**Case No: 2301852/2020**

# THE EMPLOYMENT TRIBUNAL

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| **SITTING AT:** | **LONDON SOUTH** |
| **BEFORE:** | **EMPLOYMENT JUDGE K ANDREWS** |
| **MEMBERS:** | **Ms J Forecast (by video)**<br>**Mr C Rogers** |

**BETWEEN:**

**Mrs A O'Mahony**

**Claimant**

and

**Priory Healthcare Limited**

**Respondent**

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| **ON:** | **21- 24 March 2022**<br>**25, 28 & 31 March and 15 June 2022**<br>**in chambers** |

**Appearances:**
**For the Claimant:** **Mr J Castle, Counsel**
**For the Respondent:** **Dr M Ahmed, Counsel**

## RESERVED LIABILITY JUDGMENT

The claimant was unfairly constructively dismissed.

The claims in respect of unpaid wages remains unresolved as explained below.

A remedy hearing will take place on **4 November 2022**. Directions are given below for preparation for that hearing.

## REASONS

1. In this matter the claimant complains that she was unfairly constructively dismissed and that that dismissal was automatically unfair because she had made protected disclosures and raised a relevant health and safety matter. For the same reasons she says she was subjected to detriments and further that there were unlawful deductions from her wages.

2. The overarching context for these claims is the extraordinary circumstances in which the whole country found itself in March 2020 with regard to the pandemic. The Tribunal is very conscious that we have to assess the actions of the parties in the circumstances known at the time, without the benefit of hindsight, and putting to one side our own personal experiences of and reactions to the pandemic.

3. We are also conscious that it is not our role to adjudicate on whether the respondent made the right decisions with regard to how it treated its patients. Those were clinical decisions. Our role is limited to assessing the resulting issues arising from the employment relationship

**Claims and Issues**

4. At the outset of the hearing we dealt with the preliminary issue of whether the claimant had properly pleaded certain whistleblowing claims and if not whether to allow her to amend her claim to include them at that stage. For the reasons given orally to the parties on the first morning, we concluded that those claims had not been so pleaded but permission was given to amend.

5. Accordingly, the agreed issues arising on liability are as follows:

6. <u>Protected disclosures</u>

7. Did the claimant make a qualifying disclosure to her employer, in that she disclosed information which she reasonably believed was in the public interest and tended to show:

    a. that a person failed, is failing or is likely to fail to comply with any legal obligation to which it is subject;

    b. that the health or safety of any individual has been, is being or is likely to be endangered?

8. Were any of the following such disclosures?:

    a. The ‘informal grievance’ began on 24 March 2020, being:
        i. Her email to her line manager Sarah Lovegrove at 15:51 (should read 16.51), 24 March 2020;
        ii. Her call with Sarah Lovegrove of the same day;
        iii. Her email to Sarah Lovegrove at 12:47, 25 March 2020;

iv. Her email to Denise Telford at 15:59, 26 March 2020 and attachments;
v. Her email to Sarah Lovegrove and Denise Telford at 15:51, 30 March 2020.

b. The claimant's formal grievance complaint on 1 April 2020 and addenda.

c. The claimant's 29 April 2020 grievance appeal, addenda and responses to written questions.

d. Correspondence post-grievance:
i. Her email to Sarah Lovegrove, cc Mrs Telford and Mr Bloor, at 10:02, 9 July 2020.
ii. Her email to Sarah Lovegrove at 15:50, 29 July 2020.
iii. At the meeting between the claimant and Sarah Lovegrove on 14 August 2020.
iv. Email from her to Sarah Lovegrove cc Denise Telford at 7:59 17 August 2020.

9. Constructive unfair dismissal and wrongful dismissal

10. Did any of the following constitute a breach of the implied term of trust and confidence, and/or an express term regarding the respondent's payment obligations:

a. Not allowing her to work from home from 23 March 2020 and subsequently.

b. Prohibiting her from having any contact with her patients from 1 April 2020 onwards.

c. Withholding:
i. Her salary and pension payments;
ii. Payments for her monthly clinical supervisions.

d. Failing to conduct a proper, good faith grievance and appeal process.

e. Improperly bringing disciplinary proceedings against her.

11. Was the claimant dismissed - i.e.

a. Were any breaches of contract fundamental breaches?

b. Did the claimant resign in response to any of those breaches?

c. Did the claimant affirm the contract of employment before resigning?

d. Was the dismissal:
i. for an automatically unfair reason?
ii. Otherwise unfair?

12. Section 44/47B ERA 1998 – Health and Safety cases and whistleblowing

13. Where there any circumstances of danger which the claimant reasonably believed to be serious and imminent that she could not reasonably have been expected to avert?

14. Did the claimant:

    a. Leave, propose to leave, or (while the danger persisted) refuse to return to her place of work?

    b. Take or propose to take appropriate steps to protect himself or other persons from the danger?

15. Was the claimant subjected to any of the following detriments because of the above?

    a. The withholding of her salary.

    b. The diversion of work from her.

    c. The deduction of paid holiday allowance.

    d. The threat of disciplinary action.

    e. Likely damage to professional reputation.

    f. Anxiety and distress.

16. Was the claimant subjected to any of the above detriments on the ground that she made a protected disclosure?

17. Section 13 ERA – unlawful deduction of wages, pension, holiday pay, annual leave and clinical supervision session payments

18. Has the respondent made any deduction of wages, holiday pay or annual leave without proper requirement or authorisation by virtue of any statutory provision or a provision of the claimant's contract of employment?

**Evidence**

19. For the claimant we heard from her first and then Ms S Whitbread, a former CBT and DBT therapist for the respondent. We also read signed statements from Mrs C Willis-Kember, former Therapy Services Manager for the respondent and Dr M Daves, former Consultant Psychologist for the respondent. We gave appropriate weight to those statements given that the authors were not present for cross examination.

20. The respondent relies upon the claimant's covert recording of meetings (referred to below) despite being told not to and, on one occasion, expressly confirming that she was not recording, as seriously undermining her credibility and showing her as someone who is willing to lie. The claimant's

explanation was that she did not feel that the matter had been treated by the respondent in a conciliatory manner and therefore did not trust them to make accurate notes. Further she was unaccompanied and would not be able to make satisfactory notes herself throughout the meeting.

21. In our view, whilst the claimant clearly should not have covertly recorded the meetings and certainly should not have lied when asked about it, in all the circumstances at the time we can see why she did and for that reason this behaviour in itself does not lead us to regard her as a fundamentally untruthful or unreliable witness.

22. For the respondent we heard from:
    a. Ms S Lovegrove, Therapy Services Manager; and
    b. Mrs D Telford, Hospital Director.

    We were also asked to read a signed statement from Mr A Bloor, Operations Director. Mr Bloor had attended on the first day of the hearing but was unable to remain and give his evidence due to ill health. Again, we took into account that this evidence was untested by cross examination but noted that a great deal of his involvement was detailed in contemporaneous documentation.

23. We had an agreed bundle of documents before us together with written submissions from both Counsel which were supplemented orally.

**Relevant Law**

24. **Whistleblowing and health & safety**

25. Employees are afforded various protections when they make a protected disclosure (commonly referred to as whistleblowing) and/or in relation to certain health and safety matters.

26. Protected disclosures: Any disclosure of information which in the reasonable belief of the worker making the disclosure tends to show one or more of the matters listed at section 43B(1) of the Employment Rights Act 1996 ('the 1996 Act') and is reasonably believed to be made in the public interest (not defined), will be a qualifying disclosure. That list includes that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and that the health and safety of any individual has been, is being or is likely to be endangered.

*27.* In order for a statement or disclosure to be a qualifying disclosure, it has to have a sufficient factual content and specificity such as is capable of tending to show one of those matters (Kilraine v LB of Wandsworth ([2018] IRLR 846). This is a matter of fact for the Tribunal to determine on the evidence heard. It must identify, albeit not in strict legal language, the breach relied upon (Fincham v H M Prison Service EAT 0925 & 0991/01).

