



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 800050/2023

Held in Glasgow on 29, 30, 31 May, 3, 4, 7 June and 8 July 2024

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**Employment Judge S MacLean
Tribunal Member I Ashraf
Tribunal Member D McFarlane**

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Miss D Brakenridge

**Claimant
In Person**

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Ayrshire & Arran Health Board

**Respondent
Represented by:
Mr D James, Counsel
Instructed by:
Ms L Gallagher, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim are dismissed.

REASONS

Introduction

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In the claim form sent on 3 February 2023, the claimant complains of unlawful discrimination under the Equality Act 2010 (EqA) on the grounds of disability. Following an application to amend the claim form dated 6 June 2023, the claimant was allowed to amend the disability discrimination claims to clarify the legal basis of the claims; add new types of discrimination claim and new facts occurring after 3 February 2023; and add a new claim under section 47B of the

Employment Rights Act 1996 (ERA) alleging that she suffered a detriment because she made a protected disclosure.

2. In the response as amended the respondent concedes that at the relevant time, the claimant was a person with a disability as she has anxiety and claustrophobia. The respondent denies that it discriminated against the claimant as alleged or at all. The respondent also denies that the claimant made a protected disclosure or that she suffered any detriment for having done so.
3. The claimant withdrew her claims under section 13 and 27 of the EqA. These claims were dismissed under rule 52 of schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.
4. The hearing was to determine liability only. It was conducted in person. It was agreed that the claimant and her witnesses would give evidence remotely by cloud video platform.
5. The Tribunal heard evidence from the claimant and Sian Jones, trade union representative. For the respondent evidence was given by Jacqui Donald, general manager, women and children services; Attica Wheeler, associate nurse director, women and children; Julie Heaney, health and safety service lead; Alan Paul, HR manager; Jennifer Wilson, executive nurse director; and Caroline Blake, clinical nurse manager, neonatal and acute paediatric services.
206. The Tribunal has set out facts as found that are essential to the reasons or to an understanding of the important parts of evidence. Points made in submissions have been dealt with whilst setting out the facts, the law and the application of the law to those facts. It should not be taken that a point was overlooked, or the facts ignored because a fact or submission is not part of the reasons in the way it was presented to the Tribunal.

Findings in Fact

7. The respondent is a NHS health board and a component of NHS Scotland. From 2 November 1998, the respondent employed the claimant as a midwife practitioner.

8. In 2020, the claimant was based in the neonatal unit (NNU) at University Hospital Crosshouse. She was a band 6 midwife practitioner which involved delivering patient facing clinical care. The claimant worked 26.25 hours over three days.
9. A band 7 midwife, working on the wards, undertook the day to day aspects of the claimant's line management. Caroline Blake, clinical midwife manager (band 8), undertook some aspects of the claimant's line management including long term absence and supporting return to work.
10. The claimant has a mental impairment (claustrophobia and anxiety). She was a person with a disability under section 6 of the EqA at the relevant times.
1011. For personal reasons, the claimant was absent from work from 28 May 2020.
12. On 23 June 2020, in the context of the COVID-19 pandemic (the pandemic), the Scottish government issued interim guidance about the wider use of face masks and face coverings in health and social care (the 2020 guidance) supplementing current UK person protective equipment (PPE) guidance.
1513. The 2020 guidance emanated from new and emerging evidence which was reviewed and risk assessed at UK national level. The main purpose was to prevent transmission of COVID-19 from the person wearing the mask. The 2020 guidance was followed by all the NHS boards in Scotland.
14. The respondent complies with the National Infection Prevention and Control Manual (NIPCM) which instructed health boards to refer to the 2020 guidance.
15. From June 2020 until October 2022, in line with the 2020 guidance, the respondent's position on the wearing of face masks was that healthcare staff, patients and visitors should wear fluid resistant surgical face masks in healthcare settings. The expectation was that staff would be fully supported and appropriate steps taken to implement the 2020 guidance in a way that had regard to staff wellbeing. Where staff were unable to wear a mask the respondent took appropriate steps. The respondent carried out appropriate workforce assessments in line with guidance.

16. In September 2020, based on gold standard guidance from the British Association of Perinatal Medicine, Attica Wheeler, associate nurse director/head of midwifery, decided that staff who did not hold a neonatal qualification could no longer work in the NNU. This decision affected some midwives, including the claimant. The midwives who did not hold the neonatal speciality were rotated out of NNU. The claimant was aware of this. She was not impacted as she was on long term sick absence due to stress and anxiety.
17. Around 26 November 2020, the claimant advised Ms Blake of her concerns that wearing a mask for a 12 hour shift may negatively impact her physical and psychological health. The claimant asked about returning to work and not wearing a mask. Ms Blake said that she would explore this.
18. On 18 December 2020, the claimant asked Ms Blake to note on her personnel file: that there is growing evidence and research to show that things might not be as bad as first thought and now more harm may be caused than good. The claimant was concerned that the PCR test was not a diagnostic test. The claimant also asked for it to be noted that, “as a Christian and evidence based practitioner, I wish to make a conscientious objection to giving vaccines”.
19. In January 2021, the claimant reiterated that she wanted to return to work in her clinical area. As she could not wear a mask due to having claustrophobia, the claimant wanted to resume work without wearing a mask. She was not interested in working in “track and trace”.
20. Ms Blake continued to explore alternative work for the claimant where she would not need to wear a face mask. There was limited ability to do so given that the claimant’s role was providing direct patient care. The claimant requested evidence based reasons why she could not return to her clinical area without wearing a mask. She wanted to see evidence (a) that mask wearing was safe and effective with no long term risks; (b) that risk assessments that had been carried out; (c) that asymptomatic people are at risk to others; and (d) that the PCR test gives reliable results.

21. The claimant reiterated this request on 8 February 2021 explaining that having anxiety and claustrophobia due to PTSD, she was exempt from the new rules regarding wearing face masks which was not environment specific.
22. Ms Blake sought advice from infection control, occupational health and HR. She considered all options for the claimant working from home. There were no options for home working in the NNU or the maternity in-patient ward for which Ms Blake was responsible. She approached the clinical midwife manager, integrated care and perinatal mental health lead, Ayrshire maternity unit (AMU) about the claimant training on Badgernet and updating booking visits as this might be done from home. Ms Blake was advised that shielders within the community team were doing all the booking at present. The claimant would need training on Badgernet and updated on public health information, antenatal signposting and referrals. This would be significant training which may be stressful. Other options were track and trace, updating guidelines and the COVID-19 advice line service.
23. On 12 February 2021, the claimant ask for an explanation about her ongoing situation and the reasons behind the decision making. She wanted to know about her intended role. She was aware of staff members being able to work from home and wanted that taken into consideration due to her heightened anxiety. She also wanted full pay because the COVID 19 circumstances and local policy was preventing her from returning to work.
24. The claimant and Ms Blake participated in a virtual meeting on 22 February 2021 (February 2021 meeting). The claimant was accompanied by a GMB trade union representative. A return to work plan was agreed resuming on a phased basis on 5 April 2021, after a six week block of annual leave. The claimant was to be supported working from home from May 2021, while reviewing and assessing this as the pandemic restrictions and guidance progressed. The nature of the work to be undertaken by the claimant from home was agreed. The claimant agreed to consider working with occupational health to see if she would be able to wear a face mask for short periods of time to support working in the AMU.

25. Around 28 April 2021, there was discussion about a referral to occupational health about wearing a mask for a short period of time. The claimant, who had been working with a CBT therapist, said that given her increased anxiety she had been advised that any desensitising work currently would not be beneficial.
526. Ms Blake continued to have catch ups by Teams with the claimant who was set up for home working. The claimant worked her way through emails and learn pro modules.
27. [On 17 May 2021, the claimant sent an email to Ms Blake raising concerns about the “handling of the COVID-19 pandemic based on the flawed PCR test” and the
10 implication for her and colleagues to deliver evidence based care and do no harm. The claimant said that she felt great fear and alarm about the rollout of the COVID-19 vaccine to pregnant and breast feeding women as it was an “experimental vaccine still in trail phase”. Attached to the email were links to research on the internet.
1528. On 14 June 2021, the claimant wrote to Ms Blake asking for structured work, expressing concern about the drop in pay as she was unable to work nights; and requesting a meeting to discuss her concerns about the safety of mask wearing.
29. Ms Blake spoke to the claimant on 18 June 2021 about her supporting the virtual birth reflections clinic (BRC). The BRC was not Ms Blake’s line management
20 responsibility. The claimant was therefore to contact the clinical midwife manager at the AMU to discuss this. The claimant’s other concerns were, as requested by her, forwarded to HR to be placed on her staff file.
30. The claimant started working with the BRC in July 2021. Ms Blake kept in regular virtual contact with the claimant but had no day to day line management for her.
2531. By November 2021, the claimant had been absent from the physical workplace for around 18 months. Ms Blake emailed the claimant on 25 November 2021, proposing that they have a face to face catch up at the claimant’s home on 30 November 2021. The claimant replied within the hour agreeing as she was working that day. She commented that she was heading to AMU to access
30 notes.

32. As arranged on 30 November 2021, the claimant and Ms Blake met at the claimant's home (November 2021 meeting). The claimant felt that her home working was going well. Ms Blake explored the possibility of the claimant undertaking additional duties from home but it would involve being in an office within AMU to access information. Alternatively, they discussed the feasibility of the claimant attending the infant feeding base at AMU for a few hours each week. Ms Blake suggested the claimant trying to wear a loose cotton scarf from the AMU entrance to the office. The claimant said that she would consider this.
33. On 1 December 2021, the claimant messaged Ms Blake to say that she was mask exempt and wanted the respondent to honour this. She said that she had been to the AMU before mask free but it caused her anxiety. The claimant agreed to training on neonatal Badgernet for reviewing data integrity and supporting the infant feeding team.
34. In line with the 2020 guidance, the respondent required all NHS staff to wear a face covering of some sort when entering hospital premises for work purposes. The claimant said that she was unable to wear any face covering to enter a hospital. She did not want to explore the psychological support that was offered as she had tried it before unsuccessfully. She was content doing the BRC and data protection training from home.
35. On 28 December 2021, the claimant sent an email to Ms Blake, Ms Wheeler, and Sian Jones of Workers of England raising a concern about two possible adverse reactions to the COVID-19 vaccine. The claimant said that first incident occurred in July 2021 and the second was more recently. Ms Wheeler line managed Ms Blake and the clinical midwife manager at AMU.
36. The claimant, Ms Jones, Ms Blake and Ms Wheeler met remotely on 17 January 2022 (January 2022 meeting) to discuss the concerns raised. There was discussion about the reporting processes (Datix, yellow cards and medical records) for adverse reactions to the COVID-19 vaccine. The claimant had not used the processes for escalation of drug adverse reactions. She said that she would do so in future. The claimant expressed concern about the safety of the COVID-19 vaccines. Ms Wheeler appreciated that there was conflicting

evidence and opinions, and the COVID-19 vaccine was a new vaccine in trial phase.

37. Following the January 2022 meeting, Ms Wheeler looked into the cases raised by the claimant. She spoke to the women concerned and reviewed their medical records. Ms Wheeler was concerned that the claimant had not reviewed their full records because some of the records were physically located in the hospital. From the discussions with the women, Ms Wheeler thought that they were concerned that during the sessions the claimant focussed on the COVID-19 vaccine rather than the birth process. Ms Wheeler arranged for the women to be seen by another birth reflections midwife. Ms Wheeler considered that the full medical history required to be reviewed before conducting sessions in the BRC to ensure that all relevant medical history was known. The claimant's role at the BRC was temporary, Ms Wheeler decided that the claimant should be withdrawn from the BRC as she was unable to access the full medical notes. She instructed Ms Blake to inform the claimant. Ms Blake was under considerable pressure and inadvertently failed to do so.
38. Around 1 February 2022, following a conversation with a woman at the BRC, the claimant believed that the woman had had a possible adverse reaction to the COVID-19 vaccine and was about to receive another dose. The claimant suggested that the woman consider postponing taking the vaccine and doing some research.
39. The claimant was distressed and called the respondent's whistleblowing line. The claimant spoke to a confidential contact, Jennifer Wilson, executive nurse director. Ms Wilson had no operational responsibility within maternity services. There was discussion about the processes for identifying and improving patient safety and alternative routes to deal with possible adverse reactions.
40. The management of the claimant's case was complicated. She had returned from sick absence in February 2021. The claimant was able to work but was unable to wear a face mask. She had been working from home but there were limited opportunities for her continuing to do so as the services previously

undertaken remotely were gradually returning to being in person. To assist Ms Blake, Mr Paul, HR manager, became involved in the claimant's case.

