EMPLOYMENT TRIBUNALS

Claimant: **Amy Austin-Roberts**

Respondent: **Circle Health Group Ltd**

Record of a Hearing by CVP
at the Employment Tribunal
Audio Recorded by CVP

Heard at: **Nottingham**

Heard on: **28, 29 and 30 April 2025 and 1 and 2 May 2025**

Before: **Employment Judge McTigue**

Members: **Mr G Edmondson**
Mr M Alibhai

Appearances:

Claimant: **Mrs Austin, Lay Representative**

Respondents: **Mr Ramsbottom, Litigation Consultant**

JUDGMENT

JUDGMENT having been sent to the parties on 5 May 2025 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Introduction

1. What follows represent the unanimous decision and reasons of the Tribunal. By way of background, the Claimant worked for the Respondent as a Cardiac Lead Theatre Practitioner from 13 March 2023 and until 19 July 2023. The Respondent is a Private

Health Care organisation which employs approximately 8,600 members of staff and the Claimant worked at the Respondents Park Hospital site.

2. The Claimant commenced Early Conciliation with ACAS on 23 July 2023. The Early Conciliation Certificate was issued by ACAS on 3 September 2023 and she subsequently presented her complaint to the Tribunal on 5 September 2023.

3. During these proceedings the Claimant has been represented by Mrs Austin a Lay Representative and the Respondent has been represented by Mr Ramsbottom, a Litigation Consultant.

Claims and Issues

4. This is a case which has been subject to case management on a number of occasions. Those Case Management Hearings have helped to clarify the claims and issues in this case. Case Management Hearings took place before my colleagues:

    a. Employment Judge Ahmed on 4 December 2023;

    b. Employment Judge Heap on 17 April 2024; and

    c. Employment Judge Welch on 11 July 2024.

5. In this case the Claimant lacked 2 years continuity of employment in order to bring an ordinary unfair dismissal claim but instead claims automatic constructive unfair dismissal for making a protected disclosure relying on section 103A of the Employments Rights Act 1996 (ERA 1996). She also claims automatic constructive unfair dismissal for health and safety reasons relying on section 100 of the ERA 1996 and automatic constructive unfair dismissal for asserting a statutory right relying on section 104 of the ERA 1996. She also brings a complaint of whistleblowing detriment and a complaint of breach of contract or in the alternative unlawful deductions of wages in respect of alleged unpaid sick pay.

6. The Claimant had previously made complaints of direct sex discrimination and victimisation but they were dismissed upon withdrawal by the Claimant at the Case Management Hearing before Employment Judge Welch on 11 July 2024.

7. At that same Case Management Hearing before Employment Judge Welch on 11 July 2024 the parties agreed a List of Issues. That read as follows:

*"1. **Automatic unfair dismissal***

1.1 Was the claimant dismissed?

1.2 If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?

1.3 Was the reason or principal reason for dismissal that the claimant:

1.3.1 made a protected disclosure (Section 103A ERA);

1.3.2 being an employee at a place where—

1.3.2.1 there was no such representative or safety committee, or

1.3.2.2 there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

the claimant brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety (section 100 (1)(c) ERA); or

1.3.3 for asserting a statutory right, namely the maximum weekly working time (section 104 ERA)?

1.4 If so, the claimant will be regarded as unfairly dismissed.

2. ***Remedy for unfair dismissal***

2.1 The claimant does not wish to be re-instated or re-engaged.

2.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.2.1 What financial losses has the dismissal caused the claimant?
2.2.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
2.2.3 If not, for what period of loss should the claimant be compensated?
2.2.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
2.2.5 If so, should the claimant's compensation be reduced? By how much?
2.2.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
2.2.7 Did the respondent or the claimant unreasonably fail to comply with it?
2.2.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
2.2.9 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
2.2.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

2.3 What basic award is payable to the claimant, if any?

2.4 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. ***Protected disclosure***

3.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

3.1.1 What did the claimant say or write? When? To whom? The claimant says they made disclosures on these occasions:

3.1.1.1 On 20 June 2023[1] the claimant told Suzanne Joynes, the theatre manager, that the second patient on the list for 19 June 2023 could not come off bypass else they would die as a result of not having the necessary equipment available (namely dacron grafts);

3.1.1.2 This was repeated to Suzanne Joynes on 22 June by text message;

3.1.1.3 This was repeated during a telephone conversation with Suzanne Joynes on 29 June 2023; and

3.1.1.4 This was repeated during a meeting with Suzanne Joynes on 12 July 2023.

3.1.2 Did they disclose information?

3.1.3 Did they believe the disclosure of information was made in the public interest?

3.1.4 Was that belief reasonable?

3.1.5 Did they believe it tended to show that:

3.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation; or

3.1.5.2 the health or safety of any individual had been, was being or was likely to be endangered;

3.1.6 Was that belief reasonable?

[1] On Day 1 of the final hearing the Claimant changed her position in respect of this issue. She alleged the disclosure of information took place on 21 June 2023 and not 20 June 2023.

3.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

4. ***Detriment (Employment Rights Act 1996 section 48)***

4.1 Did the respondent do the following things:

4.1.1 Extend the claimant's probation on 12 July 2023;
4.1.2 Fail to pay the claimant company sick pay for the period 23 June 2026 to 21 July 2023; and
4.1.3 Accuse the claimant of whistleblowing on 14 July 2023.

4.2 By doing so, did it subject the claimant to detriment?

4.3 If so, was it done on the ground that they made a protected disclosure?

5. ***Remedy for Protected Disclosure Detriment***

5.1 What financial losses has the detrimental treatment caused the claimant?

5.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

5.3 If not, for what period of loss should the claimant be compensated?

5.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

5.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

5.6 Is it just and equitable to award the claimant other compensation?

5.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.8 Did the respondent or the claimant unreasonably fail to comply with it?

5.9 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

5.10 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

5.11 Was the protected disclosure made in good faith?

5.12 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

6. ***Unauthorised deductions / Breach of contract***

6.1 Was the claimant entitled to receive company sick pay for the period 23 June to 12 July 2023?

6.2 Did the respondent fail to pay this to the claimant?"

8. It is necessary to record how Claimant put her case in relation to constructive dismissal as it has altered somewhat over the course of this litigation. At the Preliminary Hearing before Employment Judge Heap on 17 April 2024 she stated that the sole issue which caused her to resign was the fact that she had made an alleged protected disclosure and as a result of raising those matters she was called to a meeting with the Hospital Director, Amanda Dorkes, on 14 July 2023 and accused of making disclosures to the Freedom Speak Up Guardian and leaving a negative review on Indeed. At that point in time the Claimant said that was the sole issue that caused her to resign and that she was rendered unfairly dismissed under Section 100. That information is apparent from paragraph 24 of Employment Judge Heap's orders of 17 April 2024. At paragraph 28 of her orders Judge Heap outlined the problems for the Claimant's complaint under s104 ERA 1996 if that were the case.

9. The Claimant's pleaded case then altered somewhat and by way of a response to Case Management Orders which she provided on 2 May 2024 the Claimant stated that the events of 14 July 2024 were not the sole issue that caused her to resign but were instead the most prominent. She further stated in her response to Case Management Orders when commenting on paragraph 28 of Judge Heap's orders that:

> *"The 14 July was a final straw event the actual event focussed on whistleblowing relating to section 100 and 103A. The section 104, discrimination and breach of contract issues all occurred during the Claimant's employment and added to the untenable position. The detriment on 14 July was the final act that made the Claimant feel their employment was no longer an option."*

The Claimant also described her treatment on 14 July 2024 as a final straw event at section 1.5 of her response to the case management orders (found at pages 66 to 68 of the bundle).

10. In respect of the contractual terms that the Claimant says the Respondent breached, the Claimant relies on:

    a. Clause 1.2 of her contract;

    b. Clause 2.4 of her contract; and

    c. Clause 4.6 of her contract.

    She made that clear by her response to the case management orders at paragraph 1.2 (page 67).

Procedure, documents and evidence heard

11. This has been a remote hearing conducted via CVP. At the start of the hearing, the Claimant's representative requested that the Employment Tribunal exercise its power under Rule 43 of the 2024 Rules to exclude the Respondent's witnesses from the hearing until they gave evidence. The Claimant's representative stated that this request was being made because of the Claimant's mental health issues. No medical evidence was provided to the Tribunal to support that request.

12. The Tribunal refused to exclude the Respondent's witnesses. Our reason was that we did not have medical evidence to indicate that the Claimant was suffering from a mental health impairment which would cause her anxiety or distress if the Respondent's witnesses were not excluded. In addition, we took account of the fact that this was a remote hearing and that the parties were not in the same physical room as they would be in a standard Employment Tribunal hearing. We did, however, ask that the Respondent's witnesses and their observers turn off their cameras whilst the Claimant gave evidence. The Respondent's witnesses and observers agreed to do that. We also reminded the Claimant at the start of the hearing that she could request a break whenever she wished.

13. Mindful of the overriding objective to put the parties on a level playing field as best as we could, we also allowed the Claimant's representative an extended break of approximately 2½ hours before she made submissions. We limited oral submissions in this case to 15 minutes and both parties finished their submissions in the allocated time.

14. In this case there was an agreed bundle of 243 pages. We heard evidence from the Claimant herself. Mr Mark Rocky a Health Care Assistant employed by the Respondent also gave evidence on the Claimant's behalf. For the Respondent we heard evidence from Suzanne Joynes, Clinical Services Manager and Amanda Dorkes the Executive Director of The Park Hospital. All individuals gave evidence under oath or affirmation and were cross examined.

Findings of Fact

15. The Tribunal has not sought to set out every detail of the evidence which we heard, nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings are set out below in a way that is

proportionate to the complexity and importance of the relevant issues before the Tribunal. References to page numbers are to the main hearing bundle.

16. On 13 March 2023 the Claimant started employment with the Respondent. She was employed to work 30 hours a week on a 6 month fixed term contract. Her contract of employment appears in the bundle between pages 130 to 144. The Claimant was employed by the Respondent as a Lead Theatre Practitioner and she worked at its Park Hospital site. She specialised in cardiac procedures and had previously worked for the NHS in a similar role.

17. The Claimant also had at the time, and still has, a job working for HMRC. That second job amounted to 15 hours of work a week. She informed the Respondent at the start of her employment of her job with HMRC.

18. In respect of the Claimant's contract of employment of note is contractual clause 1.2. That states:

> "*The first 3 months (13 weeks) of your employment shall be a probationary period. The Company may, at its discretion, extend this probationary period by such additional period as the Company may consider necessary. During the probationary period your performance and suitability for continued employment will be evaluated. At the end of the probationary period the Company will inform you whether you have successfully completed your probationary period."* (page 134).

19. Clause 2.4(a) of the Claimant's contract states:

> *"During your Employment you shall: (a) comply with the policies, procedures and rules of any Group Company as supplied from time to time ("Policies") and of any association or professional body to which any Group Company and/or you may belong;"* (page 135)

20. Clause 4.6 of the Claimant's contract states:

> *"In accordance with the Working Time Regulations 1998, you will not be required to work in excess of, on average, a maximum of 48 hours per week. Should you be willing to work in excess of these hours, you will be requested to sign an opt-out agreement."* (page 137)

21. Clause 11 of the contract dealt with sickness. Clause 11.1 reads:

> *"Company sick pay is discretionary and guidelines for payment are set out in the relevant policy. Any Company sick payments shall be inclusive of any statutory sick pay due in accordance with applicable legislation in force at the time."* (page 139).

22. In terms of the policies which were applicable we had the Probationary Review Policy in the bundle between pages 81 to 90. In respect of that document we note the following clauses. Clause 2 deals with the probation period process and states:

> *"2.1 At the commencement of employment a meeting should take place with the employee and their manager to discuss the job profile and responsibilities as well as identifying any areas where additional support and training may be required.*
>
> *2.2 Managers should meet with employees within their probation on a regular basis*

usually at 4 week intervals, however, these intervals can be reviewed if required.

2.3 Should there be any immediate concerns with regard to performance and/or conduct during the initial stages of the probation period a meeting should take place immediately to address and set the expectations.

2.4 Any training or coaching required to support the employee in order to resolve any behavioural or capability issues should be identified and incorporated within the remainder of the probationary period.

2.5 A clear record should be made of each review meeting." (pages 83 to 84).

23. Clause 3 of the Probationary Review Policy dealt with the procedure that was to be adopted when performance fell below the required standard.

24. In relation to the amount of Sick Pay payable to an absent employee, Clause 10 of the Sick Pay Policy states:

"10.1 Payments under the Company's sick pay scheme are inclusive of any entitlement to statutory sick pay.

10.2 Unless different contractual terms apply there is no automatic eligibility for Company sick pay. Payment will be granted entirely at the discretion of the Company up to the maximum number of weeks as set out in the table below.

10.3 Company sick pay for all employees across Circle Health Group will be determined based on a 12 months' rolling year. Award of company sick pay may be made and calculated each time an individual is absent due to sickness, taking into account the

employee's length of service on the first day of absence, and the amount of paid sick leave the employee has taken in the previous 12 months, as follows:

Length of service on first day of sickness	Maximum Company sick pay award
Up to 13 weeks and in the event of an extended probationary period.	Nil
13 - 52 weeks	2 weeks = 2/52 of annual hours
53 - 156 weeks	4 weeks = 4/52 of annual hours
157 – 260 weeks	6 weeks = 6/52 of annual hours
261 + weeks	13 weeks = 13/52 of annual hours

25. The Respondent was undertaking a trial at The Park Hospital whereby individuals would be paid overtime rates if they had worked any hours at the weekend which were in excess of their core contractual hours.

26. In terms of line management the Claimant was initially line managed by Sarah Wakefield, however she had delegated responsibility for those functions to Kelly Holbrook. Kelly Holbrook should have undertaken probation reviews and an induction with the Claimant. Kelly Holbrook failed to undertake any induction or probation reviews with the Claimant. Sarah Wakefield then left the Respondent shortly after the Claimant started employment.

27. On 15 May 2023 Suzanne Joynes took over line management responsibilities for the Claimant.

28. On 30 May 2023 the Claimant emailed Suzanne Joynes regarding her hours, in that email the Claimant expressed her desire to reduce her hours from 30 hours a week to 20 hours a week as she did not want to end up working excessive hours at The Park (page 157).

29. On 6 June 2023 the Claimant emails Suzanne Joynes to say: *"Just wondering if there has been an update regarding my reduction to 20 hours yet?"* (page 160).

30. As no concerns had been raised by any member of staff at the Respondent regarding the Claimant's work and the Claimant had never been informed that her work fell below the required standard, as required by Clause 3 of the Probationary Review Policy, we find that the Claimant's probation period ended on 12 June 2023.

31. On 19 June 2023 there was an incident in the Cardiac Theatre, this involved the second patient on the list for that day. That patient's surgery took place between approximately 15.25 to 21.40. We have made that finding of fact based upon what appears at page 165 of the bundle which are the Theatre entry logs. The responsible Consultant in respect of that procedure was Giovanni Mariscarlo. The Claimant was present as was Metesh Acharya, an Operating Registrar, and Lisa Carson, a Perfusionist.

32. In terms of the incident, a Dacron graft was not available when operating on the second patient on the list. The Dacron graft was required after the patient had suffered a bleed around 6.00pm in the evening. The Claimant made a call to a nearby NHS Hospital for a graft to be taxied over. In the event, however, the responsible Consultant and Operating Surgeon did not need the graft as the bleeding was stemmed using other available items from the trolley, those items being Teflon Pledgets and Prolene Sutures. During the operation the Claimant expressed concern to the other staff present that the patient might not be able to be taken off bypass. However, the patient was successfully taken off bypass and went to ICU following the conclusion of their procedure. It was standard practice for cardiac patients to go to ICU following such procedures.

33. Purely by coincidence whilst that surgery was proceeding on 19 June 2023 Suzanne Joynes sent an email to the Claimant timed at 18.22. This was regarding a risk assessment for cardiac which read as follows:

> *"Hi Amy apologies if I have not managed to catch up with you. Can you please send me and Iain your availability and we can make sure to book a slot in with you. Also is there by any chance you can review and update the risk assessment relating to cardiac please and send it back to me as soon as possible." (*page 171).

34. At approximately 9.30pm on 19 June 2023 Suzanne Joynes took a call from a member of staff at the Park Hospital to inform her that there had been a problem with a patient undergoing cardia surgery and that an incident report needed to be completed.

35. On 20 June 2023 the Claimant emailed Suzanne Joynes in the following terms:

"Hello,

I am not sure I can comment on risk assessments relating to the heater cooler as I don't have the knowledge or expertise, I can ask Craig and the Profusion Team to have a look though if helpful. I believe Iain has been doing the activities required of our side whilst Profusion are not here so it may need to be a joint approach to make sure risk assessments are correct.

I think a catch up would be good. Particularly: Sheffield a Tuesday cardiac list (I could probably be available if I swapped days around but would need to leave at around 3.00pm). TAVI list datix equivalent (so we probably need to agree a solution for future) and a bit of debrief from yesterday's list. (I think I may need to fill out a Datix equivalent.)

I'm in tomorrow morning and then all day Friday and on Saturday. Not sure where I am allocated though for days in the week

thanks

Amy." (page 170).

36. That same day, i.e. 20 June 2023, the Claimant used WhatsApp to message two individuals who had been present in surgery during the incident in question. Those individuals were Metesh Acharya and Lisa Carson. Those messages appear in the bundle between pages 167 to 169. Metesh Acharya had messaged the Claimant to say, "*Thanks for your help today. Especially 2nd case"*. The Claimant replied*, "You're welcome. There were points were I did think oh shit had do we fix dissection without aortic grafts available".* Metesh then replied, *"All ok in the end"*, to which the Claimant replied, *"Yes thankfully and no callback overnight. Would you mind dropping me an email with some thoughts on anything we could have done either better or to avoid yesterday's situation I think I may have to do an incident report - more about the lack of available items than anything else I think. The case was always going to be a bit rubbish but maybe we should have better planned the 'worst case scenario' before starting."* Metesh replied, *"Sure"*, to which the Claimant messaged, *"Thank you. Sorry to cause more work"*.

37. In respect of the messages exchanged with Lisa Carson, the Claimant messaged her at 9.07am in the morning on 20 June 2023 saying, *"Hi I just wanted to say thanks for yesterday especially with ringing City about the dacron grafts. I'm hoping that the case demonstrated to those at the park what can happen when cardiac doesn't go to plan as they are all very complacent x".* Lisa Carson replied, *"No problem… hope ur ok it was pretty stressful for you. in cardiac even simple cases can go tits up. And yes hopefully the park will let you order some stuff for those just in case moment xx (sic)."* The Claimant then replied, *"Yeah. I'm ok. I am glad I have the experience of on the table disaster and I am sort of glad it was the case I scrubbed for rather than Amanda's as she flaps a bit. My issue was I then thought nobody else here after 5.30 on the scrub side actually knew what they were doing so I was somewhat on my own… whereas at glenfield there is always others that know the drill. Definite food for thought going forwards. (sic)"* By way of explanation Glenfield is an NHS Hospital.

38. On 21 June 2023 Suzanne Joynes was working away from The Park Hospital site until late in the day and she did not see the Claimant. On that point we accept

Suzanne Joynes's evidence. She was credible and reliable. We also find that on 21 June the Claimant was on pre-arranged leave in the afternoon, indeed that is apparent from paragraph 30 of the Claimant's witness statements. It is also clear that Suzanne Joynes and the Claimant did not meet on 21 June 2023 as the contents of the Claimant's message of 22 June 2023, dealt with below, make clear that the Claimant had not yet had the opportunity to speak to Suzanne Joynes. The consequence of this is that we find that the Claimant and Suzanne Joynes did not meet in person on 21 June 2023.

39. On 22 June 2023 the Claimant sent a message to Suzanne Joynes via Facebook Messenger. The message appears in the bundle starting at 173. The Claimant relies on this message as a protected disclosure. It reads:

> *"Hello, sorry to bother you. I asked to see what I was doing tomorrow and see I am on orthopaedics lists all day and I'm apparently the Practitioner in Charge too which if I am honest has added to the mounting anxiety and stress I have been feeling over the past couple of months. To the point now where I think I need to be talking to my GP about getting some help. I was hoping to have had some opportunity to speak to you after Monday's list about the things I emailed but its not been the case as I have been put on to other lists. I have gotten to the stage where I constantly feel nauseous, I get frequent episodes of dizziness, I am very much snappier than normal (and had to apologise for it on Monday) and I very much feel overwhelmed which for me is out of character. I feel very much at a loss and don't know quite what to do to help the situation."*

Suzanne replied:

> "*Hi Amy, I do apologise for not being able to speak to me much sooner.(sic) If you feel you need to speak to your Doctor for help please do so as yourself, health and wellbeing is very important. Unfortunately, I have left work now and won't be able to check/change allocations but I am there tomorrow so I can have a look then. Sorry if that is not much help. But if you are in tomorrow let's find time to have a catch up." "Apologies for the auto correct typos."*

The Claimant then replied:

> "*No problem. I'll call them first thing and see what they suggest. I am trying to write a list of things that may have contributed to how I feel, I'll message Kelly and say I have spoken to you/will continue to speak to you about tomorrow and that she may need to rearrange the morning at very least whilst I get the appointment sorted."*

Suzanne Joynes then replied:

> "*Please don't message Kelly now. See how you feel tomorrow morning and ring Kelly/Iain or myself whoever is there first, and we can sort it out then."*

A telephone number was provided for the co-ordinators and Suzanne Joynes said, *"Get some rest".*

40. The following day, 23 June 2023, the Claimant commenced a period of sick leave. The reason for that sickness absence was work related stress.

41. On 24 June 2023 Mr Rocky informed the Claimant that he had submitted a Freedom

to Speak Up request. He told the Claimant he had done this on an anonymous basis. We make that finding based upon the message that appears between the Claimant and Mr Rocky at page 177 of the bundle.

42. On 29 June 2023 Suzanne Joynes undertook a telephone welfare meeting with Claimant. The notes of the meeting are at pages 180 to 181. The Claimant mentioned the cause of her work related stress which caused her absence was the incident of 19 June 2023. A possible reduction in the Claimant's hours was discussed and the Claimant raised concerns about undertaking work other than cardiac and that she felt her cardiac skills were becoming redundant due to a lack of cardiac work.

43. The Claimant returned from her period of sickness absence on 12 July 2023 and had a return to work meeting with Suzanne Joynes on that day. Suzanne Joynes's version of the notes of that meeting are in the bundle at pages 182 to 183. We also have the Claimant's annotations to those notes at 184 to 185. It is clear from the notes that during the return to work meeting, the patient incident of 19 June 2023 was discussed in some depth. It is also clear that Suzanne Joynes extended the Claimant's probationary period. The Tribunal finds that the Claimant's probation should not have been extended in this manner. No consultation had taken place with the Claimant regarding any probation extension and no concerns about the Claimant's performance had been raised by the Respondent. A further meeting was then scheduled between the Claimant and Suzanne Joynes for the 14 July 2023 in order to discuss a possible reduction of the Claimant's hours from 30 hours a week to 20 hours per week.

44. On 14 July 2023 there was an incident regarding car parking. The incident occurred against the backdrop of the Claimant having recently returned to work. On the day in question the Claimant arrived for work at the Park Hospital and parked in an area known as The Beach. The Beach was primarily intended for patient use and staff members were not allowed to park there. In terms of staff parking at the Park Hospital, Consultants and Amanda Dorkes were permitted to park in a car park known as the Under Croft. Other staff members were meant to park at a nearby Rugby Club and a bus was laid on for by the Respondent to convey staff members from the Rugby Club car park to the main building at the Park Hospital. The Claimant knew that the area she had parked, i.e. the Beach, was intended for patient use. She also knew that she should have parked at the Rugby Club and there were no issues preventing her from being able to access the Rugby Club car park on that day.

45. After parking in the Beach car park, the Claimant inputted her details into a magic eye registration machine in the reception area of the Park Hospital. The Claimant did this as she was aware that a fine would be issued to her if she did not register her vehicle. While she was inputting her vehicle registration details the Claimant was challenged by Danielle Crump, a receptionist. The Claimant was informed by Danielle Crump that she should not be parking in the area intended for patient use. The Claimant was then abrupt to Danielle Crump and refused to move her car. Danielle Crump became upset and told the Claimant that Amanda Dorkes would not be happy. *T*he Claimant replied with words to the effect of *"Well if Amanda Dorkes is not happy she can come and find me. I am ready for an argument"*. The Claimant then left the reception area without moving her car. Upon her arrival at work,

46. Amanada Dorkes became aware of the incident as Danielle Crump had informed her about it. Sometime later that morning between 8.30 to 10.00am Kelly Holbrook brought the Claimant to Amanda Dorkes's office at Amanda Dorkes request. Amanda Dorkes explained to the Claimant that she was not allowed to park in the Beach car park as it was intended for patient use. She also made the Claimant aware that previously cancer patients had been unable to car parking in that area for ahead of their scheduled treatment appointments. We find that at no point during that meeting did Amanda Dorkes raise her voice or become aggressive.

47. The Claimant then proceeded to get upset in this meeting and a discussion about the Cardiac Team ensued, in particular, the difficulties the Claimant had experienced on 19 June 2023. Amanda Dorkes said that she was aware that concerns had been raised about Cardiac services and that she was aware that a Freedom Speak Up request had been raised on an anonymous basis. She made the Claimant aware that her input would be needed to respond adequately to that Freedom Speak Up request. At that point the Claimant then freely volunteered to Amanda Dorkes that Mr Mark Rocky was the individual who had raised the Freedom to Speak Up request under discussion. In addition, at no point during the meeting did Amanda Dorkes accuse the Claimant of making a Freedom to Speak Up request. Instead, Amanda Dorkes said that the Claimant would be supported in her role in the future. The meeting ended with the Claimant being told by Amanda Dorkes to move her car and apologise to Danielle Crump. The Claimant moved her car but did not apologise to Danielle Crump.

48. Immediately following the meeting with Amanda Dorkes, the Claimant messaged Mr Mark Rocky. She did this because she was clearly concerned as to the contents of his Freedom to Speak Up request and whether or not he had made disparaging comments about the Claimant's capabilities. The messages between the two of them appear in the bundle at pages 206 to 207. They start at 10.16 am and conclude at 10.56 am. They read as follows:

Claimant (CL) -	*"can I ask about your freedom to speak up?"*
Mark Rocky (MR) -	*"I haven't heard anything back about it yet"*
MR -	*"I will let you know ASAP"*
CL -	*"OK. I've just been in with Amanda and she said it's been done and that basically says my capability and leadership is shit. Did you also leave an indeed review? Because Amanda seems to think the same person did both."*
MR -	*"No. I didn't leave one what is happening now?"*
CL -	*"I have no idea. I got pulled in for apparently being aggressive to the reception staff this morning about car parking… then she told me about the freedom to speak up and the associated indeed review. But she said basically there's concerns about leadership which is directly me because I'm the lead."*
MR -	*"I'm getting to the point where I'm fed up of all the bullshit that goes on"*

MR - *"if management paid interest to us and listened then they would know a lot more"*

CL - *"Hmmm so I think the ay it's come across to them is that you have a problem with the leadership in cardiac - which is me.. Not that you have a problem with departmental leadership"* (sic)

CL - *"That*"*

MR - *"I do not have a problem with you and you leadership whatsoever. I completely respect you"*

MR - *"It seems like the speak up isn't anonymous then"*

CL - *"I know. I didn't think you did"*

CL - *"No I think they can work it out pretty easily"*

MR - *"I think you're an amazing lady"*

49. The Claimant did not inform Mr Mark Rocky that she had just disclosed his name to Amanda Dorkes in respect of the previously anonymous Freedom to Speak Up request that he had submitted.

50. That same day, 14 July 2023, at 1.30pm in the afternoon the Claimant met Suzanne Joynes. This was a prearranged flexible working meeting in order to discuss the possibility of reducing the Claimant's hours down to 20 hours a week. The notes of the meeting appear at page 241 to 243. Unfortunately, no agreement was reached at that meeting regarding a reduction in hours and a further meeting was scheduled between the two of them for 19 July 2023. That later meeting did not take place as by that point in time the Claimant had ceased employment. At this meeting Suzanne Joynes stuck to her position that the Claimant's probation had been correctly extended. Suzanne Joynes also reassured the Claimant that if appropriate cover was in place, the Claimant would not need to work Sundays as she was aware that this could cause the Claimant difficulties.

51. On 17 July 2023 the Claimant had an Occupational Health appointment, the report appears at page 187 to 188 of the bundle. The report indicated that the Claimant's concerns were primarily not medical matters but instead that she was unhappy about a number of matters. Those were: her working day allocation; doing non-cardiac work; a lack of clarity about her role; procedure and relationships at work.

52. On 18 July 2023 the Claimant submitted a grievance via the "Freedom to Speak Up" route. That grievance appears at pages 189 to 193. It primarily concerned the following issues:

- Unsafe practices and working conditions and deviations from the Department of Health National Guidance.

- A grievance regarding a failure to follow Company policies and procedures in respect of induction and probation.

- A grievance regarding bullying by the Deputy Theatre Manager, Kelly Holbrook.

- A grievance regarding the fact that the Claimant felt she had been victimised by Amanda Dorkes in respect of what had occurred on 14 July 2023.

53. The grievance indicates that the Claimant and Kelly Holbrook had previously disagreed regard the Claimant working on Sundays. Those disagreements stemmed from as far back as 2 July 2023, that is apparent from what is recorded on page 191. The grievance states that the Claimant did not currently consider her role to be untenable. However, under cross-examination the Claimant accepted that by the time she had drafted this grievance letter and sent it on 18 July she had decided to resign.

54. The following day on 19 July 2023 the Claimant submitted her letter of resignation. That appears at page 194. Three reasons were given for the Claimant's resignation:

(1) Breach of contract. The Claimant confirmed under cross examination this referred to the probation pay issue and also Working Time Regulation issues.

(2) Bullying. The Claimant confirmed under cross examination this referred to perceived bullying from Kelly Holbrook and

(3) Victimisation. The Claimant confirmed during cross examination that this related to the issue with Amanda Dorkes on 14 July 2023.

55. Finally, on 26 July 2023 Suzanne Joynes wrote to the Claimant asking her to reconsider her resignation. Suzanne Joynes also invited the Claimant to a meeting in order to discuss the concerns that she had raised. The Claimant did not respond to that letter and so the meeting which was scheduled to take place to discuss her concerns never went ahead.

Law

Burden of proof in relation to the Unfair Dismissal complaint

56. Where an employee who alleges that he or she was dismissed for an 'automatically unfair' reason has sufficient qualifying service to claim unfair dismissal in the normal way (i.e. two years), then the burden of proving the reason for dismissal is on the employer, as it is in an ordinary unfair dismissal claim under S.98 ERA — ***Maund v Penwith District Council 1984 ICR 143, CA***. However, where the employee lacks the requisite continuous service to claim ordinary unfair dismissal, he or she will acquire the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason — ***Smith v Hayle Town Council 1978 ICR 996, CA.***

Constructive Unfair Dismissal

57. Section 95 of the Employment Rights Act 1996 states:

95. 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) …

(b) …

(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.

58. In the leading case in this area, ***Western Excavating (ECC) Limited v Sharp [1978] ICR 221, CA,*** the Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal it must involve a repudiatory breach of contract. As Lord Denning MR put it:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

59. Therefore in order to claim constructive dismissal, the employee must establish that:

    a. there was a fundamental breach of the contract on the part of the employer;

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

    c. the employee did not delay too long before resigning thus affirming the contract in losing the right to claim constructive dismissal.

60. The Tribunal will therefore be considering whether the employer has in some way acted without just or reasonable cause which is likely to seriously damage the implied term of trust and confidence between the parties.

61. It is correct that the employee's resignation must have been caused by the breach of contract in issue. That means if there is an underlying (or ulterior) reason for the employee's resignation, such that he or she would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal.

62. The actual breach needs to be the affective reason, it does not need to be the only reason for the dismissal.

63. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the last straw by itself does not amount to a breach of contract.

64. The Court of Appeal set out in ***Omilaju v Waltham Forest London Borough Council [2005] ICR 481, CA***, that acts constituting the last straw does not have to be of the same character as earlier acts, nor does it need to constitute unreasonable

blameworthy conduct. However, in most cases it will do so. The last straw must contribute to the breach of the implied term of trust and confidence. Therefore an entirely innocuous act on the part of the employer cannot be a final straw, only if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is an objective one.

Section 100(1)(c) Employment Rights Act 1996 (ERA 1996)

65. This section states:

> ***100.— Health and safety cases.***
>
> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—*
>
> *(c) being an employee at a place where—*
>
> *(i) there was no such representative or safety committee, or*
>
> *(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,*
>
> *he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*

Section 104 ERA 1996

66. This section states:

> ***104.— Assertion of statutory right.***
>
> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—*
>
> *(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*
>
> *(b) alleged that the employer had infringed a right of his which is a relevant statutory right.*
>
> *(2) It is immaterial for the purposes of subsection (1)—*
>
> *(a) whether or not the employee has the right, or*
>
> *(b) whether or not the right has been infringed;*
>
> *but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.*

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,

(b) the right conferred by section 86 of this Act,

(c) the rights conferred by sections 68, 86, 145A, 145B, 146, 168, 168A, 169 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deductions from pay, union activities and time off),

(d) the rights conferred by the Working Time Regulations 1998 , [[the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 (S.I. 2018/58)]3,]2 the Merchant Shipping (Working Time: Inland Waterway) Regulations 2003[, the Fishing Vessels (Working Time: Sea-fisherman) Regulations 2004 or the Cross-border Railway Services (Working Time) Regulations 2008]4, and

(e) the rights conferred by the Transfer of Undertakings (Protection of Employment) Regulations 2006.

(5) In this section any reference to an employer includes, where the right in question is conferred by section 63A, the principal (within the meaning of section 63A(3)).

Section 103A ERA 1996

67. Section 103A ERA 1996 reads:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

68. The principal reason is the reason that operated on the employer's mind at the time of the dismissal. The question of whether the principal reason for dismissal was a protected disclosure is a question of fact.

Protected Disclosures

69. Section 43A of the ERA 1996 defines a protected disclosure as "a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

70. Section 43B of the ERA 1996 ("Disclosures qualifying for protection") provides as follows:

> *(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) That a miscarriage of justice has occurred, is occurring or is likely to occur,*
> *(d) that the health or safety of any individual, has been, is being or is likely to be endangered;*
> *(e) That the environment has been, is being or is likely to be damaged, or*
> *(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…*

71. Under section 43C of the ERA 1996 ("Disclosure to employer or other responsible person"):

> *(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure (a) To his employer…*
> *(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.*

72. In ***Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325*** the EAT considered what amounts to a 'disclosure of information' and held that there is a distinction between disclosing information, which means 'conveying facts' and making allegations or expressing dissatisfaction. It gave, as an example of disclosure of information, a hospital employee saying 'wards have not been cleaned for two weeks' or 'sharps were left lying around'. In contrast, the EAT held, a statement that 'you are not complying with health and safety obligations' is a mere allegation.

73. The Court of Appeal, in ***Kilraine v London Borough of Wandsworth [2018] ICR 1850***, established that 'information' and 'allegation' are not mutually exclusive. There must be sufficient factual content tending to show one of the matters in subsection 43B(1) of the ERA 1996 in order for there to be a qualifying disclosure.

74. The information disclosed by the worker does not have to be true, but rather, the worker must reasonably believe that it tends to show one of the matters falling within section 43(B)(1) ERA 1996. The employee must also reasonably believe that the disclosure is in the public interest. When deciding whether the worker had the relevant 'reasonable belief' the test to be applied is both subjective (i.e. did the individual worker have the reasonable belief) and objective (i.e. was it objectively

reasonable for the worker to hold that belief). ***Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4***, which was endorsed in ***Phoenix House Ltd v Stockman [2017] ICR 84***, in which the EAT held that, on the facts believed to exist by an employee, a judgment must be made, first, as to whether the worker held the belief and, secondly, as to whether objectively, on the basis of the facts, there was a reasonable belief in the truth of the complaints.

Unlawful deductions from wages

75. Section 13 of the ERA1996 states:

> *"(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….*
>
> *(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."*

Submissions

76. Turning to submissions we heard oral submissions from both party's representatives. The Claimant's representative summarised the Claimant's case and put forward that the Claimant would not have pursued her claim through to Tribunal if the factual allegations made were not true. Mr Ramsbottom requested that we have regard to the EAT case of ***Salisbury NHS Foundation Trust v Wyeth UKEAT/0061/2015*** and, when determining the whistleblowing complaint, bear in mind the requirement for a causal link between protected acts and detriments.

Conclusions

77. We now turn to our conclusions. To reach our conclusions we had regard to the agreed List of Issues which appeared in the bundle at pages 74 to 77.

78. The first issue the Tribunal had to consider was whether the Claimant was dismissed? A claim of constructive dismissal can only be established if:

    a. there was a fundamental breach of the contract on the part of the employer;

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

    c. the employee did not delay too long before resigning thus affirming the

contract in losing the right to claim constructive dismissal.

79. We note that the Claimant's resignation letter, dated 19 July 2023, provided three reasons. We have read that letter in conjunction with the grievance letter submitted on 18 July 2023. We have also taken into account the pleadings submitted by the Claimant. The Claimant relies on the following contractual clauses as having been breached by the Respondent:

    a. *Clause 1.2. which states:*

    "The first 3 months (13 weeks) of your employment shall be a probationary period. The Company may, at its discretion, extend this probationary period by such additional period as the Company may consider necessary. During the probationary period your performance and suitability for continued employment will be evaluated. At the end of the probationary period the Company will inform you whether you have successfully completed your probationary period." (page 134).

    b. *Clause 2.4(a) which states:*

    "During your Employment you shall: (a) comply with the policies, procedures and rules of any Group Company as supplied from time to time ("Policies") and of any association or professional body to which any Group Company and/or you may belong;" (page 135)

    c. *Clause 4.6 which states:*

    "In accordance with the Working Time Regulations 1998, you will not be required to work in excess of, on average, a maximum of 48 hours per week. Should you be willing to work in excess of these hours, you will be requested to sign an opt-out agreement." (page 137)

80. We also note the Claimant's pleaded case is that the final straw incident here was the events of 12 July 2023 i.e. effectively the conduct of Amanda Dorkes. To be clear we have found that there was no breach of contract by the employer on that date. Amanda Dorkes did not raise her voice. She was certainly not *'spitting venom'* as the Claimant alleged. If Amanda Dorkes had behaved in such an extreme manner we would have expected the Claimant to raise her conduct in the messages that she sent to her good friend Mr Rocky immediately after that meeting had taken place. She did not do so. Instead in the messages sent to Mr Rocky the Claimant was primarily interested in checking whether Mr Rocky had implicated her in his Freedom to Speak Up request that he had raised on an anonymous basis with the Respondent.

81. Although there was no breach of contract by the Respondent on 12 July 2023, we remind ourselves that a course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal. We therefore consider the entirety of the Respondent's conduct to assess whether there was a fundamental breach of the contract of employment by the Respondent.

82. Taking that approach, we conclude that clause 1.2 of the Claimant's contract was breached. As no concerns had been raised by any member of staff at the Respondent regarding the Claimant's work and the Claimant had never been informed that her work fell below the required standard, the Claimant's probation period should have ended on 12 June 2023. Instead Suzanne Joynes decided to

extend the Claimant's probationary period and failed to follow the Probationary Review Policy when doing so. As this had the effect of depriving the Claimant of company sick pay, this was a fundamental breach of contract.

83. We are not however persuaded that the breach of Clause 1.2 caused the Claimant to resign. The reality of is that this was not an automatically constructive unfair dismissal but rather a resignation by the Claimant. What then were the reasons for the Claimant's resignation?

    a. First, the Claimant had convinced herself incorrectly that she was going to be blamed or held accountable for the incident of 19 June 2023. She was concerned that Amanda Dorkes and Suzanne Joynes would incorrectly assume that she, rather than Mr Rocky, had raised a Freedom Speak Up request and that such fact would be held against her. Her concerns were ill founded and we determine that the Respondent was keen to learn from any past events or Freedom to Speak Up reports in order to improve future patient care. As the Claimant had incorrectly convinced herself that raising a Freedom Speak Up request would be held against her, she freely volunteered Mr Rocky's name to Amanda Dorkes during the meeting on 12 July 2023. She then failed to tell Mr Rocky that she had done so immediately afterwards when they had a WhatsApp message exchange.

    b. Second, the Claimant left because she was annoyed at the lack of flexibility that she now had in the private sector at The Park Hospital as compared to when she had been previously working in her NHS role. Unlike the NHS the Respondent's cardiac lists were less frequent and often at the weekends. That interfered with the Claimant's ability to take her daughter to artistic swimming.

    c. Third, the Claimant was concerned that she would lose some of her cardiac skills and effectively "de-skill" due to the less frequent cardiac work which took place at the Park Hospital as opposed to her previous employment within the NHS.

    d. Fourth, the Claimant had a fractious working relationship with Kelly Holbrook and did not like being asked to undertake non-cardiac theatre lists.

    It was effectively for a combination of those reasons that the Claimant resigned. The resignation was not due to any breach of contract occasioned by the three sections of the Employment Rights Act 1996 that the Claimant relies on. Indeed we note that the Respondent did not want the Claimant to leave. Suzanne Joynes sought to reassure the Claimant that she would not need to work Sundays and indeed she wrote to the Claimant asking her to reconsider her resignation. The Claimant did not reconsider her resignation and when she left Cardiac Services at The Park Hospital were put on hold for a period of time due to a lack of available staff.

84. If we are wrong on that we also find that the reason for the breach of clause 1.2 was not for any of the three sections of the Employment Rights Act 1996 that the Claimant relies on. The reason for the breach of clause 1.2 was effectively poor management by the Respondent.

85. In terms of that poor management, we find that when line management responsibilities were delegated to Kelly Holbrook by Sarah Wakefield, Kelly Holbrook did not undertake any reviews or induction with the Claimant. In short, she did not follow the correct procedures. The effect of this was that when Suzanne Joynes assumed line management responsibility of the Claimant she sought advice from the Respondent's HR Department and was poorly advised to extend the Claimant's probationary period. There was no reason to extend the Claimant's probationary period which resulted in the Claimant not being paid Company sick pay when she should have been. Indeed, no consultation or agreement had taken place with the Claimant about extending her probation.

86. The Claimant's case is also that clause 4.6 of her contract was breached. Clause 4.6 of the contract deals with the Working Time Regulations. In respect of whether or not there was a breach of Clause 4.6, the Claimant has provided insufficient evidence that was the case. The key word in clause 4.6 that the Claimant appears to have failed to appreciate is the word 'average'. Returning to clause 4.6 it says,

    "In accordance with the Working Time Regulations 1998 you will not be required to work in excess of on average a maximum 48 hours per week."

    The Law in short is that a worker cannot work more than 48 hours a week on average and the hours are normally averaged over a period of 17 weeks. Whilst the Claimant has showed that she had worked more than 48 hours in some weeks she has not provided sufficient evidence to the Tribunal that there was a breach of clause 4.6 when her hours were averaged over a 17 week period. We are unable, therefore, to conclude that there was a breach of clause 4.6.

87. The Claimant also contends that clause 2.4(a) of her contract of employment was breached. As Clause 2.4(a) only places an obligation on the Claimant, not the Respondent, we are unable to conclude that this clause has been breached by the Respondent. However, in her response to the case management orders of EJ Heap at paragraph 1.2 the Claimant states, "*There is an implied term of contract that the company will comply with its own policies*" (page 67). Although no implied term has been specified by the Claimant, we are conscious that she is a litigant in person and that the overriding objective obliges us to ensure "that the parties are on an equal footing". Consequently, we have also considered whether there was a breach of the implied term of trust and confidence. We conclude that the circumstances surrounding the extension of the Claimant's probationary period did amount to a breach of the implied term of mutual trust and confidence, and that such breaches are invariably fundamental. However, for the reasons already outlined above at paragraph 83, this was not a constructive dismissal but a resignation by the Claimant. If we are wrong on that, we also conclude that the reason for the breach of the implied term of mutual trust and confidence was the Respondent's poor management of the Claimant as detailed in paragraph 85.

88. In summary this was a resignation by the Claimant. The claim of unfair dismissal is not well founded and is dismissed.

89. We now move to consider the complaint of whistleblowing detriment. We have been asked to consider whether the Claimant made one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996. The qualifying

disclosures relied on are set out in the list of issues at issues 3.1.1 to 3.1.4.

90. In respect of number 3.1.1 the Claimant relies on the following: "*On 20 June 2023 the claimant told Suzanne Joynes, the theatre manager, that the second patient on the list for 19 June 2023 could not come off bypass else they would die as a result of not having the necessary equipment available (namely dacron grafts)".* At the start of this hearing, on Day 1, the Claimant altered her position on this issue. She said that this alleged disclosure did not take place on 20 June 2023 but rather 21 June 2023.

91. The Tribunal finds that this discussion between the Claimant and Suzanne Joynes did not happen. Suzanne Joynes gave evidence, which we accept, that she was away from The Park Hospital until late in the day on 21 June and she did not see the Claimant. We note that as she was away from The Park Hospital she could not have seen the Claimant in the morning. Suzanne Joynes indicated that she may then have attended at The Park Hospital later that day. However, later that day the Claimant was on pre-arranged annual leave. Indeed, such fact is apparent from paragraph 30 of the Claimant's witness statement. There was, therefore, no opportunity for a discussion between the Claimant and Suzanne Joynes on 21 June 2023. On this point we accept Suzanne Joynes's evidence over that of the Claimant. We found Suzanne Joynes on this point to be credible and reliable. On this point we did not find the Claimant's to be reliable as her version of when this discussion took place has changed as the proceedings have progressed. In addition, the Facebook Messenger conversation between the Claimant and Suzanne Joynes of 22 June 2023 indicates that they had not had an opportunity to catch up by that point in time. In sum, in respect of Issue 3.1.1 we find that there was no disclosure of information in the alleged terms on 21 June 2023.

92. We then move to protected disclosure 3.1.2. In the List of Issues this is relied on in the following terms, "*This was repeated to Suzanne Joynes on 22 June by text message"*. For this alleged protected disclosure we have the benefit of the message in question. The message in question is in the bundle, starting at page 173. After looking at that message, we have concluded that it does not support the Claimant's assertion that information regarding the second patient on the list not being able to come off a bypass or dying was contained in that message. The disclosure of information that the Claimant alleges was simply not conveyed to Suzanne Joynes by means of that message. Instead, the message is primarily concerned with the Claimant's health and her concerns about her future shifts. There is simply no disclosure of information in the terms asserted by the Claimant in that message. In respect of Issue 3.1.2 we find that there was no disclosure of information in the terms alleged by the Clamant in the message she sent to Suzanne Joynes on 22 June 2023. This was not a qualifying disclosure.

93. We shall deal simply and briefly with issues 3.1.3 and 3.1.4. Mr Ramsbottom for the Respondent accepted, during the course of the hearing and in submissions that items 3 and 4 are protected disclosures. As the Respondent has conceded they are protected disclosures we intend to say no more about them.

94. We now consider Issue 4 which effectively deals whether or not the Claimant suffered a detriment and, if so, whether those detriments were as a result of the Claimant

having made a protected disclosure(s).

95. We have been asked to consider the following,

> *"Did the respondent do the following things:*
>
> *4.1.1 Extend the claimant's probation on 12 July 2023;*
>
> *4.1.2 Fail to pay the claimant company sick pay for the period 23 June 2026 to 21 July 2023; and*
>
> *4.1.3 Accuse the claimant of whistleblowing on 14 July 2023."*

96. Did the Respondent extend the Claimant's probation on 12 July 2023? Our answer to that is yes. We have already dealt with this and said that Suzanne Joynes incorrectly extended the Claimant's probation on that date when she should not have done. The Claimant's probationary period had already ended on 12 June 2023. That was a detriment.

97. We also need to consider whether or not the Respondent failed to pay the Claimant Company sick pay for the period 23 June 2023 to 21 July 2023?. Our answer to that is also yes. The effect of Suzanne Joynes extending the Claimant's probationary period meant that the Respondent took the view that no company sick pay was due to the Claimant. The Respondent should not have taken such an approach. The Claimant's probationary period had already ended on 12 June 2023 and so, company sick pay was due to her. The failure to pay was a detriment.

98. Finally, did the Respondent accuse the Claimant of whistleblowing on 14 July 2023? We have already dealt with this in our findings of fact but to reiterate we do not find any evidence that Amanda Dorkes accused the Claimant of being a whistleblower during the meeting that took place between the two of them on 14 July 2023. On that, we prefer the evidence of Amanda Dorkes over the Claimant. She gave credible and reliable evidence, especially whilst being cross-examined, about the events of 14 July 2023.

99. We now consider whether any of the detriments suffered by the Claimant were done on the ground that she made a protected disclosure? We conclude that neither the extension of the claimant's probation on 12 July 2023 or the failure to pay her company sick pay for the period 23 June 2026 to 21 July 2023 were done on the ground of her having made a protected disclosure. The reason the Claimant's probation was extended and the reason she was not paid sick pay was ultimately because of poor management. Briefly, this was because Kelly Holbrook failed to undertake any reviews or induction with the Claimant and did not follow the relevant procedures. We have already stated this but we say again that when Suzanne Joynes took over the line management responsibility of the Claimant, she sought advice from HR on this issue and was poorly advised to extend the probation period. There was no reason to extend the Claimant's probationary period. No concerns had been raised about the Claimant's performance and in fact the Claimant appears to have been good at her job. The effect of this is that the Claimant should have been paid Company sick pay as she was outside the probationary period by the point of her relevant absence. However, those two detriments were both due to poor

management and had nothing to do with the Claimant's protected disclosures. In respect of the Claimant's disclosures to Suzanne Joynes on 29 June 2023 and 12 July 2023, the concerns the Claimant raised were heard and listened to sympathetically by Suzanne Joynes. The Claimant has failed to provide sufficient evidence of any causal link between the protected disclosures in question and the detriments in question. The claim for whistleblowing detriment is therefore not well found and is dismissed.

100. We now turn to the claim for unauthorised deductions or in the alternative breach of contract. We have been asked, first of all, was the Claimant entitled to receive Company sick pay for the period 23 June to 12 July 2023. Our answer to that is yes. The Claimant should clearly have received Company sick pay for that period. She was by that point outside the probationary period and also both of the Respondent's witnesses conceded during questions by the Tribunal that had the same thing happened today she would have been paid Company sick pay. The Respondent then failed to pay that sum to the Claimant. The claim for unauthorised deductions is well founded and the Claimant is entitled to receive an amount of sick pay between the period of 23 June to 12 July 2023 in accordance with Respondent's Company Sick Pay Policies.

101. In respect of remedy for the unauthorised deductions from wages complaint both parties agreed that, because of clause 10.3 of the Company Sick Pay Policy, the Claimant should have received 2 weeks' company sick pay. The Tribunal therefore orders that within 28 days the respondent shall pay the claimant £1226.40, which is the gross sum deducted. The claimant is then responsible for the payment of any tax or National Insurance.

102. That is the decision of the Tribunal. In summary the claims for unfair dismissal and whistleblowing detriment are dismissed. The claim for unauthorised deductions from wages succeeds. As the claim for unauthorised deductions succeeds, there is no need for us to consider the breach of contact complaint brought in respect of non-payment of Company Sick Pay.

Approved by Employment Judge McTigue

Date: 14 May 2025

JUDGMENT SENT TO THE PARTIES ON:

……19 May 2025……

……

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