EMPLOYMENT TRIBUNALS

Claimant:	**Ms M Evans**	
Respondent:	**Touch Trust Limited**	
Heard at:	**Cardiff**	**On: 4, 5, 6 and 8 March 2019 and in Chambers on 15 March 2019**
Before:	**Employment Judge C Sharp**	
Members:	**Mrs L M Thomas**	
	Ms J Southall	

Representation:
Claimant: Mr G Pollitt, Counsel
Respondent: Ms L Halsall, Consultant

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:-

(1) The claim of victimisation under section 27 of the Equality Act 2010 has been withdrawn and is dismissed.
(2) The Claimant's claim of suffering a detriment due to making a protected disclosure under section 43B of the Employment Rights Act 1996 is not well founded and is dismissed.
(3) The Claimant's claim of ordinary constructive unfair dismissal under section 98 of the Employment Rights Act 1996 is not well founded and is dismissed.
(4) The Claimant's claim of automatic constructive unfair dismissal under section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.

REASONS

1. The Claimant, Ms M Evans, was employed by the Respondent, Trust Touch Limited, between 23 July 2013 and 4 June 2018. When the Claimant resigned from her employment, she was a Creative Facilitator, which is a role where therapy sessions with vulnerable service users (referred to as guests by the parties) would attend sessions of creative movement therapy designed to assist those with learning disabilities. The Claimant was also described as a session leader as she led sessions with guests. The Respondent is a small registered charity that supplies such creative movement programmes for guests. The Claimant resigned with immediate effect by way of an email dated 4 June 2018 from her employment and presented a claim to the Cardiff Employment Tribunal on 11 June 2018, bringing a number of claims against the Respondent. The Respondent denied the Claimant's claims entirely by way of a Response received by the Employment Tribunal on 16 July 2018.

2. The Claimant made four complaints against the Respondent:-

    (a) A claim of ordinary constructive unfair dismissal, asserting that there had been a fundamental breach of contract by the Respondent of the mutual duty of trust and confidence which entitled the Claimant to resign without notice due to this repudiatory breach. The Claimant asserted that a voicemail left by Ms Beverly Garside, the Interim CEO of the Respondent, on 4 June 2018 was the "last straw".

    (b) A claim of automatic unfair constructive dismissal under section 103A of the Employment Rights Act 1996 – the Claimant asserted that an email she had sent the Trustees of the Respondent dated 9 April 2018 was a protected disclosure and was the reason, or the principal reason, for her dismissal.

    (c) A claim of suffering detriments due to the making of a protected disclosure on 9 April 2018. The Claimant alleged seven detriments, to which the Tribunal will return later in this Judgment.

    (d) A claim under section 27 of the Equality Act 2010 of victimisation.

3. At the outset of the hearing, Mr Pollitt, Counsel appearing on behalf of the Claimant, withdrew the victimisation claim, and the Tribunal ordered that it be dismissed. The issues were also explored and identified with the parties at the outset of the hearing. The Tribunal made it clear that whether or not the alleged disclosures were true was not an issue for the Tribunal to determine; the point was whether or not the Claimant had a reasonable

belief that the disclosures were made in the public interest and that the information disclosed tended to show that either the health and safety of an individual has been/is being/is likely to be endangered or a person had failed/was failing/is likely to fail to comply with a legal obligation. The same approach applied to the allegations of bullying made against the Claimant and others - whether or not such allegations were true (and it is noted that the Claimant strenuously denies bullying anyone) was not an issue for this Tribunal to determine. A list of issues had been agreed by the parties, with which the Tribunal took no exception.

4. The only other issue which was dealt with at the start of the hearing was that of identities. The hearing was in public and witnesses gave oral evidence, in addition to that set out in witness statements and in the hearing bundle and the various exhibits adduced throughout the course of the hearing. However, the details of two vulnerable service users had not been redacted from the bundles (they were later redacted to be referred to as, Client A and Client B with the permission of the Tribunal). Medical information in relation to an individual who did not give evidence and was not a party to the claim was also disclosed. The health and safety aspect of this claim centred on this particular individual, whose identity is well known to the parties and the Tribunal. It was agreed with the parties that while the Tribunal would not make a Restricted Reporting Order, this individual would be referred to as Employee X in public. This balanced the right to privacy of Employee X with the need for open justice. The Tribunal adopts the same labelling for purposes of this Judgment.

5. During the hearing, the Tribunal heard oral evidence from the Claimant, Mr Eynon Williams (former finance officer of the Respondent), Mr Paul Fears (Trustee), Ms Rebecca Iddon (former CEO of the Respondent), Miss Olivia Goodwin (employee of the Respondent), Ms Alison Johnston (employee of the Respondent), and Ms Beverly Garside (Interim CEO). The Claimant was represented by Mr Pollitt, Counsel, while the Respondent was represented by Ms Halsall, Consultant. The Tribunal wishes to record its thanks to the representatives for their assistance and professionalism throughout the hearing.

Background

6. There were few disputed facts to be determined by the Tribunal in this case. The facts within this section are undisputed, unless the contrary is stated. In late 2017, following consultation, the Respondent was restructured in order to reduce expenditure and make more efficient use of limited resources. This new staffing structure was approved by the Trustees of the Respondent and introduced by Ms Iddon, the Chief Executive of the Respondent at the time. Session Leaders became Creative Facilitators, above whom was created the role of Creative Lead; above these roles was the usual management structure. Part of the aim of the restructuring was to

reduce costs by replacing with overtime with time in lieu and the deletion of one role, held by Employee X. Other roles though existed and were available for Employee X (with payment protection to induce her to accept a new role). In the view of the Tribunal, given the evidence it heard, it would be fair to say that the new structure was not universally popular with staff. The longer serving employees, including the Claimant, held the opinion that the restructure was inappropriate and "top heavy". Newer members of staff appeared to be less concerned.

7. Following the introduction of the new structure, Employee X was consulted about whether any of the available roles were suitable, and the relationship between her and Ms Iddon appears to have become strained. In March 2018, it was necessary for Mr Fears, a Trustee of the Respondent, to meet with Employee X to discuss with her allegations that she had made of bullying against Ms Iddon and the allegations made against Employee X of bullying made by Ms Iddon. On 5 April 2018, Ms Iddon on Mr Fears' behalf, invited all the staff at the Respondent to attend a series of individual meetings with Mr Fears to discuss the issue of bullying and harassment at the Respondent. From the evidence available, it appears that the atmosphere at the Respondent was less than ideal. The Claimant refused to attend her meeting with Mr Fears, asserting that she would prefer someone wholly outside the Respondent's ambit to deal with the matter and that she believed Mr Fears not to be impartial; no reasons for this belief were given at the time by the Claimant.

8. Before Mr Fears' series of meetings (which started on 12 April 2018 and concluded on 10 May 2018) took place, the Claimant appears from the evidence to have been in consultation with one former employee and Employee X about her concerns regarding the Respondent and its management generally. An email was drafted and shown to several individuals, some of whom agreed with its contents (but did not put their names to it) and others who did not agree.

9. This email was sent by the Claimant to the Respondent's Trustees on 9 April 2018. It is this email and its contents that is asserted by the Claimant to be a protected disclosure. It contains many points about the running operation of the Respondent and Ms Iddon. By this point, Ms Iddon had resigned and was away on annual leave. In summary, the Claimant complained about the running and operation of the Respondent, raised several issues about its financial management, made allegations about the absence from the office and leadership by Ms Iddon, and alleged a lack of communication. The Claimant also complained about the new structure of the Respondent, the loss of Employee X's role, the promotion of an employee to the role of Creative Lead, the morale at the Respondent, and the effect that Ms Iddon's actions had had on the mental health of Employee X. In essence, the Claimant asserts that the contents of this email alleges

that Employee X's health and safety was being endangered by Mrs Iddon's actions and some of the other issues were breaches of a variety of legal obligations by the Respondent.

10. On 12 April 2018, Mr Fears commenced his investigatory meetings with the Respondent's staff. He interviewed four employees, and heard evidence about the actions of the Claimant towards other employees of the Respondent. In particular, there were suggestions that the Claimant had been bullying Miss Johnston and Miss Goodwin and "blanked" employees. On 16 April 2018, Mr Fears met with four more employees, whereupon more detail was given about the alleged bullying by the Claimant of Miss Johnston and Miss Goodwin. Miss Johnston had been on a period of sick leave due to stress and was not interviewed until after her return on 19 April 2018. Another employee was not interviewed until 10 May 2018 having been away on compassionate leave; the majority of interviews were concluded by 16 April 2018.

11. On 16 April 2018, following the interviews which took place that day, Mr Fears took the view that it was necessary to suspend the Claimant. As he was not in the same building as the Claimant at the time, he asked the Claimant to telephone him where it was explained to her that she was being suspended due to allegations of bullying. Ms Iddon then handed the Claimant a letter setting out that she was suspended due to allegations of bullying and the terms of that suspension.

12. The Claimant sought advice from Mr Williams and took legal advice from Messrs Darwin Gray, solicitors. On 27 April 2018, Darwin Gray wrote to some of the Trustees of the Respondent and demanded that the Claimant's email of 9 April 2018 was treated both as a grievance and as a protected disclosure, that the investigation against the Claimant was dropped and her suspension lifted. On 5 May 2018, Darwin Gray chased the Respondent for a response and the Claimant was contacted by an individual identified as "Charlene" by Facebook Messenger about the fact that two other carers called "Stuart and Jess" had been told the Claimant was suspended.

13. On 14 May 2018, the Respondent wrote to the Claimant to arrange a grievance meeting; on 16 May, Darwin Gray responded reiterating its demands on behalf of its client and that communication should be sent direct to it and not the Claimant as she was too unwell (no medical evidence was supplied). It is worth pausing at this point to note that the correspondence between the Respondent and Darwin Gray was conducted with Ms Bev Garside, the Interim CEO who was appointed on a part-time basis from 27 April 2018, having had no previous connection with the Respondent or its staff.

14. Following this exchange of correspondence, a chain of letters occurred which saw the Respondent writing to the Claimant about the grievance and the investigation, and letters from Darwin Gray reiterating its client's position and that the Respondent should not write direct to the Claimant. On 24 May 2018, the Claimant's suspension was lifted. This was because Ms Garside had the benefit of considering an investigation report prepared by Mr Fears following his initial investigation dated 18 May 2018, and considered that its contents did not support a potential finding of gross misconduct. Upon being told that the suspension was lifted, the Claimant told Ms Garside on the same day that she was not fit for work. The Claimant's position is that she knew she had not been fit for work previously but wanted to receive full pay rather than statutory sick pay. Ms Garside told the Claimant she would have to obtain a sick note, which was obtained on 25 May 2018. The Claimant was signed off work for one month due to stress.