41. The claimant continued to email the band 7 midwife to whom she reported about her shifts. The claimant did not raise any concerns about her workload and did not alert the band 7 midwife to any issues that she had at this time.
42. Around 25 April 2022, arrangements were made for a case review meeting which was initially scheduled for 19 May 2022 but was rescheduled due to annual leave.
43. The claimant submitted a grievance notification form on 29 June 2022 relating to an refusal of trade union representation from the Workers of England at the case review meeting and the respondent's position about wearing face masks.
44. The first concern was addressed when Ms Blake wrote to the claimant on 5 July 2022 confirming that she was happy to support the claimant's choice of trade union representative.
1545. The case review meeting took place on 15 July 2022 (July 2022 meeting). The purpose was to support the claimant's return to the workplace and discuss her concerns about wearing face masks. Ms Jones supported the claimant. The claimant said that she was willing to return to work in clinical areas if she was exempted from wearing a mask. It was discussed if the claimant could not be supported back to a patient facing role, and no alternative non-clinical work could be found for her, the respondent may need to explore redeployment.
46. Following the July 2022 meeting the claimant raised the same queries about mask wearing. In August 2022 the claimant asked for it to be documented in her staff notes that she had raised concerns in 2020 about the COVID-19 vaccine being rolled out to pregnant women. This was duly documented on the claimant's staff file.
47. Following a review in October 2022, the 2020 guidelines were amended to state that for all staff in acute and hospital settings, in situations where staff are providing direct care to individuals it was "strongly recommended" to wear a face

mask at all times throughout their shift. This applied to delivering direct patient care, staff in and moving around clinical areas and a break times when not seated and/or eating.

48. The claimant sent a further email on 27 October 2022, again noting her queries
5 around wearing face masks.
49. Ms Blake sought advice from Julie Heaney, health and safety lead, and occupational health. Ms Heaney said that the respondent recognised mask exemptions for staff but that they could not work in a clinical environment.
50. Ms Blake chaired a further case review meeting which took place on 22
10 November 2022 (November 2022 meeting). The purpose was to explore ways of supporting the claimant returning to her substantive role as a midwife practitioner. The claimant was accompanied by Ms Jones. Ms Heaney and Mr Paul were also present. The claimant had an opportunity to present her position. She advocated that wearing mask can cause harm and stress. She felt bullied
15 and coerced. The claimant said that she was being discriminated against by not being allowed to carry out her substantive role without wearing a mask. The claimant and Ms Jones expressed concern about risk assessment. Ms Heaney explained that the respondent's aim was to protect staff and patients (who were clinically more vulnerable) by following the updated 2020 guidelines. While face
20 mask wearing had now been relaxed in the general community, in healthcare the respondent would continue to follow guidance. Redeployment was discussed as an option once all other options were explored. The claimant could not continue indefinitely to work from home. The claimant could not continue to be supported in her role if she could not wear a mask as the substantive role required her to do so. It was agreed that the claimant would have an occupational health
25 assessment.
51. The claimant raised a grievance about the respondent's position on face masks and how it impacted on her. Mr Paul acknowledged the grievance.
52. By letter dated 5 December 2022, Ms Blake advised the claimant that all staff
30 members delivering direct patient care must wear surgical face masks in all

clinical areas. Although staff could be exempt from wearing masks on health grounds this could not apply in the direct clinical care setting. Ms Blake advised if the claimant was unable to wear a mask on health grounds, and this was supported by occupational health, redeployment opportunities would be explored out with direct clinical care roles. The claimant, would continue working as she currently was, reviewed every two/three weeks, until the occupational health report was received.

53. The occupational health consultant wrote to Ms Blake on 23 December 2022, advising that it had been explained to the claimant that there were no exceptions to the rule of wearing masks which was for patient safety and staff protection. The consultant noted that the claimant was challenging this requirement and if this was unsuccessful medical options may be available. A further appointment took place on 19 January 2023 following which the consultant advised Ms Blake that they were awaiting the outcome of the grievance process.

1554. On 16 January 2023, the Scottish government released an update confirming the current position of face masks and face covering use. In line with this, the respondent required that face masks must be worn by all staff in all clinical areas, when walking into and around the hospital or clinic facility and in any setting or area where patients or visitors were present. The respondent also required that any individual visiting or attending acute hospital, community healthcare setting, primary care premises were also strongly recommended to continue to wear a face covering and masks were provided for patients and visitor use on entry.

55. From mid-February 2023, Ms Blake was finding that the ongoing management of the claimant was impacting her mental health and well-being. She was taking the claimant's comments personally and was becoming very tearful and emotional. Following discussion it was agreed with Ms Wheeler that going forward the claimant would be managed by the clinical midwifery manager, integrated care and maternity outpatient services (CMM).

56. On 22 February 2023, Jacqui Donald, general manager, women and children invited the claimant to a remote grievance hearing on 28 February 2023 (February 2023 meeting). The claimant and Ms Jones accepted the invitation.

The claimant prepared a lengthy detailed email with a timeline and associated information.

57. At the February 2023 meeting, the claimant spoke freely and was asked questions for clarification. Ms Jones also spoke and was asked questions. Ms Heaney and a consultant microbiologist attended as witnesses. Ms Blake was present, along with Mr Paul. Neither had any part in the decision making. It was agreed that Ms Jones would send written questions to Ms Donald as some information may need to come from the Scottish government. Ms Jones did so and received a response.
1058. Ms Donald advised the claimant of her findings by letter dated 7 March 2023. The claimant appealed the decision.
59. On 9 May 2023, the Scottish government released an update confirming a change to the extended use of face masks and face coverings guidance in health and social care settings. The extended use was to be withdrawn from 16 May 2023.
60. Ms Wheeler and Ms Donald instructed Ms Blake to contact the claimant to advise her of the withdrawal of the extended use of face masks in the health care setting and support her back to an in-patient facing role. The NNU staffing model was now primarily paediatric staff nurses.
2061. Ms Blake discussed with the CMM, who would be supporting the claimant's return, a planned rotation around key clinical areas to update the claimant's all round midwifery skills. Ms Blake was unaware of any previous informal arrangements the claimant had with colleagues about attending the intrapartum ward. The rotation was to start in the maternity assessment unit on 22 May 2023 following the claimant's return from annual leave. The first week in each clinical area was supernumerary. The rotation was to support an opportunity to undertake a planned rotation within the community midwifery team.
62. Ms Blake tried unsuccessfully to speak to the claimant by telephone before sending an email to the claimant on 10 May 2023 (May 2023 email). The May 2023 email was copied to the CMM explaining that the CMM would be the

claimant's new line manager going forward. The May 2023 email referred to Ms Wheeler's decision in September 2020 to rotate out of the NNU all midwives who were not qualified in neonatal speciality. It explained that given the time since the claimant had a patient facing role she was to be supported with a planned rotation around key clinical areas. The rotation to the intrapartum setting was scheduled between 17 July 2023 and 10 September 2023. This would be followed by a rotation in the maternity in-patient ward from 11 September 2023. The claimant was asked to speak to telephone the CMM to discuss the plan.

