THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs S Richardson	**AND**	**Northumberland Tyne & Wear NHS Foundation Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields **On:** 15, 16 & 17 May 2017
Deliberations: 23 May 2017

Before: Employment Judge Arullendran **Members:** Ms L Jackson, Mr D Cartwright

Appearances

For the Claimant: Mr Y Bakhsh, Lay Representative
For the Respondent: Mr A Webster of Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Employment Tribunal that the claimant's claim against the respondent for subjecting her to a detriment on the grounds that she has made a protected disclosure pursuant to section 47B(1) of the Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

1 The issues to be determined by the Employment Tribunal were as follows:

1.1 What did the claimant say or write and to whom and when?

1.2 In the communication by the claimant to the respondent was information disclosed which in the claimant's reasonable belief tended to show one or more of the following namely –

(a) the respondent had failed to comply with a legal obligation to which it was subject;

(b) the health and safety of an individual had been put at risk.

1.3 If so, did the claimant reasonably believe that the disclosure was made in the public interest?

1.4 If a qualifying disclosure was made by the claimant to the respondent, does the disclosure amount to a protected disclosure by reason of the manner of the disclosure referred to in section 43C of the 1996 Act?

1.5 If a protected disclosure or disclosures is/are proved, was the claimant, on the ground of any protected disclosure found, subjected to detriment by the respondent in the way she was treated in March 2016 and in other ways between March and October 2016?

1.6 The claimant advances a claim to the Employment Tribunal in a claim form filed on 17 October 2016 relying on an early conciliation certificate on which Day A is shown as 17 August 2016 and Day B 17 September 2016. Was the claim presented before the end of the period of three months beginning on the date of the act or failure to act to which the complaint relates?

1.7 If not, was there a series of similar acts or failures and has the claim been presented before the end of the period of three months beginning with the date of the last of such series of acts or failures?

1.8 If not, was it not reasonably practicable for the claim to have been presented before the end of the period of three months and, if so, has the complaint been presented within such further period as is reasonable?

2 We heard witness evidence from the claimant, Angela Yildiz, Joanne Sharp, Catherine Elliott, Ann Marshall, Julie Green, Paul Courtney and Anthony Quinn. The claimant advised the Tribunal on the morning of the second day that she had a migraine but that she had taken her medication and was able to continue with her evidence. The claimant was asked to inform the Tribunal straight away if she felt unwell and/or unable to continue, however the claimant was able to complete her evidence without incident. We were provided with a joint bundle of documents consisting of 1,148 documents.

3 The claimant was represented by Mr Bakhsh who told the Employment Tribunal that he was a lay representative. He is in the business of providing representation to claimants and is regulated by the Claims Management Regulations. Mr Bakhsk stated that he did not require any assistance from the

tribunal and that he understood the mechanics of and the procedures used by the Employment Tribunal.

4 At the time this case was listed to be heard for 3 days, the Employment Tribunal had been informed that there would be approximately 6 witnesses, however a total of 8 witnesses were called in order to give evidence. Accordingly, the representatives agreed a timetable between themselves for the cross-examination of the witnesses and closing submissions were completed by 4:40pm on the final day of the hearing. At the close of the second day of the hearing, the Tribunal asked the representatives whether it would be possible for them to prepare skeleton arguments to assist with closing submissions, as Mr Bakhsh had fallen behind with the timetable for cross examination. Mr Bakhsh indicated that he would "do [his] best", however on the final day he told the Tribunal that he had not said he would produce a skeleton argument and that he had not written one. When the Judge reminded Mr Bakhsh that he had in fact said that he would do his best, Mr Bakhsh replied that his best was that he had not written a skeleton argument. Therefore, Mr Bakhsh was asked to complete the rest of his cross examination before 3pm (rather than the 1pm as on the timetable) and he was afforded extra time to make oral submissions. As there was insufficient time on the last day of the hearing for the Tribunal to complete its deliberations, the parties were informed that a reserved judgment would be sent to them in the post.

5 The Tribunal had cause to stop Mr Bakhsh in the middle of his cross-examination of Joanne Sharp as he became increasingly aggressive in his manner towards the witness. The Tribunal took into account that Mr Bakhsh is an unqualified representative, however we had to make it clear that his aggressive conduct was inappropriate and that there was no place for it in the Tribunal.

6 The claimant raised a preliminary issue at the beginning of the hearing that there were a number of documents and a policy which she wanted to be admitted into evidence. Judge Hunter had dealt with this matter the previous Friday, however Mr Bakhsh sought to raise the same arguments in front of this Tribunal. The respondent raised no arguments to the admission of the respondent's information security policy, however when Mr Bakhsh was asked by the Judge whether the other documents he was referring to were required for examination in chief or for cross-examination, Mr Bakhsh withdrew his application for the documents to be admitted.

7 **The facts**

The following findings of fact are made on the balance of probabilities:

7.1 The claimant began her employment with Northumberland Tyne and Wear NHS Foundation Trust (the Trust) in July 2013 as a Band 5 Nurse. In March 2014 the claimant was promoted to a Band 6 Nurse within the Community Mental Health Team. The claimant transferred to the Liaison Psychiatric Service as a Band 6 Nurse based at Northumbria Specialist Emergency Care Hospital (NSECH) on 22 February 2016.

7.2 The respondent is a NHS Trust and provides medical services throughout the Northumberland and Tyne and Wear regions. The Trust has a number of different mental health units throughout the regions through which it provides its services. Joanne Sharp became the temporary Team Leader at NSECH on 18 January 2016.

7.3 The claimant entered into some correspondence with her Manager, Joanne Sharp, before she began her employment at NSECH. For example, on 4 February 2016 the claimant sent an e-mail to Joanne Sharp about a conference she wished to attend on 10 May 2016. This e-mail can be seen at page 312 of the bundle. On 8 February 2016 Ms Sharp sent an e-mail to all the staff she was managing, and included the claimant in this correspondence, asking all the staff to submit their annual leave requests for 2016 to 2017 by 29 February 2016. The claimant sent her annual leave request to Ms Sharp on 26 February 2016 and this can be seen at pages 317-318 of the bundle. Ms Sharp considered the holiday request she had received and sent a reply to the claimant on 9 March 2016 (page 333 of the bundle) advising her that her July leave could not be granted, however the claimant's August leave was granted.

7.4 On 13 March 2016 the claimant was working on a dayshift from 9:00am to 5:00pm. Two Bank Nurses were in work on that day, including Sophie Robinson. The claimant completed an assessment of a patient with Ms Robinson and the claimant found that she was unable to complete the word document required at the end of the assessment prior to finishing her shift and she was keen to leave as her husband was waiting for her in his car. Therefore, the claimant agreed with Sophie Robinson that the claimant would leave her login open so Ms Robinson would have access to the respondent's e-mail system as she was unable to access her e-mails on the Trust's system at that time. It is common ground that workers from the South of the Tyne were unable to log in to the respondent's e-mail system, however they could access the patient information system on RIO. Ms Robinson was able to complete the word document on her own login, however she would not be able to e-mail it to the administration team in order to complete the assessment. It is common ground that the respondent's information security policy (page 116-1148 of the bundle) requires that staff must not share their user name or password with anyone and that if a breach of security is recorded under an employee's login the burden of proof would be with the employee to show that he or she is not responsible for the breach (page 1124).

