

Neutral Citation Number: [2026] EAT 150

Case No: EA-2023-000660-KSD

EA-2023-000856-KSD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1st October 2026

Before:

HIS HONOUR JUDGE AUERBACH
(DEPUTY PRESIDENT)

Between:

MISS ROSE SOUTHAM

Appellant

- and -

BERKSHIRE HEALTHCARE NHS FOUNDATION TRUST

Respondent

Mark Greaves (instructed by the Free Representation Unit) for the **Appellant**
Andrew Allen KC (instructed by DAC Beachcroft LLP) for the **Respondent**

Hearing date: 15 September 2026

JUDGMENT

SUMMARY

PROTECTED DISCLOSURES; PRACTICE AND PROCEDURE

The claimant claimed to have made multiple protected disclosures during the course of her employment and to have been subjected to multiple incidents of detrimental treatment on grounds of having done so. She also complained that she had been constructively unfairly dismissed.

The claimant was found by the tribunal, in original and reconsideration decisions, to have made three protected disclosures, but the detrimental-treatment and unfair-dismissal complaints all failed.

The tribunal erred in its reasoning as to why two additional claimed protected disclosures were not protected disclosures. But this did not affect the outcome, because all of the complaints of detrimental treatment either predated those claimed disclosures, or failed because the claimed treatment was found not to have factually occurred and/or not to amount to detrimental treatment, or because the tribunal had made positive findings about the reasons for such treatment which left no room for a finding that it was also materially influenced by those further claimed disclosures.

The appeals against the original and reconsideration decisions are dismissed.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal was employed by the respondent from August 2015. From January 2017 she worked as a Lead Referral Coordinator in the Integrated Care Team in Wokingham. On 11 March 2019 she gave four weeks' notice of resignation, taking effect on 11 April 2019. Thereafter she presented an employment tribunal claim, acting as a litigant in person.

2. The matter came to a multi-day full hearing in Reading in March 2023 before EJ Gumbiti-Zimuto, Mr A Kapur and Mrs B Osborne. The claimant represented herself. The respondent was represented by Andrew Allen KC. The tribunal produced a reserved written judgment and reasons running to 39 pages. It identified that the claimant had complained that she had made multiple protected disclosures and been subjected to various detrimental treatment on the grounds of having done so. She also claimed that she had resigned in circumstances amounting to constructive dismissal, and complained of unfair dismissal for the reason, or principal reason, that she had made protected disclosures, alternatively that she was ordinarily unfairly dismissed.

3. The tribunal dismissed all of those complaints. In summary, it found that, of the multiple claimed protected disclosures, the claimant had, in fact and law, made two protected disclosures, numbered PD1 and PD2. However, all of the complaints of detrimental treatment by reason of protected disclosure failed on the basis, variously, that the alleged treatment did not factually occur, did not amount to detrimental treatment and/or was not on grounds of the protected disclosures. There was also no treatment amounting, or contributing cumulatively, to a breach of the implied duty of trust and confidence. Accordingly, the claimant was not constructively, nor unfairly, dismissed.

4. Both the claimant and the respondent applied for reconsideration. The respondent raised that the decision overlooked three further claimed protected disclosures that had been added at a late stage. In its reconsideration decision, the tribunal considered those, finding that one of them (only) had been

a protected disclosure, but that the claimant had not been subjected to any detriment because of it. Otherwise, the reconsideration applications were dismissed.

The Appeals

5. The claimant appealed against the substantive and reconsideration decisions. Each appeal was considered on paper not to be arguable. The claimant requested a rule 3(10) hearing. That came before me in March 2025. The claimant represented herself. I directed two grounds, only, to proceed to a full appeal hearing. In the summary reasons attached to my order I identified them as follows.

“(1) It is arguable that the tribunal erred in respect of PD16, considered at paragraphs 126 to 129 of the liability decision, as the Appellant contended that the disclosure to Ms Williams was made not just by the email (which was considered there) but also in a discussion with Ms Williams in which she said she gave more information about her colleagues’ concerns. This is also arguable having regard also to the contents of the Appellant’s note of the meeting at which she said colleagues had raised the concerns.

(2) The Appellant contended at the rule 3(10) hearing that her note of 14 December 2017 should have been regarded as evidencing certain of her disclosures which the tribunal did not find to be sufficiently evidenced. I did not however have sight of this note, and the Appellant was not able successfully to extract it and get a copy of it to me in the course of this hearing. I note also that in the course of its decision the tribunal indicated that it looked at this note in respect of a number of the claimed disclosures, but did not find that it supported them. Nevertheless, I was prepared to allow this ground to proceed alongside the other ground, but the Appellant must comply with paragraph 4 of my order in that regard.”

6. At this appeal hearing Mark Greaves of counsel appeared for the claimant. Mr Allen KC appeared again for the respondent. Both agreed at the outset that the live grounds challenged only the original decision, so that I should dismiss the appeal against the reconsideration decision. My order arising from the rule 3(10) hearing had required the claimant to provide a copy of the 14 December 2017 note, which she had done. It had also required her to identify in respect of which claimed protected disclosures ground 2 was advanced. Mr Greaves confirmed in his skeleton argument, and at the hearing, that it was advanced (only) in respect of those labelled PD3, PD9 and PD12. In the course of argument, the scope of the challenge to the outcomes of the liability decision was also further clarified, and considerably further narrowed, in the following respects.

7. First, Mr Greaves confirmed that the claimant was only contending that the live grounds of appeal affected the outcome of certain of the individual complaints of detrimental treatment during

employment on the grounds of protected disclosures. It was accepted that the conclusions that the claimant was not constructively unfairly dismissed (whether ordinarily or automatically) could not be disturbed by the outcome of this appeal.

8. Secondly, Mr Allen KC contended in his skeleton argument that this appeal could not affect the outcomes of those complaints of detrimental treatment which had failed because the tribunal had found that the alleged treatment did not factually occur, and/or that the conduct which did occur did not amount to subjecting the claimant to a detriment. None of those findings were challenged by this appeal. Further, of the remaining alleged detrimental treatment, the one labelled D9.1 occurred in point of time prior to the dates of the claimed PDs that were the subject of this appeal. It could not possibly be found to have been on grounds of claimed protected disclosures which had yet to happen.

9. Mr Greaves confirmed that he accepted those points and that Mr Allen KC was also correct to submit that therefore what I will call the longlist of complaints of detrimental treatment that might be affected by this appeal was confined (at its highest) to those labelled D2, D9.2, D22 and D23.

10. In oral argument Mr Allen KC then went further, identifying a point about the scope of the pleaded complaints before the tribunal that arose in the following way.

11. Subsequent to the original claim, in the course of the litigation the claimant had tabled a lengthy document giving particulars, in tabular form, of each claimed protected disclosure, and each claimed instance of detrimental treatment on grounds of having made one or more protected disclosures, on which she now sought to rely. At a case-management hearing in 2020 she had been permitted to amend her claim to adopt that particulars document. In the course of further pre-trial case-management a list of issues had been produced. That list included three further claimed protected disclosures, which the claimant was permitted to add in 2022 by further amendment.

12. At the full merits hearing, the tribunal agreed to work off the more detailed particulars set out

in the claimant's particulars document, and not just the list of issues. This is referred to in the tribunal's decision at [78]. It is also reflected in the sub-headings of the concluding sections of the tribunal's decision, in which it described each claimed protected disclosure or claimed conduct by way of detrimental treatment in wording which shadowed closely (with some paraphrasing) the wording used in the particulars document. (Mr Allen KC observed that the three further PDs that were addressed in the reconsideration decision were not in the particulars document, as they had been added later, which was perhaps why the tribunal had missed them in the original decision.)

13. Against that background Mr Allen KC, in oral argument, noted that, in the particulars document, the claimant had specifically identified, for each claimed instance of detrimental treatment, *which* particular claimed protected disclosures were said to have influenced that particular treatment. That was also captured in the list of issues. Of the four instances of detrimental treatment on what I have called the longlist, D22 and D23 were each claimed to have been done on grounds of claimed protected disclosures which did *not* include those that were the subject of either live ground of appeal, being PD3, PD9, PD12 and PD16. Accordingly, the outcome of this appeal could not make any difference to the outcome of complaints D22 and D23. Further, D2 and D9.2 were each claimed by the claimant to have been influenced by PD3 and PD9, but not by PD12 or PD16.

14. Putting it all together, Mr Allen KC submitted that ground 1 (which related only to PD16) could not disturb the outcome of any of the complaints that had failed, and ground 2, at its highest, could only disturb the outcome of D2 and D9.2, and then only if the tribunal had erred as alleged by that ground in respect of claimed PD3 and/or PD9, and only if it were also then to be found that either or both of those was a protected disclosure, on grounds of which D2 and/or D9.2 had occurred.

15. Mr Greaves, in response to those further submissions, accepted the correctness of Mr Allen KC's analysis. He accordingly accepted that ground 1 could not be maintained and fell away, that ground 2 could only be maintained in relation to PD3 and PD9, and that the outcome of that ground

could only possibly have a bearing on the tribunal's decision to dismiss D2 and/or D9.2.

16. I observe that the foregoing concessions made by Mr Greaves were, in my judgment, entirely correctly made. With that preamble complete, I can now turn to consider the substance of the surviving ground, ground 2, in light of its scope having been agreed as I have set out.

Discussion

17. As I have set out, ground 2 now asserts that the tribunal erred by failing to treat the claimant's note of 14 December 2017 as evidencing PD3 and PD9.

PD3

18. As to the relevant part of PD3 the tribunal's material findings and conclusions were these.

19. Elaine Williams was the respondent's Freedom to Speak Up Guardian [21]. At [22] the tribunal described the Guardian as:

"...intended to be someone who is independent and impartial; who can ensure that the focus is on the safety issue that has been raised, who can make sure that it is properly investigated and addressed if appropriate; and who can ensure that there are no repercussions for the person who drew attention to it."

20. At [26] – [28] the tribunal said this:

"26. On the 1 December 2017, the claimant met with Trevor Lyalle, the Patient Advice and Liaison Service (PALS) Manager and raised some concerns about the Intermediate Care Team referrals not being actioned and that she felt unable to raise issues with her line manager. It was arranged that the claimant speak with Ms Williams on 8 December 2017. On 14 December 2017 the claimant sent an email to Ms Williams attaching a note setting out some of the matters that the claimant discussed with Ms Williams (p581).

27. On 05 January 2018 the claimant met with Ms Williams and Mr Sloan. The purpose of the meeting was to discuss the claimant's list of patient safety concerns. The meeting lasted over an hour. Mr Sloan went through each of the claimant's concerns discussing the issues with the claimant. Mr Sloan has no recollection of the detail of the meeting, Ms Williams states that at the end of the meeting the claimant was satisfied by what she had been told. The claimant however is more critical about the meeting. The claimant says that Mr Sloan refused to accept that the concerns were genuine; that nothing could be done because there were no additional resources available and that some of the concerns were "already being "addressed"; the claimant says that the issues raised were being 'swept under the carpet'; that no action was taken, and there was no follow up by Ms Williams, despite the claimant reminding her on several occasions.

28. The Tribunal note that there is no contemporaneous record of the claimant's unfavourable impression of the meeting or any evidence of the claimant chasing up anything arising from the meeting or making any complaint about the meeting. There is an email exchange between the claimant and Ms Williams in which the claimant expresses satisfaction with the outcome of "our recent discussion", but it is not clear whether this is a reference to the meeting on the 5 January or

another discussion with Ms Williams. In answer to questions by the claimant Mr Sloan stated that he would have dealt with any concerns that were raised with him, he would have expected his managers such as Mr Guggilapu or Ms Andrew to deal with specific issues. Mr Sloan stated that he would have welcomed people raising issues as that allows him to improve the service, he denied that he would have subjected the claimant to a detriment because she raised concerns and pointed out that the concerns that the claimant was raising would in many instances be concerns, he was already aware of because other people would have also been raising concerns. The claimant did not specifically address the meeting on 5 January 2018 in her questions for Mr Sloan. The conclusion of the Tribunal is that at the time the meeting took place the claimant did not express complaint about the way that the meeting on 5 January 2018 was dealt with by Mr Sloan, we consider that it is more likely than not that as Ms Williams stated in her evidence that the claimant expressed satisfaction with the way that the meeting went on the 5 January 2018.”

21. I interpose that Mr Sloan was the then Head of Service. Mr Guggilapu was the claimant’s then line manager. Ms Andrews was at the time the Integrated Care Home Service Manager.

22. The information claimed to have been disclosed by PD3, as set out in the claimant’s particulars document, in particular to Ms Williams on 14 December 2017 and then at the meeting with Mr Sloan (and Ms Williams) on 5 January 2018, was:

“Clinicians prioritizing meetings and administration leading to capacity being called, resulting in patients’ care being given a lower priority and increased avoidable hospital admissions.”

23. The relevant “wrongdoing” (to use the shorthand common in the authorities) on the list in section 43B(1) **Employment Rights Act 1996** was said to be endangerment of health and safety and/or failure to comply with legal obligations ((d) and (b)). The part of the 14 December 2017 document relied upon as evidencing PD3 is a bullet point reading:

“RRAT team, prioritizing admin to seeing new patients, patients have been seen within 3 hours as opposed to 2 hours.”

24. PD3 also referred to claimed disclosures on other occasions, including to Mr Guggilapu, but this appeal is only concerned with the foregoing claimed disclosures to Ms Williams and Mr Sloan.

25. In its decision the tribunal, after setting out the substance of claimed PD3, said:

“92. The document that set out what the claimant contends was discussed in her meeting with Mr Sloan on 5 January 2018 shows that one of the matters discussed was the concern that clinicians prioritised meetings and administrative tasks which lead to capacity being called (p581). The email of 25 April 2017 points to a potential complaint on behalf of patient of Dr Singh. Mr Guggilapu has no recollection of the specific context in which the email exchange relied on by the claimant took place on the 25 April 2017.

93. On the evidence before us it is not clear what the context of the conversations that the claimant was having with Mr Sloan and Mr Guggilapu were. Mr Sloan and Mr Guggilapu do not recall, and the claimant does not set out what was said and or not said beyond a headline topic. There is no evidence that the contended disclosure was made to anyone else. To be a protected disclosure, the disclosure must satisfy three conditions. It must be a qualifying disclosure, one that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of the six relevant failures has occurred or is likely to occur. It must be made, as relevant to this case, to the employer. The evidence does not allow us to conclude that there was a qualifying disclosure.”

26. Mr Greaves submitted that there was no dispute, and the tribunal found, that what the claimant claimed to have said by way of PD3 was indeed imparted to Mr Sloan at the 5 January 2018 meeting. Despite that, the tribunal had stated at the end of [93] that “the evidence does not allow us to conclude that there was a qualifying disclosure” without explaining the reasons for that conclusion. This was not *Meek*-compliant; alternatively, given the finding as to what had been said to Mr Sloan, it was perverse. He relied for support on the tribunal’s finding that PD2 *was* made, that being the reporting of an unsafe referral processing system, among other occasions, to Mr Sloan at the same meeting. He submitted that PD2 and PD3 were in closely related factual territory.

27. Mr Allen KC referred to his closing written submissions to the tribunal, to the effect that calling capacity is a patient safety *measure*, not a patient safety *concern*, and that it is not reasonable to believe that raising a concern about calling capacity tends to show a breach of a duty of care to patients, for whom other avenues of support would be available. He also queried whether the ground could be treated as embracing an issue of *Meek*-compliance. But in any event he submitted that the bullet point in the 14 December 2017 document on which the ground relied made no reference to calling capacity. The claimant had not explained to the tribunal how the content of the bullet point itself evidenced a protected disclosure. The tribunal was entitled to conclude that it did not.

28. My conclusions on these aspects follow.

29. As Sales LJ (as he then was) explained in **Kilraine v London Borough of Wandsworth** [2018] EWCA 1436; [2018] ICR 50 at [35], the concept of “information” in the definition of a qualifying disclosure has to be read as part of the phrase “which tends to show, etc.,” so that, in order

for a disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity such as is capable of tending to show one of the types of “wrongdoing” listed in section 43B(1) – or, dare I say, more precisely, capable of being reasonably believed to tend to show that.

30. I do not think that the tribunal’s conclusion on PD2 lends any weight to this challenge. As I read it, the nub of PD2 was that the service was accepting referrals which it did not have sufficient overall capacity to handle safely. The nub of PD3 was distinct. It was that clinicians were giving priority to administration, over the care of patients, leading to increased avoidable admissions.

31. As to PD3 itself, the tribunal found at [92] that the 14 December 2017 document evidenced that this subject was discussed at the meeting. That clearly followed from its findings that, at that meeting, Mr Sloan went through the claimant’s list of safety concerns with her. But [93] does not sufficiently explain why the tribunal then concluded that the evidence “does not allow us to conclude that there was a qualifying disclosure”. While it said that the claimant had only raised the “headline topic”, that does not engage with the fact that the bullet point asserted that the prioritising of administration was resulting in new patients taking longer to be seen. The statement that it was not clear what was the context of the meeting with Mr Sloan also calls for some explanation, given the findings that the tribunal had made at [26] – [28] about the chain of events leading up to it, and the discussion at it. Nor does [93] explain why the tribunal considered the lack of context to be material, nor which elements of the definition of a qualifying disclosure were not evidenced.

32. I consider that the ground embraces the contention that, in light of the content of the 14 December 2017 document (and its findings that they were communicated to Ms Williams and Ms Sloan) the tribunal was either simply wrong to conclude that this claimed protected disclosure was “not evidenced” or did not sufficiently explain that conclusion. Mr Allen KC was able to, and did, respond to both ways of putting it.

33. It does not follow, however, that the tribunal could not properly have concluded that this

disclosure did not satisfy all the elements of a qualifying (and protected) disclosure. Subject to my consideration of further issues about whether this error made a material difference to the outcome – to which I will shortly come – this issue, and any consequential issues, therefore *potentially* fall to be remitted to the tribunal for fresh consideration.

PD9

34. The substantive disclosure made in PD9, as set out in the particulars document, was said to be that the claimant:

“Reported inadequate training for therapy assistants and locum, leading to (1) staff not being able to provide personal care and meet patients’ care needs. This led to patients being put at risk (2) Locum staff leaving patients’ assessments unfinished, unable to upload patients’ information on the system, not able to discharge and send discharge letters to GPs and patients.”

35. This disclosure was claimed to raise a serious safeguarding issue and a risk to patients’ health and safety. Sections 43B(1)(d) and (b) were once again relied upon.

36. The bullet point in the 14 December 2017 letter relied upon to evidence PD9 read:

“Staff induction is very poor, locums are shown round and the rest they are expected to figure it out,. Locum physio not knowing how the process works and they go out there without assessment paperwork, don’t know how to upload documents onto Rio and administrators ending up showing them what to do. Induction process with the RRAT and Rapid Nurses also not completed and they make mistakes like rejecting referrals without knowing the process to follow and when asked they say no one has told them what to do.”

37. In its decision, after setting out the gist of PD9 at [104], the tribunal began [105]:

“The claimant’s witness statement does not contain any evidence setting out the circumstances in which this protected disclosure is made by the claimant. The matter is not referred to in the document attached to the 14 December 2017 email. ...”

38. After referring to the evidence of various of the respondent’s witnesses, the tribunal concluded paragraph [105] that the evidence **“fails to establish that there was a protected disclosure as alleged by the claimant.”**

39. Mr Greaves submitted that the tribunal was simply wrong to say that PD9 was not referred to in the 14 December 2017 letter. At the very least this statement was not *Meek*-compliant; alternatively

it was perverse. Mr Allen KC submitted that the tribunal was correct in what it said at [105], as the 14 December 2017 document made no reference to an inability to provide patient care or patients being put at risk, nor to not sending discharge letters nor to a safeguarding issue. The claimant had also not explained to the tribunal how the bullet point in that letter amounted to PD9. The tribunal was entitled to conclude that there was no protected disclosure.

40. I consider that it was, at least, a material error for the tribunal to say that the matter said to have been raised by PD9 was not referred to in the 14 December 2017 letter, given the content of the bullet point in question and the substantial overlap between it and the information that the claimant claimed was the subject of PD9 (and given its findings that, as well as that document being emailed to Ms Williams, the issues raised in it were discussed at the meeting with Mr Sloan). Once again, given the findings that had been made, about the chain of events leading up to that meeting, and what was discussed at it, the comment about the lack of evidence of the “circumstances” of the disclosure also at least calls for some further explanation.

41. Once again, I conclude that the tribunal did err as contended by this ground, in relation to PD9, though I cannot say that it would not have been open to it to conclude that all the necessary elements of a qualifying and protected disclosure were not made out. Once again, subject to my consideration of whether this error made a material difference to the outcome, this issue, and any consequential issues, therefore *potentially* fall to be remitted to the tribunal for fresh consideration.

Could the tribunal’s errors make a difference to the outcome?

42. As I have described, Mr Greaves accepted during the course of oral argument that the only complaints of detrimental treatment that could possibly now be affected by the outcome of this appeal were D2 and D9.2. Mr Allen KC went further. He submitted that, even if the tribunal erred to some extent as contended by ground 2 as it now stands, there was no realistic prospect that this could have made a difference to the tribunal’s conclusions in relation to D2 or D9.2. The appeal should therefore

in any event be dismissed. Mr Greaves submitted that I was not in a position to conclude that any errors could not have made a material difference to the outcomes of D2 or D9.2, and so I should remit further consideration of the relevant issues to the same tribunal panel. Before considering the arguments further, I need to set out the subject-matter of those two complaints, and the tribunal's findings and conclusions in relation to them.

43. As to D2, the treatment complained of was identified in the particulars as being:

“Victimised by being denied mandatory 1:1 6-weekly supervision, postponed and cancelled on a continual basis I had a total of 4 supervisions as shown for 2 years and 3 months.”

44. The case advanced at the tribunal hearing was that the individual who had so acted was Allyson Maciw. She had, in autumn 2017, being promoted to the role of Lead Care Co-Ordinator.

45. At [31] the tribunal found:

“When Ms Maciw became responsible for the claimant’s supervision and appraisals it was agreed that Ms Maciw would carry out the claimant’s 1 to 1 supervision every 6 weeks. This in fact did not happen in practice. The claimant and Ms Maciw sat opposite each other and the claimant was able to raise matters with Ms Maciw as they arose. On some occasion when 1 to 1 supervision session should have taken place they did not because Ms Maciw’s work load did not allow on other occasions the claimant indicated that she did not wish to have one.”

46. The tribunal’s conclusions in relation to D2 were as follows:

“140. Ms Maciw got the job that the claimant had also applied for. Prior to Ms Maciw’s appointment in the role of Lead Care-Coordinator she was in the role of Lead Referral Coordinator, i.e. the same role as the claimant.

141. The claimant and Ms Maciw sat opposite each other in the office and issues were dealt with between them as they arose. Although it was agreed that they would have 6 weekly 1:1 supervision sessions this did not take place because Ms Maciw had a heavy workload and on some occasions because the claimant indicated in verbal exchanges with Ms Maciw that she did not want one.

142. We are satisfied that any disclosure made by the claimant at PD1 and PD2 was not connected to the failure to carry out the weekly supervision sessions. Ms Maciw and the claimant had a difficult relationship, there were problems related to the claimant providing cover for Ms Maciw when she was away. Ms Maciw stated that she was uncomfortable with the claimant because of her behaviour there was no connection to the claimant making disclosures.”

47. As to D9.2 the treatment complained of concerned the claimant’s unsuccessful application, in early 2019, for secondment to the role of Complaint Manager. The salient findings of fact were:

“40. On 23 January 2019 the claimant made an application for secondment to the role of Complaint Manager. She completed an expression of interest form and sent her CV to Elizabeth Chapman. Ms

Chapman replied to the claimant on the 25 January 2019 thanking her for expressing an interest in the role and telling her that she was *“looking at 4 February to invite people in for an informal interview and chat about the role”*. To which the claimant replied that she was *“flexible and can do either morning or afternoon”*, resulting in a further response from Ms Chapman in which she stated that *“it will be in the morning between 9am and 12.30. I will confirm with you on Thursday if that is ok”*.

... ..

45. On 1 February 2019 Ms Chapman wrote to the claimant and told her she would not be inviting the claimant for an interview for the secondment to the Complaint Manager position. The change in attitude to the claimant’s application is explained by Ms Chapman in her witness statements as follows:

“At some point between 25 January 2019 and 1 February 2019, I was working in the same room at the Trust as a colleague, Jane Summers. I had known Miss Summers a long time: she had previously worked for the CCG but at the beginning of 2019 she was working for the Trust as Assistant Patient Safety & Compliance Manager. Miss Summers mentioned to me that she was looking to leave her role in the Patient Safety team and she had seen the advertisement for the Complaints Manager role: Miss Summers said she could be available for the secondment and would be able to hit the ground running. This was because Miss Summers had literally done the Complaints Manager role at the Trust before. A few years previously, in 2014, the Complaints Manager role had been vacant for a few months (the substantive post holder was on long term sick leave for about 11 months), then was on a phased return when she came back to work: during that phased return from 11 March 2014 to June 2014 Miss Summers covered the Complaints Manager role for two days per week as an agency worker. Prior to that, Miss Summers had also undertaken the Complaints Manager role from December 2012 until 2013: at that time, Miss Summers had undertaken the role on an interim basis because the Complaints Manager had taken early retirement on 13 December 2012 and the Trust had not yet recruited a replacement. In short, Miss Summers was very experienced in the role (she had also previously been the Complaints Manager for Berkshire East), knew how we worked in the department and I had confidence that she was proficient in the style of writing used in patient experience roles.”

Despite indicating to the claimant, a date and time for a potential interview and then entirely failing to follow a fair and objective assessment process for the role of Complaint Manager Ms Chapman states that the claimant *“was not appointable due to a lack of essential experience”*. The claimant set out that she was a Champion in her CV, however Ms Chapman denies that she was aware of the claimant’s alleged protected disclosures and we find that there is no evidence that the claimant’s alleged protected disclosure were known to Ms Chapman.”

48. The tribunal’s conclusions on D9.2 were as follows:

161. The claimant also applied for the role of Complaints Manager. This was a temporary role to cover a maternity leave. The recruitment was clumsily handled by Ms Chapman. It was in some respects a paradigm of how not to carry out a recruitment process. However, Ms Chapman’s incompetence was not connected to the claimant’s disclosures.

162. The claimant raised a number of concerns with Mr Layle in December 2017. Mr Layle would have discussed matters with Ms Chapman including PD2. However, by the time that the claimant was applying for the role of Complaints Manager, Ms Chapman was not aware of the claimant being a “whistleblower”. The fact that the claimant was not considered for the complaints manager role was not related to the claimant having made protected disclosures.

163. The claimant was entitled to believe that any application for promotion within the respondent would be treated fairly and given proper consideration. Mrs Chapman insists in her evidence to us that the claimant did not have relevant experience for the role and so would not have been able to do the full scope of the role from the start without training in the role of limited duration. The claimant’s response to the unsuccessful application was to send an email to Ms Chapman saying: “Thank you”.

164. The poor way in which the claimant's application was treated was not related to her protected disclosures. Ms Chapman did not know that the claimant had raised concerns and she made her decisions based on the claimant's lack of experience for the role. Regrettably it was implicated by the manner in which Ms Chapman handled the claimant's application, nonetheless we do not consider it was because of a protected act."

49. As to D2, Mr Allen KC submitted, in summary, that the tribunal had positively found that the failure to hold six-weekly supervision meetings had come about for a number of what he called non-whistleblowing reasons. Accordingly, even were there to be a fresh decision holding that PD3 and/or PD9 were protected disclosures, there was no possibility of that leading to a finding that D2 had occurred on grounds of either or both such disclosures.

50. Similarly, as to D9.2, he submitted that the tribunal had, once again, made positive findings as to why Ms Chapman had decided not to proceed to interview the claimant for the secondment post. While the tribunal at [142] specifically set out its conclusion as to whether Ms Chapman's conduct was because of PD1 or PD2, that conclusion was supported by broader general findings as to the positive reasons for her conduct. Further, he submitted, it had found, in terms, at [45], that she was not aware of the claimant having made any "alleged" protected disclosures.

51. As to D2, Mr Greaves noted that it is sufficient to a detriment complaint that a protected disclosure materially influenced the conduct in question. The tribunal's findings did not necessarily provide a complete explanation or set of explanations for why six-weekly supervisions had not taken place. The tribunal had itself referred at [142] to Ms Maciw being "uncomfortable" with the claimant because of her "behaviour". I was not in a position to say that the tribunal had made findings that necessarily precluded PD3 and/or PD9 (if found to be protected disclosures) being found to have materially influenced this conduct.

52. As to D9.2 Mr Greaves accepted that, read by itself, what the tribunal said at [45] would support the conclusion that Ms Chapman could not properly be found to have been influenced by PD3 or PD9, if found to be protected disclosures; but, he argued, what the tribunal said at [162]

appeared to contradict that earlier finding that she knew nothing of any disclosures. There, the tribunal seemed to be accepting that she had known in December 2017 about PD2; and the matters discussed had *included* PD2. Further, the statement that “by the time” the claimant was applying for the role in question Ms Chapman “was not aware” of her being a whistleblower, called for some explanation of how that could be, given what had been found about what she knew in December 2017.

53. My conclusions on these aspects follow.

54. As always, the tribunal’s findings, and the way that it expressed itself, must be read and understood fairly, and as a whole, and in the wider context of the overall decision.

55. In relation to D2, the question of fact for the tribunal was why regular six-weekly supervisions did not happen. The claimant’s case was that it was because she had been “victimised” and “denied” regular meetings because she was a whistleblower. The overall sense of the findings at [31] and [141] – [142] is that the claimant was wrong about that, and the explanations were a combination of reasons which Mr Allen KC fairly characterised as non-whistleblowing reasons.

56. I do not think that the references at the end of [142] leave room for PD3 or PD9 to occupy part of the field. In the course of its overall decision the tribunal found that the claimant and Ms Maciw had both done the same job until Ms Maciw successfully applied for the Lead Care Co-ordinator position. The claimant was the runner up and “marginally missed being appointed”. Ms Maciw then became responsible for her supervisions and appraisals. The tribunal described a tricky discussion in one supervision, about mobile ‘phone use [32 – 33]. It found that Ms Maciw failed to carry out a 6-monthly review in December 2018 because, at the time, the claimant was refusing to meet with her [38]. It was alleged that in February 2019 the claimant complained that Ms Maciw had come to work with an infection and given her a cough [68 - 69]. Ms Maciw made a further statement to Mr Guggilapu that the claimant was abrupt and rude in March 2019 [73]. The plain and natural reading is that it was to matters of that sort that the tribunal was alluding at the end of [142].

57. Turning to D9.2, the tribunal's findings of fact at [40] and [45], and its further comments at [161], make clear that it plainly did not think that Ms Chapman had handled the process well. But it plainly also wholly accepted that the reason for Ms Chapman's change in attitude was fully explained by the extended account in her witness statement that the tribunal extracted within [45]. That finding does not leave room for any protected disclosure to have influenced Ms Chapman's decision.

58. The last sentence of paragraph [45] begins with: "The claimant set out that she was a Champion in her CV"; and the continuation: "however Ms Chapman denies..." was a response to that. Elsewhere the tribunal found that the claimant had become a Freedom to Speak Up Champion (the role being to raise awareness of employees about the ability to speak up about concerns), and that, on the balance of probabilities, that was in May/June 2018 [22]. Against that background, the tribunal's point in this sentence was, surely, that, although the claimant included the fact that she was a Champion in her CV when applying for the secondment, that did not make Ms Chapman aware of her alleged disclosures, which she denied. Though it could, no doubt, have been better expressed, I do not read the general sense of [162] as undermining or contradicting what was said at [45]. The tribunal was there referring back to the meeting that the claimant had had with Mr Lyalle back in December 2017 (discussed at [26]). The secondment application was considered by Ms Chapman in January and February 2019, more than a year later. The natural sense is that, whatever she had been told by Mr Lyalle in 2017 would not have caused Ms Chapman to see the claimant as a whistleblower in 2019, and nothing else had occurred up to that point, to make her aware that she was.

59. For all of these reasons, I conclude that the positive findings of fact made by the tribunal about the reasons for D2 and D9.2, read in the context of this decision as a whole, do preclude any possibility of the tribunal now finding that they were on grounds of (claimed) PD3 or PD9. For that reason, although the tribunal did err as I have described, I agree with Mr Allen KC that those errors could not affect the outcomes in respect of D2 and D9.2, whereby both of those complaints failed.

Outcome

60. For all of the foregoing reasons, the live grounds of appeal have not identified any error by the tribunal which undermines its decision to dismiss any of the complaints. The liability-decision appeal is therefore dismissed. The reconsideration-decision appeal is also dismissed.