EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103482/2023

Held in Stornoway on 8 – 12 July 2024 and 22 – 26 July 2024 and in Glasgow on 22 – 29 July 2024 Deliberations on 2, 4, 5 & 16 – 18 September 2024

Employment Judge D Hoey

Ms L Hertel	**Claimant Represented by: Mr A Lyons - Barrister [Instructed by Messrs BDBF]**
Western Isles Health Board	**Respondent Represented by: Ms A Stobart - Counsel [Instructed by CLO]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed and each of the complaints is ill founded. The claim is dismissed.

REASONS

1. The claimant raised a number of complaints in connection with disability discrimination, whistleblowing detriment and unfair dismissal.

2. At a case management preliminary hearing, matters had been focussed and it was agreed a full hearing would be convened. The full hearing took place in person with the parties having been given time to prepare written submissions and to speak to them. The parties had agreed in advance that written submissions be provided with time to speak to the submissions.

3. The hearing began by a reminder of the overriding objective and the need for both parties to work together to assist the Tribunal in ensuring that everything that was done was fair and just with due regard to cost and proportionality.

The claimant sought and was given time (albeit not as much time as initially sought) to give her barrister instructions in relation to the written witness statements at the outset of the case.

Case management

4. The parties had worked together to focus the issues in this case. Regrettably it was not until 2 weeks following conclusion of the Hearing, and after submissions, that the parties were able to agree the final list of issues and the agreed statement of facts. (That was in part due to a family emergency in relation to an agent and that the claimant wished to consider which claims were to be withdrawn in light of the evidence that had been given). That resulted in the time the Tribunal had listed for deliberations being used and due to other listing arrangements, determination of this case was delayed.

5. The parties were able to agree timing for witnesses and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. The case was able to conclude within the allocated time with the parties using one of the days to focus the issues and facts agreed and in dispute.

6. Adjustments were made to the proceedings to accommodate issues arising in respect of the claimant's disability in terms of timings and physical arrangements.

Evidence

7. The parties had produced a joint bundle of 2474 pages to which additional pages were added (resulting in the bundle running to 2593 pages).

8. The Tribunal heard evidence from the claimant, Dr McAuley (medical director who was involved in the claimant's recruitment and worked with and had some responsibility for the claimant), Dr Fayers (chief officer who was the claimant's line manager), Mr Hutchison (associate director mental health and learning disabilities who worked alongside the claimant), Ms Bozkurk (director of finance and procurement who chaired the conduct hearing and the

attendance hearing), Ms C MacDonald (head of midwifery, who was the investigation manager in respect of the conduct investigation), Ms D MacDonald (director of HR (since 2024) who had been involved in the conduct appeal), Ms Keen (former head of HR), Mr King (organisational development and learning manager who supported during the conduct and absence management process), Ms MacKenzie (nurse director and chief operating officer who had witnessed the claimant at work and reviewed matters), Mr Jamieson (chief executive who heard the appeals) and Dr Cook (principal medical officer, Scottish Government who had seen the claimant at a meeting). Mr Maclennan (retired employee who was on the nursing bank) had given a written witness statement which was accepted as evidence.

Facts

9. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are strictly necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). There was a large amount of evidence given in this case, both in writing and orally, and the Tribunal only records the facts it had found as necessary to determine the issues in this case. Where there was a conflict in evidence, and that includes conflicts within the evidence from the same witness, as happened in this case, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case with regard to what was written and said at the time (when viewed in context). The Tribunal is grateful to the parties for focussing the issues and agreeing key facts and making it clear what the disputed position was in relation to such facts.

Background

1. The respondent is the local health board and on 30 November 2020 the claimant commenced employment as Associate Medical Director. While she was part time, her hours were increased until 31 March 2021 which would be reviewed. The claimant was an articulate and intelligent person.

2. In June 2020 the claimant had been diagnosed with Latent Autoimmune Diabetes ('LADA') and on 18 October 2020 the claimant emailed the respondent's Occupational Health team to notify them that she had been diagnosed with LADA.

3. The claimant was Associate Medical Director and was responsible for the Chief Officer and professionally accountable to the Medical Director. The role is a member of the senior management team (alongside the Chief Officer, Medical Director and other senior colleagues). She was to ensure there were robust systems and processes in place to deliver efficient and effective care and clinical care and governance systems and she was to deputise for the Medical Director where necessary. This was a senior role with key responsibilities to manage the service and work with and lead others. It was an important part of her role that she be able to work with the senior team and lead.

4. The claimant's contract of employment was subject to the Terms and Conditions of Service of the Consultant Grade (Scotland) as amended from time to time and expressly stated that any private practice undertaken would be governed by a Code of Conduct set out in the document. There are a number of relevant policy documents.

5. The **Investigation Process Policy** sets out the process to undertake a full and thorough investigation in a timely manner to establish facts. The process sets out the responsibilities of those involved and how an investigation should be carried out noting possible outcomes. If a complaint is raised, the process may be halted or the matter dealt with concurrently.

6. The **Conduct Policy** sets out a process to ensure concerns about standard of conduct, inappropriate behaviour or wilful misconduct are managed in a fair consistent and timely manner. The policy sets out the approach to be taken in relation to the investigation, hearing and appeal with appropriate sanctions, including warnings, reflection and dismissal.

7. The **Grievance Policy** sets out how complaints are deal with, an informal and formal approach and how the hearings are to progress.

8. The **Attendance Policy** sets out how the respondent manages absence. The different responsibilities are set out. The formal procedure exists to provide further support to facilitate a return to work. The policy notes that "the discussion and actions taken during the formal stages will depend on the employee's individual circumstances. While it would normally be the case that each stage of the formal process would be followed sequentially, there may be circumstances where it is appropriate to enter the process at stage 2 or 3. Where it has been agreed that there is no possible return to work, it may be appropriate to enter the process at stage 3". The policy encouraged flexibility in managing attendance and it was for the respondent how to manage attendance and whether to commence at stage 1, 2 or 3.

9. Stage 1 would involve a meeting with a manager to discuss support on return to work and how that could be achieved, nothing that if improvement was not achieved dismissal could result. Stage 2 would follow a similar format, exploring ways to facilitate a return to work. If improvement is not achieved a stage 3 hearing would be convened. That would be a hearing that explored a potential return to work and could result in dismissal if alternatives could not be identified.

10. The **Redeployment Policy** exists to create a fair process for exploring suitable alternative employment for those identified as being displaced which could arise as a result of capability. Consideration is to be given to the likelihood of a suitable alternative role arising within a reasonable period of time before engaging the policy. A process is undertaken to identify potential roles and match them with the displaced individual. Managers recruiting to a vacancy are expected to appoint from amongst matched employees unless essential criteria are not met. Trial periods and temporary redeployments are possible.

Disclosures about ligature points

11. On 13 December 2020 the claimant made a disclosure about ligature points on the Acute Psychiatric Unit ("APU") in a meeting with Dr McAuley. The

claimant said ligature points were present and gave rise to a risk. Dr McAuley acknowledged this was serious and would consider matters.

12. On 25 January 2021 during a weekly catch-up meeting with Dr McAuley the claimant made a further disclosure about ligature points on the APU. The claimant told Dr McAuley during a catch up discussion that ligature points had been identified in the APU which created a risk to patients.

13. On 26 January 2021 Dr McAuley sent an e-mail to Estates, and the hospital manager as well as other colleagues re 'ligature points and APU' as a result of the meeting with the claimant on 25 January 2021. The e-mail acknowledges that ligature points remain in the APU and that they pose a risk to patients, staff and the organisation. He asked that action be taken to address this.

14. At the end of January 2021, the claimant met with Mr Fayers, who had just been appointed, for the first time in his office. Mr Fayers was the claimant's line manager. A general discussion took place but there was no disclosure by the claimant and the discussion was general and welcoming.

Issue with locum psychiatrist

15. In February 2021 the claimant was asked to investigate a datix report (the way in which issues are reported in the NHS) regarding an allegation that a locum psychiatrist was sexually inappropriate with a patient.

Concerns raised about claimant's comments at IJB meeting

16. On 25 February 2021 Ms Macsween expressed concerns about the claimant's comments during the IJB meeting that day to Mr Fayers. She was unhappy that the claimant had levelled criticisms about at Board level without discussion which she did not consider productive or appropriate. This was not raised with the claimant at the time.

Claimant produces report regarding datix issue

17. On 7 March 2021 the claimant produced her report regarding her investigation of the datix report about the locum psychiatrist and on 9 March 2021 the

claimant sent Mr Fayers the report (via his executive assistant) and asked for an update from Mr Fayers. The claimant provided an update to Mr Fayers on the outcomes on 7 April 2021 and Mr Fayers said that he would feed the information back to the chief executive.

18. On 22 April 2021 Mr Fayers asked the claimant to capture her key recommendations in a table, making it clear who had responsibility for actioning them and by when. The claimant did not provide the table, and responded to say that she could provide such a matrix for Mr Fayers, but that someone with higher authority than her would need to action it.

Claimant raises ligature issues at command meeting

19. A silver command meeting took place on 9 March 2021 which was attended by Dr McAuley but not the claimant. Ligature cutters were discussed at that meeting and a colleague was tasked with checking if there were ligature cutters on all wards and resus trollies and, if not, ordering ligature cutters. At that meeting there was a discussion about the review of ligature points and the areas waiting for work to take place. It was discussed that due to high occupancy levels, the Works department were unable to access the areas. It was confirmed that 5 anti-ligature beds had arrived on 8 March 2021 (APU is a 5-bed unit).

Claimant's employment and secondary employment

20. Dr McAuley was unaware that the claimant intended to work as a GP while working as Associate Medical Director. The claimant had not completed the relevant paperwork to advise the respondent of this.

Claimant to investigate locum psychiatrist

21. On 27 May 2021 the claimant was asked to investigate a datix report that a locum psychiatrist was requested to visit patients at home, without appropriate PPE in the midst of the Covid pandemic.

Discussion about suicide

22. On 31 May 2021, in a weekly catch-up meeting there was a discussion between the claimant and Dr McAuley in relation to the suicide of a patient and employee of a local independent GP surgery who had committed suicide having taken medication prescribed by the surgery where they both worked and was a patient. It was the claimant who had raised this issue and suggested this was a matter for the respondent to investigate.

Meeting with Scottish Government: claimant raises ligature points – June 2021

23. On 9 June 2021 at a National Mental Health Meeting with the Scottish Government, with Mr Fayers, Mr Hutchison, Ms MacKenzie (nursing director and COO), Dr Cook (Principal Medical Officer), Ms Armstrong (Mental Health Nursing Advisor), and others, the claimant made a disclosure that there were ligature points present on the APU which posed a risk to the health and safety of patients. The way in which the disclosure was framed by the claimant suggested that no action had been taken by the respondent in relation to the ligature points. A number of the claimant's colleagues were concerned the claimant had raised this issue in the way she did, as she had not given any fore warning that she intended to raise it, and had not checked with her colleagues what action had in fact been taken. They were concerned that the way the claimant had raised it suggested no action had in fact been taken which was misleading.

Claimant raises concern about psychology services at meeting

24. On 17 June 2021 at a Remobilisation Meeting it was discussed that the CBT nurse was leaving to take up a promoted post in a hospital. The claimant believed that there could not be an effective mental health service without psychologists and felt there were risks in the way the service was configured. The discussion was heated but the claimant was not shouted at by anyone at the meeting.

Claimant reiterates her concern at further meeting

25. On 22 June 2021 there was another Remobilisation Meeting. There was a discussion about psychology services. The claimant asked when the psychologist would be replaced and what steps were being taken in the interim. The discussion was heated but not inappropriate (and the claimant was not "shouted down"). The claimant repeated the concerns she had raised on 17 June 2021 as to her belief that there was a lack of psychology services putting public at risk.

Claimant and colleague asked not to attend next meeting

26. On 23 June 2021 following the Remobilisation Meeting the day before, both Mr Hutchison and the claimant were asked not to attend the IJB meeting on 24 June 2021 and were invited to meetings with Mr Fayers and Ms Keen. The email which was sent to the claimant and Mr Hutchison says: *"I'm writing to ask that you do not attend the IJB Board meeting tomorrow (MS Teams). I will present your report and I thank you for providing this. My reason for this instruction is in light of the recent behaviour demonstrated by you both in connection with mental health and associated provision across the Western Isles. The most recent occurrence being at the remobilisation meeting on 22.06 at 5pm and previously the meeting with Scottish Government mental health colleagues at 09.06 at 3pm. I have become increasingly concerned at the reputational and operational risk that this presents to both the health and social care partnership and equally to you. To that end I will be inviting you to meet with me and Avril in order that I can share reflections and outline how I can support you going forwards. I do not wish to discuss my decision via email but in person as I am confident this will lead to a positive dialogue and agreement of the way forward. Please can you reply to acknowledge receipt and confirm you will not be attending the IJB board tabled for 10am on 24.06.21. With kind regards."*

27. Mr Fayers believed that the professional relationship as between the claimant and Mr Hutchison was not as good as it could be. He believed that they would *"spark each other mainly because they were wired differently".* As a result of

their personalities and way of working they could clash in the course of their duties. Mr Fayers did not want the clash to be public which was why he asked both individuals not to attend the meeting. He wanted to find a way that would allow the claimant and Mr Hutchison to work together and to raise their differences and views in a collegiate way (rather than being confrontational). Mr Fayers did not want to have the claimant and Mr Hutchison disagreeing in the way they would in a public forum and wanted to speak with both to find a way to help them manage their working relationship and public interactions better.

28. The Remobilisation Meeting was an informal predominately clinical network. While there can be disagreements which is encouraged, Mr Fayers did not want the claimant and Mr Hutchison to play out their disagreement in the public meeting in the way they had done, repeat given the risk to the respondent and each individual's reputation. Mr Fayers believed there was a lack of evidence underpinning what the claimant had said which was likely to lead to further concerns with Mr Hutchison. Mr Fayers wanted to be supportive and transparent by meeting with both individuals to discuss his concerns and work with them (with HR present) to find a way to allow the disagreements to be raised in a more collaborative way. Mr Fayers wanted to avoid any further deterioration in the working relationship with the team.

Claimant wants to know what the allegations are

29. On 24 June 2021 the claimant sent two emails to Mr Fayers asking for details of the accusations made against her. She says that if the meeting is a disciplinary meeting she would want her union representative present. Mr Fayers told the claimant he would let the claimant know what the purpose of the meeting is and that she was to continue with her planned diary. Later in the evening the claimant said that she had spoken with her union and wished a list of the accusations laid against her and dates with an agenda for the meeting.

30. The next day, in an email on 25 June 2021, Mr Fayers responded to the claimant's questions that she had asked in an email on 24 June 2021, and

advised her that he wanted *"to assure her the intention was to have an informal discussion around behaviours observed at the meetings listed in [his] initial e-mail"* (regarding the remobilisation meeting on 22 June 2021 and the Scottish Government meeting on 9 June 2021). He told the claimant there was no requirement for her to change her diary and that he would be in touch with dates.

31. On 15 July 2021, having received a copy of the SBAR, and 'noting it contained a list of actions taken and remedies', Dr Cook was content there was not a 'need to pursue the matter further with the respondent' with regards to the ligature points raised at the meeting on 9 June 2021. Dr Cook believed the respondent had taken appropriate action with regard to ligature points.

32. On 26 July 2021 the claimant sent an email to Mr Fayers saying, *"I am still waiting for a list of exact reasons why I was excluded from the IJB meeting"* and asked for the date of the meeting. That day Mr Fayers sent an email to the claimant noting that his HR colleague had been absent and he was trying to identify another person to allow a *"reflective conversation"* to take place with the claimant. He said he would share his thinking with her about the meeting that had given rise to his concerns.

33. The next day the claimant's BMA representative sent an email to Mr Fayers saying *"Dr Hertel has still not been given any indication of the nature of your concerns or the behaviours that led you to issue this instruction to remove a significant part of her working responsibilities".* Mr Fayers contacted the claimant with possible dates for the meeting.

Claimant meets Mr Fayers

34. On 12 August 2021, a meeting took place with Mr Fayers, the claimant, and her BMA representative where the meetings on 9 June 2021 and 22 June 2021 were discussed with the claimant and Mr Fayers shared his view as to what had happened and how matters can progress and improve.

35. The next day Mr Fayers sent an email to the claimant saying *"Left you a voicemail. Wondering if we use time on Monday in person for confidential 1:1*

and opportunity to share as we discussed yesterday. Please let me know if you'd like to do that. Can meet in my office for tea".

36. The claimant replied saying: *"I think its best if we continue as is. There is no more to say after yesterday."* She also noted *"we need to be sure that those ligature points have now been removed".* Mr Fayers replied saying he would check about the ligature issue. He concluded saying *"My thoughts about Monday was re sharing about past events so I can be in a better position to support. My reflection from our conversation is that there is past experience that has been uncomfortable and the option to share in confidence is something we both would find as helpful? Happy to chat on phone or teams if it helps explain".* He offered times to meet.

Claimant asked to evidence her negative view

37. On 12 August 2021 a GP contacted a forum to express concerns about infrastructure issues. He said *"despite repeated requests over the past year we have not been supplied with computers that are physically able to cope with video links or networked clinical systems in a robust way. Terminal services still have not been sorted out. We haven't got a robust way to allow staff to work from home or to allow good team working over the network".* That email had been sent to a large number of individuals within the NHS.

38. Dr McAuley noted that the claimant and another had not been included in the distribution list and sent it to them noting the GP was feeling uncomfortable. The claimant replied saying *"Can't disagree with anything he said and I think other practices would say the same. Our antiquated IT infrastructure both hard and software is wasting precious professional's time when we can ill afford it never mind Teams (although most can only get Teams on their phones and can't use the hardware in their practice). Just checking blood results takes hours of watching "the wheel of doom". I am pretty sure we could find evidence of patient harm from lack of access to the most basic patient information as well as evidence of burnout and hopelessness among clinical staff. When Michelle* [the other person to whom Dr McAuley sent the email] *and I visited recently there was an overwhelming feeling that anywhere south of Harris has*

been left to find for themselves, the word "abandoned" was used more than once and that there has been no learning or improvement I communication. How can the team manage multiple outbreaks in real time against a huge remote geography without the most basic digital tools working well and consistently? How do we improve things?".

39. The claimant had sent her email to Dr McAuley and her colleague but copied it to Dr Watts (Director of Health) and Ms McKenzie. Dr Watts replied the next day expressing concern about the statement the claimant made about finding evidence of patient harm from lack of access to basic patient information. She said any such evidence must be produced to the clinical governance team for investigation. While there had been some glitches a plan had been implemented and appear to work. She believed the public health workforce had been managing well with the technology they have and while there is always potential to do better and learn, dedicated staff linked to the community is invaluable.

40. A few days later the claimant replied saying her comments were based upon her observations and that IT had not been fully utilised. She said GPs had variable and unreliable access to Teams most using personal devices which can lead to missing vital information. She explained how time consuming tasks can be and that perhaps learning points can be sought from practices that had developed successful systems. She said the team, which does an amazing job and saves lives every day, deserves the best.

41. Dr Watts did not request any further information or evidence from the claimant.

Claimant raises issues at 30 August 2021 Remobilisation Meeting

42. In August 2021, at a Remobilisation Meeting there was a discussion between the claimant and Ms Keen regarding staffing issues. In particular, recruitment and retention were discussed. The claimant said that staff were unhappy, suffering from mental health issues, not getting support from the respondent and were too frightened to come to HR. The claimant said that the respondent was not seen as a good employer. Ms Keen took the criticisms the claimant

made personally and was frustrated. She was sharp with the claimant during the exchange. The claimant had not stopped talking and Ms Keen felt frustrated by the claimant who had made unsubstantiated criticisms. The chair of the meeting sought to bring the conversation (which was heated but did not involve shouting) to an end and move matters on.

43. Later in the day the claimant sent Ms MacKenzie an e-mail saying *"I am sorry I caused an upset in the meeting. It was not my intention. I just wondered if there was a different way to approach recruitment and retention that would make us a more attractive place than other boards and if there was a different way of looking at the problem".*

44. The next day, on 31 August 2021, Ms Keen e-mailed the claimant wanting to pick up on comments the claimant had made publicly around staffing issues relating to recruitment and retention. The claimant had stated staff were unhappy, suffering from mental health issues, not getting support and were too frightened to go to HR which the claimant had said caused challenging recruitment. Ms Keen considered the claimant's statements to be of a very serious nature. She could not ignore them and needed to understand the reasons behind them when Ms Keen was not aware of any evidence for the comments. Instead there was evidence to the contrary (setting out 7 examples of positive steps that had been taken) and noting positive statistics.

45. Ms Keen said that as Director of Human Resources and workforce Development being responsible for staff health and wellbeing for the Board she was shocked to hear the claimant's assertions which conflicted with the evidence that had been gathered over 20 months or so. She asked the claimant to provide the evidence she had to find out what can be done. For Ms Keen the culture of the respondent is hugely important as is reputation and what the claimant said publicly was very serious and could cause huge cultural and reputational damage if not addressed appropriately.

46. The claimant chose not to respond to the request for information.

Issues raised with claimant about conduct

47. On 31 August Mr Fayers sent the claimant an email headed "Support going forwards" saying: *"Reflecting on the meeting with your BMA representative we agreed a 1:1 with myself would be helpful. I'm aware that following on from our meeting there have been a further 2 occasions when senior colleagues have raised concerns (Director Public Health and Director of HR). I am seeking to outline what support you need to help you flourish in your role. Should you not want to meet with me individually I will need to take advice about how best to go forwards."*

48. The claimant replied that day saying*: "I cannot have a one to one with you as you were part of the bullying that I am now having to tolerate. You are in a position of power over me. I had told you that if you were upset with me you should tell me straight away and explain why. But instead you chose to send me a threatening email accusing me of unspecified charges. There was no thought to duty of care by my employer. It was pure and simple bullying to silence me."*

49. She continued: *"Yesterday I tried to suggest we look at recruitment and retention in a different way and that in general it can be difficult for employees in any organisation to approach HR with concerns because of the fact that they can take their job away. Even many of the GPs have contacted me in confidence to say they would be willing to talk but it must be anonymous because they do not want to be identified to the health board. I have interviewed people here who have told me how scared they are to speak out and when they do they are vilified and driven out of the organisation. In fact I often get contacted by people and told how hard it is. Others won't raise issues such as the ligature points because of the vitriol that was pored on them before. People have lost their jobs and left because of this. I cant break their confidence and I wouldn't because of what is happening to me. Its obvious they have a good reason to be scared after the response I got from you and the director of HR after I raised 2 patient safety issues in a perfectly reasonable way at appropriate meetings. I was attacked and shouted at and talked over. No one said a thing no one addressed the suggestion I was*

making or suggested that we engage in a debate on different ways of looking at things. Now I have an email from her telling me what I said, I know I didn't and what she has accused me of is her perception. I wonder if there is a recording and we can look at the transcript. There is no local procedures for raising issues of bullying only the national document… I would prefer to engage in open and honest debate without threats and raised voices and unfounded allegations something I have said all alone. But sadly this has not been the case".

50. Mr Fayers replied thanking the claimant saying: *"I am seeking to help and support you. I'll take time to reflect on your words and come back with a suggestion".*

Claimant makes further disclosures

51. In the first week of September 2021 the claimant called the whistleblowing hotline to raise concerns about the failure to remove ligature points and the unreasonableness of not providing what she regarded as sufficient CBT service and other concerns.

Claimant told she has to have a "formal meeting"

52. On 15 September 2021 the claimant was sent an email headed "Meeting with Dr McAuley" saying he wanted to "have a formal meeting" and suggested 20 September. While the claimant could bring a professional representative, Dr McAuley was not planning on having anyone with him. The claimant was given the option of having it face to face or remotely. The claimant replied saying she could not arrange a companion in time. She said she would need time to prepare if it was formal and that "presumably I will be accused of something" and so she wanted to know what the meeting was about.

53. The response sent to the claimant stated: *"for clarity the meeting itself is not formal".* She was told Dr McAuley *"is simply seeking to discuss some concerns that have been raised with him. Should you choose not to attend, he will arrange to send a letter confirming what he was seeking to discuss".*

The letter ended *"I hope this helps to clarify the use of the word "formal" in the original email.*

54. The claimant replied saying she would prefer a letter detailing the concerns and then have a meeting to allow her to discuss her concerns with her union representative. The claimant also said that *"In the meantime I have realised how seriously the situation is affecting my physical health and have discussed this with my own GP who has offered to issue a 'sick note'. I will send it to you when I receive it".*

Claimant told about investigation

55. On 16 September 2021 a letter was issued to the claimant by email (and she was given the chance of also being sent a hard copy if needed). The letter was headed *"investigation notification"* and told the claimant Dr McAuley as medical director had requested an investigation take place *"on the following allegations".* The first was that serious unsubstantiated allegations had been made by the claimant against the respondent at national and local forums. The claimant had been asked to provide evidence but failed to do so which could bring the respondent into disrepute and create reputational damage. Secondly the claimant had failed to follow a reasonable management request by refusing to attend meetings with her line manager.

56. The claimant was told the investigation would be conducted in line with the Investigation Process and a copy was enclosed. She was told the allegations related to personal misconduct and not professional conduct and the matter would proceed under the disciplinary procedure. The claimant was told of her right to appeal that classification. The investigation manager would be Mrs MacDonald who would arrange to meet the claimant.

57. Later that day the claimant sent an email asking for details of the allegations. Dr McAuley responded on 20 September 2021 acknowledging the fit note the claimant sent noting a return to work meeting can be arranged once the claimant feels fit to return to work and said: "the crux of the investigation I have instructed is to formally identify or confirm (or indeed not) allegations of an unsubstantiated nature attributed to yourself". Dr McAuley said he had

asked that the investigation progress expeditiously and the findings would be shared with her.

Claimant absent by reason of sickness

58. On 16 September 2021 the claimant's sickness absence commenced. She remained on sick leave until the date of her dismissal.

59. On 22 September 2021 the claimant advised Dr McAuley that she would not be able to return to work until the investigation has happened *"not just because it is making me unwell physically but because I cannot do my job".* Dr McAuley replied advising the claimant that the investigation *"is based on concerns raised by a number of individuals from a variety of background and roles."* The investigation is to clarify if issues of personal conduct have occurred. He advised that the claimant had been signed as not fit to work and she had been referred to the Occupational Health service (which happened on 23 September 2021). He said that if the circumstances preclude her from returning to work when medically fit, he would discuss options to support the claimant and concluded offering any support the claimant needed.

Claimant told about respondent's representative at board meetings

60. On 28 September 2021 Dr McAuley wrote to the claimant saying: *"As you are aware we are required by DL (2020)21* [a Government directive] *to have appropriate representation of Primary Care at Board Meetings. With the appointment of a Chief Officer, this role as Primary Care Lead at Board Meetings will now sit with the Chief Officer, Mr Fayers. Thank you for your input to and participation in Board meetings to date."*

61. This was not a formal part of the claimant's role but the claimant had covered the role when the Chief Officer had not been appointed and during the start of his employment. Dr McAuley had allowed Mr Fayers time to become acquainted with the role and decided that he should assume the duties, which was technically his responsibility as Chief Officer.

Claimant tells respondent while absent she will work as a locum GP

62. On 24 September 2021 the claimant e-mailed Dr McAuley advising that she was awaiting contact from the investigator and considered that to be a *"very cruel punishment for undefined crimes which I do not believe I have committed. A form of torture as defined by the Oxford English dictionary* [from which she then quotes]. She concluded: *'While off sick from NHS Western Isles I will continue to do the occasional locums as a GP'.*

63. Dr McAuley replied to the claimant confirming that the investigation was around issues of personal conduct and more detail would be given when available. *"With respect to your working as a doctor when signed as unfit to work, my understanding is that it would be inappropriate and pose employment law issues. I would ask that you do not work as a doctor during sickness absence."* He noted that if her BMA rep thought differently he would welcome their view.

64. On 26 September 2021 the claimant said she had checked with her BMA representative who had informed her she could work as a GP locum when off sick as she *"was unwell due to bullying in the role by the respondent"* and that had nothing to do with working as a doctor in a different environment. She said she needed to inform her employer but not seek permission. She said it may help her mental health as the longer an employee is off work, the more damaging it is to their wellbeing.

Investigation into claimant's conduct commences

65. From 28 September to 28 October 2021 Mrs MacDonald carried out interviews as part of her investigation into the issues relating to the claimant's conduct.

Claimant submits grievance

66. On 1 October 2021 the claimant submitted a grievance which was received by Ms Bozkurt on 4 October 2021 who contacted the claimant on 8 October 2021 offering to meet and discuss next steps, including exploring early resolution. The grievance stated that the claimant believed she was being

bullied because she had raised issues of patient safety, including concerns about ligature points, the lack of psychology provision, withdrawal of the listening group, alleged incompetent and incomplete handling of a datix incident and various communication and relationship issues with line manager and senior staff. The claimant said she believed she was being subjected to offensive, malicious behaviour and being humiliated, denigrated and undermined in her role by senior management. She wanted a formal investigation.

Issues raised about claimant's work as locum while on sick leave

67. On 1 October 2021 Dr McAuley emailed the claimant advising that he had not been aware the claimant had worked as a locum GP previously, which was what her earlier email suggested. He said that as an employee of the respondent she was legally obliged to advise the organisation of any secondary employments as part of her contractual terms and conditions. He asked for additional correspondence documenting when she commenced any form of secondary employment, and suggested she took advice on working with another employer whilst off sick. He said this would be added to the ongoing investigation *"to ensure any further information into your secondary employment is gathered".* He noted Occupational Health ("OH") had difficulty contacting the claimant and they were keen to arrange an appointment. He noted the claimant's comment about wellbeing and working and said he would want the investigation concluded as soon as possible and the claimant should progress with OH. He noted the claimant's comment that she felt she was being bullied and he referred to the Bullying Policy and suggested she make a complaint if she wished. He suggested the claimant speak to her BMA representative and when well enough would discuss this with the claimant *"to ascertain what has happened and see how we can address any unacceptable behaviour and situations".* He concluded by saying if the claimant needed any further support she was to ask him.

68. The claimant responded to say that she was *"shocked"* that Dr McAuley was not aware that she wanted to work as a locum as she had told him *"several times"* before. She also confirmed that she had taken advice on secondary

employment from the BMA and did not understand what was being asked of her in relation to pre and post-employment checks. She also alleged the OH form had been delayed by the respondent which was part of the bullying directed at her since raising concerns about patient safety. She said removing part of her role (exclusion from the Board meeting) was another example of bullying making it difficult for her to do her job. She said she was still waiting to hear from HR and had no clear list of the allegations against her and yet understood the investigation was being carried out without her knowledge or involvement.

Claimant calls INWO

69. During the first week of October 2021 the claimant called the Independent National Whistleblowing Officer ("INWO").

Occupational health

70. On 7 October 2021 the first OH report was sent to Dr McAuley. Her sickness absence was *'stress reaction to reported complex work related issues'.* She showed no difficulties with daily living and she was medically fit for work but resuming work without resolving the issues could affect her and the consultant physician recommended the issues be resolved. She was medically fit to attend and participate in the investigation.

Claimant says she is unaware of allegations

71. On 13 October 2021 the claimant emailed Ms Bozkurt and Mr King who were dealing with the claimant's grievance as part of the early resolution process and said that as this was part of the early resolution process she did not intend to discuss the detail of her complaint or any supporting evidence. She said it would help to be given details as to the allegations to allow her to defend herself. She said she had not been contacted by the investigator which was stressful. Until she had been given details she did not think an early resolution would be possible. She said she had contacted her solicitor. Mr King replied as the issue related to process to confirm the early resolution meeting would focus on discussing early resolution possibilities. The claimant replied wanting

the meeting recorded to assure her the process was fair. She also said that she wanted *"to know what I am being investigated for".*

Claimant told about process

72. On 19 October 2021 Mr King responded, advising that the allegations referred to by the claimant were *"in relation to the separate investigation"* which was *"part of a separate process",* which he and Ms Bozkurt were not involved with. Early resolution of the claimant's grievance was then closed, and the grievance proceeded via the formal route.

73. On 26 October 2021 Mrs MacDonald provided a timeline to the claimant and her BMA representative to explain what had happened to date in terms of the investigation. She stated that she hoped the claimant was well and that it would not be too long before she was in contact. The timeline noted that delays had been caused by school holidays, COVID isolation and clinical shifts. The investigation had begun in September with 14 employees involved, the aim being to conclude notes by 4 November 2021.

Confirmation as to position regarding sick pay

74. On 29 October 2021 a payroll officer wrote to the claimant noting her absence commenced on 16 September 2021 and her right to full pay would end on 16 October and with half pay ending on 16 December.

Process continues

75. During November 2021 the claimant made a written report to INWO.

76. On 4 November 2021 the claimant's BMA representative emailed Mrs Macdonald to request a date when the claimant would get details of the allegations.

Claimant told of conduct allegations

77. On 8 November 2021 Dr McAuley sent the claimant (and her representative) a 5 page letter entitled *"Investigation".* He said he was the commissioning manager and Mrs MacDonald was the investigating manager. He had been

seeking information as to the specific incidents under investigation and had now been given details. He made it clear the allegations were allegations and the claimant would be given the opportunity to set out her response.

78. The letter first set out 7 matters – being inappropriately critical at an IJB meeting on 25 February 2021, making comments about poor clinical note keeping with no basis, negative comments about staff welfare without evidence being provided when asked, raising a concern at a national meeting about ligature status which had not been discussed locally and which was not substantiated, suggestion staff departures were for negative reasons (contrary to reality), comments about suicides being greater than the reality and suggesting race was a factor in an ongoing matter when it had not been raised.

79. The letter then said there were 6 potential conduct issues relating to the matters set out – inappropriate manner of presenting and setting out concerns, the appropriateness of concerns being raised at a particular place or time (without discussing matters internally), potential lack of evidential basis for allegations (and failing to substantiate comments made), serious and potentially damaging nature of statements made without care or tact, the potential impact on the organisation and allegedly failing to follow a reasonable management request to attend a meeting with line manager.

80. He noted that the claimant had raised a grievance and Ms Bozkurt and Mr King had decided the matter be progressed by investigating the complaints made. He said that it made sense for Mrs MacDonald to investigate the grievance too. He gave 6 reasons for this – having the same person progress matters would avoid any further delays (and the amount of issues would require significant investment of time and it made sense to focus matters), occupational health supported a prompt resolution, there was a degree of overlap in the issues and they may be inextricably linked, the investigation process policy makes it clear that if a grievance relates to a matter under investigation they can be dealt with concurrently, which was the case here, it avoided a duplication of effort and as the investigation is about establishing

facts, rather than making findings, there was no prejudice in having the same person investigate both matters.

81. He said that once the investigation was complete, the intention was to lead with the grievance hearing before a different manager and then consider whether any disciplinary issues arise. He sought comments within 7 days, recognising the impact this had upon the claimant.

Claimant raises concerns

82. On 14 November 2021 the claimant raised concerns about the failure to remove ligature points and the position which the claimant considered to be unreasonable in relation to the CBT service and other concerns. She raised the same concerns in writing on 29 November 2021 with INWO.

Occupational health report

83. On 6 December 2021 an updated report was received from OH which said that although the claimant feels ready to engage with work the complex work related stress issues remain outstanding.

Conduct investigation meeting

84. On 12 January 2022 the claimant attended a conduct investigation meeting and set out her position in relation to the issues being considered. Attempts had been made to meet with the claimant sooner but this was the earliest available time.

Concerns investigated

85. On 14 January 2022, a request was made by the respondent for an external body (another NHS board) to investigate the claimant's whistleblowing complaint raised via INWO. On 19 January 2022 the claimant was told about the process and given the issues arising it would take longer than the optimal 20 days due to external input. The claimant had confirmed she was happy with the emotional, psychological and professional support she had.

Sick pay and sickness

86. On 31 January 2022 the claimant's BMA representative wrote to Dr McAuley saying this was the third time the issue of pay had been raised. Dr McAuley had not received any prior communication about the issue (and previous requests had not been forwarded to him). Dr McAuley had not received any previous communication. The representative said that as the claimant's absence arose because of the work related issues, full pay should be reinstated for the claimant (by exception). The next day Dr McAuley responded noting that discretion to extend sick pay can be exercised in exceptional circumstances. That could include where so doing would materially assist recovery of health. He did not consider paying the claimant in this case would assist her recovery and accordingly could not exercise his discretion to provide the claimant with pay when she was off work. He hoped the claimant's health improved.

Conduct investigation report completed

87. On 20 April 2022 Mrs MacDonald submitted her conduct investigation report which runs to 27 pages. The report noted the matters she had been asked to consider and identify whether there was any merit. Interviews had taken place and documents had been considered. She considered each of the 7 points raised and sets out her findings and then examines the 6 potential conduct issues and sets out what she found from the investigation. She then summarises the content of each of the interviews, and then reaches her conclusion noting that during the claimant's interview there was a reluctance to answer some questions as they were not considered to be part of the allegations which made the fact finding difficult.

88. Mrs MacDonald found that there appeared to be a collective consensus the claimants behaviour at formal or informal meetings can be more disruptive than productive with the claimant often making sweeping statements that are not followed up with evidence. It had been suggested by many of the witnesses from different roles in different meetings that the claimant catastrophises events, which she denied. The claimant had been described

as misinforming with inaccurate information, bulldozing ahead without listening to others, making sweeping statements without evidence. The claimant had used alarmist and negative words, such as being attacked and shouted down which may have been how she felt but that was not found to be an accurate description of the meetings. The claimant had preconceived ideas about situations. She considered the claimant's actions could potentially bring the respondent into disrepute. There was evidence some of the claimant's comments to local staff indicate her own feelings. The claimant had repeatedly referred to having previous experience of bullying. There was a tendency for the claimant to be overly critical and blaming of people, looking at the issues from her own viewpoint. It was accordingly recommended the case be referred to a conduct hearing.

Grievance report completed and communicated to claimant

89. On 3 May 2022 the grievance investigation report was completed. The total report with attachments ran to 254 pages. The report noted that the claimant had asserted that she was being bullied, humiliated and undermined in her role by senior management. The claimant had not escalated matters prior to raising the grievance and it had been clear that early resolution was not appropriate. While the claimant had made it clear she had been bullied before, her line managers did not recall being told of this at the outset of her employment. Mr Fayers became aware of it in June 2021. Dr McAuley noted the claimant had made it clear she had worked in challenging working environments before but not said that she had been bullied.

90. With regard to ligature points, the claimant had argued she had constantly raised this as an issue but nothing was done. In fact an action plan had been devised in 2017 with a corporate risk register which was reviewed by Ms MacKenzie when she came into post in 2021 with the health and safety team considering matters in April 2021. It was clear work had to be done but the issue was how the claimant had escalated matters at a Government meeting without any prior notice to her colleagues. Mr Hutchison had said he only learned of the issue at the Government meeting. There was no documentary

evidence that the claimant had escalated matters via email, risk management or datix. The matter was being addressed.

91. With regard to psychology services, the claimant had argued there were shortcomings with the service. She argued she had been excluded from helping by Mr Fayers and Mr Hutchison but there was no evidence to support that belief, and Mr Fayers and Mr Hutchison denied it. The claimant had been unable to evidence her statement that there was a government requirement with regard to specific psychology services (which did not seem to align with what the Government had said).

92. With regard to the conduct of Ms Keen, the claimant believed HR were "having a go at her". No specific detail had been provided. A discussion between the claimant and Ms Keen at a public meeting had become heated. Ms Keen had said the claimant had a "habit of talking at people and throwing out comments with no backup". The claimant had not provided evidence to substantiate what she had said at the meeting which had frustrated Ms Keen. The claimant had not raised any issue with Ms Keen directly.

93. Mr Fayers did not think he had a difficult relationship with the claimant. He had said the claimant had not raised any issue with him. There was no evidence of bullying. The exclusion of the claimant (and her colleague) from a meeting was *"poorly executed"* since a simple phone call would have sufficed. There was little thought given to how such a message would land but there was no evidence of bullying.

94. The claimant had raised concerns about datix incidents having said she was told people avoided raising issues *"for fear of punishment from senior management".* No evidence had been provided to support that and none could be found.

95. There was no evidence to support the claimant's assertion that occupational health referrals had been delayed by the respondent. The report stated*: "My impression is that at times the claimant interprets situations as bullying that cannot reasonably be seen as such. I do believe she is genuine in stating she*

believes it to be so but from my perspective it is an overreaction to the situation."

96. The investigation found many of the claimant's allegations were unfounded with no material to support her belief. The claimant had referred to gossip which was disturbing, there being no factual basis.

97. The investigation also found *"themes"* from witness statements that indicate the claimant's approach in raising issues was inappropriate with the claimant making comments without evidence to support them. Four examples were given when during the grievance process the claimant had made comments which she could not support with evidence. There was no evidence that the claimant was bullied nor that she had been bullied for raising matters of safety. In short, while the claimant genuinely believed she had been the subject of inappropriate behaviour, no evidence had been found to support it.

98. On 6 May 2022 the outcome of the grievance investigation was sent to the claimant. Having thoroughly assessed the claims there was no evidence to support the assertion and the grievance was not upheld. She was advised of the right to appeal.

Claimant told about outcome of whistleblowing complaint

99. On 16 June 2022 the respondent's response to the claimant's Whistleblowing Complaint was issued to the claimant. The concerns the claimant had raised were complex and it had taken time to investigate the issues objectively. The claimant had raised 8 specific complaints.

100. The first was an unreasonable failure to remove ligature points. That complaint was partially upheld as the investigation found that while some work had been done, more should have been done and with greater urgency. Further risk assessment has been undertaken to progress the work.

101. The second complaint was about an unreasonable failure to provide psychology services. The investigation found an improving picture with some continuing challenges but matters were being addressed and the complaint was not upheld.

102. The third complaint was an unreasonable failure to assess and mitigate suicide risk. A suicide prevention action plan had been created and implemented which was credible and deliberate with a connected nd monitored multi agency group delivering against the plan. That complaint was not upheld.

103. The fourth complaint related to an unreasonable failure to conduct a review into a suicide. There had been no obligation to do so and that complaint was rejected.

104. The fifth complaint was about unreasonable failures to consider and act on recommendations from incident investigations. None of the complaints in third heading had been upheld following the investigation.

105. The sixth complaint was a failure to handle concerns in line with national whistleblowing standards. While the respondent had mostly complied with the standards, on one occasion an update was provided over 20 days later which led to the complaint being partially upheld to that extent.

106. The penultimate complaint was of unreasonable failures to protect whistleblowers from detriments. There was no evidence to support that complaint.

107. The final complaint was that there was a failure to maintain a culture that values and acts on concerns of staff. This had not been substantiated.

108. The claimant was advised as to INWO who could progress matters if the claimant remained dissatisfied with the outcome.

Whistleblowing issues investigated

109. On 20 July 2022 INWO advised the respondent that they were investigating a whistleblowing complaint.

Occupational health report and support

110. On 7 September 2022 a further OH report was provided in respect of the claimant received which said *"the main barrier for a return to work at the*

present time would appear to be feelings of stress and anxiety, which she attributes to organisational difficulties at the workplace related to the disciplinary process" and goes on to say *"it is likely that the effects of an unresolved dispute on her current stress and anxiety symptoms may be exacerbated further if the hearing is postponed and the organisational difficulties are not mutually addressed effectively and in a timely manner. Therefore, this may remain a barrier for her to return to work."*

111. On 7 November 2022, a further OH referral was submitted for the claimant confirming she had been suffering with Covid and asking for assistance in supporting the claimant with a view to having a hearing take place.

Further occupational health report

112. On 7 December 2022 another OH report was received in respect of the claimant which stated the claimant *"is requesting few more weeks to prepare her defence and to organise the hearing during the new year."* That was granted.

Conduct hearing – 13 February 2023

113. On 13 February 2023 the conduct hearing took place. The claimant attended with her union representative and the hearing was chaired by Ms Bozkurt assisted by Mr King. Ms Anderson (lead nurse) was in attendance as was the investigation manager. The hearing considered the 7 points within Ms Macdonald's report with the claimant being able to provide her full response.

114. Ms Bozkurt told the claimant that *"she did not like to see* [her] *upset, and asked her to blow her nose".* The note of the hearing records that *"Mr Anderson said that he felt that the advice to 'just blow your nose' was inappropriate and he had noticed that Ms Bozkurt had almost said "pull yourself together" but she had stopped herself".* Ms Bozkurt apologised for her comment, stating that she had not meant it in any derogatory way, and it was said to support her. Mr Anderson thanked Ms Bozkurt for her apology.

115. At the end of the hearing, Mr King asked the claimant and her representative if they felt that they had had a reasonable opportunity to put forward the

claimant's concerns and that it had been a fair hearing. The claimant's representative said he would like to thank the panel for listening, and he was happy with how it had been approached and how the investigation team had brought their case forward. He thought that a fair opportunity had been provided. The claimant agreed. The hearing was not handled in a combative way. It was fairly managed.

Outcome of conduct hearing

116. On 14 March 2023 the outcome of the conduct hearing was issued to the claimant giving her a First Written Warning with mediation a condition of the outcome. The letter noted that the issues arising had been complex and it had taken longer than ordinarily expected to complete the process. The allegations were set out and the claimant had confirmed she had received the report and papers prior to the hearing and had submitted a statement of case. At the end of the hearing a discussion took place as to how a return to work could be facilitated and discussion took place with the claimant's line manager, the medical director, chief operating officer and Mr Hutchison.

117. With regard to the first allegation, the claimant being inappropriately critical at a meeting on 25 February 2021 the report found a theme of perceived inappropriate criticism aimed at the respondent but there was a lack of evidence to support this allegation which was not upheld.

118. The second allegation was comments about poor note keeping. While there was no written evidence 3 individuals had confirmed the claimant had made such comments and the claimant had apologised not for any allegations but for any misunderstanding. In the absence of sufficient evidence, the allegation was not upheld.

119. The third allegation was negative comments about staff welfare at work made at a remobilisation meeting on 30 August 2021 and the claimant failing to respond to Ms Keen's request for information. Witnesses had confirmed what the claimant had said and both the claimant and Ms Keen had apologised for their behaviour at the meeting. The claimant had failed to reply to Ms Keen's request for evidence to substantiate what the clamant had said. While that is

not normally a conduct issue, it was in the context of a long email from Ms Keen which was a reasonable request in relation to a serious matter the claimant had raised. There were several witnesses who confirmed the claimant made negative comments about staff welfare with no evidence. That was a consistent theme of behaviour identified by several individuals and the allegation was upheld.

120. The fourth allegation was that at the meeting on 9 June 2021 the claimant had raised ligature issues in the presence of the Scottish Government which had not been discussed with service leads prior to raising it at a national level which was not substantiated with evidence. The issue had been raised by the claimant who had not seen all the work that had been done. The report noted the claimant has the right to raise matters of concern but it was the way in which the concerns were raised, without checking with colleagues all the facts, that raised a difficult with colleagues. Given the claimant was raising a clear and genuine area of concern, the allegation was not upheld, but better communication and investigation should have been undertaken prior to the meeting to avoid a breakdown in communication.

121. The fifth allegation was that the claimant had raised negative and unsubstantiated comments and concerns about recruitment and retention. There were no minutes of the meeting and the claimant had been unable to share the information as colleagues did not wish their details disclosed. The allegation was not therefore upheld.

122. The sixth allegation was that the claimant made comments about suicides which was not accurate in terms of the evidence. The claimant had made the allegation based upon information within a newspaper but the reported information was incorrect. This was found to be a further example of the claimant not checking the position prior to raising an issue and the allegation was therefore upheld.

123. The seventh allegation was that the claimant had suggested race was an issue in relation to a matter when it had not been raised. The report stated that the claimant had taken the meeting out of context and there was no

underlying racism. Whilst the claimant's comments about diversity were ordinarily acceptable, it was tied to an unfounded allegation of bullying. The allegation was therefore upheld.

124. Finally it was noted that the claimant had failed to follow a reasonable management instruction by refusing to attend meetings with Mr Fayers her line manager. The claimant had said she attended regular meetings with Mr Fayers but had refused to attend an in person meeting with her manager alone as she had been bullied before and felt this was another form of bullying. The report found the meeting to be supportive and upheld the allegation.

125. The report noted that the 5 conduct issues were identified in relation to the allegations and incidents that were upheld – inappropriate manner of presenting and communicating, failing to investigate and clarify matters before raising, having no evidential basis or providing no such basis, a potential absence of care and tact in making serious and potentially damaging statements and the potential impact upon the respondent.

126. The report concluded there was evidence of a repeated negative and potentially damaging behaviours that amounted to misconduct including statements made in public that were not correct or proven which contributed to a breakdown of trust with colleagues within a short period of employment. As a consequence, a first written warning was to be issued, to be disregarded for conduct purposes 6 months following a return to work.

127. Under the heading *"next steps and working relationships"* Ms Bozkurt stated that she had a *"grave concern"* in relation to working relationships going forward. That was as much a concern for her as the allegations which was why she met the senior managers. In her experience fully factoring in the practicalities and requirements of a return to work is key to success. Colleagues perceive the claimant to be over critical and unaware of the effect of that (and often unsubstantiated) criticism on teams. The theme found from the interviews was broken trust with colleagues.

128. Ms Bozkurt asked the claimant to reflect careful on what was said in relation to the perception of there being a disconnect between what the claimant says

and the reality of the situation. There were repeated issues of the disruptive effect at meetings, including interruptions and not letting others speak. Of the 13 staff interviewed, 10 expressed concern about the claimant's behaviour, who are people of high ranking status from different areas who know what behaviours to expect. The claimant would be required to work with these people going forward. Work was needed and support will be offered. The claimant would need to reflect and engage. The claimant would require to interact with Mr Fayers and line management would require to operate effectively.

129. The claimant had said she was interested in exploring mediation which was considered an important part of the return to work which would depend upon the claimant's reflection. She concluded that based on all the above it is a condition of my outcome and a successful return to work that you engage in mediation with Mr Fayers, Mr Hutchison and Dr McAuley (and others you suggest as appropriate), agree as part of mediation a behavioural contract or protocol in terms of how the claimant would work professionally moving forward and overcome the issues. She would attend a separate meeting with Mr King and Mr Fayers as line manager to consider and reflect on organisational policies for raising concerns and the appropriate process to follow when raising concerns. The claimant was encouraged to raise such concerns but that should be done appropriately and from an informed perspective.

130. A mentor would also be appointed to provide support to allow a successful return to work and cope with the pressure, who would be impartial and understanding of the role.

131. A mediator was suggested to progress matters and a referral to occupational health was suggested to explore when the claimant would be fit to return to work on a phased basis and to identify if her health would allow her to attend mediation.

132. The letter ended by noting the right of appeal and that the claimant and her representative had felt the hearing had been fair.

Claimant appeals outcome of conduct hearing

133. On 26 March 2023 the claimant appealed the conduct hearing outcome arguing that she was not guilty of the allegations that had been upheld. She argued she had a duty to report the issues she did and could not carry out her role if her *"hands were tied by the threat of dismissal".*

134. On 12 April 2023 the claimant commenced Acas Early Conciliation.

135. On 19 April 2023 the claimant was advised in writing that the appeal would be heard by Mr Jamieson, Chief Executive, who was independent.

Occupational health referral and outcome

136. On 26 April 2023 an OH referral was submitted for the claimant noting the respondent wanted the claimant back to work as soon as well enough, anticipating a period of phased return. This referral was to ascertain time scales noting the likelihood of mediation meetings and mentoring.

137. On 2 May 2023 the claimant was formally diagnosed with Adjustment Disorder and on 10 May 2023 an OH report was provided to the respondent stating the claimant *"has been on sick leave since September 2021 due to work-related stress"* and that she was not fit to attend the appeal hearing noting she *"has been recently assessed by a specialist and she has been referred for a specific treatment which she is currently waiting for"*. It stated: *"Given the challenges and the complexity of the situation, a return to work would be unlikely if a mutually acceptable way forward is not agreed between employee and employer",* noting that her *"feelings of stress and anxiety, which she attributes to organisational difficulties at the workplace"* are the *"main barrier for a return to work".*

138. On 24 May 2023 an Early Conciliation Certificate was issued.

Ligature assessment report

139. On 31 May 2023 the independent review report in relation to the ligature assessment for the respondent was issued which said: *"efforts have been made to mitigate to a degree a number of ligature points, however only this is*

partial and significant risks remain" and that *they "were surprised to find the completion of risk assessments tended to be at a higher level (senior management) than our own board".*

Stage 3 attendance management meeting

140. In June 2023 the respondent considered that it was necessary to manage the claimant's absence via the Attendance Policy and decided to progress to stage 3, rather than via stages 1 and 2 in light of the absence to date (which had exceeded any other employee's absence) and given the need to progress.

141. On 19 June 2023 the claimant was invited to a Stage 3 Attendance Management Hearing to explore a return to work. The letter noted that it had appeared the claimant had made a public amendment to her social media channel stating she was no longer an employee of the respondent and the respondent indicated it was keen to facilitate the claimant's return to work. Ms Bozkurt was the chair of the panel. An Employee Director Ms Bain was appointed to the panel.

142. The individual initially appointed to deal with the appeal was unable to do so and on 4 August 2023 the claimant was advised that Ms Bozkurt hear the case. The respondent advised that although Ms Bozkurt chaired the conduct hearing that was said not to impact her ability to impartially an fairly hear the stage 3 hearing under the policy. There were no other available or appropriate individuals at the required level of seniority to fulfil the role. The claimant had asked for an external individual to be appointed but that was not possible as only an employee of the respondent with the required level of seniority could fulfil the role. The claimant did not raise any issue with Ms Bozkurt chairing the hearing in her response and confirmed she was content that an Employee Director attend too. The claimant had been provided with the respondent's reasoning for appointing Ms Bozkurt in writing.

Claims to Tribunal

143. On 23 June 2023 the claimant submitted a claim to the Employment Tribunal in respect of whistleblowing detriment. Early conciliation had taken place from 12 April 2023 until 24 May 2023.

Impairments and awareness

144. The claimant's primary condition was Adjustment Disorder. She was diagnosed with this on 2 May 2023. She had been bullied in the past with other incidents which led to unpredictable crying with physical and psychological symptoms. Things worsened in 2023.

145. The claimant had also been diagnosed with diabetes in or around June 2020. She was diagnosed with Latent Autoimmune Diabetes (LADA) on 1 October 2020. The respondent was advised as to her LADA diagnosis on 18 October 2020. The claimant's colleagues knew the claimant had diabetes as she was insulin dependent.

146. The respondent had been told of her Adjustment Disorder on August 2023 when the respondent received the ET1 which referred to it. It was from this date that the respondent knew about the disorder and the consequences of it. It was not reasonable for the respondent to have known prior to this date.

147. Adjustment Disorder is a mental condition that develops as a result of having to adjust to a particular source of stress. The body can develop exaggerated stress responses. The claimant experienced excessive reactions to stress, negative thoughts, strong emotions, moderate anxiety, heart palpitations, headaches, sleep difficulty, sadness and hopelessness and crying.

148. The claimant had had support in dealing with the impairments and would seek trauma therapy once the Tribunal process has concluded. The claimant does not intend to take medication.

149. Both conditions impact upon each other and can result in sleeplessness, significant stress and anxiety and lead to a drop in blood sugar levels. The

claimant suffers fatigue, anxiety, low mood, crying and an impact upon cognitive ability. The claimant also experiences severe anxiety and fatigue.

150. The claimant was capable of raising her complaints in time within 3 months from the date of each act, the claimant being able to seek advice, give instructions and engage as required. The claimant had access to a trade union representative and solicitor and was intelligent.

Further occupational health referral

151. On 13 September 2023 a further OH referral for the claimant was submitted. OH was asked about disability status and whether any information or input from the claimant's psychiatrist was required.

Stage 3 attendance management meeting

152. On 26 October 2023 the Stage 3 Attendance Management Hearing took place.

Occupational health report

153. On 26 October 2023 an OH report for the claimant was received by the respondent stating the claimant was diagnosed with chronic underlying conditions that might produce a negative effect on the ability to carry out normal day-to-day activities and she meets the time stipulation of the disability provisions of the Equality Act 2010. The report also confirmed she remained unfit for work, and an estimated return to work was not known. In response to the question from the respondent about a psychiatrist, it was said that *"specific treatment may not be effective until the organisational and work-related issues that are triggering her symptoms are resolved".*

154. The report also said: *'If a mutually agreeable solution to the organisational issues at hand is reached and redeployment if* (sic) *one of your remaining options, my recommendation for you is to inform and discuss first your options with Dr Hertel with the aim to reach a joint agreement about this possibility. Once a suitable role for redeployment is mutually agreed, then, I may be able to advice* (sic) *further.'*

Claimant raises concerns about process

155. On 16 November 2023 as part of the process the claimant raised questions regarding the approach to Attendance Management. She wished to know why Ms Bozkurt was appointed to chair the hearing given she had chaired the conduct hearing and how she would ensure her impartiality having subjected the claimant to detrimental treatment and why an external impartial chair was not appointed.

Outcome of attendance management process

156. On 20 November 2023 the outcome letter was issued. The letter noted the claimant had provided her statement of case which had been considered. The claimant had been given the right to provide written answers to questions to reduce stress and anxiety for her. That had delayed the process.

157. The letter sets out matters that the respondent considered in reaching the decision to dismiss on the grounds of capability. The claimant's attendance record was taken into account, the claimant having been on long term absence since 16 September 2021, 41 weeks after the start of her employment on 30 November 2020 as a result of work related stress. The claimant's absence equated to 73% of her employment. The letter noted the content and outcome of the supportive discussions and formal management of her absence was also considered.

158. The occupational health reports and health professionals' views were taken into account. The 26 October OH report noted the claimant was unfit to return to work and if organisational issues are not appropriately addressed and a mutually agreeable solution not reached, the claimant would not be able to return to work. OH was unable to provide a timeframe for a return to work. The claimant indicated she may not be able to return until the Tribunal process was concluded. At that time, it was unlikely the process would conclude before July 2024. That resulted in a long time to wait and created a high degree of uncertainty and unpredictability.

159. There were no adjustments that were suggested that could facilitate a return to work. The respondent did consider whether a secondment could be arranged but there were difficulties arising, including the claimant's prolonged absence from work and that a vacancy would require to exist.

160. More than 2 years had passed with no signs of a return to work and the OH clinicians view is that recover and timescales are unknown and it is unlikely that the claimant would be fit to return to work in the foreseeable future. It was also likely that there would be considerable difficulty in returning to work (for the respondent generally).

161. The claimant's role as associate medical director was a key role and while certain day to day operational matters had been assumed by other officers that was not sustainable. Her absence had also impacted upon strategic forward planning including in relation to a specific ongoing project regarding GP practices for which the claimant's role was key. The claimant's absence in that role was causing significant issues and short term cover was not viable. A resolution was required to move forward with key initiatives and responsibilities.

162. Having considered all the matters, the decision was taken to terminate the claimant's contract on grounds of capability. The claimant was given 3 month's notice, with her final day of employment being 20 February 2024 and Mr King would contact her on relation to being placed on the Redeployment Register during her notice period to consider a permanent change in role.

163. Ms Bozkurt did not consider it appropriate given ongoing matters that the associate medical director role be left unresolved for an unknown period while the claimant were temporarily redeployed elsewhere. It was necessary to find a permanent solution. The letter indicated that matters were considered from both the claimant's and respondent's perspective. She suggested pursuing employment elsewhere may be better for the claimant's health based on the health information. It was said that *"there is nothing that stands out in your statement of case or elsewhere to convince me that you actually want to*

return to that role or that a successful return to the post is a realistic possibility in any kind of acceptable timeframe".

164. Mr King would take forward the appeal against the conduct outcome in March and whether the claimant's request to do so in writing can be accommodated. Mr King would respond to other issues the claimant had raised. Ms Bozkurt did not wish to delay communicating her outcome to the claimant.

165. Ms Bozkurt also addressed the claimant's suggestion that the decision to commence the formal process was a detriment because of whistleblowing. Ms Bozkurt had *"some awareness of the issues raised previously"* and had made it clear that the claimant had the right to bring up matters of concern but she had noted that it was the way in which such concerns were brought up without knowing all the facts that caused a difficult for colleagues. She had also said that the concern was ensuring issues are raised appropriately once being properly informed. Ms Bozkurt said in her view after 2 years of absence and in light of the OH information and impact of not having an associate medical director it is appropriate to consider the claimant's continued employment. That would be a step taken for any employee because of absence (and was unrelated to whistleblowing or issues the claimant had raised in the past). The decision to end the claimant's employment was solely because of her absence. The claimant was reminded of her right to appeal.

Redeployment

166. On 20 November 2023 the claimant was placed on the Redeployment Register.

167. On 30 November 2023 Mr King responded to the claimant's questions and outstanding issues. The claimant was told as to the contractual and legal position as to how notice pay (and outstanding holiday pay) is calculated. He advised the claimant that she is entitled to a 12 week period on the redeployment register and she would be advised of any suitable vacancies that arise. She was given the redeployment form to complete.

168. With regard to Ms Bozkurt being chair, the respondent considered she was the only available and appropriate person given the circumstances which reasons had been given to the claimant on 4 September 2023. Ms Bozkurt was able to hear the matter and be impartial and she was assisted by the Employee Director who had no prior involvement. The Employee Director was content with the outcome on the facts. A *"chair options document"* was enclosed with the letter which explained the discussions and rationale following discussions with the head of HR at the time. The claimant was also advised of the support she had been given and why a decision had been taken to progress to stage 3 given the duration of absence, prognosis and importance of the role. No other employee had been absent for the period the claimant had.

Claimant appeals

169. On 4 December 2023 the claimant appealed against the outcome of the Stage 3 Attendance Hearing. She argued there was no fair reason to dismiss her, the process had been unfair and the decision was taken because she had blown the whistle. She considered she had been discriminated against because of her disability.

170. On 19 January 2024 the Stage 3 Attendance Management Appeal Hearing took place which was chaired by Mr Jamieson, chief executive.

171. The Conduct Appeal Hearing took place on 31 January 2024. That hearing was chaired by Mr Jamieson, chief executive.

Outcome of attendance management appeal

172. On 1 February 2024 Mr Jamieson issued his decision in relation to the appeal having taken into account the grounds of appeal, the statement of case submitted by the claimant and the position advanced at the hearing.

173. With regard to the argument the decision was unfair because there was no fair reason, the claimant had said she was *"capable of returning to work now or in the near future with another Board or organisation through for example secondment or redeployment".* The claimant had been absent for 2 years and

2 months which was 73% of her employment with no likely return imminent from the medical position. There was also a substantial and severe impact upon the service particularly with the ongoing project which required the associate medical director's input. Mr Jamieson concluded that he was satisfied the reason for the claimant's dismissal was her long term absence, which absence was unique within the respondent's employment and the claimant's employment had gone beyond what was normal. He believed it was correct to ensure employment processes were concluded and to allow an extended period of absence which could not continue indefinitely. He was persuaded that the effect of not having an associate medical director was detrimental on the service and colleagues.

174. With regard to the argument the decision was unfair, the claimant had argued the true medical position had not been established before dismissing and consideration should have been given to a psychiatrist referral. The claimant had also argued Ms Bozkurt had not been impartial. Ms Bozkurt did have up to date medical information in relation to the claimant and no psychiatrist report was needed since the medical position was that the ongoing work related issues required to be resolved before the claimant would be fit to return to work. Ms Bozkurt had been able to fairly and impartially hear the appeal as the conduct and attendance management processes were separate. Alternatives to Ms Bozkurt hearing the case had been considered but it was not appropriate and an employee director had been involved in the decision to ensure fairness and transparency. Mr Jamieson found no evidence to suggest Ms Bozkurt was not impartial and it was not possible to seek external input.

175. With regard to the suggestion the dismissal was because of whistleblowing and Tribunal proceedings, Mr Jamieson found no evidence to support that belief.

176. The claimant had also argued she had no supportive contact during her absence. The claimant's line manager had admitted to making less contact because he had believed such contact would not be welcome and could cause further stress. Mr Jamieson found that supportive measures had been

offered, including occupational health, offers of support via the employee relations team and access to the 24/7 helpline and counselling. The claimant had received support from her GP and a whistleblowing charity. Mr Jamieson noted that Mr King had apologised for not offering support sooner and agreed that proactive supportive measures should have been considered sooner and an alternative to the claimant's line manager identified and offered.

177. Finally with regard to the suggestion the clamant had been discriminated against because of her disability, Mr Jamieson concluded that it was reasonable to proceed to stage 3 given the unique situation with exceptionally prolonged absence, which was permitted in terms of the policy. Alternatives to dismissal had been properly considered and it was appropriate to have the claimant on the redeployment register during the lengthy notice period. There was a clear need for the claimant's role to be carried out. It was not possible for the respondent to insist another employer engage the claimant. The respondent still required the associate medical director role to be carried out. A permanent solution was needed. There was little evidence the claimant would have been fit given the outstanding issues.

178. The claimant had also said she could not return to work until the Tribunal was complete. That was likely to last until after Summer 2024 and was unknown. Mr Jamieson considered whether the claimant's' medical condition was related to the decisions and concluded on the facts the claimant had been absent from work for over 2 years and is unable to fulfil her essential role with an uncertain prognosis.

179. There was no merit in the grounds of appeal and the decision to dismiss was considered to be fair, reasonable and not related to the claimant's disability.

Redeployment options

180. On 1 February 2024 Mr King e-mailed the claimant with a list of jobs considered via the Redeployment Process. The email noted the claimant had been placed on the redeployment register on the afternoon of 20 November Each of the roles identified (which ran to 4 pages) was considered but none was suitable given the claimant's skills and experience.

Claimant seeks to amend claim to include dismissal et al

181. On 9 February 2024 the claimant seeks to amend claim (to include claim in relation to dismissal).

Dismissal

182. On 20 February 2024 the claimant's employment was terminated.

Outcome of conduct appeal confirmed

183. On 21 March 2024 Mr Jamieson issued his decision as to the outcome of the conduct appeal hearing. The letter set out the respondent's position on the reasons for upholding the decision to issue a First Written Warning. The letter noted the hearing had taken place on 31 January 2024 with the claimant having asked to answer questions in writing, which was agreed.

184. With regard to the suggestion there had been no negative comments made by the claimant about staff welfare at work at the meeting on 30 August 2021 and she had failed to respond to Ms Keen's request for evidence, the claimant said she had been unable to breach confidentiality by producing such information. Mr Jamieson noted the finding related to making unsubstantiated allegations in an inappropriate forum and failing to respond to the HR Director's email. There was a consistent theme of behaviour in relation to making unsubstantiated allegations at forums that were not felt to be appropriate causing alarm. The claimant was a senior officer and ought to have been aware of the ways in which issues could be raised. There were other more appropriate routes available rather than raising general allegations at a meeting with a large number present. The *"toxic culture of blame"* to which the claimant referred was not recognised by Mr Jamieson. He referred to positive evidence that existed showing the contrary position to that set out by the claimant.

185. With regard to the allegation no data had been provided to support comments about a higher number of suicides, the allegation related to the overall theme of behaviour where the claimant raised matters that were unfounded in a

certain way with no evidence. A senior officer ought to check facts before raising concerns at a meeting.

186. The claimant also argued it was unfair to suggest she had raised issues of potential racism during a discussion. Mr Jamieson reviewed the information but failed to see why the claimant had raised the issue she had. The concerns arising were sensitive but the claimant's suggestion of equality and diversity training in response was disproportionate and not aimed at finding a solution. Part of the ground of appeal was upheld as a result of information the clamant presented.

187. The final ground was in relation to failing to attend a management meeting. The claimant did not wish to attend the meeting as she believed she was being bullied. The claimant had a negative experience with a previous employer and developed adjustment disorder. That was not known by her manager at the time and h was trying to be supportive. The formal investigation found no evidence to suggest bullying. The claimant's line manager had been trying to resolve matters by meeting the claimant and her refusal to attend was not conducive to so doing.

188. Mr Jamieson considered matters and concluded that the overall themes of behaviour displayed by the claimant amounted to misconduct. Primarily the claimant made statements at inappropriate forums without clear evidence causing alarm amongst colleagues which crated a breakdown in relationships. In isolation the incidents would not merit disciplinary action but taken together a warning is justified. Mr Jamieson found no evidence the allegations were contrived or arose from making disclosures. There were different witnesses from different employers and professions all of whom had senior positions who found the claimant's behaviour concerning. There was consistency and a pattern of recurring behaviour which is inappropriate for a senior employee. The appeal was not therefore upheld.

189. He concluded by noting further questions had been asked but there had been a delay in providing the information. He did not wish to delay issuing his

decision given the impact upon the clamant. A response to the points the claimant raised was given in writing.

INWO report

190. On 24 July 2024 INWO published its report in respect of its investigations into the claimant's complaints. The report upheld complaints made by the claimant in relation to *'unreasonable failure to remove ligature points from hospitals'; 'unreasonable failure to consider and/or act on learning and improvement recommendations from incident investigations'* and *'failure to handle concerns in line with the National Whistleblowing Standards.'* The remaining complaints were dismissed.

Observations on the evidence

191. The Tribunal found each of the witnesses did their best to recollect the position and set out the position as they saw it often in challenging circumstances.

192. The **claimant** had provided a very detailed written witness statement. She had been able to set out in clear detail what her position was. There were a number of errors in the statement which she corrected when giving evidence. The passage of time had affected each of the witnesses which was natural given the large amount of information that this case generated with individuals having different recollections, despite apparently being clear as to what occurred.

193. The Tribunal did not doubt that the claimant genuinely and firmly believed that what she had said in her statement was accurate. Her belief was, however, reflected from her view as to the respondent's approach and her belief that the respondent did not wish to continue to engage her. In reality the respondent had supported her and wanted to find a way to facilitate the claimant's return to work. The claimant was unable to return to work given her view as to how she had been treated and how her colleagues related to her. That was a massive barrier that was unlikely to have been removed given how the claimant perceived matters.

194. There were occasions during the claimant's cross examination where she was evasive. The claimant wanted to present her position to the Tribunal by seeking to emphasise what she believed the position to be and in particular her belief that the disclosures she made had influenced the treatment she received. The Tribunal did not doubt that the claimant was articulate and intelligent. She lacked self awareness at times and it was clear that during her employment she had not understood how the way she approached matters had a material and adverse impact upon her colleagues. While patient safety and raising concerns were obviously critical and a matter about which the claimant cared, she equally had to work with her colleagues.

195. The claimant's approach was perhaps most obvious in her interactions with Ms Keen and her inability to see that comments the claimant had made as to the alleged toxic culture might frustrate Ms Keen, who had spent considerable time analysing the evidence that in fact suggested the alternative to that suggested by the claimant. Rather than engage with Ms Keen and provide some detail, even if confirmation as to the fact individuals did not wish to be named, the claimant chose instead not to engage and respond. There were a number of instances of the claimant failing to see how her approach had landed with others, evidenced best by the number of individuals who had made such comments about the claimant's approach, many of whom were senior staff from different organisations and teams.

196. There were also some occasions where the claimant was disingenuous. For example in cross examination the claimant had denied that she had seen an email which was sent to Mr Hutchison, despite the fact the claimant had seen the email since it was in identical terms to the one she had in fact received. There were a number of occasions where the claimant had to be reminded of the need to answer the specific question being asked. For example, the claimant was asked about support she was offered and it was only having been asked three times that the claimant accepted the general proposition that was being put to her.

197. The Tribunal found that on occasion the claimant's belief was misplaced or that the claimant had not properly recalled matters. This was not, on balance,

because the claimant had misled the Tribunal intentional but rather that the passage of time had materially affected the claimant's recollection which in turn had been influenced by her view as to the respondent and its motivations in light of what she considered the reasons to be for the treatment. The Tribunal carefully considered the evidence presented by the claimant and balanced that with evidence from other witnesses, and critically, from the written communications that were generated at the time.

198. **Dr McAuley** had provided a reasonably detailed written witness statement and did his best to answer the questions that were put to him. On occasion it was clear that matters had affected Dr McAuley and his recollection when he gave evidence. There were a number of occasions where Dr McAuley accepted matters put to him in cross examination which conflicted with other evidence, whether evidence given by him in his witness statement, evidence he gave orally or in the documentary evidence.

199. An example of Dr McAuley accepting something which the Tribunal did not consider accurate was that when it was put to him that he was "materially influenced" by the claimant raising issues about ligature points. While the point counsel for the claimant was seeking to make was that the disclosure had influenced the treatment, in reality Dr McAuley had been concerned about the manner of the disclosure. A significant amount of time was spent in relation to this issue and the Tribunal carefully considered the evidence in relation to that and each of the other points (and by each witness) carefully and at length. This was a key dispute between the parties. A number of witnesses appeared to concede that they were influenced by the disclosure but the Tribunal found that the witnesses insofar as they accepted that were mistaken given the conflict in evidence in this case. The Tribunal found that for Dr McAuley and the other witnesses, there was no issue at all with the claimant making disclosures. This had been made clear on a number of occasions.

200. However, the issue Dr McAuley and others had was the way in which the claimant had raised matters – the fact she had not discussed it with colleagues and checked the position before advancing a position. There was

a fundamental distinction in being upset and influenced by making the disclosure per se as opposed to the way in which the matter was dealt with (which was the point Mr Jamieon made in the appeal outcome letter). The Tribunal was unanimous in finding that the respondent in no way wished to prevent disclosures being made. However, it was important, when working as a team, to work together and ensure correct information is held before a position is adopted.

201. The Tribunal found that Dr McAuley had been confused and unclear in his approach to cross examination question which were put to him in a combative way. Counsel for the respondent had suggested in submissions that the approach to cross examination was *"vigorous and quite aggressive"* (to which the claimant's counsel replied suggesting it was *"robust"*). The Tribunal found that the approach that was taken was extremely robust such that some of the respondent's witnesses simply accepted what was being put to them as accurate, (in the Tribunal's view) without properly and carefully considering what they were accepting or providing incomplete and contradictory responses. This resulted in a large amount of oral evidence that was contradictory. The Tribunal considered that evidence alongside the other evidence, whether oral and in writing, in reaching its conclusions.

202. It was clear that Dr McAuley's memory had been affected by the passage of time. Having carefully considered the evidence, the Tribunal was satisfied none of Dr McAuley's actions was influenced in any sense by the disclosures the claimant had made.

203. **Mr Fayers** had also given a detailed written witness statement and did his best to recall matters and answer questions to the best of his abilities. He had genuinely wished to assist the claimant in a return to work but understood that the claimant believed she could not work with him. That created a real barrier to a return to work given the small and close knit nature of the team and requirement for collegiate working.

204. As with Dr McAuley there were occasions where the Tribunal found that Mr Fayers would accept what the claimant's counsel was putting to him rather

than properly and fully direct his mind to the issue. There were a number of occasions where Mr Fayers had to be told to answer the question he had been asked. As with Dr McAuley, the Tribunal found, having considered the matter at great length, that Mr Fayers had in no sense been influenced by any of the disclosures the claimant had made.

205. **Mr Hutchison** had provided a written witness statement and gave oral evidence. The Tribunal found Mr Hutchison to be credible and on occasion the Tribunal found that what Mr Hutchison said where it disputed with what the claimant said, to be preferable on the balance of probabilities. Mr Hutchison made concessions where he considered it appropriate and did his best to recall matters. It was clear that Mr Hutchison had become frustrated by how the claimant was conducting herself and her inability to see how the way she reacted in discussions and meetings had affected colleagues.

206. The Tribunal found Mr Hutchinson's evidence to be preferable when he made it clear in cross examination that the issue he (and others) had was not that the claimant should not have raised issues about patient safety but the way in which she chose to raise the matter (and her inability to see how making certain statements without the full information).

207. Similarly it was put to Mr Hutchison and others that the claimant had done nothing wrong in raising racism and diversity issues during an email exchange. It was clear, however, that the issue was the way in which the claimant had raised this as a relevant matter which was not what the discussion related to.

208. **Ms Bozkurt** set out her position and reasons at length in her written witness statement and did her best to provide answers to questions put to her. It was clear to the Tribunal that on a number of key areas Ms Bozkurt failed to properly focus on the issue and accepted what was put to her in an uncritical fashion. There were a number of occasions whereby she deferred to counsel for the claimant accepting propositions despite such matters fundamentally conflicting with her written evidence and that from other sources. Ms Bozkurt was clear and resolute at the conclusion of her cross examination that none

of the disclosures had in fact influenced her in reaching the decisions she reached. The Tribunal found that to be more likely than not to be accurate. The Tribunal spent a great deal of time carefully assessing what had been said with what occurred and how that contrasted with the other evidence before the Tribunal. The Tribunal concluded that Ms Bozkurt made a decision based on the information before her and she was not influenced by the disclosures the claimant had made.

209. **Ms C Macdonald** gave clear written and oral evidence as to the approach she took in investigating matters. She understood her role which was to ascertain facts and not make a judgment call. She had also been clear that she had followed HR advice in the way in which she conducted interviews. She candidly accepted with hindsight a better approach could have been taken. Equally, however, Ms Macdonald was not simply "rubber stamping" what she had been told, but properly interrogated the information she had been given and cross referenced the material with other oral and written evidence to reach conclusions from the facts she had. She sought properly and fairly to understand the facts before reaching conclusions and did apply her mind to the issues.

210. Ms MacDonald accepted that there were different views that could be placed upon the evidence she had found, but she had done her best and reached a conclusion that was open to her from the information she had. The Tribunal was satisfied Ms MacDonald had not in any sense been influenced by any of the disclosures the claimant had made in carrying out her duties and reaching her decision. Her report set out her reasoning clearly, which was based on what she had been told by the persons with whom she spoke. Ms MacDonald did not know the detail of the disclosures in any event. Her focus was instead on seeking the facts to allow her to set out what the position was. She was not influenced by any of the disclosures made by the claimant.

211. **Ms D MacDonald** gave detailed written evidence and sought to answer the questions put to her. Ms MacDonald was clear that proceeding directly to stage 3 in the attendance management process was permitted and the

approach generally understood (which was broadly supported by the other witnesses). The Tribunal accepted her evidence in light of the context.

212. **Ms Keen** had provided a written witness statement and gave clear and cogent answers in her oral evidence. Counsel for the claimant had adopted a combative style in approaching his cross examination and it was clear that Ms Keen had been frustrated with how the claimant had conducted herself (a frustration others had shared during the claimant's employment). Despite repeated attempts to secure Ms Keen's agreement that the disclosure had influenced Ms Keen's actions (an approach that had resulted in other witnesses accepting), Ms Keen, in a similar way to Mr Jamieson, adopted a careful and considered response to her answers. While there was some confusion, the Tribunal accepted her evidence that ultimately the issue arose not due to the claimant having raised disclosures, but her approach in so doing. Despite it being put to her on a number of occasions that she was angry and influenced Ms Keen refused to concede the point and repeatedly confirmed she had been frustrated with the pattern of behaviour exhibited by the claimant, which had been seen by others. She repeatedly confirmed that the issue was not that disclosures had been made but the way in which the claimant had done so. Ms Keen had tried to be supportive and positive and wanted to ensure the culture remained positive and open and the claimant's suggestions to the contrary had caused genuine concern, particularly absent an evidential basis for the concerns being provided.

213. **Mr King** had given a clear written witness statement and answered questions clearly. One issue that arose was a suggestion that had been raised by counsel for the claimant in relation to another witness that Mr King had asked specific questions. In effect counsel for the claimant had suggested information had been provided by Mr King which was incorrect. A document was later presented to the Tribunal that supported what Mr King had said. In cross examination Mr King explained that whom he had supported during the process and steps taken to support the claimant. He also explained why it was necessary to have someone within the respondent conduct the hearing

and why on balance it was considered fair to have Ms Bozkurt convene the hearing.

214. Mr King was also able to show the steps the respondent took to consider alternatives to dismissal. The claimant was a senior employee and intelligent and articulate. She understood the approach and was able to ask relevant questions or seek further information if needed. He explained how redeployment was fairly considered and the lengths to which the respondent went to ascertain whether dismissal could be avoided.

215. **Ms MacKenzie** gave clear evidence about what she had seen at the Scottish Government meeting shortly following her starting employment. She genuinely believed that Dr Cook had been surprised and taken aback by what the claimant had said. In her view Dr Cook and others had been taken by surprise by what the claimant had said. From what had been said at the meeting, it appeared to Ms MacKenzie that the issue of ligature points had not been dealt with before (which was the impression she had gained, as a relatively new employee, from what the claimant had presented). Given the seriousness of the matter, that led to Ms MacKenzie feeling uncomfortable. From the way in which the claimant had presented matters, it appeared to Ms MacKenzie at the time that the issue had not been escalated internally and little had been done to progress matters (which was not in fact what had happened).

216. **Mr Jamieson** had given a clear written witness statement and provided clear answers in cross examination. In the Tribunal's view, unlike some of the other witnesses, he approached cross examination carefully by focussing upon the question and answering it in a considered fashion. Some of the other witnesses had accepted what counsel for the claimant had put to them perhaps in deference or due to not properly focusing on the issues (or because they were confused). Mr Jamieson, in contrast, refused simply to accept propositions without ensuring the information was accurate and something with which he agreed. Notwithstanding that, the Tribunal carefully considered his evidence and contrasted it with the other evidence before the Tribunal.

217. Before making any concessions Mr Jamieson fairly considered the context and reality of what had occurred and why and gave clear information. Mr Jamieson was clear in relation to the changing risk picture in a hospital and how important it is for staff to be able to raise concerns. He made fair concessions as to errors that had occurred and apologised to the claimant for those. The Tribunal found that Mr Jamieson fully and properly considered all of the information before him. He was genuinely independent and capable of considering matters afresh. He was in no sense influenced by any of the disclosures and his outcome letters fully and carefully explained the reasons for his decisions which the Tribunal accepted as accurate. The Tribunal agreed with his conclusion that in reality there was little realistic prospect of the claimant ever being fit to return to work and his conclusions were reasonable and fair on the facts.

218. **Dr Cook** was able to clarify what was said at the meeting with the Scottish Government. He had already had discussions with the claimant in one to one meetings and knew about the claimant's concerns. While Dr Cook did not recall being taken aback by what had been said, it was clear that this was a possibility (and his colleague may well have been). For those, such as Ms McKenzie, who had not had one to one discussion with the claimant and understood what had in fact been done, it was not surprising that there would be concerns given the importance of the issue. Dr Cook was satisfied the respondent had taken as much action as could be expected.

219. **Mr Maclennan** had provided a written witness statement which was not challenged.

220. With regard to **factual matters in dispute**, the Tribunal considered all the evidence before it in deciding what was more likely than not to be the case. The first dispute was in relation to the meeting on 12 January 2021, during which the claimant alleged that she raised the issue of ligature points with Mr Hutchison. The claimant initially said the meeting took place on Teams but in evidence said it could have been a telephone conversation. On balance the Tribunal found that the claimant had not raised it with Mr Hutchison. It was surprising that the claimant had recalled precise details given the time that

had passed despite being unclear in other areas. Mr Hutchison was more likely to be right in his recollection that the meeting did not happen. Had the issue been raised with the claimant, it was more likely than not that she would have communicated her concern in writing given the other issues arising. There had been a large number of discussions and the Tribunal preferred Mr Hutchison's position to that advanced by the claimant. It was more likely that he would have recalled the meeting had it occurred.

221. The next issue was with regard to the meeting on 29 January 2021 which the claimant contended took place and she suggested that ligature cutters be included in the equipment on the resus trolleys in the hospital to mitigate some of the risk posed by the ligature points. On balance the Tribunal considered that the claimant was mistaken about the meeting and confused this meeting with the meeting that occurred in March when the issue was discussed which parties recalled. That was more likely than not to be the case from the evidence and the Tribunal's assessment. The Tribunal did not consider the claimant's recollection to be accurate and preferred the evidence of Mr Hutchison et al. The meeting when the claimant raised this issue was more likely to be the subsequent meeting in March.

222. The next disputed fact was that at the end of January 2021, the claimant met with Mr Fayers for the first time in his office and the claimant said she raised issued as to ligature points. Mr Fayers had just commenced employment and was more likely than not to recall what had been said to him by the claimant given the nature of the issues and context. It was more likely than not that Mr Fayers would have remembered the discussion (or that the claimant would have made some written reference to it). The absence of both led the Tribunal to conclude that Mr Fayer's recollection was more likely than not the case, in preference to the position suggested by the claimant.

223. Next it was alleged that on February 2021, the claimant was asked to investigate a datix report regarding an allegation that a locum psychiatrist was sexually inappropriate with a patient. It was disputed whether or not the claimant advised Mr Hutchison and Mr Fayers in a meeting with them (on an unspecified date). The respondent's position was that immediate action was

taken in relation to the locum. On balance and having reviewed the evidence, the Tribunal found that it was more likely than not that the claimant did not say there was a need to review all patients and evidence as this would have been something Mr Hutchison and Mr Fayers would have recalled given the severity. The respondent did take immediate action.

224. It was also alleged that on 31 May 2021, in a weekly catch-up meeting there was a discussion between the claimant and Dr McAuley in relation to the suicide of a patient and employee of a local independent GP surgery. The recollection of the claimant different to that of Dr McAuley. The Tribunal found it more likely than not that Dr McAuley's recollection was correct. It was more likely than not that the matter was raised by the claimant and that she had explained what se understood the position to be. Dr McAuley had no reason to raise the issue and the context supports his position which the Tribunal found more likely than not to be what happened. The Tribunal did consider that the claimant did disclose her belief that there was a lack of effective mental health provision as a result of the departure of a psychologist and as a result there was a risk to patients.

225. The Tribunal found that at the meeting on 17 June 2021, at a Remobilisation Meeting it was discussed that the CBT nurse was leaving. Mr Hutchison was aware that the CBT nurse was leaving to take up a promoted post in the hospital in Stornoway. The claimant believed that there could not be an effective mental health service without psychologists and further the CBT nurse was leaving. The claimant had disclosed her belief that there was a lack of effective mental health provision as a result of the departure of a psychologist and as a result there was a risk to patients. While the discussion was heated the claimant was not shouted at.

226. A key dispute in this case was whether or not the respondent was influenced by the disclosures the claimant had made in relation to the treatment relied upon. As set out below the Tribunal considered that in detail and examined the oral evidence of each witness with the other evidence before the Tribunal. Having spent a considerable amount of time in so doing, the Tribunal was satisfied the respondent had shown that the disclosures did not materially

influence the treatment in the sense required by the authorities. The respondent was concerned by the way in which the claimant had conducted herself and her approach in dealing with her colleagues (and not recognising how what she raises and how she does it might impact upon her colleagues) but the Tribunal was satisfied from its assessment of the evidence, particularly from the evidence at the time of the events and looking at the evidence as a whole, that the treatment was not influenced by any of the disclosures. The Tribunal found that the respondent had shown what the reason for the treatment was. In making this assessment, the Tribunal recognised that it is unlikely individuals would readily concede the disclosures had any influence. The Tribunal also considered the context in which admissions were made and assessed that evidence alongside the full evidence before the Tribunal. The Tribunal considered each of those responsible for the acts in question and assessed whether or not the disclosures influenced the treatment. The Tribunal unanimously found the disclosures had no such influence having spent a large amount of time assessing the evidence led.

Law

Protected disclosure

227. Under Section 43A Employment Rights Act 1996, a protected disclosure is a qualifying disclosure made by a worker to their employer or other responsible person (Section 43C) or to a prescribed person (Section 43F).

Qualifying disclosure

228. Under Section 43B, a qualifying disclosure is any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show relevant wrongdoing including “(d) that the health or safety of any individual has been, is being or is likely to be endangered.” The burden of proving a protected disclosure rests upon the claimant.

Disclosure of information

229. The disclosure must be an effective communication of information but does not require to be in writing. The disclosure must convey information or facts, and not merely amount to a statement of position or an allegation (**Cavendish Munro Professional Risks Management Ltd v Geduld** 2010 IRLR 38). However an allegation may contain sufficient information depending upon the circumstances (**Kilraine v Wandsworth London Borough Council** [2018] ICR 1850).

Reasonable belief

230. The worker must genuinely believe that the disclosure tended to show relevant wrongdoing and was in the public interest. This does not have to be their predominant motivation for making the disclosure (**Chesterton Global Ltd v Nurmohamed** [2018] ICR 731). Their genuine belief must be based upon reasonable grounds. This depends upon the facts reasonably understood by the worker at the time.

Relevant wrongdoing – endangering health and safety

231. A qualifying disclosure arises where there is disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered. It does not necessarily entail breach of a legal obligation.

In the public interest

232. A qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show relevant wrongdoing. The worker must genuinely believe that disclosure is in the public interest. That belief must be based upon reasonable grounds which may be easier to satisfy where the wrongdoing amounts to a criminal offence or an issue of health and safety. Where the worker has a personal interest in the relevant wrongdoing, it may be relevant

consider the number of other workers affected, the nature and importance of the interest, and the identity of the wrongdoer (Chesterton).

Detriment

233. Under Section 47B a worker has the right not to be subjected to any detriment by an act, or deliberate failure to act, by his employer (or a fellow worker in the course of their employment) because the worker has made a protected disclosure. A detriment is a reasonably perceived disadvantage (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337). It may arise from a deliberate failure to act which occurs when it is decided upon. Detriment is to be construed widely, there being a low threshold (see **Edinburgh Mela v Purnell** EAT/41/19).

234. For a complaint of detriment, the protected disclosure must be a material (i.e. more than minor or trivial) influence on the employer's treatment of the whistleblower. The actor (or their manipulator) must have knowledge of the protected disclosure (**Royal Mail Group Ltd v Jhuti** [2020] 20 ICR 731).

235. The reason for the detrimental treatment may be the means or manner of disclosure rather than the act of disclosure itself but such a distinction must be scrutinised carefully. This has been considered in a number of cases including **Shinwari v Vue Entertainment** UKEAT/0394/14, **Panayiotou v Kernaghan** 2014 IRLR 500 and **Parsons v Airplus** EAT/111/17. It is not unlawful if the reason for the treatment was the way in which the employee made the disclosure but a Tribunal should consider the evidence carefully in assessing whether the treatment was influenced by a disclosure.

236. Under Section 48(2) it is for the employer to show the reason for the detrimental treatment. The claimant must first prove on the balance of probabilities that there was a protected disclosure, a detriment and basis upon which it could be inferred that the protected disclosure was a reason for the treatment. Accordingly, the employee must provide sufficient evidence for a basis to suggest the disclosure could be a reason for the treatment (**International Petroleum Ltd v Osipov & Ors** UKEAT/0058/17/DA). The burden then shifts to the employer to show the reason for the detrimental

treatment. In the absence of a satisfactory explanation from the employer which discharges that burden, Tribunals may, but are not required to, draw an adverse inference.

237. The test is whether the disclosure materially influences the treatment, in the sense of being more than a trivial influence of the treatment. In **Fecitt v Manchester** 2012 ICR 372 Lord Justice Elias said liability arises if the protected disclosure if "a material factor in the employer's decision to subject the claimant to a detrimental act". The test was recently noted in **Dr Moghaddam v University of Oxford** 2024 EAT 156 (see paragraph 23).

238. The parties accepted that the decision maker ought to have the same knowledge of what the claimant is concerned about for the employer to be liable (**Nicol v World** 2024 EAT 42 and **William v Lewisham** 2024 EAT 58). It is possible for a respondent to be liable where a culture of prejudice and ill will is perpetuated against a claimant which led to the detrimental treatment (see **First Great Western v Moussa** 2024 EAT 8).

239. There is a conflict in Employment Appeal Tribunal authority as to whether or not it is legally possible for the decision to dismiss to amount to a detriment. The Court of Appeal in **Timis v Osipov** [2018] EWCA Civ 2321 determined that a dismissed employee may hold their employer vicariously liable for the detriment of dismissal under section 47B and holding the employer directly liable for their dismissal under section 103A. The Employment Appeal Tribunal in **Wicked Vision v Rice** [2024] ICR 675 suggested that a dismissal could not also be a detriment. This was doubted in **Treadwell v Barton Turns Development Limited** [2024] EAT 137 and the Court of Appeal is unlikely to resolve this conflict for a number of months.

Time limits

240. Section 48(3) of the Employment Rights Act 1996 contains the provisions dealing with time limits of detriment claims and states:

> *(3) An employment tribunal shall not consider a complaint under this section unless it is presented—*

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures , the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

(4A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).

241. Where the last act of a series of similar acts is dismissed as unfounded on the facts or because it was not done on the ground of a protected disclosure, it cannot extend time for earlier, proven, acts that are out of time — **Royal Mail Group Ltd v Jhuti** EAT 0020/16.

242. In **Lowri Beck Services v Brophy** 2019 EWCA Civ 2490 (and at paragraph 12) the Court set out some useful key principles to consider when dealing with time bar cases. These are summarised as follows:

243. The test should be given *"a liberal interpretation in favour of the employee"* (**Marks and Spencer plc v Williams-Ryan** [2005] EWCA Civ 470, [2005] ICR 1293

244. The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see **Palmer and Saunders v Southend-on-Sea Borough Council** [1984] IRLR 119 but is not limited to physical impracticability.

245. If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will not have been reasonably practicable for them to bring the claim in time (see **Wall's Meat Co Ltd v Khan** [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.

246. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee.

247. The test of reasonable practicability is one of fact and not of law.

248. In assessing whether ignorance of a right is reasonable, as Lord Scarman commented in **Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53, CA the Tribunal must ask further questions: 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?' The Court of Appeal in **Porter v Bandridge Ltd** 1978 ICR 943, having referred to Lord Scarman's comments ruled that the correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them. The Court upheld a tribunal decision that a claimant who took 11 months to present an unfair dismissal claim ought to have known of his rights earlier, even if in fact he did not.

249. The onus is upon a claimant to prove that was not *"reasonably practicable"* for a claim to have presented within the specified time period: **Saunders v Southend on Sea Borough Counci**l [1984] IRLR 119. With the passage of time the existence of Employment Tribunals and the right to bring claims have become well known. As such, prospective claimants will in most cases struggle to persuade an Employment Tribunal that they were unaware of the right to bring a claim, and those who aware of such rights will, therefore, be on notice of the need to take advice as to how and when such a claim may be made; see **Trevelyans (Birmingham) Limited v Norton** [1991] ICR 488.

250. Even if it was not reasonably practicable to have lodged the claim in time, the claimant must still show that the claim was raised within such further period as was reasonable which is a question of fact from the evidence.

Automatic unfair dismissal

251. In terms of section 103A of the Employment Rights Act 1996, if the sole or principal reason for a dismissal is that the claimant had made a protected and qualifying disclosure, the dismissal is automatically unfair. That differs from detriment cases (where the test is whether the treatment was materially influenced (in a more than trivial way) by a disclosure).

252. In some limited cases it may be permissible for Tribunals to *"look behind"* the stated reason for dismissal. In **Jhuti v Royal Mail** 2020 ICR 731 the Supreme Court held that in general Tribunals should focus upon the reason given by the decision maker, subject to exceptions, such as where someone in the hierarchy of responsibility above the employee determines that for one reason the employer should be dismissed but that reason is hidden behind an invented reason which the decision maker adopts. In those exceptional cases it is the Tribunal's duty to look beyond the invented reason. The Supreme Court noted that instances of decisions to dismiss in good faith, not just for a wrong reason, but for a reason which the employee's line manager has dishonestly constructed, will not be common. A reason cannot be imputed to the decision-making employee.

253. Although the claimant does not have the burden of establishing that the reason (or principal reason) for dismissal was her making protected disclosures, she must produce some evidence to support her case (**Kuzel v Roche Products Ltd** [2008] ICR 799).

Ordinary unfair dismissal

254. Section 98(1) of the Employment Rights Act 1996 places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2) or failing that some other substantial reason. The potentially fair reasons in section 98(2) include a reason which: *"relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".*

255. Section 98(3) goes on to provide that *"capability"* means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

256. Where the respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in Section 98(4):

"…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".

257. It has been clear ever since the decision of the Employment Appeal Tribunal in **Iceland Frozen Foods Limited -v- Jones** 1982 IRLR 439 that the starting points should be always the wording of section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In

most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or without that band. This approach was endorsed by the Court of Appeal in **Post Office –v- Foley** 2000 IRLR 827.

258. The application of this test in cases of dismissal due to ill health and absence was considered in **Spencer –v- Paragon Wallpapers Limited** 1976 IRLR 373 and in **East Lindsey District Council –v- Daubney** 1977 IRLR 181. The Spencer case establishes that the basic question to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer, and if so how much longer. Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, and the overall circumstances of the case. In **Daubney**, the Employment Appeal Tribunal made clear that unless there were wholly exceptional circumstances, it is necessary to consult the employee and to take steps to discover the true medical position before a decision on whether to dismiss can properly be taken. However, in general terms where an employer has taken steps to ascertain the true medical position and to consult the employee before a decision is taken, a dismissal is likely to be fair.

259. The Employment Appeal Tribunal considered this area of law in **Shenker Rail (UK) Limited –v- Doolan** UKEATS/0053/09/BI). In that case the Employment Appeal Tribunal (Lady Smith presiding) indicated that the three stage analysis appropriate in cases of misconduct dismissals (which is derived from **British Home Stores Limited –v- Burchell** 1978 IRLR 379) is applicable in these cases. In **BS v Dundee City Council** 2014 IRLR 131 in which at dismissal the employee had been off sick for about 12 months (after 35 years' service) with a fit note for a further four weeks, the Court reviewed the earlier authorities and said this at paragraph 27: *"Three important themes emerge from the decisions in **Spencer** and **Daubney.** First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his*

views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."

Burden of proof in discrimination cases

260. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

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

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

261. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

262. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

263. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v**

Nomura International Plc 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

264. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

265. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909). Although it would normally be good practice to apply the two-stage test, it is not an error of law for a Tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a prima facie case.

266. The Tribunal took into account **Field v Steve Pye & Co** EAT2021-000357 and **Klonowska v Falck** EAT-2020-000901. The Tribunal was able to make findings in light of the facts found in light of the absence of any reference by the parties to burden of proof. The Tribunal found clear evidence as to the reason why the respondent acted.

Discrimination arising from disability

267. Section 39(2)(c) of the Equality Act 2010 prohibits discrimination against an employee by dismissing him. Section 15 of the Act reads as follows:

"(1) a person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability".

268. Paragraph 5.6 of the Equality and Human Rights Commission Code of Practice ("the Code") provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

269. In order for the claimant to succeed in his claims under section 15, the following must be made out:

a. there must be unfavourable treatment (which the Code interprets widely saying it means that the disabled person 'must have been put at a disadvantage' (see para 5.7)).

b. there must be something that arises in consequence of the claimant's disability;

c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and

d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

270. Useful guidance on the proper approach was provided by Mrs Justice Simler in the well-known case of **Pnaiser v NHS England** 2016 IRLR 170:

"A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on

the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it."

Unfavourable treatment

271. The Supreme Court considered this issue in **Williams v Trustees of Swansea** 2018 IRLR 306 and confirmed that this claim raises two simple questions of fact: 'what was the relevant treatment and was it unfavourable to the claimant?' 'Unfavourably' must be given its normal meaning; it does not require comparison, it is not the same as 'detriment'. A claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable. The court confirmed that demonstrating unfavourable treatment is a relatively low hurdle.

272. It is necessary firstly to identify the relevant treatment that is said to be unfavourable and a broad view is to be taken when determining what is 'unfavourable', measuring the treatment against an objective sense of that which is adverse as compared with that which is beneficial. Treatment which is advantageous cannot be said to be 'unfavourable' merely because it is thought it could have been more advantageous, or, because it is insufficiently advantageous.

273. In order to achieve the stated purpose, the concept of 'unfavourable treatment' will need to be construed widely, similar to how the concept of 'detriment' has been construed for the purposes of other anti-discrimination provisions. The Code (at paragraph 5.7) indicates that unfavourable treatment should be construed synonymously with 'disadvantage': *'Often, the disadvantage will be obvious and it will be clear that the treatment has been*

unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably'.

274. It is also clear from the examples given in the Code that unfavourable treatment need not be directed specifically at the disabled person and it may arise in consequence of a policy that applies to everyone. It therefore covers treatment that, although not directed specifically at a disabled person, nonetheless has specific adverse effects on the disabled person.

Justification

275. As to justification, in paragraph 4.27 the Code considers the phrase *"a proportionate means of achieving a legitimate aim"* (albeit in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:- is the aim legal and non-discriminatory, and one that represents a real, objective consideration and if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

276. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31: *"although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). European law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."*

277. The Code at paragraph 4.26 states that *"it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence*

to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision criterion or practice was applied. If challenged, the employer can set out the justification to the Employment Tribunal."

278. In **Chief Constable v Homer** 2012 ICR 704 Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. It is necessary to weigh the need against the seriousness of the detriment.

279. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end. The employer has to show (and the onus is on the employer to show) that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the respondent's business but the Tribunal must make its own judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test.

280. The Tribunal is required to critically evaluate, in other words intensely analyse, the justification set out by the employer. The assessment is at the time the measure is applied and on the basis of information known at the time (even if the employer did not specifically advert to the justification position at that point). Flaws in the employer's decision-making process are irrelevant since what matters is the outcome and now how the decision is made.

281. There must firstly be a legitimate aim being pursued (which corresponds to a real need of the respondent), the measure must be capable of achieving that aim (ie it needs to be appropriate and reasonably necessary to achieve the aim and actually contribute to pursuit of the aim) and finally it must be proportionate. The discriminatory effect needs to be balanced against the

legitimate aim considering the qualitative and quantitative effect and whether any lesser form of action could achieve the legitimate aim.

282. Chapter 5 of the Code contains useful guidance in applying the law in this area and the Tribunal has had regard to that guidance.

Indirect discrimination

283. The provisions on discrimination are within the Equality Act 2010, and are construed purposively against the background of the EU Framework Directive. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that disability is a protected characteristic.

284. Section 19 of the Equality Act 2010 states:

> *"**19 Indirect discrimination***
>
> *1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if —*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

285. Section 212 defines "substantial" as meaning "not minor or trivial".

286. Lady Hale in the Supreme Court gave the following general guidance in **R (On the application of E) v Governing Body of JFS** [2010] IRLR 136: *"Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."*

287. The same principle applies for other protected characteristics, one of which is disability.

Provision, criterion or practice

288. The provision, criterion or practice (PCP) applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In **Hampson v Department of Education and Science** [1989] ICR 179 it was held that any test or yardstick applied by the employer was included in the definition. Guidance on what was a PCP was given in Essop v Home Office [2017] IRLR 558.

289. In **Ishola v Transport for London** [2020] IRLR 368 Lady Justice Simler considered the context of the words PCP and concluded as follows:

"In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

290. The Equality and Human Rights Commission Code on Employment at paragraph 4. 5 states as follows:

"The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision."

Disproportionate impact

291. There must be evidence that shows the PCP creates a disproportionate impact upon women (in respect of sex discrimination) and older people (in respect of age discrimination).. That is a matter also referred to in the Equality and Human Rights Commission Code of Practice: Employment ("the Code") at paragraph 4.15 onwards.

Particular disadvantage

292. The wording of section 19 does not require statistical proof. As Baroness Hale put it in **Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601 the change in the Act over the predecessor provisions:

"was intended to do away with the need for statistical comparison where no statistics might exist… Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question".

293. In **Essop v Home Office** [2017] IRLR 558 the Supreme Court made the following comments:

"A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various … They could be

social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men …"

294. In **Cumming v British Airways plc** UKEAT/0337/19 that quotation was referred to in relation to sufficiency of evidence as follows:

"there may be an argument that Lady Hale's general proposition was sufficient to establish the case along with the statistics relating to the whole of the crew or that in any event there was no reason to think that the proportion of men in the crew with childcare responsibilities differed materially from the proportion of females with such responsibilities".

295. Assumptions should be avoided and decisions made on the basis of evidence.

Objective justification

296. It is for the employer to establish the defence on the balance of probabilities. It has the elements of:

a. The means to achieve the aim must correspond to a real need for the organisation;

b. They must be appropriate with a view to achieving the objective; and

c. They must be reasonably necessary to achieve that end.

297. In **Chief Constable v Homer** 2012 ICR 704 Baroness Hale emphasised that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so.

298. The Employment Appeal Tribunal held in **Land Registry v Houghton and others** UKEAT/0149/14 that the Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant. That was explained further in **City of Oxford Bus Services Ltd v Harvey** UKEAT/0171/18 as *follows "proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment……an employer is not required to prove there was no other way of achieving its objectives (**Hardys & Hansons place v Lax** [2005]*

*IRLR 726). On the other hand, the test is something more than the range of reasonable responses (again see **Hardys**).”*

299. The Tribunal also had regard to and applied the guidance in relation to justification in indirect discrimination recently issued by the Employment Appeal Tribunal at paragraphs 76 to 85 of **NSL v Zaluski** 2024 EAT 86 which emphasises the importance of carrying out a critical analysis and that the need for a critical and thorough evaluation is not merely a reflection of the fact that what is being considered is whether a form of discriminatory treatment is shown to be justified. It is, because the outcome of an indirect discrimination complaint is liable to have wider implications and the Tribunal must form its own view of the working practices and business considerations involved. The Tribunal must demonstrate it has understood and engaged with the evidence before it.

300. Guidance on that issue is also given at paragraphs 4.25 onwards in the Code.

Reasonable adjustments

301. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in Section 20, Section 21 and Schedule 8. This is considered in chapter 6 of the Equality and Human Rights Commission Code of Practice. That paragraph states: *“A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, … that an interested disabled person has a disability and is likely to be placed at the disadvantage”.*

302. Therefore the duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20) (for which see **Wilcox v Birmingham** CAB 2011 EqLR 810).

303. An employer will be taken to know of the disability if it is aware of the impairment and the consequences. There is no need to be aware of the specific diagnosis. If an employer has no actual knowledge of the disability,

the Tribunal must consider whether there was constructive knowledge, namely, whether the employer ought to have known of the disability from the facts before the employer at the time (**McCubbin v Perth** UKEATS/25/13).

304. If the employer did not know of the disability (or ought not reasonably to have known) the duty to make reasonable adjustments it not engaged. The same applies if the employer did not know, or could not reasonably have known, of the alleged substantial disadvantage.

305. The Court of Appeal in **Gallop v Newport City Council** 2014 IRLR 211 said that it is essential for a reasonable employer to consider whether an employee is disabled, and form their own judgment. In that case the employer relied on advice from Occupational Health that the claimant was not 'covered' by the Equality Act 2010, and had then unquestioningly adopted that unreasoned opinion. Whilst ordinarily an employer will be able to rely on suitable expert advice, this cannot displace their own duty to consider whether their employee is disabled, and it is impermissible simply to rubber stamp a proffered opinion.

306. In **Donelien v Liberata UK Ltd** 2018 IRLR 535, Underhill LJ emphasised that an unquestioning reliance on an unreasoned report will not prevent a finding of constructive knowledge.

307. The Employment Appeal Tribunal considered this issue in **Kelly v Royal Mail Group Ltd** UKEAT/0262/18 which emphasised that it is not sufficient for an employer merely to rubber-stamp in that case the medical advisors' report and that it must make his own factual judgment as to whether the employee is disabled. The respondent in that case gave independent consideration to the matter rather than unquestioningly following Occupational Health reports. It was relevant to note that from the information available to the employer from the claimant, there had been no suggestion from the claimant that there was any adverse effect on his day-to-day activities and there was nothing to alert the claimant's managers to the need to look behind the conclusions of the information they had obtained. In light of all the information available to the employer, this is not a case where it could be said that they had knowledge that the claimant has a disability. Particular consideration was given to the

lack of any evidence that the claimant's condition was likely to be long-term and/or that it had an adverse effect on his day-to-day activities.

308. When Gallop was remitted to the Tribunal it was unsuccessful because the decision maker did not in fact have knowledge of disability and that was upheld by the Employment Appeal Tribunal in **Gallop v Newport City Council** (No 2) 2016 IRLR 395.

309. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the Tribunal (**Jennings v Barts and The London NHS Trust** UKEAT/0056/12). In that case the Employment Appeal Tribunal suggested that an employer should concentrate on the impact of the impairment, not on any particular diagnosis.

310. Langstaff P in **Donelien v Liberata UK Ltd** UKEAT/0297/14 (affirmed by the Court of Appeal 2018 IRLR 535) warned that when considering whether a respondent to a claim *'could reasonably be expected to know'* of a disability, it is best practice to use the statutory words rather than a shorthand such as *'constructive knowledge'* as this might imply an erroneous test. The burden is on the employer to show it was unreasonable to have the required knowledge.

311. The importance of a Tribunal going through each of the constituent parts of section 20 was emphasised by the Employment Appeal Tribunal in **Environment Agency v Rowan** 2008 ICR 218 and reinforced in Royal Bank of Scotland v Ashton 2011 ICR 632.

312. As to whether a *"provision, criterion or practice"* ("PCP") can be identified, the Commission Code of practice paragraph 6.10 says the phrase is not defined by the Act but *"should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions".* The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in **Nottingham City Transport Limited v Harvey** UKEAT/0032/12 in which the then President Mr Justice Langstaff (dealing with a case under the Disability Discrimination Act 1995 and the Disability Rights Commission's Code of Practice from 2004, both now superseded by the provisions summarised

above) said of the phrase *"provision, criterion or practice"* in paragraph 18: *"Although those words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustment, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned."*

313. This was applied in **Ishola v Transport for London** [2020] EWCA Civ 11, LJ Simler, whose reasoning we have applied. It is possible for a PCP to be a *"one off"* provided it has the character of a PCP, in other words it could be something the employer might well adopt as a PCP. Just because it has not been applied before does not, by itself, mean it is not a PCP.

314. For the duty to arise, the employee must be subjected to *"substantial disadvantage in comparison to a person who is not disabled"* and with reference to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) defines *"substantial"* as being *"more than minor or trivial".* The question is whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison to those who do not have the disability (**Sheikholeslami v University of Edinburgh**, 2018 IRLR 1090).

315. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28

and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer.

316. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

Time limits in discrimination cases

317. The time limit for Equality Act claims appears in section 123 as follows:

> *"(1) Proceedings on a complaint within section 120 may not be brought after the end of –*
>
> *(a) the period of three months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the Employment Tribunal thinks just and equitable …*
>
> *(2) …*
>
> *(3) For the purposes of this section –*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it".*

318. A continuing course of conduct might amount to conduct extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks –v- Commissioner of Police of the Metropolis** 2003 IRLR 96 which deals with circumstances in which there will be an act extending over a period. In dealing with a case of alleged race and sex discrimination over a period, Mummery LJ said this at

paragraph 52: *"The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."*

319. The focus in this area is on the substance of the complaints in question — as opposed to the existence of a policy or regime — to determine whether they can be said to be part of one continuing act by the employer.

320. **Robinson v Surrey** 2015 UKEAT 311 is authority for the proposition that separate types of discrimination claims can potentially be considered together as constituting conduct extending over a time.

321. The Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust** 2006 EWCA Civ 1548 confirmed that the correct test in determining whether there is a continuing act of discrimination is that set out in Hendricks. Thus tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

322. In **South Western Ambulance Service NHS Foundation Trust v King** EAT 0056/19, the Employment Appeal Tribunal observed that when a claimant wishes to show that there has been *'conduct extending over a period'* if any of the acts relied upon are not established on the facts or are found not to be discriminatory, they cannot form part of the continuing act.

Extending the time limit

323. Section 123 of the Equality Act 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

324. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the Employment Appeal Tribunal has said in the case of **Chohan v Derby Law Centre** 2004 IRLR 685 that a Tribunal should *"have regard to"* the Limitation Act 1980 checklist as modified in the case of **British Coal Corporation v Keeble** 1997 IRLR 336 which is as follows:

a. The Tribunal should have regard to the prejudice to each party.

b. The Tribunal should have regard to all the circumstances of the case which would include:

i. Length and reason for any delay;

ii. The extent to which cogency of evidence is likely to be affected;

iii. The cooperation of the respondent in the provision of information requested;

iv. The promptness with which the claimant acted once he knew of facts giving rise to the cause of action; and

v. Steps taken by the claimant to obtain advice once he knew of the possibility of taking action.

325. In **Abertawe v Morgan** 2018 IRLR 1050 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded to Tribunals by section 123(1). The only requirement is not to leave a significant factor out of account. Further, there is no requirement that the Tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account. A key issue is whether a fair hearing can take place.

326. In the case of **Robertson v Bexley Community Services** 2003 IRLR 434 the Court of Appeal stated that time limits are exercised strictly in employment law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. This is a matter which is in the Tribunal's discretion. The Court of Appeal in **Chief Constable of Lincolnshire v Caston** 2010 IRLR 327 observed that although time limits are to be enforced strictly, Tribunals have wide discretion.

327. In **Rathakrishnan v Pizza Express (Restaurants) Ltd** 2016 ICR 283 the Employment Appeal Tribunal held that in that case the balance of prejudice and potential merits of the reasonable adjustments claim were both relevant considerations and it was wrong of the Tribunal not to weigh those factors in the balance before reaching its conclusion on whether to extend time.

328. The Tribunal considered and applied the judgment of Underhill LJ in **Lowri Beck Services v Brophy** 2019 EWCA Civ 2490 and in particular at paragraph 14. Ultimately the Tribunal requires to make a judicial assessment from all the facts to determine whether to allow the claims to proceed and in particular assess the respective prejudice.

329. The Tribunal also applied the principles set out by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** 2021 ICR D5. The Court emphasised that it would be wrong to rigidly apply the "Keeble factors" since that would lead to a mechanistic approach to what is meant to be a very broad general discretion. The correct approach in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular the length of, and the reasons for, the delay.

Submissions

330. The parties had both provided written submissions which the parties were able to supplement orally, deal with issues arising from each other's submissions and answer questions. The submissions have been fully taken into account.

331. The Tribunal noted that this claim had a large number of complaints and issues arising. The list of issues ran to 21 pages with 81 separate issues arising. Counsel for both parties had ensured relevant evidence was led and challenged and had agreed in advance that written submissions would be exchanged, with time being given for supplementary submissions. It was clear that the principal focus of the claimant's claim was in relation to the detriment claim. The claimant's agent's written submissions spend 30 pages (of a 32 page document) focusing on the detriment and disclosures.

332. Regrettably, from a submissions perspective, the position in respect of each of the complex discrimination complaints was materially different. The list of issues pertaining to the disability complaints ran for 3 pages. The issues arising are complex. Despite that, the claimant's agent's submissions in relation to the discrimination complaint ran to 3 written paragraphs, with no detailed engagement with the issues (in contrast to the position in relation to the detriment complaints). There were no detailed oral submissions in this regard. Counsel for the claimant during oral submissions said that the issue for the claimant in essence was that she was treated badly due to the disclosures and it was clear that was the real focus of the case.

333. The Tribunal has done its best to focus the issues arising in respect of the discrimination complaints in the absence of clarity in submissions and set out the position as understood from the evidence as best it could. That has been challenging given the complex legal and factual matrix in that regard and perhaps serves a useful reminder of the utility of focusing a claim in relation to the key areas to ensure those complaints are fully addressed.

Discussion and decision

334. The Tribunal approached each of the issues in turn, considering the facts, the law and the parties' submissions and reached a unanimous decision.

WHISTLEBLOWING DETRIMENT (section 47B Employment Rights Act 1996)

PROTECTED DISCLOSURES

335. The first issue to determine is whether the disclosures alleged by the claimant were made and amount to qualifying and protected disclosures. While 15 disclosures were initially relied upon, these were refined by the submissions stage and the Tribunal considers the remaining disclosures in turn.

Protected disclosure 2

336. This related to the weekly catch up meeting on 13 December 2020 between Dr McAuley and the claimant where she identified a number of ligature points on the acute mental health ward and that it presented a risk to patients as they could use these points to hang themselves. The respondent conceded this amounted to a qualifying and protected disclosure.

Protected disclosure 3

337. This was that on 12 January 2021 on a Teams meeting with Mr Hutchison the claimant disclosed she had visited the acute mental health ward and had identified ligature points present on the ward which posed a risk that patients could die by suicide using these points. From the evidence before the Tribunal, on balance the Tribunal found the claimant had not raised the matter with Mr Hutchison. The Tribunal preferred the evidence of Mr Hutchison (and his recollection) than the claimant's recollection. This disclosure is not established in evidence.

Protected disclosure 4

338. This was that on 25 January 2021 at the weekly catch-up meeting between the claimant and Dr McAuley the claimant disclosed that the ligature points she had identified in the acute mental health ward had not been removed and that patients were at risk and was conceded by the respondent to be a qualifying and protected disclosure.

Protected disclosure 5

339. This was that on 29 January 2021 at a Bronze command meeting the claimant had identified ligature points present on the acute mental health ward, and that ligature cutters ought to be included within the hospital's arrest trollies

whilst the ligature points were being removed to reduce the risk of patients dying by hanging themselves on the ligature points. From the evidence presented to the Tribunal, it was more likely than not that the disclosure to which the claimant referred was the meeting in March and not this meeting and as a result this disclosure had not been established in evidence. The Tribunal preferred the evidence of Mr Hutchison to that of the claimant in relation to this issue and did not find on balance the disclosure to have been made as alleged (on this occasion).

Protected disclosure 6

340. This is that during last week of January 2021 in a meeting with Dr Fayers the claimant disclosed she had visited the acute mental health ward and had identified ligature points present on the ward which posed a risk that patients could die by suicide using these points. The Tribunal did not find on the balance of probabilities that this had occurred and as a consequence the disclosure had not been established in evidence.

Protected disclosure 7

341. This was that in February 2021 during a meeting with Mr Hutchison (via Teams) and Mr Fayers (in person) the claimant said no remedial action had been taken to prevent further patient harm, following locum consultant psychiatrist suspension and referral to GMC. The Tribunal found this had not been established from the evidence. The claimant's agent submitted that was "likely" that the issues would have been discussed but the Tribunal preferred the evidence of Dr Fayers and Mr Hutchison.

Protected disclosure 8

342. This was that on 31 May 2021 in a weekly catch up meeting the claimant disclosed that patients were put at risk by the failure to investigate a suicide of a patient and employee (known to have mental health difficulties) of a local GP surgery who had died/committed suicide having taken a large amount of medication prescribed by the surgery where she both worked and was a patient. This had not been established from the evidence.

Protected disclosure 9

343. This was that on 9 June 2021 in a meeting with Mr Fayers, Mr Hutchison and others the claimant disclosed that there were ligature points present on the acute mental health ward which posed a risk to the health and safety of patients in the acute mental health ward and was conceded by the respondent to be a qualifying and protected disclosure.

Protected disclosure 10

344. This was that on 17 June 2021 in a Remobilisation Meeting the claimant disclosed that there was a lack of psychology service on the islands putting the health and safety of those located on the islands and the remaining staff working within the service at risk. The Tribunal found that this had been established as having been said in evidence. It was a disclosure of information, that there were fewer qualified staff thereby creating (in the claimant's view) risk. The claimant believed the information gave rise to a risk to health and safety and was made in the public interest. It was reasonable for the clamant to believe that and as such this is a protected and qualifying disclosure.

Protected disclosure 11

345. This was that on 22 June 2021 at a remobilisation meeting the claimant explained that the last psychologist on the island had moved to another role and that patients were reporting their concerns to their GPs that they had not been informed of the CBT nurse's departure, and that the service had been removed too quickly, which left patients feeling unsupported and concerned about their ongoing care. As a result of these concerns from patients and GPs, the claimant asked when the psychologist would be replaced and what steps were being taken in the interim. The Tribunal found this had happened. The claimant had disclosed information about her concerns in relation to the service. It was the disclosure of information and the claimant believed there was a risk to health and safety, which was made in the public interest and amounted to a reasonable belief. It is a qualifying and protected disclosure.

Protected disclosures 13

346. This was that during the first week of September 2021 on a call to the whistleblowing hotline the claimant disclosed that there was an unreasonable failure to remove ligature points which was conceded to amount to a protected and qualifying disclosure.

Protected disclosure 14

347. This was that in November 2021 the claimant disclosed there had been unreasonable failure to remove ligature points and was conceded to amount to a protected and qualifying disclosure.

Protected disclosure 15

348. This was that on 29 November 2021 in a letter sent to the respondent by INWO on behalf of the claimant she disclosed the same matters she raised in disclosures 13 and 14 and was conceded to be qualifying and protected disclosure.

DETRIMENTS – Time bar

349. The first issue to determine in relation to the detriments is whether any detriment claim occurring three months or more prior to 12 April 2023 (the date the claimant commenced early conciliation) is time barred. The respondent argued the acts are single acts and as such are time barred. The claimant argued the acts are part of a series of similar acts or failures that continued beyond 12 April 2023 and/or it was not reasonably practicable for the complaint to be presented before the end of the period of three months from the date of the alleged detriment.

350. The Tribunal did not find the claimant's agent's submission to be meritorious. The acts relied upon were distinct and separate acts. Different people were involved. There was no policy or link to justify considering the acts to be part of a series. The issues arising in respect of each of the acts are materially different and they are not connected with each other. The Tribunal considered all of the circumstances surrounding the acts which showed that the acts are

different and discrete acts with no similarity or connection. There was no evidence showing the treatment relied upon being organised or concerted or connected in some way. The acts were not extending over a period or linked in some way or part of a continuing state of affairs. The Tribunal had the benefit of hearing from the persons responsible and took into account why the acts were carried out to assess whether or not they formed part of a series of similar acts. The Tribunal found that each detriment was an individual act to which the time limit provisions applied on an individual basis.

351. Any detriment that occurred on or before 11 January 2023 (3 months before early conciliation was commenced) would be out of time. That comprises detriment 4 (which occurred on 17 June 2021), detriment 6 (which occurred on 23 June 2021), detriment 7 (which ended on September 2021), detriment 8 (which occurred on 30 August 2021), detriment 9 (which occurred on 15 September 2021), detriment 10 (which occurred in September 2021), detriment 11 (which occurred in August/September 2021), detriment 13 (which occurred on 28 September 2021), detriment 14 (which occurred on 1 October 2021), detriment 15 (which occurred on 8 November 2021), detriment 18 (which took place from December 2021 until 1 February 2022) and detriment 19 (which occurred in September 2022).

352. The remaining detriments (namely detriment 21 (which occurred on 13 February 2023), detriment 22 (which occurred on 13 February 2023), detriment 23 (which occurred on 14 March 2023), detriment 24 (which occurred on 19 June 2023), detriment 26 (which occurred on 19 June 2023), detriment 28 (which occurred in June 2023), detriment 29 (which occurred on 20 November 2023), detriment 30 (which occurred on 20 November 2023), detriment 32 (which occurred June to November 2023), detriment 33 (which occurred on around 20 November 2023), detriment 36 (which occurred on 20 November 2023) and detriment 38 (which occurred on 1 February 2024) are in time.

353. The detriments found to be out of time are one-off acts that did not extend over a period of time. The acts relied upon are not part of a series of similar acts or failures that continued beyond 12 April 2023.

354. Having found the foregoing detriments to be brought out of time, the Tribunal considered whether it was not reasonably practicable to have brought the complaints in time. The Tribunal found no evidence that it was not reasonably practicable to have presented these complaints timeously. The claimant had a disability but was able to communicate with her advisers and progress complex matters on her behalf. The Tribunal took careful account of the content of the impact statement and the evidence led by the claimant but on the evidence it was clearly reasonably practicable for the claimant to have presented each complaint in time. The claimant is articulate and intelligent. She is capable of seeking information and giving instructions. She had the benefit of a trade union representative and had an expert solicitor. There was no reasonable impediment to her lodging the complaints on time. It was reasonably practicable for the claimant to have presented each of the detriment complaints in time.

355. Even if it had not been reasonably practicable to have raised the complaints in time, there was no evidence before the Tribunal explaining why the claim was raised when it was (and not sooner). While the Tribunal took account of the claimant's health, she was able to interact with her advisers and seek advice and give instructions. The claims would not have been raised within such further period that was reasonable. The foregoing detriment complaints were accordingly late and it was reasonably practicable for them to have been brought in time.

356. Notwithstanding the Tribunal's decision in relation to time bar, having heard the evidence and given the submissions made the Tribunal considered each of the detriments in turn to assess whether or not the relevant disclosures relied upon were in any relevant sense a reason for the treatment.

Did any disclosure influence the detriment?

357. The Tribunal took each detriment in turn. While the Tribunal had found many of the complaints to be time barred and found that a number of the disclosures relied upon did not amount to protected and qualifying disclosures, the Tribunal assessed each detriment in relation to each of the disclosures relied

upon to assess whether the disclosures materially influenced (in a more than trivial way) the treatment. In assessing whether or not the disclosures influenced the treatment, the Tribunal assessed all the evidence before it, recognising that individuals may not readily accept they were influenced by a disclosure and taking care to assess the full factual context (irrespective of what they say at a later point in time) and assessing the particular disclosure (as detailed above) and the treatment relied upon.

Detriment 4

358. This was that on 17 June 2021 Mr Hutchison had (allegedly) shouted down the claimant in a meeting. The Tribunal did not find from the evidence presented that this had occurred. The Tribunal found no relevant connection between the events at the meeting on 17 June 2021 and disclosures 2, 3, 4, 6, 7, 9 and 10 having taken each of the disclosures in turn. The disclosures did not influence Mr Hutchison's treatment of the claimant at all.

Detriment 6

359. This was that on 23 June 2021 the claimant was asked not to attend the IJB meeting and accused of being an operational risk. There was no doubt the act occurred. Both the claimant and Mr Hutchison were both told not to attend the meeting. Not attending the meeting was a detriment since the claimant enjoyed doing so and reasonably wanted to continue.

360. The Tribunal carefully considered whether or not the protected disclosures materially influenced the decision. The Tribunal took into account the detailed submissions of the claimant's agent who argued that in context the disclosures had an influence (and referred to an "embarrassment of riches as to why the respondent's narrative does not bear any scrutiny"). The Tribunal considered, however, that the reason why the decision was taken was due to how the claimant and Mr Hutchison had conducted themselves at the meeting. Dr McAuley was of the view that there was a risk to both individuals and the respondent if their disputes were to be played out in such a manner in the way and in forum it had. He wished to find a way to support both

individuals to conduct themselves in a more collegiate fashion. The issue was not the raising of the concern.

361. Having considered each of the disclosures in turn, from the evidence, the Tribunal was satisfied from the evidence presented that the decision was not on the grounds, either individually or cumulatively, that she made protected disclosures 6, 7, 9, 10 and 11. The Tribunal is satisfied that the disclosures did not influence the treatment.

362. The Tribunal noted that in cross examination Dr McAuley at points accepted he was materially influenced by the potentially damming statements (which contradicted over evidence). The Tribunal did not consider on balance that at the time the disclosures in any way influenced his decision. Had the claimant (and any other employee) acted as the claimant had, the outcome would have been the same. The sole reason for preventing attendance at the meetings and believing there was an operational risk was to manage the behaviour and prevent a recurrence. It was the way in which the claimant (and Mr Hutchison) had acted and not because of the content of the discussion. The disclosures relied upon did not influence the treatment.

Detriment 7

363. This is that from June to September 2021 details of the allegations about the claimant's behaviour were delayed and not forthcoming. While the respondent's agent argued there were no allegations, there was no doubt the claimant had not been told precisely what it was that was giving rise to concerns. To that extent there was detrimental treatment.

364. Having carefully analysed the evidence the Tribunal is satisfied none of the disclosures relied upon had any connection at all to the decision not to provide specification sooner than when it was provided. Just because the behaviour occurred when the claimant had made disclosures does not by itself mean the disclosures influenced the decision. On one view, had the disclosures been operating on the mind of the relevant individuals, it would have been more likely information was given sooner, if there was a desire to treat the claimant adversely. The delay in giving information was because the respondent

wished to be supportive. It was clear the respondent did not initially wish to make matters formal. The claimants' line manager wanted to have a discussion with the claimant and find a way forward rather than setting out in writing "allegations". The Tribunal is satisfied that the disclosures had no influence at all on the treatment. The Tribunal accepted the respondent's position that the issue was about the behaviour, the way in which matters were dealt with, and not the fact matters were raised per se. Having considered each of the disclosures, the Tribunal found the treatment was not on the grounds, either individually or cumulatively, that she made protected disclosures 6, 7, 9, 10 and 11. The disclosures had no influence upon the treatment.

Detriment 8

365. This was that on 30 August 2021 Ms Keen became angry and abusive in a meeting and then wrote to the claimant asserting that the claimant had said things she had not said and demanding the claimant justify her suggestions.

366. The Tribunal found that Ms Keen was frustrated and that there was a heated exchange at the meeting. To that extent there was detrimental treatment. Ms Keen was clearly frustrated because the claimant had made serious allegations about retention and recruitment which suggested the culture was toxic, which entirely contradicted the evidence Ms Keen had. She was naturally concerned about the matter having been raised and naturally wanted to understand if such statements were made from an informed perspective.

367. The Tribunal accepted Ms Keen's evidence that the disclosures had not influenced her in her behaviour. Her sole concern was to identify what, if any, evidence existed to substantiate the serious and challenging issues the claimant had raised. Having analysed each of the disclosures in turn, Ms Keen's treatment of the claimant was not on the grounds, either individually or cumulatively, that she made protected disclosures 2, 3, 4, 5, 6, 7, 9, 10 and 11. The disclosures did not have a material (i.e. more than trivial) influence upon Ms Keen in this regard.

Detriment 9

368. This was that on 15 September 2021 Dr McAuley attempted to arrange what was clearly meant to be a formal meeting but stating it was informal. It was accepted by the respondent that the way in which this matter was handled was poor. The use of the word *"formal"* clearly upset the claimant and to that extent the treatment was detrimental. The intention was to have an informal discussion with the claimant about how she had raised matters and to find a way to work with her to improve her behaviour given the impact upon her colleagues. It was clear that the claimant had a lack of self-awareness. She was unable to see how the way in which she presented matters could be seen as unfair and critical, and not collegiate. The meeting was not a formal conduct meeting but a formal meeting in the sense of a discussion with her manager about how she deals with work related issues.

369. The claimant's agent simply says the exchange "clearly arose due to the protected disclosures and in particular what she said to the Scottish Government" but there is no basis to make that assertion. Dr McAuley wanted to meet the claimant to find a way to raise with her the concerns that had been raised with him and work with the claimant to assist her in becoming more collegiate and self-aware. The act was entirely separate from and not related to the disclosures which had no influence, far less material influence, on the decision to call the meeting formal, which was an inelegant way of setting the position out. Dr McAuley would clearly rather have communicated with the claimant in person but the claimant wanted matters put into writing

370. Having considered each of the disclosures, the treatment was not on the grounds, either individually or cumulatively, that she made protected disclosures 7, 8, 9, 10 and 11. The disclosures did not have a material (i.e. more than trivial) influence upon Dr McAuley and his handling of the meeting.

Detriment 10

371. This was that in September 2021 the respondent failed to provide a detailed list of the allegations raised against the claimant about her conduct. The respondent argues there was no failure because there were no allegations as such. However, the issue here is the delayed provision of the detail about the

specific matters that concerned the respondent about the claimant. The claimant had repeatedly asked for detail as to what the concerns were and this was not provided at the time. That was a detriment.

372. The claimant's agent argued the reason for the delay was because the respondent was "annoyed" at the claimant raising the matters and the "reluctance to provide a detailed list of allegations stemmed from the respondent engaging in dirt digging exercise due to raising protected acts". There is no factual basis to make this assertion. The respondent had general concerns about the claimant's behaviour and conduct, stemming from the way she had interacted with colleagues and the impact her behaviour had upon those colleagues. Rather than immediately set the issues in writing, the respondent wanted to speak with those who had raised the issues to find out the detail. Dr McAuley did provide detail on 8 November 2021 once the interviews had been carried out.

373. While it was possible to have provided some detail as to the allegations, the full and precise information was not available until the interviews completed, which was at the end of October. The fact the claimant had made disclosures was not a reason for not providing fuller details sooner. The only reason the information was delayed was because the respondent wished to understand what the issues colleagues had before setting anything out in detail. There is no basis to find that the delay was in any way on the grounds that disclosures had been made. Having considered each disclosure in turn, the treatment was not on the grounds, either individually or cumulatively, that she made protected disclosures 6, 7, 8, 9, 10 and 11. The disclosures did not have a material (i.e. more than trivial) influence upon the delay in telling the claimant about the issues.

Detriment 11

374. This was that in August/September 2021 Mr Fayers, Dr McAuley and the respondent instigated an investigation into the claimant's conduct.

375. The claimant argued *"this detrimental treatment had a serious knock impact"* suggesting the investigation caused ill health or led to the claimant's absence

all of which led to dismissal. However, the respondent's agent argues investigating concerns raised is not a detriment. Concerns had been raised by colleagues about the claimant's conduct. The claimant had refused to attend a meeting with her line manager and a number of senior colleagues had raised concerns about the claimant's behaviour with Dr McAuley, including Dr Watts and Ms Keen. The act of investigating concerns is not reasonably a detriment where genuine concerns have been raised which an employer wishes to consider. There was no malice or intent to adversely treat the claimant. On the contrary, the intention was solely to find out what had happened in a structured way. While some employers might simply have had a brief chat with those affected, given the nature of the issues, the seniority of those involved and the potential impact, if the concerns had merit, it was equally reasonable to conduct a proper investigation to ascertain what, if any, issues in fact arose. That was not reasonably detrimental but was entirely fair and proper. Instigating an investigation on the facts was not a detriment.

376. While the claimant argued the treatment was *"undoubtedly"* due to the protected acts, the respondent was concerned about the way in which the claimant had conducted herself. The concern as, as the respondent's agent submits, the claimant had raised matters without first exploring the issues with her colleagues, which is what her colleagues reasonably expected. It was the manner in which the claimant raised the issues, without verifying the key facts, that was causing colleagues concerns. The reason for the treatment was not therefore the disclosures but the concern about the way in which the claimant was conducting herself and concerns raised by colleagues which the claimant's line manager reasonably wished to understand.

377. Having analysed each disclosure in turn, the Tribunal found the treatment was not on the grounds, either individually or cumulatively, that she made protected disclosures 6, 7, 8, 9, 10 and 11. The disclosures did not have a material (i.e. more than trivial) influence upon the decision to investigate the claimant.

Detriment 13

378. This was that on 28 September 2021 Mr Fayers, Dr McAuley and the respondent removed part of the claimant's role namely attendance as primary care lead at Board Meetings. The Tribunal found that this was a detriment. Although the respondent's agent is correct is saying this was not a formal part of the claimant's role, it was clearly part of her role she enjoyed and wished to continue. Removing the duty was reasonably considered detrimental.

379. The Tribunal carefully considered the reason for the act from the evidence. Mr Fayers had joined in January and taken time to *"find his feet".* Dr McAuley's position was that he had waited a sufficiently long time before telling him that this was his duty. It was not disputed that the Scottish Government direction was that the correct person to carry out the task was Mr Fayers. It was also not disputed that the claimant would still be called to report on matters falling within her area at the relevant meetings.

380. The Tribunal accepted Dr McAuley's evidence that the time had come, in his view, for Mr Fayers to assume responsibility for a task that was his in any event. Sufficient time had passed to allow him to include the task in his duties. The Tribunal did not accept the claimant's agent's argument that *"the only credible and plausible explanation as to why this occurred was the respondent looking to drive out and make the claimant's employment unpleasant due to making protected disclosures".* The Tribunal was not persuaded the fact the claimant had made the disclosures was at all connected, in any way, to the decision. Rather, the time had come in Dr McAuley's view to transfer the task to Mr Fayers, whose responsibility it was to do that role.

381. Having taken each disclosure in turn, the Tribunal found the decision was not on the grounds, either individually or cumulatively, that she made protected disclosures 6, 7, 8, 9, 10 and 11. The disclosures did not have a material (i.e. more than trivial) influence upon the decision the claimant not attend the next meeting.

Detriment 14

382. This was that on 1 October 2021 Dr McAuley inferred the claimant was in breach of the respondent's policy by working whilst off sick and that this would be added that to the other conduct allegations raised against her.

383. It was accepted that Dr McAuley had told the claimant she was in breach of policy by working when absent and this would be included as part of the investigation. That was because Dr McAuley did not know the claimant was continuing to work as a GP. Even if the claimant had told him, the Tribunal was satisfied Dr McAuley had no knowledge (or at least recollection) of being told when he raised the issue. Dr McAuley did accept it would have been preferable to have been clear at the time and provided the relevant forms (and in fact did not progress with this as an allegation).

384. The Tribunal did not consider that inferring the claimant was in breach of policy by working when off sick and saying this would be added to the list of matters to be raised was detrimental on the facts. An employer is entitled to investigate matters of potential misconduct and the claimant could not reasonably argue this was a detriment given the genuine desire to understand what had happened given the context.

385. The Tribunal did not accept the claimant's agent's argument that *"the only credible reason as why this was raised was because Dr McAuley was annoyed at the claimant having made disclosures and raised ligature points with the Scottish Government".* The Tribunal prefers the respondent's agent's submission that Dr McAuley raised the matter because he believed it was an issue. The Tribunal accepted Dr McAuley's evidence in this regard. He genuinely believed the claimant was acting in breach of policy and this would be something that had to be investigated. He was not influenced in any way by the disclosures.

386. Having considered each of the disclosures in turn, the Tribunal found the treatment was not on the grounds, either individually or cumulatively, that she made protected disclosures 6, 7, 8, 9, 10 and 11. The disclosures did not have a material (i.e. more than trivial) influence upon Dr McAuley in his decision to add this to the issues to be considered in relation to the claimant.

Detriment 15

387. This was that from September to 8 November 2021 Mr Fayers, Dr McAuley and the respondent delayed providing specific details of the conduct issues raised against the claimant and failed to provide an explanation for the delay.

388. The Tribunal found that there was a delay in providing the full detail of the allegations and providing no clear explanation. That was a detriment. However, the Tribunal was satisfied the treatment was not influenced by any of the disclosures. The reason for the delay was to obtain the full information. While some employers would have provided this in a different way, other employers would do as the respondent did given the circumstances. The only reason for the delay was the investigation that was being undertaken. The respondent chose to wait until this had been concluded before setting out the detail. The disclosures did not influence the respondent in making that decision.

389. The Tribunal did not accept the claimant's agent's argument that the true reason for the delay was because the respondent was trying to *"dig up any dirt they could find".* The respondent was investigating the issues. Ms MacDonald wished to ascertain what the facts were. The disclosures did not influence the delay in providing details and failing to explain the delay.

390. Having analysed each of the disclosures in turn, the Tribunal found the treatment was not on the grounds, either individually or cumulatively, that she made protected disclosures 6, 7, 8, 9, 10 and 11. The Tribunal found the disclosures did not have a material (i.e. more than trivial) influence upon the respondent in relation to its delay in telling the claimant about the conduct issues.

Detriment 18

391. This was that from December 2021 to 1 February 2022 the claimant's requests to exercise discretion to pay contractual sick pay were ignored. The respondent did not ignore the claimant's request as Dr McAuley responded as soon as he received the request. He had not received the earlier requests

and no evidence was presented showing they had been received by him. The request was not ignored and to that extent this complaint fails. The request was considered and refused. To the extent the clamant did not receive a positive decision to extend sick pay by way of exception, that would be a detriment. However, the sole reason for the refusal to extend sick pay was that Dr McAuley did not consider the circumstances to be exceptional as agreeing to continue to pay the claimant would not materially increase the chances of a return to work. Dr McAuley did not consider there to be exceptional circumstances that would entitle him to exercise his discretion in favour of the claimant. The disclosures were entirely irrelevant and the same decision would have been made irrespective of the person or disclosures. The disclosures in no sense influenced the treatment.

392. The claimant's agent did not suggest why the disclosures were in any way relevant to the decision. The fact Mr McAuley made the decision himself rather than another remember of the HR team does not suggest any wrongdoing. Mr McAuley applied the contractual position as he understood it. The existence of the disclosures was unconnected to his actions in this regard.

393. Having considered each of the disclosures, the Tribunal found the reason for not exercising discretion was not on the grounds, either individually or cumulatively, that she made protected disclosures 6, 7, 8, 9, 10, 11 13, 14 and 15. The disclosures did not have a material (i.e. more than trivial) influence upon Dr McAuley in his determination not to award the claimant discretionary sick pay.

Detriment 19

394. This was that in September 2022 Ms C MacDonald (investigator and Head of Midwifery) and the respondent failed to consider whether the conduct allegations were materially influenced by the making of a protected disclosure.

395. Ms MacDonald had been tasked with investigating the issues that had been raised. She met with around 14 individuals to try and understand what had happened (and why complaints had been made about the claimant's

conduct). While the claimant had told Ms MacDonald on a general level that she felt the treatment was related to her having raised ligature points, Ms MacDonald's focus was on the facts, namely what happened. The Tribunal did not consider that Ms MacDonald's decision not to go further was a detriment. Ms MacDonald considered the information she had been given and sought the views of those present. While her approach in the investigation was not perfect, she did her best.

396. Even if the failure was a detriment, the disclosures that were made in no sense influenced Ms MacDonald. The Tribunal found Ms MacDonald to be doing her best to understand what happened and what the facts were. She did not conclude that any of the disclosures was or was not a reason for the things she found as she was focusing on what happened. She did confirm at the appeal hearing that she did not consider the disclosures to have had any influence upon her decision not to consider whether the conduct allegations were materially influenced by the disclosures. The Tribunal is satisfied the disclosures did not have any influence upon how Ms MacDonald conducted the investigation.

397. Having considered each of the disclosures, the Tribunal found Ms MacDonald did not omit to consider the impact of the disclosures on the grounds, either individually or cumulatively, that she made protected disclosures 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11. The disclosures did not have a material (i.e. more than trivial) influence upon Ms MacDonald in this regard.

Detriment 21

398. This was that on 13 February 2023 Ms Bozkurt, Mr King, Ms Anderson and the respondent failed to consider whether the conduct allegations were materially influenced by the making of a protected disclosure.

399. It was not entirely clear whether or not Ms Bozkurt, Mr Kind or Ms Anderson failed to consider whether the allegations were influenced by a disclosure but it is clear that those individuals did their best to consider, fairly, the material before them in reaching the decisions they did.

400. The claimant's position is that no consideration was given to the influence the disclosures had and so the only explanation must be the disclosures themselves. The Tribunal considered the evidence and did not accept that proposition.

401. Even if there had been a failure, the Tribunal was clear that the protected disclosures did not influence their decision. The Tribunal was satisfied each individual acted fairly and reasonably in light of the information they had at the time under the prevailing circumstances. It is not correct to assume the only explanation must be the disclosures. The Tribunal found that the disclosures did not influence the treatment at all. The Tribunal accepted the evidence that the disclosures that had made did not influence what was considered in this regard.

402. Having considered each of the disclosures carefully and the evidence, the Tribunal found the respondent did not fail to consider whether the conduct allegations were materially influenced by a disclosure on the grounds, either individually or cumulatively, that she made protected disclosures 9, 10, 11, 13, 14 and 15. The disclosures did not influence how the respondent considered this issue.

Detriment 22

403. This was that on 13 February 2023 Ms Bozkurt conducted the conduct hearing in a combative way. The Tribunal did not find this to have been established. Ms Bozkurt was sympathetic to the claimant and wished to ensure she had a fair chance of setting out her position. She accepted the words she used could be misinterpreted and if it had been an in person meeting she would have given the claimant a tissue and taken a break.

404. It was clear that the claimant and her union representative both considered the hearing to be fair. The allegation had not been made out as the hearing was not conducted in a combative or unfair way.

405. The disclosures the claimant made did not influence Ms Bozkurt's handling of the meeting. She did her best to focus on the issues in hand and progress in a fair and reasonable way.

406. Having assessed each disclosure and the evidence, the Tribunal found the way in which the meeting was handed was not on the grounds, either individually or cumulatively, that she made protected disclosures 9, 10, 11, 13, 14 and 15. The disclosures did not have a material (i.e. more than trivial) influence upon Ms Bozkurt with regard to how she handled the hearing.

Detriment 23

407. This was that on 14 March 2023 Ms Bozkurt issued a first written warning which was materially influenced by the protected disclosures made by the claimant.

408. A warning was issued. The claimant says the charges were without merit and as such there should have been no warning (and the issuing of a warning is a detriment). The respondent argues the allegations did have merit and as such the issuing of a warning in the face of misconduct is not a detriment.

409. The Tribunal considered the evidence. Ms Bozkurt considered the material she had before her in reaching her decision. In relation to allegation 3 she concluded a number of witnesses had said the claimant had made comments without having an evidential basis (and the claimant chose not to respond to Ms Keen's request). By not replying to the request for information, the claimant had shown that she had made comments without evidence, which was one of the themes Ms Bozkurt had found. She did not uphold allegation 4 because the claimant was entitled to raise the issue, even although the claimant did not have all the facts. That shows that Ms Bozkurt was fairly assessing the information and being fair and reasonable to the claimant, and not simply blindly accepting assertions put before her. She concluded that the claimant should not simply have referred to details in a newspaper article before checking the facts underpinning those. That was not an unreasonable conclusion to reach, and was another example of the claimant making clear

factual assertions on which the actual data was not in the claimant's possession and had not been verified by her.

410. In relation to allegation 7 Ms Bozkurt chose to accept that the claimant had not been reasonable in her approach and what she had said. That might not be a conclusion others would reach but it was a reasonable approach on the facts before her.

411. In relation to allegation 8 it was clear, as the respondent's agent submits, that the claimant did refuse to meet her manager. She said she believed she was being bullied. Ms Bozkurt believed that her manager was in fact trying to be supportive which was necessary for the employment relationship to work. Again while others may have reached a different view, the conclusion Ms Bozkurt reached was not unfair or unreasonable.

412. Ms Bozkurt concluded that having met around 14 people, many of whom were very senior individuals in different roles and some from different organisations, there was a clear pattern of belief as to how the claimant had reacted and the impact upon colleagues and trust. She concluded a first warning was a reasonable sanction. That was not an unreasonable or unfair outcome from the information before Ms Bozkurt and in light of the reasons she gave. Similarly her decision to consider how to facilitate a return to work was entirely reasonable as she wished to facilitate a return to work and allow the employment relationship to operate. While others may have approached matters separately and differently, Ms Bozkurt approached the matter reasonably and in a supportive way.

413. On the facts, the issuing of a first warning and the outcome was fair and reasonable. It not a detriment given the conduct reasonably found to have occurred.

414. Even if the issuing of a warning had amounted to a detriment, the disclosures did not influence Ms Bozkurt's approach findings and conclusions. As the respondent's agent notes, Ms Bozkurt was not privy to private correspondence between the claimant and INWO (protected disclosures 13, 14 and 15). The Tribunal was satisfied Ms Bozkurt's issue of the warning was

not influenced at all by the disclosures the claimant had made. On occasion the Tribunal found Ms Bozkurt's oral evidence to be confused. There were occasions where her oral evidence, particularly in cross examination, contradicted other evidence. The Tribunal considered that carefully and at length. The Tribunal concluded from its analysis of the evidence that Ms Bozkurt had not been influenced by any of the disclosures relied upon in a material (ie more than minor or trivial way).

415. Having considered each disclosure in light of the evidence the Tribunal found the warning was not on the grounds, either individually or cumulatively, that she made protected disclosures 9, 10, 11, 13, 14 and 15. The disclosures did not have a material (i.e. more than trivial) influence upon Ms Bozkurt in relation to her decision to issue a warning.

Detriment 24

416. This was that on 19 June 2023 the absence management process was invoked against the claimant in respect of her sickness absence.

417. The claimant argued it was a detriment to proceed in the manner the respondent did. The respondent's agent notes, correctly, that the claimant had said that she had wished the respondent commenced the absence management process sooner. The respondent's agent also notes the claimant had been absent for over 2 years and had not been in post for long. The Tribunal did not consider invoking the absence management process against the clamant in respect of her sickness absence to be a detriment. The purpose of the process is to find ways of facilitating a return to work and focussing on how to fairly progress matters, recognising that the issue has to be addressed. This was particularly so given the length of absence and prognosis that suggested there was no imminent (or known) return date.

418. Even if the treatment did amount to a detriment, the decision to commence the process was not influenced by the disclosures relied upon. It was clear given the nature of the role the claimant did and the prevailing circumstances that the respondent's policy required to be invoked. The disclosures had no bearing on that.

419. Having assessed each disclosure in light of all the evidence before the Tribunal the Tribunal found the decision to invoke the absence management process was not on the grounds, either individually or cumulatively, that she made protected disclosures 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14 and 15. The disclosures did not have a material (i.e. more than trivial) influence upon the respondent in this regard.

Detriment 26

420. This was that on 19 June 2023 the respondent progressed straight to Stage 3 of the Attendance Policy, bypassing other informal stages.

421. The claimant's position was that this was done because the respondent wished to expedite the claimant's exit and was therefore because of her disclosures especially when viewed in the context of challenging recruitment conditions.

422. The respondent argued it was not a detriment to proceed to stage 3 since the policy provides for such an approach and the outcomes of earlier stages can be included at stage 3. As the claimant was not going to be fit to return to work until the management issues were resolved going through stage 1 would have had no effect since the relevant triggers would have been reached and further processes and stressors would have arisen. It was said to be reasonable and fairer to seek to resolve the management issues and seek to facilitate a return to work and once it became clear that did not work, progress to stage 3.

423. In principle stage 3 is about finding ways of facilitating a return to work. It is not simply about dismissal. Further the context is important in assessing whether it could reasonably be said to be a detriment to proceed to stage 3. The Tribunal, particularly using its non-legal member industrial experience, did not consider the claimant's agent's interpretation of the policy to be accurate. The Tribunal's unanimous view was that it was open to the respondent, reasonably, to proceed directly to stage 3 in this case. That was an option open to the respondent and it was reasonable for the respondent to have done so in this case. The claimant had lengthy absence. She was in a senior position with the work requiring to be done. Continuity was important.

The prognosis was not good. There was nothing in the earlier stages that could not be addressed in stage 3. While it may have delayed matters, it was equally possible to say the respondent should have commenced the formal process sooner (at whatever stage). The approach was not reasonably considered to be a detriment give it was in exceptional circumstances contemplated by the policy.

424. Even if the treatment could reasonably be considered a detriment, the Tribunal was satisfied that the reasons for so doing were because of the attendance and absence levels, the nature of the role and medical position. The disclosures in no sense influenced the decision.

425. Having assessed each disclosure in light of the evidence, the Tribunal found proceeding to stage 3 was not on the grounds, either individually or cumulatively, that the claimant made protected disclosures 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14 and 15. The disclosures did not have a material (i.e. more than trivial) influence upon the respondent in its decision to proceed directly to stage 3.

Detriment 28

426. This was that from September 2021 to date the respondent failed to follow the respondent's Attendance Policy.

427. The claimant argued that any attempt to get the claimant back to work was *"shelved"* pending the disciplinary appeal and that without justification her appeal against her written warning took a *"back seat"* to the absence management process. It was also suggested going to stage 3 was a breach of the policy without going through each stage and that the only reason for not going through each stage was because of the disclosures.

428. The respondent argued this is an unfair complaint as there is a lack of specification as to what was said to have been done and by whom. It is probably fairer to say the other detriments namely 24 and 26 contain the specific details (and the counsel for the claimant adopted the same submissions for each of the 3 detriments).

429. The Tribunal did not consider it fair to say the respondent *"failed to follow the attendance policy".* The respondent did follow the policy. The claimant might not have liked the way in which it was followed or the outcome of the process but the respondent followed the policy. The claimant's absence was managed. While it could have been managed sooner (and the claimant suggested that might have been preferable), the respondent waited until it was clear that there was no imminent return or reasonable likelihood of a return to work and then progressed to the final stage to ascertain if there was anything else that could be done. It was open to the claimant to suggest any steps that could facilitate a return to work and the respondent would have (and did) consider those. This was not a case of the respondent wishing to expedite to dismissal. The claimant's absence was already more than the respondent had ever experienced. The claimant had been given a more than reasonable period to return to fitness. She was unlikely to do so in the short to medium term and no specific return date had been identified, and it was not even clear if one would arise. Nothing had been suggested that supports the contention that even if the earlier stages had been followed, the outcome would have been any different. It was not reasonable to delay matters further. The respondent followed the policy and in so doing there was no detriment.

430. In any event the Tribunal found the disclosures had no influence on the way in which the policy was followed. The respondent did its best to avoid dismissal and waited a longer than reasonable period. There was no basis to assume the position was going to change and there was nothing the claimant had suggested which could have facilitated her return to work sooner. She was unhappy with how her issues with regard to her managers had been dealt with. That was a major barrier in her return to work. She required to work with her managers and it appeared that she was incapable of doing so. The respondent followed its policy and did so without any influence of disclosures the claimant made.

431. Having assessed the evidence and considered each disclosure in turn, the Tribunal found the way in which the respondent approached the attendance policy with regard to managing her absence was not on the grounds, either

individually or cumulatively, that she made protected disclosures 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14 and 15. The disclosures did not have a material (i.e. more than trivial) influence upon how the respondent progressed the claimant's attendance and absence.

Detriment 29

432. This was that on or around 20 November 2023 Ms Bozkurt and the respondent failed to consider other options prior to dismissal such as redeployment/secondment opportunities, mediation, counselling, management training/ coaching.

433. The claimant's contention was that no real steps other than dismissal were explored and mediation and counselling was *"half hearted".* No attempt was made to consider her being engaged as a GP or wait until she was fit, it being suggested that the respondent *"wanted the claimant out the organisation due to protected disclosures".*

434. The respondent argued redeployment was considered prior to dismissal and it was instigated during the notice period (and continued during the appeal process), there being no obligation to consider it prior to that point. Secondment was also not considered appropriate given the absence of control the respondent had (and the fact the claimant's substantive role would not be filled on a permanent basis). While mediation was considered at the conduct stage, at the absence management stage it was clear the claimant would not be fit, on any view, until the Tribunal process had concluded (at the earliest). Training and coaching would have formed part of a return to work but that was not possible.

435. The Tribunal found the respondent's submissions to have merit and accepted the evidence of Ms Bozkurt and Mr King that other options prior to dismissal were properly considered. The respondent did not fail to consider other options prior to dismissal. While more could have been done, a reasonable attempt was made to consider ways to avoid dismissal. This was an unusual case given the length of absence compared to active service (and all other cases the respondent had experienced). The claimant's role was senior and

important and the work required to be done. Redeployment was considered and steps were taken to identify roles. The detriment had not been established on the evidence.

436. Even if there had been a detriment, the disclosures had no influence on the steps taken to find alternatives to dismissal. Those managing the process did their best to consider how to secure the claimant's return to work in the face of challenging circumstances and medical evidence. In reality the claimant suggested no way she could return to work given her approach to her managers and how she was treated. The disclosures did not influence the treatment.

437. Having considered each disclosure in light of the evidence the Tribunal found the steps considered to avoid dismissal were not on the grounds, either individually or cumulatively, that she made protected disclosures 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14 and 15. The disclosures did not have a material (i.e. more than trivial) influence upon the respondent in this regard.

Detriment 30

438. This was that on or around 20 November 2023 Ms Bozkurt failed to consider permanent redeployment/secondment opportunities as an alternative to dismissal.

439. The claimant's and respondent's position mirrored their position in relation to the former detriment. The Tribunal did not find Ms Bozkurt had failed to consider appropriate alternatives to dismissal. The detriment had not been established in evidence. Ms Bozkurt's approach was in no sense influenced by any of the disclosures. Her approach was solely to secure the claimant's return to work and the disclosures did not influence her approach.

440. The approach taken was not on the grounds, either individually or cumulatively, that she made protected disclosures 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14 and 15. The disclosures did not have a material (i.e. more than trivial) influence upon Ms Bozkurt in this regard.

Detriment 32

441. This was that from June to November 2023 the respondent appointed Ms Bozkurt as Chair of the absence management hearing and/or the failure to appoint another individual as requested by the claimant.

442. The claimant's agent had not made specific submissions on this point but the argument appeared to be the failure to appoint someone truly independent was a detriment and because of the disclosures.

443. The respondent argued there was no detriment since Dr Watts could not carry out the role due to retirement and Ms Bozkurt was the only individual available with sufficient seniority. While she had been involved in the claimant's case at an earlier stage, she was able to fairly determine matters. Further an Employee Director was introduced into the process to ensure transparency and fairness.

444. This was finely balanced but the Tribunal, with the benefit of non-legal members and their industrial experience, concluded that there was no detriment on the facts. The claimant was a very senior individual. It was important to have someone of equal (or greater) seniority determine the issue. The chief executive was able to deal with any appeal and Ms Bozkurt was the only available individual. The respondent had explained that to the claimant. It was not possible to introduce an external party. The claimant had been given a fair opportunity and the issues arising were fairly determined. The role of the chair was to assess the position going forward in light of the evidence. Knowledge of the issues arising with regard to the claimant did not in fact create bias or a barrier to fairly determining the position on the facts.

445. Even if the failure to appoint a totally independent person was a detriment, the Tribunal would have found that the sole reason for so doing was because there were no other suitable individuals available and the respondent was unable to go external for the appointment and, critically, the disclosures relied upon had no influence at all upon that decision. This was a senior individual whose employment was at risk. The hearing was about managing her absence. Even although Ms Bozkurt had some knowledge of the issues, that did not prevent her from ascertaining the facts with regard to the claimant's

absence and identify ways of securing a sustained return to work. The decision was not influenced by any of the disclosures. The decision was solely based on who was available at the time and in the interests of fairness.

446. Having assessed the evidence and each disclosure, the Tribunal found the approach was not on the grounds, either individually or cumulatively, that she made protected disclosures 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14 and 15. The disclosures had no influence upon the respondent's decision to appoint Ms Bozkurt as chair.

Detriment 33

447. This was that on or around 20 November 2023 Ms Bozkurt and the respondent failed to wait a few more months for the claimant to return to work as she had indicated she was likely to be able to do in 2024.

448. The claimant relied upon their submissions with regard to detriment 29 and 30. The respondent argued there was no failure to wait a few more months. The respondent points out the Occupational Health advice was that there was no impending return and in any event that could not be contemplated prior to the conclusion of the Tribunal process (which could be in excess of years from commencement of the absence). Even if the claim concluded the claimant might still have been unable to return, especially if she was not successful. The respondent meanwhile had important projects to progress which required an associate medical director in post. In short the respondent would be required to wait significantly more than "a few more months" for the claimant to return to work.

449. The Tribunal found that counsel for the respondent was correct. There was no realistic prospect of a return to work for the claimant in any meaningful sense until at least 3 years following her absence and even in that event that was probably unlikely. It was clear that the claimant was incapable of working with her managers, whom she considered to have bullied her. She had not accepted the findings of the internal processes and she was unhappy with how she was treated. The claimant's position, supported by the medical evidence, was that a return was likely when the issues with her employment

had been resolved. But that required the claimant to accept what had happened and seek to work with the respondent and her colleagues to return to work on a sustained basis. There was little realistic possibility of that occurring.

450. The detriment had not been established on the evidence since the respondent would have been required to wait substantially more than a few months and it was simply not operationally feasible to do so.

451. The approach taken was because of the needs of the operation in light of the circumstances relating to the claimant and her medical position. Any employee with the same employment issues (who had not made any disclosures) would have been treated in precisely the same way. The disclosures did not influence the approach taken in any way.

452. Having assessed the disclosures in light of the evidence, the Tribunal found the time the respondent waited before dismissing was not on the grounds, either individually or cumulatively, that she made protected disclosures 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14 and 15. The disclosures had no influence upon Ms Bozkurt in this regard.

Detriment 36

453. This was that on 20 November 2023 Ms Bozkurt decided to dismiss the claimant.

454. The claimant's case was that without the disciplinary process the claimant would not have gone sick and she would not have been dismissed. It was suggested that if the claimant could not be *"shut up and controlled in the way the respondent wanted, the only outcome would be dismissal"* which was *"clearly influenced"* by the disclosures. The fact the process was internal supported that conclusion.

455. The respondent argued it was not possible for the dismissal to be a detriment. While there is some authority in support of this, there is authority at an equal level that supports the contention relying on the individual officer's decision to dismiss (and not the respondent per se) is lawfully a detriment.

456. While in principle a dismissal could be a detriment, a dismissal that is entirely warranted on the facts is not a detriment. Objectively viewed the claimant's absence was such in the context of this case in light of the clear medical evidence and organisational needs of the respondent that dismissal was a fair and reasonable response. In deciding whether or not dismissal is a detriment, the Tribunal must consider the subjective view of the claimant but also whether a reasonable person would regard it as such in context. Looking at all the facts in this case, a reasonable person would not regard dismissal by reason of capability (in circumstances where pay had been exhausted and there was no reasonable prospect of an imminent return to work and where returning to work would create further risk given the perception held as to how colleagues were acting) to be a detriment.

457. The dismissal was not a detriment when the claimant was incapable of working and when there was no realistic imminent or known return date in circumstances the claimant was unable to work with her colleagues where the respondent required the role the claimant was employed to do to progress. This is particularly so for an NHS Board given the restrictions which apply.

458. Even if the claimant's dismissal was a detriment, the reasons for it were set out in Ms Bozkurt's outcome letter. The disclosures had no influence at all on the decision to dismiss (directly or indirectly). Ms Bozkurt carefully focussed her considerations to the legitimate circumstances and the decision and process was not directly or indirectly influenced by the disclosures. She understood the background and understood the job she was required to carry out. The Tribunal found the disclosures did not influence her decision from all the evidence.

459. Having carefully analysed each disclosure in light of the evidence, the Tribunal found the decision to dismiss was not on the grounds, either individually or cumulatively, that she made protected disclosures 9, 10, 11, 13, 14 and 15. The disclosures did not have a material (i.e. more than trivial) influence upon Ms Bozkurt in this regard.

Detriment 38

460. This was that on 1 February 2024 Mr Jamieson decided not to uphold the claimant's appeal against her dismissal.

461. Counsel for the claimant agued Mr Jamieson knew about the disclosures and that his actions *"were clearly materially influenced"* by the disclosures. The respondent argued a dismissal cannot be a detriment. From the evidence the Tribunal found that the decision not to uphold the appeal was not a detriment on the facts. Mr Jamieson properly and fully considered the circumstances around the claimant's dismissal. He fairly considered the points with which the claimant took issue. He decided on balance that dismissal was the appropriate outcome of the unique facts of this case. That was a fair and reasonable option and on that basis his failure to uphold the appeal could not be said to amount to a detriment.

462. In any event having carefully assessed the evidence the Tribunal was satisfied that the reason was not in any way influenced by the disclosures. Mr Jamieson's' reasons were carefully and fully set out and those were the sole reasons, there having been no influence by the disclosures. The respondent's concern was about the way in which she had conducted herself and how she had communicated, not the fact she had made disclosures. As with Ms Bozkurt, he understood the importance of being able to make disclosures but the issues was the manner in which they were made. While the distinction can be a fine one, the Tribunal was clear from the evidence that the disclosures themselves in no sense influenced the decision. The disclosures did not have a material (i.e. more than trivial) influence upon Mr Jamieson in this regard.

463. Having considered the evidence and each disclosure in turn the Tribunal concluded that the decision not to uphold the appeal was not on the grounds, either individually or cumulatively, that she made protected disclosures 6, 7, 8, 9, 10, 11, 13, 14 and 15.

Taking a step back

464. The Tribunal took a step back and considered the disclosures and the detriments, having looked at each individual detriment and each disclosure to analyse any connection. The claimant's case was essentially that because

she had made various disclosures, the respondent began to treat her badly and sought or expedited her removal (and otherwise treated her adversely). The Tribunal carefully analysed all the evidence with particular care to consider what was said and done at the time. This was not a case where there was an obvious link with any disclosure and the treatment (and no such link was said to be present). Rather, the claimant's agent's position was that the connection was to be gleaned from the surrounding circumstances. The Tribunal considered the evidence before it carefully to ascertain what, if any, influence each of the disclosures relied upon for each of the detriments had in relation to the relevant treatment. That took time and detailed analysis.

465. The Tribunal took into account the oral evidence at the Hearing. On occasions a number of the witnesses gave contradictory evidence, with evidence in chief being clear (there being no connection as between the disclosures and the treatment, there being specific reasons for each action) and then on occasion (during cross examination) seeming to suggest a disclosure had such a connection. Some witnesses readily conceded matters which flatly contradicted the position they had earlier set out (and often did so in the midst of lengthy questioning in a challenging environment). The Tribunal found some of the oral evidence unclear and confusing. Often the position changed later in cross examination or during re-examination. The Tribunal considered the evidence in its entirety in reaching its decision.

466. The Tribunal considered the admissions made in cross examination carefully but assessed those as against the evidence before the Tribunal, with particular consideration being given as to what was said and done at the time and as against the entirety of the evidence (including the evidence in chief, cross examination and any re-examination). This was done to assess whether any of the disclosures had a material (i.e. more than trivial) influence upon the relevant act, recognising that such a link is rarely admitted. It was the Tribunal's role to assess whether at the time the decision was taken, the individual was influenced by the disclosures. That included what was said at the Hearing but with careful consideration as to what was said and done at

the time. That was done carefully taking time to assess the full evidence and factual matrix given the lack of clarity in some respects from the oral evidence.

467. The Tribunal was satisfied having carefully considered all the evidence before it that the claimant was mistaken in her belief that the respondent's treatment of her had been influenced by the disclosures she had made. Having assessed the treatment, the Tribunal unanimously found that the each of the disclosures (whether protected or not) had no influence (in a more than trivial way) upon the treatment. While on occasion the treatment was because of the way in which the claimant raised issues, the disclosures themselves did not influence the treatment. The Tribunal did not find this was a case that was similar to **First Great Watern v Moussa** (as argued by the claimant). The respondent had been open and transparent and encouraged the raising of disclosures and there was no culture of prejudice or ill will against the claimant that had led to the treatment. The respondent had satisfied the Tribunal that the disclosures she had made had not influenced the treatment. On that basis, this complaint is ill founded.

AUTOMATICALLY UNFAIR DISMISSAL

Was the sole or principal reason for the claimant's dismissal that she made one or more of the protected disclosures?

468. The claimant in cross examination stated that her claim was not that her dismissal was because she had made disclosures but that she had made disclosures and was then absent from work and the respondent dismissed her because of her absence, which she said was thereby (or indirectly) because of disclosures. Even upon re-examination by her counsel, she was firmly of the view that her dismissal was not because of disclosures but her absence.

469. The Tribunal considered that the claimant was correct in her view. The sole or principal reason for her dismissal was because she was incapable of carrying out the role for which she was engaged. She was dismissed because of capability. The fact she had made disclosures was not a reason for her dismissal.

470. Counsel for the claimant's argument was that it was *"entirely clear that the respondent disliked the claimant making protected disclosures and if the claimant couldn't be controlled they wanted her out"*. That may have been her view but that was not the evidence. The Tribunal carefully considered the reason why the claimant was dismissed. Counsel for the respondent argued the real reason for dismissal was as set out in Ms Bozkurt's dismissal letter. The claimant's absence was taken into account (which amounted to 73% of her employment) as was the outcome of the absence management process. The medical information available to the respondent was central to the decision which comprised occupational health reports, adjustments and critically the likelihood of a return to work. It was the fact that the claimant was unlikely to return to work in the short to medium term that led the respondent to dismiss. In other words the set of facts or beliefs in the respondent's mind was the claimant's inability to do her role and no imminent or reasonable prospect of her being able to do so.

471. The Tribunal accepted that there was no basis to find that Ms Bozkurt was in some way influenced by the disclosures the claimant had made. The Tribunal was also satisfied that Ms Bozkurt was not influenced in her decision (knowingly or otherwise) in any way by others who sought to treat the claimant unfairly because of the disclosures. There was no such influence found to have been applied to her. She was clear, and the Tribunal accepted, that her focus was on ascertaining whether there was any reasonable prospect of facilitating the claimant's return to work (irrespective of the disclosures the claimant made). There was no such prospect. The claimant was not automatically unfairly dismissed. The protected disclosures were not a reason (and they were not the sole or principal reason) for dismissal.

UNFAIR DISMISSAL

What was the reason for the claimant's dismissal?

472. The set of facts or beliefs that led the respondent to dismiss the claimant was the claimant's absence and inability within a reasonable period of time to be

likely to return to work. She was dismissed because of her inability to do her role. She was dismissed for capability, a potentially fair reason.

Was the decision to dismiss the claimant substantively unfair for one or more of the reasons relied on by the claimant namely: at the time the decision was taken to dismiss her, was the claimant capable of returning to work another health board and/or organisation thought, for example, secondment or redeployment opportunities?

473. The first ground the claimant argued the dismissal was unfair was because she was said to be fit to work elsewhere and dismissal had been the focus. The respondent argued the claimant was not capable of working elsewhere and in any event there was no available post, given the claimant had a 12 week period where redeployment was considered.

474. In all the circumstances the claimant was not fit to return to her role. The respondent took reasonable steps to ascertain whether dismissal could be avoided. It was not for the respondent to contact other employers to seek out vacancies elsewhere (whilst the claimant's role required to be undertaken on a permanent basis). The respondent took reasonable steps to identify suitable alternative employment, by liaising with the claimant and by placing her on the redeployment register. No vacancies had been identified by the respondent, or the claimant. Reasonable steps to identify alternative employment prior to dismissal had been taken.

475. The Tribunal did not consider that the claimant's agent's submission that the respondent had failed to properly discuss redeployment opportunities. The respondent acted fairly and reasonably in seeking alternatives. While other employers may well have gone further, an equally reasonable employer on the facts would have done what the respondent did. The respondent's actions in this regard were not unreasonable or unfair.

Was the claimant likely to be in a position to return to work for the respondent during 2024 and ought the respondent to have taken steps to find alternative employment and/or waited a few more months until the claimant was likely to be in a position to return to work for the respondent?

476. From the claimant's own evidence she was not going to be able to consider a return to work until at least Autumn 2024, following the Tribunal process (and probably later if her claim was not successful and if there were appeals etc). There was no reasonable basis to suggest the claimant would have been fit to return to work within *"a few more months".* It was far more likely that the claimant would not be fit to return to work for many months and potentially remain unfit to return to her role, given her inability to work with her managers and the prevailing circumstances. The claimant's health and view was such that a return to work was not imminent. She wanted to await the outcome of the Tribunal process and assess her position. From the information before the respondent at the time dismissal was considered, it was reasonable to dismiss. The claimant's return to work depended upon a number of variables, many of which supported the respondent's view that a return to work was not likely to be feasible within the short to medium term.

Could and should permanent redeployment and secondment opportunities have been explored with the claimant prior to dismissal?

477. Counsel for the respondent argued that it was for the claimant to identify any secondment opportunities and none had been identified. An employer is under a duty to act fairly and reasonably in dismissing an employee. No secondment opportunities had been identified. A secondment is temporary and would not resolve the issue as to the claimant's substantive role which required to be carried out on a permanent basis. The respondent did not act unreasonably in its approach to secondment.

478. With regard to seeking alternative roles prior to dismissal, the Tribunal found that the respondent acted fairly and reasonably. The claimant was placed upon the redeployment register. The claimant also had the opportunity to identify suitable roles and raise these. The approach taken by the respondent was reasonable.

Did the respondent fail to make reasonable adjustments to enable the claimant to return to work?

479. The respondent had sought to support the claimant and facilitate a return to work. The circumstances were challenging. The key barrier to the claimant's return to work (as identified by the medical evidence) was the complex employment issues facing the claimant. Those issues required to be resolved before a return to work would be considered. The respondent was trying to do so but there was no reasonable timeframe after which a return to work was likely. The respondent had made all adjustments that were reasonable and had did all it could reasonably to secure the claimant's return to work. That the claimant was unable to return to work was not the fault of the claimant or respondent but the circumstances facing the claimant which the respondent manged in a fair and supportive way.

Was the procedure carried out by the respondent unfair because the respondent did not establish the claimant's medical position before taking the decision to invoke the Attendance Policy?

480. This was not a fair criticism of the process since the medical position was clear. The respondent understood what the medical position was – the claimant was unable to return to work until, at the earliest, when the complex employment and management issues had been resolved.

Was it unfair in that the respondent failed to obtain evidence from the claimant's psychiatrist before taking the decision to dismiss?

481. The claimant's argument was that the respondent failed to obtain "further advice" from the claimant's psychiatrist or to *"properly get to the bottom with occupational health when the claimant could return to work and what support could be given to get the claimant to return to work".* That was not a fair criticism to make of the medical position. The claimant had made her position crystal clear and the medical position that was before the respondent reflected that position. There was no further information suggested to the respondent at the Hearing that suggested there was any outstanding medical information or issues that would assist the process. The respondent sought relevant information from the occupational health physician and took that into account. No further information was suggested nor reasonable.

482. From a medical standpoint the claimant would be fit to return to work once the complex employment and management issues were resolved. She was incapable of working with her managers whom she considered to have bullied her and she was unwilling to engage in mediation and other workplace resolutions until the Tribunal process was complete. While some employers might well have sought further medical intervention, an equally reasonable employer would accept the position as advanced by the claimant and the medical information that was available. The respondent's approach to obtaining proper medical information was fair and reasonable.

Did the respondent fail to follow the Attendance Policy by not providing supportive contact during the claimant's sickness absence?

483. There were no express submissions on this issue from the claimant but the issue appeared to relate to the fact the claimant's line manager had not engaged with the claimant. The respondent's position was that it was reasonable for alternative arrangements to be put in place where the claimant is unable to work with her line manager and believes she is being bullied by him. That was a reasonable position to adopt given the risk that further contact could create.

484. The respondent had put in place supportive measures to work with the claimant and to seek to assist her return to work. The HR team did maintain contact with the claimant and those communicating with the claimant had offered support. The claimant was a senior employee and knew the resources the respondent had (and was able to seek further information if needed). Counsel for the respondent noted in her submission the steps taken (as accepted by the claimant in cross examination) to supporting her during her absence. The respondent acted fairly and reasonably by supporting the claimant during the challenging circumstances she faced.

Did the respondent fail to follow the Policy by proceeding directly to Stage 3 of the Attendance Policy?

485. This was one of the key planks of the claimant's unfair dismissal complaint. The claimant was of the view (at least at the Hearing) that the respondent

ought to have gone through stage 1 and 2 first prior to dismissing and the failure to do this resulted in the dismissal being unfair. The respondent argued the policy was clear in creating flexibility such that each case can be progressed in the manner suitable for it.

486. The non-legal members' industrial expertise was invaluable in considering this. The Tribunal was of the view that the respondent's interpretation of the Policy was the correct one. Each individual case must be considered on its merits. Ordinarily stage 1 would be the first step but there can be cases where stage 2 or stage 3 is appropriate. The policy gives an example of when proceeding directly to stage 3 would be appropriate but that is not expressly stated (or reasonably inferred from the context) to be the only situation when proceeding to stage 3 would be appropriate and it would be contrary to what the policy says about taking individual circumstances into account to then prevent flexibility of proceeding to stage 3 in other appropriate cases.

487. Counsel for the respondent noted that the policy is a national policy and had been negotiated by the unions (including the BMA) and employer at a national level. Counsel noted the BMA had told the claimant that it was rare to proceed directly to stage 3 (but not that such an approach would be a breach). There was no evidence to suggest the BMA considered the respondent's approach to amount to a breach of the policy. The respondent's witnesses, who operate the policy regularly, agreed that the important issue was the flexibility and proceeding to stage 3 was entirely consistent with the policy.

488. The Tribunal considered that on the facts of this case proceeding directly to stage 3 was permitted by the Policy. In any event, it was fair and reasonable for the respondent to do so given the facts of this case. A very long time had been given to allowing the claimant time to return to fitness. When it became clear that the claimant was unlikely to return to work, the respondent formally applied the Policy. That was reasonable on the facts of this case given the prevailing circumstances and issues affecting the claimant and her position. Proceeding to stage 1 or 2 would have made no substantive difference in this case. It was appropriate to proceed directly to stage 3. The respondent acted fairly and reasonably in approaching the matter in the way they did.

Did the respondent fail to follow the policy by not exploring secondment and/or redeployment opportunities before taking the decision to dismiss?

489. This was considered above. The Tribunal concluded that the respondent acted fairly and reasonable in its approach to exploring secondment and redeployment opportunities before dismissing.

Did the respondent fail to follow the policy by not considering or acting upon Occupational Health's recommendation to consider redeployment prior to dismissal?

490. The respondent acted fairly and reasonably with regard to the medical information it obtained prior to dismissal.

Did the respondent fail to follow the policy by not appointing an independent or impartial person to decide upon this matter, and instead refusing the claimant's request to recuse Ms Bozkurt as Chair given her prior involvement in the employment matters above, thereby rendering her decision unfair and biased?

491. For the reasons set out above, the Tribunal considered that the respondent had acted fairly and reasonably in this regard. Ms Bozkurt's role was to ascertain whether or not the claimant was fit to return to work or could be fit to return within a reasonable period of time. While Ms Bozkurt had been involved in the process at an earlier stage, that did not prevent her from fairly considering the facts and surrounding circumstances as to the attendance question.

492. While a perfect process would have someone determine the issue who had no prior involvement, on the facts of this case it was not possible to do so. There were few senior officers available. The respondent concluded that it required to be a senior officer employed by the respondent and not a third party. That was a reasonable approach to take. A third party, the Employee Director, had been included in the panel and no issues had arisen. The chief executive was also appointed to deal with any appeal.

493. In all the circumstances the respondent acted fairly and reasonably in deciding that Ms Bozkurt would hear the matter.

Did the respondent fail to follow the policy by failing to contact the claimant to discuss redeployment opportunities during her notice period to date?

494. The respondent acted fairly and reasonably in considering redeployment opportunities. The claimant knew of the vacancies that were available and was given a fair chance to consider.

Were there other options available to the respondent which it should but which it did not take, including obtaining further advice from the claimant's psychiatrist?

495. Counsel for the respondent noted that the claimant's health was covered extensively by the occupational health report (and no further psychiatric input was considered necessary). The Tribunal agreed that obtaining further information would not have been necessary. There has been suggestion as to what such a further step would have achieved or why it would have been necessary given the very clear reasons and medical position pertaining to the reason for the claimant's unfitness to work.

Were other options available including allowing a further period of review before dismissing to explore secondment and redeployment opportunities?

496. The respondent had waited a reasonable period of time. It was fair and reasonable not to wait longer. All other options had been reasonably considered and it was reasonable to proceed to dismissal on the facts.

Were other options available including allowing the claimant to recover and return to work for the respondent in 2024 as she had indicated she was likely to be in a position to do?

497. From the information available to the respondent at the time, the respondent had waited a reasonable period of time. While some reasonable employers might well have waited a few more months, an equally fair and reasonable

employer would have proceeded as the respondent did on the facts. There were no other reasonable alternatives available.

Were other options available including consulting with the claimant regarding permanent redeployment and/or secondment opportunities?

498. The claimant was given all available vacancies and there was no suggestion anything had been omitted. The respondent had acted fairly and reasonably in their approach to alternatives to dismissal.

If the Tribunal finds that there was a potentially fair reason, taking into account the circumstances and the size and administrative resources of the respondent, did the respondent act reasonably in treating it as sufficient reason for dismissing the claimant in accordance with equity and the substantial merits of the case?

499. The Tribunal took a step back to assess whether or not in dismissing by reason of capability the respondent acted fairly and reasonably in all the circumstances, taking account of the size and resources and equity and the merits of the case. The Tribunal unanimously concluded that the respondent did act fairly and reasonably on the facts of this case and in light of the information that was before the respondent at the time. This was a decision reached with particular reliance upon the industrial expertise of the non legal members in this case.

500. The length of the claimant's absence was taken into account and a substantial amount of time had passed. The respondent took into account all the relevant circumstances. It was not correct to say the respondent failed to consider and take into account that the claimant's sickness was caused by the making of protected disclosures, as submitted by counsel for the claimant. The claimant's absence was caused by her inability to work with colleagues whom she considered to have bullied her. The claimant was unable to return to work while the complex employment and management issues had not been resolved but it was not clear what a resolution would look like, given the senior role the claimant had and the requirement to work with colleagues. The claimant's view as to a return to work was also clear.

501. A fair process had been undertaken. The respondent was seeking to resolve the complex employment and management issues the claimant perceived. The claimant had not accepted the outcome of the conduct hearing. It was unlikely that the claimant would accept the outcome given her view as to the conduct of her colleagues. Facilitating a return to work in those circumstances would be extremely challenging and there was no guarantee mediation or other workplace resolutions would work. It was reasonable for the respondent to proceed to manage the claimant's absence and ascertain what the likelihood of a reasonable return to work was on the facts.

502. The respondent obtained as much medical information that was reasonable and sought to work with the claimant to facilitate her return to work. In all probability a return to work was not possible in the short to medium term, looking at matters from the information available to the respondent at the time.

503. The respondent fairly approached the process and gave the claimant a fair opportunity to respond to the issues and identify what, if any, steps could be taken to facilitate her return to work. It was appropriate in all the circumstances of this case to proceed to stage 3 of the policy and it was fair and reasonable to have done so. There were no other reasonable steps that could fairly have been taken to have avoided dismissal. Even delaying dismissal would simply have delayed dismissal given the medical information and context. The claimant was unlikely to be capable of contemplating a return to work until conclusion of the Tribunal process and even then she would require to overcome the massive hurdles pertaining to the workplace conflicts and her views as to her colleagues. She was not prepared to accept that her conduct was in any way responsible for the situation in which she found herself, despite the evidence that had been produced from different individuals from different areas, whose position was consistent in relation to the approach the claimant had taken. The respondent had sought to deal with the issues the claimant had and waiting a further period of time was unlikely to have made any difference. It was reasonable to proceed when the respondent did on the facts.

504. The chair of the panel that dismissed the claimant had knowledge of the background pertaining to the claimant but there was no evidence that she acted unfairly or that her involvement was materially unfair on the facts. The size of the respondent was such that it was not possible to source an alternative chair, and the chief executive (who was independent) was able to hear the appeal. The approach was not perfect but it was reasonable given the role of the chair was to ascertain the claimant's fitness to work going forward. There was no reason Ms Bozkurt could not carry out that role fairly. The chief executive who had not been involved in the process was able to deal with an appeal.

505. The respondent took all reasonable steps to avoid dismissal and consider alternative roles. The claimant's position was fully taken into account, balancing that with the requirements of the respondent. Fair steps were taken to identify alternative roles, taking into account the medical position. The medical position was fully taken into account. The fact the claimant had made protected disclosures was not in any sense reason for her dismissal and did not in any sense influence the decision to dismiss her.

506. The respondent acted fairly and reasonably in dismissing the claimant by reason of capability in all the circumstances taking account of size, resources, equity and the merits of the case.

Was the decision to dismiss the claimant within the range of reasonable responses available to the respondent?

507. The Tribunal was unanimously of the view that the decision to dismiss fell within the range of reasonable responses open to a reasonable employer. The Tribunal recognised that some other employers might well have done more, whether gone externally for a chair or waited a longer period before dismissing but an equally reasonable employer would have acted as the respondent did. It is equally the case that some other reasonable employers could well have decided (fairly) to have dismissed sooner (on the same facts). The Tribunal must avoid substituting its view and instead consider whether the respondent acted fairly and reasonably from the information available to

the respondent at the time. Having considered the material before the respondent at the time, taking account of the context, the Tribunal concluded the decision to dismiss the claimant fell within the range of responses open to a reasonable employer.

Discrimination complaints

508. The Tribunal noted that the claimant had provided very little by way of substantive submissions in relation to the discrimination complaints as indicated above (there being only a few sentences). As a result, the Tribunal did it best to assess what each complaint was from the evidence before it, where it was possible to do so, given the seriousness of these complaints.

DISCRIMINATION ARISING IN CONSEQUENCE OF DISABILITY

509. The first issue under this complaint is to consider each of the acts relied upon as unfavourable treatment to assess whether the act had been established in evidence.

510. The first act was **invoking the Absence Management process.** This was accepted as having been done.

511. The next act was **failing to obtain up to date medical evidence** prior to invoking the Attendance Policy. The Tribunal found the respondent did not fail in this regard. A reasonable amount of up to date information had been secured and the respondent knew all it needed to about the claimant's health.

512. Third it was alleged the **respondent failed to consider invoking stages 1 or 2** of the Absence Management Process instead of moving directly to stage 3. The respondent chose to opt to stage 3 directly as they considered it appropriate in the circumstances. The respondent had not therefore failed to consider stages 1 and 2. The decision taken was that this was an appropriate case in which the respondent could proceed directly to stage 3.

513. Next it was said the respondent had **failed to wait a few more months** for the claimant to return to work. There was no dispute the respondent did not wait longer before dismissing than when it did.

514. It was then said the respondent **failed to consider other options prior to dismissal** such as redeployment and secondment opportunities, mediation, counselling, management training and coaching. The respondent reasonably considered alternatives to dismissal before deciding to dismiss and the Tribunal did not find the respondent to have failed in this regard.

515. Next it was argued that the respondent **did not consider permanent redeployment/secondment opportunities** as an alternative to dismissal. The Tribunal did not find this to have been established in evidence as the respondent reasonably considered alternatives.

516. The second last act relied upon was **not exercising discretion to pay contractual sick pay** during the claimant's sickness absence. This act had been established in evidence.

517. The final act relied upon was **dismissing the claimant** for capability reasons which obviously had been established.

If so, did the above amount to unfavourable treatment?

518. The Tribunal next considered whether the acts relied upon amounted to unfavourable treatment.

a. invoking the Absence Management process: This was not unfavourable treatment since the purpose of the treatment was to secure a return to work, which was favourable treatment.

b. failing to obtain up to date medical evidence prior to invoking the Attendance Policy: The Tribunal found the respondent did not fail in this regard. There was no additional information that would have changed the position. It was not therefore unfavourable treatment.

c. a failure to consider invoking stages 1 or 2 of the Absence Management Process instead of moving directly to stage 3: The respondent chose to opt to stage 3 directly as they considered it appropriate in the circumstances. Proceeding with earlier stages would have made no difference given the prevailing circumstances.

Proceeding directly to stage 3 was permissible and an attempt to secure a return to work for the claimant and as set out above proceeding to formally manage absence from work is not unfavourable treatment on these facts.

d. failing to wait a few more months for the claimant to return to work: The Tribunal did not consider in this case that waiting a few more months would have made any difference at all. The claimant would not have been fit to return to her role *"within a few months".* On the claimant's own evidence she would not be able to even consider a return until the Tribunal process is complete which was clearly going to be substantially more than a few months. On the facts, waiting a few months would have made no difference and it was not unfavourable treatment not to give the claimant more time.

e. failing to consider other options prior to dismissal such as redeployment and secondment opportunities, mediation, counselling, management training and coaching: The respondent reasonably considered alternatives to dismissal before deciding to dismiss and so this was not unfavourable treatment.

f. not considering permanent redeployment/secondment opportunities as an alternative to dismissal: The respondent had reasonably considered all relevant alternatives and their action was not unfavourable treatment.

g. not exercising its discretion to pay contractual sick pay during the claimant's sickness absence: The Tribunal did not consider it to be unfavourable treatment not to be paid wages when unfit to work in these circumstances.

h. dismissing the claimant for capability reasons: Being dismissed was unfavourable treatment.

If so, was the unfavourable treatment because of something arising in consequence of the claimant's disabilities?

519. There were no express submissions as to how each act arose because of something arising in consequence of disability. While it might be assumed the claimant was arguing she was absent because of disability, the evidence was that the claimant was absent because of her perception of the conduct of her managers (which meant she could not return to work).

520. Without clear guidance as to what the claimant says the issues are, it is difficult to discern the position from the evidence. The authorities make it clear that the Tribunal must identify what caused the treatment that was unfavourable (bearing in mind there may be more than one cause and it is not necessary the cause is the main or sole cause). The cause or reason for the treatment must have a significant (in the sense of more than minor or trivial) influence on the unfavourable treatment to be an effective or operative cause or reason. The Tribunal then needs to consider whether the reason or cause was something arising in consequence of disability (recognising there may be more than one causal link and assessing the evidence to determine whether as a matter of fact the reason was because of something arising in consequence of disability). The Tribunal considered the evidence before it, absent any express submissions from the claimant on these complex issues.

    a. invoking the Absence Management process: There was no evidence that the claimant's absence was because of her disability rather than because of her inability to work with her colleagues and the complex work related matters. Invoking the absence management process was not because of something arising in consequence of disability.

    b. failing to obtain up to date medical evidence prior to invoking the Attendance Policy: This was not unfavourable treatment and had not been established.

    c. failing to consider invoking stages 1 or 2 of the Absence Management Process instead of moving directly to stage 3: This had not been established and was not unfavourable treatment on these facts.,

d. failing to wait a few more months for the claimant to return to work: This was not unfavourable treatment. It was also not because of something arising in consequence of disability.

e. failing to consider other options prior to dismissal such as redeployment and secondment opportunities, mediation, counselling, management training and coaching: This had not been established. In any event from the evidence the Tribunal found the treatment was not because of something arising in consequence of disability.

f. not considering permanent redeployment/secondment opportunities as an alternative to dismissal: This had not been found in evidence. In any event, from the evidence the Tribunal found the treatment was not because of something arising in consequence of disability.

g. not exercising its discretion to pay contractual sick pay during the claimant's sickness absence: The respondent did this. It was unfavourable for the claimant not to be paid. This arose because the claimant was absent from work and the respondent did not consider the circumstances to be exceptional to justify exercising discretion. The Tribunal did not find that it was because of something arising in consequence of the claimant's disabilities. The claimant was absent from work due to her perception of the challenges the complex work situation created for her. Dr McAuley's decision was not because of something arising in consequence of disability but because of his decision that paying the claimant would not facilitate her return to work.

h. dismissing the claimant for capability reasons: This arose as a result of the claimant's absence which did not arise because of the claimant's disability but due to the challenges the claimant perceived as to her complex working relationships. The evidence before the Tribunal was that the claimant was unable to work with her colleagues and that prevented her from returning to work. It was not her disability that prevented her from working, evidenced by her desire (and clear ability) to work elsewhere when absent from her role. Fundamentally the

claimant was unable to work with her colleagues whom she perceived as treating her adversely because of her disclosures. That was the reason the claimant was unable to work rather than the disability.

If so, was that treatment by the respondent objectively justified as a proportionate means of achieving legitimate aims?

521. Although the Tribunal did not find that there had been unfavourable treatment because of something arising in consequence of disability, the Tribunal considered the justification argument presented by the respondent, the onus being on the respondent to satisfy the Tribunal as to justification.

522. The respondent relied upon the following legitimate aims: to promote attendance at work and appropriately manage absence in order to provide an efficient and cost-effective public service and to ensure health and safety of patients and staff through appropriate staffing levels; allocating limited resources (financial/personnel) as appropriate; effectively running healthcare services; meeting patient/service demands and needs; and seeking to avoid delay and resultant difficulties.

523. The Tribunal found the aims relied upon were in principle legitimate (and it was not argued otherwise). Promoting attendance at work and appropriately managing absence in order to provide an efficient and cost-effective public service is clearly something that is legitimate. The applies to ensuring health and safety of patients and staff through appropriate staffing levels and allocating limited resources (financial/personnel) as appropriate; together with effectively running healthcare services; meeting patient/service demands and needs; and seeking to avoid delay and resultant difficulties.

524. The Tribunal considered each of the acts in turn to determine whether the treatment was objectively justified. The onus of establishing justification is on the respondent who must establish the defence by evidence. The Tribunal must therefore consider the evidence that was led in assessing whether or not the legitimate aim was proportionately applied on the facts. The Tribunal has been careful to apply the authorities in this area and carefully consider the evidence led.

525. **Invoking the Absence Management process**: Given this was not unfavourable treatment, justification does not arise. Had it been necessary to do so, the Tribunal would have found the invoking of the absence management process a proportionate means of achieving a legitimate aim, having balanced the discriminatory effect with the needs of the respondent. Invoking the policy was reasonably necessary to achieve the aim. The impact of the process upon the claimant was significant but it was the opportunity for the claimant to set out her position as to fitness for work, prognosis and timescales. The impact upon the respondent of an indefinite absence was very substantial. The Tribunal balanced the impact of the treatment upon the claimant and the effect upon the respondent. The respondent had waited a reasonable period of time before progressing. The claimant had the opportunity to set out her position. The Tribunal considered the impact of invoking the process upon the claimant to be outweighed by the impact upon the respondent of not doing so. The Tribunal was satisfied that the legitimate aim was proportionately applied from the evidence having balanced the discriminatory effect of the measure with the legitimate aim.

526. The treatment was justified in appropriately managing absence in order to provide an efficient and cost effective public service and to ensure health and safety of patients and staff through appropriate staffing levels; allocating limited resources (financial/personnel) as appropriate; effectively running healthcare services; meeting patient/service demands and needs; and seeking to avoid delay and resultant difficulties. The treatment was clearly capable of achieving these aims and having balanced the effect of the treatment on the claimant with the impact upon the respondent, the Tribunal found the treatment to be justified pursuant to those aims.

527. The respondent had discharged the burden of showing that invoking the absence management process was a proportionate means of achieving its aim. In reaching this decision the Tribunal examined the evidence and intensely analysed the impact upon the claimant as against the respondent from the evidence presented to the Tribunal. Having intensely analysed the

measure the Tribunal is satisfied that the treatment was objectively justified from the evidence presented to the Tribunal.

528. **The alleged failure to obtain up to date medical evidence prior to invoking the Attendance Policy:** This was not unfavourable treatment. The respondent had obtained relevant, sufficient and up to date medical evidence that allowed a fair decision to be taken. This had not been made out.

529. **The failure to consider invoking stages 1 or 2 of the Absence Management Process instead of moving directly to stage 3:** This had not been established and was not unfavourable treatment on these facts. The respondent did consider invoking stages 1 and 2 and chose to proceed directly to stage 3, considering this an appropriate case to do so.

530. **Failing to wait a few more months for the claimant to return to work:** This was not unfavourable treatment. Had it been necessary to do so, the Tribunal would have found that the decision to dismiss when the respondent did was justified given the specific aims relied upon and the evidence. The respondent had waited longer than any other absent employee. The claimant's role was senior and ongoing projects required someone in post to progress. The respondent had to make a decision and proceeding to do so when they did would have been objectively justified on the evidence.

531. **The alleged failure to consider other options prior to dismissal such as redeployment and secondment opportunities, mediation, counselling, management training and coaching:** This had not been established in evidence as the respondent did consider other options prior to dismissal.

532. **Not considering permanent redeployment/secondment opportunities as an alternative to dismissal:** The respondent did consider other opportunities as an alternative to dismissal and this had not been established.

533. **Not exercising its discretion to pay contractual sick pay during the claimant's sickness absence:** The respondent did this. It was unfavourable for the claimant not to be paid. This arose because the claimant was absent from work and the respondent did not consider the circumstances to be

exceptional to justify exercising discretion. It is not clear how this was because of something arising in consequence of the Claimant's disabilities. The claimant was absent from work due to her perception of the challenges the complex work situation created for her. There was no connection as between her disabilities and the exercise of discretion.

534. Given this was not unfavourable treatment, justification does not arise. Had it been necessary to do so, the Tribunal would have found not exercising discretion to pay sick pay to be a proportionate means of achieving a legitimate aim, having balanced the discriminatory effect with the needs of the respondent. Making the decision not to do so for the reasons given was reasonably necessary to achieve the aim. The impact of the failure to receive additional pay upon the claimant was significant but as a public body the respondent is required to ensure funds are used justly. Continuing to pay the claimant would not have facilitated her return to work. The respondent requires to treat its employees fairly and consistently. The policy exists to achieve that and in the circumstances there was no proper basis to justify continuing to pay the claimant. The Tribunal balanced the impact of the treatment upon the claimant and the effect upon the respondent. The claimant had received the sick pay to which she was entitled. The Tribunal considered the impact upon the respondent to have been greater than the impact of not paying the claimant upon the claimant.

535. The treatment was justified in appropriately managing absence in order to provide an efficient and cost effective public service. The treatment was clearly capable of achieving this aim and having balanced the effect of the treatment on the claimant with the impact upon the respondent, the Tribunal found the treatment to be justified pursuant to those aims.

536. The Tribunal was satisfied that the legitimate aim was proportionately applied from the evidence having balanced the discriminatory effect of the measure with the legitimate aim. The respondent had discharged the burden of showing not exercising discretion was a proportionate means of achieving its aim.

537. In reaching this decision the Tribunal examined the evidence and intensely analysed the impact upon the claimant as against the respondent from the evidence presented to the Tribunal. Having intensely analysed the measure the Tribunal is satisfied that the treatment was objectively justified from the evidence presented to the Tribunal.

538. **Dismissing the claimant for capability reasons:** This was done and being dismissed was unfavourable treatment. It arose as a result of the claimant's absence which did not arise because of the claimant's disability but due to her inability to work with her colleagues (which was itself because of the challenges the claimant perceived as to her complex working relationships).

539. The Tribunal considered the justification evidence carefully in relation to dismissal, the onus being on the respondent. The Tribunal unanimously concluded that dismissal of the claimant for capability reasons was a proportionate means of achieving a legitimate aim, having balanced the discriminatory effect upon the claimant with the needs of the respondent. Dismissal was reasonably necessary to achieve the aim given the medical position and context. The impact of dismissal upon the claimant was significant but equally she was unable to continue to work and the outlook was poor as the claimant was not fit to return within a reasonable period of time. There were no other vacancies arising and the respondent had waited a very lengthy period of time and had been supportive. The claimant's role required to be filled on a permanent basis given the work that needed to be done. The impact upon the respondent of an indefinite absence and a role that was not being filled was very substantial.

540. The Tribunal balanced the impact of the treatment upon the claimant and the effect upon the respondent. The respondent had waited a reasonable period of time and had given the claimant every opportunity to set out when she would become fit or what changes could be made to facilitate her return to work. The Tribunal considered the impact upon the respondent to far outweigh the impact dismissal had upon the claimant.

541. The treatment was justified in appropriately managing absence in order to provide an efficient and cost effective public service and to ensure health and safety of patients and staff through appropriate staffing levels; allocating limited resources (financial/personnel) as appropriate; effectively running healthcare services; meeting patient/service demands and needs; and seeking to avoid delay and resultant difficulties. Dismissal was clearly capable of achieving these aims and having balanced the effect of the treatment on the claimant with the impact upon the respondent, the Tribunal found the treatment to be justified pursuant to those aims.

542. The Tribunal was satisfied that the legitimate aim was proportionately applied from the evidence having balanced the discriminatory effect of the measure with the legitimate aim. The respondent had discharged the burden of showing dismissal was a proportionate means of achieving its aims.

543. In reaching this decision the Tribunal examined the evidence and intensely analysed the impact upon the claimant as against the respondent from the evidence presented to the Tribunal. Having intensely analysed the measure the Tribunal is satisfied that the treatment was objectively justified from the evidence presented to the Tribunal.

Time limit issues

544. The first issue was whether in respect of each claimed act, were any or all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) and (b) of the Equality Act 2010. Given the complaints had not been established, this did not require to be determined. The Tribunal considered the matter given the submissions. Early conciliation commenced on 12 April 2023 with the complaint raised on 23 June 2023. As a consequence, a complaint about an incident on or before 11 January 2023 (3 months before early conciliation was commenced) would be out of time. Each act was separate and not linked in any way. The complaints were separate and distinct and time ran from each individual act or omission.

545. The acts relied upon are invoking the absence management process (which was in June 2023), failing to obtain up to date medical evidence (which was

around October 2023), moving directly to stage 3 (which was in June 2023), failing to wait a few more months before dismissing (which was on 20 November 2023), failing to consider other options before dismissing (which was on 20 November 2023) and not exercising discretion to pay (which was on 1 February 2022) and dismissing (which was on 20 November 2023). The complaint which was raised prior to expiry of the time limit was the refusal to exercise discretion to pay sick pay. That was raised out of time.

546. The next issue would have been whether time be extended on a just and equitable basis. The claimant had the benefit of a trade union and solicitor and had explicitly told the respondent she had been taking advice. The Tribunal took account of the claimant's impact statement. The Tribunal did not consider counsel for the claimant's submission that it is for the respondent to lead evidence as to time bar to be meritorious. The Tribunal requires to assess from the evidence generally whether or not it is just and equitable to allow the claim to proceed. The prejudice to the respondent in allowing that complaint to proceed would have been greater than the prejudice to the claimant on the limited facts before the Tribunal on this issue. The delay was lengthy and there was no reason provided as to why the complaint was not raised in time. The cogency of the evidence was unaffected. The claimant had the ability to raise the matter but did not do so despite the resources available to her. The Tribunal would not have considered it to be just and equitable to extend time from the evidence before it, had it been necessary to do so. The prejudice to the respondent in having to meet the complaint in the circumstances would have outweighed the prejudice to the claimant.

Knowledge of disability

547. Had it been necessary to do so, the Tribunal would require to consider pursuant to section 15(2) whether the respondent did not know or could not reasonably be expected to know that the claimant had the disability. The claimant's position was that the respondent ought to have had constructive knowledge of adjustment disorder by September 2022 having been off work for around a year by then and there were multiple occasions when the respondent could have asked for medical input. Counsel for the respondent

argued the respondent knew about LADA and adjustment disorder following receipt of her case for the stage 3 hearing (which was in October 2023). It was conceded that there was some awareness of her diabetes prior to that.

548. The difficulty in determining this issue is that there was no evidence linking any of the specific impairments with the treatment. The Tribunal considered that the respondent learned of the disability and consequences in August 2023. The respondent did know about the claimant's diabetes prior to that date but it is unclear when nor the extent to which that amounted to a disability (or had the disadvantages relied upon). The claimant had made it clear in correspondence that the principal condition relied upon in relation to the discrimination complaint was adjustment disorder (and the effect this had upon her other impairments). The respondent did not know and could not reasonably have known about the disability prior to August 2023.

549. **Taking a step back,** the Tribunal considered that there was no unfavourable treatment because of something arising in consequence of the claimant's disability and even if there had been, such treatment was justified on the facts. This complaint is ill founded.

INDIRECT DISCRIMINATION

PCPs

550. Did the respondent apply any of the following as a provision, criterion or practice ('PCP') (in terms of the Equality Act 2010) to the claimant:

a. invoking the Attendance Policy against the claimant in June 2023: To the extent that the PCP is the application of the Attendance Policy, that was a PCP that was applied and would be applied to all individuals.

b. invoking the Attendance Policy against the claimant without first obtaining up to date medical evidence: There was no evidence before the Tribunal that the respondent's practice was to invoke the Policy without first obtaining up to date medical evidence. In fact the practice was that relevant medical evidence was obtained prior to progressing the policy. This PCP had not therefore been established in evidence.

c. moving straight to Stage 3 of the Attendance Policy: This was a relevant PCP since the respondent, in appropriate cases, proceeded directly to stage 3.

d. refusing to consider secondment and/or redeployment opportunities prior to taking the decision to dismiss the claimant: This had not been established in evidence since the respondent did not refuse to consider such opportunities either generally or in relation to the claimant.

e. ignoring the claimant's requests to exercise discretion to pay contractual sick pay during the claimant's sickness absence: The respondent did not ignore the claimant's requests. As soon as the request was received it was dealt with. The request was refused.

Did any such PCP put the claimant at a substantial disadvantage (referable to her disabilities) in comparison to persons who are not disabled?

a. invoking the Attendance Policy against the claimant in June 2023: The Policy applied to all staff. There was no evidence the claimant was at a substantial disadvantage in comparison to persons who are not disabled. Individuals who were absent for the same period of time would have been treated in the way as the claimant.

b. invoking the Attendance Policy against the claimant without first obtaining up to date medical evidence: This had not been established. In any event up to date medical evidence would not have altered the position.

c. moving straight to Stage 3 of the Attendance Policy: There was no evidence that moving straight to stage 3 placed the claimant at any greater disadvantage than anyone else who was not disabled. Moving straight to stage 3 did not preclude anything that could be done at stages 1 or 2. The respondent would treat anyone with a similar level of absence, who was not disabled, in the same way and would

consider proceeding directly to stage 3 where it was appropriate to do so.

d. refusing to consider secondment and/or redeployment opportunities prior to taking the decision to dismiss the claimant: This had not been established in evidence.

e. ignoring the claimant's requests to exercise discretion to pay contractual sick pay during the claimant's sickness absence: Even if this had been established as having occurred, the respondent would have treated a person who was not disabled in the same way. There was no substantial disadvantage.

If so, was that treatment by the respondent justified as a proportionate means of achieving legitimate aims?

551. The respondent relied upon the following legitimate aims: to promote attendance at work and appropriately manage absence in order to provide an efficient and cost effective public service and to ensure health and safety of patients and staff through appropriate staffing levels; allocating limited resources (financial/personnel) as appropriate; effectively running healthcare services; meeting patient/service demands and needs; and seeking to avoid delay and resultant difficulties.

552. As the PCPs had not been established in evidence and it had not been shown that any relevant PCP gave rise to relevant disadvantage, it was not necessary to consider this. Had it been necessary to do so, the Tribunal would also have found that the treatment was (individually) justified as a proportionate means of achieving a legitimate aim.

553. The aims relied upon were in principle legitimate (there being no contrary argument). Promoting attendance at work and managing absence to achieve a cost effective public service and allocate resources, run health care and meet service demands without delay are clearly in principle legitimate aims. From the evidence when intensely balancing the impact of the discriminatory treatment on the claimant with the needs of the respondent, on the facts of

this case the treatment would have been objectively justified. To avoid any doubt the Tribunal considered each of the PCPs and each individual justification.

554. The Tribunal would have found the **invoking of the absence management process** a proportionate means of achieving a legitimate aim, having balanced the discriminatory effect with the needs of the respondent. Invoking the policy was reasonably necessary to achieve the aim. The impact of the process upon the claimant was significant but it was the opportunity for the claimant to set out her position as to fitness for work, prognosis and timescales. The impact upon the respondent of an indefinite absence was very substantial. The Tribunal balanced the impact of the treatment upon the claimant and the effect upon the respondent. The respondent had waited a reasonable period of time before progressing. The claimant had the opportunity to set out her position. The Tribunal considered the impact of invoking the process upon the claimant to be outweighed by the impact upon the respondent of not doing so. The Tribunal was satisfied that the legitimate aim was proportionately applied from the evidence having balanced the discriminatory effect of the measure with the legitimate aim.

555. The treatment was justified in appropriately managing absence in order to provide an efficient and cost effective public service and to ensure health and safety of patients and staff through appropriate staffing levels; allocating limited resources (financial/personnel) as appropriate; effectively running healthcare services; meeting patient/service demands and needs; and seeking to avoid delay and resultant difficulties. The treatment was clearly capable of achieving these aims and having balanced the effect of the treatment on the claimant with the impact upon the respondent, the Tribunal found the treatment to be justified pursuant to those aims.

556. The respondent had discharged the burden of showing that invoking the absence management process was a proportionate means of achieving its aim. In reaching this decision the Tribunal examined the evidence and intensely analysed the impact upon the claimant as against the respondent from the evidence presented to the Tribunal. Having intensely analysed the

measure the Tribunal is satisfied that the treatment was objectively justified from the evidence presented to the Tribunal.

557. With regard to the **alleged failure to obtain up to date medical evidence** prior to invoking the Attendance Policy, this had not been established in evidence. The respondent had obtained relevant, sufficient and up to date medical evidence that allowed a fair decision to be taken.

558. With regard to **moving straight to Stage 3 of the Attendance Policy** the respondent had in fact considered stages 1 and 2 and made a decision to proceed to stage 3. The Tribunal found that proceeding to stage 3 in appropriate circumstances was a proportionate means of achieving a legitimate aim, having balanced the discriminatory effect with the needs of the respondent. The policy expressly allows the respondent to proceed directly to stage 3 (and gives a situation where it can be done). In this case proceeding directly to stage 3 was reasonably necessary to achieve the aim. The impact of the claimant's absent was such that steps had to be taken. The medical position was clear – the claimant was not likely to be fit for work until the complex management and employment issues were resolved and there was no obvious way in which the circumstances would be such as to allow the claimant to return given her view. The respondent required to manage the claimant's absence and there was nothing in stage 1 and 2 which could not be done at stage 3. The impact upon the claimant was considerably less than the impact upon the respondent given her potentially indefinite absence. The Tribunal balanced the impact of the treatment upon the claimant and the effect upon the respondent. The respondent had waited a reasonable period of time before progressing. The claimant had the opportunity to set out her position and raise any issue as to her absence (which would have been the same had stage 1 or 2 been adopted). The Tribunal considered the impact of moving to stage 3 upon the claimant to be outweighed by the impact upon the respondent of not doing so. The Tribunal was satisfied that the legitimate aim was proportionately applied from the evidence having balanced the discriminatory effect of the measure with the legitimate aim.

559. The treatment was justified in appropriately managing absence in order to provide an efficient and cost effective public service and to ensure health and safety of patients and staff through appropriate staffing levels; allocating limited resources (financial/personnel) as appropriate; effectively running healthcare services; meeting patient/service demands and needs; and seeking to avoid delay and resultant difficulties. The treatment was clearly capable of achieving these aims and having balanced the effect of the treatment on the claimant with the impact upon the respondent, the Tribunal found the treatment to be justified pursuant to those aims.

560. The respondent had discharged the burden of showing that proceeding to stage 3 was a proportionate means of achieving its aim. In reaching this decision the Tribunal examined the evidence and intensely analysed the impact upon the claimant as against the respondent from the evidence presented to the Tribunal. Having intensely analysed the measure the Tribunal is satisfied that the treatment was objectively justified from the evidence presented to the Tribunal.

561. With regard to **refusing to consider secondment and/or redeployment opportunities** prior to taking the decision to dismiss the claimant, this had not been established in evidence since the respondent did not refuse to consider such opportunities either generally or in relation to the clamant.

562. With regard to **ignoring the claimant's requests to exercise discretion to pay contractual sick pay** during the claimant's sickness absence, the respondent did not ignore the claimant's requests. As soon as the request was received it was dealt with. The request was refused.

563. Had it been necessary to do so, the Tribunal would have found not exercising discretion to pay sick pay to be a proportionate means of achieving a legitimate aim, having balanced the discriminatory effect with the needs of the respondent. Making the decision not to do so for the reasons given was reasonably necessary to achieve the aim. The impact of the failure to receive additional pay upon the claimant was significant but as a public body the respondent is required to ensure funds are used justly. Continuing to pay the

claimant would not have facilitated her return to work. The respondent requires to treat its employees fairly and consistently. The policy exists to achieve that and in the circumstances there was no proper basis to justify continuing to pay the claimant. The Tribunal balanced the impact of the treatment upon the claimant and the effect upon the respondent. The claimant had received the sick pay to which she was entitled. The Tribunal considered the impact upon the respondent to have been greater than the impact of not paying the claimant upon the claimant.

564. The treatment was justified in appropriately managing absence in order to provide an efficient and cost effective public service. The treatment was clearly capable of achieving this aim and having balanced the effect of the treatment on the claimant with the impact upon the respondent, the Tribunal found the treatment to be justified pursuant to that aim.

565. The Tribunal was satisfied that the legitimate aim was proportionately applied from the evidence having balanced the discriminatory effect of the measure with the legitimate aim. The respondent had discharged the burden of showing not exercising discretion was a proportionate means of achieving its aim.

566. In reaching this decision the Tribunal examined the evidence and intensely analysed the impact upon the claimant as against the respondent from the evidence presented to the Tribunal. Having intensely analysed the measure the Tribunal is satisfied that the treatment was objectively justified from the evidence presented to the Tribunal.

Time limit issues

567. The first issue was whether in respect of each PCP, were any or all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) and (b) of the Equality Act 2010. Given the complaints had not been established, this did not require to be determined. The Tribunal considered the matter given the submissions. Early conciliation commenced on 12 April 2023 with the complaint raised on 23 June 2023. As a consequence, a

complaint about an incident on or before 11 January 2023 (3 months before early conciliation was commenced) would be out of time.

568. The PCPs relied upon are invoking the absence management process (which was in June 2023), moving directly to stage 3 (which was in June 2023), failing to consider other options before dismissing (which was on 20 November 2023) and not exercising discretion to pay (which was on 1 February 2022). The complaint which was raised prior to expiry of the time limit was ignoring requests for discretion to pay sick pay. That was raised out of time.

569. The next issue would have been whether time be extended on a just and equitable basis. The claimant had the benefit of a trade union and solicitor and had explicitly told the respondent she had been taking advice. The Tribunal took account of the claimant's impact statement. The Tribunal did not consider counsel for the claimant's submission that it is for the respondent to lead evidence as to time bar to be meritorious. The Tribunal requires to assess from the evidence generally whether or not it is just and equitable to allow the claim to proceed. The prejudice to the respondent in allowing that complaint to proceed would have been greater than the prejudice to the claimant on the limited facts before the Tribunal on this issue. The delay was lengthy and there was no reason provided as to why the complaint was not raised in time. The cogency of the evidence was unaffected. The claimant had the ability to raise the matter but did not do so despite the resources available to her. The Tribunal would not have considered it to be just and equitable to extend time from the evidence before it, had it been necessary to do so. The prejudice to the respondent in having to meet the complaint in the circumstances would have outweighed the prejudice to the claimant.

570. The indirect discrimination complaint is ill founded, there being no provision criteria or practices which placed the claimant at a disadvantage, with any such treatment being shown to be justified on the facts.

FAILURE TO MAKE REASONABLE ADJUSTMENTS

PCPs

571. The complaint in respect of the failure to comply with the duty to make reasonable adjustments was not clear. The issues agreed between the parties had failed to identify what the PCP was that was said to place the claimant at a disadvantage such that the duty was engaged. This was not included in the list of issues and there were no submissions from the parties on the PCPs pertaining to this complaint. The authorities have reminded Tribunals of the importance of approaching each of the constituent elements of the legislation. The Tribunal applied the PCPs relied upon in respect of the indirect discrimination complaint as it appeared that it was those on which this complaint was based.

a. invoking the Attendance Policy against the claimant in June 2023: To the extent that the PCP is the application of the Attendance Policy, that was a PCP that was applied and would be applied to all individuals.

b. invoking the Attendance Policy against the claimant without first obtaining up to date medical evidence: There was no evidence before the Tribunal that the respondent's practice was to invoke the Policy without first obtaining up to date medical evidence. In fact the practice was that relevant medical evidence was obtained prior to progressing the policy. This PCP had not therefore been established in evidence.

c. moving straight to Stage 3 of the Attendance Policy: This was a relevant PCP since the respondent in appropriate cases proceeded directly to stage 3 pursuant to the terms of the Policy.

d. refusing to consider secondment and/or redeployment opportunities prior to taking the decision to dismiss the claimant: This had not been established in evidence since the respondent did not refuse to consider such opportunities either generally or in relation to the clamant. There was no evidence that this was a policy, provision or criterion adopted by the respondent.

e. ignoring the claimant's requests to exercise discretion to pay contractual sick pay during the claimant's sickness absence: The respondent did not ignore the claimant's requests. As soon as the

request was received it was dealt with. The request was refused. This had not been established as a PCP in evidence as there was no policy of ignoring requests. The policy from the evidence was to reply to any such requests.

Did the above matters put the claimant at a substantial disadvantage compared with a non-disabled colleague, because of her disabilities?

572. The claimant had not set out what the substantial disadvantage was in respect of each PCP in submissions but the Tribunal did its best from the evidence in considering this issue. The Tribunal considered each issue in turn:

a. invoking the Attendance Policy against the claimant in June 2023: There was no evidence applying the Policy placed any employee at a disadvantage. The purpose of the Policy was to facilitate a return to work which is not a disadvantage. The Tribunal found no disadvantage, far less no substantial disadvantage, as a result of this PCP.

b. invoking the Attendance Policy against the claimant without first obtaining up to date medical evidence: This had not been established in evidence as a PCP. Had there been such a PCP failing to obtain up to date medical evidence could give rise to a substantial disadvantage but in this case there was no evidence before the Tribunal that the claimant was to any extent placed at a disadvantage in relation to medical evidence. The respondent knew all it needed to know about the claimant's medical position. There was no new information suggested which would have changed the position.

c. moving straight to Stage 3 of the Attendance Policy: This was a relevant PCP since the respondent in appropriate cases proceeded directly to stage 3. While all actions that can be carried out at stage 1 and stage 2 could be carried out at stage 3, proceeding to stage 3 takes less time (since it avoids the need to deal with each stage and the time such a step could take). To that extent proceeding directly to stage 3 gives rise to a substantial disadvantage.

d. refusing to consider secondment and/or redeployment opportunities prior to taking the decision to dismiss the claimant: This had not been established in evidence as there was no such policy.

e. ignoring the claimant's requests to exercise discretion to pay contractual sick pay during the claimant's sickness absence: The respondent did not ignore the claimant's requests. This had not been established as a PCP in evidence as there was no policy of ignoring requests.

Removing disadvantage

573. Taking into account the matters above, did the respondent fail to take such steps as were reasonable to avoid the substantial disadvantage (caused by the application of the PCP)? The Tribunal dealt with each PCP in turn.

a invoking the Attendance Policy against the claimant in June 2023: The Policy applied to all staff. There was no evidence the claimant was at a substantial disadvantage in comparison to persons who are not disabled. Individuals who were absent for the same period of time would have been treated in the way as the claimant. In this case the Tribunal found the respondent had done all that was reasonable to remove any disadvantage.

b. invoking the Attendance Policy against the claimant without first obtaining up to date medical evidence: This had not been established. In any event up to date medical evidence would not have altered the position. The respondent had done all that was reasonable to remove any disadvantage.

c. moving straight to Stage 3 of the Attendance Policy: The only disadvantage created by moving straight to stage 3 was that it took less time. Moving straight to stage 3 did not preclude anything that could be done at stages 1 or 2 and it was open to the claimant or respondent to suggest any of the actions that could have been done at stages 1 and 2 at the third stage. It was possible to proceed directly

to stage 3 in appropriate cases. The disadvantage created, the extra time, was not an issue in this case given the time the respondent had already waited for a substantial amount of time before invoking the policy at all. The respondent would treat anyone with a similar level of absence, who was not disabled, in the same way and would consider proceeding directly to stage 3 where it was appropriate to do so. Allowing more time to pass would not make any difference to the outcome given the facts in this case and the respondent did all that was reasonable to remove the disadvantage in this case.

d. refusing to consider secondment and/or redeployment opportunities prior to taking the decision to dismiss the claimant: This had not been established in evidence. The Tribunal found in any event that the respondent had acted reasonably in seeking alternatives prior to dismissal.

e. ignoring the claimant's requests to exercise discretion to pay contractual sick pay during the claimant's sickness absence: Even if this had been established as having occurred, the Tribunal would not have considered in this case that paying the claimant when absent would have been reasonable. It would not have led to a swifter return to work.

Steps

574. In the circumstances, did the respondent fail to make reasonable adjustments for the claimant, as set out by the claimant). Taking each of the steps said by the claimant to be reasonable in turn.

a. failing to provide supportive contact during the claimant's sickness absence and/or to consider alternative means of providing such support in the circumstances of the case: The Tribunal found that the respondent did provide supportive contact during the claimant's absence and considered alternative support. While there was a short delay, there is no evidence that the claimant was placed at any

disadvantage as a result (and the respondent apologised). This was not a step that would have removed any disadvantage.

b. failing to consider invoking stages 1 or 2 of the Attendance Policy instead of moving directly to stage 3: The Tribunal was satisfied it was appropriate for the respondent to proceed directly to stage 3 in this case given the lengthy of absence and prevailing circumstances. There is nothing which could have been done at stage 1 or 2 that could not have been done at stage 3. The respondent had waited a very lengthy period of time and it was appropriate to proceed directly to stage 3. The respondent properly and fairly applied its policy and sought to facilitate a return to work for the claimant which was not possible. The respondent had in any event not failed to consider invoking stages 1 and 2 since it considered such stages and decided it was appropriate to move to stage 3. This had not been established in evidence and would not have removed any disadvantage.

c. failing to obtain up to date medical evidence prior to invoking the Attendance Policy: The respondent did not fail to obtain up to date medical evidence. The respondent had all it reasonably needed to make a decision. There was no specific evidence that the respondent did not have which could have made a difference. This would not have removed any disadvantage.

d. failing to appoint another individual to hear the absence hearing and/or not considering recusing Ms Bozkurt from chairing the hearing particularly in light of the claimant's assertion that Ms Bozkurt had been combative in the disciplinary hearing causing further damage to her health: The Tribunal did not consider there to be any material disadvantage to the claimant on the facts by the approach taken. Taking such a step would not have removed any disadvantage created by any PCP. It was in any event likely that any other person hearing the matter would have reached the same outcome.

e. failing to wait a few more months for the claimant to return to work as she had indicated she was likely to be able to do in 2024: This would not have removed any disadvantage. The respondent waited for a reasonable period of time and waiting a few more months would not have removed any disadvantage as it was more likely than not that the position would be the same.

f. failing to consider other options prior to dismissal such as redeployment and secondment opportunities, mediation, counselling, management training and coaching: The respondent did reasonably consider all alternative options to dismissal before deciding to dismiss and this had not been established in evidence. The respondent had taken all reasonable steps in this regard.

h. not considering permanent redeployment/secondment opportunities as an alternative to dismissal: This had been considered and the respondent had taken all reasonable steps in this regard

j. not exercising its discretion to pay contractual sick pay during the claimant's sickness absence: Exercising discretion to pay the claimant would have had no appreciable impact upon the absence. There was no evidence to suggest paying the claimant more money would have affected her attendance at work. This was not therefore a reasonable step to remove the disadvantage.

k. dismissing the claimant for capability reasons: It was reasonable in all the circumstances for the respondent to dismiss the claimant. It is assumed the step meant here was not dismissing the claimant. The Tribunal considered in the circumstances that not dismissing the claimant would not have been a reasonable step taking account of the context and facts. The respondent had done all it reasonable could have done on the facts to remove any disadvantage created by the application of the relevant PCPs.

Knowledge

575. Did the respondent know, or could have reasonably known that the claimant was a disabled person at the relevant times and was likely to be placed at the disadvantage. If so, when did the respondent have this knowledge? The respondent's position with regard to knowledge is set out above. The respondent knew of the impairments by August 2023. It is not clear what the respondent knew or did not know about the specific disadvantages in the absence of evidence and submissions in this regard but given the complaint is ill founded it is not necessary to consider this issue further.

Time bar issues

576. Were any or all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) and (b) of the Equality Act 2010? Given the complaints are ill founded it is not necessary to consider this. ACAS was contacted on 12 April 2023 and the claim lodged in June 2023. As set out above there are a number acts which substantially predate the lodging of the claim. The acts or omissions from prior to February 2023 are out of time. The complaints in respect of the dismissal are clearly in time but the remaining complaints are not and the Tribunal would not have considered it just and equitable to extent the time limit in respect of those complaints from the evidence before the Tribunal. The prejudice to the respondent in allowing the complaints to proceed would have been greater than the prejudice to the claimant on the limited facts before the Tribunal on this issue. The Tribunal would not have considered it to be just and equitable from the evidence before it, had it been necessary to do so.

577. The first issue was whether in respect of each omission, were any or all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) and (b) of the Equality Act 2010. Given the complaints had not been established, this did not require to be determined. The Tribunal considered the matter given the submissions. Early conciliation commenced on 12 April 2023 with the complaint raised on 23 June 2023. As a consequence a

complaint about an omission which occurred on or before 11 January 2023 (3 months before early conciliation was commenced) would be out of time.

578. The steps relied upon were unclear but appear to mirror those in respect of the indirect discrimination complaint. One of the complaints would have been out of time - the refusal to exercise discretion to pay sick pay. The other complaints related to matters after February 2023.

579. The next issue would have been whether time be extended on a just and equitable basis. The claimant had the benefit of a trade union and solicitor and had explicitly told the respondent she had been taking advice. The Tribunal took account of the claimant's impact statement. The Tribunal did not consider counsel for the claimant's submission that it is for the respondent to lead evidence as to time bar to be meritorious. The Tribunal requires to assess from the evidence generally whether or not it is just and equitable to allow the claim to proceed. The prejudice to the respondent in allowing that complaint to proceed would have been greater than the prejudice to the claimant on the limited facts before the Tribunal on this issue. The delay was lengthy and there was no reason provided as to why the complaint was not raised in time. The cogency of the evidence was unaffected. The claimant had the ability to raise the matter but did not do so despite the resources available to her. The Tribunal would not have considered it to be just and equitable to extend time from the evidence before it, had it been necessary to do so. The prejudice to the respondent in having to meet the complaint in the circumstances would have outweighed the prejudice to the claimant.

580. The respondent had taken all reasonable steps on the facts to remove any substantial disadvantage created. This complaint is accordingly ill founded.

D Hoey
_____
Employment Judge

02 October 2024

Date

Date sent to parties **03 October 2024**