7.5 After arriving home at the end of her shift, the claimant decided to telephone Ms Sharp in order to tell her that she had left her login open for Ms Robinson. Ms Sharp was not on call that evening and she missed the call from the claimant, however the claimant left a message on Ms Sharp's voicemail asking for her to call back. The claimant and Ms Sharp eventually spoke at around 7:00pm that evening. The claimant told Ms Sharp that she felt uncomfortable because she had left her login open in order for Sophie Robinson to complete the patient record and e-mail it in order to make sure that the information was received at the other end.

The claimant said that she thought she had made an unwise decision in doing this because Ms Robinson would have access to the claimant's e-mails and her personal documents and Ms Robinson could send out e-mails from her account without the claimant's knowledge and this could be compromising for her. Ms Sharp replied that she knew about the various IT issues and that they had been placed on the Trust's risk register, however she said that there were processes in place to uphold patient safety. Ms Sharp thanked the claimant for her honesty in bringing this matter to her attention and she went on to say, "I can't say what you have done is OK, because it's not OK, but please don't worry too much about this, we can sort it out". Ms sharp also told the claimant that although she did not know Sophie Robinson particularly well, she was confident that she would not use the claimant's e-mail for anything other than the agreed purpose. Ms Sharp went on to say not to worry about the issue as she would note any e-mails sent from the claimant's e-mail address that evening would not be from the claimant. After completing the telephone conversation, Ms Sharp decided that she would raise this matter with her own Line Manager, Kate Elliott, at a prearranged supervision meeting which was due to take place the following day.

7.6 In paragraph 33 of the claimant's witness statement, she states that she had "standard ordinary interactions" with Ms Sharp between 14 and 22 March 2016.

7.7 On 14 March 2016 Ms Sharp attended a supervision meeting with Kate Elliott. At this meeting she told Ms Elliott that the claimant had left her login open for a Bank Nurse, Sophie Robinson, to use in order to e-mail a patient record and that this was in breach of the information security policy. Ms Sharp made it clear that the claimant had been upset about this incident. Ms Elliott decided that rather than disciplining the claimant for a breach of the information security policy, Ms Sharp should ask the claimant to retake her online information governance training because she wanted reassurance that this incident would not be repeated in the future. Ms Elliott made this decision in accordance with paragraph 9 of the policy which states, at page 1141 of the bundle, "The Trust is committed to developing an open learning culture. It has endorsed the view that, wherever possible, disciplinary action will not be taken against members of staff who report near misses and adverse incidents, although there may be clearly defined occasions where disciplinary action will be taken."

7.8 On 22 March 2016 the claimant attended her first management supervision meeting with Ms Sharp at 11:00am. The meeting took place in the downstairs Liaison Psychiatry Office which was situated in a staff only area. The door to the office had a key on the outside and a turn lock or "snick" on the inside. This room was used by other staff members for meetings and Ms Sharp had been interrupted on a couple of occasions that morning as the team were in the process of moving offices and the meeting room was being used for storage. As the meeting started, Ms Sharp informed the claimant that she wanted to discuss a number of sensitive issues so she got up and placed the snick on the door. It is

disputed between the parties whether Ms Sharp told the claimant the reason for putting on the snick. The claimant asserts that Ms Sharp did not give any explanation at all, however Ms Sharp maintains that she told the claimant that she had put the snick on the door to maintain privacy. Given the uncontested evidence of Ms Sharp that she had been interrupted in the previous meetings she had held that morning, we find that the evidence of Ms Sharp is entirely consistent with the events as described by her and therefore we prefer Ms Sharp's evidence that she did inform the claimant that she wanted to maintain privacy and this was the reason why she had placed the snick on the door. It is common ground that the claimant made no comment about the snick on the door at the time that Ms Sharp locked the door, nor did she make any comment at any point during the meeting. It is also noted that the claimant did not make any attempt to leave the meeting room during the meeting.

7.9 Ms Sharp discussed several issues with the claimant at the supervision meeting. Ms Sharp started the conversation by discussing the issue of 13 March and in particular the telephone conversation in which the claimant had told her that she had left her login open. Ms Sharp said that she had discussed the issue with her Manager, Kate Elliott, and that although it could be dealt with as a disciplinary matter Ms Elliott had decided that the claimant should revisit her online information governance training instead. The claimant said that this was punitive and she was clearly unhappy at having to redo her training. The claimant also said that other people were using each other's logins to access email at work. Ms Sharp then went on to ask the claimant about her career history. The claimant maintains that she was interrogated by Ms Sharp and that the questioning was inappropriate which left her feeling very upset. However, Ms Sharp maintains that she asked similar questions of all the other team members in the supervision meetings that she held with them and that this was merely an attempt to find out about the backgrounds of the employees that she would be managing and to find out if they had any training needs, particularly as the claimant had presented herself as being quite nervous at work. Looking at the questions asked by Ms Sharp, which are listed in paragraph 44 of the claimant's witness statement, they appear to be entirely consistent with a manager finding out about the career history and training needs of an employee. Therefore, we accept the version of events as put forward by Ms Sharp and we do not accept that the claimant was interrogated.

7.10 Ms Sharp says that she then went on to discuss a letter written by the claimant which had combined the details of two separate patients and that this had been raised as an incident on an IR1 form. A copy of the IR1 form, which is at page 310(40) of the bundle of documents does not give any details of which nurse was involved with this incident. There is dispute between the parties as to what happened in the meeting at this point. The respondent argues that the claimant stood up and said "I will do whatever it takes to defend myself. I'm not a woman to be crossed", however the claimant denies making this statement. It is impossible for the Tribunal to make any findings on this point as it is one person's word

against another, particularly as there is no mention of this incident in either the claimant's evidence or the supervision notes taken by Ms Sharp (page 859 of the bundle). In any event, whether this incident took place or not is not central to the legal issues to be determined by this Tribunal.

7.11 At the end of the supervision meeting, both the claimant and Ms Sharp were required to attend a team meeting. The minutes from the team meeting can be seen at page 343 of the bundle. It is common ground that Ms Sharp told the team that "some people" were letting others use their accounts on the Trust's IT system and that this should not be happening. It is also common ground that the claimant's name was not mentioned at this team meeting.

7.12 On 22 March 2013 the claimant sent an e-mail to Ms Sharp asking for her supervision notes and requesting a further meeting to discuss matters (page 337-338). At the same time, the claimant sent an e-mail to Kate Elliott asking for her to contact the claimant in order to speak to her (page 347 of the bundle).

