The Respondent produced metadata which showed that the document at 101 had been created on 21 September 2021 and that this latest version of the Contract page 84, had been created on 18 October 2021. Mrs Asghar makes the point that the signature of Mrs Hatton-Shaw at the end of the second contract retains the original date, 22 September 2021 and there is no signature from her. She also says that there was a third version of this contract, issued to her originally in September. The Respondent's administration is undoubtedly muddled, we accept that the facts are as outlined by Mrs Hatton-Shaw, namely that she realised there had been a mistake, she gave instructions for that to be corrected and the contract that we see at page 83 was created as a consequence.

99. A new job description was also issued, which is at page 121 and which bears the job title "Clinical Lead (Quality)".

100. In October 2021, one of Mrs Asghar's direct reports, who we shall refer to as 'X' was arrested by the Police for theft of controlled drugs. Boxes of medication with the Respondent's labels on them had been found by the Police during a search of this person's home address.

101. On 28 October 2021, Mrs Asghar submitted a referral relating to X to the Health and Care Professional's Council (HCPC).

102. X submitted a grievance, complaining that the referral had incorrectly included a reference to controlled drugs having been found at their home and to the Respondent currently investigating missing controlled drugs. It is true that the Respondent was at the time investigating a problem relating to missing controlled drugs.

103. Mrs Asghar reviewed the referral of X with Miss Harvey (People Advisor) who had been investigating. The Police had provided a list of the medication found at X's home, none of which were in fact controlled drugs. In respect of the Respondent's missing controlled drugs, the issue had been resolved and found to have had nothing to do with X. Mrs Asghar prepared an amended referral, which was submitted on 17 December 2021, signed by Mrs Asghar and Miss Harvey.

104. On 1 December 2021, Mr Betts held a one to one with Mrs Asghar, his note is at page 194. Mr Betts discussed with Mrs Asghar the importance of work life balance, making reference to a number of emails that she had sent outside normal working hours. He records Mrs Asghar as saying that she felt she was getting on okay, that she was getting to grips with things

and was more settled. He recorded that there was, "good progress". There is a note that reads, "Cultural discussion".

105. On 5 December 2021, there was an exchange of emails between Mrs Asghar and Mr Betts in which Mr Betts wrote:

> "Remember work smart and not harder. I need you match fit for the week's commitment so weekend work should only be a requirement if absolutely necessary. So far I haven't seen anything that couldn't wait until during the week!"

106. Sometime in December 2021, Mrs Asghar met with Mr Betts, the Regional Operations Director, Mr Hubbard and the Regional Medical Director, Mr Wilford. In this meeting, they discussed whether or not Mrs Asghar had taken on too many duties in addition to those that were strictly required in her role. In particular, research that she had agreed to undertake pursuant to a request from the Respondent's Central Office. She was counselled not to take on too much work and that if she was asked to undertake work that was outside her job role, she should consider refusing it.

107. On 24 December 2021, Mrs Asghar had a further one to one meeting with Mr Betts, (page 202). The note referred to lessons having been learned from the HCPC referral. They contain a note of Mrs Asghar being reminded to strike a healthy work / life balance. The note also records:

> "Marium has no concerns she wishes to discuss at this time. She stated that she feels she is settling into her new role. *"It's busy but it would be because of the type of job it is"*. She recognises that at times she falls behind, however she is aware of this and is utilising strategies to overcome."

108. On 4 February 2022, Mr Betts arranged for Mrs Asghar's salary to be increased to £45,000 per annum. This is noted on a Variation Form dated 4 February 2022 and which also refers to Mrs Asghar's job title as "Clinical Lead (Quality)". Mr Betts says he increased the salary in accordance with the indication on the job offer that the salary would be reviewed after six months. He in fact reviewed it after four months. He says, (and we accept) the reason for this was Mrs Asghar was doing well, not because she had raised concerns about her salary.

109. During February 2022, Mrs Asghar recommended Mr Betts for an internal award, "Values in Practice". Writing of him:

> I appreciate all the support that Alistair has given over time. Nothing is too much, he is always happy to discuss, advise and guide further. Alistair's advice is always well thought out and appreciated. Alistair has a fresh way of looking at things which is very innovative. As a Manager, he sets a fantastic example for all of us to follow."

110. Mrs Asghar and Mr Betts had a further one to one on 3 May 2022, noted at page 226. The note contains reference to, "information overload" and a discussion about what Mrs Asghar wants to do in the future.

111. As some point, it is not clear when, X submitted a further grievance, complaining that the amended referral to HCPC made reference to self-prescribing. A Ms Turner, (Director of Quality Improvement) was appointed to investigate the grievance. She concluded the referral should be amended and resubmitted to HCPC. We do not have the grievance outcome, but Ms Harvey gave the following explanation in her witness statement:

> "Company is an urgent care provider rather than an Ambulance Trust and the company does not work within the Joint Royal Colleges Ambulance Liaison Committee Guidelines. Paramedics should not be using their own medication stock when working for the company and we do not therefore have any policies or procedures to support this. As such, it is outside the scope of our expertise to comment on whether requisitioning a controlled substance and entering it into the controlled drug book is, or is not, prescribing."

112. There was a meeting between Mrs Asghar, Mrs Hatton-Shaw and Mr Betts on 19 July 2022 to discuss changes to the HCPC referral. Following that, Mrs Asghar prepared an amended referral, working with Miss Harvey. She sent that to Miss Harvey, copied to Mr Betts, on 12 August 2022, (page 230).

113. Subsequently, on 15 August 2022, Miss Harvey reviewed the redraft with Mrs Hatton-Shaw and emailed comments to Mrs Asghar, page 239. On 31 August 2022, Mrs Asghar sent the redraft to Ms Turner for approval, (pages 238 – 239).

114. On 2 September 2022, Ms Turner provided some comments, (page 243) to which Mrs Asghar responded. Ms Turner's comments and Mrs Asghar's response can be seen at page 237. We do not have the actual referral and amendments, but one can see that Mrs Asghar is pushing back against the suggestion that something she had written should be removed with regard to the Controlled Drugs Book. The police had provided a photograph of the Controlled Drugs Book. She is concerned that HCPC in their Referral Form, request that they be kept up to date with investigations and she is:

> "…uneasy of coming across as dishonest when removing critical aspects which the Police have informed us about as requested by yourself, Jenna and I have made clear this isn't our evidence and is in fact reported by the Police. However, I don't feel comfortable removing this altogether because of the below part within the HCPC Form."

115. Mrs Asghar makes reference to the section of the form which asks that the HCPC be kept up to date.

116. Ms Turner replied on 5 September 2022, (page 241). She wrote:

> "The comments that I provided were with the intention of being helpful and for consideration.

> The outcome of my investigation is that IC24 is an urgent care provider rather than an Ambulance Trust and we do not work with the Joint Royal Colleges Ambulance Liaison Committee (JRCALC) Guidelines. Paramedics should not be using their own medication stock when working for IC24 and we do not therefore have any policies or procedures to support this. As such, it is outside the scope of our expertise to comment on whether requisitioning a controlled substance and entering it into a Controlled Drug (CD) Book is, or is not, prescribing.
>
> In view of the above, we should not be commenting on entries in a Controlled Drug Book which is nothing to do with our organisation. We have notified HCPC that the Police have completed an investigation that has now been finalised. It is not our job to do the investigation on behalf of the HCPC despite their request to do so."

117. On 15 September 2022, Mrs Asghar wrote by email to Ms Harvey about the Referral amendment, making reference to her notes of her conversation with Miss Harvey, setting out her summary of their conversation and asked for confirmation that she understood correctly:

- "There is a concern at present regarding the Clinician's fitness to practice and the ability to obtain CD medication due to the MH history and current concerns. It is appropriate to send this across to HCPC as rightly mentioned by Jo this is outside of IC24 scope.

- We cannot assume the Police have referred the Clinician to HCPC therefore, it is appropriate to make reference to the CD Book. However, self-prescribing references are inappropriate and have been removed.

- Overall, there is an element of responsibility and accountability as employers that we complete the Referral will [sic] information that is known to us (i.e. possession of CD Book with recordings).

- The Referral needs to be resubmitted to PAG by Tuesday and I have included this in my email to Jo. I will keep you updated on this and off course [sic] send the finalised version around before it goes to PAG."

118. A revised Referral was sent to HCPC on 26 September 2022, (page 253).

119. In the meantime, we note that on 20 September 2022, Mrs Asghar was interviewed for a post with the Respondent that would have represented a further promotion in respect of which, she was unsuccessful.

120. On 27 July 2022, Mrs Asghar requested leave during the Christmas period. We were referred to a text exchange at page 229, which shows that Mr Betts refused the request, saying that it would not be right to grant it. He explained (and we accept) that at the time the Respondent's policy had been to not permit leave between Christmas and New Year. In fact after this request, the policy changed.

121. During this time, Mrs Asghar was sitting with the Executive Chief Nurse, Mrs Robinson, for Leadership Coaching. Mrs Robinson was an Executive

Sponsor of the Respondent's resource group for gender equality known as, 'Brave Women', of which Mrs Asghar herself was a Lead. Mrs Robinson's evidence was and we accept, that during those coaching sessions, Mrs Asghar spoke of being overwhelmed in the Clinical Lead role, that she was struggling because she was inexperienced, she found management of clinicians difficult, found it difficult having to deal with multiple tasks and managing her time effectively. She found it hard to take responsibility and accountability. She did not raise concerns with regard to her workload levels.

122. At this point we should also note that Mr Betts' evidence was that he was spending approximately four hours a day assisting Mrs Asghar. Mrs Robinson said that she had told him, he was spending too much time supporting Mrs Asghar.

123. On 6 October 2022, Mrs Asghar submitted a Flexible Working Request, which is at page 254. She wished to reduce her hours to three days a week / 22.5 hours, the work days to vary depending on service needs. She also wrote on the form:

> "The remaining 15 hours would need to be filled and this may impact the service."

124. Mr Betts discussed the Flexible Working Request with Mrs Robinson that day and we accept her account of that conversation, paragraph 21 of her witness statement. Mr Betts had expressed surprise at the request for flexible working, given that Mrs Asghar had recently applied for a Director's role. He expressed concern about two different managers managing the group of practitioners, who could be problematic and with whom there were some behavioural issues. Mrs Robinson considered his concerns valid.

125. Mr Betts that day also had a conversation with Mrs Asghar, although he did not regard it as a formal conversation in relation to the Flexible Working Request. He was negative. He suggested that it was likely the request would be declined. He was concerned that hers was a full-time role and he was not convinced it could be undertaken part-time, based on previous experience. He was concerned that even if she were allowed to work part-time, she would find herself working more than her part-time hours. Mrs Asghar had suggested a job share arrangement, but with somebody who had applied for the role previously and had been unsuccessful. He suggested to Mrs Asghar that she thought about it.

126. Mrs Asghar was absent from work due to unrelated illness on 7 October 2022, (a Friday) and upon her return to work on Monday 10 October 2022, she had a Return to Work Meeting with Mr Betts. The Return to Work Meeting record at page 262 records discussion as follows:

> "Approach to work and role at present. Marium needing to decide what she wants her future to look like and what she may need in the way of support to achieve this realistically."

127. In terms of support offered, the document records:

> "Discussion on FWR and whether this is the right approach."

128. The full record of the discussion between Mrs Asghar and Mr Betts appears at page 266. Mrs Asghar indicated that she wished to retract her Flexible Working Request and that she had decided to resign her position. She said that she was unable to manage her workload. She felt that her role needed to be reviewed. It was clear that she only wanted to work part-time. The possibility of other roles was discussed with her. She confirmed that she would formally notify Mr Betts of her intention to retract the Flexible Working Request and provide her resignation. Mr Betts invited her to have a discussion with somebody other than him, about issues she felt that she faced, specifically in relation to her workload. She stated she did not have any specific issues with Mr Betts. He suggested that she took some time to reflect, before making her final decision. We note that Mrs Asghar returned the note of that conversation, (page 264) writing:

> "Please find attached the signed ROC from earlier today. Thank you for your time and understanding."