63. The claimant sent an immediate email reply Ms Blake saying that she was on annual leave. Later that day she sent a further email complaining about the absence of discussion and lack of courtesy. The claimant requested evidence for the decision. She said that she was discriminated against because she was not returning to the NNU and would be rotated into an area that would cause her severe anxiety. The claimant said that she was attending a meeting the following day with occupational health and would be contacting her trade union representative.

64. On 16 May 2023, the claimant sent an email to the CMM advising that she was commencing a period of sick leave. The claimant said that before May 2020 she struggled with anxiety. Ms Blake would have been aware that adjustments were made for her; the claimant did not go to theatre or labour wards as she could not tolerate enclosed spaces. It was not a secret that she has claustrophobia. The planned rotation was ongoing discrimination.

Observations on witnesses and evidence

65. The claimant gave her evidence honestly and to the best of her recollection. Her refrain was that she was that she was an evidence based practitioner. The Tribunal did not doubt the genuineness of the claimant's beliefs, the seriousness in which she took her professional accountability, or her reasons for raising her concerns with the respondent. The Tribunal acknowledged that the claimant referred the respondent to evidence that she said supported her position. The Tribunal felt that the claimant often lacked insight and awareness about the concerns of others and how her actions impacted on them.

66. The respondent's witnesses, in the Tribunal's view, recognised that there were differing opinions held by colleagues and experts on mask wearing. They understood the claimant's position and appreciated that she was not alone in having those views. The respondent's witnesses did not express personal
5 opinions, but explained the rational underpinning the Scottish government guidelines which were in place and the risk to the respondent if they were not followed. They also explained the challenges that they faced working during the pandemic and that the claimant's inability to wear a mask was not unique. Many colleagues, for a variety of reasons, could not wear face masks for all or some
10 of the time. Some colleagues could wear certain types of masks and not others.
67. The Tribunal considered that on the material findings, based on what was said at the time and contemporaneous correspondence, there was little conflicting evidence. There was however different interpretation and perception of events afterwards. Accordingly the Tribunal makes the following observations.
1568. The claimant said that before 2020, her colleagues knew that she had claustrophobia. She wore a mask for short periods. She struggled going to theatre and being in the labour ward. The claimant left the duty room at times. Her colleagues were supportive and reviewed her situation. Ms Blake's evidence was that the claimant was based in the NNU and working in the intrapartum ward
20 was not part of her regular duties. Ms Blake was not involved in the claimant's day to day management. Ms Blake said that she of the unaware of any informal arrangements the claimant may have had if there were occasions when she covered the intrapartum ward. The Tribunal considered that Ms Blake's evidence was plausible given that there were around 150 staff under her line management.
2569. The Tribunal grasped that the claimant disputed the evidential underpinning of the 2020 guidelines. The Tribunal had no jurisdiction or expertise to form a view on this. The pandemic and its impact on people was unprecedented. The medical and scientific experts had differing opinions which evolved as more data became available and research was being undertaken. The Scottish government
30 is in charge of NHS Scotland of which the respondent on only one of the several NHS boards. The Tribunal appreciated that for the respondent to challenge or

depart from the 2020 guidelines and any update would have significant consequences.

70. The November 2021 meeting took place in person. Ms Blake believed, not unreasonably, from the claimant's email reply and subsequent demeanour at the meeting that she was agreeable to this. The discussion was not disputed although on reflection the claimant changed her mind about the proposal and made Ms Blake aware of this. Ms Blake accepted the claimant's position.

71. There was no dispute that at the January 2022 meeting, the claimant's email was discussed. The claimant's position was that Ms Wheeler described the COVID-19 vaccine as an "experimental vaccine". Ms Wheeler denied using the word "experimental" but did accept saying that the COVID-19 vaccine was new and on trial. The Tribunal noted that it was the claimant who used the word "experimental" in her email sent on 17 May 2021. Ms Blake's contemporaneous notes had a bullet point followed by, "new vaccine - in trail phase". The Tribunal accepted Ms Wheeler's evidence of what was said given that it was consistent with the contemporaneous notes.

72. Ms Wheeler also gave evidence about the enquiries made by her following the January 2022 meeting. There was no supporting documentation. However, Ms Blake (who was not involved in any enquiries) did confirm that she was told by Ms Wheeler that the claimant was to be withdrawn from working in the BRC because she was unable to access the full medical records and so was unable to provide appropriate care to the women. The claimant was unaware of this as she was not informed at the time.

73. In the Tribunal's view Ms Blake had gone to considerable lengths to find work that the claimant could undertake from home. Unfortunately none was within Ms Blake's area of responsibility which is why she explored options in other areas. Ms Blake had no day to day supervision of the claimant and had no responsibility for the BRC. The claimant's email sent on 25 November 2021 referred to her going to the AMU to access notes. Subsequent correspondence, following the November 2021 meeting suggested that the claimant was not wearing a mask when she did so. The Tribunal's impression was that until the January 2022

meeting Ms Blake did not appreciate that the claimant was not accessing the full medical records. While the claimant said that it was unnecessary as she was not a labour midwife, that was not the view shared by Ms Wheeler as it ignored that the relevant medical history might be contained in these records.

574. Ms Blake accepted that she did not tell the claimant about not working in the BRU when Ms Wheeler instructed her to do so. When pressed Ms Blake explained her personal circumstances at that time and that she had been absent from work. The Tribunal considered that Ms Blake was under considerable pressure and had inadvertently failed to do so. There was no evidence that this was a deliberate oversight. Ms Blake had no animosity towards the claimant. None of the decisions were taken by Ms Blake. Ms Blake was understanding of the claimant's position and had endeavoured to find her work.

75. The Tribunal considered that it was highly likely that Ms Wheeler carried out the review and spoke to the women as the concerns raised by the claimant at the January 2022 meeting had not been previously recorded through usual channels. The Tribunal considered that it was understandable for Ms Wheeler to consider the advice given and implications of the claimant being unable to access the full medical records when advising women at the BRU. Ms Wheeler knew that the claimant's role in BRU was temporary understood. She understood why the claimant had not accessed the full medical records. Ms Wheeler took the decision to withdraw the claimant from the BRU. The Tribunal accepted Ms Wheeler's evidence.