7.13 On 23 March 2016 the claimant tried to contact Ms Sharp by telephone, without success. The claimant then telephoned Ann Marshall who is a Senior Clinical Nurse. The claimant told Ms Marshall of the telephone conversation on 13 March and the meeting of 22 March with Ms Sharp and as a result of this Ms Marshall asked Anthony Quinn, Directorate Manager, to carry out an informal fact finding procedure to see what was going on. This was not done pursuant to a specific policy, but rather as a general informal process.

7.14 The claimant eventually spoke to Ms Sharp on 23 March 2016 and Ms Sharp said that she would arrange a meeting with the claimant and Julie Green, Service Manager for Psychiatric Liaison Services, but that there may be a delay due to holidays. The claimant agreed to this and said that she wanted to move forward in a positive way.

7.15 On 28 March 2016 the claimant returned to work from annual leave and e-mailed Ms Sharp asking for a copy of her supervision notes.

7.16 On 1 April 2016 Kate Elliott spoke to the claimant on the telephone and they agreed to meet on 4 April.

7.17 On 4 April 2016 the claimant met with Kate Elliott. The claimant told her that Ms Sharp was being difficult with her about her annual leave request and that she felt nervous about being alone with Ms Sharp. The claimant said that she did not feel safe with Ms Sharp. The claimant gave Ms Elliott her account of what happened at the meeting on 22 March and that she felt she had been punished for raising the issue about people sharing logins. Ms Elliott told the claimant that the request for her to complete her training again was her request, not Ms Sharp's request. Ms Elliott told the claimant that she was not aware that the sharing of logins had been a common issue, particularly as Ms Elliott had not been in attendance at the

team meeting on 22 March. The claimant also discussed the way that annual leave was being allotted by Ms Sharp and said that she felt that parents should get a priority during school holidays, however Ms Elliott said that other employees also had caring responsibilities but that she would speak to Ms Sharp to find out how the annual leave was being allotted. The claimant told Ms Elliot that she was unhappy about the door having been locked by Ms Sharp at the meeting on 22 March and she wanted an apology from Ms Sharp. Ms Elliott suggested that an informal meeting take place with the claimant, Ms Sharp and herself in order to move matters forward.

7.18 Ms Elliott asked Nick Holdsworth, Nurse Consultant, to see if he could find out whether logins were being shared by other members of staff. He reported back to her that this was not happening. Ms Elliott also spoke to Ms Sharp about the way she had been allocating annual leave and found this to have been a fair process.

7.19 On 11 April 2016 the claimant met with Ms Ann Marshall to discuss a conference matter. However, the claimant ended up discussing the meeting between herself and Ms Sharp and the meeting with Ms Elliott. Ann Marshall encouraged the claimant to work collaboratively with Ms Sharp and Ms Elliott and she asked the claimant to give Ms Sharp a chance to respond to her concerns.

7.20 On 11 April 2016 Ms Elliott asked to meet the claimant on 12 April in order to conduct an informal meeting to find a way to move forward.

7.21 The claimant received an e-mail from Ms Sharp on 11 April advising her that her request to attend a conference had been turned down by Julie Green (page 372 of the bundle). No reasons were given for this at the time, but Ms Green's evidence is that she often has to turn down requests to attend conferences due to resources and although she could not recall this specific conference, she thought it may have been an issue due to funding.

7.22 On 12 April 2016 the claimant, along with her witness, Angela Yildiz, met with Ms Sharp and Ms Elliott in the same office in which the meeting of 22 March had taken place. Ms Elliott's evidence is that this meeting was arranged not to rehash what had taken place but to find a way forward for the parties. Ms Elliott's outline notes for this meeting can be seen at page 383(1-4) and Ms Yildiz's notes can be seen at pages 384-389 of the bundle. At this meeting Ms Sharp confirmed that she had locked the door on 22 March 2016 for reasons of privacy, but that she now accepted that the claimant had been upset by this and she apologised several times to the claimant for the distress caused to her. Ms Sharp also made a promise that she would not lock the door in future. This meeting became very heated and the claimant called Ms Sharp a liar, a bully and gruesome. At this point Ms Elliott asked Ms Sharp to leave the meeting so that she could speak to the claimant alone. The claimant was very upset and told Ms Elliott that she could not attend one to one meetings with Ms

Sharp any longer as she did not feel safe being alone with her. As a result of this, Ms Elliott offered the claimant a temporary move to the team based at the RVI in Newcastle in order to help her feel comfortable whilst at work. However, the claimant said that she did not want to move. This was the last time that the claimant had any face to face contact with Ms Sharp.

7.23 On 13 April 2016 the claimant spoke to Ms Elliott on the telephone and advised her that she had completed a self certification and would not be attending work that week. The claimant requested a referral to occupational health. Ms Elliott said that she would speak to Team Prevent regarding supportive measures which could be put in place to assist the claimant in returning to work, but the claimant said that she wanted Ms Sharp to be moved. Ms Elliott told the claimant that she was satisfied with Ms Sharp's account of the events of 22 March and that no one else had reported using another employee's logins at work and therefore it was neither necessary nor appropriate to move Ms Sharp. In any event, this was not a decision that Ms Elliott could make as it was only within the purview of Julie Green to make such decisions. Ms Elliott told the claimant that she would make a referral to occupational health that she would ask them to comment on the suitability of the position at the RVI in order to provide advice on whether this would be appropriate or not.

7.24 The claimant was unhappy with the conversation she had had with Ms Elliott and therefore she telephoned Ms Marshall. The claimant then spoke to Ms Elliott again about the potential offer to work at the RVI and Ms Elliott reiterated that this was being offered as a supportive measure. The claimant said that she never said that she would not work with Ms Sharp, just that she did not want to be alone with her because she felt unsafe. The claimant made another telephone call to Ann Marshall and discussed with her the offer that had been made to work at the RVI, which she was upset about. Ann Marshall said that there would be options for support available if she was willing to work with Ms Sharp. The claimant asked what these options would be, however Ann Marshall did not know at the time and she asked the claimant to think about what she wanted to do.

7.25 On 18 April 2016 the claimant reported to Helen Dawson at the RVI by telephone and advised her that she was going to be absent on sick leave until 21 April. Ms Dawson asked the claimant if she wanted a referral to occupational health, however the claimant said that she had already requested this through Ms Elliott.

7.26 On 21 April 2016 the claimant submitted a formal grievance to Ann Marshall setting out a list of outcomes that she wanted from the process, and this can be seen at pages 395-399 of the bundle.

7.27 Ms Elliott was awaiting advice from HR before making her referral to occupational health in respect of the claimant and details can be seen at page 1080 of the bundle. The referral to occupational health was made

on 22 April 2016. The occupational health department made arrangements for an assessment to be carried out on the claimant on 29 April.

7.28 On 28 April 2016 Ann Marshall telephoned the claimant to confirm receipt of her grievance and she said that she had appointed a Senior Nurse, Paul Courtney, to investigate the grievance. Ms Marshall asked the claimant to write to her separately about what support measures she needed in order to return to work.

