EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MS GILLIAN PENBERTHY	**V**	**POWYS TEACHING HEALTH BOARD**

HELD REMOTELY BY CVP **ON: 10, 11, 12 & 13 JUNE 2024**

BEFORE: EMPLOYMENT JUDGE S POVEY
MRS M HUMPHRIES
MR W HORNE

REPRESENTATION:
FOR THE CLAIMANT: **IN PERSON**
FOR THE RESPONDENT: **MR HIGNETT (COUNSEL)**

JUDGMENT having been sent to the parties on 17 June 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The decisions of the Tribunal are unanimous and although it is the Employment Judge providing the decision and reasons to the parties, they are the decisions of all of us and have been contributed to by all members of Tribunal.

Background

2. This is a claim by Gillian Penberthy ('the Claimant') against her former employer, Powys Teaching Health Board ('the Respondent'). The Claimant began ACAS Early Conciliation on 15 December 2022 and it ended on 26 January 2023. The claim was presented to the Tribunal in form ET1 on 25 February 2023.

3. The Claimant brings complaints of detriment for making protected disclosures. All of those complaints are resisted by the Respondent.

4. At a Case Management Hearing on 18 August 2023 before Employment Judge Sutton KC, a List of Issues was agreed and case management directions made to prepare the case for the final hearing. Those issues were not amended by either party, save that the Claimant withdrew a complaint of victimisation, which was dismissed by a judgment dated 4 December 2023. The remaining issues were what the Tribunal had to determine. A copy of the List of Issues, so far as they relate to liability, is at Appendix 1.

5. We heard oral evidence from the Claimant. Nicola Duffy provided a witness statement in support of the Claimant's case but was not cross-examined on it (although she was asked some questions by the Tribunal). For the Respondent, we heard from the following employees:

    5.1. Heide Smith (Business Support Manager, Operational Business Support Manager from August 2021)

    5.2. Natasha Price (at the time, Assistant Workforce & OD Business Partner)

    5.3. Catherine Watts (Test Trace & Protect ('TTP') Service Manager & Clinical Lead)

    5.4. Wayne Tannahill (Associate Director of Capital Estates & Property)

6. We also had sight of a witness statement from Jackie Griffin, who at the relevant time was the Respondent's Testing Supervisor and the Claimant's line manager. We were informed that Ms Griffin has since retired and indicated that she did not wish to take part in the proceedings. There were no applications for a witness order. As Ms Griffin's evidence was untested, we afforded it limited weight.

7. Each witness we heard from adopted their written statement. We also also had sight of a paginated bundle ('the Bundle') and received oral and written submissions from Mr Hignett for the Respondent and written submissions from the Claimant.

8. The Claimant is a litigant in person. The Tribunal explained the process and procedures to her, checked her understanding, encouraged her to ask questions and gave her guidance throughout. We were satisfied that the Claimant was able to fully engage in the process and present her claim to the best of her abilities.

9. We were grateful to the Claimant and Mr Hignett for the assistance they provided and the work they had undoubtedly undertaken both before and during the hearing. We were grateful to all the witnesses including the Claimant, who attended and answered the questions asked of them to the

best of their recollections. We were also grateful to Ms Duffy who supported and assisted the Claimant throughout the hearing.

Applicable Law

Protected Disclosures

10. So far as relevant, a protected disclosure is defined by sections 43A – 43C and 43F of the Employment Rights Act 1996 ('ERA 1996').

11. By reason of section 47B(1) of the ERA 1996:

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

What is detriment?

12. What matters is that, compared with other workers (hypothetical or real), the Claimant is shown to have suffered a disadvantage of some kind. Detriment should be assessed from the viewpoint of the employee or worker. A threat by an employer (or its worker or agent) to take action which would constitute a 'detriment' is itself a detriment for the purposes of section 47B of the ERA 1996, provided that the threatened worker was reasonable in regarding it as being to his disadvantage (per Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11).

13. It must be a detriment to which the employee or worker has been subjected in the 'employment field' (Tiplady v City of Bradford Metropolitan District Council [2019] EWCA Civ 2180).

14. It is for the Claimant to prove, on the balance of probabilities, that she made protected disclosures and that she suffered detrimental treatment form the Respondent.

Was the detriment because of the protected disclosures?

15. The test of causation is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistle-blower (per Fecitt and ors v NHS Manchester (Public Concern at Work intervening) [2011] EWCA Civ 1190).

16. The burden of proof in this regard is on the Respondent. Section 48(2) of the ERA 1996 means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the Claimant — i.e. that there was a protected disclosure, that there was a detriment and the Respondent subjected the Claimant to that detriment — the burden shifts to the Respondent to prove that the Claimant was not subjected to the detriment on the ground or grounds that she had made the protected disclosures.