76. There was disputed evidence about the claimant's telephone call to a confidential contact in early February 2022. The claimant said that she spoke to Ms Wilson on 1 February 2022 and disclosed her concerns about adverse reactions to COVID-19 vaccines. The claimant said that she was told that she was not able to whistle blow. Ms Wilson had no recollection of speaking to the claimant. She did however have a diary entry on 3 February 2022 with the claimant's initials. Ms Wilson said that it was her practice not to take notes of confidential conversations and she would not discuss them with anyone other than fellow

confidential contacts. It was for the caller to decide whether to pursue any concern through the whistleblowing process internal or externally.

77. The Tribunal considered it more likely than not that the claimant and Ms Wilson did have a discussion in early February 2022. The Tribunal also considered that it was likely that Ms Wilson would have explored with the claimant if she had raised the concerns through the normal processes for identifying and improving patient safety. While it may have been suggested to the claimant that there were alternative ways to deal with her concerns, the Tribunal considered that it was highly unlikely that Ms Wilson would have told the claimant that she could not use the whistleblowing procedure if the claimant asked for her concerns to be handled under it. The Tribunal's reasoning was that this is stated in the whistleblowing policy to which the claimant had access and she was being advised by her trade union.

78. There was disputed evidence about who introduced the subject of redeployment at the July 2022 meeting. It seemed to the Tribunal more likely than not that Mr Paul would have mentioned it given his HR background. The Tribunal did not consider anything turned on this. It was in the Tribunal's view appropriate to introduce this process as a possibility. The respondent was not at that stage proposing to explore this process and the claimant was not seeking so either.

20 **Deliberations**

Discrimination arising from disability

79. The Tribunal referred to section 15 of the EqA which provides protection from discrimination arising from disability. The first element of this claim is that the claimant has to have been treated unfavourably.

2580. The claimant says that she was treated unfavourably by the respondent because she was prevented from returning to her clinical role or given any meaningful work. The respondent accepted that the claimant was treated unfavourably as she was not allowed to return to work as a midwife in the period late 2021 to May 2023. The Tribunal was satisfied that the claimant was treated unfavourably.

81. The next element of a section 15 claim is that the claimant must show that there was “something” arising in consequence of her disability and that the unfavourable treatment arose because of that something.
82. The claimant said that the “something” arising in consequence of her disability was the inability to wear a mask. The respondent did not contest that the claimant’s inability to wear a mask arose in consequence of her disability. The respondent also accepted that the claimant’s inability to wear a mask was more than a trivial part of the reason for the unfavourable treatment. Accordingly the Tribunal’s focus was on whether the respondent could justify that treatment.
1083. The Tribunal asked whether the treatment was a proportionate and reasonably necessary way of achieving a legitimate aim. This entailed the Tribunal carrying out a balancing exercise between the reasonable needs of the employer and the effects of the treatment.
84. The respondent says that its overlapping aims were compliance with governmental guidelines; appropriate management of services; and appropriate management of health and safety issues.
85. The claimant accepted that in requiring her to wear a mask the respondent was pursuing a legitimate aim to protect the health and safety of staff and the public. However she said that her “treatment” was not legitimate. The claimant said that government guidelines provide advisory information on how statutes and regulations should be followed. She said that the respondent did not provide legislation to support mask wearing or evidence that surgical masks worked. Her position was that surgical masks were not personal protective equipment as there was limited evidence that surgical masks provide source control and that they are effective for the transmission of asymptomatic individuals. She considered that the respondent was in breach of health and safety standards as the only mask that would protect an airborne pandemic were FFP3 masks.
86. The claimant also argued that the 2020 guidelines stated that masks may cause distress for certain members of staff and it was expected that staff would be fully supported and appropriate steps take locally to implement the guidance in a way

that has regard to staff wellbeing. Further from October 2022, the 2020 guidelines changed to recommend the use of surgical face masks.

87. Mr James said that 2020 guidelines (and subsequent updates) were clear in the relevant period. The 2020 guidelines recommended that staff working in clinical areas should wear a face mask at all times throughout their shift. While the 2020 guidelines had to be implemented in a way that had regard to staff well-being, Mr James said that did not go as far as the claimant suggested: that those staff who are unable to wear a mask could disregard the 2020 guidelines. He also submitted that from October 2022 some marginal changes were made to the 2020 guidelines in that staff were strongly recommended to wear masks at all times and that staff involved in direct patient care should wear a mask throughout their shift. It did not change to suggest that those with mask exemptions were exempt from wearing a mask at any time.

88. The Tribunal accepted that the 2020 guidelines were advisory. However guidance is issued as best practice and there is an expectation that it will be followed. Additionally the 2020 guidelines were cross referenced in the NIPCM which provides standards that the respondent must apply. The Tribunal considered that the respondent must have regard to the 2020 guidelines (and any updates). Any deviation would in the Tribunal's view require explanation particularly as the 2020 guidelines and subsequent updates were issued by the Scottish government who is responsible for NHS Scotland of which the respondent is part. The Tribunal could understand that to depart from the 2020 guidance (and subsequent updates) could have significant consequences for the respondent as it was highly likely that it would be an issue for the Health and Safety Executive particularly as all the NHS health boards in Scotland were following the 2020 guidance (and subsequent updates).

89. The Tribunal acknowledged that there was a risk that not following the 2020 guidelines (and subsequent updates) could have led to a rapid transmission of COVID-19 in hospitals and clinical settings. The respondent had genuine concerns about harm to patients and staff. There was also the public and patient perception of staff not wearing a mask when providing direct patient care particularly to vulnerable patients.

90. Balanced against this was that the claimant was unable to return to her clinical duties as she could not wear a mask. This was in the Tribunal's view connected to the respondent achieving its legitimate aims. The claimant first asked to return to her clinical role without wearing a mask in December 2020. The COVID-19 vaccine had only started to be rolled out to the public. The second "lockdown" took place between late December 2020 and late April 2021.
91. The Tribunal asked if there was something less discriminatory that could be done instead. In the Tribunal's view the respondent endeavoured to find alternative work for the claimant which did not involve her wearing a mask. The claimant was offered to work in "track and trace" but she was not interested. Ms Blake initially made arrangements for the claimant to work from home. The claimant appeared to be content with this. Given her patient facing role, there was limited work that could be carried out remotely. Ms Blake then explored options beyond her own department which resulted in the claimant working remotely for the BRU. The claimant was removed from the role as she was unable to access the full patient records in hospital as she could not wear a mask. In any event the BRU role was temporary as the clinic was returning to in person.
92. From April 2022, the claimant's focus was on returning to the NNU and she wanted an individual risk assessment. The claimant could not wear a mask. There was no issue about the type of or duration of her wearing a mask. The respondent tried to engage with the claimant to discuss potential options but there was an impasse. The claimant's attention was on challenging the requirement for her to wear a mask in the NNU. While the claimant may have been willing to attend work and not wear a mask, the Tribunal was unconvinced that the public and patients would have been comfortable with this.
93. The Tribunal was satisfied that the respondent attempted to engage with the claimant to explore other options. However she was insistent that she wanted to return to her clinical role but not wear a mask. While the Tribunal considered that this was the claimant's prerogative, her position did have consequences, as the respondent could not at that time allow her to be a clinical area without wearing a mask. While there was an option of redeployment, the Tribunal felt that the respondent was not rushing to do this given that the situation was likely

to resolve when the updated 2020 guidelines were eased and, in any event, the claimant did not indicate any desire to be redeployed. The respondent continued to allow the claimant to work from home. While this was undesirable because the claimant had no work to do, the Tribunal felt that the respondent's needs outweighed the impact on the claimant. The respondent's actions were proportionate. The Tribunal felt that it was a proportionate means of achieving the legitimate aim as the updated 2020 guidelines were highly likely to be further eased, the claimant's treatment was regrettable but not indefinite. Accordingly the claim of discrimination arising from disability was dismissed.

10 *Indirect discrimination*

94. The Tribunal then referred to section 19 of the EqA. Indirect discrimination occurs when employer applies to an employee a provision, criterion or practice (PCP) that it discriminatory in relation to a relevant protected characteristics.
95. The claimant relies on the PCP that wearing of a surgical face mask was a requirement when working in clinical areas. The respondent accepted that this was a PCP.
96. The Tribunal then asked if the PCP put or would put persons having anxiety and claustrophobia at a particular disadvantage when compared with persons who do not have the condition.
2097. From the evidence the Tribunal understood how wearing a mask affected the claimant. However the Tribunal was not satisfied that it could find that people with anxiety and claustrophobia have issues wearing a mask and therefore the PCP put them at a particular disadvantage. Also there was evidence that the PCP adversely affected other people who did not have anxiety and claustrophobia for example those with breathing/respiratory conditions.
98. The Tribunal did not consider that the claimant had established group disadvantage. In any event for the reasons set out above the Tribunal considered that the PCP was a proportionate means of achieving a legitimate aim. Accordingly the indirect discrimination claim was dismissed.

Reasonable adjustments

99. The Tribunal referred to section 20 and 21 of the EqA. Employers are required, when the duty is triggered, to make reasonable adjustments to alleviate disadvantages suffered by employees with disabilities.
5100. The claimant relies on the application of a PCP causing substantial disadvantage. She clarified during case management that the PCP applied to her was that she had to wear a surgical face mask for a 12 hour shift to allow her to continue working in the NNU. The respondent accepted that this was a PCP and it was applied to the claimant.
10101. The substantial disadvantage relied upon by the claimant was that she was prevented from returning to her role within NNU. The respondent accepted that the PCP put the claimant at a substantial disadvantage in comparison with those who are not disabled.
102. The claimant proposed that reasonable adjustments were allowing her to return to work in the NNU and acknowledging the surgical masks were not fit for purpose.
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103. In her submissions, the claimant referred to not being allowed to carry a non-clinical role that was offered as she could not enter the hospital or do office based work. The claimant suggested that the disadvantage could have been avoided by acknowledging her mask exemption; and acknowledging that surgical masks are not fit for purpose.
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104. The Tribunal asked whether the proposed adjustments were capable of alleviating the disadvantage and if they were reasonable.
105. Dealing with the second proposed adjustment (acknowledging that surgical face masks were not fit for purpose), the Tribunal agreed with Mr James' submission that this would not have alleviated the disadvantage. The Tribunal's reasoning was that even if the respondent made that acknowledgment, the 2020 guidelines (and subsequent updates) would have remained in place. The respondent would have needed to follow the 2020 guidelines given they were cross referenced in
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the mandatory NIPCM and likelihood of prosecution by the Health and Safety Executive.

106. The Tribunal then asked if it reasonable for the respondent to have to taken the steps proposed by the claimant. The claimant was mask exempt. The
5 respondent appreciated the claimant's situation and took steps to find her work which would not require her to wear a mask. In Tribunal's view, the claimant's mask exemption did not mean that it was reasonable for the respondent to disregard the 2020 guidance (and subsequent updates) and allow the claimant to work in the NNU (or other clinical setting) without wearing a mask. The
10 Tribunal agreed with Ms James' submission that to do so could have seriously endangered patient safety and could have led to more rapid viral transmission. The Tribunal considered that to have done so could exposed the respondent to risk of prosecution by the health and safety executive for the reasons already stated.
15107. The Tribunal concluded that the adjustments proposed by the claimant were not reasonable. Accordingly the reasonable adjustment claim was dismissed.

Harassment related to disability

108. The Tribunal referred to section 26 of the EqA which provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a protected
20 characteristic and it had the purpose or effect of violating B's dignity or creating an intimidating, hostile or degrading, humiliating or offensive environment for B.
109. The Tribunal considered each of the claimant's allegations of harassment and asked if it was unwanted conduct; if it had the purpose or effect of violating the claimant's dignity, creating an intimidating, hostile or degrading, humiliating or
25 offensive environment for her; and if related to the protected characteristic of disability. The Tribunal noted that when deciding if the conduct has that effect it must take into account the claimant's perception; the other circumstances; and whether it is reasonable to have that effect.

110. While this was mentioned in the claim form there was no evidence of any meeting on this date. The Tribunal did not consider that harassment took place.

November 2021 meeting

111. The November 2021 meeting was prearranged with the claimant's agreement.

5 The claimant submitted that she misread the email and would never knowingly have agreed to a home visit. She considered that it was inappropriate as Ms Blake was straight from work, not wearing a mask, which was unprofessional and putting the claimant's health at risk.

112. The Tribunal considered that the claimant agreed to Ms Blake's home visit particularly as she did not indicate otherwise at the time. While the claimant complained about Ms Blake's suggestion that the claimant might try wearing a loose cotton face covering to enter the hospital, the Tribunal considered that this was in the context of exploring additional duties that the claimant might undertake. The claimant did not indicate any objection to this proposal at the meeting. To the contrary she indicated she was willing to consider it. When the claimant later reconsider her position, Ms Blake accepted that and it was not pursued further.

113. Viewed objectively the Tribunal did not consider the November 2021 meeting was harassment. The claimant had been absent from the physical workplace since May 2020. She had returned from sick absence in February 2021 and following leave had been working from home since April 2021. Ms Blake was exploring with the claimant potential work that she would be capable of undertaking and seeking her views on this. The claimant was initially willing to consider the proposal and when she did not want to pursue it, Ms Blake did not force the issue.

July 2022 meeting

114. The claimant believed that the outcome of the July 2022 meeting was predetermined, she was considered a trouble maker and Mr Paul issued ultimatums.

115. The July 2022 meeting was a case review. The claimant had been working from home; she had been away from the physical workplace for two years. She was unable to wear a mask due to her disability. The Tribunal considered that it was appropriate to discuss alternative options if the claimant was unable to return to her substantive role.
116. The Tribunal appreciated that this was challenging meeting. The claimant was working from home but there was insufficient work for her to do there. The respondent had unsuccessfully explored the possibility of her undertaking additional duties. The claimant was not able to return to her substantive role because she could not wear a mask.
117. The Tribunal's impression was that the respondent had kept away from raising issues with the claimant hoping that in time the situation would resolve itself. In the Tribunal's objective view, the respondent had to raise with the claimant how, and in what capacity, she might return to the physical workplace, which discussion until now had been avoided. While this discussion was no doubt unpleasant and stressful for the claimant, it had to be discussed. The Tribunal did not consider that any outcome was predetermined or imminent. It was not harassment.

November 2022 meeting

20118. The claimant's position was that she was being set up to fail. She could no longer work from home; she could not do her substantive role or enter the hospital as she could not wear a mask. The claimant complains about the actions of Ms Heaney, Mr Paul and Ms Blake; and that Ms Jones was not listened to.
119. The November 2022 meeting was a case review which followed a review of the 2020 guidelines and at that stage that the claimant had been physically out of the work place for around 30 months. Objectively, the Tribunal considered that it was understandable for the meeting to be arranged and for the respondent to endeavour to progress matters. While it was unusual for Ms Heaney to attend such a meeting, given the concerns raised by the claimant, the Tribunal felt that her role was to explain the respondent's position on wearing masks and clarify

that masks exemptions for staff were recognise but they could not work in a clinical environment. The claimant did not agree but that was not in the Tribunal's view harassment.

120. The Tribunal found that Mr Paul discussed redeployment. This was first mooted
5 at the July 2022 meeting but no more than that. The respondent had tried various alternative working options which had not been successful. By this stage the claimant wanted to return to the NNU with no mask because she was exempt. This was not an option for the respondent. There was an impasse and objectively speaking the respondent had to progress and explore solutions with the claimant
10 possible options that she did not welcome.

121. While Ms Blake indicated that she could not continue indefinitely to support the claimant working from home, the timescale was fixed, subject to review, and input from occupational health was sought.

122. The Tribunal considered that viewed objectively the respondent's actions were
15 understandable albeit that the claimant did not want to the conduct to occur.

123. As regards the allegation that Ms Jones was not listened to, the Tribunal did not make that finding. The Tribunal considered that the respondent did not agree with Ms Jones but that was mutual. In any event this was not in the Tribunal's view harassment related to disability.

20 February 2023 meeting

124. The claimant complained about the lack of notice for this meeting. The Tribunal considered that the claimant and Ms Jones had notice. Neither of them sought a postponement before or at the meeting. The Tribunal was not satisfied that the conduct was unwanted nor did it relate to disability.

25 125. The claimant also said that Ms Jones was prevented from asking questions. The Tribunal found that Ms Jones asked questions at the meeting and sent additional question in writing to which the respondent replied. Regardless, as explained above, the Tribunal did not consider that an allegation of not listening to Ms Jones was related to disability.

126. The Tribunal also did not find that the claimant was not allow to speak freely. She spoke and was asked questions for clarification. The Tribunal did not consider that this allegation related to disability. Also view objectively the conduct of the meeting was standard procedure.
5127. The claimant complained that she had not had an individual risk assessment. This was not disputed nor was there any challenge that the claimant was unable to wear a mask. The respondent accepted that the claimant could not return to her substantive role while the 2020 guidelines (as updated) remained in place. The Tribunal considered that viewed objectively this could not be harassment.
10128. The claimant asserted that the respondent was failing in its duty of care and ignoring evidence. She submitted that she lost faith in, and did not trust the respondent. Ms Donald had not been previously involved. She listened, heard and understood the concerns raised by the claimant and Ms Jones. Ms Donald acknowledged the claimant's frustration. She also had the benefit of hearing
15 from Ms Heaney and a consultant microbiologist. The respondent followed the 2020 guidelines (as updated) and the NIPCM as the risk was too great. Viewed objectively the Tribunal considered that Ms Donald understood the claimant's inability to wear a mask and her view on the effectiveness of mask wearing. The claimant was provided with written reasons for the outcome reached by Ms
20 Donald. While the claimant disagreed with the outcome that was not harassment. The claimant's grievance was considered and a decision reached on which she had a right of appeal. The Tribunal did not consider that this was harassment related to disability.

May 2023 email

25129. The claimant complained that in the May 2023 email she was told not to return to the NNU and that she would be rotated into the intrapartum ward.
130. From the Tribunal's findings, the claimant being moved from the NNU was unrelated to the claimant's disability. The decision taken in September 2020, and related to the qualifications of those working in the NNU. The claimant was

not the only midwife affected. The Tribunal did not consider that viewed objectively being moved from the NNU was harassment related to disability.

131. The claimant said that before 2020, there were adjustments in place for her not to going the labour ward or theatre because of her anxiety and claustrophobia.
5 The Tribunal did not doubt that her colleagues were supportive. The claimant worked in NNU. The Tribunal accepted that Ms Blake was unaware of any informal arrangements the claimant had with colleagues if there were occasions when she covered the intrapartum ward.
132. Viewed objectively, Ms Blake had tried to speak to the claimant who was being
10 supported back to a patient facing midwifery role (which she had not done for three years) by rotating in a variety of clinical settings to update her skills. The claimant was aware since late 2020 that colleagues with whom she worked had been rotated out of the NNU. The claimant was invited to speak to her new CMM to discuss the plan. The claimant had a scheduled appointment with the
15 occupational health consultant. The rotation to the intrapartum setting was not scheduled until 17 July 2023. While the Tribunal did not doubt that the claimant was upset on receiving the 10 May email, it was not harassment relating to disability.
133. Having reached the conclusions that it did, the Tribunal dismissed the claim of
20 harassment related to disability.