28. Whether a worker had the required reasonable belief (of both what the information tended to show and whether the disclosure was being made in

the public interest) is judged taking into account that worker's individual circumstances. Accordingly, whether belief is reasonable must be subject to what a person in their position would reasonably believe to be wrong doing. It is a mixed subjective/objective test.

29. The information does not have to be true but to be reasonably believed to be true, there must be some evidential basis for it. The worker must exercise some judgment on his or her own part consistent with the evidence and resources available (Darnton v University of Surrey [2003] ICR 615).

30. To be protected a qualifying disclosure has to be made in accordance with one of six permitted methods of disclosure which include to the person's employer (section 43C(1)(a)).

31. Health and safety matters: the 1996 Act provides that these protections attach where an employee:

> '(c) being an employee at a place where-
> (i) there was no [health and safety] representative or safety committee, or
> (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
> he brought to the employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
> (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
> (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.
>
> (2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.'

32. Resulting protections: Where a protected disclosure has been made and/or relevant health and safety matter has arisen, the employee has the right not to be subjected to any detriment by his employer on that ground (sections 44 and 40 7B of the 1996 act). Whether a matter amounts to a detriment is assessed by reference to whether a reasonable worker might take the view that, in all the circumstances, it was to his detriment.

33. Further, an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is a relevant health and safety matter as defined above that the employee made a protected disclosure as defined above (sections 101 03 a of the 1996 Act).

34. **Constructive Dismissal**:

35. In order to bring a complaint of unfair dismissal it is first necessary to establish that the claimant has in fact been dismissed.

36. If there is no express dismissal then the claimant needs to establish a constructive dismissal. Section 95(1) of the 1996 Act states than an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if:

> "(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

37. In Western Excavating (ECC) Limited v Sharpe ([1978] ICR 221), the Court of Appeal confirmed that the correct approach when considering whether there has been a constructive dismissal is that:

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

38. In Kaur v Leeds Teaching Hospitals NHS Trust ([2018] EWCA Civ 978) the Court of Appeal confirmed that in a normal case where an employee claims to have been constructively dismissed it is sufficient for a Tribunal to ask itself the following questions:

> (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?
>
> (2) Has he or she affirmed the contract since that act?
>
> (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 to so called 'last straw' cases explained in London Borough of Walton Forest v Omilaju ([2005] IRLR 35)) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation)
>
> (5) Did the employee resign in response (or partly in response) to that breach?

39. The 'Malik term' referred to above is a reference to the House of Lords decision in Malik v BCCI SA (in liquidation) ([1997] IRLR 462) (as corrected by Baldwin v Brighton & Hove CC [2007] ICR 680) which confirmed that to succeed in a constructive dismissal claim the employee needs to show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them. This conduct is to be objectively assessed by the Tribunal rather than by reference to whether the employer's conduct fell within the band of reasonable responses.

40. If an employee has been dismissed, constructively or expressly, then it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the 1996 Act. If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

41. **Unpaid wages**:

42. If a worker suffers an unauthorised deduction from his or her wages he or she may make a complaint to the Tribunal (section 23 of the 1996 Act). Where the total amount of wages paid is less than the total amount properly payable, the amount of that deficiency is a deduction (section 13).

**Findings of Fact**

43. Having assessed all the evidence, both oral and written, and the submissions made by the parties we find on the balance of probabilities the following to be the relevant facts.

44. The parties and pre-pandemic arrangements

45. The respondent is part of the Priory Group which provides private healthcare throughout the UK. It has more than 20,000 employees over a large number of sites. One of those sites is a private hospital known as Hayes Grove. Mrs Telford is the most senior employee based at that site. She reports to a Regional Operations Director, Ms L Houghton. There are regional support services available to each site including HR and health and safety advice. The respondent has a number of policies of the sort one expects to see from an employer of this size including grievance and whistleblowing policies.

46. The claimant commenced employment with the respondent in February 2015 as a Therapist at Hayes Grove. She worked two days per week providing family therapy on the eating disorders unit predominantly to inpatients over two wards but also on a variable basis - according to demand and time available - to a number of outpatients. At the time of the events in question there were 12 such inpatients and 40 outpatients. It is clear that the claimant was very committed to the best interests of her patients; any suggestion otherwise by the respondent is rejected.

47. The claimant's contract of employment specified Hayes Grove as her place of work with no provision for remote or home working. It also included a 'deduction of monies' clause which read as follows:

> 'You hereby authorise Priory Healthcare Ltd to deduct from any remuneration accrued and due to you or from any payment in lieu of notice, any overpayment of reference salary, expenses or 'payments made by mistake or through misrepresentation or for debts or other sums which require to be authorised pursuant to Section 13 of the Employment Rights Act 1996.'

48. The claimant is a member of the British Association for Counselling and Psychotherapy (BACP) and as such is required to undertake a certain number of clinical supervision sessions. Her contract of employment was silent on the question of clinical supervision but did require compliance with policies and procedures of the respondent. The supervision policy recorded the importance of supervision, that everyone working in care and service delivery would have access to regular supervision and that clinical supervision would be provided monthly. The relevant job description also provided that the claimant must participate in appropriate clinical supervision. The overall effect of these documents is that provision of monthly clinical supervision was a contractual term that persisted whilst the claimant was 'working'. It is not expressly clear however from the documents whether that reference to working means 'employed' or 'on duty'. Mrs Telford's evidence was that it means the latter. On the basis of the documents before us we agree with that interpretation.

49. The claimant also had a private therapy practice which she operated out of a self-contained office within her own home which was set up to provide the necessary operational requirements and confidentiality for such a practice.

50. Arrival of the pandemic

51. The World Health Organisation declared Covid 19 as a pandemic on 11 March 2020.

52. On 16 March the Prime Minister announced that work should be undertaken from home where possible.

53. On 19 March the claimant emailed Ms Lovegrove referring to the 'current circumstances' and offering to conduct her outpatient sessions on the following day remotely. She said however that if she did not hear from her she would come in as normal and expect the clients to come to her. Ms Lovegrove replied stating that all face-to-face sessions should continue as normal unless the relevant staff/patients were self isolating. She also confirmed that in light of the uncertainty, remote therapy would be available for patients but it would be delivered from the hospital. The claimant accepted that position and attended for work the following day.

54. Also on 19 March the Government published its guidance on sectors (including health and social care) it considered critical and defined key workers.

55. On 20 March Mr Irving (the respondent's Chief Operating Officer) sent an email, which was cascaded to all employees, setting out the respondent's position. That email included:

> 'Firstly, be safe and look after your own and you colleagues mental wellbeing. This is so important as this crisis is going to last some time and you need to keep mentally and physically health throughout.
>
> As you will have seen from the Ops Plan, I have made the decision to stop all family members visiting patients (other than CAMHS patients for obvious reasons, but will review

regularly). The reason for this is twofold: one is to protect the patient, staff and ward environment from the spread of this disease. The other is to protect the family member from contracting the disease in our premises and then spreading to others in the family when returning home. I hope you all understand this action. It would be helpful, if your team speak to the family members to explain this via a telephone call, as I am sure they may have questions. However, we have also drafted a letter as a follow up to the call. This will be in the Ops Plan later today.

You will have seen the guidance from the Government on Keyworker status today. For any avoidance of doubt, anyone working in the hospital environment is classed as a Keyworker, from nurse to admin, to maintenance. Trevor has sent you all a letter signed by him that your staff can use for the schools as evidence of keyworker status. I am aware that some of these school may push back on individuals. If that is the case, can you please inform the Coronavirus Queries email address and we will deal with them individually.

There has been a real surge in request for IT equipment to allow people to work from home or for conference calling. You may not be aware but IT equipment is as rare as Loo Roll at the moment and we really do not have reserves. You will need to think very clearly at site whether you need the equipment or you can find alternatives ways of solving the problem. Additionally, I do not want to see a mass exodus of people working from home, leaving the nurses and HCA's and cleaners, etc on their own. This is not a good morale booster. So, any equipment required will need to be requested through Adrian Cree (Medical staff), OD's, who in turn will get approval from me.'

At some point early in the pandemic the respondent set up a bronze/silver/gold command structure to coordinate its response. Regular and frequent guidance was issued to management and staff as the situation evolved.

56. On 23 March at 16.36 the claimant emailed Ms Lovegrove and raised her concerns about attending.

57. Ms Lovegrove telephoned the claimant shortly afterwards in response and left a voicemail advising her that the respondent's position was that therapists were expected to attend the hospital to deliver sessions due to confidentiality and governance issues. However all outpatient therapy sessions would be conducted by telephone from the consulting rooms.

58. The claimant replied confirming that she would attend the following day and they could discuss the matter.

59. That evening the Prime Minister announced the national lockdown. That announcement included:

'From this evening I must give the British people a very simple instruction - you must stay at home.

Because the critical thing we must do is stop the disease spreading between households.

That is why people will only be allowed to leave their home for the following very limited purposes:

… travelling to and from work, but only where this is absolutely necessary and cannot be done from home.'

60. The claimant emailed Ms Lovegrove at 22.38. She said that following the Prime Minister's announcement she would not be able to attend work the following day. She said it was a shame that the respondent was not able to support therapists in working from home and that she knew of other therapists, including in the NHS, where working from home was being supported. She concluded by saying:

    'I am here and available for work if you want me.'

    The claimant did not return to work or attend the site again prior to her resignation.

61. On 24 March Mrs Telford emailed all staff at Hayes Grove enclosing a key worker letter for their use when travelling to and from work.

62. The claimant and Ms Lovegrove spoke in the early afternoon. Both made notes of the conversation. Ms Lovegrove confirmed that the respondent's position regarding attendance at work had not changed following the lockdown announcement. The claimant clearly expressed in detail her unhappiness and disagreement with that position. In the course of the conversation Ms Lovegrove confirmed that the respondent had a limited number of IT licences available for people to work from home and that they were being prioritised for use by employees required to self isolate. The conversation concluded with them agreeing to disagree about the respondent's approach.

63. Also in that conversation it was agreed that the claimant would take that day as annual leave and noted that she was due in any event to take her next working day, 27 March, as time off in lieu. They agreed that the claimant would let Ms Lovegrove know by email her plans for the following week. In her note of the conversation, the claimant acknowledged that she agreed the day would be taken as annual leave but stated that she felt pressured into giving that response.

64. Following the conversation the claimant emailed Ms Lovegrove at 16.51 attaching her note of it and also a transcript of Ms Lovegrove's voicemail from the previous day. In the email she resiled from her earlier agreement and said:

    'The government's current position is that everyone must stay at home; people should only be going into work if their job "*absolutely cannot be done from home*". My job absolutely can be done from home, and this is what therapists for other organisations (including the NHS) are doing. Currently there are Priory staff members - including consultants/therapists - working from home, so this is an arrangement that can be put in place for me.

    Today is not a day of annual leave. I was ready and willing to undertake telephone sessions with clients, but subsequently I was told that I could not work from home.'

65. The claimant emailed Ms Lovegrove again on 25 March at 12.47. She asked for permission to speak to the mother of a patient who had contacted her by text asking for assistance. She also said:

'Just to be clear, I remain of the view that I should not physically come into the Priory because I do not want to compromise either my health or others', nor go against the Government's legally-enforceable advice. I hope you understand.'

66. Ms Lovegrove sought advice and assistance from Mrs Telford who emailed the claimant on the same day at 16.07. She confirmed her understanding that the claimant had no Covid symptoms and was not self isolating nor was she or any member of her family highly vulnerable. She referred to the role of healthcare professionals in responding to the pandemic and stated that the claimant had a duty to attend work. She referred to changes in practice that were being implemented in line with internal guidance and that from Public Health England but stated they had in-patients who needed their services to continue to the best of their ability. She confirmed that all staff, unless they were isolating, were expected to attend site, to work collaboratively with the nursing team and consultants in order to provide safe and therapeutic care to in-patients. Whilst on site, therapists would be expected to provide telephone consultations from a suitable office/consulting room.

67. The claimant replied to Mrs Telford on the following day. In summary she repeated that physical attendance at work was permitted only if absolutely necessary and that did not apply to her as she could provide her services from home. She clearly stated that the respondent's position conflicted with the regulations and that by attending work she would be putting patients, staff, her family and herself at risk. She requested that they work together towards resolving the issue but if that was not possible to be provided with a copy of the respondent's grievance procedure.

68. She attached a short document that gave further details of both why she felt it was inappropriate for her to attend on site and why her arrangements in her home office were appropriate.

69. On 30 March the claimant emailed Ms Lovegrove and Mrs Telford. She stated:

'During the coronavirus crisis, it is socially responsible for me to stay away from premises where i may spread the illness or be affected by it. The Government has also made this law.

I therefore inform you that I do not intend to return to the Priory premises until it is safe to do so.

Of course I am very happy to work from home, giving consultations by telephone. This is mandated practice in the NHS.'

70. Mrs Telford replied by email on the same day. She confirmed her understanding that there were no medical reasons why the claimant could not attend work nor any other extenuating circumstances. She confirmed that the claimant was classified as a key worker and that she was fundamental in allowing the respondent to continue to provide inpatient service for vulnerable patients. She said that they were asking all key workers, including therapists, to support their site and be prepared to undertake a range of reasonable duties in order to continue to provide this

essential service. She acknowledged that the claimant had an alternative view but stated that the letter outlined the respondent's position and instructions and that therefore she was required to attend site.

71. The claimant replied again on the same day by email stating that Mrs Telford's letter had not addressed any of the concerns she had previously raised, that she maintained she should be providing her services from home and that she should be supported in doing so. She again requested the grievance policy which was provided to her the following day by the on-site HR manager Ms Davies.

72. In a further exchange between the claimant and Mrs Telford on 1 April, Mrs Telford confirmed that any clients contacting the claimant should be directed to the Cedar therapy unit who would advise appropriately. She also asked the claimant, if she had a work mobile, to put a message on it directing her clients to the Cedar unit. It has not been disputed that the claimant was thereafter prevented from working with/contacting her patients. Mrs Telford's witness statement contained a cogent explanation of the reasons for the respondent's policy that during the absence of any team member, unless they are providing a stated on-call service, all enquiries must be dealt with centrally by site.

73. Formal Grievance and HSE complaint

74. On 1 April the claimant emailed Dr McLaren, Medical Director, advising him that she was formally raising a grievance in two respects:

> '1. The Priory's repeated refusal to support me in working from home during the Covid-19 pandemic, despite (i) other members of staff being able to do so, and (ii) it being a legal requirement that all persons work from home unless it is absolutely necessary that they physically attend work.
>
> 2. The Priory's failure to maintain a safe working environment during the Covid-19 pandemic.
>
> My position is that The Priory has breached the duty of care that it owes me, as a member of staff.'

75. On 2 April 2020 the claimant requested a copy of the respondent's whistleblowing policy from Ms Telford, confirmed that she had raised a grievance with Dr McLaren and had filed a report with the BACP. The whistleblowing policy was provided to her on the same day and she was also advised to forward her grievance to Mrs Telford or to Ms Houghton. In the event the claimant did not pursue any formal internal whistleblowing complaint.

76. At some point in early April, the claimant also filed a complaint online with the Health and Safety Executive (HSE). No copy of that complaint was before us although a subsequent email from the claimant to the HSE confirmed that it had:

> '…clearly stated that my employer - a private mental healthcare provider - has not implemented the requisite Covid-19 health & safety standards in its workplace, thereby

endangering staff and patients. It further stated that my employer has ordered all members of staff - both healthcare and administrative staff - to continue operating on site since lockdown was implemented regardless of whether any individual is capable of working from home.'

77. The HSE acknowledged the complaints on 20 April and provided links to further information but made it clear that they were not going to take any action and she may wish to bring their guidance to the attention of her employer.

78. In the meantime the claimant had sent further details of her grievance, including a number of attachments, to Dr McLaren at 08.59 on 6 April.

79. That afternoon Ms Lovegrove emailed the claimant advising her that a telephone conference call had been arranged by Ms Houghton for the following day as an opportunity for the claimant to discuss her concerns regarding her return to work with senior managers of the private healthcare division. The managers joining the call would be Ms Houghton, Ms Stanford (Managing Director), Mrs Telford and Ms Lovegrove.

80. The claimant replied stating that she felt extremely uncomfortable about attending such a meeting. She set out her reasons why and stated that she was concerned the call was not a genuine, good faith attempt to resolve the matter at hand and that she needed assurance that her formal grievance was being attended to correctly. She suggested that the meeting should be postponed until she had spoken to Dr McLaren and her legal advisers and that if the meeting was arranged she would like her daughter to attend. She also asked for the meeting to be audio recorded and a comprehensive note taken and circulated.

81. On 7 April the claimant had a conversation with Dr McLaren. Her note of that conversation records that she expressed her concerns about the proposed meeting with senior managers. He confirmed that he was not aware of that meeting and that he had referred the formal grievance to HR so that it would be dealt with appropriately. He also confirmed that the decision about working from home was not a local decision and that there was a respondent wide policy in place.

82. The grievance was allocated to Ms Crimmings, Head of Quality. We had no evidence before us from Ms Crimmings either oral or written and therefore can only work from the notes of that process.

83. Ms Crimmings interviewed Mrs Telford on 9 April and on the same day the claimant was invited to a telephone grievance hearing on 16 April with Ms Crimmings. She was advised that she had the right to be accompanied by a fellow employee or accredited representative of a recognised trade union/professional association and Ms Davies would attend as a notetaker.

84. The claimant emailed Ms Davies the following day explaining that it was not possible for her to be accompanied by a colleague or union representative and requested that her daughter attend with her and be allowed to address the hearing to put and sum up her case, respond on her behalf to any views

expressed and confer during the hearing. She also asked if the grievance meeting would be audio recorded.

85. Ms Davies replied on the day before the meeting confirming that it would not be permitted for the claimant's daughter to attend and repeated who the claimant could bring (and that the meeting could be postponed for this to be organised). The claimant emailed again repeating that she was disappointed that her daughter could not attend with her. Ms Joanna Davies, Regional HR adviser, replied repeating the position as already explained and that the meeting could be rescheduled in order for a suitable companion to attend. She also confirmed that audio recordings were not permitted, a notetaker would be present and that the claimant would receive a copy of the notes. The claimant confirmed that she did not wish the meeting to be postponed and would attend alone.

86. Ms Crimmings interviewed Ms Lovegrove on 14 April.

87. The notes of the interviews between Ms Crimmings and Ms Lovegrove and Mrs Telford (although the notes in relation to Ms Lovegrove read much more as a statement by her rather than a record of an interview) were not particularly detailed. This accords with the evidence of both Ms Lovegrove and Mrs Telford that the detail of the claimant's grievance was not put to them in this investigation. This is notwithstanding that the written documents already submitted by the claimant as part of her grievance contained many details of the various heads of her complaint.

88. The grievance meeting took place as planned on 16 April. Despite being told it was not permissible, the claimant made a covert recording of the meeting as already referred to above.

89. The thrust of the claimant's position at the meeting was that she disagreed with the respondent's policy that she was required to attend the site and provide her services to patients remotely from their premises. She made it clear that she believed she could do her job from home and she should do it from home both because of the government's regulations and also the risk of bringing infection into the site where there were many immunocompromised patients. She also made it clear that just because she was classified as a key worker did not mean that she had to work from the site and that she was ready and willing to work from home.

90. There is a dispute between the parties as to the accuracy of the notes of the grievance meeting produced by the respondent but whichever notes are used it is clear that Ms Crimmings restated the policy of the respondent and did not appear to engage with the claimant's criticisms of it.

91. Towards the end of the meeting the claimant read out a written statement of her case which she had submitted immediately beforehand. She subsequently sent a copy to Ms Crimmings.

92. After the grievance meeting she did not escalate the matter to anyone in higher authority to check whether there was a possible exception for the

claimant or whether the claimant generally had good points about the policy more widely.

93. Notes of the grievance meeting were sent by Ms Davies to the claimant on 21 April 2020. The claimant disputed their accuracy. It is inevitable that any notes, other than a transcript, will be a summary of what was said and will not capture every detail. The claimant's case, however, goes further than that. She says that the notes were grossly inaccurate, did not fairly represent what she had said during the meeting and furthermore that Ms Crimmings relied upon those inaccuracies in making her final decision.

94. The claimant identified many examples of where she said the notes were inaccurate. Some of those examples are the product of the summary nature of notes. However we agree that some of the examples are more troubling and do appear to be a misrepresentation (sometimes by omission) of what she actually said during the meeting (details of which are provided by the transcript of the covert recording). For example, those matters identified at paragraphs 94(e), (g), (m), (o) and (q) of her witness statement.

95. In response to the claimant's concerns about the accuracy of the official notes, Ms Davies confirmed that a version showing the claimant's marked up amendments would be kept on the file.

96. On 20 April the claimant emailed Ms Crimmings with further points concerning the grievance meeting. A lot of this email was her repeating or expanding upon points she made in the meeting but there are also sections where she criticises the grievance process.

97. Also that day Ms Crimmings emailed Ms Davies and inadvertently copied in the claimant. In that email Ms Crimmings said:

    'Also, she read out a summary of her grievance which took almost 10 mins!!!'

    Although in a subsequent email to the claimant Ms Crimmings said this was a way of 'ensuring all key things are included in the meeting notes' we conclude that the way she expressed herself together with the multiple exclamation marks does indicate either a sense of exasperation and/or criticism of the claimant on her part. We also note that Ms Crimmings had – unsuccessfully – tried to recall the email.

98. On 22 April the claimant sent her amendments to the notes to Ms Davies who had confirmed that they would be considered and reviewed as evidence in the outcome.

99. On 24 April 2020 Ms Crimmings wrote to the claimant informing her that her grievance had not been upheld. She confirmed that both versions of the notes had been reviewed. Notwithstanding that she did expressly refer to the matters identified at paragraphs 94(m), (o) and (q) of the claimant's witness statement (respectively purported summaries of what the claimant had said about the respondent's decision to keep its hospitals open, possibly performing roles other than therapist and whether she willing to

fulfil her role). It is clear that in relation to those matters she was relying upon the inaccurate notes produced by Ms Davies.

100. She did however give a full explanation of her reasons for not upholding each element of the grievance and expressly referred to the further points the claimant had sent in after the meeting and responded to each of them. She also made a number of recommendations aimed at supporting the claimant in moving forward in a positive way (which included the claimant being given a clear explanation of the position regarding her leave and pay).

101. The claimant submitted an appeal against that grievance outcome on 29 April. The grounds of her appeal were stated as:

> '1. Pursuant to lockdown measures implemented by the Government on 23 March 2020, UK citizens may only physically attend work if impossible for them to work from home. I maintain that I am able to work from home.
>
> 2. With regards to outpatients, the Priory has said that I am required to hold telephone consultations on site. I do not understand why I cannot undertake such telephone consultations from home. particularly given that other members of staff - both "at risk" and not "at risk" - have been permitted to do so.
>
> 3. With regards to inpatients, the Priory has said that the patients have a right to face-to-face treatment during the pandemic which cannot be delivered over video call or the telephone from home. I disagree with this position and assert that this approach is highly inappropriate and dangerous as it unnecessarily increases the risk of immunocompromised patients and staff members contracting Covid-19. Further, from my discussions with colleagues I do not feel that the Priory has the necessary safeguards in place to protect patients and staff members on site.'

102. Following an exchange with Ms Joanna Davies, the claimant confirmed that she wished her appeal to be dealt with on paper only. Accordingly Mr Bloor who was appointed as the appeal manager considered a relevant file of papers including the claimant's grievance and supporting papers, correspondence, notes of the interviews conducted by Ms Crimmings, the two versions of the notes of the grievance meeting and the outcome letter.

103. Following receipt of her payslip dated 30 April which showed a deduction of £856.18 for 'other leave' the claimant wrote on 4 May to Ms Joanna Davies questioning that deduction. It was only in response to that letter that Ms Telford offered an explanation of the deduction.

104. In reply the claimant said:

> 'For the avoidance of doubt, I have never agreed, and do not continue to agree, to the Priory's arrangements concerning annual leave/unpaid leave. Throughout the matter I have continually expressed my desire to continue working, albeit from home in compliance with lockdown measures and in order to keep others safe. I assert my right to be reimbursed for my deducted annual leave and wages, and for the appropriate pension payments to be made.'

105. On 5 May 2020 the BACP updated its guidance to its members and stated that where ever possible they advised not to continue to see clients face-to-face if other options are available. They made it clear, however, that

there were many factors to consider and that no definitive answer could be given that would be applicable in every case.

106. The claimant filed her Tribunal claim form on 6 May. At that point the claim was limited to unpaid wages and annual leave.

107. Also on 6 May the claimant was invited to attend an appeal meeting with Mr Bloor to be held on 12 May by zoom. She was informed of her rights to be accompanied. Correspondence followed between the claimant and Ms Joanna Davies between 11 and 18 May regarding the claimant's request to be accompanied by her daughter at the appeal meeting and for it be recorded which were again refused. In the course of those exchanges the claimant referred to her trust and confidence in her employer being undermined specifically by reference to the inaccuracies in the note of the grievance meeting. On 18 May the claimant confirmed that she would like to proceed with the appeal meeting via written representations as she felt 'unsupported and unsafe'. It was agreed that once he had reviewed the documentation Mr Bloor would provide questions for the claimant to answer which he would then review and provide an outcome in writing.

108. Those questions were provided to the claimant on 22 May and she was asked to provide replies by 27 May – later extended by agreement to 1 June. Her answers ran to 17 pages.

109. The summary above of the correspondence between the parties does not convey the very detailed and, at times, repetitive nature of the claimant's communications. At times she did seem to take an overly combative and legalistic approach to her dealings with the respondent particularly given the very difficult circumstances facing the organisation at the time.

110. In the meantime on 21 May Mrs Telford wrote to the claimant putting on hold from May the funding of professional clinical supervision until she resumed her duties. She did this on the basis that the policy requiring such funding was predicated on the employee 'working' and the claimant was not. The claimant replied on 28 May saying that suspending this payment potentially jeopardised her BACP membership and that she assumed this was done to put undue pressure on her to return to working on site. Further, that she had already undertaken the supervision session for May (although this was subsequently paid by the respondent). Mrs Telford said she would reply once she had spoken to Regional HR but did not. The claimant also gave evidence that supervision was important even if not actively working because it could take up to 6 months for a therapist to process, with their supervisor, the impact of their work on them.

111. On 27 May the claimant raised a complaint with the HSE as to their lack of action regarding her original complaint. In that email she said:

> 'So that you are aware: a number of my colleagues who continued to work on site following lockdown have now contracted Covid-19. Some of these colleagues require/have required hospital treatment; one such individual is someone with whom I share an office and office equipment (including a telephone, computer and keyboard) pursuant to my employer's 'hot desk' policy. Further, there are patients on site who have tested positive for Covid-19.

Members of staff who have come into contact with such patients are not told to self-isolate at home while awaiting test results (which they themselves must procure without my employer's assistance); instead, they continue to work on site - sometimes on more than one ward - and remain in contact with patients. Moreover, there are members of staff who continue to operate between hospital sites which may be contributing to the spread of Covid-19.'

They replied on the following day confirming that the matter would be progressed.

112. On 2 June the HSC raised a 'Concern' regarding social distancing, cleaning and lack of suitable PPE with the respondent. Mrs Telford sent a detailed written response on the following day. Specifically with regard to the EDU and therapy services she said:

'Eating Disorder Services (20 beds) - Currently, our service is funded by NHS England (NHSE) who fulfil their commitment to monitor services closely. At the start of the pandemic, in collaboration with NHSE, all in-patients were risk assessed and the most appropriate, personalised care plan was agreed which may have been discharge home, long term leave or to remain an in-patient if considered the safest option. Over the following weeks the unit was subject to increased demand and has been full for some time. There is a Priory wide admission and discharge procedure for Eating Disorder patients that was compiled in collaboration with specialist service leads and guidance from PHE and NHSE. Depending on the risk factors, patients are isolated on admission on-line with the relevant Standard Operating Procedure (SOP). The in-patient therapeutic programme has remained in place for the duration of the pandemic including therapy (subject to staff availability).

In summary, no patients on the Eating Disorder Unit have developed symptoms or tested positive for COVID.'

and

'Therapy Services - Face to face therapy with inpatients has continued throughout. All out-patient therapy moved to video call appointments early in the pandemic. Wherever practical within a hospital setting, all staff observe the social distancing rules of 2 metres. For the delivery of safe group therapy, rooms have been changed and numbers within the group restricted to allow safe social distancing. Depending on the room in use, the group size is between 5 and 7 patients. Therapy staff who attend site have access to individual consulting rooms rather than shared office space for administration.'

113. On 4 June the HSE sent a notification of contravention letter to the respondent which identified two areas of material breach (in summary concerns regarding the fitting of masks and failure to fully assess and identify all necessary measures to prevent the further spread of Covid including inadequate risk assessment, social distancing and cleaning). The respondent was also informed that it was required to pay a fee (not a fine) further to this breach and that the notice should be brought to the attention of employees. They required confirmation within five days of the steps taken in response to the notice.

114. The HSE sent a copy of that letter to the claimant on 5 June together with a covering letter setting out the parts of their conclusions particularly relevant to the concerns she had raised although noted that:

'The main element of your concern is with regards face to face therapy. The hospital now only provides face to face for inpatients and state that they feel it is an important part of

patient recovery. It is not for HSE to comment on the Hospitals decision to continue with face to face sessions both for group therapy and individuals, as in my opinion this is more a therapeutic or medical decision and has to be on a case to case basis. The UK Government advice does recognise that 'services relating to mental health' may be an exception when it comes to its advice about continued remote working. As you point out the Priory are using remote therapy where they feel it is appropriate.'

115. The HSE had to chase the respondent on both 10 and 17 June but following an exchange of emails between them on 23 June, the HSE confirmed that their record would be closed.

116. On 26 June Mr Bloor sent his outcome letter to the claimant. It was a lengthy and detailed explanation as to why her appeal had not been upheld. We identify in the conclusion section below particular aspects of this letter that we have take into account.

117. Despite Mr Bloor confirming at the end of that letter that the appeal had been concluded and his decision was final, the claimant replied on 29 June with comments and challenges to his conclusion.

118. Mr Bloor wrote to her on 6 July providing further clarification around the points she had raised, enclosed a copy of the HSE's final report and outlined next steps for ongoing support. He also invited her to a meeting on 10 July with Ms Lovegrove to allow the respondent to support her and facilitate a return to work. He set out in detail the measures in place to reassure her about her safety for the meeting (completion of risk assessments, signage, removal of shared items, cleaning arrangements and social distancing etc) and confirmed that the request to attend the meeting with Ms Lovegrove was a reasonable management request. He offered to hold the meeting via video conference or telephone if she preferred. He also set out what it was proposed should be covered in the meeting, details of the site's risk assessment and measures in place, updates in relation to working processes within the therapy team, feedback and measures in relation to the HSE, an individual risk assessment, reassurance around her return to work and a discussion regarding use of annual leave to cover some of the period she had been absent. He also, as an exception, offered that she could be accompanied to the meeting by a colleague or union representative.

119. The claimant replied on the same day saying she would contact Ms Lovegrove regarding the meeting but making it clear she disagreed with Mr Bloor's conclusions and continued to maintain that she should be working from home and that the respondent should be supporting her in this.

120. <u>Discussions regarding the claimant's return to work on site</u>

121. On 8 July the claimant emailed Ms Lovegrove asking for details of the respondent's arrangement concerning therapeutic treatment of outpatients. Ms Lovegrove replied on the same day confirming that following the approval of a detailed reopening plan and associated risk assessments, the outpatient therapy service had been reopened from 1 July for some urgent face to face therapy and was continuing to offer a remote service to others

with a view to providing more face to face therapy as advised. She said she could update the claimant with further detail as to the changes in relation to working processes during the proposed meeting.

122. The claimant replied on the following day setting out why, notwithstanding some easing of Government restrictions, she disagreed with that decision and why it made her feel very unsafe – particularly with regard to recommencing on-site treatment of outpatients. She stated that she was greatly concerned for the welfare and well-being of her clients and concluded:

> 'You'll appreciate that I am finding it very hard to believe that the Priory has my interests in mind when its conduct to date has proven otherwise, thereby materially breaching my trust and confidence in it as my employer.
>
> As such, I will not be attending the meeting on Friday given the conflicting positions.'

123. In a further email on 10 July the claimant confirmed that she felt there was little point in the meeting going ahead as its purpose was to discuss her working on site when she did not feel that was appropriate or safe and she maintained her position that she should be working from home.

124. On 27 July Ms Lovegrove again emailed the claimant. She referred to the Government's announcement that from 1 August the rules regarding shielding would change as context for the respondent's continued efforts to reasonably request her to engage with attempts to plan and support her return to work. She said the meeting would give an opportunity to provide the claimant with more information around the detailed risk assessment for the site as well as a number of other specific issues about which the claimant had raised concerns. She requested the claimant's attendance at a rescheduled meeting on 31 July and repeated the purpose of that meeting as set out in Mr Bloor's email.

125. The claimant replied on 29 July setting out in detail why she disagreed with the most recent Government announcement and the respondent's decision to start bringing outpatients on site. She repeated that the respondent's conduct over the course of lockdown had materially undermined her trust and confidence in it as her employer. She repeated that she did not feel safe or comfortable returning on site until a vaccine was available and therefore would not be attending the rescheduled meeting.

126. In the absence of Ms Lovegrove on leave, Mrs Telford wrote to the claimant on 7 August acknowledging the claimant's email and expressing a desire to make a final attempt to meet with the claimant via videoconferencing on 14 August (whilst reminding her that recordings of meetings were not permitted). She said that at that meeting they would brief the claimant on current risk assessments and control measures in place and develop a tailored individual risk assessment for her return to work. She attached the existing site risk assessments, an individual risk assessment template, an annual leave request form and the employee handbook.

127. Mrs Telford reminded the claimant that participation in work-related meetings was a reasonable management request and a failure to engage in the meeting would contravene her contract of employment and as such, failure to attend could result in a disciplinary process ensuing.

128. The claimant replied again disagreeing with the respondent's and Government policy (noting the withdrawal of the work from home policy from 1 August) but confirming that she would attend the meeting.

129. At the outset of that meeting, on 14 August, Ms Lovegrove asked the claimant if she was recording the meeting and she said she was not. That was a lie.

130. Ms Lovegrove gave very detailed information to the claimant regarding the Covid controls/measures put in place at the site and her very detailed objections and queries were answered there and then where possible, including with regard to the treatment of outpatients, and a commitment was given to follow up with any outstanding details. It is clear that by this stage the respondent was giving careful thought to the issues arising from the type of work that the claimant would be doing if she returned to work on site. The claimant refused to say why she believed that social distancing and mask wearing was not being respected. The meeting concluded (after approximately 2 hours) with the claimant asking for an IT licence to be provided for her so that she could work at home.

131. On 17 August the claimant emailed Ms Lovegrove restating her position and attaching a 'non-exhaustive list of concerns' she had raised at their meeting and her note of Ms Lovegrove's replies.

132. Mrs Telford and Ms Lovegrove met to discuss the outstanding matters raised by the claimant and on 25 August Ms Lovegrove emailed the claimant attaching a table which listed each of the claimant's issues, the response and embedded links to various relevant documents. She expressed her hope that the table (which was 21 pages long - excluding any embedded documents) would provide her with the clarification and further information she was seeking and that they could move forward with plans for her return to work at site. She invited the claimant to a meeting on 4 September by zoom to discuss that further and to make those arrangements. She did not deal with the claimant's request for an IT licence however this is not surprising given the respondent's position was she should return to work on site.

133. She did state:

> 'Participation in work related meetings is a reasonable management request and failure to engage in this meeting will contravene your contract of employment. As such, failure to attend could result in a disciplinary process ensuing.'

134. In reply on 28 August the claimant said:

> 'I see little purpose in having these meetings when I do not intend on returning to work on site until Covid-19 has been eradicated/a vaccination becomes available; until such a time.

my position is that I should be working remotely and that the Priory should be supporting me in doing so. This is not me attempting to avoid fulfilling my work obligations under my employment contract; I am trying to play my part in mitigating the spread of Covid-19, in order to keep myself and others safe.'

135. On 3 September Ms Lovegrove confirmed to the claimant that:

'The purpose of the meeting remains the same as outlined in my earlier email dated 25 August 2020 relating to facilitating your return to work on site and you are encouraged to attend this meeting. Please note that this is a reasonable management instruction and refusing to follow this may mean that you are subject to disciplinary action.'

136. The claimant did not attend the meeting on 4 September.

137. <u>The claimant's resignation</u>

138. On 7 September Ms Joanna Davies invited the claimant to a disciplinary meeting to be held by zoom. She stated that the meeting would afford the claimant:

'… the opportunity to provide an explanation for the following matters of concern:

- Refusing to follow a reasonable management instruction to attend a work related meeting scheduled for 4'" September 2020.
- Unauthorised absence. As you are aware you have been absent from work since the 24th March 2020.'

which she stated were matters of potential gross misconduct and if substantiated could result in dismissal. She enclosed a copy of the disciplinary policy plus other relevant documents and advised the claimant of her right to be accompanied.

139. The claimant replied on 8 September setting out why she felt this action as unreasonable, repeating in general terms her overall position and concluding:

'The Priory has now made the decision to bring disciplinary proceedings against me following my decision to exercise my employment and other legal rights. This, in addition to its gross misconduct towards and treatment of me to date, has led to my trust and confidence in it as my employer being seriously breached. My wages and pension contributions have been withheld for over five months, and financial cover for my clinical supervision sessions suspended for four. When I have enquired about what arrangements have been put in place for my clients'/patients' welfare, given that such arrangements will necessarily involve me, I have not had a response. My reputation as a therapist had been adversely affected. My mental health has suffered tremendously to the point where I have difficulty functioning normally. I do not know how I can continue my employment given the aforementioned repudiatory breach.

As such, I feel that the Priory has left me with no option but to tender my resignation. This is not something that I choose freely; rather, I feel that I have been left with no choice in the matter.'

140. An exchange of emails between the claimant and Ms Joanna Davies followed where both parties stated their position on various issues and on 11 September, Ms Davies confirmed, despite her earlier position, that the respondent would not proceed with the disciplinary process.

## Conclusions

141. Did the claimant make any protected disclosures?

142. The claimant relies upon the disclosure of information which she says in all the circumstances she reasonably believed was in the public interest and tended to show:
    a. that a person failed, is failing or is likely to fail to comply with any legal obligation to which it is subject; and
    b. that the health or safety of any individual has been, is being or is likely to be endangered.

143. As for the first, the relevant legal obligation was compliance with the lockdown announcement made by the Prime Minister on 23 March 2020 (and its subsequent iterations) and the alleged failures were both those of the respondent (in requiring the claimant to work on site) and the claimant (had she complied with that requirement). As for the second, this was a risk to the health or safety of both herself, other employees and patients from Covid.

144. The claimant expressly and repeatedly referenced her belief in those failures and risks in her disclosures of information to various representatives of the respondent from 24 March until her resignation and repeated it in her resignation letter. She plainly believed her position to be in the public interest.

145. As to whether she reasonably believed those disclosures both to be in the public interest and tending to show those failures and risks, we find that she did – especially in light of the HSE's findings in June - until receipt of the information given to her during the meeting on 14 August with regard to the respondent's specific control and mitigation measures implemented and their operational arrangements. Upon receipt of that information and reassurance (in addition to Mr Bloor's lengthy explanation of why the grievance appeal was not upheld and his further comments on 6 July ) the claimant – whilst acknowledging that she did not agree with the respondent's position – could no longer reasonably believe that either she or the respondent would be failing to comply with a legal obligation should she return to work on site or that the health or safety of any individual would be likely to be endangered (beyond the unavoidable level of risk presented by Covid).

146. Consequently, we find that the claimant did make the protected disclosures alleged at paragraph 8 above (with the exception of 8(d)(iv) which post dated that meeting) and is afforded the protection of sections 47B and 103A of the 1996 Act accordingly.

147. Were there any circumstances of danger which the claimant reasonably believed to be serious and imminent that she could not reasonably have been expected to avert?

148. If so, did the claimant:

a. Leave, propose to leave, or (while the danger persisted) refuse to return to her place of work?
b. Take or propose to take appropriate steps to protect himself or other persons from the danger?

149. Following the same analysis as above, we conclude that there were circumstances of danger which the claimant reasonably believed to be serious and imminent and she did leave, and refuse to return to, her place of work as a result. However, after 14 August she could reasonably have been expected to avert those circumstances by following the respondent's control measures they had put in place and which had by then been explained to her in detail. Accordingly, the claimant has the benefit of the protection of sections 44 and 100 of the 1996 Act until that date.

150. Was the claimant subjected to any of the following detriments because of the protected disclosures and circumstances of danger as found above?

a. The withholding of her salary

The claimant's salary was withheld from 24 March 2020; clearly a detriment. For the reasons above until 14 August she had a reasonable belief that there were serious and imminent circumstances of danger and because of that belief did not attend work. Her salary was withheld on that ground. There was a clear causal link between her reasonable belief and the non-payment of salary which was therefore unlawful pursuant to section 44 of the 1996 Act.

The salary was not withheld however on the ground that she had made the protected disclosures but because she did not attend for work. Consequently there was no breach of section 47B.

b. The diversion of work from her

Work was diverted from the claimant and, in all the circumstances particularly the claimant's professional position and her strength of feeling about the welfare of her patients, this did amount to a detriment. However, there was insufficient causal link between that diversion of work and both the claimant's reasonable belief in the serious and imminent circumstances of danger and her protected disclosures. Although, as above, they were the reason for her absence from work there was another link in the causal chain namely the respondent's policy decision – which it was entitled to make – with regard to patient management and communication.

c. The deduction of paid holiday allowance

On reflection, the pleadings and submissions from both Counsel (and to some extent the evidence) did not address the issue of unpaid wages, including annual leave. Accordingly the panel does not sufficiently understand the claim and the response in this respect in

order to be able to make a decision. Having found, as above, that wages for the period 24 March to 25 August were unlawfully withheld, we will invite submissions (and if necessary, evidence) at the remedy hearing on the annual leave claim and what, if anything, is outstanding.

d. The threat of disciplinary action

The first reference to the possibility of disciplinary action for non-participation in work-related meetings was made by Mrs Telford in her email to the claimant on 7 August in respect of a proposed meeting that the claimant did in fact attend. This was repeated by Ms Lovegrove in her emails dated 25 August and 3 September (both with regard to a remote meeting on 4 September). The invite to a disciplinary meeting was in Ms Joanna Davies's email dated 7 September. The reason for that meeting was expressed to be both the claimant's unauthorised absence from 24 March 2020 and her refusal to attend the 4 September meeting.

The threat of disciplinary action could reasonably be regarded by the claimant as a detriment. Insofar as the threat was predicated on her refusal to attend a work-related meeting, however, we conclude that there was insufficient causal link between it and both the claimant's reasonable belief in the serious and imminent circumstances of danger (which ended on 14 August]) and her protected disclosures. The reason for that threat was not the claimant's absence from work or that she had made protected disclosures but that she had refused a reasonable management instruction to attend a work-related meeting (to be held remotely).

The second reason for the threatened disciplinary action however was the claimant's failure to return to site since 24 March 2020. That failure was intrinsically because of her – until 14 August – reasonable belief in the relevant circumstances of danger. The resulting threat insofar as it related to the period of absence up to and including 14 August was therefore unlawful pursuant to section 44 of the 1996 Act. It was not however on the ground of her having made protected disclosures.

e. Likely damage to professional reputation and
f. Anxiety and distress

There was insufficient evidence before us to find these alleged detriments as a fact but in any event these are potential consequences of a detriment having been suffered rather than detriments themselves and therefore a matter for the remedy hearing.

151. Did the respondent breach the implied term of trust and confidence, and/or an express term regarding their payment obligations when:

a. <u>Not allowing her to work from home from 23 March 2020 and subsequently;</u>

i. In assessing the respondent's treatment of the claimant throughout this period we remind ourselves to recognise the extraordinary circumstances faced at the time and that no doubt the respondent was in a crisis management mode having to deal with a fast moving and changing situation of the utmost severity. Having said that we do find that the response of Ms Lovegrove and Mrs Telford to the claimant's concerns in the early stages was at times inflexible and they both resorted to a dogmatic application of policy without, on occasion, engaging with her central issue of why she could not provide the services required from home. There also did not seem to be a recognition on the ground that just because an employee is a key worker and is allowed to attend their place of work does not mean that they must so attend.

ii. That approach was also adopted by Ms Crimmings in the first stage of the grievance again without properly engaging with the claimant's arguments about why she could or could not work from home. This was no doubt a reflection of the inadequacies of that first stage of the grievance that are dealt with below resulting in Ms Crimmings perhaps not fully understanding the claimant's position.

iii. It was not until the grievance appeal that Mr Bloor properly and fully for the first time engaged with the claimant, acknowledged her key argument and set out why she could not work from home. He also expressly acknowledged the point about key worker status. Furthermore, he engaged with her beyond the strict limits of the grievance appeal.

iv. Ultimately the respondent was entitled to organise its operation as it saw fit and to make the necessary management decisions including the allocation and prioritisation of IT licences. Their decision not to allow the claimant to work from home (as opposed to not paying her while she was absent – see below) was not a breach of the implied term no matter how strongly the claimant disagreed with it.

v. In any event, we find that at no point were the inadequacies of the respondent's treatment of the claimant in this respect 'calculated' to cause the necessary damage to the employment relationship so as to amount to a breach of the implied term. Furthermore, when looking at the treatment of her overall from 23 March to the conclusion of the grievance appeal, we do not find that they were 'likely' to do so.

b. Prohibiting her from having any contact with her patients from 1 April 2020 onwards;

Whilst recognising the understandable impact this had on the claimant, who took her duties towards patients assigned to her very seriously, this did not amount to a breach of contract. The patients were in the care of the respondent and it was entirely appropriate for them to discharge their duties towards them in the best way they saw fit and to centralise and coordinate communication with patients. The decision not to allow the claimant to contact patients, including where a patient's relative had made contact with her, was entirely in accordance with that principle.

c. Withholding:

i. Her salary and pension payments;

It is clearly an express term of the contract of employment that employees shall attend for work and when they do so will be paid in all respects. If an employee fails to attend for work then absent a specific contractual or statutory provision the employer is not bound to pay them. Looking at the claimant's situation from a purely contractual perspective therefore, it was her choice not to work and therefore there was no contractual obligation on the respondent to pay her and no breach of contract when they did not.

However given that we have found non-payment of wages from 24 March to 14 August to be a detriment on health and safety grounds, that must amount to a breach of the implied term of mutual trust and confidence.

ii. Payments for her monthly clinical supervisions;

These payments were withheld from June onwards but for the reasons set out above this was not a breach of an express term of the contract of employment. In all the circumstances whilst we do not conclude that it was an act calculated to destroy or seriously damage the relationship of trust and confidence, we do find that it was likely so to do and there was no proper reason for that. Whilst we note that provision of clinical supervision is expressly stated in the respondent's document not to be therapy, it is clearly part of the respondent's duty of care towards their therapist employees who require that support in order to be able to process the, no doubt, extremely distressing scenarios that they engage with. Just because the claimant was not actively working at the time, and in particular in the heightened conditions of the pandemic, it is clear that the claimant would still need to be processing those matters for a period of time and we accept the claimant's estimate of six months. The fact that Ms Telford

referred the issue to Regional HR (albeit with no conclusion) shows that there was at least some room for discretion to be exercised. This was accordingly a breach of the implied term.

d. Failing to conduct a proper, good faith grievance and appeal process;

i. We conclude that were many flaws in the conduct of the grievance process at its first stage.

ii. Ms Crimmings chose to interview Ms Lovegrove and Mrs Telford before she interviewed the claimant. That would not necessarily be a problem if she had then gone back to them after having interviewed the claimant and put various of the points the claimant had made to them for comment. She did not do so and this is aggravated by the fact that the notes of the interviews with Ms Lovegrove and Mrs Telford indicate that the detail of the claimant's written grievance had not in any event been put to them to any extent.

iii. The notes taken of the meeting between the claimant and Ms Crimmings are problematic. Whilst we do not expect notes to be verbatim, we do expect them to be a fair reflection of what is said during a meeting and the stance taken by its various participants. It is inevitable that details will be missed but it is reasonable for that to apply in equal measure to all participants. The claimant gave good examples of where the notes did not appear to properly reflect what she said and did not do justice to the case that she was putting forward. We do not go so far as to say this was a deliberate attempt by either the notetaker or Ms Crimmings to undermine the claimant's position but it does appear to be a feature of the notes nonetheless. This becomes all the more significant when extracts of those notes-and on occasion disputed parts of the notes-are referred to by Ms Crimmings in her outcome letter.

iv. We are troubled by the comment made by Ms Crimmings in her email dated 20 April regarding how long it took for the claimant to read out her statement of case i.e. 10 minutes. The comment and how it was expressed betray an attitude that was not acknowledging the importance of the claimant having an opportunity to present her case particularly as she was unrepresented at the hearing. In any event, taking 10 minutes to read out such a statement is really not that long. We can see why the claimant characterises the first stage of the grievance appeal as having been done in bad faith. (We do not criticise the respondent for not allowing the claimant to be accompanied at the grievance (and other) meetings by her daughter however. Other options were available to the claimant, even remotely, and this was a reasonable application of a standard policy.)

v. We are also particularly troubled by the claimant being invited on 6 April to a meeting the following day with four senior managers (not including HR) at a time when her grievance was live, she had recently requested a copy of the whistleblowing policy (2 April) and when it must have been obvious that the subject matter of that grievance would overlap with the intended subject matter of the meeting. The respondent says that this was coincidental and that another employee was being treated in the same way. Given the circumstances and the extremely poor timing of this invite, we do not accept that explanation. It is completely understandable that the claimant felt uncomfortable about attending such a meeting as she explained in her email in reply.

vi. For all those reasons we conclude that the handling of the grievance at its first stage did amount to a breach of the implied term. We then considered whether the handling of the appeal stage was such that it not only remedied those specific flaws (where it was able to do so) but also was such as to restore the claimant's trust and confidence in her employer. Whilst we recognise that the appeal was conducted more appropriately than the first stage and Mr Bloor carried out a more thorough consideration of the issues, we do still have concerns about it (and it is unfortunate that Mr Bloor was not present to be able to be questions about those concerns).

vii. First, it is clear from the language used by Mr Bloor in his outcome letter that he aligned himself with the decision of the respondent. For example, he repeatedly referred to 'we believed', 'we felt' etc. Given that Mr Bloor was Operations Director at the time (and we have noted that although his witness statement said he took on that role in September 2020, the claimant was told in May 2020 that he was Operations Director) it is perhaps almost inevitable that he would so align because presumably he was involved in the making of those decisions and the setting of that policy. If that was the case (and again we did not have the opportunity to ask him) we have concerns about whether he was sufficiently impartial to be able adequately to deal with the claimant's specific grievances.

viii. This concern is outweighed overall, however, by the detailed approach Mr Bloor took to explaining the respondent's policy and position to the claimant both in the grievance outcome letter and in the follow-up correspondence with her. He also acknowledged, in a way that does not appear to have been acknowledged by Ms Crimmings, the claimant's central point that she could have worked from home even though she was

a key worker and that it was simply respondent policy preventing her from doing so.

ix. Mr Bloor's approach did not, however, remedy the serious flaw in the first stage of the grievance of not putting the claimant's case back to Ms Lovegrove and Mrs Telford after their first initial interview. There is no evidence that Mr Bloor did that at appeal stage either. Further, apart from a general statement in his outcome letter that he found the issue with the notes made 'no material difference to the outcome', there is no indication of him fully engaging with the claimant's point regarding the notes. Given that the appeal process was being done on the papers only this was particularly important.

x. There is no evidence that Mr Bloor even knew about the proposed senior manager meeting on 6 April. It does not appear to be referred to in the claimant's appeal statements. He did not therefore have an opportunity to remedy that and the consequences of that on the claimant persisted.

xi. Overall, therefore, we find that whilst the appeal stage of the grievance was undoubtedly better than the first stage (and we certainly find no bad faith on the part of Mr Bloor), it was insufficient to restore the trust and confidence that the claimant had justifiably lost in the respondent.

e. <u>Improperly bringing disciplinary proceedings against her.</u>

i. By 7 September, when disciplinary proceedings were commenced and the claimant was invited to a hearing, it is clear that she had been provided with very detailed information regarding the respondent's arrangements and control measures and that it was reasonable for them to require her to attend work. For the reasons already explained above she did not by this stage have a reasonable belief that there were circumstances of danger such as to entitle her to refuse to attend work.

ii. She did have that belief however until 14 August and therefore it was improper to bring disciplinary proceedings against her in respect of her unauthorised absence before that date. To that extent, this did amount to a breach of the implied term.

152. <u>Did the claimant resign in response to the found breach(es) of the contract?</u>

a. We have carefully considered the events between the conclusion of the grievance appeal (6 July) and the claimant's resignation on 8 September in order to form a view on the reason for that resignation.

It is clear that the trigger - or last straw although it was never pleaded as such - was the respondent's decision to bring disciplinary proceedings against her. However her resignation letter also referenced the overall conduct of the respondent towards her including the handling of her grievance, withholding her pay and her clinical supervision sessions all of which we have found to be breaches of the implied term.

b. Although some of those breaches occurred some time before the claimant's resignation, in all the circumstances it cannot be said that she had affirmed the contract. She was very plainly and at length maintaining her position in respect of all these matters throughout the relevant period.

153. We conclude, therefore, that the claimant was constructively dismissed.

154. <u>If there was a constructive dismissal was it because of protected disclosures and/or health and safety concerns and/or otherwise unfair?</u>

155. That being the case, we turn to the reason for that constructive dismissal. The respondent pleaded that the reason was conduct or some other substantial reason. We find that the reason was the conduct of the claimant, namely her failure to attend work from 24 March onwards and her failure to follow reasonable management instructions regarding attending work meetings.

156. There was no causal link between the protected disclosures however and the dismissal. The disclosures had been taken on board as part of the grievance process. They were not the reason for the dismissal.

157. In respect of the claimant's health and safety belief, however, insofar as the reason for the dismissal was predicated on her absence up to and including 14 August, it was her reasonable belief in circumstances of danger such as to entitle her to refuse to attend work. It was, therefore, automatically unfair.

158. <u>Has the respondent made any deduction of wages, holiday pay or annual leave without proper requirement or authorisation by virtue of any statutory provision or a provision of the claimant's contract of employment?</u>

159. For the reasons explained above we wish to revisit this issue with the parties at the remedy hearing.

**Remedy Hearing**

160. A one-day in person remedy hearing will take place on **4 November 2022** at London South Employment Tribunal, Montague Ct, 101 London Rd, Croydon, CR0 2RF and the parties notified of the date. Submissions will be invited at that hearing on the appropriateness or otherwise of reductions to compensation otherwise payable to the claimant because of her contributory conduct and application of the Polkey principle.

161. No later than 6 weeks after this Judgment is sent to the parties the claimant shall send to the respondent an updated schedule of loss together with copies of any updated witness evidence and supporting documents.

162. No later than 2 weeks thereafter the respondent shall send to the claimant a counter schedule of loss together with copies of any additional documents they say are relevant to the issue.

163. The parties shall seek to agree a bundle of documents for use at the remedy hearing and file one electronic and three hard copies no later than 48 hours before the remedy hearing.

164. The parties are encouraged to seek to reach agreement without the need for a further hearing. In which case they shall please inform the Tribunal as soon as possible.

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Employment Judge K Andrews
Date: 15 June 2022