Findings of Fact

17. The Claimant was employed as a Community Covid 19 Tester, under a fixed term contract from 24 September 2021 until 31 March 2023. She was initially based at a site in Builth Wells but in the summer of 2022, she and her team were relocated to Bronllys Hospital ('Bronllys'). The Bronllys testing site opened to the public on 3 July 2022. The Claimant and other members of the testing team raised concerns regarding the set up and operation of the Bronllys site with the Respondent. In addition, the Claimant sent her concerns to the Health & Safety Executive ('the HSE') on 5 July 2022. In response to the concerns that had been raised, the Respondent suspended the operation of the Bronllys testing site on 8 July 2022 and closed it to the public.

18. The Claimant alleged that she made two protected disclosures, in the form of three emails and a letter, all to the Respondent as her employer. They all related to her concerns regarding the Bronllys site. The Respondent took what Mr Hignett described as a pragmatic approach to whether or not the Claimant had made protected disclosures (as defined by the ERA 1996). In effect, it was accepted that some of the Claimant's communications to the Respondent fell within the legal definition of protected disclosures (although the complaint to the HSE was not included in the List of Issues as one of the Claimant's protected disclosures and no such concession was made in respect of it, not least because the test for whether a disclosure is protected is different when it is made to a body other than the employer).

19. The Tribunal therefore proceeded on the basis that the Claimant had made protected disclosures to the Respondent and the primary issue to determine was one of detriment.

20. The Claimant alleged that following the making of her protected disclosures, which all related to concerns about health and safety at Bronllys, she suffered acts of detriment, which, she says, were because she had raised those concerns.

21. We considered those alleged acts of detriment in turn (and as set out in the List of Issues). There were also issues with time limits, which we considered and determined only after determining the protected disclosures complaints. We will explain why at the conclusion of these reasons.

22. Before we turn to the alleged detriments we make the following observations:

    22.1. As we have noted, the Respondent received a number of complaints from different employees raising concerns regarding Bronllys, including health and safety issues. The Claimant was not the only person to bring those concerns to the Respondent's attention.

22.2. The Respondent's response to those concerns was unequivocal. It suspended the operation of Bronllys within days. In our judgment, that was compelling evidence that the Respondent listened to and took seriously the concerns brought to its attention by its staff. That is how it should be and that, quite clearly, was how it was in respect of Bronllys. The Respondent did not delay, prevaricate or ignore what it was being told. It investigated and took decisive action.

23. That was the relevant context in which we went on to consider the Claimant's allegations that, despite complaints and concerns being raised from numerous sources and notwithstanding the swift and decisive action taken by the Respondent, she was targeted by various managers who subjected her to detrimental treatment for raising concerns about Bronllys.

24. The alleged detriments are taken from the List of Issues and considered in turn.

Between 20-27 July 2022 Heide Smith harassed and intimidated the Claimant ('Detriment 1')

25. Ms Smith had been instrumental in organising the move from Builth to Bronllys and setting up the Bronllys testing site. She had taken annual leave before Bronllys was due to open but on her return, found that it had been closed. In the course of trying to find out why that was the case, Ms Smith was made aware of the complaints that had been raised by staff, including the referral to the HSE by the Claimant.

26. As part of her investigations, Ms Smith had attended Bronllys on 18 July 2022 and spoken to Nicola Duffy and another tester, Rosalind Reed. The Claimant was not working on that date. Following the meeting, Ms Duffy made a complaint about Ms Smith, alleging that she blamed testing staff for failures and for undermining the Bronllys service (at [292] – [293] of the Bundle).

27. Ms Smith also approached the Claimant to arrange a meeting. She tried to set up meetings on 20 July 2022 and again on 22 July 2022. The Claimant refused on both occasions to meet. The purpose of wanting to meet with the Claimant was to explore why she had felt it necessary to report her concerns to the HSE as early as 5 July 2022, particularly as the Respondent's "*Procedure for NHS Staff to Raise Concerns"* anticipated that "*[I]n most cases individuals should not find it necessary to alert external parties*" (per [848] of the Bundle).

28. On 22 July 2022, Ms Smith attended the Bronllys site and approached the Claimant at her desk. Despite this being part of the alleged detriment relied upon by the Claimant, she was unable to recall any material details of the meeting in her evidence. When taken to Ms Smith's account of their interaction, the Claimant did not take issue with it's accuracy (at [182] of the Bundle). In effect, the Claimant refused to meet with Ms Smith,

insisting that she required a chaperone, claiming that she was in the middle of emailing Ms Smith and then confirming that she was in effect refusing to meet with her manager. Faced with these refusals, Ms Smith said she would speak to human resources ('HR'), take matters to the next level and left.

29. In effect, the alleged detriment were the attempts by Ms Smith to meet with the Claimant (which consisted of two electronic invites which the Claimant refused) and the interaction on 22 July 2022.

30. In our judgment, Ms Smith did not harass or intimidate the Claimant. Ms Smith was entitled as a manager with responsibility for Bronllys to make reasonable enquiries of staff, particular in the context of the concerns that had been raised, the decision to close the site to the public and the Claimant's decision to escalate her concerns to the HSE. There was nothing unreasonable or inappropriate in any of the steps taken by Ms Smith in wanting to meet with the Claimant or her interaction with her on 22 July 2022.

31. Any unreasonable behaviour was, in reality, on the part of the Claimant. It was clear from her evidence that her objections to meeting with Ms Smith were motivated by the complaint raised by Ms Duffy. However, the Claimant had not been present when Ms Smith had met with Ms Duffy on 18 July 2022 and it was simply no answer to that for the Claimant to refuse to meet with Ms Smith in the manner that she did.

32. It was also not sustainable or reasonable for the Claimant to argue, whether at the time or subsequently, that Ms Smith was not her manager and therefore she was not required to meet with her or that Ms Smith was not authorised to meet with the Claimant. Ms Smith was responsible for Bronllys and responsible for those who managed the Claimant. She was self-evidently entitled to meet with the Claimant and endeavour to obtain further information about what had gone wrong at Bronllys.

33. For those reasons, we did not find that there was any detriment to the Claimant in the conduct of Ms Smith towards her during the period 20 – 27 July 2022.

34. In addition, whilst Ms Smith wanted to meet with the Claimant to discuss her concerns about the site including her decision to escalate those concerns to the HSE, that was not because the Claimant had made protected disclosures but because she had raised them with the HSE. We agreed with Mr Hignett that there is a material difference in law between treatment for making protected disclosures and treatment because of the manner in which protected disclosures and associated concerns are being raised (often referred to as the separability issue).

35. In any event, there was no detriment and the Claimant's complaint to the HSE was not relied upon by her as a protected disclosure.

36. The Claimant's attitude toward Ms Smith so early in the relevant process was indicative of a perception or belief that permeated everything that followed. The Claimant appeared to be convinced that first, Ms Smith and then numerous other managers were motivated by a desire to punish her for raising concerns about Bronllys. In effect, everything that followed and with which she disagreed appeared to be viewed through that lens.

37. It also raised an obvious and unanswered question. If the Claimant was right and the Respondent wanted to retaliate against her for raising her concerns, why didn't they simply sack her? By July 2022, she had only been employed for nine months and was not entitled to any legal protection against ordinary unfair dismissal. She was on a fixed term contract and the Bronllys testing centre had been closed. It would not have been onerous to terminate her contract on the basis that the work for which she was employed had diminished. That would have saved the Respondent the apparent trouble they subsequently went to, as alleged by the Claimant. It would also have saved them having to pay her, including at the enhanced rate she was paid for weekend working of which we heard much in evidence.

38. In reality, the Respondent did not dismiss the Claimant at the time nor ever contemplate dismissing her. Instead, it honoured her fixed term contract until it expired at the end of March 2023, a further eight months after the Claimant had raised her concerns.

<u>On 23 August 2022 Jacqueline Griffin enforced lone working and shift changes on the Claimant ('Detriment 2')</u>

39. The Respondent operated a lone working policy, as is common in most, if not all, health authorities. It is of particular relevance in a large rural health authority like the Respondent, where lone working is an essential requirement for delivering services. Lone working is permitted (per the Respondent's policy at [793] of the Bundle). What the policy spoke to were the safety measures and risk assessments to be deployed in lone working situations.

40. To that end, we found Ms Watts's evidence compelling. She explained how on a daily basis those members of staff who were lone working were identified, monitored, with the work undertaken and possible risks arising being considered and assessed.

41. The Claimant worked 22.5 hours per week, which was spread over four days. When working at Builth, the Claimant had been working her hours over three days. She asked to change her working pattern from three to four days (in order to care for her dog), a request which was made to Ms Watts, which Ms Watts treated as a request for flexible working and which was approved, prior to the move to Bronllys.

42. On 31 August 2022, the Claimant complained that on 23 August 2022 Ms Griffin had informed her that she had to do lone working and changed her shift pattern (at [318] of the Bundle). The change to the Claimant's shifts

was to move her from four mornings per week to four afternoons per week. That did not, at that time, result in the Claimant lone working. However, in September 2022 and as a result of at least two of the testing team leaving the Respondent's employment, the Claimant and Ms Duffy were left to cover the service.

43. In order for the Claimant and Ms Duffy to deliver the seven day service at Bronllys, there was bound to be periods of lone working (as between the testing staff; there were other staff on site at Bronllys, but the Claimant's role included community testing). The Claimant worked a four day shift pattern, as did Ms Duffy.

44. The Claimant complained that the Respondent should not have run a seven day service and should have been reducing the service in accordance with Welch Government guidance. With respect to the Claimant, how and to what extent the Respondent ran its TTP service was not a matter for her. It was matter for senior management and clearly within their power and remit. There was no breach of any Welsh Government guidance in continuing with a seven day service. The guidance (and it was just that, guidance) was to reduce services. How that was done was a matter for the Respondent. Options were considered and discussed by Adrian Osborne, who at the time was Programme Director (COVID Vaccination and TTP), in his email of 8 July 2022 (at [242] of the Bundle).

45. To that end, lone working by Ms Griffin was not enforced. Rather, it was a natural consequence of the reduction in staff. The Claimant's working pattern of 22.5 hours over four days did not change, it was simply moved from morning to afternoons.

46. As such, there was no detriment. In addition, there was clear evidence as to why shift patterns were changed and why the Claimant had to move to lone working. None of that related to the Claimant's protected disclosures.

<u>On 12 September 2022, 2 emails were sent to the Claimant, 1 of which was abusive and derogatory in nature ('Detriment 3')</u>

47. On 8 September 2022, Ms Griffin sent Ms Smith a query about the Claimant's time off in lieu ('TOIL') for comment. Ms Smith was Ms Griffin's line manager (and Ms Griffin was the Claimant's line manager). That explained Ms Smith's involvement in the issue of the Claimant's TOIL.

48. Ms Smith replied to Ms Griffin and raised a number of concerns and queries about the Claimant's TOIL claims. On 12 September 2022, those email exchanges were sent by Ms Smith to the Claimant.

49. The Claimant claimed that Ms Smith sent the email exchanges with Ms Griffin to her on purpose, as an act of detriment and because she had complained about Bronllys. Ms Smith said that they were sent by accident and that she was mortified when she realised what she had done.

50. In our judgment, the sending of the email to the Claimant was clearly an accident and an error by Ms Smith. That was reflected in Ms Smith's actions immediately afterward. She reported the matter to her line manager (Ms Watts) and to HR (Ms Price). She attempted to recall the email and when that failed, she contacted the Respondent's IT service, who were able to recall it. She informed Ms Griffin of the mistake, as the Claimant's line manager.

51. None of those actions were remotely consistent with Ms Smith sending the email deliberately or with any intent to punish, harass or intimidate the Claimant. It was rightly accepted that seeing those emails would have been uncomfortable, even upsetting, for the Claimant. It is never nice to see others talking about you. But managers must manage and not everything they discuss is to be shared with staff. This was an error and an embarrassing one at that.

52. As it was not deliberate, it was self-evidently wholly unconnected with the Claimant making protected disclosures. In any event, if Ms Smith wanted to punish the Claimant, as she alleges, why not discipline her for overreporting her TOIL or decide that she has been overpaid TOIL and seek to recover it from her? Again, if the Respondent was trying to punish the Claimant, there appeared to be far more plausible and effective options available, which it did not take.

53. For those reasons, the email sent to the Claimant by Ms Smith on 12 September 2022 was an error, and to the extent that the error caused the Claimant detriment, it was nothing to do with her making protected disclosures.

<u>On 23 September 2022 at a Teams "drop in" meeting, the Claimant was spoken about, and some of the language used/ the observed behaviour of employees of the Respondent, was upsetting to the Claimant ('Detriment 4')</u>

54. The Claimant did not attend the meeting on 23 September 2022 but watched the recording shortly afterwards, having been alerted to it by Ms Duffy. It was attended by a number of employees including Ms Griffin and Ms Watts.

55. A transcript of that recording was in evidence and the focus was on an interaction between Ms Griffin and Ms Watts (at [379] of the Bundle). It was alleged by the Claimant that when Ms Griffin said "*Happy days"*, she was referring to the fact that the Claimant was not attending the meeting.

56. In our judgment, this was perhaps the most stark example of the Claimant's perception being misplaced and unreasonable and of her interpreting the most innocuous and neutral actions as somehow being about her and being motivated by the Respondent's desire to harass, intimidated and punish her for complaining about Bronllys.

57. According to the transcript, Ms Watts reported that the Claimant was not coming to the meeting (which, by definition was a drop in meeting and so

attendance was not compulsory). Ms Griffin's immediate response was *"Ok, that's fine. Well".* The conversation continued and Ms Griffin said "*Happy days"*. On no reasonable reading of the transcript can it be found that the comment had anything to do with the Claimant not attending the meeting. It had no relationship or reference whatsoever to the Claimant's non-attendance. Rather, her non-attendance was simply noted as being "*fine*".

58. Ms Watts, who did attend the meeting and gave evidence, confirmed that there was no issue with the Claimant not attending. That, as we have found, was reflected in the transcript.

59. In the alternative, even if it did relate to the Claimant's absence (which it clearly didn't), it was not derogatory in any reasonable sense of the word. And finally, there was no evidence at all that it had anything to do with the Claimant making protected disclosures. Ms Watts attended the meeting and her evidence was again compelling. It was simply a comment to notify the start of the meeting.

60. There was no language or behaviour in the meeting which could reasonably and objectively cause upset to anyone. There was no derogatory treatment and nothing that occurred in the meeting had anything whatsoever to do with the Claimant's protected disclosures.

<u>Between around 7 October – 21 December 2022, Catherine Watts did not reimburse the Claimant's mileage expenses ('Detriment 5')</u>

61. There was a delay in processing and paying the Claimant's expenses claims (although it was not in issue that they were paid eventually). These related to additional mileage and travel which resulted from the service relocating from Builth to Bronllys. This issue generated a lot of documentary evidence, much of which was in the Bundle. What was abundantly clear from the evidence was that the delays were caused by a combination of user error (including by the Claimant) and technical issues.

62. The evidence also showed that the Respondent went to extraordinary lengths to try and resolve the problems the Claimant was facing, including filling out a paper form for her to sign and making two emergency payments. Again, it begged the question – if the Respondent was trying to punish the Claimant, why do any of that? Why not just continue with delaying the payments, as alleged by the Claimant?

63. In reality, there was an abundance of clear and compelling evidence as to why there were delays in processing and paying expenses and none of it related to the Claimant making protected disclosures.

64. Whilst there was detriment by the delays in reimbursing the Claimant's expenses claims, that detriment had nothing whatsoever to do with the Claimant's complaints about Bronllys. The Respondent clearly discharged the burden of proof on it to show that the delay in paying the Claimant had

nothing to do with her protected disclosures and everything to do with human error and technical issues with the expenses software.

Between 25-27 November 2022, Catherine Watts accessed the Claimant's medical records in breach of GDPR, did not undertake a risk assessment when the Claimant presented with a cough, and violated the Claimant's rights by causing the Claimant to take a PCR test against her will and by sending the Claimant home from work against her will and by dismissing the Claimant's feelings, opinions and assessment of risk ('Detriment 6')

65. On Friday, 25 November 2022, the Claimant attended work with a cough. In her evidence, Ms Watts recalled that she was told about this by staff on site at Bronllys. Ms Watts emailed the Claimant on the same day, asked if she had informed her line manager and advised that if the Claimant had respiratory symptoms (including a cough), to follow staff testing guidance (and included a hyperlink to the same). The Claimant was also advised that if she needed to take a polymerase chain reaction ('PCR') test, she would have to remain off work until she had the results (at [602] of the Bundle).

66. On Saturday, 26 November 2022, the Claimant attended work. By now she had taken a PCR test and tested positive for Respiratory Syncytial Virus (RSV). Ms Watts emailed the Claimant on the same day, as follows [601]:

> I hope you are feeling better and your symptoms improving. I understand that you went into the Hub at lunchtime today, whilst having received a positive RSV result, and that you were asked by the Band 5 on duty to return home and await further instruction.
>
> I appreciate that you may feel able to work, however with a positive result to a contagious disease, I advise you to please remain off work tomorrow(Sun 27/11/22) and contact your GP at your convenience.

67. We pause there to recall that Ms Watts was the clinical lead for the TTP service.

68. The Claimant's case is that Ms Watt's accessed her medical information, namely her PCR results in breach of General Data Protection Regulations (GDPR), forced her to go home, did not undertake a risk assessment, forced her to take a PCR test and ignored her feelings, all because the Claimant had made protected disclosures.

69. Ms Watt's evidence was she was informed by the Band 5 nurse on site at Bronllys that the Claimant was symptomatic and had tested positive for RSV (per Para 85 of her witness statement). She then emailed the Claimant and asked her to go home as a result (per [601] of the Bundle). We had no reason to doubt Ms Watt's recollection that she was informed by staff of the Claimant's symptoms and positive RSV test. The Claimant alleged that the Band 5 nurse had told her that Ms Watts already knew that the Claimant had tested positive for RSV (in her oral evidence but not in her witness statement). There was no other evidence to support that

allegation and no evidence of how Ms Watts would or could have known of the PCR test results, other than being informed, indirectly, by the Claimant.

70. In addition, Ms Watts' email of 26 November 2022 was consistent with her evidence to the Tribunal, that she had been informed of the PCR test results by the Band 5 nurse and that the Band 5 nurse had also advised the Claimant to go home. There was no evidence that Ms Watts' accessed the Claimant's medical records or her PCR test results. In contrast, there was clear, consistent and contemporaneous evidence that Ms Watts was told by medical staff that the Claimant had tested positive for RSV. The Band 5 nurse, quite properly, told the Claimant to go home. Ms Watts simply restated that instruction.

71. There was no reason or obligation to undertake a risk assessment. The Claimant had a respiratory virus during the pandemic, in circumstances where she was working with the public to test for Covid. It was not just consistent with the Respondent's policy but removing the Claimant from interacting with potentially vulnerable people was consistent with national guidance and, we venture, simple common sense.

72. As such, there was no detriment to the Claimant in being told to go home when she reported testing positive for RSV in a healthcare environment. In the alternative, if there was any detriment (by not being paid the enhanced weekend rate), it had nothing to do with the Claimant's protected disclosures and everything to do with fact that the Claimant had tested positive and was working in a healthcare environment, during a pandemic, with access to the public.

<u>The Respondent did not have a Whistleblowing Policy (which it accepts), and the Respondent failed to follow its Respect and Resolution process (used to consider the concerns raised by the Claimant). This included taking longer than necessary to consider the issues raised by the Claimant and not appropriately addressing the issues raised by the Claimant regarding Heide Smith ('Detriment 7')</u>

73. On 25 July 2022, the Claimant indicated that she intended to raise a grievance regarding a range issues pertaining to Bronllys and the TTP service ([247] - [249] of the Bundle). She followed that up with a letter dated 5 August 2022 and headed "Formal Request for Resolution" (at [114] – [119]).

74. Given the contents of the letter and the language used, the Respondent was entitled to conclude that the Claimant wanted her concerns investigated and determined via its Respect & Resolution Policy. That was carried out by Mr Tannahill and his handling of that process was at the heart of this alleged detriment.

75. The Claimant accepted in her oral evidence that if the Respondent did not have a Whistleblowing Policy, it was not it because of her protected

disclosures. In reality, the Respondent did have a policy, whether its own or by following the All Wales Policy.

76. As found, the Claimant raised a grievance and clearly indicated that she wanted it dealt with under the Respect & Resolution Policy. The policy was followed by Mr Tannahill. Any delay in the process was because of the complexity of the complaints being raised and the fact that the Claimant kept adding to her complaints (20 separate emails were sent by the Claimant to Mr Tannahill during the process). In addition, further delays were caused, completely innocently and without any fault or blame, by the fact that the Claimant worked part-time and was on sick leave from 19 December 2022 until her contract expired at the end of March 2023.

77. In addition, and contrary to the Claimant's submissions, Mr Tannahill did deal with her complaints about Ms Smith, per his report at [134] – [156] of the Bundle (and also the refusal of her flexible working request, a point not expressly raised in the List of Issues but alluded to by the Claimant in her questioning of Mr Tannahill).

78. In the alternative, if there were any failures to follow the policy by Mr Tannahill, it had nothing to do with the Claimant's protected disclosures. There was no evidence at all that the complaints about Bronllys played any part in how Mr Tannahill conducted and determined the grievance. In contrast, there was plenty of evidence of him approaching the matter with an open mind and impartially, after conducting investigations, whereupon he reached conclusions based upon the evidence and provided reasons for those conclusion. Mr Tannahill confirmed in his oral evidence that the Claimant's protected disclosures played no part at all in how he conducted and decided her grievance and that was clearly reflected and corroborated by the documentary evidence before us.

<u>The Respondent rejected the Claimant's request for flexible working ('Detriment 8')</u>

79. On 4 October 2022, the Claimant asked to change her hours. She wanted to work every weekend (which paid an enhanced rate) and not work on Thursdays (at [427] – [429] of the Bundle). On 3 November 2022, Ms Griffin refused the request (with the agreement of Ms Watts) and gave clear, reasonable and intelligible reasons for that decision (at [430] - [431]). Those reasons had nothing to do with the Claimant's protected disclosures (which by this time had been made three months ago) and Ms Watts confirmed in her oral evidence that the disclosures played no part at all in the decision.

80. Ms Watts had determined the Claimant's previous request to change her hours and so it was not unusual for her to be involved this time around. Ms Griffin made the decision (as the Claimant's line manager) but asked for Ms Watt's input and confirmation, which was provided.

81. Refusing the Claimant's flexible working request was a detriment but the decision had nothing at all to do with the Claimant making protected

disclosures. The Respondent clearly discharged the burden of proof on it to show that refusing the flexible working request had nothing to do with the Claimant's protected disclosures. Instead, it set out its reasons, which were informed by service delivery and planned structural changes. Each reason was clear, plausible and open to the Respondent to rely upon (at [430] of the Bundle).

Analysis & Conclusions

Detriment

82. For the reasons we have given, the Respondent did not subject the Claimant to any detriment because she raised concerns and complaints about the testing site at Bronllys. The detriments alleged by the Claimant were either did not occur as alleged, did not constitute detrimental treatment or, if they were acts of detriment, were in no way because of those complaints. Indeed, we were unable to find any evidence that anything done regarding the Claimant's employment, whether detrimental or not, was in any way because she had made protected disclosures.

83. Making protected disclosures in themselves does not give rise to any wrongdoing on the part of an employer. Indeed, in this case, the Respondent had full regard to what it was being told by the Claimant and others about Bronllys and acted promptly to address the concerns raised by closing the site to the public. What is unlawful is when an employer subjects someone to detriment because of those protected disclosures.

84. For the reasons we have given, the Respondent did not subject the Claimant to detriment for making protected disclosures. As such, her claim is not made out and is dismissed.

Time Limits

85. Claims of detriment for making protected disclosures must be presented to the Tribunal within three months of the detriment complained of (allowing for the effects of ACAS Early Conciliation, which serves to pause or extend the three month period, provided Early Conciliation is started within three months of the alleged detriment).

86. If the claim is not started within the required time frames, the Tribunal has no power to consider them, unless the Claimant can show that:

    86.1. It was not reasonably practicable to present the claim within the time limit; and

    86.2. It was presented within a further period which was in all circumstances reasonable.

87. Where the detriments were part of a course of conduct, the time limit runs from the date of the last detriment in the series.

88. The issue of time limits was in the Respondent's Grounds of Resistance and detailed in the List of Issues. As such, the Claimant has been on notice of it from the outset. Despite that, she made no reference to it in her witness statement nor provide any evidence on the point. As a litigant in person and to be fair to her, the judge asked her whether there had been any barriers or obstacles to her presenting her claim sooner that she did. The Claimant said that there were none.

89. ACAS Early Conciliation began on 15 December 2022 and ended on 26 January 2023. The Claimant presented her claim to the Tribunal on 25 February 2023.

90. On that basis, in respect of Detriments 1, 2 and 3, the three month time limit had expired before the Claimant started Early Conciliation. As such, she did not get the benefit of the clock being stopped during Early Conciliation.

91. Detriment 4 was presented in time. Early Conciliation started before the three month time limit expired. It expired during Early Conciliation (i.e. on 22 December 2022). The rules afforded the Claimant one month after the end of Early Conciliation to present this particular complaint. Early Conciliation ended on 26 January 2023, so the Claimant had until 26 February 2023 to present this complaint. It was presented on 25 February 2023 and therefore in time.

92. Detriments 5, 6, 7 and 8 were all presented in time.

93. As detailed above, in respect of Detriments 1, 2 and 3, the test is whether it was reasonably practicable for the Claimant to present the complaints in time. It is for the Claimant to show that, which she has failed to do. By her own account, there was nothing preventing her presenting her claim in time.

94. In her written submissions, and for the first time, the Claimant said that all the detriments are linked and should be treated as an continuing act. In our judgment, even if they were detriments (which, as we explain above, not all of them are – Detriments 1 and 2 were not detriments and that, in itself, would break any series), they were not part of a continuing act. The detriments are alleged against different people, over different time periods relating to different issues and events.

95. As they were not part of any continuing or linked events, Detriments 1, 2 and 3 were presented out of time. There was no evidence presented by the Claimant that it had not been reasonably practicable to present those complaints in time. It follows that the Tribunal has no jurisdiction to determine them and they are struck out.

96. However, we have determined all of the complaints and detriments relied upon, including Detriments 1, 2 and 3. We heard evidence and submissions on all of them. We determined them, in part, because only by

making findings about them could we decide if they were part of a continuing course of conduct.

97. More importantly, the Tribunal did not want the Claimant to think that she lost her case on a technicality (that of some of the complaints being out of time) and we did not want the Respondent's witnesses and staff to feel anything other than fully vindicated that they did not subject the Claimant to detrimental treatment because of her protected disclosures.

EMPLOYMENT JUDGE S POVEY
Dated: 15 July 2024

Order posted to the parties on 16 July 2024

For Secretary of the Tribunals Mr N Roche

APPENDIX 1

List of Issues

Time limits

1. The claim form was presented on 25 February 2023 and early conciliation commenced on 15 December 2022. The first act complained of took place on 2 July 2022 and the last on 21 December 2022. On such basis, was:

   1.1. The claim made to the Tribunal in time (within three months plus early conciliation extension) of the act to which the complaint relates?

   1.2. If not, was there conduct extending over a period?

   1.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period (ie, 21 December 2022)?

   1.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

      1.4.1. Why were the complaints not made to the Tribunal in time?

      1.4.2. In any event, is it just and equitable in all the circumstances to extend time?

Protected Disclosures

2. The Claimant has confirmed that the protected disclosures are as follows, and the Respondent accepts that in each case, the alleged disclosure was made to the Respondent:

   2.1. <u>Emails sent by the Claimant, on 2, 4 and 25 July 2022 regarding health and safety concerns at the Bronllys Covid-19 Testing Site Drive Thru</u>:

      a. Did the content of these emails amount to a disclosure of information?

      b. If so, did the Claimant reasonably believe that the disclosure tended to show that:

         (i) The Respondent had failed, was failing or was likely to fail to comply with its legal obligations to care for its patients and

employees (per section 43B(1)(b) ERA 1996) and/or;

(ii) The health and safety of the individuals had been, was being or was likely to be endangered in that the Respondent was not providing appropriate or adequate care to patients and employees (per section 43B(1)(d) ERA 1996)

c. Did the Claimant reasonably believe that the disclosure was in the public interest?

d. If so, was the disclosure a protected one having regard to section 43C ERA 1996?

2.2. A letter sent by the Claimant on 5 August 2022 to the Respondent regarding further health and safety concerns at the Bronllys Testing Site:

a. Did the content of this letter amount to a disclosure of information?

b. If so, did the Claimant reasonably believe that the disclosure tended to show that:

(i) The Respondent had failed, was failing or was likely to fail to comply with its legal obligations to care for its patients and employees (per section 43B(1)(b) ERA 1996) and/or;

(ii) The health and safety of the individuals had been, was being or was likely to be endangered in that the Respondent was not providing appropriate or adequate care to patients and employees (per section 43B(1)(d) ERA 1996)

c. Did the Claimant reasonably believe that the disclosure was in the public interest?

d. If so, was the disclosure a protected one having regard to section 43C ERA 1996?

Detriments for making Protected Disclosures pursuant to section 48 ERA 1996

3. The Claimant alleges that the following acts constituted a detriment on the grounds that she had made protected

disclosures:

3.1. Between 20-27 July 2022 Heide Smith harassed and intimidated the Claimant:

a. Did this occur?

b. If so how did it occur? The Claimant says that this was via phone calls (including via a third party), by email, and face to face

c. Did it constitute a detriment to the Claimant?

d. Was it on the ground that the Claimant had made a protected disclosure?

3.2. On 23 August 2022 Jacqueline Griffin enforced lone working and shift changes on the Claimant:

a. Did this occur?

b. If so how did it occur?

c. Did it constitute a detriment to the Claimant?

d. Was it on the ground that the Claimant had made a protected disclosure?

3.3. On 12 September 2022, 2 emails were sent to the Claimant, 1 of which was abusive and derogatory in nature:

a. Did this occur?

b. If so who sent these emails? The Claimant says they were forwarded to her by Heide Smith

c. Did it constitute a detriment to the Claimant?

d. Was it on the ground that the Claimant had made a protected disclosure?

3.4. On 23 September 2022 at a Teams “drop in” meeting, the Claimant was spoken about, and some of the language used/ the observed behaviour of employees of the Respondent, was upsetting to the Claimant. The Claimant did not attend the meeting, but watched the recording shortly afterwards. It was addended by a number of employees including Jaqueline Griffin and Catherine Watts:

a. Did this occur?

b. If so what made the Claimant believe this was a detriment?

c. Did it constitute a detriment to the Claimant?

d. Was it on the ground that the Claimant had made a protected disclosure?

3.5. Between around 7 October – 21 December 2022, Catherine Watts did not reimburse the Claimant's mileage expenses (although this has since been attended to):

a. Did this occur?

b. If so what made the Claimant believe this was a detriment?

c. Did it constitute a detriment to the Claimant?

d. Was it on the ground that the Claimant had made a protected disclosure?

3.6. Between 25-27 November 2022, Catherine Watts accessed the Claimant's medical records in breach of GDPR, did not undertake a risk assessment when the Claimant presented with a cough, and violated the Claimant's rights by causing the Claimant to take a PCR test against her will and by sending the Claimant home from work against her will and by dismissing the Claimant's feelings, opinions and assessment of risk:

a. Did this occur?

b. If so what made the Claimant believe this was a detriment?

c. Did it constitute a detriment to the Claimant?

d. Was it on the ground that the Claimant had made a protected disclosure?

3.7. The Respondent did not have a Whistleblowing Policy (which it accepts), and the Respondent failed to follow its Respect and Resolution process (used to consider the concerns raised by the Claimant). This included taking longer than necessary to consider the issues raised by the Claimant and

not appropriately addressing the issues raised by the Claimant regarding Heide Smith:

a. Did this occur?

b. If so what made the Claimant believe this was a detriment?

c. Did it constitute a detriment to the Claimant?

d. Was it on the ground that the Claimant had made a protected disclosure?

3.8. The Respondent rejected the Claimant's request for flexible working:

a. Did this occur?

b. If so what made the Claimant believe this was a detriment?

c. Did it constitute a detriment to the Claimant?

d. Was it on the ground that the Claimant had made a protected disclosure?