15. Following receipt of a sick note on or around 29 May 2018, the Respondent invited the Claimant to attend a welfare meeting with the option of it taking place at home and on an accompanied basis. The Claimant refused that meeting by way of an email of 31 May 2018 and again asked that the Respondent contacted Darwin Gray rather than her. On 31 May 2018 the Respondent explained that it wanted to have a welfare meeting to discuss reasonable adjustments to allow the Claimant to return to work and that it was not in her interest for the grievance to remain outstanding. A number of options were proposed to enable the grievance to be dealt with without the Claimant attending a grievance meeting. It is accepted that there was a telephone voicemail left on or around this time by Ms Garside asking the Claimant to get in contact with her. No response was received from the Claimant or Darwin Gray.

16. On 3 June 2018, the Claimant in her private capacity attempted to visit a service user at his care setting. The Claimant alleges that she was told that she could not see this person, referred to as Client B, on an unsupervised basis due to "what had happened at Touch Trust", and that she was not to have any physical contact with Client B. The Claimant found this deeply distressing. On 4 June 2018, Ms Garside left a voicemail, the terms of which is undisputed, asking the Claimant to get in to contact with her. The Claimant asserts that that voicemail was the last straw and the reason why she emailed her resignation on the same day, though she also made reference to what had happened the previous day with Client B within her resignation email.

17. It is fair to note that the parties have both raised other extraneous issues or allegations, none of which the Tribunal regarded as relevant to the issues it needed to determine.

The Law

18. There was no dispute between the parties either at the outset of the case, in the List of Issues or at the submission stage about the law and its relevant provisions. The dispute centres around the interpretation of the law in light of the facts of this case.

Detriment due to the making of a public interest disclosure

19. The starting point is section 43B of the Employment Rights Act 1996 which states that:

> "*a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following –*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered…"*

Section 47B of the same Act makes it clear that an employee and 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 [he] has made a protected disclosure.

20. The burden of proof for such a claim is that the employee must prove that they have made a protected disclosure and that there has been detrimental treatment on the balance of probabilities. The Respondent then has the burden of proving the reason for the detrimental treatment. Mr Pollitt on behalf of the Claimant also reminded the Tribunal that, in the case of ***NHS Manchester -v- Fecitt and others*** **[2012] IRLR 64**, the Court of Appeal held that the test in detriment cases is whether *"the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle blower*."

21. The Tribunal has to answer a number of questions when considering whether there has been a protected disclosure. It also bore in mind the warning from the Employment Appeal Tribunal in the case of ***Kilraine -v- London Borough of Wandsworth*** **UK EAT/0260/15** that Tribunals should take care when deciding if the alleged disclosure was providing information as in practice information and allegations were often intertwined and the fact that information is also an allegation is not relevant. The questions are as follows:

> Is the email of 9 April 2018 a qualifying disclosure – this requires the following questions to be answered (a) has there been a disclosure of information? As the case of ***Cavendish Munro Professional Risks Management Limited -v- Geduld*** **[2010] ICR 325** makes clear, there is a need to convey facts, and not just make an allegation. It is this point that triggered the warning in the ***Kilraine*** case. An opinion does not

equate to information (***Goode -v- Marks and Spencers PLC*** **EAT 0442/09**).

Was the information, in the reasonable belief of the Claimant, made in the public interest? This requires an analysis of the case of ***Chesterton Global Limited and others -v- Nurmohamed*** **[2017] EWCA 979**. Within that Judgment, the Court of Appeal made a number of extremely useful observations when dealing with the issue of public interest. It made the point that simply considering whether more than one person's interest was served by a public disclosure was a mechanistic view and required the making of artificial distinctions. The Court of Appeal said that instead a Tribunal should consider four relevant factors. It reiterated that Employment Tribunals should be cautious when making a decision about what "is in the public interest" when dealing with a personal interest issue because "*the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistle blowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never*." The four factors that the Tribunal should to consider are:

(a) The numbers in the group whose interests the disclosure served (if one is considering the entire workforce of the NHS or John Lewis, the sheer number of employees affected are likely to render a disclosure in the public interest for example and such a belief reasonable);
(b) The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
(c) The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
(d) The identity of the alleged wrongdoer – the larger or more prominent the wrongdoer, in terms of the size of its relevant community i.e. staff, suppliers and clients, the more obviously should a disclosure about its activities engage the public interest, though this point should not be taken too far.

It is relevant to point out there can be more than one reasonable view as to whether a disclosure has been made in the public interest, and the Tribunal should not substitute its view for that of the Claimant, but it must consider

whether the Claimant subjectively believed the disclosure was in the public interest, and whether that belief was reasonable.

The next question the Tribunal has to ask is did the information, in the Claimant's reasonable belief, show that the health and safety of an individual was endangered or there had been a breach of a legal obligation by the Respondent?

The last question to be determined is whether the Claimant suffered a detriment which was materially influenced by her email of 9 April 2018? The Claimant has claimed seven alleged detriments, which were set out at the start of the hearing:

(1) Her suspension;
(2) Being "kept in the dark" about the reasons for her suspension;
(3) The Respondent not dealing with her grievance;
(4) Ignoring the Claimant's requests for the Respondent to contact her solicitor, and not her directly;
(5) An alleged disclosure to the public as set out in the messages from Charlene;
(6) Ignoring explanations by Darwin Gray and by the Claimant that she was not well enough to attend hearings;
(7) Communicating information to the care setting of Client B which led to the incident of 3 June 2018.

Ordinary constructive unfair dismissal

22. The well-known case of ***Western Excavating (ECC) Limited -v- Sharp*** **[1978] ICR 221** makes it clear that for such a claim to succeed there must be a fundamental breach of contract that entitles the Claimant to resign due to a repudiatory breach by the Respondent. This is something that must go to the heart or the root of the contract and entitle the Claimant to resign without notice. This involves a consideration as to whether there has been an act or omission, or a series of acts or omissions, by the Respondent which was the cause of the Claimant's resignation and amounted to a fundamental breach of contract. There needs to be a consideration of when the breach occurred and if there has been any affirmation by the Claimant, and whether the Claimant resigned in response to the alleged acts or omissions.

23. This case has been pleaded by the Claimant, who has been legally advised throughout, as a 'last straw' case, asserting that the voicemail of Ms Garside asking the Claimant to get in contact on 4 June 2018 was the last straw. As a result, additional points must be considered by the Tribunal. It must consider whether the voicemail was an entirely innocuous act and apply an objective test when considering this point. The case of ***Lewis*** **v** ***Motorworld*** makes it clear that while the last straw does not have to be a breach of

contract, the last straw must in some way contribute to the breach of contract (for example, breach of the mutual duty of trust and confidence). The case of ***Omilaju -v- Waltham Forest LBC*** **[2005] ICR 481** saw the Court of Appeal stating that if the act is entirely innocuous, it cannot be a last straw. Without the existence of a last straw, the Claimant's claim is likely to be unsuccessful.

The case of ***Kaur -v- Leeds Teaching Hospital NHS Trust*** **[2018] EWCA Civ 978** saw the Court of Appeal list five questions which should be sufficient for an Employment Tribunal to ask to determine whether an employee has been constructively dismissed:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? The answer in this case is the voicemail of 4 June 2018.
(2) Has she affirmed the contract since that act? Given that the Claimant resigned immediately following receipt of that voicemail, the issue of affirmation is not one that the Tribunal is likely to find in favour of the Respondent.
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part (applying the approach explained in *Waltham Forest -v- Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?
(5) Did the employee resign in response (or partly in response), to that breach?

The Court of Appeal also referred to the last straw doctrine as "conduct as crosses the *Malik* threshold" which was a reference to the case of ***Malik -v- Bank of Credit and Commerce International SA*** **[1998] AC 20**. This is the question as to whether, viewed objectively, the course of conduct showed that the employer over time had demonstrated an intention to no longer be bound by the contract of employment.

24. If the Claimant's resignation is found to be a dismissal, the Tribunal then must consider whether it was unfair and whether a fair procedure was adopted.

<u>Automatic constructive unfair dismissal</u>

25. This requires an analysis as to whether any of the disclosures made by the Claimant in her email to the Respondent dated 9 April 2018 amount to a protected disclosure, though the earlier findings in relation to the section 47B claim will be relevant here too. The only additional question is whether the reason or principal reason for the Claimant's 'dismissal' is that she made a protected disclosure? It is also worth noting that if the Claimant

establishes that there is an issue warranting investigation and capable of supporting her claim of automatic constructive unfair dismissal, the burden of proof moves to the Respondent, who must prove, on the balance of probabilities, the reason for dismissal (**Maund v Penwith District Council 1984 ICR 143 CA** and **Kuzel v Roche Products Ltd 2008 ICR 799 CA**). It is also open to the Tribunal to find a reason for dismissal, on the basis of the evidence before it, not advanced by either party. As this is a constructive dismissal case though, the Claimant must establish that she has been 'dismissed' and that the protected disclosure was the principal reason that the Respondent committed the fundamental breach of contract.

26. It is also relevant to note that the Tribunal had the benefit of both written and oral submissions from the representatives who ably appeared on behalf of their respective clients. The Tribunal adopts those submissions in full and does not propose to summarise them but will deal with relevant points in its decision.

Findings

Is the email of 9 April 2018 a qualifying disclosure?

27. The first question was whether the email was a disclosure of information. The Tribunal carefully analysed the email (while bearing in mind the contents of the pleadings and the Scott Schedule). It considered that the first four paragraphs of the email contained no information and was simply the Claimant's opinion about the restructuring and the running of the Respondent and the conduct of the CEO. The fifth paragraph in the Judgment of the Tribunal did contain information, but not in its entirety (a point to which the Tribunal will return later in this Judgment). The Tribunal was content that the information about the allocation of two members of staff seven hours a week to take forward project work, the recruitment of extra Session Leaders, and the information that a member of staff had been promoted to the Senior Management Team without completing basic Session Leader training was information.

28. In addition, the contents of the sixth paragraph also in the Judgment of the Tribunal contained information. There is information about the inability of finance officers to complete their duties, about unbanked cheques, about a failure to send or pay invoices and the mention of the suspension of an account with a supplier due to non-payment of an invoice.

29. In the view of the Tribunal, the penultimate paragraph, while mostly opinion, does contain information in that it says "*most upsetting of all has been to watch [Employee X's] mental health deteriorate as a result of her treatment by Rebecca*". While there is little detail in this sentence, the words used are sufficient to identify an employee whose health is allegedly being endangered due to the actions of the CEO of the Respondent.

30. In the final paragraph, in the Judgment of the Tribunal, there was information that computers have been broken and not replaced and a uniform policy is not being adhered to. The rest of the paragraph is mere opinion.

31. Was this information, in the reasonable belief of the Claimant, disclosed in the public interest? Did she subjectively believe that it had been made in the public interest and was that belief objectively reasonable is another way to phrase this question. The panel adopted a consideration of the factors set out in the ***Chesterton Global*** case. In relation to the first set of information, the Tribunal considered that the information about the two members of staff being allocated seven hours a week to take forward project work and the recruitment of extra Session Leaders, causing additional cost to be borne by the Respondent was reasonably believed by the Claimant to be a disclosure made in the public interest as shown by the evidence before it. This is because the information is effectively about the use of money given to a charity to be used to assist guests to receive therapy – the Claimant's oral evidence and the letters from her solicitors made this point. Objectively, the Respondent is a small charity and had faced financial difficulties which had caused the need for a re-structure. It is in the public interest that money given to charities is used appropriately and this was a point that the Claimant had made herself and which is objectively a reasonable point. It is relevant that these two pieces of information are minor but sufficient to enable the Tribunal to be satisfied that the Claimant believed her disclosure was in the public interest and that her belief was reasonable. However, the Tribunal did not reach the same conclusion in relation to the promotion of an individual to the Senior Management Team. This is a complaint that is clearly about one individual person, and not the role. The Claimant did not give any evidence as to why she would reasonably believe this to be in the public interest, and in the Tribunal's view it was not in the public interest but merely a private workplace dispute.

32. In relation to the information given about finance more generally in the sixth paragraph of the Claimant's email, the Tribunal had no difficulty in light of the evidence received that this was something that the Claimant subjectively believed to be in the public interest and indeed is in the public interest for the reasons given above. This is about the use of money given by the public to support charitable work and includes information that suggests that the ability of the charity to carry out its work is being affected by these issues.

33. In relation to the allegation about the information about Employee X's mental health, the Tribunal bore in mind that the Claimant was talking about one employee alone but there was a wider issue too. The Claimant was aware of the wider investigation with the whole staff about bullying (though

her evidence was that she believed Employee X's allegations were the focus of that investigation and she declined to take part). The allegation is that the actions of the Respondent was causing deterioration of an employee's mental health. The Claimant in her evidence was clearly deeply concerned about this, though it is fair to note that it appears that Employee X had not told the Claimant pertinent information about what was really happening between her and the Respondent as part of the restructuring process. From the evidence from both parties and the bundle, in the view of the Tribunal, the Claimant was not being given the whole picture by Employee X, but understood her to be so stressed by Ms Iddon and the Respondent's actions that she was seeking medical assistance. The Claimant's evidence was that she was concerned about the impact upon Employee X and that the Respondent was not conducting itself appropriately. However, the Claimant did link the mental health issue to the restructuring process in her evidence and the Tribunal was overall just satisfied that her subjective belief was that the mental health of employees generally was an issue and this was in the public interest to disclose, though it accepted that this was a borderline decision as only one employee was being affected and it bore in mind the warning in **Chesterton Global**. The Claimant was not in a position to know whether what was being done was deliberate or inadvertent, but it is relevant to bear in mind that the conduct complained of was being undertaken allegedly by the CEO of a charity dealing with vulnerable guests. The Claimant's unchallenged evidence in her witness statement was that she *"genuinely believed Ms Iddon was breaking the law in the way she was bullying and mistreating [Employee X]"* and that Employee X "*<u>was</u> TT …and represented everything that was good and proud about the organisation"* (underlining by the Tribunal). The Claimant went on to say that if the Respondent could treat Employee X as it had, her belief was that it raised issues about the attitude towards other staff and service users. The Tribunal therefore concluded that the Claimant subjectively believed that her disclosure was in the public interest. It viewed that belief as objectively reasonable in the circumstances, given the nature of the Respondent's "business" and the vulnerable nature of its service users.

34. The final disclosure of information regarding the computers and the uniform policy in the Judgment of the Tribunal was not made in the public interest and that the Claimant did not believe it had been made in the public interest. While the public will rightly be concerned about the use of money by charity, individual minor trivial issues such as the uniform policy was not one that considering the four factors of ***Chesterton Global*** was likely to meet the test of public disclosure. Indeed there is nothing in the Claimant's evidence that suggests that she thought this was in the public interest.

35. This then led the Tribunal to consider whether the disclosures of information regarding the remaining disclosures of information in the Claimant's

reasonable belief show that the health and safety of an individual had been endangered or a breach of legal obligation had occurred or was likely to occur.

36. In relation to the first disclosure, namely that two members of staff had been allocated seven hours a week for project work and extra Session Leaders had been taken on, there was nothing within the Claimant's evidence that set out what legal obligation she thought been breached. Charities are entitled to recruit extra staff and to allocate staff hours to undertake particular projects. In reality, the Claimant's core of her disclosure was about financial issues which is dealt with in her second remaining disclosure, namely that set out in the sixth paragraph of her email.

37. Turning to consider the allegations set out in the sixth paragraph of her email, the Claimant over time has changed the precise specification of the legal obligation she alleged was being breached. In the initial letter from her solicitors there are references to various provisions of the Charities Act 2011, later there are references to other pieces of legislation and Acts of Parliament. The Claimant in her evidence did not refer to any particular piece of legislation, and indeed this is not required. What is required, as is made clear in the case of ***Eiger Securities LLP -v- Korshunova*** **UK EAT/0149/16** is that the source of the legal obligation is identified, but the identification of the obligation does not need to be detailed or precise, but does need to be more that a belief that certain actions were wrong. The initial letter from the Claimant's solicitors, which is made on 27 April 2018, the point is made that disclosure of financial issues was in the public interest and amounted to breaches of legal obligation because the Respondent was a charity which received grants and public money through fundraising in order to assist members of the public and therefore it was within the public interest to disclose information about that charity's actions or inactions. The view of the Tribunal is that this does not properly reflect the Claimant's evidence. The Claimant's position is relatively simple - that monies given to a charity should be spent in a manner that benefitted its service users and ensured that the charity was able to carry out its objectives. It is an obvious inference from what the Claimant wrote in her email that if cheques were unbanked and that invoices are not sent out or paid, this reduces the income available to the charity. A reduced income affects the charity's ability to carry out its activities as demonstrated by the suspension of an account with a supplier which meant that printing was not possible for a period. The Claimant is not required to identify a precise part of the Charities Act 2011 or any other Act of Parliament to establish this is the legal obligation to which she refers.

38. Was the Claimant reasonable in believing that this information tended to show there had been breach of such a legal obligation? In the view of the Tribunal, yes. While there may be a perfectly reasonable explanation for

some of the points raised (for example, cheques are banked only once a week), there was sufficient information known to the Claimant from both the former finance officer and her own observations that there were financial difficulties. An account had been suspended with a supplier. Invoices were not being paid. The Respondent in its own evidence accepted that after her resignation as CEO, Ms Iddon had to act effectively as a finance officer to resolve all the matters. Whether or not the Claimant's allegation is correct, this is sufficient information to demonstrate that in her reasonable belief the information she provided tended to show that there was, or had been, a breach of a legal obligation.

39. In relation to the disclosure about Employee X's mental health, in the view of the Tribunal given what the Claimant knew from what she had been told by Employee X (and the Tribunal accepted the Claimant's evidence in this regard both orally and as shown by text messages with Employee X), the information showed that an employee's health and safety, namely her mental health, was endangered. The Tribunal accepted the Claimant's oral evidence that Employee X's mental health was a real concern for her at the time she made the disclosure.

40. As a result the Tribunal concluded that the disclosure set out in the sixth paragraph of her email regarding the financial position of the Respondent and the disclosure in relation to the health and safety issue in connection to Employee X's mental health constituted qualifying disclosures. Under section 43C of the Employment Rights Act 1996, those disclosures were protected as they were made to her employer.

41. This then left the issue as to whether the Claimant suffered detriment due to these two protected disclosures. Taking each act of detriment in turn, the Tribunal concluded as follows:

    (a) was the suspension of the Claimant materially influenced by the protected disclosures?

    The Tribunal did not accept all of the oral evidence it heard from Mr Fears as accurate. It is pertinent to point out that it is open to a Tribunal to accept part of what a witness says, but not all. In particular, it did not accept his oral evidence that he did not and had not read the Claimant's email of 9 April 2018. In the Judgment of the Tribunal, Mr Fears had read this email. He made references to it in his witness statement and suggested that it was put together by more than one person and analysed its contents. However, the Tribunal equally accepted that it was more likely than not Mr Fears did not read the email on 9 April itself because as he said it was too long for him to read on his phone and he was away with work. It also found his evidence that he knew that the Chair of the Trustees was dealing with the

matter, and he left the email to read later as he was dealing with the investigation of allegations of bullying and harassment, to be persuasive.

Having read the investigation report, considered the oral evidence of Mr Fears and the contents of the hearing bundle, the Tribunal was not satisfied on the balance of probabilities that the Claimant's suspension was materially influenced by the protected disclosure. This is because the contents of the interviews with the employees which had been gathered over time up to 16 April 2018 gave reasonable grounds and proper cause for the Claimant's suspension. By this point, eight employees had been interviewed, a number of whom had given such descriptions of the Claimant's behaviour (albeit that the Claimant denies the allegations) that showed, on the balance of probabilities, there was a case to be answered. In particular, two employees appeared to have been the primary targets for the Claimant's alleged misconduct, namely Ms Goodwin and Ms Johnston. Ms Johnston had in fact been on a period of sick leave due to workplace stress, and which she alleged had been caused by the Claimant's conduct towards her (Ms Johnston was not interviewed until 19 April 2018).

As early as 12 April. there are indications that the Claimant may have been involved in bullying and harassment, and was potentially the ringleader. Yet Mr Fears did not suspend her following the interviews of 12 April but continued to gather further evidence. The Tribunal considered it was more likely than not that had Mr Fears wished or been materially influenced by the protected disclosures, it was more likely than not that he would have suspended the Claimant earlier. It is noteworthy that it was not until the interviews with Ms Goodwin, Ms Iddon and Ms Goodwin's line manager took place that Mr Fears concluded that suspension was reasonable and proper. The allegations made in respect of other employees were minor and less numerous than the allegations against the Claimant, and justified a disparity in treatment (in that only the Claimant was suspended). Ms Goodwin gave an account of an incident with the Claimant that led to her being hurt and another incident in front of guests. The Tribunal deliberately in this Judgment has not set out in detail the allegations made against the Claimant as they were not resolved and are strenuously denied, and it is conscious that this Judgment will be published. However it is satisfied that it was more likely than not that it was the evidence gathered on 12 and 16 April that was the reason why the Claimant was suspended, including incidents that led to harm or in front of guests, and not the protected disclosures.

42. The Tribunal then considered the allegation that the Claimant had been "in the dark" for five and a half weeks about the reasons for her suspension and this had been materially influenced by the protected disclosures. The Tribunal did not find this allegation to be made out on the balance of probabilities. The Claimant was told from the outset she was being

suspended due to allegations of bullying and harassment. She was aware that an investigation was underway. The Respondent was not be able to set out in detail the allegations until that investigation concluded, which did not occur until after the final interview on 10 May 2018. Mr Fears then analysed the evidence and produced a report on or around 18 May. It is also noteworthy that the Claimant during this period had instructed solicitors who, apart from wanting the Claimant's grievance to be resolved, demanded that the allegations against the Claimant were dropped immediately. This extraordinary request, given that the Respondent had a duty to complete its investigation due to the duties it owed to other employees, was in the view of the Tribunal unhelpful. It is also relevant that the Chief Executive left in early May 2018 and was replaced by Ms Garside who commenced working 2 days a week on 27 April 2018. Ms Garside's evidence was that she had to be briefed on a number of issues (which the Tribunal accepted), and that while this was while the Claimant's suspension was an important issue, it was not the only issue facing the Respondent. While the Tribunal agrees that it might have been helpful to have updated the Claimant, it was only little after a week after her suspension that her solicitors wrote to the Respondent and set out the demands of its client. The Respondent did not respond until 14 May, the Tribunal accepts that this was because it was the amount of time required for a part-time Interim CEO to get up to speed with what was going on and then attempt to progress matters. There is no evidence that showed that the Respondent or anyone within the organisation deliberately kept the Claimant "in the dark" or in any event withheld the details of the allegations of bullying and harassment due to the protected disclosures.

43. The Tribunal then considered the allegation that the Respondent failed to deal with the Claimant's grievance due to the protected disclosures. The Tribunal, having considered all the evidence before it, was not persuaded that the protected disclosures materially influenced the Respondent's failure to deal with the Claimant's grievance. The Respondent was not able to deal with the Claimant's grievance because the Claimant would not engage with it. She would not attend a grievance hearing. She would not avail herself of the opportunities offered to her as an alternative to attending a grievance hearing by Ms Garside. It is difficult to resolve a grievance if the person bringing the grievance will not speak to the Respondent or find another way to communicate about the grievance. Doing so through correspondence from a solicitor is unlikely to resolve a grievance, as shown by the evidence of Ms Garside who talked about the need to try and build a rapport with an employee bringing a grievance so that they feel they can say what they need to say and discuss the grievance. The Respondent offered on a number of occasions to deal with the Claimant's grievance. This allegation is not supported by the evidence.

44. The Tribunal considered the allegation that the Claimant's requests that the Respondent contacted Darwin Gray, rather than herself directly, were ignored by the Respondent due to the making of a protected disclosure. The Tribunal was not satisfied that the Respondent's refusal to correspond with the Claimant via her solicitors was materially influenced by the protected disclosures on the basis of the evidence. As was explained in writing by the Respondent and in oral evidence from Ms Garside, the Claimant was the Respondent's employee. There is no requirement that the Respondent had to go through solicitors if an employee so instructed. The Tribunal notes that from the outset Darwin Gray alleged that the Claimant was unwell, but failed to supply any objective evidence of the Claimant's alleged ill health. Ms Garside's position that simply accepting the word of solicitors who are being paid by an employee as to the employee's health was not sufficient was in the Judgment of the Tribunal the reason why the Respondent ignored Darwin Gray's and the Claimant's requests about direct contact. The Claimant herself accepted that she did not obtain a sick note or say that she was too ill to work as she wanted to receive payment in full, rather than statutory sick pay. Putting to one side the issue of an employee who is not fit for work obtaining payment in full whilst suspended, the Respondent was not unreasonable in expecting independent evidence of alleged ill health in the circumstances, particularly as employees who are suspended are stressed for the reasons given by Ms Garside in her oral evidence. The protected disclosures in the view of the Tribunal did not materially influence the Respondent's refusal to correspond with solicitors.

45. The Claimant alleges that two individuals referred to as Stuart and Jess were told about her suspension by the Respondent and that this disclosure was materially influenced by her protected disclosures – the Tribunal identified that there was an evidential issue in relation to this alleged detriment. It had the benefit of the Facebook messages with Charlene, but it did not have the benefit of any evidence from Charlene, Stuart or Jess. This is hearsay evidence; though strict hearsay rules do not apply in the Employment Tribunal, it does affect the weight that can be placed on such evidence. As is set out in the messages, it is not clear who allegedly told Stuart and Jess what or for what reason. As Charlene said: "*I would have to ask them who and what exactly was said. They have repeatedly asked where you were and were told that they can keep saying you're on holiday, and said you were suspended. Jess only told me yesterday, but I think they were told a few weeks ago x".* It is therefore unknown who told Stuart and Jess what or why. In light of this evidential issue, the Tribunal is unable to make any findings of fact about what was said to Stuart and Jess, or by whom or whether the decision to disclose the suspension was materially influenced by the Claimant's protected disclosure. The Claimant has not satisfied the burden of proof.

46. The Claimant alleges that she suffered a detriment due to the Respondent ignoring explanations that she was not well enough to attend a hearing – the Tribunal was willing to treat this as a detriment in light of relevant case law, but was not persuaded that the alleged ignoring was materially influenced by her protected disclosures. First, as Ms Garside has set out in her oral evidence, until the Claimant told the Respondent over the telephone that she was not well enough to attend work on 24 May 2018 when her suspension was lifted, all that was given to the Respondent were assertions by a solicitor paid by the Claimant that she was unwell due to stress. The Respondent has explained that until it was provided with a sick note, it was not satisfied that the Claimant was really not well enough to attend a hearing. The Tribunal accepts this evidence. The sick note provided in late May simply says that the Claimant is unfit for work due to stress. Being unfit for work does not mean that an employee is unfit to attend a meeting. It is worth bearing in mind that by this point the Claimant's solicitors had regularly demanded that the Claimant's grievance was resolved forthwith. Ms Garside gave the Claimant a number of options to enable her grievance to be dealt with, which were not accepted by the Claimant. In addition, as Ms Garside explained in her oral evidence, employees who are unwell and dealing with a grievance and disciplinary investigations often will remain stressed until the matter is concluded. Seeking a welfare meeting with an employee is not inappropriate, and the Tribunal heard evidence from Ms Johnston about the Respondent arranging a welfare meeting with her promptly when she was signed off sick with stress. There was no evidence that supported the Claimant's contention that her protected disclosures materially influenced the Respondent in "ignoring" explanations that she was not well enough to attend hearings.

47. The final claim of detriment asserted by the Claimant relates to the incident that occurred on 3 June 2018. The only evidence before the Tribunal is that of the Claimant. No evidence from those working at the care setting about what happened, and whether this followed a disclosure by the Touch Trust has been provided. The Claimant in her resignation refers to "*what had happened at Touch Trust*" as the reason for the rules imposed upon her visit to Client B the previous day. It is not clear as the Respondent points out whether the care setting had safeguarding concerns from what it had observed, or had somehow heard about the Claimant's suspension, or indeed what had happened that day. Setting to one side the issue about professional boundaries, there is no evidence before the Tribunal that could support a finding that the care setting was given information by the Respondent or that if any information was given, that it was disclosed due to the protected disclosure. The Respondent's evidence given by Ms Garside is that no-one at the Respondent had been in contact with the care setting on the subject of the Claimant. The Claimant did not satisfy the burden of proof in respect of this allegation.

48. Accordingly the Claimant's claim of suffering detriments due to the making of a protected disclosure is not well founded and is dismissed.

Ordinary unfair dismissal

49. In the view of the Tribunal, the starting position was to consider the last straw as pleaded by the Claimant, namely that the voicemail from Ms Garside asking the Claimant to get in contact on 4 June 2018 was a last straw and contributed to the fundamental breach of contract by the Respondent. The Tribunal thought there was some force in the submissions of Ms Halsall that breaches of contract leading up to the last straw had not been adequately pleaded by the Claimant, though during the course of the hearing, issues such as the suspension of the Claimant, continuing the suspension, and the refusal to write to the Claimant's solicitors rather than the Claimant direct were features of the Claimant's case. Other points were made by Mr Pollitt on behalf of the Claimant, such as the Respondent ignored the Claimant's health concerns and failed to update her were also relevant. The Claimant's solicitors in effect pleaded the detriments as not only being detrimental treatment for a s.43B claim but also acts that in total consisted of a repudiatory breach of contract.

50. The Tribunal considered that a voicemail simply asking an employee to get in contact with the Interim CEO who had requested a welfare meeting and made a number of suggestions as to how the grievance could be dealt with, even in the circumstances of this case, was an entirely innocuous act. Ms Garside was unknown to the Claimant and had no previous involvement with the Respondent. Objectively, such a voicemail is innocuous, though this finding is supported by Ms Garside's evidence that she was simply trying to move matters forward and deal with the Claimant's grievance and get her back to work. It was for this reason that Ms Garside overruled Mr Fears and lifted the Claimant's suspension. There was nothing within the voicemail that could contribute to a breach of trust and confidence and this therefore means that the Claimant's claim of constructive unfair dismissal must fail as she has not shown that she was dismissed. In any event, the acts alleged as being part of a continuing course of conduct directed at the Claimant by the Respondent that constituted a fundamental breach of contract (namely the various detriments) in the Judgment of the Tribunal were not a fundamental breach of contract. There was nothing that crossed the ***Malik*** threshold and showed that the Respondent had demonstrated an intention to no longer be bound by the contract of the employment. The Tribunal therefore finds that the claim of constructive unfair dismissal is not well founded and should be dismissed.

Automatic unfair constructive dismissal

51. The Tribunal's findings in relation to whether or not a protected disclosure has been made in relation to the claim of suffering a detriment due to the making of a protected disclosure are adopted for this claim. The Tribunal

has found that two protected disclosures were made in relation to financial matters and health and safety in respect of the mental health of Employee X. It then turned to the question of whether the reason or the principal reason for the Claimant's dismissal was due to the making of the protected disclosure; but she has failed to establish that she was dismissed. In the view of the Judgment, it was not satisfied that the Claimant's "dismissal" was due to the making of the public interest disclosure. The Claimant resigned in response to a last straw which is not asserted to be any part of the making of a protected disclosure i.e. the voicemail from Ms Garside on 4 June 2018. The Tribunal has already found that the detriments the Claimant alleges that she suffered were not due to the making of a protected disclosure, if they happened at all. This includes her suspension from work and the various interactions between the Respondent, the Claimant and her solicitors between her suspension and her resignation. The findings already made in relation to the ordinary unfair dismissal claim are also relevant.

52. In light of its findings, the Tribunal concludes that the claim of automatic constructive unfair dismissal is not well founded and is dismissed.

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Employment Judge C Sharp
Dated: 25 March 2019

JUDGMENT SENT TO THE PARTIES ON

……31 March 2019……

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS