EMPLOYMENT TRIBUNALS

Claimant: **Ms N Sisodia**

Respondent: **Birmingham Crisis Centre**

Heard at: **Birmingham Employment Tribunal** **On: 27-31 January 2025**

Before: Employment Judge Kight
Ms L Clark
Ms S Campbell

Representation
Claimant: In person
Respondent: Mr A F Griffiths, Counsel

JUDGMENT having been sent to the parties on ***03 February 2025*** and written reasons having been requested by the claimant in accordance with Rule 60(4)(b) of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

REASONS

INTRODUCTION

1. By claim form dated 25 November 2023 after a period of early conciliation between 22 September and 3 November 2023 the claimant submitted claims pursuant to **sections 47B** and **103A of the Employment Rights Act 1996 and Article 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**.

2. In summary the claimant claims that specific treatment of her by the respondent, which culminated in her being handed a letter on 10 August 2023 notifying her of allegations made against her and offering to enter into a settlement agreement with her to terminate her employment, amounted to a repudiatory breach of contract, specifically a breach of the implied term of mutual trust and confidence. She claims that she resigned in response to that treatment with immediate effect, treating herself as constructively dismissed and that she is entitled to her notice pay. The claimant claims that the reason or principal reason for the respondent's treatment of her was that she had made up to four protected disclosures such that her constructive dismissal was automatically unfair. She also argues that the treatment complained of

amounted to detrimental treatment because she had made protected disclosures.

3. The respondent denies breaching the claimant's contract as alleged or at all. The respondent says the claimant was not dismissed, that she did not make protected disclosures and therefore that there was no automatic unfair dismissal or detriment because of them.

ISSUES

4. The issues the tribunal was to decide were identified at a Preliminary Hearing for Case Management on 3 April 2024 and clarified at the start of the final hearing. The claimant identified the following as potential breaches of her contract:

    a. Bullying – which the claimant clarified was a reference to the respondent sending the letter on 10 August 2023 referred to above

    b. Changes to her job role

    c. False allegations – which again was a reference to the contents of the letter of 10 August 2023

    d. Victimisation due to whistleblowing, which was identified as:
        i. Being put at risk of redundancy on 14 March 2023
        ii. Being put on "garden leave" from 5 April to 17 July 2023
        iii. On her return to work on 17 July 2023
            1. her job role being changed and her duties being taken away
            2. her colleagues avoided speaking to her
        iv. On 25 July 2023 she was excluded from a work party
        v. Being given the letter of 10 August 2023 already referred to

5. The matters identified as "victimisation due to whistleblowing" above are also the detriments complained of which the claimant said were because she had made protected disclosures.

6. The claimant relied upon four alleged protected disclosures on 6, 14 and 24 March and 22 June 2023. The respondent disputed that any of these disclosures met the necessary criteria to amount to protected disclosures.

EVIDENCE

7. The tribunal was provided with a bundle of documents running to 528 pages in advance of the hearing. On day one of the hearing the respondent applied to include, and the tribunal concluded that it was in the interests of justice to add a further supplemental bundle of 44 pages containing a chronology and various email correspondence, and subsequently a one-page email (identified as document A) and the minutes of a trustee meeting on 26 July 2023 (identified as document B).

8. The tribunal was provided with a witness statement for the claimant, and for the respondent, witness statements for Ms Sue Broughton, a trustee; Mr Matthew Hooper, a trustee and company secretary, Mr Alan Fleming, CEO, Ms Susan Ryan Centre Manager and Ms Julie Kilkelly, Deputy Centre Manager.

9. When making determinations in relation to disputed facts in this claim, the tribunal reminded itself of the observations of Mr Justice Leggatt in the case of ***Gestmin v Credit Suisse [2013] EWHC 3560 (Comm) (paragraphs 16-22)***. It is well-established that human memories are fallible and not always a perfectly accurate record no matter how strongly someone believes their memory to be accurate. Perceptions and external information can affect how memories are created as can thoughts and beliefs and what is remembered might also be affected by what appeared to be most important at time. Unconscious bias may make us more likely to embed thoughts that reflect those beliefs. They can change over time and the process of going through the employment tribunal proceedings themselves can create bias. Witnesses may have a stake in a case. They can sometimes genuinely recall as memories things that did not occur or fail to recall as memories something that did occur. Even if a witness has confidence in what they say it might not provide a reliable guide to the truth. Considering those matters, inferences drawn from documents and known and probable facts are frequently more reliable, though even contemporaneous documents can suffer from inaccuracies, they may record perception, and the purpose of the document may influence decisions about what is included and how it is written.

FINDINGS OF FACT

10. The claimant began her employment with the respondent, a charity providing refuge services for women and children escaping domestic abuse, on 3 or 4 January 2022, though nothing turns on this date. She was AAT qualified, and part ACCA qualified at the time. She worked as a Finance Officer and her line manager was the respondent's CEO, Mr Fleming. Her salary was £21,000 per annum, with £500 incremental increases every six months for the first two years of employment, dependent upon satisfactory performance.

11. A Ms Harris had previously been employed by the respondent as a Finance Manager, but the trustees of the respondent had decided instead to have a Finance Administrator/Officer role, hence the claimant's appointment. The claimant's role was initially therefore narrower than the previous finance manager role set out in the job description contained in the bundle. Ms Harris continued providing support to the respondent during 2022 by completing the payroll for it each month one day over a weekend. The respondent's accounts were completed by an external accountant, Ms James.

12. On 22 May 2022 Ms Harris prepared a report on the claimant, setting out areas where the claimant had made mistakes. In the report Ms Harris highlighted that the claimant wanted to take on more learning around processing salaries but said she was not sure and confident that the claimant would take it all in as there were other aspects of the day-to-day accounting and petty cash that the claimant was still trying to learn. The claimant was not made aware of this report at the time.

13. On 3 August 2022, the claimant was awarded a salary increment of £500. She also received an email from Mr Fleming which noted that he was *"very pleased with what you do"* and invited the claimant to take a long weekend once a month. This is at odds with Mr Fleming's witness evidence to the tribunal that by this stage he had concerns about the claimant's performance. On balance the ribunal prefers the contemporaneous documentary evidence and concludes that although Ms Harris had flagged mistakes in May 2022, Mr Fleming did not have concerns at this point in August 2022 about the claimant's performance.

14. The respondent agreed for Ms Harris to provide support to the claimant for her to learn payroll, which took place over three or four days on weekends between August/September and December 2022. Ms Harris' involvement with the respondent formally ceased on 19 December 2022 and the claimant took over payroll tasks. The claimant did not feel as though she had been fully trained.

15. Meanwhile in October 2022 Ms Kilkelly became deputy manager at the centre and began working in the same office as the claimant, initially without any issue. Just before the Christmas break Ms Kilkelly felt insulted by a comment the claimant made to her, at the end of a conversation they were having, that Ms Kilkelly was "*actually quite clever aren't you, to look at you I wouldn't think you were like that"*. Ms Kilkelly told the claimant how she felt but the claimant tried to laugh it off and Ms Kilkelly felt there was no attempt by the claimant to acknowledge how she had made Ms Kilkelly feel and did not seem to care.

16. Following her return to work after the Christmas break Ms Kilkelly told the tribunal, and the tribunal accepted her evidence, that the claimant seemed a different person. She described the claimant in her witness statement as very moody, did not engage in the attempted conversations like she used to, and she started to heavily express her hatred for her job. She recalled the claimant's interest in her job and other people significantly declined. In her oral evidence, which the tribunal found to be open and credible, Ms Kilkelly explained that she initially put it down to the claimant being under stress with studying for exams and doing the payroll. She explained that when the claimant was doing certain tasks, like payroll, she would get very frustrated and would swear and huff and puff. She said that when she saw this, she would ask the claimant if she was ok or needed any help and the claimant did not engage.

17. In her evidence Ms Ryan, the centre manager, also recalled a change in the office atmosphere from January 2023. Although she did not work in the office with the claimant, she said, and the tribunal accepts, she would come into the office regularly to check in with people, including the claimant, who always said she was fine.

18. However, another employee Miss Swann disclosed to Ms Ryan that she was upset about the way the claimant was treating her. Ms Kilkelly had also noticed this, and she and Ms Ryan discussed it on 23 January 2023. Ms Ryan explained that she had a series of conversations with Miss Swann who asked Ms Ryan not to raise the matter with the claimant because she feared it would make things worse. Handwritten notes of those conversations were contained in the bundle, recording the issues Miss Swann was encountering, how they made her feel and that she did not wish the matter to be raised with the

claimant. The tribunal accepts that those notes are an accurate reflection of what Miss Swann was telling Ms Ryan at the relevant time.

19. In addition, Ms Ryan explained that around January 2023 the Facilities Manager Mick Carter also raised concerns to her about the claimant, which were set out in a typed note and related to safe keys, banking cheques, a mis-paid invoice for electrical installation services, being asked for receipts previously provided, being asked by the claimant to put nominal codes on receipts and paperwork being left in a box on the floor and nearly thrown away more than once.

20. The claimant's evidence was that at the start of January 2023 she felt uncomfortable being asked to approve an invoice for £18,900, which Mr Fleming had given her to approve, for a company she could not find any information on. She therefore decided not to authorise the transaction. The tribunal accepts that the claimant's concern about this invoice was genuine at the time, albeit she did not immediately raise it with the trustees or the external accountant, which one might have expected.

21. A trustees meeting took place on 25 January 2023 at which it was mentioned that a meeting had taken place earlier in the month between Mrs Broughton and Ms James at which they had discovered that the claimant was making *"too many silly mistakes"*. The notes also recorded that they decided to put in place measures to prevent this and monitor the situation monthly. The plan was for there to be a monthly meeting between the claimant, Mr Fleming, Ms Broughton and Ms James with a review after 6 months.

22. The claimant's evidence was that she was not underperforming in her role and that if she had been, the respondent would have raised it with her. The tribunal accepts that the respondent had not told the claimant about its concerns at this point and therefore that this was her genuine belief. However, the tribunal considers that the respondent's views of the claimant's performance at the time differed and were set out in contemporaneous documents. The tribunal is satisfied that by January 2023 the respondent did have genuine concerns about the claimant's ability to fulfil at least the payroll and petty cash aspects of her role to the standard it needed.

23. The first of the review meetings was due to take place on 20 February 2023, but it did not happen because the claimant was on annual leave. The meeting was rearranged for 11am on 7 March 2023 and on 2 March 2023 Ms Broughton sent an email to Mr Fleming, copied to Ms James and the claimant checking whether it was still happening.

24. This email prompted an exchange between Mr Fleming, Ms Broughton and Ms James in which Mr Fleming disclosed that the claimant had not returned to work on 1 March 2023, there had been problems with salaries and that he and Susan (Ryan) had a long discussion and concluded that the claimant would not be with the respondent for much longer, *"her attitude is not good and I don't think she is up to the role"***.**

25. By this stage, as well as Ms Ryan having been made aware of Ms Swann, Ms Kilkelly's and Mr Carter's concerns about the claimant's negative behaviours she had also been made aware that a new Childcare Support Worker had been

paid her February pay ten days early. Her evidence was that she had weekly meetings with Mr Fleming and that when the issues relating to Ms Swann came to light, she told him about them. Although in his witness evidence, Mr Fleming suggested that he became aware of a deterioration of the atmosphere in the office on his return from annual leave, the tribunal finds that at least some of these matters were also likely to have formed part of the discussions referred to by Mr Fleming in his email of 2 March 2023.

26. Ms James' response to the email on the same day suggested that her expectation was the claimant would be dismissed. In her evidence Ms Broughton explained that she understood Ms James and Mr Fleming to have spoken about alternatives to the claimant continuing in her role, including outsourcing payroll and other finance tasks.

27. During this time, Mr Fleming had also been in contact with Ms Harris via email and on 21 February 2023 in response to an offer of support from Ms Harris, Mr Fleming told her that he was *"meeting Sue B and Tracey soon as I am not happy with the way things are going with Neera. I may have some options for you, I will keep you updated…."*.

28. Mr Fleming then had a period of annual leave and was due to return to work on 8 March 2023. The meeting on 7 March 2023 did not take place.

29. The tribunal finds that by 2 March 2023, Mr Fleming was of the view that the claimant's employment should come to an end and that the finance tasks of payroll and petty cash could be outsourced, potentially to Ms Harris. The tribunal finds that he had not however, at this point, fully formulated or discussed his plan in any detail nor did he have the agreement of the trustees to proceed.

30. Whilst Mr Fleming was away, late on 6 March 2023, the claimant sent an email to Ms Broughton and Ms James. The claimant raised a range of concerns which are referred to in more detail in our findings. At the end of her email, she stated *"Please can I also make a request that this email is kept **strictly confidential** as I do not want Alan, Susan and Mick to be aware of this"*. This is the first alleged protected disclosure which the claimant relies upon.

31. Ms Broughton shared the email with Andrew Hardie, Chairman of the trustees and another trustee, Mr Hooper who is also company secretary. She did not share the email with Mr Fleming or any other member of staff. She spoke to Ms James and told her that they were dealing with the matter internally and not to disclose the email to Mr Fleming. Ms Broughton contacted the claimant and arranged to meet with her and Mr Hooper at Mr Hooper's work office to discuss her email. Ms Broughton asked the claimant to bring along any documents which would help them to understand the claimant's concerns. The meeting was arranged for 4pm on 14 March 2023.

32. Mr Fleming returned to work on 10 March 2023 and after meeting again with Ms Ryan, he decided to take action to address the situation with the claimant's performance. Without input from the trustees, he started a process to dismiss the claimant under the auspices of *"outsourcing all financial and bookkeeping contained within the charity"*. The tribunal finds he decided to do this because it was easier and less time consuming than taking the claimant through a

performance management process to support her in improving to the necessary standard. He set this out in an email to Ms Broughton on 15 March 2023.

33. On the morning on 14 March 2023, Mr Fleming and Ms Ryan met with the claimant. Ms Ryan produced a very brief note of the meeting. She could not recall how she had made this note but considered it an accurate reflection of what had been said at the meeting. The tribunal found Ms Ryan's evidence on this issue rather vague. The note was not shared with the claimant. The tribunal finds that during the meeting Mr Fleming told the claimant that he was outsourcing petty cash and payroll and that they were considering making her redundant. It is clear the claimant believed she had been told that this was the decision of two trustees. This is what she told a family member shortly after the meeting via WhatsApp message and what she subsequently reported to Ms Broughton and Mr Hooper. On balance the tribunal concludes that the claimant was more likely told by Mr Fleming that the decision to make her redundant would be made by two trustees rather than had been made by two trustees. This would have been consistent with both the stage of the process, the fact that there had not been discussion with the trustees about the process, and the likely way forward given that it appears to be the respondent's practice where necessary for the trustees to nominate two trustees to manage processes relating to staff (for example the investigation into the claimant's disclosures and ultimately the offer of a settlement agreement).

34. After this meeting had taken place, at around 13:00 Ms Broughton received a zoom invite from Mr Fleming for a call the following day. Ms Broughton replied with apologies that she could not attend that call. Shortly after Ms Broughton received an email from Ms James to say that she had received a call from Mr Fleming, that he told her that he had spoken to the Claimant that morning *"about making her position redundant and he was going to set up a meeting for us to all talk about it"*.

35. Ms Broughton identified in a subsequent email that Mr Fleming's decision "*to progress things without knowing the full situation"* put the respondent in a difficult position. It is clear from the email chains that up until that point, neither Ms Broughton nor Mr Hooper were aware of or had been involved in what Mr Fleming had done. All they knew was what Mr Fleming had said in his email of 2 March 2023 already referred to. The tribunal find it is also evidence that Mr Fleming had not been told of the claimant's email of 6 March 2023 or its contents before he held the meeting.

36. Ms Broughton and Mr Hooper then met with the claimant as arranged and discussed the claimant's concerns as set out in her email of 6 March 2023. The claimant handed documents to the trustees which she believed supported and evidenced her concerns. The claimant relies on what she said and handed to the trustees during this meeting as amounting to a protected disclosure.

37. The content of that meeting was recounted to the respondent's HR advisors the following day. The notes of this meeting were not shared with the claimant at the time, and in her oral evidence she could not agree to them being an accurate reflection of what had been said. She did however confirm that she had questioned Ms Broughton and Mr Hooper about whether her being told by Mr Fleming she was being made redundant was linked to her having raised

concerns. She could not recall whether she was assured by them that they had not advised Mr Fleming of her concerns. She said Mr Hooper told her they were going to take legal advice and that "*that is a different matter"*. In his oral evidence Mr Hooper confirmed that he did say words to that effect, which were not recorded in the notes.

38. However, the tribunal did not find this to be evidence that Mr Hooper or any other trustees had been involved in a decision to make the claimant redundant at this point as he and Ms Broughton had only learned of Mr Fleming's actions earlier that afternoon as already described.

39. Following the meeting, Mr Hooper and Ms Broughton contacted the respondent's HR advisors, Citation, for advice on next steps. They informed Citation of the situation in terms of the claimant raising concerns and Mr Fleming proposing her redundancy and instructed the HR advisors to ensure that Mr Fleming was not made aware of the matter.

40. On 15 March 2023 Mr Fleming sent an email to Ms Broughton, as referred to above, in which he recounted his meeting with the claimant and the decision to restructure the finance department. Ms Broughton responded to Mr Fleming's email, expressing concerns about his approach. She asked whether he could slow things down at all. Despite Ms Broughton's request, Mr Fleming went ahead with arranging two present staff to take on extra duties he felt the claimant had not got to grips with effect from the following week. Ms Broughton took no action to stop him.

41. On 16 March 2023 Mr Hooper spoke to Mr Fleming. He told him that they needed to meet to discuss concerns which had been raised. He did not tell Mr Fleming what the concerns were or who had made them.

42. On 17 March 2023 the claimant resigned with immediate effect as she had told Ms Broughton in an email the day before she was going to do because of her ongoing concerns about the respondent's practices. She emptied her desk of her personal belongings and shredded some paperwork, which she said in XX were her "scribbles and some gas quotes". Before leaving she handed the safe and cabinet keys to Ms Julie Kilkelly, deputy manager and they both signed a note to confirm this had happened. The claimant addressed her resignation letter to Mr Fleming. The focus of her letter in terms of the rationale for her decision was on her being pressurised to do payroll without adequate training or support. The claimant explained she did this so as not to alert Mr Fleming to her concerns about his financial conduct. She referred to having handed her keys to Julie Kilkelly the deputy manager.

43. Ms Kilkelly recalled in her written witness evidence that the claimant had approached her with two pieces of paper and the keys, asking her to sign to confirm receipt. She also recalled in oral evidence it being reported to her by two staff members and her subsequently seeing the claimant go to the shredder to shred papers, but she did not know what the papers were.

44. After receiving a letter from the respondent asking her to reconsider her resignation, the claimant changed her mind, her resignation was rescinded, and she returned to work on 22 March 2023. She agreed to attend a grievance

meeting to discuss her concerns about what she perceived to be financial irregularities and her proposed redundancy.

45. On 24 March 2023, the claimant sent a text message to Ms Broughton raising an issue about not being able to find receipts covering the period November 2022-February 2023. The claimant relies upon this message as a protected disclosure.

46. On 5 April 2023 the claimant attended the grievance meeting. Notes were provided to the claimant at the time, and she raised no concerns about them. At the meeting the claimant discussed her concerns and was given the option of taking a period of paid leave whilst the investigation into her concerns was conducted and concluded. The claimant chose to take the paid leave, which commenced with immediate effect. She did not know how long the investigation would take or how long she would be on leave, but there is no evidence to suggest that this was an issue for the claimant at the time. Nor was there any evidence of the claimant asking when the investigation would be concluded, and she would return to work, to suggest that she was unhappy with the length of the leave or keen to return sooner.

47. On 15 June 2023 the respondent sent the claimant the outcome of its investigation. Mr Fleming was cleared of wrongdoing as no financial irregularities were found to have occurred. The letter noted that the claimant had said at the grievance hearing if the outcome was that there was found to have been no wrongdoing on Mr Fleming's part then she would resign from her position. The claimant accepted in evidence that she did say to a trustee that if Mr Fleming was cleared of wrongdoing she would resign. The claimant did not resign.

48. On 17 June 2023 she wrote to Ms Broughton and Mr Hooper responding to the grievance outcome. She flagged that it had been her ethical duty to inform, that her concerns related to what were donations made by the public and charity money and that she had raised an issue about keys because she did not want to be held accountable if there was money missing. She challenged an assertion in the letter that she had said she was not interested in doing payroll or other duties and she concluded the email by asking who she would report to if she returned to work as she was not happy reporting to Mr Fleming or Ms Ryan.

49. A series of emails between the claimant and Ms Broughton followed, in which on 21 June 2023, Ms Broughton asked the claimant whether, in light of her email, she wished to appeal the outcome. On 22 June 2023 the claimant replied, re-stating her concerns, that she considered them to have been a report of fraud and whistleblowing and that she could not conceal such matters. The email suggested that the claimant felt the wrongdoing was being concealed. The claimant relies on this email as her fourth protected disclosure. The email chain continued until 3 July 2023 in which the claimant said she wanted to have an informal chat to address a couple of matters, including in relation to computer password access, rather than appeal the outcome. She added *"I believe whatever you are doing is in the best of the Charity"* [sic].

50. On 4 July 2023 there was a conversation between Ms Broughton and the claimant. Although the topics of discussion were broadly not disputed, the

claimant and Ms Broughton had different recollections of the tenor of the conversation. The claimant said she had expressed deep concerns and fear for her safety because she had discovered that Mr Fleming was aware of her reporting of him. She said that Ms Broughton had told her Mr Fleming would remain in his position and that she would still report to him. She claimed that Ms Broughton showed no empathy or understanding of her concerns or distress and did not consider her safety, instead telling the claimant to *"stop speculating"*. She also recalled raising concerns about her password. Ms Broughton recalled the claimant raising concerns about email access and reporting lines and explaining that shared email access was standard and alternative reporting lines were impractical. In response to being asked why, if Ms Broughton had behaved as she claimed, she had decided to return to work the claimant said she did not know what else to do. The claimant did not challenge Ms Broughton's account of the conversation in evidence. The tribunal finds that if the claimant had been spoken to by Ms Broughton and had expressed concerns about safety as she claimed, she would not have decided not to appeal and would not have returned to work. The tribunal did not accept that the claimant did not know what else to do, she had been given the option to appeal and there was no indication that the claimant would be forced to return to work if she did that. The tribunal finds that Ms Broughton was genuinely trying to address the claimant's concerns.

51. Prior to the claimant's return to work, on 11 July 2023, Mr Fleming contacted Citation about the situation with the claimant. It is apparent from the record of what Citation was told that now the process to address the claimant's concerns had been concluded Mr Fleming wished to press ahead with his earlier plan to make her redundant and that he had in fact already changed the claimant's role for the reasons he had identified before he was aware of her disclosure. Mr Fleming refers to having been told he couldn't have a consultation with the claimant to make her redundant by the trustees, so he wanted to know what to do. Citation told Mr Fleming that the consultant dealing with this matter would need to come back to him. On 13 July 2023 Mr Fleming called Citation again and spoke to another consultant. He gave that consultant largely the same information, including that the claimant was due to return to work on Monday. Mr Fleming was advised of three options: reconsider the redundancy position look at a settlement agreement or look at a conduct route, i.e. a disciplinary process. The consultant asked Mr Fleming to send over a business case but thought that a settlement agreement would be the safest route. Mr Fleming subsequently received an email from Citation confirming their advice that the options would be to either look to recommence the redundancy proposal or consider offering a settlement agreement.

52. On 17 July 2023 the claimant returned to work. Only she and Ms Kilkelly were in the office that day. There was a communication between the claimant and Mr Fleming about the claimant's duties, from which the claimant understood that Ms Harris was going to carry on doing payroll. The claimant said that nobody spoke to her and the tribunal was taken to some WhatsApp messages the claimant sent to a family friend which summarises the communication with Mr Fleming and that *"Nobody is not even talking to me"* [sic]. Ms Kilkelly's evidence was that there was limited small talk between her and the claimant that day, including a conversation which appeared to the tribunal to be the claimant trying to establish what Ms Kilkelly knew of the concerns she had raised. Ms Kilkelly said she felt that the atmosphere was awkward.

53. Ms Kilkelly had written down the content of her conversations with the claimant that day and the claimant's demeanour at the time, as part of her observations of the claimant which she had started earlier in the year when she was encountering difficulties with her. Ms Kilkelly went on in her evidence to describe what had happened in the office on 18, 19, 20 and 25 July 2023 all as she had written down at the time in her notes. The claimant alleged that on 18 July 2023 Ms Kilkelly asked her what she was doing there and said she didn't think she would come back. Ms Kilkelly's evidence was that this did not happen on 18 July 2023 but that on 27 March 2023 in response to the claimant asking whether she was surprised she was back (after her first resignation on 17 March 2023) she said she was surprised she would want to come back. Ms Kilkelly had recorded this in her observations at the time. The claimant points to a WhatsApp message to her family member on 18 July 2023 to support her version of events but all that message says is *"they all thought I was not coming back"*. The tribunal finds that if Ms Kilkelly had said what the claimant alleges, the claimant's message would have been more specific. In view of the contemporaneous documentation the tribunal finds Ms Kilkelly's account of the situation in the office more reliable.

54. On 25 July 2023 there was a party at the respondent. The claimant said she was excluded from it. Both Ms Ryan and Ms Kilkelly explained in their evidence that they did not exclude the claimant and like every other time there had been a party when the claimant was there, she had been invited. Again, Ms Kilkelly had recounted the discussion on 25 July 2023 in her contemporaneous notes which supported both her and Ms Ryan's evidence. With that in mind, the tribunal considered their account of events more reliable than the claimant's and conclude that the claimant was invited to the party but declined as she had done on previous occasions.

55. On 26 July 2023 there was a meeting of the trustees, the minutes of which were disclosed during the hearing. Mr Fleming was not present for part of the meeting at which Ms Broughton and Dr Hardie briefed the other trustees on what had been done in relation to the claimant's concerns, in terms of investigation, the outcome of the investigation and whether the trustees were obliged to report the matter to the charity commission. They also discussed the ongoing position with the claimant's employment and her performance, but no decisions appeared to be made about that. Ms Broughton's evidence was that the trustees discussed taking further advice from Citation and the tribunal considers that to have been the likely conclusion at that point in the meeting. Following that discussion however, Mr Fleming returned to the meeting and proposed that the respondent should offer the claimant a settlement agreement. The respondent's evidence was that at this point the trustees identified two trustees, Mr Hooper and Ms Bloom, to work with Mr Fleming to seek advice on what options there were.

56. The tribunal finds that very little, if any advice was subsequently taken on options other than the proposed settlement agreement route, because Mr Fleming had already asked Citation about the options and had settled upon the settlement agreement route.

57. The tribunal finds that the advice that was taken following the trustees meeting related more to what the settlement offer should be, the content of the letter which should be sent and the process for providing the letter to the claimant.

58. A letter was prepared by Mr Fleming, with support from Citation and was reviewed by Mr Hooper, Ms Bloom and Ms Broughton, who approved it. Mr Hooper accepted in oral evidence that he did not seek to interrogate or substantiate the contents of the letter or the allegations relating to the claimant's conduct which were contained in it. Mr Hooper met with the claimant on 10 August 2023 and handed her the letter. Notes of the meeting were contained in the hearing bundle and recounted Mr Hooper telling the claimant twice that the best solution for all involved was to part ways. The notes also recount Mr Hooper explaining to the claimant that the allegations in the letter would be investigated, if needed. The claimant asked what the alternative to accepting the respondent's offer was and was told that grievances could be pursued against her, they would be investigated, and the outcome was not known,

59. The letter, contained in the bundle suggested that the respondent had already discussed its concerns with the claimant's conduct, attendance and performance with her. It identified around ten separate issues with the claimant's conduct and or performance, without giving specifics of them. It set out the offer which involved a termination date of 25 August 2023, gave the claimant seven days to consider the offer and identified that if no agreement could be reached then the next step would be to investigate the concerns about her further in accordance with the respondent's disciplinary procedure.

60. The claimant did not return to work after that date. Instead, she remained absent and made a counteroffer on 14 August 2023 which was rejected by the respondent on 18 August 2023. Mr Hooper put forward a revised and final proposal which was open for consideration until 28 August 2023, when if the offer was not accepted the claimant would be expected to return to work and an investigation would commence.

61. On 25 August 2023 the claimant resigned. She set out in her resignation letter that she was resigning with immediate effect. She explained she felt she had no alternative but to resign due to "*bullying and harassment at work, victimisation due to me reporting fraud in the charity, changes to job role and putting false allegations"*.

LAW

Constructive dismissal

62. The leading case in such claims is ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 CA*** which sets out the test that a claimant must satisfy to succeed in a claim for constructive dismissal. A claimant must establish that:

    a. there was an actual or anticipatory fundamental breach of contract on the part of the respondent

    b. the respondent's breach caused the claimant to resign

    c. the claimant did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

63. Where the alleged breach of contract is a breach of the implied term of mutual trust and confidence, the case of ***Malik v BCCI (in compulsory liquidation)***

1997 ICR 606 HL provides that there is such a breach where the respondent acts without reasonable and proper cause and, when viewed objectively, in a manner that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

64. The tribunal has also had regard to the EAT case of ***Omilaju v London Borough of Waltham Forest UKEAT/0941/03*** in which it was confirmed that where there is a final act by the employer which causes the employee to resign, it is not essential for that final act itself to constitute a breach of contract, the tribunal had to look at matters cumulatively. In considering the cumulative effect the tribunal reminds itself of the guidance provided by Lord Justice Underhill in the Court of Appeal case of ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978***

65. In terms of the reason for resignation, it is a question of fact for the tribunal. For there to be a constructive dismissal the breach of contract must be *"an effective cause of the resignation"*. In ***Abbycars (West Hornden) Ltd v Ford EAT 0472/07*** Elias P said "*the crucial question is whether repudiatory breach played a part in the dismissal"*

66. In relation to the question of affirmation, applying the guidance of Mr Justice Langstaff (then President of the EAT) in ***Chindove v William Morrison Supermarkets plc EAT 0201/13***, it is not just about the mere passage of time between the breach of contract and the resignation in isolation. What matters is whether, in all the circumstances, the claimant's conduct has shown an intention to continue in employment rather than resign.

67. Mr Griffiths submitted on behalf of the respondent that applying the case of ***London Borough of Wandsworth v CRW UKEAT/0322/15*** as referred to in Harvey, it was not possible for the claimant to plead automatically unfair dismissal because of whistleblowing and ordinary constructive dismissal in the alternative. He contended that were the tribunal to find that there was no automatic unfair dismissal but there was a constructive dismissal based upon finding that whistleblowing was not the principal reason for dismissal this would be inconsistent. The tribunal disagrees. The ***Wandsworth*** case addressed the situation where a tribunal found that a claimant had been automatically unfairly dismissed for whistleblowing but that the dismissal was nonetheless for a potentially fair reason, conduct which was clearly inconsistent. The judgment in that case pointed out that once there was a finding of automatic unfair dismissal there could not also be a fair dismissal on ordinary unfair dismissal principles. It is not authority for the proposition that a tribunal cannot on the one hand find that there was no automatic unfair dismissal for whistleblowing, but the same behaviour nonetheless amounted to a repudiatory breach of contract for a reason unrelated to whistleblowing. There would be no such inconsistency.

Whistleblowing detriment and dismissal

68. **Section 47B(1)** and **103A ERA 1996** provide an employee with the rights not to be subjected to detrimental treatment or dismissed for making protected disclosures.

What amounts to a protected disclosure?

69. The relevant statutory provisions in respect of this question are as follows:

> ***43A Meaning of "protected disclosure".***
>
> *In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*
>
> ***43B Disclosures qualifying for protection.***
>
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> > *(a) that a criminal offence has been committed, is being committed or is likely to be committed*
> > *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> > *(c) …*
> > *(d) ….*
> > *(e) ….*
> > *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*
>
> *(2) … (3) … (4) …*
>
> *(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).*

70. The authoritative cases on what amounts to a "disclosure of information" for the purposes of **S.43B** are ***Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT*** and ***Kilraine v London Borough of Wandsworth 2018 ICR 1850 CA*** which establish that the word "information" has to be read with the qualifying phrase "tends to show" and so it must contain sufficient factual content to be capable of tending to show one of the relevant failures and this is a matter for the tribunal's evaluation taking into account all the facts of the case and the context of the disclosure.

71. Mr Griffiths also referred the tribunal to the cases of ***Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT*** and ***Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06/RN*** which the tribunal had regard to when considering the question of whether the claimant's disclosures met the definition, along the guidance in ***Babula v Waltham Forest College 2007 ICR 1026 CA*** and ***Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731 CA*** relating to the public interest test.

What does detriment mean?

72. The term "detriment" is not defined in the legislation but applying the guidance given in ***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337 HL***, it is to be assessed from the viewpoint of the worker, and it is not necessary for there to be physical or economic consequences to the employer's act or inaction. What matters is that, compared with other workers (hypothetical or real), the complainant is shown to have suffered a disadvantage of some kind.

Burden of proof

73. **Section 48(2) ERA 1996**, requires that the burden of proving that there was a protected disclosure, a detriment and that it was the respondent who subjected the claimant to that detriment rests with the claimant. Only if those elements of the claim are proven, does the burden then shift to the respondent to prove that the claimant was not subjected to the detriment on the ground that he made a protected disclosure.

74. The proper approach to drawing inferences in a detriment claim was summarised by the EAT in ***International Petroleum Ltd and ors v Osipov and ors EAT 0058/17*** and the tribunal has been guided by that approach as well as reminding itself that the mere fact that a "detriment" arises, and that the worker suffers as a result is not enough. To succeed in establishing liability under **s.47B** the claimant must show that the detriment arises from the act or deliberate failure to act by the employer (see ***Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108 EAT***).

Causation

75. As to the test of causation in detriment cases, the key authority is ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372 CA*** and the formulation of Elias LJ, that is whether the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower.

76. The test is different in dismissal cases, **S.103A ERA 1996** provides that an employee will only succeed in a claim for automatic unfair dismissal if the tribunal is satisfied, on the evidence, that the reason or principal reason is that the claimant made a protected disclosure (i.e. in cases of constructive unfair dismissal like this one, the reason that operated on the employer's mind at the time the employer committed the alleged fundamental breach of the claimant's contract of employment that precipitated the resignation).

FINDINGS

Constructive dismissal

Fundamental breach

77. Taking matters chronologically, the claimant relies upon:

    a. Being placed at risk of redundancy on 14 March 2023 because, she says, she made a protected disclosure

b. Being placed on paid leave from 5 April to 17 July 2023 because, she says, she made a protected disclosure

c. The unilateral change to her duties either on its own or as an act of whistleblowing detriment

d. Her colleagues avoiding speaking to her following her return to work on 17 July and excluding her from a work party on 25 July 2023 because, she says, she made a protected disclosure and

e. Being given the letter of 10 August 2023 which in view of its contents she said amounted to bullying and contained false allegations.

78. It is not in dispute that the claimant was placed at risk of redundancy on 14 March 2023 and as set out in its factual conclusions the tribunal finds that this was not because there was a genuine redundancy situation but because Mr Fleming had decided to create such a situation to remove the claimant from the respondent without having to go through a performance management process. The claimant's pleaded case in relation to this particular act, however, was not that this happening was a breach of contract. The breach she says was that it was an act of detriment because she had blown the whistle and for reasons which the tribunal will come on to, we find that was not the case. As such we cannot find, on the claimant's case as pleaded, that this amounted to a fundamental breach of contract.

79. Similarly, it is not in dispute that the claimant was on a period of paid leave from 5 April to 17 July 2023. However, as the tribunal concluded in its findings of fact, this was the claimant's choice, offered to her by the trustees as a supportive measure and the claimant was not required or put under any pressure to take this leave of absence. It was not conduct without reasonable or proper cause calculated or likely to destroy or seriously damage the employment relationship. In any event, again, the claimant's pleaded case in relation to this particular act, was not that this happened but that it was an act of detriment because she had blown the whistle and for reasons which we will come on to we find that was not the case.

80. It is not disputed that the claimant's duties were changed, so that when she returned to work on 17 July 2023, she had very little to do. The majority of her role had been either outsourced or reassigned to others. The respondent's case is that the role was changed with the claimant's agreement and was no more than what had been discussed with her during the meeting on 14 March 2023. The claimant's case is that the changes were not agreed and that her role was changed unilaterally. The tribunal agrees with the claimant that the changes were made to her role unilaterally and without any genuine prior consultation with her. The decision to effectively outsource her role, communicated to her on 14 March 2023 by Mr Fleming, was not a discussion or consultation as such, but a notification of what was going to happen and what subsequently did happen. It was clear that Mr Fleming had already made up his mind and by the following day had taken steps to effect the changes – as set out in his email to Ms Broughton. The claimant had no choice in the matter. The tribunal accepts that the respondent did have reasonable and proper cause to take steps to cover the claimant's role in her absence, but not

to unilaterally change her role when she was both still in it and when she returned from her period of paid absence, without first having engaged in a meaningful consultation with her about the reasons for the changes. The tribunal concludes that the respondent taking this step was likely to damage or seriously destroy the employment relationship because it left the claimant returning to work with large parts of her role taken away and therefore it amounted to a breach of the implied term of mutual trust and confidence and a fundamental breach.

81. In relation to the allegation that the claimant's colleagues were not speaking to her on her return to work, and on 25 July 2023 excluded her from a work party, putting aside the fact that the claimant argues that these acts were detriments because she made protected disclosures, the tribunal is not satisfied that the claimant has proved this was what happened and finds that the evidence suggests a more likely scenario of the respondent's staff, in particular Ms Kilkelly and Ms Ryan treating the claimant appropriately, not ignoring her and inviting her to attend the party.

82. Finally, in relation to the letter of 10 August 2023 and its contents, which the claimant says were false allegations, it is clear that the sending of this letter was conduct without reasonable and proper cause which was likely to destroy or seriously damage the employment relationship.

    a. it is understood that it was parliament's intention, when it introduced the concept of "protected conversations" pursuant to **s.111A ERA 1996**, to enable employers and employees to have discussions about a potential termination of employment with a settlement.

    b. It is also accepted that the respondent had received reports of the allegations which were made relating to the claimant creating a hostile environment, complaining to other staff about managers, stating she hated working at the charity, stating that staff had been stealing money from petty cash and shredding documents. The evidence also demonstrates that the claimant had made mistakes in performing her role and the respondent had concerns about her performance.

    c. However, the letter said that the respondent had already discussed concerns about her conduct, attendance and performance on 14 March 2023. The tribunal finds that this was inaccurate. The evidence before the tribunal also suggested that the claimant had not refused to take on many of her job description roles or payroll duties, but rather she had agreed her duties at the outset, had asked to broaden them to include payroll duties and then had them taken from her. In those circumstances, the tribunal finds that the respondent providing the letter to the claimant and the inclusion of these latter points in its contents were without reasonable and proper cause.

    d. The steps to start this process were taken by Mr Fleming on 11 July 2023, before the claimant had returned to work when he contacted Citation and from the notes of those interactions it is apparent that, Mr Fleming at least, had no intention of the claimant continuing to work for the respondent given that all the options involved the termination of her employment.

e. Three weeks after the claimant had returned to work, she was faced with an employer who was raising unspecified allegations about her performance and conduct, dating back several months, which had not previously been raised with her or investigated to substantiate them and telling her that the best way to deal with the situation was for her employment to end via a settlement agreement rather than face a potential disciplinary meeting.

f. Finally, the claimant was only given seven days to consider her position, whereas the ACAS code on settlement agreements provides at paragraph 12 provides that parties should be given a reasonable period of time to consider the proposed settlement agreement and as a general rule, a minimum period of ten calendar days should be allowed to consider the proposed formal written terms of a settlement agreement and to receive independent advice, unless the parties agree otherwise.

83. Even if the tribunal is wrong to conclude that the 10 August 2023 letter of itself was a fundamental breach of contract, then applying the guidance in ***Omilaji*** and ***Kaur***, the tribunal is satisfied that the letter was part of a course of conduct which included the changing of her job duties and together these acts amounted to a fundamental breach of the implied term of mutual trust and confidence, with the letter of 10 August 2023 being the last straw.

Effective cause

84. Having reached that conclusion, the tribunal then turns to the question of whether the breach was an effective cause of the claimant's resignation. The tribunal finds that it was. Whilst the claimant, like the respondent, may well have hoped to secure an amicable parting of company and have been disappointed with the settlement offers made by the respondent, the negotiations themselves were prompted in large part by the respondent's breach – it was an effective cause. The tribunal considered whether, bearing in mind what the claimant had said during the grievance meeting, that she would resign if Mr Fleming was exonerated of any wrongdoing, this was the reason for her resignation but found whilst it was likely a factor it was not the reason. Had it been the reason, the tribunal considered the claimant would not have returned to work on 17 July 2023 but would have resigned then instead. The fact was that she returned to work despite the grievance outcome.

Affirmation

85. Finally, looking at whether the claimant affirmed her contract by virtue of her entering into settlement negotiations and not resigning until 25 August 2023. The tribunal reminded itself of the guidance of Mr Justice Langstaff in ***Chindove*** and asked itself whether the claimant's conduct had shown an intention to continue in employment rather than resign. Plainly it did not. She immediately commenced a period of leave following receipt of the letter on 10 August 2023, did not return to work and rather than try to convince the respondent to change its mind about wanting to part ways, she simply tried to negotiate a better exit package. When it became clear to her that this was not forthcoming, she did not return to work but resigned with immediate effect.

86. In these circumstances the tribunal finds that the claimant was constructively dismissed by the respondent and therefore her claim for wrongful dismissal (i.e. for her notice pay) succeeds.

Whistleblowing detriment and dismissal claims
Protected disclosures

87. The claimant relied upon four alleged protected disclosures. In each case the claimant relied upon her belief that the disclosures tending to show either that a crime (in this case fraud) and/or a legal obligation and/or concealment of either a crime or failure to comply with a legal obligation. She identified her understanding about the existence of legal obligations which the respondent's employees including herself and the trustees were required to comply with in her witness statement at paragraphs 12 to 14:

    a. A legal obligation on the respondent to accurately allocate expenses to the correct cost department.

    b. A legal obligation on the trustees to keep sufficient accounting records to explain all transactions and show the charity's financial position.

    c. A legal obligation on the trustees to safeguard the assets of the charity and ensure proper application of resources.

    d. A legal obligation on the trustees to take steps to prevent and detect bribery, fraud, financial abuse and other irregularities.

88. There was no dispute that each of the disclosures were made to the claimant's employer. In terms of assessing each disclosure the tribunal carefully followed the guidance set out in the authorities mentioned above.

89. Disclosure 1: the claimant's email of 6 March 2023 to Ms Broughton, trustee of the respondent and Ms James. Careful scrutiny of this email confirmed that it contained the following information:

    a. Payments for items such as fuel were being made by Alan and Mick where the claimant was unclear whether they were business or personal transactions.

    b. She had been given receipts for items she was told was for the centre but did not believe that the items were for the centre.

    c. She had been told to post payments for items without receipts.

    d. She had been told to second authorise payments and record credit card spends which did not appear to be for the centre, such as for painting, roofing, a Christmas present from a member to kids but that was to do with golf.

    e. Mr Fleming had withdrawn cash and then tells her to refund to try to confuse transactions.

f. She had been told to change certain transactions after they had been posted in December.

90. The claimant stated towards the end of her email *"I have concerns about how things are running, so thought if I could raise them with both of you"*. The tribunal is satisfied that although not expressly stated in the email, the claimant believed that this information tended to show that fraud had been, was being or was likely to be committed or that the respondent and/or trustees were failing or was likely to fail to comply with their legal obligations regarding the preservation and protection of the charity's finances. In view of her position at the centre, her understanding at the time of the processes and the fact that she was making the disclosure both to a trustee and the external accountant the tribunal is satisfied that the claimant's belief although subsequently determined to be wrong, was reasonable and that the claimant genuinely believed in the implications raised by the information.

91. Turning then to the question of whether the claimant believed that making this disclosure was in the public interest, the tribunal reminded itself of the factors in ***Chesterton*** and the guidance in ***Babula***. The claimant in her witness statement identified that failing to properly record expenses could undermine the trust of stakeholders, beneficiaries and the public. It appeared to the tribunal that this was the claimant's belief, that this was certainly wider than the claimant worrying only about her own position and ultimately that the claimant was mindful that it was the CEO of a charity about whom she had these concerns. The claimant both at the time and in her oral evidence pointed out that there was no benefit in her raising these concerns to herself. Whilst the tribunal recognises that there was an element of the claimant wishing to protect herself given her role and the concerns she raised, that is not something which detracts from whether it was reasonable for her to consider that making the disclosure was in the public interest. We find that the claimant did have the necessary reasonable belief and therefore that this disclosure was a qualifying and protected disclosure.

92. Disclosure 2: this was the claimant's meeting with Ms Broughton and Mr Hooper on 14 March 2023 at which they discussed the matters raised in the claimant's 6 March 2023 email and the claimant handed the trustees the documentation about which she was concerned and believed demonstrated what has just been addressed in respect of disclosure one above. The contents of the meeting as recalled to Citation by the respondent detail the specifics of each of the claimant's concerns. The tribunal find for the same reasons as set out in relation to disclosure one that her explaining these matters to the trustees, particularly against the backdrop of her earlier disclosure was a disclosure of information which the claimant reasonably believed to be in the public interest and tended to show that fraud had been, was being or was likely to be committed or that the respondent and/or trustees were failing or were likely to fail to comply with their legal obligations regarding the preservation and protection of the charity's finances. The tribunal therefore finds that disclosure two was also a qualifying and protected disclosure.

93. Disclosure 3 is a text message from the claimant to Ms Broughton on 24 March 2023. It discloses that the claimant has been looking for but cannot find credit card receipts for November 2022 to February 2023. This is after she had been absent from work for several days. Whilst this could perhaps be construed as

evidencing a breach of the trustees' legal obligation to keep sufficient accounting records, the claimant does not suggest anything of the sort in her message. The message reads more as a query as to whether Ms Broughton knew the whereabouts of the receipts. Whilst this is a disclosure of information, the information is not that the receipts are necessarily lost, just that the claimant cannot find them and the tribunal is not satisfied that the claimant had a reasonable belief that the disclosure was in the public interest or that it tended to show that there was a breach of a legal obligation. The tribunal therefore finds this was not a qualifying or protected disclosure.

94. Disclosure 4 is an email dated 22 Jue 2023 from the claimant to Ms Broughton and Mr Hooper, which subsequently formed part of an email chain which was sent to Dr Harries. It is sent in response to the claimant having received the outcome of the investigation into her concerns, which found no evidence of financial wrongdoing. In the email the claimant specifically refers to having reported fraud. She states that she cannot conceal and support this and lists what she believes the documentation she had produced to the trustees demonstrated. She is concerned that there is a deliberate attempt to conceal the wrongdoing and considers herself to have been implicated. The tribunal concludes that on its own, this email does not disclose information but rather it repeats allegations. However, when considering the previous disclosures which had been made and the background context, the tribunal is satisfied that the email tends to show the claimant's belief that there had been fraud and that in view of the outcome letter it was now being concealed. In the email the claimant explains why she believes this could be the case and the tribunal is satisfied that both it amounts to a reasonable belief and that the claimant had a reasonable belief that this was in the public interest. She states, *"I do not have a personal benefit from this, just doing my duty as you can understand".*

95. The tribunal therefore finds that this final disclosure, looked at against the background of the previous two protected disclosures, also amounts to a protected disclosure.

Detrimental treatment and causation

96. Having established that the claimant did make protected disclosures, the tribunal then had to consider whether any of those disclosures were the principal reason for the claimant's dismissal and/or whether they caused her to be subjected to detriments.

97. In terms of the question of time limits and the detriments, the tribunal was satisfied that those alleged detriments which took place before 23 June 2023, formed part of a series of similar and largely connected acts, the last of which was the 10 August 2023 letter and therefore fell within the jurisdiction of the tribunal given the date of the claim and the period of ACAC Early Conciliation.

98. However, the tribunal is not satisfied that the claimant has met the burden of proof. Despite being given a full opportunity to challenge the respondent's witnesses and it being specifically pointed out to her that she needed to put this part of her case to them, i.e. why they did what they did, the claimant did not do so. Nonetheless, the tribunal has considered the position carefully. The claimant appears to rely largely on two matters, to support her contention:

a. the fact that the matters complained of happened after she made protected disclosure on 6 March 2023; and

b. the fact that the respondent had not been up front with her about their concerns about her performance which the claimant asserts means that these cannot have been genuine concerns and which the tribunal found were genuine concerns.

99. Taking each of the alleged detriments in turn:

a. It is clear from the documentary evidence that as early as February 2023 Mr Fleming had discussed with both Ms Ryan and Ms James the possibility of removing the claimant from the charity and outsourcing her duties. Whilst the meeting about this with the claimant did not happen until 14 March 2023, after the 6 March 2023 protected disclosure, we find that Mr Fleming had already settled upon the idea before then. What is more, the tribunal is satisfied that on 14 March 2023 Mr Fleming was unaware that the claimant had made any disclosure about him and as such it cannot have materially influenced his actions. As to the claimant's assertion that she was told that two trustees had decided to make her redundant, the tribunal concludes as set out in its findings of fact that whilst the claimant genuinely believed this is what she had been told, it was likely that she had misunderstood and it is clear from the evidence that the trustees only learned of Mr Fleming's plan to hold the meeting around 15 minutes before it took place. They were clearly not a party to Mr Fleming's actions and did not make the decision, in the knowledge of the claimant having made a protected disclosure.

b. In relation to the period of leave, the tribunal is not satisfied that the claimant has shown this to have amounted to detrimental treatment. The claimant accepted in her oral evidence that it was her choice to avail herself of the leave being offered to her. There is no evidence to suggest that the claimant was unhappy with the length of that leave or that she made any attempt to return to work any sooner. As the tribunal finds this did not amount to a detriment this aspect of the claim can go no further.

c. In relation to the change of duties on the claimant's return, for the reasons already explained in relation to the question of whether this action amounted to a breach of contract the tribunal finds that this did amount to detrimental treatment. However, the tribunal is satisfied again that there is no causal link between the decision to change the claimant's role and remove duties from her and her making any of the three protected disclosures. It is apparent from the evidence that Mr Fleming had decided these steps needed to be taken before he became aware of the claimant's first protected disclosure (see emails in February 2023 and 15 March 2023). Whilst the tribunal accepts that by 17th July 2023 Mr Fleming and the trustees were aware of the claimant's disclosures and there was, by this stage, trustee inclusion in the decision-making, that decision-making was simply a continuation of what had previously been determined as the way forward because of the issues with the claimant's performance prior to her absence. The tribunal finds the

claimant has not shown the decision was materially influenced by her making protected disclosures.

d. In relation to the assertion that the claimant's colleagues avoided speaking to her and she was excluded from a work party on 25 July 2023, the tribunal considers the evidence of Ms Ryan and Ms Kilkelly that the claimant was not excluded or ignored and that the claimant would never attend work parties despite always being encouraged to, including on 25 July to be the more reliable version for the reasons set out in its findings of fact. Given the tribunal finds that this alleged detrimental treatment did not happen, this claim cannot go any further.

e. In relation to the letter of 10 August 2023, the tribunal accepts for the reasons already referred to in relation to the constructive dismissal tests, that this letter did amount to detrimental treatment. The tribunal also accepts that the letter was prepared and handed to the claimant at a time where those involved in the process – Mr Fleming, Mr Hooper, Ms Bloom and Ms Broughton, were fully aware of the claimant's disclosures. However, the tribunal is not satisfied that this alone is sufficient evidence to prove that the protected disclosures materially influenced the decision to prepare and send this letter or what to put in the letter. To the extent that they were challenged and in any event in their witness evidence Ms Broughton, Mr Fleming and Mr Hooper were all clear that the claimant's disclosures were <u>not</u> a factor. It is apparent from the documentary evidence that by the time the claimant was due to return to work, Mr Fleming had put in place alternative arrangements for her duties to be carried out. He and the trustees were genuinely concerned both that the claimant was unable to perform her original duties to the necessary standard and that the relationship between the claimant and her colleagues had broken down owing not to the claimant's disclosures but to the matters they had raised earlier in the year. In those circumstances the tribunal is not satisfied that the claimant has shown that the respondent was materially influenced by the disclosures and this claim fails.

<u>Automatic unfair dismissal for making protected disclosures</u>

100. Given the tribunal's finding that none of the protected disclosures materially influenced the conduct of the respondent upon which the claimant relies and which the tribunal found the claimant was constructively dismissed in response to, it cannot be the case that that the principal reason for that same conduct was the claimant's making of protected disclosures. Therefore, the claimant's claim that the reason or principal reason for her dismissal was her making protected disclosures must also fail.

CONCLUSION

101. The claimant's claims for automatic unfair dismissal and for whistleblowing detriment both fail and are dismissed.

102. The claimant was constructively dismissed and therefore wrongfully dismissed and entitled to receive notice pay.

Approved by Employment Judge Kight

Approved on 5 February 2025