7.29 On 29 April 2016 a telephone assessment was carried out on the claimant by occupational health. They said that there appeared to be a management issue and suggested that the claimant receive support from Care First which is a counselling service (page 1085 of the bundle).

7.30 On 4 May 2016 the claimant sent an e-mail to Ms Sharp asking why her request for leave had been refused and this can be seen at page 400 of the bundle. The claimant received a reply from Ms Sharp (page 404 of the bundle) advising her that too many people had requested the same number of weeks off during the school holidays.

7.31 On 5 May 2016 Ms Sharp sent an e-mail to all the staff asking them to revisit the information security policy and this can be seen at page 406 of the bundle.

7.32 On 6 May 2016 the occupational health report was received by the respondent citing that there had been a breakdown of management support and advising that occupational health could not get involved with management disputes.

7.33 On 6 May 2016 the claimant sent an e-mail to Ann Marshall setting out the support that she was requesting in order to return to work (page 408 of the bundle), however Ms Marshall was on annual leave and she had set her e-mail to send out an automated out of office reply. The e-mail from the claimant setting out her alleged public interest disclosure and the support options she was requesting for her return to work (page 410-411) was not received by Ann Marshall until 27 May 2016 due to the fact that she was absent on annual leave and then returned on reduced duties due to an injury sustained whilst on annual leave. The claimant's e-mail had gone into Ms Marshall's junk folder and she did not find it until 27 May 2016.

7.34 On 19 May 2016 Ms Sharp sent an e-mail to all the team members advising them that a Band 5 Nurse had been promoted to Band 6. The claimant assumed that this was her job, however evidence from the respondent shows that this was not the claimant's position but was another Band 6 position.

7.35 On 20 May 2016 the claimant received a letter from Paul Courtney advising her that he was going to be using the informal process regarding the grievance. He says that he received advice from Kim Carter in Human

Resources to use the informal process. The claimant was very upset by this as she wanted the formal process to be used and she telephoned Mr Courtney pointing this out and requesting a rearrangement of the grievance meeting to 1 June 2016. The claimant sent an e-mail to Mr Courtney on 22 May 2016 asking him why he was using the informal process and Mr Courtney replied on 23 May 2016 (page 417 of the bundle) offering an apology for the distress caused and confirming that he would be using the formal process and that Capsticks Solicitors would be involved. The claimant then received an e-mail from Lana Walsh at Capsticks on 26 May 2016 (page 420 of the bundle) advising her that she could not attend the meeting on 1 June.

7.36 On 27 May 2016 Ann Marshall replied to the claimant that she would look at the e-mail which the claimant had sent to her on 12 May, but said that she had been away on holiday and it would take some time for her to deal with the requests. The claimant replied that she wanted to arrange a meeting (page 423 of the bundle). On the following working day, 1 June 2016, the claimant sent another e-mail to Ms Marshall chasing her up. Ms Marshall was at work on limited duties only at that time, she was focusing on the inspection to be carried out by the CQC and therefore she asked Anthony Quinn to deal with the matter in her stead (page 428-429 of the bundle).

7.37 On 6 June 2016 the claimant sent an e-mail to Anthony Quinn requesting support in order to return to NSECH and stating that she had made a public interest disclosure on 13 March which had led to bullying. The claimant suggested that she be given an alternative Line Manager and that she should not be left alone with Joanne Sharp. Mr Quinn forwarded this e-mail to Julie Green because she managed the service and asked her what support options were available (pages 441-443 of the bundle). Upon receiving a reply from Julie Green, Mr Quinn asked Kate Elliott to present the various options to the claimant (page 434 of the bundle), however this was not done and Ms Elliot's evidence as to why it was not done was because of superseding events which led her to believe that Mr Quinn would be dealing with the matter.

7.38 Mr Quinn replied to the claimant's e-mail of 6 June and suggested that she contact a freedom to speak guardian, as outlined in the policy at pages 179-199 of the bundle. Mr Quinn's reply can be seen at page 500 of the bundle.

7.39 On 11 June 2016 the claimant replied to Mr Quinn and advised him that her union representative was away on holiday and they agreed to meet on 22 June 2016 (pages 512 and 520 of the bundle).

7.40 On 22 June 2016 the claimant attended a meeting with Mr Quinn. He identified three areas, the first was the claimant's return to work which was being managed by Kate Elliott, the second was the claimant's grievance which was being managed by Mr Courtney and the third was the claimant's public interest disclosure. Mr Quinn said that he was

considering temporary redeployment of the claimant during the grievance investigation. He said it was not appropriate to move Ms Sharp until the outcome of the grievance was known, however the claimant said that she could not be left alone with Ms Sharp. Mr Quinn maintained that he needed to have stability in the management of the team in order for the team to function properly within the business. Mr Quinn was concerned that if the claimant returned to work at NSECH she may find herself alone with Ms Sharp and he explained that the proposed temporary move was a supportive measure, not punitive. Mr Quinn said that he would reconsider the situation again once the outcome of the grievance was known and that the position at the RVI remained open to the claimant. Mr Quinn also raised other potential positions which were available within the Older Person Liaison Team in Morpeth (which the claimant had previously indicated an interest in) and the Community Mental Health Team at Greenacres, which the claimant had previously worked at. After considering all of these options and discussing the situation relating to Ms Sharp, Mr Quinn told the claimant that he did not have details of the claimant's public interest disclosure and he asked her to provide him with them. The claimant was shocked at this as she had assumed that Mr Quinn knew about the disclosure, however she went on to provide the necessary information to Mr Quinn. Emma Rushmer, who was in attendance at the meeting, said that this matter needed to be dealt with under Stage 2 of the public interest disclosure policy and the claimant agreed that she wanted Mr Quinn to lead that investigation.

7.41 On 23 June 2016 the claimant sent an e-mail to Anthony Quinn requesting clarification of the points raised at the meeting and this can be seen at pages 530-535 of the bundle. The claimant maintained that she was being victimised for raising a public interest disclosure and she asked Mr Quinn to arrange a meeting to discuss the same. Mr Quinn replied (page 551 of the bundle) and stated that he could not meet the claimant until 29 June.

7.42 On 25 June 2016 the claimant reported Joanne Sharp to the police regarding the locking of the door at the meeting on 22 March 2016. The claimant sent an e-mail to Anthony Quinn on 26 June 2016 advising him that she had made this report to the police. The police report can be seen at pages 567-568 of the bundle.

7.43 The claimant attended a grievance meeting with Mr Courtney on 27 June 2016. The claimant read out a timeline which she had on her telephone and can be seen at pages 836-844 of the bundle. Much of the timeline concentrated on the incident with the locked door. The claimant complained that Ms Elliott was backing up Ms Sharp and she would not accept that it was difficult in a case where it was one person's word against another and that this would be hard to resolve. At this point the claimant told Mr Courtney that she had reported Ms Sharp to the police and therefore the grievance was suspended whilst the police carried out their investigation.