Whistleblowing

134. The Tribunal referred to section 43B(1) of the ERA. To be a qualifying disclosure, the subjective belief of the worker that the disclosure showed a relevant matter and was in the public interest must be objectively justified.
- 25 135. The claimant relied on various asserted protected disclosures from May 2021 onwards raising concerns about the reliability of PCR tests, that surgical face masks were not PPE; and various adverse effects of the COVID-19 vaccine on pregnant women due to the limited information about safety, efficacy and adverse reactions.

136. The respondent accepted that the various disclosures contained information that the claimant subjectively believed disclosed information tending to show a relevant matter in section 43B(1) of the ERA and was in the public interest.
137. In many of the emails the claimant copied most of the information from websites and sent it to the respondent unedited. Nonetheless, the Tribunal proceeded on the basis that the claimant had made protected disclosures.
138. The purported detriments relied upon by the claimant were being removed from her role in the NNU; being excluded and isolated from her clinical area; being given no work; and the respondent not carrying out individual risk assessments of the harms of face masks.
139. The Tribunal noted that treatment only amounts to a detriment if a reasonable employee might consider it a detriment. An unjustified sense of grievance cannot amount to a detriment.
140. The Tribunal found that the respondent was following guidance issued by the Scottish government in June 2020. Risk assessment was carried out at national level. The respondent carried out workforce assessment. While no individual risk assessment was carried out on the claimant, because of her disability, she was unable to wear any type of mask for face covering for any time. The Tribunal was not satisfied that there was a detriment in respect of risk assessment.
141. The Tribunal considered from its findings that the claimant suffered detriment in being removed from the NNU, excluded from her clinical area; and given no work.
142. The Tribunal noted that the protected disclosures must be a material influence on the decision maker's thought process. Accordingly the Tribunal considered who was the decision maker and what influence the protected disclosures had on their decision making.
143. The requirement of extended mask wearing came into effect in June 2020 while the claimant was on long term sick leave. The respondent was following Scottish government guidelines introduced because of the pandemic.

144. In September 2020, Ms Wheeler decided that staff in the NNU who did not hold a particular qualification, would be rotated out of the NNU. In the Tribunal's view this decision pre-dated and was unrelated to any disclosure of information by the claimant. The decision also affected other colleagues not only the claimant.
5145. From December 2020, there was discussion about the claimant returning to her clinical role. Around this time the claimant raised concerns about PCR testing. Her sick absence ended in 18 February 2021. After annual leave she worked from home from 5 April 2021. The claimant was agreeable to this. The claimant made further disclosures in May 2021 about PCR testing and the safety of the COVID-19 vaccines in pregnant and breast feeding women. Ms Blake continued to look for work, out with her line management, that the claimant could undertake from home. The claimant worked from home in the BRU which she enjoyed.
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146. The Tribunal considered that Ms Blake made significant efforts to find work for the claimant which she could undertake from home. The Tribunal's impression was that the claimant was initially content to do so. The Tribunal considered that Ms Wheeler would be aware of this as she line managed Ms Blake and the clinical midwife manager at the AMU who was in charge of the BRU.
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147. The claimant made protected disclosure in an email sent to Ms Blake and Ms Wheeler in December 2021. No action was taken on receipt of this email other than to arrange the January 2022 meeting at which there was discussion about the claimant's concerns about two adverse reactions to the COVID-19 vaccine. Afterwards Ms Wheeler looked into the cases, reviewed the records and spoke to the women involved. She considered that the full medical history required to be reviewed before conducting sessions in the BRC to ensure that all relevant medical history was known. It was only then that Ms Wheeler then decided to remove the claimant from the BRU.
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148. While Ms Wheeler's decision post-dated the protected disclosure about concerns related to the COVID-19 vaccine, the claimant has been raising concerns since at least December 2020. The January 2022 meeting involved discussion about how vaccine safety concerns about vaccines could be raised. The Tribunal did
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not consider that any protected disclosure had a material influence on the decision to remove the claimant from the BRU.

149. The Tribunal did not find that Ms Wilson was a decision maker in relation to any detriment experienced by the claimant. The Tribunal thought it unlikely that Ms
5 Wheeler was aware that the claimant had any conversation with Ms Wilson in early February 2021.
150. The Tribunal did not find that Ms Wheeler, or Ms Blake decided that that the claimant should be given no work. While the claimant was not told of the decision to remove her from the BRU, the Tribunal considered that was an oversight by
10 Ms Blake for reasons unrelated to any protected disclosure. The Tribunal was mindful that while it was focusing on the claimant, she was not the only employee for whom Ms Wheeler and Ms Blake had responsibilities in addition to their clinical duties. The lack of direct line management appeared to the Tribunal to an omission because the claimant was working from home in an area for which
15 Ms Blake and the band 7 midwife to whom the claimant reported about shifts had no responsibility.
151. The Tribunal appreciated that the claimant was expecting work to be allocated to her. However the Tribunal was surprised that the claimant did not raise any concerns about the lack of work with the band 7 midwife allocating shifts, Ms
20 Blake or the clinical midwife manager responsible for the BRC.
152. In any event, the claimant's focus from April 2022, was to return to her clinical role. The reason that this was not possible was due to the guidelines about extended use of face masks. Ms Blake continued to explore options with the claimant. This was increasingly challenging as more roles, that in the early
25 stages of the pandemic were being conducted remotely, were returning to being in-person. The situation was reviewed as and when there was a review of the guidelines.
153. As soon as the restrictions were lifted in May 2023, Ms Wheeler directed Ms Blake to contact the claimant to facilitate her return to a clinical role. At that point

the NNU staffing model primarily paediatric staff nurses. The claimant did not have the required qualification.

154. The Tribunal concluded that none of the purported detriments took place on the grounds that the claimant made any protected disclosures. Accordingly the
5 whistleblowing claim was dismissed.

Time limits

155. Mr James submitted that any act or omission before 29 August 2022 is time barred. Most of the acts complained of occurred before August 2022. He said that it was reasonably practicable to bring her whistleblowing claims in time. She
10 did not do so or in such further reasonable period. In relation to the discrimination claims, most concerned the decisions that the claimant was not allowed to work in the NNU without wearing a mask most which dated from 2020 or 2021.

156. Given its approach to the deliberations and the conclusions reached, the Tribunal did not revisit each act to consider if it was in time.

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S MacLean
Employment Judge

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19 September 2024
Date

Date sent to parties

25 September 2024