EMPLOYMENT TRIBUNALS

Claimant:	Miss Jessica Thorpe
Respondent:	Cumbria, Northumberland, Tyne & Wear NHS Foundation Trust
Heard at:	Newcastle CFCTC in person
On:	11, 12 & 13 December 2023
Before:	Employment Judge Loy (siting alone)

Representation

Claimant:	Mr A Tinnion, counsel
Respondent:	Miss M Martin, counsel

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is that:-

1. The claimants claim for constructive unfair constructive dismissal is well founded and succeeds.

2. The claimant's claims of unlawful deduction from wages is well founded and succeeds.

3. The claimant's claims of breach of contract is well founded and succeeds.

REASONS

Background

1. By a claim form presented on 14 February 2023 the claimant claims:

   1.1. constructive unfair dismissal contrary to section 95(1)(c) and section 98 Employment Rights Act 1996 (ERA);

   1.2. unlawful deduction from wages contrary to section 13 and section 23(1) ERA; and

   1.3. further and in the alternative to 1.2 above , damages for breach of contract under section 3 Employment Tribunals Act 1996 and Article 3 of the Extension of Jurisdiction Order 1994.

2. In its response form dated 21 March 2023, the respondent denied all liability.

The issues to be determined

3. ***Constructive unfair dismissal***

   3.1. Did the Claimant's employment contract contain an implied term imposing a duty on the parties not to, without reasonable and proper cause, engage in conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (the "**Implied Term**")?

4. If it did, did the following conduct by the respondent occur:

   4.1. The respondent's delay in dealing with claimant's case from 30 April 2020 (date claimant suspended) to 11 November 2022 (date of resignation) [Amended PoC, para. 25(i)] [claimant's case is that breach began by no later than 1 August 2020, remained an ongoing breach until claimant's resignation on 11 November 2022;

   4.2. The respondent suspended the claimant from 30 April 2020 to 11 November 2022 [Amended PoC, para. 25(ii)]. The claimant's case is that breach began by no later than 1 August 2020, and remained

an ongoing breach until claimant's resignation on 11 November 2022;

4.3. The respondent did not provide the claimant with a disciplinary outcome letter following the disciplinary hearing meeting on 21 July 2021 [Amended PoC, para 25(iii)(a)]. The claimant's case is that the breach began by no later than 28 July 2020, and remained an ongoing breach until the claimant's resignation on 11 November 2022

4.4. The respondent did not provide the claimant with a letter explaining claimant's continued suspension after 21 July 2021 [Amended PoC, para. 25(iii)(c)]. The claimant's case is that the breach began by no later than 28 July 2020, remained an ongoing breach until claimant's resignation on 11 November 2022;

4.5. The respondent ignored the claimant's grievance lodged 21 October 2021 [Amended PoC, para. 25(iii)(d)].The claimant's case is that the breach began by no later than 28 October 2021 and remained an ongoing breach until the claimant's resignation on 11 November 2022.

5. To the extent the conduct occurred, did the respondent thereby breach the Implied Term? In particular (a) was the respondent's conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent, and (b) if it was, did the respondent have reasonable and proper cause for that conduct?

6. Did the claimant resign in response (in whole or part) to one (or more) breach of the Implied Term?

7. If yes, did the claimant timely resign in response to one (or more) breach of the Implied Term, or did she unduly delay resigning in response to the breach, thereby losing the right to resign and claim constructive dismissal?

8. **Unlawful deduction from wages**

8.1. The claimant alleges that during the period of suspension she was paid her basic wage (rather than her "normal wage" which included shift allowance, overtime and unsociable hours payments). She alleges that there was no ongoing contractual basis for her continued suspension after August 2020, and claims the difference in her basic pay and normal play for the period of "wrongful suspension" for unlawful deduction from wages. She states that the period of wrongful suspension resulted in an ongoing loss of £12,000 per annum.

8.2. What is the amount of wages that were properly payable to the claimant at the time she was suspended?

8.3. Did the respondent make a deduction from the claimant's wages which:

8.3.1. Was not required or permitted under the terms of the claimant's contract of employment or under statute; or

8.3.2. The claimant had not given their written consent for.

8.4. If so, has there been a series of unlawful deductions?

9. **Breach of contract**

9.1. The claimant accepts that the respondent has a contractual right to suspend in accordance with the implied terms at paragraph 32 of her Grounds of Complaint. The claimant says that a reasonably competent investigation should have concluded at 3 months, and therefore by August 2020, there was no ongoing contractual basis for the continued suspension and the respondent was thereafter in breach of contract.

9.2. Did the respondent breach the claimant's contract of employment by continuing to suspend her after August 2020?

9.3. If so, did the breach of contract cause the claimant to suffer loss during the period of suspension from August 2020 - November 2022?

Evidence

8. The tribunal was provided with an agreed bundle of documents of 1410 pages. References in this judgement to the bundle are marked [ ].

9. The claimant gave evidence on her own behalf. The claimant produced a witness statement of 62 paragraphs over 12 pages. The claimant was cross-examined by Miss Martin.

10. The respondent called three witnesses:

    10.1. Ramona Duguid, the respondent's Chief Operating Officer. Mrs Duguid produced a written witness statement of 72 paragraphs over 12 pages. Mrs Duguid was cross-examined by Mr Tinnion.

    10.2. Gemma Rutherford, the respondent's Group Head of Workforce and Organisational Development who produced a written witness statement of 28 paragraphs over 6 pages. Ms Rutherford was cross-examined by Mr Tinnion.

    10.3. Angela Faill, the respondent's Associate Director of Information Governance and Mental Health Legislation, who produced a written witness statement of 29 paragraphs over 6 pages. Ms Faill is also the respondent's Data Protection Officer. Ms Faill was cross-examined by Mr Tinnion.

A Note on the Findings of Fact

11. A central feature of the evidence in this case, was the allegations made by patient X against the claimant together with how the respondent managed its approach to the investigations to which the death of patient X gave rise.

12. The issues in dispute in this matter do not depend on the factual accuracy or otherwise of the allegations made by patient X. The tribunal therefore wants to make it clear at the outset both that it is unnecessary for the tribunal to express a view on the accuracy or otherwise of the allegations themselves or to make its own findings on the accuracy or otherwise of those allegations.

13. The tribunal therefore makes no attempt to address, let alone to make factual findings as to whether or not any of those allegations were accurate

Findings Of Fact

14. All of the tribunal's findings of fact were made on the balance of probability.

15. The claimant joined the respondent NHS Foundation Trust on 31 May 2016 as a Band 2 Healthcare Assistant. On 26 March 2018, she was promoted to a Band 3 Nursing Assistant. In January 2020, the claimant started a 4 year nursing degree apprenticeship at Sunderland University. This was a course that the claimant could undertake while continuing her role on the ward. At that stage, the claimant was well on her way to pursuing her career as a professional nurse in healthcare.

16. The claimant was given a contract of employment [322-330]. That contract incorporated Agenda for Change. Agenda for Change is a national collective agreement applying to all NHS staff up to a certain level including that of the claimant. The claimant was entitled to be paid for basic contractual hours. If those was basic contractual hours included work for weekends, nightshift or evenings, the claimant received pay enhancements under Agenda for Change.

17. The claimant also had a contract for bank work. This enabled the claimant to work additional hours over and above her basic contractual hours. The claimant took advantage of the opportunity for additional bank work which allowed her to increase her overall level of pay.

18. The claimant was assigned to Ward Z . There are four wards on the Clinic all of which provide a secure facility for males with mental disorders/illnesses who have come into contact with the criminal justice system. Patient X was a patient in the Ward Z at the time relevant to these proceedings. Patient X had been referred from a prison facility.

19. Patient X was a patient on Ward Z and was therefore a patient to whom the claimant was responsible for providing clinical care. On 27 April 2020, patient X alleged that he was having an inappropriate relationship with the claimant. The claimant gave evidence that patient X had prior to that date made allegations about his relationship with the claimant that was untrue. Patient X had apparently said that the claimant was pregnant with his child. The claimant said that supervision records should have reflected that she reported these allegation to her superiors, but no such supervision records were produced by the respondent in these proceedings.

20. On 30 April 2020, the claimant was suspended by Helen Goudie (Clinical Manager). On 14 May 2020, the claimant was informed by Sandra Barker,

Associate Nurse Director, that she was to be subject to a disciplinary investigation [439]. That letter sets out the allegations as follows:

'*[that you]*

1. *Engaged in a relationship with a patient which breached professional boundaries;*

2. *Accessed and updated service user data on RiO was unauthorised and without consent;*

3. *Disclosed confidential information relating to the patient group and Trust.*

21. The patient referred to first allegation is patient X. The letter does not mention the claimant's suspension. However, it was common ground that the claimant had been suspended by Helen Goudie on 30 April 2020. The letter also said that Helen Goudie had been appointed as Investigatory Officer.

22. On 28 May 2020, the claimant was interviewed by Helen Goudie. The claimant was supported by her trade union representative, Mark Goodall. The notes are not disputed by the claimant, although she is understandably critical that the notes were not provided to her for many months.

23. There then started a series of extensions to her suspension. The claimant suspension was subject to monthly extensions in June, July, August, October, November and December 2020. The letters reflecting those extensions are in the bundle. Those letters are essentially in like form and identify the reason for the extension as the safeguarding allegations made against the claimant and the ongoing investigation. There was no review and extension letter in September 2020. There was no review and extension letter prior to the claimant's disciplinary hearing in July 2021, some seven months after the final review and extension letter in December 2020.

24. The respondent's disciplinary policy is at [102-125]. At paragraph 10 of the policy suspension is addressed. The relevant parts of that policy in relation to pay during suspension and the periodic review of extensions to the period of suspension are in the following terms:

'*Suspension*

10.1 There may be circumstances where it is necessary to suspend an employee; this will be on full pay with average enhancements… While a case is being investigated

…

10.12 The Considering Manager must conduct a formal review in the event that a suspension continues beyond three months to ensure that appropriate progress is made. This will be reported to the Corporate Decision Team by the Executive Director of Workforce and Organisational Development.

25. There was a dispute about precisely what was meant by 'average enhancements'. It was common ground that (somewhat unhelpfully) neither the respondent's disciplinary policy or Agenda for Change define that term. The claimant's position was that she should, in simple terms, not be financially disadvantaged as a consequence of her suspension. She should therefore have been paid essentially what she would have been paid had she not been suspended.

26. The respondent (somewhat later in the piece) acknowledged that the claimant had received only her basic pay. The respondent sought to rectify that by making a subsequent lump sum payment that the tribunal will come to below. The difference between what the claimant says she should have received whilst suspended and what she did receive (even when adjusted by the subsequent lump sum payment) is what the claimant claims by way of unlawful deduction from wages.

27. The claimant very sensibly accepted that patient X's allegation entitled the respondent to suspend her. What was at the heart of the dispute between the parties, was the duration of that suspension. The claimant said that a reasonably competent investigation and disciplinary hearing would have been concluded within three months of her suspension. The effect would be that she should have been allowed to return to work on the terms communicated to her at the end of the disciplinary hearing on 21 July 2021 by no later than 1 August 2021.

28. The point of substance is that the claimant says that the investigation and disciplinary hearing should reasonably have been resolved within three months

(or there or thereabouts) and the fact that they were not and in the circumstances in which they were not, amounted to breaches of implied term of mutual trust and confidence in the claimant's contract of employment.

29. On or around September 2020, during the suspension she started a social media profile called 'Slice of Jess'. This started as a as an Instagram account where she uploaded images of food she had made. This is known as becoming a social media influencer and by the time of her witness statement in November 2023 the claimant accrued 50,000 followers. Around the same time, the claimant started making YouTube videos. By the time her witness statement was made, the claimant had 25,000 subscribers to her channel. She made some 580 videos in three years which is approximately three videos per week. This is capable of generating money from Google who place advertisements based on their own algorithm, which presumably assesses the commercial value of the volume and profile of a person's followers/subscribers.

30. On 5 October 2020, the claimant attended a second interview [572-585]. At this meeting, the claimant was told that a new investigating officer, Anthony Deery (Group Nurse Director), had been appointed to replace Helen Goudie. The explanation given was that Helen Goudie should not have been the investigating officer in the first place because she was the person who suspended the claimant.

31. In the terms of paragraph 13.1 [113]*, 'the Considering Manager[i.e. the investigating officer] must not be the same as the Manager that suspended the employee*'. The rationale is to ensure impartiality from initial decision to suspend. Plainly that was a matter known to the respondent from the point of suspension on 30 April 2020.

32. The claimant does not dispute the accuracy of the notes of her second interview. What she says, is that just in the same way as the first interview, there was no reference to a mobile phone number. As will become clear in due course, the issue of whether or not the claimant was in regular contact with patient X became a feature of the prolonged suspension of the claimant. The point the claimant makes is that is not a matter which features in either of her first two interviews, whereas it became a central factor in the intervention by Mrs Duguid in preventing the implementation of the outcome delivered orally at the disciplinary hearing on 21 July 2021 and her continued suspension for some 16 months after that.

33. This is the matter which comes to be known as the ‘pink phone’ issue. The pink phone looms large in the justification for the continuation of the claimant suspension from 21 July 2021 onwards. In simple terms, the respondent under Mrs Duguid’s direction justified the claimants ongoing suspension because of concerns that the pink phone may be used by the claimant to contact patient X on a very large number of occasions before the claimant’s initial suspension on 30 April 2020.

34. On 14 December 2020, the claimant says that she spoke to Rachael Aitken, Ward Manager of the ward on which the claimant worked. The claimant says that Ms Aitken had told Rachael that a nurse on Aidan Ward had been overheard saying that this nurse wished that the claimant dead.

35. On 31 December 2020, patient X died. The claimant was not informed of the patient’s death at that stage. As things transpired, patient X’s death was found to be caused by a known but rare reaction to his medication.

36. On 13 January 2021, the claimant was sent the investigation report [614 – 642]. The investigation report included 13 statements taken from ward staff amongst. The claimant was told there would be a disciplinary hearing on 22 January 2022.

37. At this point, the claimant had been suspended for approximately nine months. The claimant criticises the respondent for its apparent inactivity between July 2020 and December 2020. The respondent brought no evidence to explain this delay. The claimant also remarks that the mobile phone number that was used to call the number the ward was only disclosed to her at this stage.

38. By a letter of 25 January 2021, Elaine Fletcher (Group Nurse Director) informed the claimant that the disciplinary hearing arranged for 22 January 2021 was to be postponed. Importantly, it was Mark Goodall, the claimant’s RCN trade union representative, who requested this postponement. The reason given for the postponement was to allow the claimant and Mr Goodall additional time to review the investigation report and its appendices. The disciplinary hearing was then rearranged for 2 March 2021. The first rearranged date of 2 March 2021, was again postponed because the claimant wanted further information to be collated. It was then rescheduled for a third time on 18 March 2021. That third rearranged date was postponed again at the request of the claimant who had raised concerns about not receiving information that she had requested.

39. In April 2021, Mrs Duguid joined the respondent as its Chief Operating Officer. Mrs Duguid explained that she was briefed on current/ongoing investigations as

part of her induction process. This included a briefing in relation to the disciplinary investigation in relation to the claimant. Accordingly, Mrs Duguid was aware of the outstanding investigation involving the claimant and the potential for a disciplinary hearing before the disciplinary hearing took place on 21 July 2021.

40. Mrs Duguid also became aware that there was a police investigation into the circumstances of patient X's death. Patient X had died some eight months after the claimant had been suspended and some four months before Mrs Duguid took up her appointment. Mrs Duguid was also aware that there would be a police investigation, and that the Trust would need to carry out a Serious Incident Investigation, a Safeguarding review and that there would be Coronial proceedings.

41. Mrs Duguid said, and the tribunal accepts, that the death of a patient under the care of the respondent was a significant issue that needed to be investigated robustly. The tribunal also accepted that it was the in the interests of patient safety for that to take place. The tribunal also notes that the interests of patient X's family would also need to be taken into account by the respondent.

42. At paragraph 14 of her witness statement, Mrs Duguid says that

'With the benefit of hindsight it may have been appropriate for me to intervene and adjourn the hearing on the basis of the police investigation was ongoing. However, I was concerned that there had already been a significant delay to the disciplinary process and I had not been involved in the investigation findings or the detailed evidence from staff which had been provided'

43. The tribunal also noted that there was no reference by the parties to any provision in the disciplinary procedure (or any other procedure) which reserves the right of the respondent to suspend its employees in circumstances where multidisciplinary processes need to be undertaken and completed. Indeed, this case may have been a good deal simpler if there had been such a right and the claimant had been suspended under it.

44. On 19 May 2021,the claimant received a threatening telephone call from a withheld number. The claimant was told to *'take this as a warning'.* The claimant says she recognised the voice as that of Lauren Matthews, a nurse on the ward

on which the claimant worked . The claimant reported this threatening call to the Trust and the police.

45. At paragraph 22 of the claimant's witness statement, the claimant complains of a further delay in the process to allow further enquiries about my supervision records and the mobile phone. She says that the second investigator report doesn't appear until 27 May 2021 and that she has no idea why it took another five months for this report to be produced. The report is at [700 – 717]. The claimant does not refer in her statement to her own request through her trade union representative for the disciplinary hearing to be postponed. Nor does the claimant refer to the reasons why the second rearranged hearing 4 to March 2021 and the third rearranged hearing of 18 March 2021 were postponed.

46. The Tribunal is not suggesting that it was unreasonable for the claimant to require further time, but to be fair to the respondent it would have been more candid to explain that it was not solely at the respondent's behest that matters had not proceed on previous occasions. In any event, by 27 May 2021 the concern by the respondent that the pink phone was a phone used by the claimant to contact patient X had become explicitly included in the case against her in respect of the first allegation that there had been an inappropriate relationship with patient X.

47. On 5 July 2021, the Trust received confirmation from the police that the police were content for the Trust to progress its own internal serious incident review into the circumstances that had led to patient X's death. The police had previously asked in January 2021 for the Trust to hold off from doing so.

48. On 21 July 2021, the disciplinary hearing took place. This was during the Covid pandemic and was accordingly held by Teams. The hearing was chaired by Elaine Fletcher, Group Nurse Director. It was at this meeting that the claimant first learned of the death of patient X. At the end of that hearing, the claimant was told the outcome orally. The claimant was told that she was to receive a first written warning in respect of the second allegation that the claimant had accessed and updated user data from the respondent's patient record database without authority or consent. By obvious implication the first and third allegations have not been upheld. The most serious of the allegations was the first allegation: that the claimant had engaged in a relationship with a patient which breached professional boundaries. That was patient X.

49. The claimant was told by Elaine Fletcher that she would receive a letter confirming the outcome. Plainly, it is an ordinary and natural expectation that, having been given the outcome orally, the claimant would receive written confirmation. It was common ground that the claimant never received any letter confirming the outcome of the disciplinary hearing 2021 before her resignation on 11 November 2022.

50. The undated letter at [951 – 957] was disclosed to the claimant in the course of these proceedings. There was no dispute that this was the draft letter that Elaine Fletcher told the claimant that she would receive following the oral outcome she was given at the end of the disciplinary hearing. That letter makes clear that the first allegation was not been upheld. The letter also makes clear that the third allegation had not been upheld. The letter confirms that the second allegation had been upheld and confirms the sanction in the same terms as were communicated verbally to the claimant on 21 July 2021.

51. The letter also says as follows regarding the claimant suspension:

'Your suspension is now lifted and you will be contacted to arrange a return to work, taking into account an[y] support needed'

52. In relation to the first allegation, the undated and unsent letter says as follows:

'The panel felt that whilst if there was no conclusive evidence that there was a relationship between you and patient X there may have been a blurring of boundaries due to the fact that patient X responded well to you. It is not felt that this was managed robustly by ward management, or that you receive the correct level of support and guidance around this.

Therefore this allegation is ***not upheld'***

53. Elaine Fletcher did not give evidence to the tribunal. However, it is not in dispute that this undated, unsent letter reflected precisely the oral outcome that the claimant had received at the end of the hearing on 21 July 2021. It is also not in dispute that Elaine Fletcher did not consider that patient X's allegation of an intimate relationship with the claimant had not been established on the evidence that she heard. It is also pertinent that Elaine Fletcher appeared to be reading from a document when she verbally informed the claimant of the outcome of the disciplinary hearing.

54. When the claimant left the disciplinary hearing on 21 July 2021, some one year and three months after her suspension, that she reasonably understood that:

    54.1. The first allegation had not been upheld.

    54.2. The first allegation was the most serious allegation. An allegation of inappropriate behaviour towards patient X.

    54.3. The second allegation had been upheld.

    54.4. She would be receiving a first written warning effective for 12 months because the second allegation had been upheld.

    54.5. The third allegation had not been upheld.

    54.6. She would be returning to work as soon as the practicalities could be arranged.

    54.7. The claimant suspension would be lifted to enable a return to work to take place.

55. The claimant did not receive any written confirmation of the oral outcome which she received at the end of the disciplinary hearing. Instead, on 30 July 2021, the claimant received a letter from Mrs Duguid, the respondent's Chief Operating Officer [791]. The letter informed the claimant as follows:

    'Dear Jessica

    I am writing to you following the disciplinary hearing held on 21 July 2021.

    Unfortunately, we are not in a position to reach a conclusion of this process given the connectivity your case has with other investigations which are active and involve other agencies. I understand this will be potentially distressing for you given the period of time you have been suspended from work. It is important for me to stress that this decision is in the interests of ensuring the integrity of other investigations which have not yet concluded.

    …'

56. The letter goes on to anticipate a meeting in person or via Teams to discuss the contents of the letter.

57. Mrs Duguid's evidence at paragraphs 17 and following of her witness statement, was that she '*subsequently reviewed the full disciplinary investigation file and all the supporting statements from 13 members of staff.'* This includes one of the staff member statements (which was available prior to the disciplinary hearing) in which patient X apparently disclosed that he/she had been in an intimate relationship with the claimant for some months. It included a reference to patient X saying that he/she was stressed about this and the impact it might have on him/her being sent back to prison if the relationship was discovered. This is also when Mrs Duguid became aware of the 280 calls that had been made to the ward payphone form a mobile number which came to be known as the pink mobile phone [612 – 613].

58. Mrs Duguid also made reference in her witness statement to the contemporaneous view of the responsible clinician for patient X. The responsible clinician said that patient X did not express delusional thoughts or have a history of raising unfounded concerns. The responsible clinician also refers to alleged details of a sexual nature and an alleged intimate relationship that patient X had told them that he/she was having with the claimant. The responsible clinician also refers to the fact that patient X was '*extremely worried'* about the potential consequences for himself and the claimant.

59. Mrs Duguid explained that she had two principal concerns. First, the existence of an active police investigation into the circumstances of the death of patient X; and, secondly, the clinical deterioration of patient X which was documented in staff statements [532, 533 & 543].

60. Looked at objectively, the claimant's concern was not just that she had been suspended for such an elongated period, but that she understood that she would be returning to work and that her suspension had by necessary implication was about to be lifted.

61. In addition, the statement that the Trust was not in a position to reach a conclusion of *'this process'* can only reasonably be understood as a reference to the disciplinary process. Looked at objectively, that process had been concluded with the outcome being that referred to in paragraph 48 above. In the tribunal's assessment, there was no reasonable basis for Mrs Duguid to suggest that the disciplinary process had not already ended and that the claimant's suspension

was about to be lifted. At the risk of stating the obvious, Elaine Fletcher could not have been anticipating the claimant's return to work after the conclusion of the disciplinary hearing on 21 July 2021, without implicitly envisaging that the claimant's suspension would be lifted.

62. In reality, Mrs Duguid had supervened at the level of Executive Director to countermand the outcome that Elaine Fletcher had reached. As Mrs Duguid says at paragraph 14 of her witness statement, she may with the benefit of hindsight have been better served by intervening earlier. However, she did not. This left the claimant in an entirely unsatisfactory position. She had been suspended for well over a year. She had been given the outcome of a disciplinary hearing the effect of which was that she would be returning to work subject to a written warning. However, she was now being told by an Executive Director, who had not to her knowledge previously been involved in the matter, that was no longer the case.

63. On 10 August 2021, Mrs Duguid attended a meeting with the police to discuss the status of the investigations. Mrs Duguid tells us in her witness statement that amongst other things she shared with the police the fact that 280 calls had been made from a specific phone number to ward on which the claimant wor. It is clear that Mrs Duguid was sharing this information with the police because of their greater investigatory powers which could potentially be used to trace the owner of the pink mobile phone.

64. On 11 August 2021, the claimant had her first meeting with Mrs Duguid. This meeting was again held by Teams. The upshot of the meeting was that the claimant was told that the Trust would not be bringing her back to work until two further processes had been concluded: first, the police investigation into the death of patient X; and, secondly, the Trust's own Serious Incident process.

65. Neither of these two investigations were unknown to the Trust when the claimant disciplinary hearing was concluded on 21 July 2021. By this time, Mrs Duguid had been in post for over four months and on her own evidence she had become aware of and familiarised herself with the issues surrounding patient X's death and the claimant's disciplinary process. The apparent necessity for these two processes to be concluded would no doubt have come as a surprise to the claimant who had been led to understand on 21 July 2021 that she would shortly be returning to work.

66. The claimant's position was that she thought that she had already demonstrated the pink phone could not be hers due to evidence she had already produced that an 11 minute call and a separate 6 minute call from the mobile phone number had been made at the same time that the claimant was able to produce two photographs of herself in a social setting in neither of which she was using any phone at all. The claimant also raised her own concerns at this meeting about the threatening phone calls she had received in respect of which the Trust had (to the claimant's knowledge) not looked into.

67. The tribunal formed the view that Mrs Duguid was very seriously concerned that the pink phone belonged to the claimant and that it was the claimant who had made the 280 calls that were made from it to the ward on which the claimant worked . Mrs Duguid's subsequent attempts to persuade the police to use their investigatory powers investigative powers fortified the tribunal's view in this regard. It appeared the tribunal that Mrs Duguid was not satisfied that the disciplinary investigation had run down (or through lack of its own investigatory powers been unable to run down) this aspect of the allegation that patient X and the claimant had been in an inappropriate relationship. For Mrs Duguid, this raised continuing safeguarding concerns and related issues of patient safety which in her executive capacity she prioritised over acknowledging the finality of the disciplinary hearing on 12 July 2021.

68. Mrs Duguid again wrote to the claimant on 12 August 2021 [812]. That letter addressed the reason for not permitting the claimant to return to work in the following terms:

'it is important that the status of [the police] investigation is concluded in order to be clear on the information shared between agencies and any implications or additional elements of the investigation which may need to be considered.

The Trust is working with the Police in the sharing of information and relevant disclosures, which I confirmed would potentially include some of the information gathered as part of the disciplinary investigation into breach of professional boundaries by you and this deceased patient. The supporting evidence obtained as part of this investigation, and the outcome reached is likely to be shared with the Police. The Police may also want to speak to you as part of concluding their investigation.

In addition to this, I also confirmed that the Police have now confirmed that the Trust can commence the internal serious incident investigation into the death of this patient, which may also include factors relevant to the allegations made in your disciplinary investigation.

Whilst I realise this is a stressful time for you, for the reasons outlined above it is in the interests of protecting you and also the integrity of other investigations which need to conclude for you to remain suspended from work at this time.

I have noted the concerns you also raised [i.e. the threatening phone calls], which I realise you have raised previously and I can confirm that these matters will be looked into when the timing is appropriate for us to do so.'

69. Accordingly, Mrs Duguid made it explicitly clear in her letter that the status of the claimant at the time for her meeting of 11 August 2021 (and ongoing) was that of being suspended from work.

70. It is important to state that the tribunal accepted that at all times Mrs Duguid was acting out of what she saw as professional obligation to prioritise patient safety. Mrs Duguid's evidence was that she realised that the different processes that were undertaken in serious matters such as the death of a patient were not stitched together. As the tribunal understood it, Mrs Duguid wanted to establish a broader approach from the Trust so that the processes did not work in silos but worked more holistically. There was nothing wrong with that position in principle.

71. However, what happened here in the tribunal's view was that Mrs Duguid sought to superimpose that holistic approach i.e. when the disciplinary hearing had effectively concluded. Mrs Duguid saw the danger in this which was that the claimant might be returned to work in circumstances where other investigations (the police investigation, the Trust's Serious Incident investigation its Safeguarding review and the coronial process) might come to conclusions about the relationship between the claimant and patient X which were different and possibly inconsistent with the decision of the Trust at the disciplinary stage not.

72. Mrs Duguid's position was that the processes needed to be undertaken with an overarching managerial oversight. However, in this particular case the tribunal concluded that Mrs Duguid was also very concerned in particular about the evidence of the pink phone and the volume of calls that had been made from an unidentified phone number to a phone on the ward on which the claimant worked during the period leading up to the claimant's investigation and ending no later than her suspension on 30 April 2020.

73. As the tribunal understood it, Mrs Duguid's concern was that there may have been a connection between an inappropriate relationship between the claimant and patient X and a decline in patient X's mental health. Mrs Duguid also referred to the view of patient X's responsible clinician that patient X summarised Mrs Duguid's witness statement that patient X *'did not express delusional thoughts or have a history of raising unfounded concerns. This statement also included details of a sexual nature and an intimate relationship between the claimant and patient X, which patient X had disclosed to the responsible clinician [612]'* - see paragraph 21 of Mrs Duguid's witness statement.

74. On 13 September 2021, the Trust's Serious Incident Report was concluded. The material conclusion was:

'No significant findings were identified during the scope of the investigation, and therefore no findings or recommendations will be reported [1246].

75. A second Teams meeting between the claimant Mrs Duguid took place on 14 September 2021. There is no note of this meeting and neither the claimant nor Mrs Duguid gave evidence about what was said at that meeting.

76. On 20 October 2021, the claimant raised a grievance which she sent to the Trust's Chief Executive. At paragraph 34 of her witness statement, the claimant summarises the complaints as follows:

- *Withholding my disciplinary outcome letter and keeping my case open*
- *Failing to provide me with regular updates*
- *I was receiving basic pay only and losing about £1,000 a month in earnings*

77. On 21 October 2021 [829], the Trust completed its Serious incident Investigation. The claimant made the point that she was not interviewed as part of the process that led up to that outcome.

78. Mrs Duguid's position on the claimant's grievance is set out at paragraph 37 of her witness statement. She says that she agreed that the claimant's grievance would be looked at independently after the police investigation had concluded. The parties to that agreement appear to have been Mrs Duguid and the Executive

Director of the Workforce, Gemma Rutherford. It was not suggested that the claimant agreed to that approach.

79. On 17 December 2021, Ms Faill (Associate Director of Information Governance and Mental Health Legislation) sent an email to Mrs Duguid which confirms that the police considered that *'there was no role/line of enquiry for them therefore our [Serious Incident Investigation] and their findings were being submitted to the Coroner. [The police] did say that the Coroner may or may not ask about this…'* [836-837]. This information appears to have been acknowledged by Mrs Duguid on 13 January 2022 [838]. The claimant was not approached by the police for the purposes of their investigation. It would appear to follow from this that the claimant's grievance could now be proceeded with given that that the claimant's grievance had been held in abeyance until the police investigation had concluded.

80. On 14 January 2022, Peter Astbury (Head of Clinical Risk, Incidents and Investigations) informs Mrs Duguid that he had spoken to the Trust's legal advisers in connection with the Coroner's inquiry and that *'the pre-inquest review will likely give us a much better idea of how interested the Coroner is going to be on the HR side of things as at this time we can't really can't predict how much weight the coroner is going to give to it.'* [840].

81. Mrs Duguid's evidence at paragraph 42 of her witness statement, was that she still did not think it was appropriate to bring the claimant back to work. This was because in Mrs Duguid's view it was unclear whether or not the coroner would be considering the disciplinary investigation findings.

82. On 29 April 2022, Mrs Duguid emailed the claimant to set up a meeting to update her. Mrs Duguid also referred to the need for a Safeguarding review to be completed.

83. On 28 May 2022, a third meeting took place between Mrs Duguid and the claimant. The claimant's notes of this meeting are at [851-862].

84. The claimant comments that in the intervening nine months since her disciplinary hearing, she had received no extension letter regarding her suspension nor any letter regarding a review of her suspension. The claimant also points out that she had heard nothing further about the grievance she had submitted over seven months previously.

85. At the meeting on 28 May 2022, the claimant says she was given yet further reasons for the delay in her return to work: first an upcoming pre-inquest review hearing to be conducted as part of the coronial process and, secondly, the Trust's need to undertake a safeguarding report.

86. By this stage, the claimant had been suspended for over a year. The claimant had been told in August 2021 that, notwithstanding the outcome of her disciplinary hearing, she would not be allowed to return to work until the conclusion of the police investigation into the death of patient X and the respondent own serious investigation into that incident. Those matters appear by the time of the third meeting with Mrs Duguid to have been concluded.

87. Now the claimant was being told there were two more (previously unmentioned) processes that needed to be undertaken before she could return to work. The claimant says that she was nonetheless assured by Mrs Duguid at this meeting that both the pre-inquest review hearing and the safeguarding report would be concluded by 30 June 2021 i.e. within a further month.

88. At the meeting of 28 May 2022, the claimant made a further request for the notes of the disciplinary hearing on 21 July 2021 and again raised the issue of the shortfall in the payments that she had been receiving during her very lengthy period of suspension.

89. On 16 June 2022, Mrs Duguid prepared the terms of reference for the safeguarding report [863 – 865]. Paragraph 4.4 of the terms of reference is in the following terms:

'If there are no further issues identified by the Coroner or from the Safeguarding review the Trust will be looking to support staff member JT returning to work and recommencing their nurse training.'

90. On 20 June 2022, the pre-inquest review took place. Mrs Duguid says in her statement at paragraph 50 that she still did not regard it appropriate for the claimant to come back to work. This was because it was *'still a possibility'* that HM Coroner would ask questions in respect of the serious incident report and/or about a side note which on legal advice the respondent had provided to the coroner. The side note was not made available to the tribunal.

91. The next communication with the claimant was Mrs Duguid's letter of 8 July 2022 [879 – 880]. Mrs Duguid informed the claimant that the Trust had received no request for information from the police regarding either the disciplinary investigation generally or the particular matter of the alleged inappropriate relationship between the claimant and patient X. Mrs Duguid goes on to inform the claimant that the Trust had shared its internal serious investigation report with the Coroner in advance of the pre-inquest hearing. Mrs Duguid's letter goes on to say the following:

'The Trust has had the pre-inquest meeting was preparing the necessary information to support the lines of enquiry. As part of this, the legal advisers to the Trust are reviewing what information we may need to supply in the context of the Human Resource investigation involving you and the deceased patient. A further meeting to discuss this is being arranged and I cannot comment further on this at this stage.

…

As part of this safeguarding review, I have shared specific points of reference from the disciplinary investigation, including the inability to determine the source of a regular mobile phone number used to contact the deceased patient.

I confirmed at our meeting that following the pre-inquest hearing and the conclusion of the safeguarding review, I was hopeful we would be in a position to move forward provided these items did not have any further considerations in July. Unfortunately, these two matters have not concluded.

I realise the length of time you been suspended from work and you will be disappointed we are not in a position to move forwards. However, it is essential for me to stress again, but the conclusion of these matters are important.'

92. On 19 July 2022, the respondent Safeguarding review was concluded.

93. Also in July 2022, the claimant received what purported to be two payments in respect of a shortfall in the pay that she had received during her period of suspension. The first payment was for two years' arrears of holiday pay and the second payment was for arrears of pay owing to the claimant in respect of her suspension. The suspension pay was £214.68 x 26 months giving a total of £5,581.68. The arrears of holiday pay in respect of each year that the claimant had been suspended was £1,900 for the first year and £2,900 for the second year.

94. On 14 September 2022, the claimant received another threatening call from a withheld number. She reported the matter to the police. The claimant told Mrs Duguid about this further call in their meeting of 20 October 2022.

95. On 2 August 2022, the claimant made a subject access request [892] in an effort to obtain the disciplinary notes from her disciplinary hearing on 21 July 2012 (over one year previously).

96. On 3 October 2022, the claimant sent what she describes in her witness statement as a final letter (in fact an email) to the Trust [898-899]. The email was sent to a broad range of executive and senior managers at the Trust. It is worth setting out the claimant's email in full.

'Dear all

As you may know, I have been suspended since April 2020. I was called to a disciplinary hearing in July 2020 where I received a warning for inappropriate use of a laptop. Since then, my paid suspension has continued without lawful reason. A grievance submitted by me in October 2021 has been ignored.

It is my belief all of this arises from the death of a patient on [the ward on which the claimant worked] , investigations into it by the Police and other Agencies, and a misplaced view that I am in some way accountable for these events, which is wrong and without any lawful basis.

Once again, I seem to have dropped off the radar yet again, please could one or more of you respond to the following points, as I have had no communication from anyone in the Trust for over a month.

- ***Welfare phone calls -*** *These have appeared to have stopped with no warning. My last phone call was on 18 August, with a scheduled call on 5 September at 3 pm with Heather Turner who did not ring, and also did not respond to my email enquiring the absence of her call.*

- ***Missing information -*** *I requested during my phone calls with Heather Turner & Gemma Rutherford for a breakdown of my payment of the sum that I was paid on 11 July. I also requested a copy of my payslips. Neither have been provided.*

- ***Subject Access Request -*** *I filed a subject access request with the disclosures department on 2 August, I was asked for proof of ID which was provided on 8 August. I was advised that this took 30 days to provide a response, and to date I have not heard back.*

- ***Meetings with Ramona Duguid & my union rep -*** *I was advised of actions to be complete by the end of June, however I have not heard anything since then.*

- ***Grievance -*** *I filed a grievance in October 2021 with John Lawlor who passed this to Lynne Shaw. She advised it would be dealt with in due course, and although I have been advised that this would not be looked into straight away, we are now nearly a year down the line, is this a normal or reasonable length of time for the Trust to respond to staff concerns?*

I feel that I have been very patient over the last 29 months of this suspension, and 14 months since my disciplinary hearing where I was advised of the end of that hearing via a written letter read out to myself and my union rep that I would be returning to work shortly. This letter along with the notes from the hearing appear to be withheld from myself as I have requested these multiple times.

I feel as though there is some sort of cover up in process, intended to keep me out of the workplace and from discussing matters with colleagues. I've been left with no choice but to send this email to you all collectively, as individually, I appear to have been ignored.

I hope to hear from one or all of you soon with a resolution to my situation. I am a healthcare professional who was been sitting at home on paid suspension for 29 months and that cannot be in the public interest.

Thanks

Jess'.

97. Much of that email is a simple statement of facts. The only area with which the tribunal disagrees is in relation to the suggestion that there is some form of cover up. The tribunal rejects that interpretation wholeheartedly. What has happened here in the tribunal's judgement is that Mrs Duguid was committed to prioritising the interests of patient X over all other factors. Given her professional designation and her role within the respondent, that is plainly a responsible position to adopt. As Mrs Duguid says herself, this is a question of balancing competing priorities. That is not an easy task to do, and nor does Mrs Duguid suggest that it is.

98. The tribunal has also come to the conclusion that Mrs Duguid had her own very serious doubts about whether or not the claimant had in fact engaged in an inappropriate relationship with patient X. Mrs Duguid was not looking to cover that up. Far from it, she was determined to get to the bottom of it by whatever means she reasonably could. In the tribunal's view, Mrs Duguid was heavily influenced by a number of significant matters:

98.1. The professional view of patient X's responsible clinician who stated that patient X did was not prone to expressing delusional thoughts about the claimant and had no clinical history of raising unfounded concerns;

98.2. The coincidence of some 280 calls being made from an unidentified source to the ward on which the claimant worked when, first, the claimant was on shift and, secondly, patient X had reported that there was a second mobile phone being used to enable his communications with the claimant; and

98.3. The possibility that an inappropriate relationship with the claimant may have been a contributing factor to a deterioration in the mental health of patient X who may have been concerned about being sent back to prison if the relationship became known.

99. The tribunal wishes to emphasise that it has not and does not need to come to any conclusion about whether or not those concerns were well-founded. The tribunal simply records what it understands to be the concerns operating on the mind of Mrs Duguid at the time as the underlying reason she continued the claimant's suspension and the consequential delay.

100. Mrs Duguid's reply to the claimant's email to the claimant's email of 3 October 2022 [898] is also worth setting out in full to demonstrate the respective positions adopted by the claimant and the respondent in the immediate lead up to the claimant's resignation on 11 November 2022. Mrs Duguid replies in the following terms:

'Dear Jess

Thank you for your email, which I briefly discussed with Lynne and James yesterday. I realise the time you have been suspended from work is both significant and exceptional in relation to the circumstances.

Whilst I accept the information and clarity you are seeking as to next steps may feel like this is not progressing, however there is a significant amount of work being taken forward in relation to the Coronial process relating to the death of the patient who made allegations that they were in a relationship with you. It is essential for both you and the family of the deceased that we ensure appropriate safeguards are in place given the nature of this inquest, which is an 'Article 2 inquest'.

The inquest is scheduled for mid-October. It would be appropriate to arrange to meet as soon as possible after the inquest therefore I will ask Emma to arrange a meeting before the end of October
Whilst I can't pre-empt any of the outcome of the inquests or lines of inquiry, I will discuss the scenarios we need to plan for in advance of when we meet so that I can hopefully be in a position to offer you more clarity when we meet before the end of October.

I will follow up the welfare calls, we have had some staff absences however this should not affect the calls to you and I'm sorry this has. I am not involved in the subject access requests process but I will make Angela Faill aware of the concerns you have raised with delays.

I will get Emma to get a date set for us this week so you know this is in the diary.

With best wishes

Ramona'

101. Mrs Duguid's reply does not address the contention that the claimant's grievance has been ignored, her request for a breakdown of monies that are owed or for the failure to conclude matters by 30 June 2022.

102. On 13 October 2022, the inquest into the death of patient X concluded. It was common ground that the claimant was not contacted by the Coroner's Office in the same way that she had not been contacted by the police or the Trust in relation to its Serious Incident investigation or the Safeguarding Review. The cause of death was identified as complications arising from prescribed medication.

103. On 20 October 2022, a fourth meeting took place between the claimant to Mrs Duguid. The claimant's notes of that meeting are at [913 – 923]. At this meeting the claimant told Mrs Duguid about the further threatening phone call she had received on 14 September 2022.

104. Also at this meeting, Mrs Duguid made further reference to the pink mobile phone which the claimant took as an insinuation that her denial that the mobile phone was hers had not been accepted by Mrs Duguid. A discussion also took place about members of staff having raised concerns about the alleged relationship between the claimant and patient X. The claimant objected to the characterisation by Mrs Duguid of such ongoing concerns as 'human behaviour is human behaviour'. The implication was that Mrs Duguid was powerless to prevent staff on the ward from continuing to discuss their concerns about the claimant's relationship with patient X. The claimant regarded such matters as gossip which could have been and should have been stamped out by the respondent.

105. The meeting also discussed the claimant's outstanding grievance. Mrs Duguid asked the claimant what parts of the grievance she wished to pursue in the light

of her imminent return to work. I don't regard that as Mrs Duguid sidestepping the fact that the grievance had not been dealt with since it was raised on 20 October 2021.

106. By letter dated 28 October 2021 [926-927] Mrs Duguid wrote to the claimant to summarise the claimant's position now that the disciplinary investigation; the police investigation; the Serious Incident investigation; the Safeguarding Review and the coronial investigation had all now been completed. The most material parts of that letter read as follows:

'Dear Jess

…

Given that these matters have concluded I confirmed at our meeting that we are now in a position to return you to work following your suspension in relation to this matter. I confirm that it would be sensible to put in place some experienced nursing pastoral support for you in the first instance to talk through the steps we need to take in getting you back to work. I am pleased that Vida Morris will be the contact person who will be supporting you with this and I have asked Vida to make contact with you to arrange the next steps.

At our meeting I also confirmed that the letter following your disciplinary hearing would be sent to you… You also raised a grievance against the Trust and agreed to review the elements of this with your union representative in relation to the areas you would like to be taken forward and reviewed.

This has been an exceptional case for the Trust and I realise the length of time you been suspended from work. I will ensure the learning from disciplinary cases which involved active police investigations surrounding the death of patients are taken into account when panel hearings are convened in order to ensure all elements are fully considered in the very rare and exceptional cases such as this one.
…'

107. Vida Morris is an experienced Senior Nurse for Pastoral Care and Development. The tribunal accepted Mrs Duguid's evidence that she selected Vida Morris because of the impact of the long period of suspension and surrounding circumstances would have had on the claimant both personally and

professionally. Mrs Duguid also says in her witness statement that the concerns that the claimant had about 'gossip' from ward staff would be another matter that the claimant could discuss with Vida Morris.

108. It was Mrs Duguid's expectation that the claimant will now be returning to work with the support and assistance of Vida Morris. The tribunal accepted that this was a legitimate expectation on Mrs Duguid's part bearing in mind that Mrs Duguid had expressly told the claimant orally on 20 October 2022 and in writing on 28 October 2022 that *'I confirmed at our meeting that we are now in a position to return you to work following your suspension in relation to this matter.'*

109. The tribunal accepts that by 20 October 2022 the respondent's position was that the claimant would be returning to work. Those are matters that Mrs Duguid wanted the claimant to discuss with Vida Morris. That said, the tribunal also noted Mrs Duguid's evidence at paragraph 62 of the witness statement that *'a secure unit was no longer considered appropriate.'* Mrs Duguid does not elaborate on that caveat. The tribunal understood that as a reference back to one of the caveats to the claimant's return to work that was discussed on 21 July 2021 and which are set out at in the unsent letter that Elaine Fletcher had been expecting to send to the claimant following the disciplinary on 21 July 2021 [956]. The relevant caveat is as follows:

'That you were transferred from [the ward on which the claimant worked\]. I will explore the options available and you will be contacted separately to confirm this.'

110. That of course, did not, preclude the claimant being returned in July 2021 to Cuthbert, Cuthbert Annex or Oswin wards, all of which are secure facilities within the Clinic.

111. In respect of the claimant's grievance, Mrs Duguid's position was that the claimant agreed at the meeting of 20 October 2022 to review her grievance with her union representative to confirm which elements of the grievance she wished to take forward in the light of the fact that she was now returning to work. Mrs Duguid says that the claimant did not get in touch with her or anyone else from the Trust following that meeting regarding her wishes in respect of her grievance. Mrs Duguid tasked the Executive Director of Workforce and Organisational Development (Gemma Rutherford) to pick up the grievance next steps to ensure that they were looked at independently for the claimant.

112. The claimant knew on the basis of Mrs Duguid's letter of 28 October 2022 and the preceding meeting on 20 October 2022 that Vida Morris had been appointed to oversee and facilitate the claimant's return to work. The claimant was informed both at the meeting of 20 October 2022 and in the subsequent letter of 28 October 2022 that she should anticipate contact being made by Vida Morris.

113. Vida Morris contacted the claimant by email on 8 November 2022 [934 – 936] and asked the claimant to give her a call or to provide a contact number so she could give the claimant a call to discuss the arrangements for the claimant's return to work. Ms Morris sent the same message as she had left by email on 8 November 2022 to the claimant by a letter sent recorded delivery to the claimant's home address [934 – 955].

114. By a letter dated 11 November 2022, the claimant resigned her employment [938 – 939]. In her witness statement, the claimant explained that there had been a three week delay before the promised contact from Vida Morris transpired. By this, the tribunal understands the claimant is be referring to the period between her meeting with Mrs Duguid on 20 October 2022 and receipt of the email message from Vida Morris on 8 November 2022. The claimant also received a letter by recorded delivery and there was no suggestion that the claimant had been attempting to contact was Vida Morris or anyone else in that period of three weeks.

115. In her letter of resignation, the claimant provides the following reasons for her decision to resign:

    115.1. She did not receive an outcome letter following the disciplinary hearing on 21 July 2021;

    115.2. She continues to be the subject of insinuations that the pink mobile phone belonged to her and, by implication, had been used to contact the patient X;

    115.3. The failure on the part of the Trust to address the ongoing gossip about the alleged relationship between herself and patient X and the failure to investigate the threatening phone calls that the claimant had reported to the Trust;

115.4. The Trust had ignored her grievance;

115.5. The financial and emotional impact of the whole process on her; and

115.6. The underpayment of monies owed to her.

116. The claimant rejects the respondent's assertion in these proceedings that the reason for the claimant's resignation that she wanted a to pursue her career as a Social Media Influencer. The tribunal accepts the claimant's evidence that the 'Slice of Jess' was only started during the period of suspension initially as a hobby. The tribunal notes that the significant success of a Slice of Jess which was attracting some 50,000 followers. The claimant's tax returns show that her income from Google rose from £4,211.00 in 2021 to £19,222.00 in 2023.

117. On 14 November 2022, Vida Morris contacted Ms Faill asking whether Ms fail had heard from the claimant. Both Vida Morris and Ms Faill were at this stage unaware that the claimant had resigned. Also on 14 November 2032, Vida Morris contacted the claimants to book a support meeting [940]. Ms Faill and Vida Morris then became aware that evidence had been overtaken by the claimant's resignation on 11 November 2022.

118. The claimant also claims a shortfall in the average enhancements to her basic pay that she says she should have received during the period of her suspension.

119. First, the claimant says that the period taken by the respondent to calculate average enhancements was artificially low because it ran from 30 April to 31 May 2020. The claimant point out that she was suspended throughout May 2020.

120. The claimant also challenges the basis of calculation of average enhancements. The way in which the Trust calculated the average enhancements was to adjust the basic pay for the enhanced pay elements that were payable during the hours which the claimant was required to work within her scheduled shift pattern. That method of calculation would include enhanced pay elements for weekends, bank holidays etc. cetera within the scheduled shift pattern. The claimant says that the average enhancements should also include additional regular work that she undertook such as overtime and bank work.

121. The claimant also claims for a shortfall in pay after the period which it contends any reasonable investigation disciplinary hearing would have concluded i.e. by 31 July 2020. The claimant therefore claims damages for breach of contract between 1 August 2020 and the date of resignation on 11 November 2022. The

claimant also claims loss of the pension contributions that she would have received on top of her wages which she estimates to be about £5000 per year.

122. After the claimant resigned she obtained employment as a Care Worker in the private sector where she worked on an 'as and when required basis'. The claimant applied for a job as a Band 2 Health Care Assistant with Northumbria Healthcare, the status of which was outstanding at the date of these proceedings.

The relevant law
Constructive dismissal

123. Section 95 Employment Rights Act 1996 (ERA) sets out the circumstances in which an employee is dismissed:

> ***(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –***
>
> ***a. the contract under which he is employed is terminated by the employer (whether with or without notice),***
>
> ***b. he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract,***
>
> ***or***
>
> ***c. the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."***

124. Plainly, if an employee has been expressly dismissed by his employer then section 95(1)(a) applies, and there is no need for the employee to show that he has been constructively dismissed. The test of whether an employee has been constructively dismissal is as set out in section 95(1)(c) ERA and is the statutory version of a principle originally established at common law. However, where there has been no express dismissal and there has been no termination by virtue of a limiting event under section 95(1)(b), it will be for the employee to show that the

provisions of section 95(1)(c) have been satisfied and that s/he has been constructively dismissed .

125. If an employee who has resigned his/her employment is unable to show that the provisions of section 95 (1)(c) have been satisfied, that employee will not be treated as having been dismissed. It follows that if an employee has resigned and not been dismissed s/he cannot assert a right not to have been unfairly dismissed. If an employee does satisfy the provisions of section 95(1)(c) then his/her resignation would be treated as a dismissal for the purposes of the law of unfair dismissal set out in Part X ERA.

126. Importantly, satisfying section 95(1)(c) establishes only that a claimant has been dismissed. Provided that the employee satisfies the other qualifying conditions to bringing a claim of unfair dismissal (such as any requirement for a qualifying period of service), that employee has the right not to be unfairly dismissed and the right to bring proceedings in the Employment Tribunal complaining of unfair dismissal. An Employment Tribunal might nevertheless find in appropriate circumstances that a constructive dismissal is fair where that dismissal is for a potentially fair reason under section 98 (1) or (2) ERA and that the claimant's constructive dismissal for that reason meets the requirements of fairness under section 98(4) ERA.

127. In order to establish that the requirements of the section 95(1)(c) are met, the employee must show:

127.1. there was a fundamental breach of contract on the part of the employer that repudiated the contract of employment;

127.2. the employer's breach caused the employee to resign; and

127.3. the employee did not delay too long before resigning, thereby affirming the contract.

Breach of contract

128. The first step is to identify the term of the contract of employment which is said to have been breached by the employer, and to consider whether there has been a breach of that term. The breach relied upon may be of either an express or

implied term or, where the breach has not yet occurred, an anticipatory breach of an express or implied term.

129. The term relied upon by both claimants is the implied term of trust and confidence. Breach of the implied term of mutual trust and confidence is the breach most frequently relied on in constructive dismissal cases. The term provides that employers (and employees) will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties – Malik v Bank of Credit and Commerce International SA 1997 ICR 606, HL.

130. In cases where a breach of the implied term is alleged, the Tribunal's function is not the same as the range of reasonable responses test. That test applies in relation to the statutory test for unfair dismissal, not the contractual test for constructive dismissal.

131. An example that has been given by the Employment Appeal Tribunal (EAT) to illustrate the reasonable and proper cause element of the test is that in any employer who proposes to discipline an employee for misconduct is likely to be doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process. However, if the employer had reasonable and proper cause for taking the disciplinary action, the employer cannot be said to be in breach of the implied term of trust and confidence - Hilton v Shiner Ltd Builders Merchants 2001 IRLR 727, EAT.

132. The second element of the test is whether the conduct was calculated or likely to destroy or seriously damage trust and confidence. This requires the Tribunal to consider the circumstances objectively, from the perspective of a reasonable person in the claimant's position Tullett Prebon plc v BGC Brokers LLP 2011 IRLR 420, CA. The test is met where the employer's intention is to destroy or seriously damaged trust and confidence, or where the employer's conduct was likely to have that effect.

133. A breach of the implied term of trust and confidence can be caused by one act, by the cumulative effect of a number of acts or a course of conduct. A last straw incident which triggered the resignation must contribute something to the breach of trust and confidence itself - Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA. There is no need for there to be proximity in time or in nature between the last straw and previous acts - Logan v Commissioners of Customs and Excise 2004 ICR 1, CA.

Fundamental breach

134. If there has been a breach of contract, the breach must be fundamental. This requires considering whether the conduct is:

> *"a significant breach going to the root of the contract of employment, which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract."* Western Excavating (ECC) Ltd v Sharp 1998 ICR 221, CA.

135. Fundamental breach is probably synonymous with repudiatory breach, that is a breach which is a repudiation of the whole contract - Photo Production Ltd v Securicor Transport Ltd 1980 ACA 27, HL.

136. This stage is not needed where the Tribunal has found that there was a breach of the implied term of trust and confidence: any breach of that term is a fundamental breach necessarily going to the root of the contract – Morrow v Safeway Stores plc 2002 IRLR, EAT.

137. Whether a breach of a term is a fundamental breach is a question of fact and degree. Some points about this:

a. the effect on the employee is relevant;

b. the employer's subjective intention is not a key part of the test. It may be relevant, but the intention must be judged objectively - Leeds Dental Team Ltd v Rose 2014 ICR 94, EAT.

138. Some cases have considered whether an employer can remedy a fundamental breach of contract before the employee accepts it. Other than an anticipatory breach of contract, which may be withdrawn up to the moment of acceptance, a fundamental breach of contract cannot be remedied by the wrongdoer. After a fundamental breach has occurred, it remains open to the employee to agree to affirm the contract, or to accept the fundamental breach once it has occurred, whatever action the employer takes following the fundamental breach. This means that the only option available to the employer who wants to correct their action is to invite the employee to affirm the contract - Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA.

139. However, there is a distinction between a fundamental breach of contract that cannot be remedied, and action taken by an employer that prevents the breach of contract occurring or becoming a fundamental breach – Assamoi v Spirit Pub Company (Services) Ltd *EAT 0059/11.*

Resignation

140. If the employer fundamentally breaches the contract of employment, the employee may accept the repudiation and terminate the contract by resigning, either with or without notice. The contract comes to an end at the time of the communication of the resignation to the employer. If the employer is in continuing breach of contract, the employee can resign at any point to while it is continuing – Reid v Camphill Engravers 1990 ICR, EAT.

141. The employee may resign by words or conduct. For example, an employee's failure to return to work following maternity leave has been considered sufficient to communicate acceptance of the employer's fundamental breaches of contract.

142. There are some conflicting authorities as to the relevance of an earlier fundamental breach by the employee, with some authority suggesting that an employee cannot allege constructive dismissal if s/he is in breach of contract him/herself - RDF media group plc v Clements 2008 IRLR 207, QBD . However, there appears to be acceptance that if one party commits a fundamental or repeated breach that the other does not accepted as bringing the contract to an end, the contract and the obligations under it continue. The obligation of trust and confidence is not suspended when one party breaches the contract, and so it remains open to an employee who has committed a fundamental breach to accept a later repudiation by the employer and end the contract -Atkinson v Community Gateway Association 2015 ICR 1, EAT.

143. In Aberdeen City Council v McNeill 2015 ICR 27 the claimant committed acts of gross misconduct, including sexual harassment and being intoxicated at work. He claimed constructive dismissal in relation to the disciplinary investigation, which the employer carried out in a way which breached the implied term of trust and confidence. The Court of session rejected the employer's argument that the employee's breaches prevented the employee from relying on a later breach of trust and confidence by the employer. However, the employee's own breach could be relevant to compensation. For example, in a complaint of constructive unfair dismissal, breaches such as misconduct could be found to be contributory conduct resulting in a reduction to the basic and compensatory awards.

Resignation caused by breach of contract

144. The breach must have caused the resignation, but it need not be the only cause. The test is whether the employee resigned in response to the conduct which constituted the breach. This is a question of fact for the Tribunal.

145. Once an employer's fundamental breach has been established, the Tribunal should ask whether the employee has accepted the breach and treated the contract of employment as at an end. It does not matter if the employee also objected to other actions (or inactions) by the employer that were not a breach of contract. Constructive dismissal is made out if the employee resigned at least partly in response to the employer's fundamental breach of contract - Logan V Celyn House Ltd EAT 0069/12. The crucial question is whether the repudiatory breach played a part in the dismissal, i.e. whether it was one of the factors relied on by the employee when resigning Abby cars (West Hornden) Ltd v Ford EAT 0427/07.

Delay and affirmation

146. If the employee waits too long after becoming aware of the breach of contract before resigning, s/he may be taken to have affirmed the contract. The question is whether the employee has shown an intention to continue in employment, rather than an intention to resign. This will depend on the particular circumstances of the case. Factors relevant to this question include the employee's conduct, as well as the length of time which has passed since the breach.

147. In Alan v Robles [1969] 1 WLR 1193 it was held that delay in itself may not constitute affirmation of the contract, but if it was prolonged maybe evidence of an implied affirmation.

148. In WE Cox Toner (International) Ltd v Crook ICR 823 the EAT provided the following guidance of affirmation:

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

149. When finding on the facts of that particular case that the claimant had affirmed the contract during the six-month period in which continues to work but there was also ongoing correspondence about the allegation, the EAT said this:

'We find the question whether or not Mr Crook affirmed the contract difficult. On the one hand, throughout that period Mr Crook was objecting to the repudiatory conduct and the company was continuing to repeat the wrongful allegations. On the other hand, there must be some limit to the length of time during which an employee can continue to be employed and receive his salary at the same time as keeping open his right to say that the employer has repudiated the contract under which he is being paid.'

150. In addition to affirmation by delaying, the employee may affirm the contract by taking action which is consistent with employment continuing, irrespective of the timeframe, for example, considering alternative roles, accepting a promotion or a pay rise.

151. Where there is a continuing cumulative breach of the implied term, the employee is entitled to rely on the totality of the employer's acts even if she has previously affirmed the contract. The effect of the last straw is to revive the employee's rights to resign.

152. In a case where a number of breaches of contract are relied on by the claimant, the Tribunal may be assisted by the step-by-step approach of Lord Justice Underhill in Kaur v Leeds Teaching Hospitals [2018] E WCA Civ 978:

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

b. Has the employee affirmed the contract since the act? If so, there cannot be a constructive dismissal in respect of that act or earlier acts.

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

d. If not, was it nevertheless a part of a course of conduct comprising several acts and/or omissions which, viewed cumulatively, amounted to a breach of the implied term of trust and confidence? If it was, there is no need for any separate consideration of a possible previous affirmation.

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

153. It follows that if the last straw was part of a course of conduct which cumulatively amounted to a breach of the implied term, affirmation of the earlier acts does not need to be considered: the last straw revives the right to resign even if there has been an earlier affirmation. However, if the last straw is not part of a course of conduct which breaches the implied term, the Tribunal will have to consider whether earlier acts have been affirmed. In such a case, the claimant can succeed in establishing constructive dismissal if:

a. there has been no affirmation of the contract by the claimant;

b. the earlier act or course of conduct was repudiatory; and

c. the earlier act or course of conduct at least contributed to the eventual decision to resign.

Unlawful deduction from wages

154. Section 13 Employment Rights Act 1996 sets out the circumstances in which an employer will have made an unlawful deduction from the employee's wages. It provides:

> *13 Right not to suffer unauthorised deductions.*
>
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> > *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

155. Section 14 Employment Rights Act 1996 sets out the circumstances where a deduction is excepted from the general principle of unlawful deductions provided for in section 13. Insofar as is relevant to these proceedings the applicable exceptions in section 14 provide:

> *14 Excepted deductions.*
>
> *(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—*
>
> *(a) an overpayment of wages, or*
>
> *(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker…*
>
> *(4) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of any arrangements which have been established—*
>
> *(a) in accordance with a relevant provision of his contract to the inclusion of which in the contract the worker has signified his agreement or consent in writing, or*
>
> *(b) otherwise with the prior agreement or consent of the worker signified in writing, and under which the employer is to deduct and pay over to a third person amounts notified to the employer by that person as being due to him from the worker, if the deduction is made in accordance with the relevant notification by that person.*

The contractual jurisdiction of the employment tribunal

156. The employment Tribunal has jurisdiction under article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 to hear a contractual claim by an employee where the claim arises or is outstanding on termination of employment and relates to:

155.1. a claim for damages for breach of the employment contract or other contracts connected with employment;

155.2. a claim for a sum due under the contract.

157. The order also allows a contract claim by an employer if it is presented at a time where the employee has a contract claim against the employer before the employment Tribunal (articles 4(d) and 8(a)). If the employee's claim is subsequently withdrawn, settled or dismissed, the employer's claim can still proceed.

156. Certain breach of contract claims are specifically excluded from the Tribunal's jurisdiction under article 4, but none of those exclusions are of application in the present case.

157. The amount recoverable (whether by an employee or employer) in the employment Tribunal under a contract claim is £25,000. That is a total for all contractual claims relating to the same contract.

Conclusions

158. Applying the law to the facts as tribunal has found them in relation to each of the allegations the tribunal has come to the following conclusions.

Constructive unfair dismissal

Issue 1: Did the claimant's employment contract contained an implied term imposing a duty on the parties not to, without reasonable and proper cause, engage in conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (the Implied Term)?

159. It was common ground that the Implied Term (or the Malik terms as the respondent referred to it in closing submissions) was a term of the claimant's contract of employment. The tribunal therefore proceeded on that agreed basis.

Issue 2.2.1: Did the respondent delay in dealing with the claimant's case from 30 April 2020 (the date the claimant was suspended) to 11 November 2022 (the date the claimant resigned)?

160. On any view, there was a considerable elapse of time in dealing with the investigation and determination of the claimant's disciplinary process. From

suspension on 30 April 2020 to the meeting on 20 October 2022 when the claimant was told she was to be permitted to return to work is a period of some 29 months. Even allowing for the seriousness of the allegation and the multiple processes that took place, that is an enormous period over which to be suspended from work.

161. The timeline and the events that took place within it are to a material extent not in dispute. The legal effect of those events and consequences is what lies between the parties.

162. The tribunal does not accept the respondent's submission that a reasonably competent investigation and disciplinary process would have taken no more than three months. The tribunal did not hear from Elaine Fletcher or anyone else involved in the process that led up to the disciplinary hearing on 21 July 2021. However, the tribunal is aware of the seriousness of the allegation made by patient X and that they were 13 witness statements taken as part of the investigation. The alternative submission from the claimant, that the whole process should have taken no more than a year implicitly recognises the complexity and time involved.

163. The Trust also had to take into account that eight months after the claimant's suspension, patient X died. The Trust was thereafter dealing with both an extremely serious allegation of an inappropriate relationship between patient X and the claimant and then an extremely serious incident in the death of a patient for unexplained reasons while in the care of the Trust. The tribunal also heard evidence from Mrs Duguid that Covid was at least in part a reason why matters did not progress more quickly than they did.

164. Thereafter, Mrs Duguid made the decision to continue to suspend the claimant pending the resolution of all the procedures related to the death of patient X before allowing the claimant to return to work. The tribunal had no evidence about the length of time that it would normally take for a police investigation to run its course. The tribunal has no evidence from which it can infer any delay on the part of the police or of the coroner. The real issue here is not delay but the lawfulness of the Trust's decision not to allow the claimant to return to work after the disciplinary hearing on 21 July 2021, but rather to insist on her continued suspension until the four subsequent processes all reached their conclusion.

165. In the circumstances, the tribunal does not consider that the elapse of time occasioned by any particular part of the processes that the Trust required to be concluded before the claimant was allowed to return to work to be really the

central point for its consideration. The central point was whether the Trust's decision to continue the claimant's suspension lawfully exercised.

Issue 2.2.2: Did the respondent suspend the claimant from 30 April 2020 to 11 November 2022?

166. It was not in dispute that the claimant was suspended from work for 30 April 2020 until 20 October 2022. There was a dispute as to whether the claimant remained suspended from 20 October 2022 until her resignation on 11 November 2022.

167. The claimant says that she remain suspended until she might actually return to work. That contingency was overtaken by her resignation.

168. The respondent disagrees. The respondent says that Mrs Duguid made it clear at the meeting on 20 October 2022 that the claimant could return to work. The respondent points out that in Mrs Duguid's letter of 28 October 2022 confirming the outcome of the meeting on 20 October 2022, she refers to the claimant's suspension in the past tense. The respondent says it is not necessary to say expressly that the claimant's suspension was lifted since the entire rationale of the meeting on 20 October 2022 was to inform the claimant that the path was now clear for her to return to work.

169. The tribunal concludes that the claimant did remain suspended from work after the meeting of 20 October 2022, but solely for the purpose of giving effect to the arrangements necessary for the claimant to return to work after such a significant period of suspension. It would not have been responsible for Mrs Duguid to immediately lift the suspension and require the claimant the following day to present for work. That is why Mrs Duguid made the arrangements for an experienced nurse with pastoral responsibilities to ensure that the claimant's return to work was managed in the best interests of the claimant, the respondent and the Trust's patients.

170. Nevertheless, the tribunal finds that the claimant did remain suspended at the point that she resigned.

Issue 2.2.3: Did the respondent provide the claimant with the disciplinary outcome letter following a disciplinary hearing meeting on 21 July 2021?

171. The respondent accepts in its submissions that no disciplinary outcome letter was sent to the claimant at any time following the disciplinary hearing on 21 July 2021 and before her resignation. This was despite the outcome of the hearing being communicated to the claimant verbally on the day and despite repeated requests for written confirmation.

172. The tribunal does not agree with the respondent's submission that, *'By definition, the outcome letter signifies the conclusion of the matter.'* In the tribunal's judgment, the disciplinary process ended on 21 July 2021 when Elaine Fletcher verbally communicated the outcome of the disciplinary hearing to the claimant in unequivocal terms. The allegation that the claimant had been involved in an inappropriate relationship with patient X was not upheld. The unsent outcome letter disclosed in these proceedings is entirely consistent with what the claimant says Elaine Fletcher told her on 21 July 2021 at the end of the disciplinary hearing.

173. The claimant was also told at the end of the hearing that she was to be given ra written warning on the basis that the second allegation (that she had accessed user data without authority or consent) had been upheld.

174. As the respondent points out, Elaine Fletcher was not called as a witness, so the tribunal did not have the benefit of her input. That leaves the tribunal with the documentary evidence referred to which in the tribunal's view is incapable of any other reasonable interpretation than that the disciplinary process was finalised on 21 July 2021. All that remained outstanding was the confirmation letter. The only reason that letter was not sent was because Mrs Duguid intervened due to her own concerns about whether all lines of enquiry had been run down and the need in her view to await further processes to be concluded before the claimant should be allowed to return to work.

Issue 2.2.4: Did the respondent provide the claimant with a letter explaining the claimant's continued suspension after 21 July 2021?

175. The claimant accepts that the respondent was issued with a letter explaining her suspension after 21 July 2021. That is the letter from Mrs Duguid to the claimant of 12 August 2021 [812-813]. The claimant was issued with another letter

explaining her continued suspension. That is the letter from Mrs Duguid to the claimant of 8 July 2022 [879-880].

176. That latter letter starts, *'I am writing to provide a further update in relation to the circumstances of your ongoing suspension from the Trust.'* The letter then goes on to do just that. The claimant was also told why her suspension was ongoing in each of the meetings that the claimant had with Mrs Duguid.

177. The claimant was accordingly not kept in the dark about the reason for her continued suspension. Mrs Duguid repeated at meetings and in writing why the claimant remain suspended. The reason for continued suspension was that Mrs Duguid did not consider it appropriate for the claimant to return to work whilst a succession of processes/investigations that might conceivably cast some light on the allegation that the claimant had had an inappropriate relationship with patient X remained incomplete.

Issue 2.2.5 Did the respondent ignore the claimant's grievance lodged on 20 October 2021?

178. The claimant's position is that her grievance was simply not progressed prior to her resignation on 11 November 2022.

179. The claimant says that no action at all was taken to progress her grievance: no one was appointed to investigate it; no meetings were called to discuss it with the claimant; and no outcomes were reached.

180. The only material mention of the grievance is at the meeting of 20 October 2022 (the first anniversary of the grievance) at which it was suggested by the respondent that the claimant and her trade union representative were invited, in the light of the decision to allow the claimant to return to work, to identify which parts of the grievance she still wished to pursue.

181. The reality of the situation was that Trust decided not to do anything about the claimant's grievance until the various processes had run their course. This was consistent with the respondent's approach to the claimant's disciplinary process. Both the disciplinary and the grievance processes were effectively stayed until the four additional processes connected with the death of patient X had run their course. It is probably a matter of semantics whether that amounts to 'ignoring' the claimant's grievance. The tribunal's view is that the respondent took a

conscious decision not to progress the claimant's grievance pending the completion of other processes.

Issue 2.3: Did the respondent's conduct breach the Implied Term?

182. The tribunal considers that the respondent acted in a way that was likely to destroy or seriously damaged the relationship of trust and confidence between the claimant and the respondent in each of the following ways:

182.1. Mrs Duguid's decision to intervene to continue the disciplinary process when it had in fact already ended on 21 July 2021;

182.2. Mrs Duguid's decision to continue to suspend the claimant after the end of the disciplinary process on 21 July 2021;

182.3. Mrs Duguid's ongoing decisions to continue the claimant's suspension while the police investigation, the Serious Incident investigation, the Safeguarding Review and the coronial process ran their course; and

182.4. The respondent's decision not to progress the claimant's grievance after it was brought on 20 October 2021.

183. The tribunal also accepts the claimant's points about the serious adverse effects the prolonged suspension had on the claimant's work experience and skills; her relationship with colleagues; and her Nursing Assistant Apprenticeship degree. Mrs Duguid accepted these adverse effects in cross examination.

184. The tribunal does not accept that the respondent's failure to provide the outcome letter is really the important point. The tribunal considers that the disciplinary process was at an end at the point at which Elaine Fletcher verbally confirmed the outcome to the claimant on 21 July 2021. The tribunal therefore disagrees with Mrs Duguid that the disciplinary process was not at an end at the point at which she intervened. Indeed, Mrs Duguid was right when she says that she would have been better served by intervening before the disciplinary hearing on 21 July 2021 if she wanted to pause that process pending the other related processes reaching fruition. That said, there was nothing in the policies to which the tribunal was referred which gave the respondent the right to suspend an employee pending the exhaustion of all and any related investigations or procedures.

185. The next question is whether the respondent had reasonable and proper cause to act in the way that it did.

186. The claimant accepts that there was reasonable and proper cause to suspend her at the initial stage after patient x's allegation against her.

187. However, the tribunal has found that the claimant's disciplinary process concluded on 21 July 2021 at the point at which Elaine Fletcher delivered the outcome to the claimant. After that, the only further matter might have remained outstanding was the possibility an appeal against the written warning that the claimant received.

188. The tribunal has concluded that the continued suspension of the claimant after that point was without reasonable and proper cause. The practical effect of the continued suspension was to revoke the finality of the disciplinary hearing and effectively to place the claimant in a position of double jeopardy which lasted for a further 15 months.

189. That is not to say that there is an absolute bar against double jeopardy in disciplinary matters. There may be cases where new evidence comes to light making it entirely proper for an employer to revisit a previously decided upon issue. However, this was not one of those cases. This was a situation where Mrs Duguid took a different view to Elaine Fletcher on precisely the same facts. The respondent had known since December 2020 that a police investigation would take place. When that was used as a reason for the claimant's continued suspension by Mrs Duguid she was relying not on any evidence acquired after the facts available at the time of the disciplinary hearing. She was simply takin a different approach to the same circumstances.

190. The reality of the situation was that Mrs Duguid remained concerned that there was a link between the pink mobile phone and the claimant. If such a link could have been established, the allegation of an inappropriate relationship could potentially have been established. Mrs Duguid's efforts to enable the police to track down the owner of the pink mobile phone is evidence to that effect.

191. The respondent knew from 10 August 2021 that the police were not going to take any further action in relation to the claimant. The first reason given to the claimant for her continued suspension was by then no longer an issue. It was by that stage clear to the respondent that the reason for patient x's death was a reaction to normal levels of a prescribed drug.

192. Mrs Duguid then decided that the claimant should not return pending the conclusion of another process, the Trust's own Serious Incident Investigation. The respondent knew from 13 September 2021 that this investigation had produced no significant findings and had made no recommendations.

193. By 21 October 2021, Mrs Faill was telling the police that the respondent was in a position to confirm the outcome of the disciplinary to the claimant. Yet, the claimant remained suspended for a further year while the respondent completed a Safeguarding Review and awaited the outcome of the coronial inquest. At no stage since the conclusion of the claimant's disciplinary process on 21 July 2021 had the claimant been spoken to by the Trust, the police or the coroner.

194. In these circumstances, the tribunal has concluded that there was no reasonable and proper cause for the claimant's continued suspension and/or being placed in double jeopardy after 21 July 2021.

195. The tribunal acknowledges Mrs Duguid's laudable commitment to patient safety and also acknowledges the difficulty of balancing the competing interests of patient safety and the employment rights of the claimant. However, on the facts of this particular case, the claimant remained suspended in the hope that one process or another might turn up some additional evidence that had not been available to Elaine Fletcher and which might incriminate the claimant. That does not appear to the tribunal to amount to a reasonable and proper cause to keep the claimant suspended after, at the very latest the conclusion of the police investigation on 10 August 2021.

196. The tribunal does not consider that the withholding of the grievance outcome letter adds much to the conclusions it has already reached. In reality, withholding

then outcome letter was part and parcel of respondent's decision to keep the claimant suspended until all of the processes which might conceivably reveal fresh evidence had been concluded. The same goes for the way in which the respondent dealt with the claimant's grievance. The respondent had simply decided that nothing would be done to assist the claimant until it was clear that nothing further was going to emerge.

Issue 2.4: Did the claimant resign in response to one (or more) breach of the Implied Term?

197. The claimant's position is that her letter of resignation makes it abundantly clear that it was the breaches of contract by the respondent which caused her to resign. That letter does indeed refer to the period of the claimant's suspension, the failure to provide an outcome letter after the 21 July 2021 disciplinary hearing and the failure to address the claimant's grievance. The claimant says that these are all matters underpinning the breach of the implied term of trust and confidence.

198. The claimant dismisses as a 'fanciful' the suggestion that the real and sole reason for the claimant's resignation was that she decided to pursue a career as a social media influencer based on the success she had with a Slice of Jess.

199. The respondent says that there is a real issue in relation to the causation between any breach of the Implied Term and the claimant's resignation. The respondent says it is surprising that for over two years the claimant had been chasing the respondent for positive news about her return to work and yet the claimant chose to resign at the point at which her wishes were granted.

200. The respondent fairly points out that the claimant had been deeply critical of the time taken to resolve matters describing the amount of time it had taken to conclude matters as 'extortionate' and referring to the 'devastating' impact on her well-being. Yet, it was at the very point that the situation had been resolved in her favour and her that she chose to resign.

201. The respondent says that the real reason the claimant resigned was because she preferred to pursue a career independent of healthcare as a social media influencer. Although not expressed in such terms, the respondent's position appeared to be that the claimant was content to receive her pay over an extended period while she got her social media career up and running.

202. The tribunal accepted the respondent's point which was pursued in cross examination of the claimant that a very considerable amount of time had to be invested in the claimant's social media activities in order for it to generate the level of content that it did and for which the claimant started to receive an increasingly large amount of income. That culminated in October/November 2022 when the claimant earned over £3000 and over £2000 respectively.

203. The tribunal accepts that the claimant's desire to pursue a career as a social media influencer and to work elsewhere than the respondent were both reasons that were influential on her decision to resign. In that regard, the tribunal has considerable sympathy for the respondent's position. It is after all an oddity of this case that after over 2 years of calling on the respondent to perform its side of the contract, the claimant resigned when in other contexts the breach might be considered as having been remedied.

204. However, the tribunal must apply the applicable legal principles. There is no restriction on the innocent party to a repudiatory breach from seeking to earn money from other activities that are not expressly or impliedly prohibited by the contract of employment. If the duration of the claimant's suspension gave her an opportunity to explore the potential for social media activities to generate income then so be it.

205. The test of causation is referred to in paragraphs 144-145 above. It is a relatively low bar. The crucial question is whether the fundamental breach played a part in the dismissal in the sense that it was one of the factors relied upon by the employee when resigning. The law is clear that that the breaches do not need to be the only cause of the resignation.

206. While the tribunal had considerable reservations about the claimant's motivation in waiting to resign until the respondent had effectively given her everything she wanted, ultimately the tribunal cannot conclude as a matter of fact that the breaches in question were not at least a part of the reason for the claimant's resignation.

207. The respondent points out that the claimant was not cross-examined about the honesty or sincerity of the reasons she gave for resigning in her letter of dismissal. However, it was plainly implicit in the way in which the respondent put its case that the respondent was saying that the claimant was content to take her pay while she looked to pursue an entirely different career.

208. The tribunal has taken all that into account when concluding that as a matter of fact the breaches identified by the claimant in her letter of resignation were a contributing and effective cause of her resignation. In those circumstances, the relatively low threshold of causation in this aspect of the claimant's case has been met.

209. The tribunal concludes that the respondent was in breach of the Implied Term from at the latest 10 August 2021 by continuing to suspend the claimant and placing her in a position of potential double jeopardy when there was no reasonable and proper cause to do so.

210. The next issue for consideration is the effect of the respondent's decision on 20 October 2021 to inform the claimant that she was to be permitted to return to work. The background to this meeting is that the respondent has been in continuing breach of the Implied Term for over a year. The claimant has been repeatedly calling on the respondent to perform its obligations under the contract of employment, most notably by raising a grievance, to no avail.

Issue 2.5: Did the claimant timely resign in response to one (or more) breach of the Implied Term, or did the claimant unduly delay resigning in response to the breach, thereby losing the right to resign and claim constructive dismissal?

211. There is no constructive dismissal if the employee affirms the contract after and despite the employer's repudiation. The correct approach is to look at the circumstances as a whole to see if the claimant has conducted herself in a way which is consistent only with keeping the contract alive.

212. Looking first of all at the question of delay and the continued acceptance of pay. There is no rule that delay is in and of itself conclusive of affirmation. Throughout the period of the respondent's continuing breach the claimant was making it clear that she objected to not being allowed back to work and to not being given confirmation that the disciplinary process had ended on 21 July 2021. Due to the nature of the respondent's repudiation, the claimant was prevented from carrying out any duties since the respondent was depriving her of the opportunity to do so.

213. While it is true to say that the claimant was receiving pay throughout the 30 months of her suspension, it also has to be acknowledged that it was at the respondent's instigation that she was put in the position of being unable to perform her side of the contract of employment. Further, it was the respondent who repeatedly continued the claimant's suspension while different processes ran their course. This was not a case where the respondent said at the outset that the claimant would remain suspended until each and every process was concluded. Rather, the respondent decide to postpone the claimant's return to work on a rolling basis as each of the processes concluded.

214. In these circumstances, the tribunal concludes that the claimant was entitled to a reasonable period of time after confirmation that she was to return to work within which to accept the respondent's ongoing repudiation or to affirm the contract of employment. The tribunal further concludes that the period between 20 October and 11 November 2022 was in the overall context of this particular case a reasonable period for the claimant to reflect on whether there was any reasonable prospect of her making a successful return to work.

215. The tribunal also notes that at the meeting of 20 October 2022, Mrs Duguid was still not prepared to let the issue of the pink mobile phone lie which did not suggest to the claimant that she would be returning with a clean slate. In all of the circumstances, the tribunal has concluded that the claimant did not affirm the contract of employment before she accepted the respondent's repudiation by resigning. Accordingly,. The tribunal finds that the claimant was dismissed within the terms of section 95(1)(c) ERA.

216. The respondent has realistically not advanced a case that any dismissal was either for a potentially fair reason and fair in all the circumstances of the case

within the terms of section 98 ERA. Accordingly, the claimant was unfairly dismissed.

Unlawful deduction from wages

Issue: ***What is the amount of wages that were properly payable to the claimant at the time she was suspended?***

Did the respondent make a deduction from the claimant's wages which was not required or permitted under the terms of the claimant's contract of employment or under statute or the claimant had not given their written consent for?

If so, has there been a series of unlawful deductions?

217. The tribunal has concluded that the claimant was suspended between 30 April 2020 and 11 November. The entitlement to pay during the period of the claimant's suspension is set out at para 10.1 [109-112] of the pre 2021 disciplinary policy and para 9.1 of the post 2021 policy are in the same terms in relation to pay. The claimant was contractually entitled to *'full pay with average enhancements.'*

218. The amount that was properly payable to the claimant in her monthly salary instalments ought therefore have equated to 'full pay with average enhancement'. The difficulty lies in interpreting what is meant by that term. It was common ground that Agenda for Change does not define that term and so is of no assistance to its interpretation.

219. The ordinary and natural meaning of that term is that full pay includes any enhancements to the plain rate of pay for the hours worked in the normal course of an employee's usual shift pattern. The hours within that pattern that would attract a premium would also be payable at that enhanced rate to a suspended employee to ensure that they were not worse off as a result of suspension.

220. The tribunal does not consider that bank work was envisaged to be included in the term average enhancements. Regardless of the contractual status of bank work there is no contractual right to any particular minimum number of hours. Pay for bank work is not an enhanced rate. It is separate and distinct work. The

tribunal does not consider that the term can be extended to mean 'the average pay received in the period immediately prior to suspension'.

221. However, the period over which full pay and average enhancements falls to be calculated should be period when the claimant was working normally and should include an amount to reflect the average level of overtime the claimant was working. In that way the claimant could properly be said to be no worse off than had she been working normally under her contract of employment rather than suspended.

Breach of contract

Issue: Did the respondent breach the claimant's contract of employment by continuing to suspend her after August 2020?

If so, did the breach of contract because the claimant to suffer loss during the period of suspension from August 2020 - November 2022?

222. The judgment of the tribunal is that the respondent was in breach of the Implied Term by continuing to suspend the claimant from 10 August 2021 at the latest.

223. The question of recoverable loss is a matter of remedy.

Employment Judge Loy
10 July 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

22 October 2024
Miss K Featherstone

FOR EMPLOYMENT TRIBUNALS

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