7.44 On 28 June 2016 the claimant sent an e-mail to Mr Quinn with a summary letter from the 22 June meeting and this can be seen at pages 578-581 of the bundle.

7.45 On 29 June 2016 the claimant attended a public interest disclosure investigatory meeting. A copy of the notes from the meeting can be seen at pages 691-698 of the bundle. Mr Quinn explained that the public interest disclosure would be investigated separately from the grievance in accordance with the Trust's policy. The claimant maintained that not allowing her to return to work was punitive, however Mr Quinn maintained that during the investigation of the grievance the claimant would have to work elsewhere, but that he would find out whether there was a vacancy available at Greenacres and whether the Trust could possibly help with her travel and childcare costs if she worked at the RVI.

7.46 On 30 June 2016 the claimant sent an e-mail to Mr Quinn requesting further information on the support options available to her and details of the temporary post in the Community Care Group. This can be seen at pages 596-597 of the bundle. The claimant also informed Mr Quinn that the police were no longer continuing with their investigation into Ms Sharp.

7.47 On 1 July 2016 the claimant sent another e-mail to Mr Quinn stating that the police were still to interview Ms Sharp, which Mr Quinn found very confusing.

7.48 On 2 July 2016 Mr Quinn received another e-mail confirming that the respondent could continue with its grievance procedure as the police had closed their file (page 607 of the bundle).

7.49 On 6 July 2016 Mr Quinn sent an e-mail stating that he would rather wait for the outcome of the claimant's appointment with her GP before deciding on her return to work (page 613 of the bundle). The claimant had spoken to Mr Quinn the previous day about her return to work and requested details of the vacancies available so that she could discuss them with her GP. In response to this, Mr Quinn sent an e-mail to the claimant providing details of the Behavioural Analysis and Intervention Team (BAIT) role.

7.50 Mr Quinn carried out an investigation into the public interest disclosure raised by the claimant. He interviewed Julie Green (page 660 of the bundle), Kate Elliott (page 661), Joanne Sharp (page 662-663), Jean Robinson (page 663(2-3)), Nick Holdsworth (page 663(4)), Zack Benbow (page 663(5)) and Steve Dolan (page 663(6)). The outcome of the interviews was that nobody reported anybody sharing logins with other members of staff, with the exception of Sophie Robinson who remembered that she did use a member of staff's login because the member of staff had to leave work at the end of her shift. The claimant's name was not mentioned because she had asked for her anonymity to be preserved during the investigation.

7.51 With regard to the grievance interviews which were taking place around the same time, Mr Courtney was not able to interview Joanne Sharp on 14 July 2016 due to the availability of the parties involved and so it was agreed that Caroline Waite of Capsticks would interview Ms Sharp by using the written questions from Mr Courtney, which are exhibited to his witness statement, exhibit PC/1. Mr Courtney followed up this interview by a telephone meeting with Ms Sharp and a meeting with Caroline Waite and he concluded that Ms Sharp's account was a stark contrast to the claimant's account (page 940-944 of the bundle). Mr Courtney interviewed Kate Elliott and found that she had not been present at the meeting on 22 March. Mr Courtney found that it was Ms Elliott who had spoken to Ms Sharp and asked that the claimant review her training on information governance. However, Mr Courtney found that it was difficult to determine who, if anybody, was telling the truth about what happened at the meeting on 22 March. Mr Courtney concluded that the door to the meeting room could have been opened by anybody from the inside and that Ms Sharp had already agreed on 12 April not to lock the door in future and provided several apologies to the claimant. Therefore, he decided that there was no reasonable basis for concluding that the behaviour of Ms Sharp on 22 March had been inappropriate and the claimant's grievance was not upheld. A copy of the grievance outcome letter can be seen at pages 728-730 of the bundle.

7.52 On 15 July 2016 the claimant attended a public interest disclosure meeting with Mr Quinn, Angela Yildiz and Ms Rushmer. A copy of the outcome letter can be seen at pages 702-706 of the bundle. Mr Quinn found that the IT issues were identified on the Trust's risk register and had been escalated to director level where solutions had been sought. He found that there had only been one occasion of a bank staff accessing a permanent staff's login and that this was not a repeat issue. The claimant asked for the request for her to redo her training to be retracted, however Mr Quinn said that he needed to wait for the grievance outcome in order to make a decision about this. At this stage the claimant said that she was keen to work at BAIT.

7.53 On 3 August 2016 the claimant sent an e-mail to Capsticks requesting a copy of the investigation report from the grievance. A reply was received by the claimant stating that the respondent had not been required to produce an investigation report (pages 732-733) and therefore one was not available.

7.54 On 3 August 2016 the claimant sent an e-mail to Mr Quinn stating that she was disappointed with the grievance outcome and that she was most upset that Mr Courtney had stated that the claimant's professional performance was an issue in the grievance outcome letter.

7.55 On 3 August 2016 Emma Rushmer sent an e-mail to the claimant advising her that she could not return to NSECH whilst Mr Quinn was on holiday and that she should start her role at BAIT. This can be seen at page 745 of the bundle.

7.56 On 8 August 2016 the claimant commenced a phased return to work as a Band 6 Nurse Therapist at BAIT.

7.57 On 11 August 2016 the claimant sent a grievance appeal letter to Mr Quinn and he decided that the claimant should remain at BAIT in her temporary role until her appeal was concluded (page 769-775 of the bundle).

7.58 On 17 August 2016 the claimant sent an e-mail to Mr Quinn asking for an update on the appeal and he said that he would chase Capsticks, but confirmed that an appeal hearing would take place on 26 September 2016.

7.59 On 6 September 2016 the claimant sent at e-mail to Mr Quinn asking why her site name had now changed to the RVI on the Trust's system. Emma Rushmer replied to this e-mail on 21 September 2016 with an explanation, which can be seen at page 959 of the bundle, stating that it was an error due to the way the respondent's system automatically allocated certain roles to specific sites, but that it would be changed.

7.60 On 14 September 2016 the claimant received a grievance appeal bundle which can be seen at pages 909-953 of the bundle.

7.61 The claimant attended a grievance appeal hearing on 16 September 2016 which was chaired by Ken Wilde and the meeting lasted three and a half hours. At this meeting the claimant stated that she could no longer work with Joanne Sharp. The outcome to the grievance appeal hearing can be seen at pages 961-970 of the bundle. The claimant's claim of bullying was not upheld, however it was found that the locking of the door had been inappropriate on 22 March 2016 and the Trust gave the claimant an apology for this. It was also decided that the request for retraining was disproportionate and it was retracted. The grievance appeal concluded that the claimant's professional performance was not in question and that this phrase had been used by Mr Courtney inappropriately.

7.62 On 26 September 2016 the claimant attended a return to work meeting with Mr Quinn and Ms Rushmer. The claimant was accompanied by her trade union representative. The claimant stated that she would not work with Joanne Sharp and therefore she requested a permanent transfer to BAIT.

7.63 On 27 September 2016 the claimant e-mailed Mr Quinn with ten requests regarding her support and return to work. The requests included the payment of displacement allowance and a payment for 37.5 hours even though the claimant was working 30 hours per week. This can be seen at page 978 of the bundle.

7.64 On 29 September 2016 Mr Quinn sent an e-mail to the claimant advising her that there was no permanent position available in BAIT yet and that

only a temporary six month position was available (page 994 of the bundle). The claimant raised queries about this in her e-mail of 30 September which can be seen at page 993-995 of the bundle. Emma Rushmer replied to the claimant on 2 October, which can be see at page 999-1000 of the bundle, confirming that the claimant's contract with the Trust would be permanent but her position at BAIT would be a temporary position. The claimant replied to this e-mail confirming her acceptance.

7.65 The claimant attended a meeting with Mr Quinn and Emma Rushmer on 11 October 2016. A direct question was asked by the claimant's trade union representative as to what would happen to the claimant if no suitable alternative work was available for her at the end of her temporary employment. Mr Quinn said that the claimant would be found alternative work under the transitional employment process policy, but that if no work was available she would be given 12 weeks notice to terminate her employment. However, Emma Rushmer stated that there was no shortage of Band 6 posts throughout the Trust and it was highly unlikely that she would be given her notice. The claimant was very upset by this and so she sent an e-mail to the Chief Executive, John Lawler, a copy of which can be seen at page 1021 of the bundle.

7.66 On 13 October 2016 Mr Quinn sent an amended letter from the 11 October meeting and confirmed that the Trust would be using the transitional employment process policy (page 1027-1032 of the bundle).

7.67 On 16 October 2016 the claimant sent an e-mail to Mr Quinn raising concerns that she was working extra hours and the impact this was having on her childcare and she also requested a copy of the transitional employment policy. Mr Quinn replied on 17 October 2016 (page 1038 of the bundle) enclosing a copy of the policy and confirming that the Trust would pay for 37.5 hours if the claimant agreed to working 30 hours in the workplace and 7.5 hours from home as a supportive measure.

8. Submissions

8.1 Mr Bakhsh submits that the burden of proof is on the respondent to show that it did not subject the claimant to a detriment on the grounds that she made a protected disclosure. The claimant submits that she made a protected disclosure on 13 March 2016 during the telephone conversation she had with Ms Sharp that the Trust were failing to comply with a legal obligation and that they were placing the health and safety of patients at risk because of the inability of staff to log on to the Trust's IT system. The claimant submits that she was then subjected to a series of detriments as a result of raising the public interest disclosure and she relies on the case of **NHS Manchester v Fecitt [2011] EWCA Civ 1190**. In particular, the claimant submits that the respondent's witnesses were all materially influenced by the disclosure that she made to Ms Sharp and this resulted in her being treated differently to the other staff members in the team in that the claimant was required to undertake her training again, however the rest of the team were merely asked to refresh their knowledge of the

policy. The claimant submits that she was subjected to a detriment by Ms Sharp at the meeting of 22 March 2016 on the grounds that she had raised a public interest disclosure on 13 March and that this detriment consisted of bullying on the part of Ms Sharp and the locking of the door to the meeting room which meant that the claimant could not leave. The claimant also submits that she was subject to a detriment in the way the annual leave was allocated by Ms Sharp and that Ms Sharp was materially influenced by the disclosure made by the claimant on 13 March and that her holiday requests were refused on the grounds of having raised the disclosure. The claimant submits that her grievance was delayed, as was her referral to occupation health, because of the disclosure made on 13 March. The claimant further submits that she found herself in a precarious employment situation, having previously had permanent employment with the Trust, because she raised a public interest disclosure with Ms Sharp and the refusal to allow her to return to work at NSECH was a detriment on the grounds of having raised a public interest disclosure.

8.2 The respondent relies on a very well written skeleton argument, which we do not propose to reproduce in this judgment. It is noted that the respondent takes a neutral stance on whether or not the claimant made a disclosure on 13 March and whether or not that disclosure amounted to a protected disclosure because it comes down to one person's word against another's and it is for the Tribunal to make its findings of fact on this issue. The respondent refers us to the case of **Chief Constable of West Yorkshire Police v Khan [2001] UKHL48** on the meaning of detriment. The guidance in this case was that a person may be treated less favourably and yet suffer no detriment. In **Ministry of Defence v Jeremiah [1980] QB87** Lord Justice Whiteman said that, "A detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment". The respondent also refers us to the case of **London Borough of Harrow v Knight [2003] IRLR 140** in which Mr Recorder Underhill stated, "It is necessary in a claim under section 47B to show that the fact that the protected disclosure had been made caused or influenced the employer to act in the way complained of: merely to show that 'but for' the disclosure the act or omission would not have occurred is not enough".The respondent also refers us to the leading case of **Fecitt v NHS Manchester [2011] EWCA Civ 1190**. In that case the Tribunal found that two of the claimants were redeployed because it appeared to the management to be the only feasible method of dealing with a dysfunctional situation and stated that it is often extremely difficult to resolve the conflicts which sometimes arise within the workforce after a protected disclosure has been made. The Tribunal in that case was satisfied that the employer had genuinely acted for other reasons, rather than victimisation, and that necessarily discharged the burden of showing that the prescribed reason played no part in it. The respondent refers us to the case of **Shinwari v Vue Entertainment Limited UKEAT/0394/14** in which Justice Similar stated, "It is permissible in appropriate circumstances for a tribunal to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself, provided the

Tribunal is astute to ensure that the factors relied on are genuinely separable from the fact of making the protected disclosure and are in fact the reason why the employer acted as it did."

8.3 The respondent submits that the claimant has failed to provide any convincing rationale for Ms Sharp's motive to subject her to a detriment on the grounds of her alleged protected disclosure. The claimant said in cross-examination that Ms Sharp wanted to silence her, however there was no evidence to this effect. Indeed, the evidence was that the respondent's risk register reflected that there had been many IT issues and Ms Sharp could not have been seeking to cover this up as she raised the matter with her Line Manager, at the team meeting and with the team in subsequent emails. Equally, there is no evidence that the respondent was trying to cover the matter up as it conducted a detailed investigation into the protected disclosure. The respondent submits that the claimant was given annual leave in August, as requested, and annual leave in the February half term in 2017 and therefore she was not subjected to a detriment. The respondent submits that throughout her cross-examination the claimant failed to establish why the respondent's witnesses had behaved the way they did and repeatedly said that she did not know what their motives were and did not know why they had done what they had done. The claimant maintained throughout her cross-examination that the fact she had raised a public interest disclosure was enough to make the connection that the treatment she received from the respondent was as a result of having made the disclosure. The respondent submits that Ms Sharp had accepted in hindsight that it was inappropriate of her to lock the door on 22 March 2016, but subsequently apologised for this. However, the claimant sought to give the impression that she could not leave the room, but that it became clear in cross-examination that this was not the case at all and it also became clear that she never raised the issue at the time. The respondent submits that the claimant's account of this matter had become increasingly melodramatic as time has gone on, leading to the claimant making a complaint to the police. With regard to the proposed move to the RVI, the respondent submits that offering someone the option to move somewhere else in a difficult situation does not amount to a detriment and that this was offered from the claimant's unwillingness to attend supervision meeting and her unwillingness to be left alone with Ms Sharp. The respondent's internal investigations found that the claimant's grievance of bullying and harassment was not well-founded and therefore the respondent did not feel the need to move Ms Sharp to another location. During the grievance appeal hearing Mr Wilde found Ms Sharp had neither bullied nor harassed the claimant. With regard to the claimant's claim that she was left in a precarious employment situation, the respondent submits that the claimant knew that there was no permanent vacancy available at BAIT at the time that she agreed to work in that unit and that it was entirely right for Mr Quinn to inform the claimant, when asked a direct question, what would happen to her if there was no alternative work available to the effect that the claimant would be given her notice. The respondent submits that this was not subjecting the claimant to a detriment.