129. About an hour later on 10 October 2022, Mrs Asghar wrote,

> "As per our discussion earlier today, I would like to withdraw my FWR submitted below and instead resign. As discussed, this is due to the large workload which I feel is impacting in a negative way and becoming unsafe. Therefore, please accept this email as my resignation following a three month notice period.
>
> Thank you for all your support and guidance throughout my time within the role, I have thoroughly enjoyed working with you and the team."

130. On 11 October 2022, Mrs Asghar spoke with Miss Harvey and said to her that her resignation had nothing to do with Mr Betts and the Senior Leadership Team had been great and everybody had been supportive.

131. Later in the notice period, Mrs Asghar said to Miss Harvey that Mr Betts had become frosty but that she did not wish to raise anything.

132. On 5 December 2022, Mrs Asghar included the following in an email to Mr Betts:

> "… I would like to highlight, remind and like recorded that this is linked with my lack of capacity and workload that I have been highlighting for a long time now. I am half way in my notice period with my reasons for leaving exactly this and nothing has changed or any adjustments made."

133. On 8 December 2022, Mr Betts met with Mrs Asghar. The written notes of that meeting, with Mrs Asghar's comments, are at page 286. Mrs Asghar complains now, about the Respondent failing to take any action with regard to the comments that she made on those notes. We are not

surprised that they did not. It seems to us that the notes with Mrs Asghar's comments essentially represent two different, "spins" on the same conversation. The essential theme is consistent with references to capacity and workload, previous suggestions that Mrs Asghar should relinquish some of the work that she had taken on voluntarily, which she said was a minor hurdle.

134. Mrs Asghar attended an Exit Interview with Mrs Hatton-Shaw, notes of which are at page 289. We accept that they are an accurate record of the gist of their conversation. It covered the following:

134.1. There were a number of reasons for leaving including workload, the time taken for her Masters Degree, not being allowed sufficient time for that compared to Mr Fisher, who was allowed time for studying;

134.2. Inaction by Mr Betts when she complained about workload;

134.3. Mr Betts' attitude to the Flexible Working Request, indicating that it would be refused;

134.4. Her main reason for leaving was the behaviour of her manager;

134.5. She described her manager as poor;

134.6. Her manager should improve his communication skills, that he comes across as disrespectful and hurtful and bullying;

134.7. She said that she had been lucky to have coaching from Mrs Robinson and referred to having amazing leaders;

134.8. She did not feel that she had been paid fairly, complaining that she had started on £43,000 per annum because she did not have two Clinical Modules, whereas others did not either;

134.9. She said at one point the reason she had decided to leave was that her FWR had been refused;

134.10. She complained that she had spent the year telling Mr Betts about her workload and that he had tried to blame everything else, such as her ego, her Masters, etc.;

134.11. She said that she did not raise a Grievance because she felt that he would make her life miserable during the notice period; and

134.12. She said there had been a difference in treatment with regards to study leave as between herself and Mr Fisher.

135. We do not accept Mrs Asghar's allegation, denied by Mrs Robinson, that during the Exit Interview Mrs Robinson had said she did not want to hear about Mr Betts. It makes no sense that she would make a comment like that in an Exit Interview. Clearly from the minutes of the interview, she heard a great deal about Mr Betts.

Conclusions

Whistleblowing – Protected Disclosures

3.1.1 of the list of issues: June 2022 email to Ms Hatton-Shaw, Mr Betts. Ms Turner and Ms Harvey stating that she was being pressurised to submit a document about a paramedic who had been arrested – the Claimant believed the Respondent was lying about the evidence available

136. There was no such email.

137. If one considers the correspondence as a whole, what could be the protected disclosure? From the correspondence, what one sees is that Mrs Asghar has disagreed with a proposed course of action. She has not provided any information to her correspondents.

138. In the list of issues, Mrs Asghar identifies Ms Hatton--Smith, Mr Betts, Miss Harvey and Ms Turner as recipients of a Protected Disclosure. These are the people she was communicating with regard to the HCPC referral. She disagreed with them, she was not making disclosures to them.

139. When she was being cross examined, Mrs Asghar said that she did not rely on the email of 2 September 2022 as her Protected Disclosure, but in cross examination of Ms Harvey and Ms Hatton-Shaw, she appeared to be suggesting that it was. In closing submissions, she said she was, “telling everyone”.

140. In closing submissions, Mrs Asghar told us that she relied on s43B(1) (c) (miscarriage of justice) and (d) (Health and Safety) as the appropriate categorisation of her disclosure. She submitted that:

140.1. If diamorphine was being misused, (that was the controlled drug involved) that was a situation in which a person’s health and safety was or was likely to be endangered, and

140.2. If the police photographs of the Controlled Drug Book were not disclosed, there might be a miscarriage of justice.

141. We do not think it was reasonable for Mrs Asghar to believe either to be so. Nor for the sake of completeness, would it be reasonable for her to believe that the matter she was raising related to a potential breach of a legal obligation, (she did not identify one) or that there was or was likely to be concealment, (categories in the list of issues but not relied upon by Mrs Asghar during the hearing).

142. For all these reasons, we find that Mrs Asghar did not make a Protected Disclosure

143. We make the observation that the use of the word, “lying” in relation to Mrs Asghar’s description of the actions of the Respondent in the evidence

referred to in the HCPC referral is odd. The evidence does not suggest that they were lying.

Whistleblowing – Detriments

Issued 4.1.1: Being told that she was refusing a management request

144. We accept the evidence of Mr Betts and Mrs Robinson that neither of them made a reference to Mrs Asghar refusing or potentially refusing a management request or that she might face disciplinary action

Issue 4.1.2: Mrs Robinson telling her in a coaching session that she did not want to hear about Mr Betts

145. We have found that Mrs Robinson did not say that.

Issue 4.1.3: Ms Harvey taking no action when Ms Howe and Ms Williams raised concerns about Mr Betts

146. We accept Miss Harvey's evidence that no such concerns were raised with her.

147. Mrs Asghar's claims of having been subjected to detriment for having made protected disclosures fail; she did not make Protected Disclosures and she was not subjected to the detriments relied on.

148. Mrs Asgarth's claims of having suffered detriment for have made Protected Disclosures fail for these reasons.

Direct Sex and/or Race Discrimination

149. Mrs Asghar relies variously, on 4 actual comparators and in the alternative, a hypothetical comparator. The 4 comparators, who are not of Pakistani origin, are:

149.1. Mr Kurn. He was a Clinical Lead. He was not line managed by Mr Betts.

149.2. Ms Parkington. She was a Clinical Lead in Kent. She was interviewed by Mr Betts, (amongst others) but she did not report to him.

149.3. Ms Randlesome. She was a Clinical Lead recruited by Mr Betts, but she did not report to him.

149.4. Mr Fisher. He was Quality Governance Manager reporting to Mr Betts during the C's employment.

Issue 5.2.1: Starting on £43,0000 (Race only)

150. Mr Kurn, Ms Parkington and Ms Randlesome started on a salary of £45,000 because of their previous experience in Senior Clinical Lead roles, which is a role Mrs Asghar leapfrogged in her appointment. That

there were three people appointed to the same role, not of Pakistani origin, on a higher salary could, without more, give rise properly to the conclusion that race played some part in the setting of salary. The burden of proof shifts to the Respondent, but we accept the explanation of Mr Betts that the reason was Mrs Asghar's comparative lack of experience and that race played no part in his setting her initial salary.

Issue 5.2.2: Mr Betts not permitting pre-booked leave (race and/or sex)

151. The comparator is hypothetical. There are no facts from which we could properly conclude that the reason for Mr Betts actions was race or sex. Their holiday dates clashed. The policy suggests that whilst it is right that they ought not to be away at the same time, equally, having booked her holiday with authorisation in the role that she was in at the time of booking, she ought to have been permitted to keep it. However, we can see from the correspondence that there was no element of compulsion; the evidence was that she was happy to go along with resolving the problem in the way that she did, by offering to change her flights. Mr Betts would have raised the issue of the clash of their holiday dates in the same way had Mrs Asghar not been of Pakistani origin or had she been a man.

Issue 5.2.3: Mr Betts telling her that he was not comfortable with her being on leave at the same time as him (race and/or sex)

152. The comparator is Mr Fisher, who is in a different role and so not a true comparator. It is a reasonable position for Mr Betts to take, that he does not want them both off at same time. It is provided for in the policy. There is nothing to suggest that the hypothetical comparator would have been treated any differently. There are no facts from which we could properly conclude that race or sex played any part Mr Betts preference that he and Mrs Asghar should not be away from work at the same time.

Issue 5.2.4: Mr Betts requiring her to work 60 hours a week (race and/or sex)

153. The comparator relied upon was Mr Kurn, who is not a true comparator, because he was not managed by Mr Betts.

154. Mrs Asghar was not required by Mr Betts to work 60 hours a week. He counselled her against overdoing it, a number of times. The long hours that she undoubtedly worked were, to a degree, caused by additional work she had undertaken, (referred to by the Respondent, a tad unfairly, as, "voluntary work") including on her Masters, and in her role as a Lead in the Brave Women group, as well as because of her inexperienced in the role.

155. Mrs Asghar made reference to the fact that after she left, her role had been advertised as 2 roles. She says that this demonstrates that it was too much work for one person. We accept the Respondent's explanation, that this followed a re-organisation and that what was advertised was not simply a split of her old role; it was two new roles.

156. The allegation is not made out; Mrs Asghar was not required by Mr Betts to work 60 hours a week.

157. For the avoidance to doubt, Mr Betts' expectations of Mrs Asghar in terms of the level of work would have been the same of a man or a person not of Pakistani origins in the same circumstances.

Issue 5.2.5: Amending her job title to Clinical Lead (race only)

158. We accept that the mix-up over Mrs Asghar's job title was, as a mater of fact, just a mistake. It was not a detriment either. There was no detriment to Mrs Asghar's job title being Clinical Lead (Quality) nor in the act of changing her job title to that from Clinical Quality Lead. It was clear to us that in practice, these two titles were used interchangeably and they meant the same thing.

159. The comparators relied upon were Mr Kurn and Ms Parkington. They had the correct job title, Clinical Lead (Quality) to which Mrs Asghar's job title was changed.

160. There are no facts from which we could properly conclude, absent an explanation, that the change in job title had anything to do with Mrs Asghar's race or gender.

Issue 5.2.6: Mr Betts making work place adjustments for Mr Fisher but not for the Claimant (race and/or sex)

161. Mr Fisher is the comparator relied upon. Mrs Asghar says that Mr Betts allowed Mr Fisher flexibility in the hours that he worked and did not do the same for her. We accept Mr Betts' evidence that this is not true; he allowed the same flexibility, subject to her meetings the responsibilities of her role, just as he did with Mr Fisher.

162. There are no facts from which we could properly conclude that race or sex played any part in Mr Betts' actions in this regard.

Issue 5.2.7: Mr Betts refusing study leave (race only)

163. Mr Fisher is the comparator. Mr Betts gave Mr Fisher time off for his Prescribing Course, because it was of direct relevance to his role. He explained that he did not give Mrs Asghar Mondays off to work on her Masters, because it was not directly relevant, although he made it clear he would allow her Mondays off in so far as it was possible, having regard to the demands of the service.

164. We understand and accept Mr Betts' logic. It may seem a bit harsh. We can see why Mrs Asghar would say her Masters degree, (Leadership in Healthcare) was relevant to her work. However, on the facts, Mrs Asghar did not make a major issue of this at the time. She was given the opportunity to do the Prescribing Course herself and declined. We accept Mr Betts' evidence

that had she decided to do the Prescribing Course, she would have had exactly the same opportunity for study leave as Mr Fisher.

165. Mr Fisher is not a true comparator, because he was doing a different course, for which study leave was available. There are no facts from which could conclude that the reason for that difference was that she was Pakistani. A hypothetical comparator, a person studying for such a Masters in the same circumstances would have received the same response from Mr Betts to a request for study leave.

Issue 5.2.8: Pressurising into withdrawing flexible working request (race and/or sex)

166. On the evidence, we accept that Mr Betts did not, "pressurise" Mrs Asghar into withdrawing her request. His reasons for saying what he did as recorded in the finding of fact have nothing to do with Mrs Asghar's race or sex. There are no facts from which we could properly conclude otherwise absent explanation. The hypothetical comparator would have been spoken to in the same way.

Overview

167. We have stood back and considered all of the allegations together in the round and remain of the view that there are no facts, (save in respect of the allegation relating to salary) from which we could properly conclude, absent explanation from the Respondent, that any of the alleged detriments amount to detriments inflicted because of Mrs Asghar's race or sex.

168. For these reasons, Mrs Asgarth's complaints of direct race and sex discrimination fail.

Harassment Related to Race

Issue 6.1.1: Mr Betts telling her how he handled foreign nurses leave requests exceeding 2 weeks

Issue 6.1.2: *Mr Betts telling her how he enjoyed requests for leave over Christmas from nurses who were not Christian*

169. Both allegations are clearly capable of being harassment related to race, even if made to a person who was not of the same ethnic origins as the people who were the subject of the remarks. However, we doubt the credibility of these allegations:

169.1. In formulating the list of issues, Mrs Asgarth had said that these comments were made in November or the beginning of December 2021. In her witness statement she said they were in April 2022, (after Christmas, which seems odd). She is inconsistent.

169.2. If the comments were made in November 2021, it is very odd indeed, inconsistent, that in February 2022 Mrs Asghar should recommend Mr Betts for the award in the terms that she did. Perhaps it is that she realised that awkward inconsistency, that led her to change the date when she alleges these comments were made.

169.3. If Mr Betts had made those comments, we would have thought that Mrs Asghar would have raised the blatant inappropriateness of them with him subsequently, or with Mrs Robinson.

170. We find on the balance of probability, that it is more likely than not that these comments were not made by Mr Betts.

171. For these reasons, Mrs Asgarth's complaint of race related harassment fails.

Flexible Working Request

172. The Respondent does not dispute that Mrs Asghar make a request pursuant to section 80F. Did the Respondent fail to comply with section 80G(1)? Mrs Asgarth's case in this regard was put on the basis that it had not dealt with the application in a reasonable manner. However, we find that she withdraw her application within 4 days of making it. There was no lack of reasonableness in the Respondent's approach. The application was dealt with in a reasonable manner.

173. Mrs Asgarth did at one stage refer to Mr Betts as having refused her request. He did not. Section 80G(1)(b) was not therefore engaged.

174. For these reasons, Mrs Asgarth's complaint in relation to her flexible working request fails.

Constructive Unfair Dismissal

175. In so far as any of allegations are events that did happen, either individually or taken together, none of them amount to a breach of the implied term of mutual trust and confidence. Such actions as did take place, namely:

175.1. Mrs Asgarth starting on £43,000;

175.2. Changing pre booked leave;

175.3. Not allowing Mrs Asgarth leave at the same time as Mr Betts;

175.4. The hours that Mrs Asgarth worked;

175.5. Amending her job title;

175.6. The extent to which she was allowed flexibility in her hours;

175.7. Not allowing her set study leave;

175.8. Speaking to her about her flexible working request

Were all with reasonable and proper cause and could not be said to amount to conduct calculated or likely to undermine mutual trust and confidence.

176. Had we found otherwise, they were all, save for the flexible working request, affirmed as breaches of contract, by Mrs Asgarth continuing in her employment without protest.

177. Mrs Asgarth's complaint of constructive unfair dismissal also fails

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Employment Judge M Warren

Date: 2 July 2024

Sent to the parties on: 11 July 2024....

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For the Tribunal Office.

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