9. **The Law**

9.1 The Employment Rights Act 1996 provides as follows:

43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, 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, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

48 Complaints to employment tribunals.

(1) An employee may present a complaint to an [employment tribunal] that he has been subjected to a detriment in contravention of section [43M, 44, 45, 46, 47, 47A,47C(1), 47E, 47F or 47G].

…

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

…

(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

…

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

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

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

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

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

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

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act

inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

10. Decision

10.1 Mr Bakhsh has submitted that the burden of proof in this case is on the respondent by virtue of section 48(2) of the Employment Rights Act 1996. However, he is entirely mistaken in his understanding of the law as this section does not mean that once a claimant asserts that she has been subjected to a detriment that the respondent must disprove the claim. Rather, the correct application of the law is that once all the necessary elements of the claim have been proved on the balance of probabilities by the claimant, the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the grounds that she had made a protected disclosure, as in discrimination cases. Indeed, in the case of **Fecitt** (above) the tribunal approved of this application of the burden of proof and the test for causation, as set out **Igen v Wong (2005) ICR 931**.

10.2 We are mindful of the fact that it is very difficult in cases where the key issue comes down to one person's word against another's and it is made even more difficult where there is a subsisting employment relationship between the parties. However, where it has been impossible for the parties to settle the matter between themselves, the Tribunal must intervene and make a decision on the balance of probabilities. Whilst doing this, we take into account the fact that the claimant has told the Tribunal several times that she is a strong person who stands up for her rights and the rights of others and this is borne out by the evidence of both the claimant and the respondent that the claimant spoke regularly at conferences on issues relating to patient safety and dignity. We accept that the claimant is fully conversant with whistleblowing and the Trust's policy on speaking out.

10.2 We find that it is more probable that not that the claimant took it upon herself to leave her login open for Sophie Robinson to email the completed patient record on 13 March 2016. The claimant's own evidence in cross examination was that she knew there was an on-call manager whom she could have contacted before the end of her shift, but she decided for herself that the manager would not be able to help with this particular situation. It is clear from the claimant's evidence that she knew she was acting in breach of the respondent's policy on information security by leaving her login open and that she had potentially left her personal documents and emails unattended, which could potentially be used by others without her permission. We find that this was the reason the claimant was upset and her main reason for contacting Ms Sharp that evening was to absolve herself of any wrongdoing, particularly if it was later found that emails had been sent from her account that evening by a third party. It is, thus, more probable that not that the telephone

conversation between the claimant and Ms Sharp on 13 March was about the claimant's own wrongdoing in leaving her login open and making sure that any emails sent would not be attributable to her. Ms Sharp was asked by the tribunal if the claimant had said anything about patient safety during the telephone conversation and her reply was that it was only referenced in the wider sense in the that the reason she gave for leaving her login open was to make sure the email "got to the other end". Given the claimant's knowledge of whistleblowing and the Trust's policies, we would have expected the claimant to have been explicit in her conversation with Ms Sharp about making a public interest disclosure and we would also have expected the claimant to follow such a disclosure up in writing, given the prolific nature of the claimant's emails present in the tribunal bundle. However, there is no evidence of any follow up on any potential disclosure by the claimant and this is entirely consistent with the evidence of Ms Sharp that no such disclosure was made by the claimant during the telephone conversation on 13 March 2016. Therefore, we find that the information disclosed by the claimant to Ms Sharp on 13 March 2016 did not in the claimant's reasonable belief tend to show that the respondent had failed to comply with a legal obligation to which it was subject or that the health or safety of an individual had been put at risk.

10.3 Mr Bakhsh has not adduced any evidence or made any submissions on what the potential legal obligation was that the respondent was subject to and, thus, we find that the respondent has not failed to comply with any legal obligation. However, if we are wrong and the information did in the claimant's reasonable belief tend to show that the health or safety of an individual had been put at risk by delaying the submission of the patient record through failing to have an email system that Miss Robinson could access whilst at work, we must go on to consider whether the claimant reasonably believed that the disclosure was made in the public interest. Given our findings that the claimant was motivated to speak to Ms Sharp because she knew she had acted improperly and wanted to make sure she was not blamed for any outgoing emails from her account, we find that the claimant did not reasonably believe that her disclosure was made in the public interest.

10.4 As we have found that the claimant did not make a protected disclosure to the respondent, we are not required to make any findings on whether she was subject to a detriment on the grounds of having made such a disclosure, as set out in paragraph 1.4 above. However, for the sake of completeness, we agree with Mr Webster's submission that the claimant's entire claim is predicated on the "but for" test, which is clearly the wrong test in public interest disclosure cases, as set out in **Knight**, above, and Mr Bakhsh has failed to understand this, despite referring us to the case of **Fecitt**. Indeed, the claimant's assertions throughout the hearing were that she was subjected to detriments because she had made a protected disclosure, without adducing any evidence of a causal link other than stating that if she had not made a disclosure on 13 March none of the incidents or acts of detriment would have taken place.

10.5 As there was no protected disclosure, and even if there was such a disclosure, as the claimant has failed to prove on the balance of probabilities that she was subjected to detriments on the grounds of such a disclosure, there is no requirement for the respondent to prove that the reason for the treatment was not the disclosure. However, we note that the alleged detriment regarding the refusal of annual leave preceded the events of 13 March 2016 and could not possibly have any causal link with the alleged disclosure and even the claimant had to agree in cross examination that she saw what Mr Webster was saying about it being impossible for a detriment to have taken place prior to her alleged disclosure.

10.6 The request for the claimant to refresh her online IT training, whilst potentially capable of amounting to a detriment, was a decision which was not made by Ms Sharp (the alleged perpetrator), but by her manager, and it is clear that this decision was made as a response to the claimant having breached the information security policy herself and there is no evidence that Ms Elliot was materially influenced by any alleged disclosure. What is also clear from the policy and Mr Bakhsh's submissions is that such a breach should have been dealt with as a very serious disciplinary issue by the respondent, but the manager invoked the "fair blame" paragraph of the policy and this was to the claimant's benefit rather than a detriment. Had Ms Elliot been seeking to silence the claimant, as alleged, it would have been easy for her to invoke the disciplinary procedure rather than merely make a request that the claimant refresh her training.

10.7 The locking of the door by Ms Sharp at the meeting of 20 March, whilst potentially capable of amounting to a detriment, was done in order to retain privacy during the meeting. The uncontested evidence of Ms Sharp was that she had been interrupted several times that morning and we find that this was the reason for locking the door, not because of any alleged disclosure by the claimant.

10.8 The respondent accepts that there was a delay in dealing with the claimant's grievance. Whilst this is potentially capable of amounting to a detriment, we find that the reasons for the delay were the availability of staff to attend interviews and the fact that the claimant had reported Ms Sharp to the police and the respondent, with advice from Capsticks, decided to place their investigation on hold until the police had completed their investigation. There was no evidence that Mr Courtney knew of the alleged disclosure by the claimant and therefore he could not have been materially influenced into deliberately delaying the grievance, as alleged by the claimant. Mr Bakhsh made much in his cross examination of Mr Courtney about his decision to not interview Ms Sharp in person. However, it is not for the Tribunal to comment on how an employer conducts their internal processes or to look behind them, unless there has been a breach of the ACAS Code (which was not the case here) or where there is some nefarious alternative motive on the part of the respondent. We are unable to find any evidence that the decision to allow Capsticks to

interview Ms Sharpe was a detriment to the claimant, or that the decision was materially influenced by the claimant's alleged disclosure, particularly given that Mr Courtney is based at Sunderland, had never met the claimant and had no knowledge of her alleged disclosure. The respondent may well be criticised for the delay in dealing with the grievance, but it is not for this Tribunal to assess the quality of the respondent's processes and procedures. We can only look to the evidence to see if the daly was a deliberate act or omission and whether it was materially influenced by the claimant's alleged disclosure. In this case we cannot find any evidence that they delay was deliberate or that there was any causal connection with the alleged disclosure.

10.9 Both the claimant's grievance and public interest disclosure were investigated by the respondent using their internal procedures. The claimant is clearly unhappy with the findings that Ms Sharp had not bullied/harassed her and that there had not been a breach of the information security policy by other workers, as alleged by the claimant. However, there is no evidence at all that the respondent was trying to silence the claimant and that their findings were materially influenced by her alleged disclosure. Indeed, the uncontested evidence of the respondent is that it cannot prevent any worker from speaking to the CQC about any failings or non-compliance by the respondent and that the claimant would have been able to speak to the CQC even when absent from work on sick leave. There is also no evidence whatsoever that all the people involved, Ms Sharp, Ms Elliot, Ms Green, Ms Marshall, Mr Courtney and Mr Quinn were all conspiring to silence the claimant. It is clear from the evidence that Ms Green, Mr Courtney and Mr Quinn had no knowledge of the claimant's conversation of 13 March 2016 with Ms Sharp. Furthermore, Mr Quinn encouraged the claimant to speak to a freedom to speak guardian about the whistleblowing and the claimant's own evidence was that Ms Marshall encouraged the claimant to become a freedom to speak guardian herself within the Trust in order to assist other whistleblowers in the future. We find that these are not the actions of an employer trying to silence an employee. Whilst the NHS can be criticised for its lack of robust IT systems, particularly given national event in recent weeks with ransomeware attacks on their IT systems, it is not for this Tribunal to assess the quality of this Trust's IT systems, as Mr Bakhsh seems to want us to do. We note that the Trust had placed it's IT problems on a risk register well before the events on 13 March 2016 and that the issue with staff from the south of the region accessing their emails at the Trust had been largely resolved by the date of this hearing.

10.10 The delay in making the referral to occupation health by Ms Elliot may, on the face of it, look like a potential detriment. However, the referral was made and the evidence is quite clear that Ms Elliot had been waiting for advice from the Trust's HR team before making the referral, hence the slight delay. There is no evidence that the respondent was deliberately avoiding making the referral or that it was on the grounds of the alleged disclosure.

10.11 Not allowing an employee to return to her principal place of employment is potentially capable of amounting to a detriment. However, we accept the respondent's evidence that they put forward potential alternative employment to the claimant because she was adamant that she did not want to be alone with Ms Sharp in the workplace, particularly as this is corroborated by the claimant's evidence that she was scared to be on a one to one with Ms Sharp. This situation is somewhat analogous to that in **Fecitt** where the employer moved its employees in order to deal with a dysfunctional situation. We accept the respondent's evidence as entirely cogent in that they were mindful of the duty of care that they owed to the claimant and other members of staff, including Ms Sharp. Had the claimant been allowed to return to her usual place of work, the respondent could not guarantee that the claimant would never find herself alone with Ms Sharp, which the claimant did not want, and the respondent was also mindful that the claimant had made a complaint about Ms Sharp to the police some 3 months after the incident complained of and 2 months after Ms Sharp had offered the claimant several apologies and a promise that she would never lock a door again. There is no evidence that the respondent's decision to offer the claimant alternative employment was materially influenced by the claimant's alleged disclosure. Similarly, as the claimant had accepted temporary work at BAIT, there is no evidence that once the temporary work ceased the claimant was being subjected to a detriment by the respondent by considering her for alternative positions under it's redeployment policy. Mr Bakhsh has made much of the fact that the claimant is not a redundant employee and therefore does not meet the criteria for qualifying under the policy, but we fail to see how it could be classed as a detriment to consider the claimant under the policy when the alternative would be dismissal without any consideration of suitable alternatives. At the time the claimant requested a permanent transfer to BAIT, she knew the position was temporary but she was adamant that she could no longer work with Ms Sharp. Ms Sharp had retained her employment at NSECH as the respondent had found that she had not bullied or harassed the claimant and all the internal procedures had been exhausted. The claimant's argument that had she never made a disclosure she would have retained her permanent employment is applying the "but for" test, which is entirely erroneous. It is clear that the claimant did not want to work with Ms Sharp any longer and that it was this decision which led to the claimant working at BAIT.

10.12 In summary, if we are wrong in concluding that there has not been a protected disclosure which in the claimant's reasonable belief was made in the public interest, we are unable to find that the claimant was subject to any detriments on the ground of such a protected disclosure.

10.13 Given that the claimant has failed to prove her case on the substantive grounds, above, we make no findings on the issues relating to whether the claim form was submitted in time, whether there were a series of detriments which material affect the calculation of the time limit and whether it was reasonable practicable to have submitted the claim in time

or such further period as is reasonable (if not in time): paragraphs 1.6, 1.7 and 1.8 above.

10.14 The claimants claims pursuant to section 47B of the Employment Rights Act 1996 are not well-founded and are dismissed.

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EMPLOYMENT JUDGE ARULLENDRAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
6 June 2017
JUDGMENT SENT TO THE PARTIES ON

8 June 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL