EMPLOYMENT TRIBUNALS

Claimant: Ms N Metcalf

Respondent: St Anne's Community Services Limited

HELD AT: **Leeds** **ON: 15 to 23 January 2024**
Deliberations: 24 January, 22 March 2024
BEFORE:
Employment Judge JM Wade
Ms J Lancaster
Mr M Taj

APPEARANCES:
Claimant: **in person, with Mr Naylor, husband**
Respondent: **Mr H Menon, counsel**

RESERVED JUDGMENT

The unanimous decisions of the Tribunal are that:

1 The claimant's complaints of protected disclosure detriment are dismissed.

2 The claimant's constructive unfair dismissal complaint succeeds.

4 The claimant's constructive wrongful dismissal complaint succeeds.

5 The claimant's holiday pay complaint is dismissed having not been pursued in her schedule of loss or witness statement.

REASONS

Summary of conclusions

1.1. The claimant did not engage in gross misconduct during her employment;

1.2. PIDs 1 and 5, and 6 were qualifying disclosures; PIDS 2 – 4 were not.
1.3. No detrimental treatment found was on the ground of the disclosures made;
1.4. Detriments 1, 2, 4, 6 to 11 and 13 amounted to conduct cumulatively and in some cases separately breaching the implied term of trust and confidence;
1.5. The claimant did not affirm her contract between 10 October 2002 and 3 March 2023;
1.6. Her resignation on 3 March 2023 was a constructive unfair and wrongful dismissal.

Introduction

2. The claimant was head of corporate governance at the respondent charity, which employs around 1500 staff providing supported living and other services to vulnerable people in the communities of Yorkshire and the North East. The claimant resigned her post and presented the complaints determined above. In these reasons we may use the shorthand "PID" for "protected interest disclosure", also commonly known as a "whistleblow".

3. The claimant's case was that she blew the whistle on a number of occasions and as a result was subjected to detrimental treatment, the last of which was untrue and spurious disciplinary allegations, in response to all of which she resigned. The claimant was also given permission to amend her claim to rely on all the PID detriment allegations as breaches of the implied term of trust and confidence, in pursuit of an ordinary constructive unfair dismissal claim.

4. The respondent's case included that the claimant's alleged PIDs were not PIDs, that there was no detrimental treatment, or if there was it was for good cause, that the claimant resigned because she knew she would be dismissed and that there was no constructive dismissal. As to notice pay/wrongful dismissal, the respondent's case was that it would prove the claimant had engaged in gross misconduct prior to her resignation, as a complete defence. A complaint about holiday pay was not pursued, either in the claimant's witness statement or her schedule of loss.

The hearing

5. The claimant's particulars of claim alleged that the respondent's conduct had made her ill and she included within the hearing file some medical evidence. An occupational health referral recorded that she was shaking and stammering on 4 November 2022 and those symptoms were present at times during this hearing. These are very sad circumstances. The only diagnosis available to the Tribunal as to the nature of those symptoms was work related stress.

6. The claimant had been represented by solicitors both before she resigned and when she presented her complaint. She became a litigant in person soon after the presentation of the claim form.

7. It was plain that the Claimant could be greatly challenged by being both the advocate and main witness in her case, because of her symptoms. The Tribunal made adjustments to enable the hearing to complete over seven days, albeit there was no time for deliberations or Judgment.

8. Adjustments included breaks as appropriate, communicating directions in writing to the parties, standing down for most of the third day to enable the claimant to recover, identifying and locating appropriate documents with the assistance of the respondent, and dealing pragmatically with the admission of new documents and other matters on the parties' applications.

9. Those applications included from the claimant a written application of 8 January 2024 to amend the list of detriments to include post employment detriments. This application was refused, applying Selkent principles. Ultimately the prejudice to the claimant in refusing in circumstances where, should any of the other PID allegations succeed, post employment conduct could be pursued as aggravated damages and/or as matters of unreasonable conduct of the litigation. Permitting the amendment would result in the hearing being adjourned to enable the respondent to plead to the allegations, or proceeding with the existing complaints and making separate arrangements for subsequent determination of the new allegations, and the prejudice to the respondent of either course should the amendments be permitted, outweighed that to the claimant, in all the circumstances of this case on balance.

The evidence

10. The Tribunal had a hearing file of around fifteen hundred pages by the time late additions from both sides were permitted. As is frequently the case, questions to the witnesses arose from a far fewer number of documents.

11. The Tribunal had written statements from the claimant in four parts: a main statement of facts and argument of forty five pages; an impact statement of two pages; a seven page statement of alleged policy failings; and a ten page statement which summarised the legal obligations relied on and reasonable belief, and the claimant's asserted facts concerning each detriment, in relation to the alleged PIDS. We considered the claimant a vulnerable litigant because of her health during this hearing, who at times was not able to fully represent her written case. She had, however, documented that case at great length.

12. On behalf of the respondent we had around sixty pages of witness evidence, including a two page, late statement from Ms Somers, for which permission was given because it arose from assertions in witness evidence on behalf of the claimant which could not have been anticipated.

13. The Tribunal heard from the claimant first on Tuesday 16 January. She had one witness, Mr Webb, a former colleague in respect of whom it was alleged a conflict of

interest had arisen and she had engaged in gross misconduct in connection with that conflict.

14. Mr Webb was interposed when the claimant became unwell on Wednesday 17 January, and then he was released, upon the claimant being very unwell. The Tribunal stood down for the rest of that day. Mr Webb also had very sad personal circumstances which meant it was his attendance had to be managed carefully - Mr Menon confirmed in writing he had finished his cross examination of Mr Webb. The claimant's evidence then resumed and was completed the following day, Thursday 18 January.

15. The respondent's witnesses were heard as follows: Mrs Kirkby, chief executive officer, on Friday 19 and Monday 22 January, followed by Mr Machin, trustee, and Ms Somers, corporate governance manager. On Tuesday 23 January we heard: Mr Munday, interim property director, Mr Jeffers, director of people, Mr Fennelly, who investigated the claimant's grievance, and Mr Gregor, chief financial officer who gave a disciplinary outcome concerning the claimant in late 2023 – more than six months after her employment had ended.

16. The claimant's statements contained a great deal of detail, not all of which was challenged, but neither did she discuss all its detail with the respondent's witnesses. This would have been an impossible task for both sides within the time estimate and quite properly, given the claimant's health, she and Mr Menon focussed on the main points. We have not made findings on matters where we consider it unfair to do so and where they would not help us determine the claimant's case.

17. We also consider that the intense and emotional reflections in the claimant's statement indicative of profound belief in conspiracy, were not present in her contemporaneous communications at the time, which were professional and straight forward. We consider the explanation for that difference (and any recollection we have found to be mistaken within the respondent's witnesses' evidence), is that memory is an inherently reconstructive process. When a narrative is developed and repeated over time, the brain often considers it to be true, whatever the position at the time. In short, memory and belief in memory are inherently unreliable and contemporaneous expressions are more likely to be reflect the truth.

18. Whether analysed as "conduct without reasonable and proper cause" or "on the grounds of" PID, the Tribunal has made findings of fact about why the respondent engaged in particular conduct by examining the minds of those involved, most reliably expressed in their communications at the time.

<u>The Allegations</u>

19. The alleged protected disclosures are as follows:

1. An email dated 4 August 2022 from the Claimant to Ms Kirkby, Mr Mundy and the Senior Management Team (para. 25 of the Grounds of Claim - GoC)

2. An oral discussion between the Claimant and Ms Kirkby on 13 September 2022 (para. 37 GoC)

3. A discussion in a Teams call between the Claimant and Ms Kirkby on 14 September 2022 (para. 39 GoC)

4. An oral discussion between the Claimant and Ms Kirkby on 26 September 2022 (paras. 50 to 57 GoC)

5. A grievance letter dated 17 October 2022 (para.30 GoC)

6. A letter from the Claimant's solicitors to the Chair and Vice-Chair of the Respondent's Board of Trustees dated 21 December 2022.

<u>The detriments</u>

The Claimant alleges that on the ground of one or more of those disclosures, the Respondent subjected her to the following detriments:

1. At a meeting on 25 or 26 August 2022 Mr Munday (Interim Director of Housing) made the comment in para. 33 GoC

2. On 13 September 2022 Ms Kirkby (CEO) conducted an unscheduled personal development review with the Claimant (paras. 36 to 38 GoC)

3. On 14 September 2022 Ms Kirkby conducted a follow-up review via Teams (paras. 39 to 46 GoC)

4. At some point before the Claimant's return from leave on 28 September 2022, Ms Kirkby entered her email box and deleted over three quarters of her emails/email trails, including an email in which Ms Kirkby criticised the Claimant for challenging lack of due diligence (para. 32 GoC)

5. At some point before the Claimant's return from leave on 28 September 2022, the scope of the external consultant's review into the housing governance department was extended and another consultant was appointed (paras. 32 and GoC).

6. At some point before the Claimant's return from leave on 28 September 2022, the staffing in the Claimant's team was reduced from 112.5 hours to 37 hours (paras. 32 and 63 GoC).

7. At some point before the Claimant's return from leave on 28 September 2022, Ms Kirkby deleted three key governance functions from the Claimant's organisational structure (paras. 32 and 63 GoC).

8. At some point before the Claimant's return from leave on 28 September 2022, Ms Kirkby actively chose to ignore the concerns the Claimant had raised (para. 32 GoC).

9. On 10 October 2022 after the Claimant's return to work after a period of sickness absence, Ms Kirkby failed to conduct a return to work interview with her (paras. 61 and 64 GoC).

10. On 10 October 2022 Ms Kirkby conducted an exit interview with a departing employee in a way that undermined the Claimant (para.61 GoC).

11. On 10 October 2022 Ms Kirkby took over a meeting with external insurance partners in a way that undermined the Claimant (para. 62 GoC)

12. On 10 October 2022 Ms Kirkby gave information to the Claimant that undermined her in front of a subordinate colleague, Sally Summers (para. 63 GoC).

13. Ms Kirkby cancelled a board meeting that the Claimant was due to lead on 10 October 2022 and carried out the work herself without consultation with the Claimant (para. 65 GoC).

14. As at the date of the Claimant's claim to the Tribunal (20 March 2023), the Respondent failed to investigate her grievance of 17 October 2022 (para. 66 GoC).

15. At some time after the Claimant presented her grievance, Ms Kirkby told the Chair of the Respondent's Board of Trustees not to communicate with the Claimant (para. 67 GoC).

16. On 13 January 2023 the Respondent sent the Claimant a letter making spurious and untrue allegations of misconduct (paras. 69 and 70 GoC).

17. As at the date of the Claimant's claim to the Tribunal (20 March 2023), the Respondent failed to notify the Claimant what process it would be following to process these allegations.

The Law

20. Section 47 B of the Employment Rights Act 1996 ("the ERA") relevantly provides at 47B (1) : "A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure". Detriment means, objectively, adverse treatment about which the claimant can justifiably feel aggrieved, and on the ground that means materially influenced or contributed in a way which was more than trivial.

21. Section 43 B relevantly provides that, …"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..(b) that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he or she is subject".

22. Section 48(1A) of the ERA provides that a worker may present a complaint to the Tribunal that he has been subject to a detriment in contravention of Section 47B. Section 48(3) relevantly provides: "An employment tribunal shall not consider a complaint under this section unless it is presented – before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates, or where that act or failure is part of a series of similar acts of failures, the last of them…".

23. As to unfair dismissal, the ERA relevantly provides:

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer 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.

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

(a) *the reason (or, if more than one, the principal reason) for the dismissal, and*

(b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

(a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

(b) *shall be determined in accordance with equity and the substantial merits of the case.*

24. The following relevant principles concerning Section 95(1) (c) (which imports the common law doctrine of constructive dismissal into the definition of dismissal) can be derived from the authorities.

25. Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: 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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all, or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains, for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

26. Courtaulds Northern Textiles Limited v Andrew [1979] IRLR 84: A term is to be implied into all contracts of employment that the employer will not, without reasonable or proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

27. Woods v WM Carr Services (Peterborough) Limited [1981] ICR 666: To constitute a breach of the implied term of trust and confidence, it is not necessary to show that the employer intended any repudiation of the contract. The Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, was such that the employee cannot be expected to put up with it.

28. The "last straw" doctrine means that if a person resigns in response to a series of actions which, together, constitute a fundamental breach, the last of the actions (the "last straw") must be more than trivial: London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493. It must contribute, however slightly, to the breach of the implied term of trust and confidence.

29. The principles of affirmation were examined in Cockram v Air Products EAT 0038/14/LA and were helpfully summarised. Mrs Justice Silber said this (paragraph 25): "The question whether a party has affirmed the contract is fact sensitive and context dependent. It does not generally lend itself to bright lines or rigid rules." At paragraph 15 she says: "It is undoubtedly the case that an employee faced with an

employer's repudiatory breach is in a very difficult position, as the courts have repeatedly recognised. Most recently, Jacob LJ described the difficulties in these circumstances in Bournemouth University Corporation v Buckland [2011] QB 323 at para. 54 as follows:

"..t*here is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation."*

30. The relationship of affirmation to the last straw doctrine has posed difficult questions. In Dr I Gibson and Partners v Mrs SA Hughes UKEAT 0371/06 His Honour Judge McMullen QC said this at paragraphs 19 and 20:

"*First this is not a last straw case. The difficultly in using metaphors, as Lord Hoffmann warned recently in Lawson v Serco [2006] ICR 250 para 19, is there is a great danger in spending too long on a metaphor and a striking metaphor may lead to distraction. The last straw indicates that a very substantial weight be placed upon the back of a camel which it will bear with fortitude. But there comes a stage when any addition to the load will cause the camel's back to be broken, even if the addition is of something as trivial as a straw. That is the language used throughout the cases from Lewis v Motorworld to Omilaju. What is plain is that for this doctrine to be engaged there must be more than one event. True it is that none of them needs to be serious and none needs to be a breach of contract, provided cumulatively they amount to a fundamental breach.*

In this case a line was drawn under the events of June 2004 by the Claimant's affirmation of her contract and so none of the events, including a disputed matter of 4 June which occurred before her affirmation, can contribute to the load placed upon the camel's back."

31. The tension between "last straw" and affirmation has recently been addressed in the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978. At paragraph 51, Underhill LJ holds: "*I cannot agree with [the above] passage. As I have shown above, both Glidewell LJ in Lewis and Dyson LJ in Omilaju state explicitly that an employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation; provided the later act forms part of the series (as explained in Omilaju) it does not "land in an empty scale". I do not believe that this involves any tension with the principle that the affirmation of a contract following a breach is irrevocable. Cases of cumulative breach of the Malik term… fall within the well-recognised qualification to that principle that the victim of a repudiatory breach who has affirmed the contract can nevertheless*

terminate if the breaches continues thereafter… the right to terminate depends on the employer's post-affirmation conduct."

32. Section 103A relevantly provides that "An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure.

33. Gross misconduct involves deliberate and wilful serious misconduct amounting to a repudiatory breach of contract – by her conduct the employee is demonstrating she will not be bound by the terms of the contract. That is an objective test. Where the employer knows of such conduct, it must, like the employee asserting constructive dismissal, not delay in accepting the breach and terminating otherwise it will be taken to have waived the right to terminate. Boston Deep Sea Fishing Co v Ansell (1888) 39 Ch D 339 established the principle that where an employer has been misled as to facts, it may defend a wrongful dismissal claim on the basis of facts becoming known after the employment has ended. That is the case notwithstanding, "it had itself decided to breach its contractual obligations or was looking for a reason to justify dismissal or was motivated by its own financial interests"…see Williams v Leeds United Football Club [2015] IRLR 383 at para 83.

Submissions

34. The arrangements for submissions were made taking into account that the claimant acted as a vulnerable litigant in person, who was at the end of a difficult case. These arrangements were discussed and agreed in advance. Mr Menon produced written submissions, which he had provided to the claimant, and he developed them briefly orally. The claimant became distressed and was unable to continue towards the conclusion of those submissions. The Tribunal directed a letter to the parties with its note of Mr Menon's final point, unheard by the claimant, and the claimant was given time – until 30 January - to provide written submissions. The respondent was accorded a right of reply on any points of law in the claimant's written submissions. The claimant provided her written submissions on 30 January and on 6 February made two further evidential points by email. The respondent made no further submissions by way of reply.

35. The parties' submissions are not rehearsed in these reasons – it will be apparent in our findings and conclusions where they have, or have not, born fruit.

36. Given the chronology and detail in the case, it was necessary to address our findings and conclusions applying the law to those findings chronologically and then to address limitation. The claimant commenced ACAS conciliation on 13 January 2023, a certificate was issued on 24 February and her claim was presented on 20 March 2023.

The Issues

37. In simple terms, the respondent did not accept the claimant had made the protected disclosures alleged, did not accept events had happened as alleged and where they had, it asserted reasonable and proper cause and/or that any disclosure found had no material influence on its actions. It alleged the claimant had engaged in gross misconduct. These were the principal matters to be decided by the Tribunal.

Findings of fact and conclusions

The respondent

38. The respondent is a charitable care and support provider based in Leeds but with operations further afield. It provides supported housing, homelessness services, day centres, supported living, domiciliary care, residential care, respite care, specialist nursing care and other services to hundreds of people in the community. It wins contracts to do so from local authorities. It has a written whistleblowing policy and a substantial suite of other polices akin to those found in a local authority or large care provider where operations carry inherent risk due to the nature of the work. Its income is around forty five million pounds a year.

The claimant and Mr Webb

39. The claimant had previously worked for 16 years at Leeds City Council in project management, where she knew Mr Fennelly, and then for seven years founding a spin off of the council's community adult learning disability service. She also undertook voluntary and secretary of state appointed roles. She holds a great number of professional qualifications across corporate governance, CIPD, IOSH, risk management and others.

40. Mr Webb has worked in operational health and safety manager roles before becoming senior lecturer in health and safety at Leeds Beckett University. The claimant knew Mr Webb, having been lectured by him, and having worked together within two organisations.

41. The first organisation was De'Leigh Limited ("DL"), which the claimant founded and of which she was a director from 2008. At the time she also founded a second company, De'Leigh Publications Limited, also not trading by 2020 ("Publications"). Mr Webb was a director of DL from 2013 to 2021. He resigned as a director before he commenced employment with the respondent in January 2022.

42. DL did not at any material time trade, albeit it remained identified as "active" on the companies house register. Its accounts demonstrated no trading. It was originally set up as a vehicle for the claimant's training and accreditation - CIPD

– and to give her credibility. It had been hoped that health and safety training would be delivered by Mr Webb through the company but that did not come to fruition.

43. Mr Webb's declaration to the respondent dated 25 August 2021 also declared his directorship describing DL as "Dormant Company for CPD use".

44. Both the claimant and Mr Webb answered "no" to the question: "do you have any other business interests that may be a conflict of interest. This could include for example but not limited to, self employment." Publications did not pose such a conflict because it too was not trading.

45. The second organisation in which the claimant and Mr Webb held appointments at the same time was the Leeds Occupational Health Advisory Service Limited ("LOHAS"), a charity/not for profit organisation whose work included providing advice to people suffering from work related injury. The claimant and Mr Webb were trustees/directors holding roles as chair/secretary/director - the claimant was recorded as such on companies house from 2016 to November 2021 and Mr Webb 2016 to August 2021. The trustees met for two hours every quarter and there were five or so trustees.

<u>The claimant's employment by the respondent</u>

46. The claimant was appointed to the post of head of governance (company secretary) with the respondent on 24 April 2020, reporting to the finance director. The respondent had a written conflicts of interest policy published in 2018 which she inherited. It was reviewed and re-published in July 2022. The claimant's post was identified as the author of the 2022 policy.

47. The claimant's declaration of interests form signed on 24 March 2020 recorded: (1) current employment/previous employment with continuing financial interest: DL said to be used only for professional accreditation and now to become dormant; (2) LOHAS (under other trusteeships) due to end in May 2020; (3) a down syndrome charity trusteeship, due to end in November 2020. The claimant repeated her reference to "De'Leigh" under "i*nvestments in unlisted companies partnerships and other forms of business, major shareholding (5% of issued capital) and beneficial interests".*

48. The claimant could reasonably have understood from her appointment, having made these declarations, that the respondent had no difficulty on her commencing employment and continuing to hold these posts, on the basis declared. The respondent could have asked for more information about these interests – it did not. The form required annual review by the signatory.

49. The 2022 version (and likely 2018 version) of the conflict of interest policy defined potential conflicts and interests, identified that decision makers in recruitment of senior staff and other key matters could have in place standing

declarations advising of potential conflict, and these would be kept in a register within the corporate governance office, with annual reviews of those declarations or when circumstances change. The policy advised on the management of conflicts, including restricting involvement in decision making. The 2022 version also contained provisions about declaring “loyalty interests” where staff could be involved in the recruitment of close family and relatives, close friends and associates and business partners.

<u>The appointment of Mr Webb</u>

50. In 2021 the claimant took on the respondent’s health and safety function on the departure of the post holder. She assisted Mrs Kirkby in the management of a fatality. The claimant’s work on that matter had been regarded as excellent by Mrs Kirkby.

51. The respondent needed to recruit to the health and safety manager post, not least because it had a large volume of fire risk assessments required for its properties. The vacant post (or its equivalent) had previously reported to the housing team. It was agreed between Mrs Kirkby and the claimant that the health and safety manager post would report to the claimant and that the claimant would report to Mrs Kirkby as CEO (rather than the CFO – Chief Financial Officer).

52. The respondent recognised the claimant’s new responsibility and changed the post title to Head of Corporate Governance, but maintaining within its duties company secretarial functions. The salary for the post also increased by around £6000 per annum with effect from 13 January 2022, all of which was documented and approved. The challenges of the post were greater than the claimant’s previous post.

53. The health and safety manager role was advertised and the claimant contacted Mr Webb to see if he had any contacts or students on his course who might be suitable. The application process was to include a presentation and interview, and the interview panel was to be chaired by the claimant. The trustee chair of the health and safety committee, Ms Riley was also on the panel, with two other managers – one in learning and development and an area operations manager. The advertised post was not attracting many applicants. Mr Webb himself decided to apply; he knew Ms Metcalf from De Leigh and LOHAS and Leeds Beckett University.

54. Five applicants were selected for virtual interview on 16 August 2021. Two retracted their applications the day before, and one on the day, leaving Mr Webb, and the other candidate. The claimant asked Ms Somers to “step in” and note take the interviews for her on the day. The presentations and interviews were by “Teams”. The claimant verbally declared to the panel that she knew Mr Webb before he attended the teams meeting and again before he started his presentation. She had also told Ms Kirkby that she had worked with him in the

past and had told Ms Somers that she knew him from years ago. It was 'years ago" - 2011 - when the claimant graduated in health and safety management while working at Leeds City Council and presumably had been lectured by Mr Webb. The claimant had also worked with Mr Webb as a trustee, and in collaborating in DL. Both comments to her colleagues were therefore true.

55. Our reasons for finding that the oral declaration was made at the start of the presentation include the following. Mr Webb and the claimant gave sworn oral evidence that the declaration was made. Ms Somers disagreed. Of the other attendees, the only direct evidence was from Ms Somers, who addressed this matter in a statement served on 12 January 2024 and in response to their statements. She had not previously given any account of the matter. Her oral evidence was that she did not remember the declaration and if it had been said she would have noted it.

56. We did not have evidence from the other two managers attending nor Ms Riley. The claimant had provided Ms Somers with a template with the interview questions ready typed and had asked her to "step in" to take notes. The notes include the chair - the claimant - making welcome and introductions (but not what she said). Ms Somers also did not note any content for Mr Webb's presentation. The only notes which were detailed were the interview question responses from Mr Webb – consistent with being asked to "step in" to take those notes. It is also likely all attendees took their own notes (but we did not have the notes for the other two panel members) and that a "recruitment pack" or file of all matters including a report from the claimant as chair, was done. Those papers were not before the Tribunal, nor, it appears, were they before a subsequent investigator appointed by the respondent. It strikes the Tribunal as entirely likely that the full papers for the recruitment process contained more than just Ms Riley's and Ms Somers' notes and the note of Ms Riley's concerns.

57. Further, the claimant had a deep understanding of the governance requirements and had told Ms Somers and Ms Kirkby of her knowledge of Mr Webb. Neither she nor he had anything to hide in that respect – she had completed a declaration of interests form prior to joining the respondent and he was to do so. In those circumstances and on balance, we consider it entirely likely that the claimant declared her knowledge of Mr Webb verbally at the start of that process. That declaration did not extend to the detail of how, or in what context, they had worked together, or how they knew each other from years ago, but simply the fact of their knowing each other.

58. The context in which Ms Somers and Ms Kirkby (around Christmas of 2022 – see below) saw entries on companies house and reached adverse conclusions (as reported in 2023 to the respondent's solicitors and an external investigator), and their feelings about those matters, do not help the Tribunal with a finding about what happened in August 2021. That is particularly so when Mr Webb did not have the Christmas 2022 matters put to him.

59. In simple terms, Ms Somers' not recalling in 2024 and not expressly noting a declaration in 2021, does not outweigh the claimant and Mr Webb's compelling evidence (even allowing for the general difficulties with memory identified above, and an allowance for – they would say that wouldn't they). Most significantly, in context the overarching likelihood is that the oral declarations were made in the context we have described, including the then good relationships all round.

60. After presentation and interview the panel agreed that the other candidate was not appointable for lack of experience. Ms Riley was not keen on Mr Webb's appointment, for a number of reasons, but was content to leave the decision to the operational members. Her observations and reservations were noted because she wanted them noting. Ultimately the panel agreed Mr Webb would be offered the post. He refused the offer of employment initially because the salary was too low, and subsequently negotiated a higher salary. The claimant presented a report and business case to the respondent's Senior Management Team ("SMT") about the recruitment and terms to be offered, with Ms Kirkby's approval. The claimant did not have the authority to increase any offer herself. The SMT authorised an improved offer, which Mr Webb then accepted and the claimant liaised with HR to sort out the car allowance element of pay.

61. Ms Riley asked to see all emails between the claimant and Mr Webb. The claimant wrote to her formally to say she would be happy to do that under a subject access request but Ms Riley did not pursue that further. Again, the claimant had nothing to hide. It was for Mrs Kirkby and the SMT to question or challenge the need to increase the pay scale based on market rates for the post if they had any concerns in circumstances where Mrs Kirkby knew the claimant had worked with Mr Webb before. The claimant's paper was no doubt subject to objective scrutiny and Mrs Kirkby could have asked for more details of their knowing each other if she was concerned. The claimant's salary paper was not before the Tribunal in circumstances where the respondent's case was that she had improperly lobbied for Mr Webb's salary to be increased because of her loyalty to him. We noted she had provided a similar paper to increase the salary of the information governance officer post in 2022 and considered it entirely likely she had done so for the health and safety manager post.

62. The claimant did not complete a new conflicts of interest declaration form concerning her prior knowledge of Mr Webb - or potential "loyalty interest" as part of the recruitment process – or at least there is no evidence for that. To the extent that was within the 2018 policy applicable at the time, we consider her failure to do so does not amount to deliberate, wilful and gross misconduct indicating she was no longer to be bound by her contract of employment, given the verbal declaration. She had been honest with her colleagues about her connection with him, and the detail of the connection could be triangulated from their respective declarations. Had questions been asked at the time, as they were before this Tribunal, it is likely the result would have been the same – their working together was limited to two organisations, about which they had both

been truthful and transparent. Dormant status had not been registered with companies house for DL but they both believed the company to be dormant because it had not traded for many years and micro account submissions had been filed, on one occasion signed by Mr Webb. There was nothing untoward in the extent of the verbal declarations and there was nothing to hide.

63. The claimant's evidence about good governance included reference to a, "comply or explain" principle – that is, comply with the policy requirement or explain why you have not done so. In simple terms, the claimant's failure to complete a loyalty interest declaration form in respect of her knowledge of Mr Webb, and that there were two De'leigh companies - have been explained. The claimant declared her knowledge at the start of the interview and the companies were both dormant. Yes, in an ideal world she would be able to produce a loyalty interest form and would have been clearer on the original declarations form, but these matters do not amount to gross misconduct as alleged by the respondent – that is deliberate and wilful serious misconduct demonstrating the claimant was not to be bound by her contract. They are, nonetheless, matters which could erode confidence in the occupant of the HCG post to be able to hold others to account.

<u>Pensions deficit reporting and the claimant struggling in 2022</u>

64. By 2022 then, the claimant managed a team of people and had been leading the respondent's governance for two years, working well with Mrs Kirkby. She had extremely good 360 degree feedback in June 2021. By 2022 her team included Mr Webb, health and safety manager, Ms Somers, corporate support services manager, an information governance officer ("SO") a governance officer, and an assistant, and there were one or two others reporting to Ms Somers in her capacity of corporate support services manager/Mrs Kirkby's personal assistant.

65. In February 2022 the respondent's then Chief Finance Officer ("CFO") had drawn up a plan to reduce the respondent's deficit with the West Yorkshire Pension
Scheme (WYPS). The plan information had been required by the Charity Commission, which had a "case open" in respect of that financial risk. The risk was also identified in the respondent's risk register. The CFO expected the Charity Commission to be satisfied with the respondent's actions.

66. At the claimant's February "PDR" meeting Mrs Kirkby recorded that the claimant was under considerable work pressure at that time. In particular there was a concern about finishing the respondent's suite of policies. The claimant clearly had a considerable workload of other matters on which she had been working hard, because a week's time off in lieu was granted by Mrs Kirkby at that time.

67. At a Pensions and Investment committee meeting in March 2022 there was no update from the Charity Commission on the pensions deficit case. The claimant

was the principal liason with that regulator and was asked to seek a formal closure notice. She did so, including on 13 April 2022. In a response on 14 April 2022 the Commission replied that as a result of the information provided, it would close its case. That was good news, but the claimant missed the email. Trustees and the CEO/CFO were not told at that time – there were hundreds of unread emails in the claimant's inbox including because colleagues copied her in on matters which did not require any action from her, but nonetheless filled her inbox. There was also an information governance "inbox" which the information governance officer managed. Ms Somers had access to the claimant's inbox, but editing or deleting or managing her inbox, was for the claimant.

68. Mrs Kirkby used regular "PDR" meetings as a way to document, manage and support the claimant (and others). The claimant had a large portfolio of work across many different disciplines, and also her share of team/people related issues. In early May 2022 Mrs Kirkby stressed the need for trustee papers and communications to be improved, with nothing to be late going forward. That came on the back of trustee concerns in March about the organisation of their papers. Mrs Kirby helped with that and the claimant appreciated that help. Mrs Kirkby also encouraged the claimant to step out of matters and delegate if possible. There was also a substantial task list for the claimant including organising a beauty parade for insurers, redoing and upgrading a job specification for the information governance officer, amongst many. Some of her staff had been absent unwell and there were difficulties recruiting a Governance Officer – the claimant had put forward a paper to SMT to increase the respondent's salary offer because of those difficulties.

69. At a PDR meeting with Mrs Kirkby on 8 June 2022 the claimant described herself as having felt like she was drowning and that [this] "was destroying who I am personally and professionally" but that she wanted to stay. Mrs Kirkby's response to that was that "we are giving you too much". The claimant's great workload was affecting her performance and resilience. Mrs Kirkby said the claimant was not to have any new involvement without clearing it with her. She also offered help and started addressing the policies work herself – sending out the whistleblowing policy for comment, for example, on 10 June. At the time the claimant was grateful for that help, and her position remained that her department was under resourced.

70. Mrs Kirkby also said this about Ms Otley, one of the claimant's team: "want it noting she was rude to me. Please don't wait. Increase job content massively". That is an indicator that Mrs Kirkby's approach to management could be unforgiving and reactive, but she had been very supportive of the claimant to date. Mrs Kirkby had also directed that Ms Otley only be permitted one day working from home, albeit Ms Otley sought more home working than that.

71. After a usual review of team and work it was also agreed that the claimant would also give Mrs Kirkby access to her email inbox as a back up if needed. At least

two of the claimant's required actions from May were rolled over, and the claimant was again asked not to get involved in other areas but was given specific instructions about the need to regularly, and by phone, contact trustees and ensure committee papers were sent. The most important task was identified as ensuring papers were not late to trustees.

72. That month also saw the claimant intervening with colleagues to dissuade Mr Webb from being involved in a housing project on the basis that his role would be to tick boxes until something went wrong, and then he would be accountable under health and safety regulations as "CDM". On the other hand she asked property colleagues to involve him in other property/safety matters because he was accountable and expert – the second intervention resulted in the expression of some frustration from a property colleague to Mr Munday, and also a questioning of Mr Webb's expertise. Mr Munday replied in an innocuous way empathising with the colleague's frustration; he did not seek to suggest her frustration was unfounded, nor did he encourage it, but it was apparent that housing colleagues did not necessarily share the claimant's confidence in Mr Webb.

73. The claimant's intervention on behalf of Mr Webb demonstrated that she was acutely aware of the hazard of holding a regulatory post and being blamed when things went wrong. It also demonstrated her line management of him and ability to influence the work he was allocated.

74. The claimant saw her GP that month – June 2022 - seeking support for adjustments at work as her mental health was declining. She had had some time off work following a holiday. However, she also resumed being a trustee of the down syndrome charity. At some point she may have mentioned to Mrs Kirkby that she would like to resume that post as an aspiration, but we consider she did not say she was doing so, nor seek permission, nor sign a new declaration of interests form. That was conduct which, given her role, was likely to erode trust and confidence, but it was not gross misconduct – wilful and deliberate conduct indicating she was not bound by her contract. In the context of the claimant's workload pressures and declining health and resilience, it is highly likely Mrs Kirkby would have discouraged taking on such a voluntary role outside work at that time, had she been approached clearly about it.

75. At the July Pensions and Investments committee meeting, the committee was again told there was no formal pensions deficit closure notice as yet, and it had been chased on 11 July. On 2 August 2022, no doubt because the claimant had by then discovered the closure notice was sent by the Charity Commission in April, the claimant sent an extract of the Commission's email to the committee and others. Mrs Kirkby replied almost immediately replied to ask, "Great, thanks, when did this come in out of interest?" She received no reply. The risk register typically identified the date when risks were closed or considered addressed.

76. Had the claimant simply forwarded the Charity Commission email it would have been apparent that it was sent on 14 April and there had been delay on the claimant's part. Mrs Kirkby did not pursue her enquiry further with the claimant. She had access to the claimant's inbox and could have checked for herself when the email had been received. However, the committee action log for October 2022 recorded that although the matter was closed, the date of the closure notice was still outstanding. At that time then, it appears Mrs Kirkby had not verified when the notice was sent, apparently content to let things lie.

77. The claimant's oversight was simply that, an oversight, due to the volume of work and emails and her declining mental health at that time. It was plainly embarrassing to her and she sought to avoid that embarrassment by not acknowledging the real position at a time of strain on her resilience – that is the most likely explanation of the "cut and pasting". The oversight itself was not gross misconduct — at the time she reported to trustees in July, she did not know the reply was there – she was not knowingly misleading them. Avoiding acknowledging the oversight by cutting and pasting the response and not replying to Mrs Kirkby was surprising; it may have been consistent with the claimant saying "[this] was destroying who I am personally and professionally", that is, her workload was very badly affecting her mental health and her professionalism was under strain. Given the post she held, this episode could also erode trust and confidence in her when known, unless accepted as symptomatic of the claimant struggling in 2022.

<u>The Drug and Alcohol Centre Project ("the DAC")</u>

78. The respondent had, for some time, hoped to relocate its drug and alcohol service from a site considered less than ideal. Mr Munday's company was appointed to provide housing and estates consultancy, four days a week from November 2021. He occupied the post of "Interim Director of Housing and Estates". Part of his remit, was to explore the potential to sell the site and acquire and build a new centre. He also sat on the "SMT", or senior management team. The claimant was not a permanent member of the SMT although she had responsibility for corporate governance across the organisation and was frequently copied into communications – this was a source of frustration for her, at times.

79. The Charities Act 2011 regulates the disposition of charity land, requiring charity trustees to instruct an adviser to provide a "best terms that can reasonably be obtained", report and to have considered it and have decided they are so satisfied before any disposition. The Companies Act requires trustees/directors to act in the best interests of the company and there is detailed provisions to address the meaning of that obligation in specific circumstances.

80. Not long after Mr Munday's appointment, an acquirer/property developer came forward, wishing to build student accommodation on the DAC site, and partner the respondent to rebuild a new centre on a new site. After preliminary work, Mr Munday appointed a surveyor, John Sawyer, in March 2022 to provide a

"value for money" report at a cost of £5000. He also appointed an established firm, "Cushmans", to value the sites, in May 2022 at a cost of £7000. Neither the claimant nor trustees were involved at all in the March appointment of Mr Sawyer.

81. The Business Development Director was using Mr Sawyer for a discreet piece of work, and had asked the HR Director if anything was required to appoint him for consultancy, and been told nothing was required. Mr Munday therefore considered Mr Sawyer could simply be appointed by him for the DAC work. For the Cushmans appointment Mr Munday told the claimant that he was wishing to obtain a valuation for the site, and she advised him to liase with the Chief Financial Officer because he too was instructing valuations. She also advised that to do so was within his financial authority, and that a conflicts declaration would need to be completed.

82. The claimant did not advise specifically on due diligence being required on Cushmans in May, but had previously circulated a due diligence checklist to SMT in October 2021 for making appointments. Mr Munday was not to know that, but others were. The Business Development Director, who had also instructed Mr Sawyer, had made the appointment on the basis of references and a CV. The due diligence checklist was re-issued in July 2022.

83. In simple terms, what was required was a paper audit trail evidencing that the surveyor was RICS qualified, a copy of insurance cover and references and other appropriate verification. The claimant did not know the significance and potential value of the proposed project when Mr Munday contacted her in May 2022. Other suppliers, for example, lawyers, had been appointed by the respondent without any record of due diligence being undertaken.

<u>The Trustees' wish for different support</u>

84. On 26 July 2022, Mrs Kirkby had met with three Trustees including the chair, Ms Sully, and Mr Machin to discuss governance support. Their instruction to her was to appoint a company secretary, because the support to trustees was not good enough, or fit for purpose, in their view, and they did not consider the claimant capable of the role. They needed a company secretary, and wanted that person to take their minutes. They also believed that papers being late and disorganised would be a deterrent to potential trustees, in circumstances where three or four were standing down around that time. They noted there had been some improvement in the papers for the last meeting. That may have been because of Mrs Kirkby's instruction to the claimant at the May and June PDR meetings. Nevertheless, the trustees' clear wish was to appoint a company secretary, and they considered neither the claimant nor Ms Somers could do that role with sufficient rigour, and they suggested "lifting governance out separately" and getting someone external for the company secretary role. Mr Machin was happy to support Mrs Kirkby and they wished the matter to be progressed in September - this was the gist of the conversation.

The 27 July Board Meeting

85. The surveyors having reported, Mr Munday wrote a paper to be considered at a Board Meeting of Trustees and the executives on 27 July 2022. The DAC proposals to acquire a new site and build a new DAC, dispose of the respondent's city centre sites, and partner the property developer and others, were explicitly subject to: **"f**inalising Heads of Terms, the relevant planning permissions, satisfying regulatory requirements, financial targets being met and ongoing due diligence"**.** The proposed disposal was "off market" to the developer, the value was several million pounds, and there was no documented due diligence for the developer included within that report. The report recorded that the respondent had looked at the developer's audited accounts. The three options presented by the surveyors included advertising openly for bids. The paper recommended seeking trustee approval for a decision in principle for an off market sale. The paper also attached advice from solicitors about the project.

86. The trustees met privately before the July Board meeting. They had concerns about the DAC paper.

87. The claimant had not been involved in the contents of the DAC paper before it was sent out. She attended the Board meeting and observed the unhappiness from trustees about the lack of due diligence within the report and other concerns which Mr Munday sought to address. She felt some criticism was implicitly directed at her for the due diligence being omitted from the report. Mr Munday's position was simple – he had no vested interest, being an interim from a different part of the country: trustees could do the project or not, it was up to them - "it's no skin off my nose if you take it [the offer] or not". Mr Munday said that due diligence had been sought but not shared in the report. We make this finding because the claimant has given several different formulations of what was said orally in the meeting, full minutes were taken and subsequently approved, and on balance we consider this is the limit of what was said.

88. The minutes of the meeting recorded: the report was taken as read, the proposed trustee agreement was sought in principle and would not be legally binding, but would give the developer and the respondent the confidence to progress, until a binding legal agreement was made. The timeline proposed that a legal contract would be brought back to the Board in September as work would need to start to enable completion of the respondent's new premises in Summer 2024, with the developer able to build and have ready university accommodation by 2026. There was a recognition of urgency, but a lawyer trustee noted that the legal advice was in conflict with the surveyors report (as to whether an off market deal was in the interests of the respondent).

89. Consideration of the project was postponed to 4 August.

90. On 28 July the day after the meeting the claimant sent generic advice and guidance about charity disposals to Ms Sully (chair) and Mr Machin, copied to

Mrs Kirkby and others. In a reply on 29 July Ms Sully noted from that advice that the trustees were supposed to have instructed the surveyor, and she didn't recall signing off on that. Mrs Kirkby then asked the claimant and Mr Munday by email: "*can you word something on this. (If we had asked them to instruct a surveyor it would have slowed it down), so as usual, best practise, we do these things for the trustees to support and protect them"*. This appeared to be an attempt at an explanation post facto. The reality, it appeared, was that nobody had picked up on the detail of the Charities Act requiring the trustees to instruct, and that needed to be addressed before any sale could take place.

91. On 29 July Mrs Kirkby had also sent the claimant and others a full suite of policies and procedures, and asked the claimant how quickly the policy working group could be convened to meet – there were ten to approve and many others to ratify, with some ratified already live on the respondent's intranet. Mrs Kirkby wanted to attend the working group meeting. Notwithstanding the DAC then, there was also plenty of "business as usual" work for the claimant and Mrs Kirkby and the requirement to advance and finalise policies was becoming critical to bids and other work.

<u>Alleged Disclosure 1: An email dated 4 August 2022 from the Claimant to Ms Kirkby, Mr Mundy and the Senior Management Team (para. 25 of the Grounds of Claim - GoC)</u>

<u>Alleged detriment 1: At a meeting on 25 or 26 August 2022 Mr Munday (Interim Director of Housing) made the comment in para. 33 GoC</u>

92. On 1 August 2022 Mr Munday talked to the claimant in passing about providing retrospective letters of appointment for the two surveyors, and her immediate response was – "of course I can" or words to that effect. The claimant's expectation was that she would rehearse the background in any letters of appointment, explaining how the appointments had been made, the due diligence, and so on.

93. Mr Munday then emailed the claimant saying "Hi Noreen, Thanks for drafting these" and providing some basic details. The email was headed: two retrospective appointments. She responded asking for the due diligence forms, declarations of interest from both, and details of the procurement process. Mr Munday replied on 3 August saying he hadn't done a conflict form for Cushmans but could get one, and giving explanations, including that the Sawyer had "piggybacked" on another colleague's appointment of the same surveyor.

94. Later on 3 August the claimant exchanged some text messages with Ms Sully, the chair of trustees, in connection with the DAC. The chair asked if the claimant had been asked about the process for the disposal of land and the claimant said she had not. That was the reply the chair had expected, and she clearly understood that the claimant was upset by the implication in the meeting that she was at fault because trustees had questions. The chair was sympathetic

and said she would not raise the claimant's non involvement. The claimant replied that she would have to raise it, although she had been in meetings all week, she wanted to write to Mrs Kirkby about 1) the risks/dependencies in the project; 2) the lack of cost/benefit analysis; 3) the quality of the business case; and 4) the speed of travel – she ended, "I am not suggesting it is wrong but don't feel if challenged I can see the proper checks, balances, and controls in place that should be in place.

95. Mr Munday emailed the claimant on the morning of 4 August 2022 in friendly terms asking her if she wanted to inform the social housing regulator - Homes England - of the project, or was she happy for him to do it. He further asked if the claimant had a relationship with the housing regulator, because he wanted to talk to them about a grant sitting with the premises to be sold. At this point it seemed that although the claimant had not been involved to date, she was now to be involved as required.

96. The claimant responded to Mr Munday's 3 August retrospective appointment email at 12.46 on 4 August 2022 copying in all the senior management team. She did not reply to his emails about Homes England. Her email to him included: " *I sat in the Board mtg listening to references and assurance of due diligence and governance been undertaken, however, none of which had come through your Corporate Governance office, and now I am asked now [sic] to provide retrospective appointments, this is not how governance works, as your Head of Corporate Governance this is not how you should expect me to work, it is right that I check and challenge and not simply acquiesce to the request to provide retrospective appointments. Chris I will take your points in order:....."*

97. The claimant then set out governance advice in relation to each point raised by Mr Munday's email, including, in relation to Mr Munday's procurement of the surveyors' reports: " i*s this within the scope/delegated authority of an interim role*?" (which was not something she had raised back in May when approached by Mr Munday). As to the report to trustees she said this:

98. "*the report does not reflect a comprehensive business case, there is no attached risk register, no dependencies identified, no transparent reference to Governance or due diligence, no options appraisal, and no controls/reference to project methodology."*

99. She then also made recommendations including: "*That we apply the litmus test: if this went wrong, what would be the repercussions, what would be the lessons learnt/criticisms made and <u>whose door would they be laid at?</u> That we slow down on this, that we get all our ducks in order in a controlled and comfortable way, that we are very clear and can demonstrate/evidence transparency in exercising good, controlled, and timely judgment and decision making, we only take a paper back to Board when it is watertight"....*

Was this email "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..(b) that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he or she is subject"?

100. The content/information relied on by the claimant was "the due diligence situation" in context. This email conveyed that 1) trustees had been told by Mr Munday at the meeting that due diligence and governance had been undertaken concerning the DAC project; 2) that none had come through her office – in short – she had not been involved. She had told Ms Sully the day before that she would have to raise this and other omissions with Mrs Kirkby. She stopped short of saying the due diligence did not exist – but she was explaining her refusal to provide letters of appointment for the surveyors, when she had not been provided with due diligence. She characterised the email as "re request from Chris asking me to complete two retrospective app ltrs, please see".

101. The claimant's case was that the information she disclosed tended to show the respondent was likely to fail to comply with the Charities Act prohibition on sale (unless the conditions were satisfied) and/or that directors' duties would be breached. She further said that, "*we were a long way down this process ..and there was no order, no notification to the Charity Commission nor was there a report to comply or explain/propose to exempt"/there was no evidence in place or undertaken in support of the sale of charity assets".*

102. As to reasonable belief she said this: "I *believe this is a charity and as such it is funded by the public purse and to build and maintain trust and confidence we have to demonstrate transparency and accountability, and in this instance as nothing has bene collected , we can []show any transparency or evidence supporting judgment or decision making that if challenged would provide required assurance."*

103. There were many legal obligations engaged in this project, with which compliance was necessary, including the requirement for the commissioning of the best value report by the trustees. When the claimant wrote her email she had already indicated to Ms Sully she would have to raise her non-involvement with Mrs Kirkby. She had said to Ms Sully, she did not believe the project was necessarily "wrong", but evidencing checks and balances would be difficult.

104. The tone and contents of the claimant's email, and the very proximate communications with Ms Sully, reflect the claimant's beliefs and purpose at the time. She was disclosing information, the lack of due diligence and the flaws in the report, which she reasonably believed tended to show a legal obligation would be breached. She did not believe the project was wrong, or corrupt, or fraudulent, but she reasonably believed there was insufficient time to fulfil the required steps before a binding contract could be signed - because of insufficient time, the respondent was likely to fail to comply with the Charities

Act provision. She was also concerned that being able to demonstrate compliance with good decision making was at risk. She provided the email both to advise, in the interests of the management team and herself, and to inform, reasonably believing she did so in the public interest. Without the evidence of due diligence and checks and balances, she and the management team could be exposed if matters went wrong in the future. She was also implying that had she been involved sooner, she could have provided advice much sooner on what was required. That expression of the claimant's personal interest, and the public interest, are not mutually exclusive, the claimant was doing both in this email. It amounted to a protected disclosure.

105. The claimant's position to Ms Sully in text messages and in her email to SMT, is not as extensive as the claimant's case, set out in a letter before action, and pleaded, namely that she believed Mr Munday had given a commitment to the developer, that it was not clear when the property had been advertised, with a clear implication of a potentially fraudulent or "wrong" sale, and that she had whistle blown to that effect. Nevertheless, the 4 August email was a protected disclosure.

106. The respondent's case, put to the claimant, was that she could not reasonably have believed on 4 August that the respondent would breach the Charities Act when she knew a sale could not complete without overcoming a raft of hurdles, including covenant release. Further Mr Munday's report was clear that any Trustee decision in favour of the project was subject to heads of terms, planning, financial targets being met, and all regulatory requirements. In short there was no prospect of an "off market" and non compliant sale without the trustees being satisfied in accordance with all legal requirements. The gist of her answer to that case was consistently the same – the timescales were such that she believed it was not possible to be compliant. We accept she reasonably held that belief, in all the circumstances.

107. When the claimant texted Mrs Kirkby to say she had sent this email, Mrs Kirby replied that she should not have copied in all the management team. Mrs Kirkby went on: "*we made it clear to board why we were going forward in this way. We are getting the due diligence and retrospective appointment by trustees when they are happy with the letter*…*We knew this was not watertight and would not be until the date of contract signature so this could not be withheld until this point as it would be too late.."* and that *"we can't slow process down*". It is this reply which the claimant later believed was deleted from her inbox. At the time she acknowledged it and did not appear to take any issue with it.

108. The context of Mrs Kirkby's reply was that she, like others, was aware of the developer's time pressure. Further, without an agreement to sell the DAC, some £300,000 to £500,000 of remedial fire safety work would need to be undertaken on the premises. That email to the claimant was copied to Mr Munday only.

109. Mrs Kirkby also emailed the the business development director only, as follows, “I don’t like governance smacking hands in this way...”. Mrs Kirkby considered all that was needed as advice on due diligence was, “here are the forms, can we ensure we use them going forward, and if you have anything in play at the moment, please can we get one.”. She considered the claimant was “grandstanding” in her email. Mrs Kirkby sent the “hand smacking” email within ten minutes of the claimant’s email, but thereafter it appeared business as usual.

110. Everyone understood that the offer from the developer was time limited because contracts needed to be exchanged by November 2022 at the latest. That was notwithstanding that a critical step on the project was release by the City Council of a covenant, and approval for that had not yet been sought. The next full board meeting for the respondent was not until October 2022.

111. Later in the afternoon of 4 August, a reconvened meeting of the Board took place, with the claimant present, at which it was agreed that there was more work to do before the trustees could approve the sale in principle, with Mr Munday hoping to circulate further information by 8 August. Those measures included that the surveyors’ reports would be updated in line with legal advice as to their remit, that Mr Sawyer would attend the next meeting (as would lawyers), that architects plans would be included and so on. Mr Machin, the acting chair, again noted that the trustees should have appointed Mr Sawyer and that what was now required was a positive recommendation [that the off market sale] was the best option. He also indicated he had satisfied himself of Mr Sawyer’s qualification to give such an opinion. The minutes recorded: “*it was noted Mark Turnbull, Anthea Sully and Bryan Machin have had further discussions with regards to the Alcohol Centre and updates provided by DH&E (Chris Munday) on the process needed in order to finalise the decision next week. “Are we content to take an in principle decision on the Alcohol Centre”.*

112. After that meeting, and Mrs Kirby’s email, it must have been clear to the claimant that the trustees would insist that all requirements were met – essentially that her concerns and more were being addressed by them, before approving the project in principle. She knew that Mr Turnbull, for instance, was a highly respected public lawyer with expertise in this area.

113. Ms Somers was then asked to draft appointment letters for the two surveyors and she did so on or around 5 August 2022, albeit they were not signed. Mr Munday then secured completion of the due diligence check list and supporting information for the developer (which ran to many pages) and the further paperwork was sent to Trustees on 8 August for a reconvened meeting on 11 August.

114. On 9 August Mr Munday emailed the claimant to chase for the Homes England contact. Notifying this regulator was one step which the claimant knew must be done.

115. On 11 August the Board met again to consider the papers, which included legal advice, draft heads of terms, a draft report advising the Trustees by Jon Sawyer, a proposal to delegate further scrutiny of the project to the Finance and Performance Committee, due diligence for the developer, and further minutes settled by the respondent's solicitors. Again the claimant was present. Mr Sawyer was present and gave a full overview of his experience noting no conflicts of interest. Various resolutions were approved, including delegated authority for the costs of the project (which were substantial) and its management. The trustee who had a potential conflict due to a position at Leeds City Council did not take part in the decision.

116. On 16 August the claimant cancelled an 8.30am SMT meeting because there were insufficient attendees – only the Director of Business Development and Mrs Kirkby could attend. Mrs Kirkby instructed the claimant by text to recall the cancellation notice and the meeting took place - the claimant's view was that it was not quorate.

117. On 17 August Mrs Kirkby invited the claimant to a delayed PDR meeting – saying "my apologies" - to take place on 13 September. The last one had been in June and the invitation said 4pm until 6pm on 13 September face to face – that was soon after Mrs Kirkby was due to return from holiday.

118. On 19 August Mr Munday again chased the claimant for a Homes England contact by email, having been on leave for the previous two weeks. He then had a brief chat with the claimant about it on 24 August. He also appointed the claimant to the "core group" or project team which was to work on the project and meet weekly from 26 August. The business development director, CFO, Mr Munday and others were in that group.

119. Mrs Kirkby was then on leave without email access from 22 August to 12 September 2022.

120. At a "Teams" meeting of the Project Team on 26 August, Mr Munday opened the meeting by saying, 'Noreen I am going to embarrass you now in front of colleagues - she replied he did not need to do that – and he went on - can you give me the telephone number of the Housing Regulator, you have failed to provide me with it". It was clear to those present that Mr Munday was frustrated when he said this – it was not said in humour or jest. The claimant was embarrassed and she challenged Mr Munday about it. Other colleagues noticed and asked her how she was afterwards.

121. Shortly thereafter she provided Mr Munday with web links and information for the housing regulator – in simple terms, she had no specific contact and expected Mr Munday to be able to source the information from his housing colleagues, but she did her best and her communications were cordial with him. She also sent out an invite to relevant trustees, Mr Munday and other SMT

members for a ten minute briefing on DAC every two weeks on a Thursday. It was clear there was momentum to the project. On 2 September the chair of trustees contacted the claimant by text about their hope to meet together and when there was no reply, she asked if the claimant was okay. The claimant replied on the 5th saying she was okay, would hope to be better, and asking to meet the next week.

Conclusions on detriment 1

122. The claimant has a legitimate sense of grievance about Mr Munday's conduct in the meeting. He could have telephoned her, or spoken before the meeting – there was no need to embarrass his colleague in that way.

123. Why did he? The simple reason was that the claimant had not replied to his requests for help with the housing regulator and in a time pressured situation, he was deeply frustrated. He considered it wholly unacceptable not to reply to him in that context.

124. A great deal of water had gone under the bridge since the claimant's 4 August email, most significantly the trustees had received legal advice and been satisfied of Mr Sawyer's competence and other matters such that they had approved the DAC in principle. We accepted Mr Munday's evidence that his conduct was simply frustration that the claimant had, from his perspective, ignored a request for three weeks on a project which everyone knew was pressed for time. Was his conduct without reasonable and proper cause – yes – a public rebuke was unnecessary; was it calculated or likely to destroy or seriously damage trust and confidence? Did it "cross the Mallik threshold"? It certainly was not calculated to do so; of itself, it was insufficiently serious in context to be likely, objectively, to do so. It could, with other matters, contribute to a breach – the claimant was "okay" at that time, but unhappy.

Disclosure 2: An oral discussion between the Claimant and Ms Kirkby on 13 September 2022 (para. 37 GoC)

Disclosure 3: A discussion in a Teams call between the Claimant and Ms Kirkby on 14 September 2022 (para. 39 GoC)

Detriment 2: On 13 September 2022 Ms Kirkby (CEO) conducted an unscheduled personal development review with the Claimant (paras. 36 to 38 GoC)

Detriment 3: On 14 September 2022 Ms Kirkby conducted a follow-up review via Teams (paras. 39 to 46 GoC)

125. On 13 September Mrs Kirkby conducted the PDR meeting to which she had invited the claimant before she went on leave. The meeting was not unscheduled.

126. Making clear findings about what was said in this meeting, beyond the criticisms listed below, is difficult. Mrs Kirkby relied on her note; her witness statement denied much of the claimant's additional content. When put to her she accepted that some matters were not in her note (emails etc) but was clear in her evidence that the additional content concerning Mr Munday and a lack of a conflicts of interest form, was not said. The contemporaneous notes before the Tribunal were those of Mrs Kirkby, signed by her and sent to the claimant on 16 September.

127. The claimant did not sign Mrs Kirkby's notes or return them or dispute them (but she had signed no previous PDR notes either). Their contents included typical and likely matters. The claimant's most proximate record of what was said is within a grievance sent on 17 October. The grievance was headed "Formal grievance/victimisation due to whistleblowing". Its contents were as follows:

"*It is with a heavy heart that I feel i have no other option but to raise this grievance, following what I believe to be an issue of whistleblowing. I have raised my concern with the CEO (my line manager) and DLP Consultant* [this is a reference to Mr Munday]. *However, since doing so my treatment at work has been beyond unreasonable, unwarranted, undeserved and detrimental to my health and wellbeing.*

The straw on camel's back has been broken and I am currently on medical sick leave due to work related stress.

On 27 July 2022 I had to sit through a Board meeting where it was confirmed by DLP Consultant that all levels of compliance in the form of due diligence had been sought (but not shared), in relation to his business case for disposal and re-provision of a multi-million-pound housing project. Despite the Corporate Governance Office not being privy to this, it was strongly implied that it was. Trustees were left believing that it was. Following this, I was asked by DLP Consultant on behalf of the CEO to write retrospective letters of appointment for two separate consultants who had already been commissioned to work on the project some months earlier.

***Firstly,** I asked for the evidence of compliance to support the drafting of the retrospective letters, only to find that none had been undertaken. I raised this as an issue, but there was an attempt to justify the lack off evidence, and subsequently dismissed [sic].*

***Secondly,** following this I raised further concerns and subsequently escalated what turned out to be a greater lack of statutory and regulatory compliance which should have been produced but was not. But the work had already started and the commitment made to undertake the project had already been promised [in relation to the asset disposal, sale and reprovision of a St Anne's CQC regulated, local authority commissioned service and its two adjacent but now vacant three-story office blocks] to a developer. The developer's own key dependency and risk are[believed to be] to sign contracts with St Anne's by November 2022 in order that they can fulfil their*

demolition and build timetable for student accommodation on the site of St Anne's disposed properties.

What came to light, as a result of doing my job and not unreasonably asking for the evidence and escalating the issue at the time, was that the Board of Trustees were told that the required compliance was in place, when in fact it turned out that it wasn't.

Since this time, I feel I have been victimised in the form of overt bullying in meetings, told that others will be brought in over me to do my job, removed from key pieces of work, and had line management responsibility removed. I have received increased work-related pressure, ignoring, undermining and attempting to discredit my professional integrity. I have been victim of blame and fabricated complaints, courted complaints from line managed staff, had previously allocated capacity hours removed, and had statutory functions within my remit removed and diluted.

I have a chronology, and written evidence, in support of this grievance. I understand that you will convene a meeting to discuss and whilst I welcome this, I feel the behaviours and actions towards me since raising this have made my position untenable. I need to have trust and confidence in my employer to be able to do the job I do. However this is sadly lacking, and whilst, there might be, I see no other outcome but to concede a settlement agreement and terminate my contract with immediate effect. I would be grateful if you could let me know when you wish to meet."

128. Although the claimant's chronology was not before the Tribunal, we consider it informed a letter before action on 21 December, in which it was said, "the claimant has been subject to unfair and misleading performance reviews". The claim to the Tribunal contains particulars of the criticisms, and the claimant's witness statement contains "quotes" of comments by Mrs Kirkby and detail of matters she raised. The claimant says in her statement that she made a note of the meeting immediately and later provided it to her solicitor, but that note was not provided to the Tribunal – perhaps it was considered to be privileged.

129. Even had the note been provided, it is frequently the case that two parties to a difficult meeting record different content about it afterwards. Both notes may be right in that they reflect the points "taken in", rehearsed and remembered, by the attendee. Often the complete picture involves considering both recollections, testing each against all other material and what is likely (or not).

130. Mrs Kirkby did not, for instance, on her own evidence, note all criticisms that she raised with the claimant, or the claimant's immediate reaction to them. Her witness statement also indicated that some matters were discussed on 14 September, when the note suggest that these were discussed on the 13th, because they precede an entry, "discuss tomorrow".

131. She noted that the claimant had said at the start of the meeting that she was not happy and: "don't think I am doing the job I am being paid to do. Trustees on 27
July had a go when I was sat there and said no due diligence done. I can't do anything if not party to the conversations. Felt awful. This is not what corporate governance is about. I am always playing catch up and worse over the last three days". This content has the ring of truth about it, because these comments are consistent with the claimant's email of 4 August and her earlier exchanges with the chair by message. The claimant did not raise Mr Munday's treatment of her on 26 August, on 13 September.

132. We find they discussed other matters, including new trustees, the health and safety manager's resignation the day before, and issues with the claimant's staff. The claimant identified the need to recruit an information governance officer, because Ms Otley had resigned and Mrs Kirkby was pleased about that (Ms Otley being the colleague she considered had been rude to her).

133. Mrs Kirkby had a range of criticisms to raise and she did so as follows:

133.1. There were too many - over 1000 - emails in the claimant's inbox;
133.2. That she Mrs Kirkby had had to do the risk register;
133.3. That Mrs Kirkby had had to re-do policies;
133.4. That Mrs Kirkby had had to work late to get board papers out;
133.5. That the committee papers were always late;
133.6. That trustees felt the claimant was not responsive;
133.7. That they had no confidence and wanted to recruit a company secretary;
133.8. That she sent too many emails to trustees (Mrs Kirkby did not accept she said the claimant communicated too much with trustees, but
the number of emails they received was a criticism trustees made in July and we therefore consider this was said);
133.9. That the claimant and Ms Somers had failed to recruit a governance officer.

134. In simple terms, this was a poor state of affairs, Mrs Kirkby believed.

135. The claimant unsurprisingly felt this was an attack on her job security. She also felt she was being made a scapegoat and she was insistent to Mrs Kirkby she would not be made a scapegoat. She said the criticisms were to deflect from the challenges of the DAC, and her 4 August email. She became upset and Mrs Kirkby suggested that she go home and they meet again the next day on teams - "what is your proposition" is how Mrs Kirkby noted the way matters were left. To note matters in that way, we consider Mrs Kirkby must have had some reaction from the claimant beyond her becoming upset. We consider it wholly likely that the claimant said words to the effect that she would not be a scapegoat. They adjourned to the next day.

136. The next day the claimant did raise Mr Munday's treatment of her; she referred back to the retrospective letters request, which Mrs Kirkby denied was made by her; she considered she was still being made a scape goat, and it was her job to check and challenge. She put forward two proposals: she was supported in her job by recruitment of new staff, bearing in mind leavers; or she resign/leave and in doing so she felt she had been victimised for doing her job (that was the gist of it).

137. Mrs Kirkby said she did not want the claimant to leave and that they would review matters after the October Board meeting – and she set actions including for the claimant to "exit Sara by 11th" and be happy with.. handover". On the claimant's own evidence Mrs Kirkby was taken aback by the claimant's reaction on the 13th and had been more pleasant in her approach on the 14th.

138. That day the claimant also had a text exchange with the chair of trustees indicating that she may need a conversation with her on record. At this time the respondent was expecting a new People/HR Director, Mr Jeffers, to start on 30 September.

Conclusions on the allegations above

139. Applying the same analysis as above, we ask whether the claimant's comments in these two meetings amounted to qualifying protected disclosures, and we find they did not. The content of what was said was not information which in the reasonable belief of the claimant was made in the public interest and tended to show that the respondent had failed, was failing, or was likely to fail to comply with any legal obligation to which it was subject.

140. The claimant was restating her original complaint within the 4 August email, that she had been asked to provide appointments without due diligence; and had been made to look at fault in the Board meeting when trustees were unhappy with a lack of due diligence, but not that she feared the pace meant obligations could not be put right. The information was expressed this time wholly in her own interests, reacting to Mrs Kirkby. She felt her job and her professional reputation were being wrongly challenged and she was being "scapegoated". She felt blamed, and she believed Mrs Kirkby was fixing blame for initial trustee unhappiness about the DAC, on the claimant, when in fact she had not been involved and that was fundamentally unfair. Further she could not, at this time in mid September, reasonably believed that legal obligation failures were likely from the project because: 1), Mrs Kirkby in her immediate reply had said that matters were being put right at pace; 2) she had been present in the meetings when the trustees had taken lengthy and rigorous steps to satisfy requirements, 3) she had been involved in the project team meetings and knew Mr Munday was taking regulatory steps – for example notifying the housing regulator; and the trustees had approved the project i**n principle,** subject to further robust scrutiny work on committee.

141. Nevertheless the claimant had reason to feel aggrieved that she faced a no holds bar critique of her and her department. We then focus on Mrs Kirkby's reasons for presenting criticisms in this way at this meeting? In simple terms, Mrs Kirkby did so because all these matters were real challenges facing her and the claimant's department at this time – she had not made them up – and her management style, we know from her instruction about the claimant's colleague, could be unforgiving. She may have supported and forgiven the claimant up to this point, but the trustees had been clear to Mrs Kirkby that work to add a company secretary post must be advanced in September, and it was September.

142. The criticisms of the claimant were not "black and white", in the sense that the detail of the criticisms had particular context. The claimant's simple position was that her team was under resourced and, as Mrs Kirkby had acknowledged in June, the claimant had "too much". There were also particular and various reasons – for example, late provision by others – as to why board papers might be late. The fact that trustees had seen some improvement but still wished to bring in an external company secretary to support them - an additional post - and "carve out" corporate governance – suggests they too recognised a capacity issue not wholly connected with the claimant. They did not, for example, suggest dismissing the claimant on performance grounds and replacing her. Nor did Mrs Kirkby suggest this in her discussions with them.

143. While we have found the 4 August email to be a protected disclosure, Mrs Kirkby did not see it that way. She regarded it as undesirable grandstanding and public hand slapping of management colleagues. She was clear that what mattered, ultimately, was satisfying the requirements, and she expressed in her email how that was to be done – there was to be a revised letter or report from Mr Sawyer, instructed by trustees – it was also manifestly clear from their meetings that legal obligations were to be addressed. The claimant's case includes that had she prepared the letters of appointment she would still have her job – had she not written the email, made the disclosure, Mrs Kirkby would not have unleashed the criticism she did, on 13 September. We do not agree with that case. The chain of events is such that Mrs Kirkby raised those matters because they were real, and because she had been instructed to address the trustee support issue. The way she did it reflected being at the end of at least four months of knowing that things could not go on as they were.

144. Did Mrs Kirkby act without reasonable and proper cause in the first meeting? Telling the claimant her "customers" had lost confidence in her, and wanted to hire a company secretary (which was a substantial part of her job description), without any attempt to reassure the claimant that her employment was not at risk, or any expression of the positive – papers had improved last time - was without reasonable and proper cause. It was also conduct likely to destroy trust and confidence when Mrs Kirkby knew the claimant's health had been challenged by her workload. At the meeting the next day it became very clear that the claimant

may resign over this. In those circumstances Mrs Kirkby sought to avoid a resignation and reinstated her support for the claimant to recruit to the vacant posts and re-visit matters in October.

145. The claimant was then on leave from 15 to 23 September.

Disclosure 4: An oral discussion between the Claimant and Ms Kirkby on 26 September 2022 (paras. 50 to 57 GoC)

Detriment 4: At some point before the Claimant's return from leave on 28 September 2022, Ms Kirkby entered her email box and deleted over three quarters of her emails/email trails, including an email in which Ms Kirkby criticised the Claimant for challenging lack of due diligence (para. 32 GoC)

Detriment 5: At some point before the Claimant's return from leave on 28 September 2022, the scope of the external consultant's review into the housing governance department was extended and another consultant was appointed (paras. 32 and GoC).

Detriment 6: At some point before the Claimant's return from leave on 28 September 2022, the staffing in the Claimant's team was reduced from 112.5 hours to 37 hours (paras. 32 and 63 GoC).

Detriment 7:At some point before the Claimant's return from leave on 28 September 2022, Ms Kirkby deleted three key governance functions from the Claimant's organisational structure (paras. 32 and 63 GoC).

Detriment 8: At some point before the Claimant's return from leave on 28 September 2022, Ms Kirkby actively chose to ignore the concerns the Claimant had raised (para. 32 GoC).

The respondent's financial circumstances worsen

146. On or around 21 September 2022 the Chief Finance Officer had authorised forecasts which overstated income in Finance Committee papers. They underpinned covenants to the respondent's bank to support a loan facility to fund the DAC. The loan facility was to be approved on the basis that bank covenants would be met. After the meeting the CFO emailed Mrs Kirkby indicating an error of overstating income, with the result that the respondent would, in fact, lose £2million in the year to 31 March 2023. Mrs Kirkby could not approve papers, nor could the loan facility be obtained – to do so would have been fraud – and Mrs Kirkby had to explain matters to Mr Machin, who chaired the finance committee, and the housing regulator. The loan could not be accessed.

147. Mrs Kirkby considered that the CFO had misled trustees and herself, by representing covenants would be met in the meeting, when he knew they would not.

She considered that was a matter of gross misconduct. An agreement for the CFO to leave the respondent on terms which included payment of his notice, was concluded by the new People Director in the weeks thereafter. The immediate impact of the mistake included a need to cut cost.

148. The findings above were made on the basis of Mrs Kirkby's oral evidence only, the Tribunal concluding it had the ring of truth about it bearing in mind that Mrs Kirby is herself an accountant. Her statement had indicated a bare change in financial circumstances and the evidence emerged in response to questions, and at the direction of the Tribunal in circumstances where the respondent had included confidentiality in its agreement with the departing finance director.

149. We also note that the respondent in fact reported an operating loss of some £977K for the year to 31 March 2023 in its accounts, in contrast to a small surplus the previous year, which is consistent with Mrs KIrkby's evidence of a deteriorating position at mid year and a need to address it.

<u>26 September 2022</u>

150. Unaware of these matters the claimant returned to the office from leave on 26 September. She had a chesty cough. She messaged the chair of trustees early that morning to the effect that she had been unwell throughout her leave, unsurprisingly, and although she was going into the office that day, she would have to come back home. She asked for a meeting with the chair, to whom she also reported.

151. On arrival she bumped into Mrs Kirkby who asked her how her holiday was and the claimant said she was tired and unwell and she was incredibly stressed about work or words to that effect. Mrs Kirkby invited her into her office. There the claimant became tearful telling Mrs Kirkby that she felt the earlier criticisms came out of the blue and were as a result of her challenging about due diligence, or words to that effect. In making this finding we consider Mrs Kirkby's general recollection about this meeting is mistaken. Her evidence was that virtually nothing of the events before the claimant's holiday were discussed and all that was said was that the claimant had a chest infection and the claimant was tired and demoralised coming back from holiday.

152. The claimant had indicated that morning that she would not be staying at work and may need a conversation with the chair. Having said that it is wholly likely that the claimant did discuss the pre-holiday events and impact on her with Mrs Kirkby and in doing so became tearful. It is unlikely that she would become tearful, which Mrs Kirkby accepts happened, if simply revealing a chest infection. It is also very unlikely she would not mention the impact on her of the 13 September conversation. We find she also criticised the project methodology for DAC, said that there were insufficient checks and balances, that departments worked in silos and that it was hard for her to catch up, when, in effect she was excluded – that was the gist of her further comments, which was her belief and consistent with earlier comments.

153. Mrs Kirkby then told the claimant that two vacant posts (information governance officer and governance officer) were to be merged and asked her to draft or comment on a merged job description. Mrs Kirkby did not explain the changed financial circumstances underpinning this decision and the claimant said she could not continue, that her resilience was eroded due to continually increasing pressure on her and her team. She was at her wits end, unable to take any more, and needed to look after herself. Mrs Kirkby then suggested the claimant take the afternoon and the next day as time in lieu (Mrs Kirkby had suggested that in the past when the claimant had been under strain from workload). In this, again, we consider the claimant's case more likely in all the circumstances and that Mrs Kirkby is mistaken about the content of their meeting that day. There were no contemporaneous notes from either side to help us in those findings.

154. Before she left the office the claimant observed two external consultants in the office working on a Housing Governance audit when previously there had been one. She considered she was undermined by this change without consultation with her. In this she had an unjustified sense of grievance; the work was procured by Mr Munday and the CFO. The supplier sent additional resource to get the work done. Had she remained at work no doubt that could have been discussed. As it was, her perception that the scope of work had changed by the presence of an additional person, was simply wrong.

Further matters

155. The date of the allegations above is an error, most likely arising in the recording of the case management discussion. The claimant's return to work was 26 September and all were agreed that she attended the office that morning and that was the relevant pleaded date in the large part.

156. First thing on 28 September, the claimant emailed Mrs Kirkby and Ms Somers with a draft merger of the Data Protection officer and Corporate Governance officer. She set out her belief that it was **not** the right thing to do, and all the reasons why. She made no reference to her own resilience in that email and appeared apparently recovered, but within half an hour she emailed the SMT and Ms Somers and Mr Webb to let them know she would not be in the office due to a very painful cough. She was going to the GP to confirm, but having had a week off work free she believed something had taken hold. Mrs Kirkby forwarded that email to the new People Director Mr Jeffers, and another HR colleague. We do not consider a public statement of a cough dilutes the claimant's evidence that she earlier told Mrs Kirkby she was at her wits end, and her resilience was under strain. The matters, again, are not mutually exclusive.

157. Mrs Kirkby was herself on leave from 3 to 10 October.

158. At 9.11 am on 3 October the claimant emailed a colleague, copying Mrs Kirkby and others, saying she had been advised to self certify absence. She marked the email strictly confidential, and she said she was due a follow up on Wednesday, and would hope to return on 10 October, subject to the doctor's assessment. She went on, "*my work is more than just a job for me, like everybody, I need to be fit and well in order to do it, I need to be more than, "well enough".*

159. At lunchtime on 3 October when the claimant was still absent Mrs Kirkby emailed her saying "H*i Noreen, I know you won't see this until you return, however I just wanted to update you on the following: in your absence I have started looking at unread emails, so you don't have to do them all when you return. If they are not urgent, they are now marked as red. I have not filed anything Junk email has been checked and deleted....As Sara is leaving next week, I have put in place meetings to manage handover. Sally has been booking meetings for me. We are going through your diary and rearranging meetings to when you return, or if they are urgent then I am dealing with them. I have asked that Sally can have editing permissions for you [sic] calendar to support this. We are trying to ensure we manage your absence effectively and do not leave you with a lot to come back to...I hope you are feeling better*..". In short, although she was on holiday, Mrs Kirkby was stepping in to manage the claimant being way at the same time.

160. Mrs Kirkby started the inbox review some time before lunch time on 3 October. On 5 October 2022 she reported this to the chair of trustees: "*sadly there are 1000 emails unread that I am going through this week. There are some urgent queries re insurance that are worrying and emails from families ignored. So embarrassing. Not sure we will come back from this as I will tell her as soon as she returns from sick that this has let us down. Not sure I can do otherwise. I am finding a catalogue of things that haven't been done now from a work perspective. I am not logging them all separately (as I am sure HR would tell me to do), just trying to deal with them before its too late and something happens. No great shock, but hugely disappointing."*

161. Mrs Kirkby reduced the inbox by three quarters. She also deleted emails which the claimant subsequently considered should not have been deleted, including the email response to her from Mrs Kirkby criticising her for the 4 August email. The claimant subsequently complained about this and her inbox was restored. It was accepted in the respondent's response to the claimant's letter before action that: "I understand that a number of irrelevant emails where[sic] deleted in the normal course of covering your client's role in her absence. This included out of date emails, "spam" emails, copy emails etc." There was no suggestion in Mrs Kirkby's email to the claimant that any emails other than "junk" had been deleted. We therefore find that the deletions went beyond "junk".

<u>Conclusions on the allegations above</u>

162. The claimant's case was that within her meeting on 26 September the claimant made further protected disclosures – protected disclosure 4. This was said to be her repetition of her concerns about the organisation and the DAC (which, for the same reasons as above we do not find were qualifying protected disclosures – by this stage she could not reasonably have believed the respondent was likely to fail to comply with project related legal obligations).

163. As to alleged detriment 4, said to be on the grounds of this, and earlier alleged disclosures, Mrs Kirby was transparent in why she was tackling the claimant's unread inbox: the size of the inbox had been a criticism she had made of the claimant. Why did she tackle it? To address that and because she was concerned matters would go unaddressed in an important inbox. The circumstances included that the claimant had said she was "at her wits end" and her resilience was low and she had been clearly saying so since June.

164. The claimant's case is that for a self certified absence of a week, this was totally overreaching and unnecessary and that for that length of absence, accessing her inbox in this way and deleting items did not have, "reasonable and proper cause".

165. On the one hand we consider accessing to check for matters needing action, and even deleting "junk", in the commonly held understanding of that word – unsolicited spam emails – would have helpful purpose and was with reasonable and proper cause. On the other hand, deleting more than that, including making a judgment on "out of date" or "copy emails" went beyond the explanation given to the claimant at the time. That was not transparent and was without reasonable and proper cause in circumstances where Mrs Kirkby did not know the claimant would not return on 10 October. It was also conduct which was objectively likely to contribute to the destruction of trust and confidence. The claimant perceived unexplained deletions, and was unlikely to accept the conduct was benevolent given the September 13 PDR, which we have found was itself a breach of the implied term.

166. As to detriment 5, we have addressed this – the claimant has an unjustified sense of grievance about it.

167. As to detriments 6 and 7, for they amount to the same allegation at this point in the chronology, telling the claimant of the merger of two posts in the claimant's team. The reason why, was the respondent's new financial reality arising from the forecasting error. It was certainly unrelated to news imparted that day about the claimant's own well being, nor was it related to the claimant's 4 August email or verbal similar comments. Was it, given the financial strain, conduct with reasonable and proper cause?

168. The claimant had told Mrs Kirkby that she was, in effect, reeling from the criticisms before her holiday. Before her holiday recruitment to the two positions had been agreed, the claimant's position being, her team was under resourced.

Mrs Kirkby nonetheless communicated a cut in her resourcing immediately on the claimant's return, without explaining any underlying reason. Mrs Kirkby's position was that she could not explain the events we describe above to the claimant – it was, in effect, above the claimant's pay grade to know the reasons why. That, in relation to a colleague in whom Mrs Kirkby had placed great confidence in the past to address a fatality. In our judgment, it was conduct without reasonable and proper cause, in the context of a commitment two weeks' earlier to recruit, to volte face from that without any explanation whatsoever. That conduct was likely to destroy or seriously damage trust and confidence, whether or not Mrs Kirkby intended it so.

169. As for detriment 8, ignoring the claimant's concerns, Mrs Kirkby did not engage with those with the claimant on 26 September or while the claimant was away at all. Unsurprisingly, at this time she had other matters on her mind including a likely departure of the CFO and the DAC project at risk because of the loan issue. She did not ignore the concerns on the ground of the 4 August email, she ignored them because she had other priorities at that time. Was that conduct without reasonable and proper cause calculated or likely to destroy trust and confidence. It was not calculated to do so, but without any discussion with the claimant of the reasons she did not have capacity to engage with her at this time, it was likely to contribute to the destruction of trust and confidence.

Detriment 9: On 10 October 2022 after the Claimant's return to work after a period of sickness absence, Ms Kirkby failed to conduct a return to work interview with her (paras. 61 and 64 GoC).

Detriment 10: On 10 October 2022 Ms Kirkby conducted an exit interview with a departing employee in a way that undermined the Claimant (para.61 GoC).

Detriment 11: On 10 October 2022 Ms Kirkby took over a meeting with external insurance partners in a way that undermined the Claimant (para. 62 GoC)

Detriment 12: In 10 October 2022 Ms Kirkby gave information to the Claimant that undermined her in front of a subordinate colleague, Sally Summers (para. 63 GoC).

Detriment 13: Ms Kirkby cancelled a board meeting that the Claimant was due to lead on 10 October 2022 and carried out the work herself without consultation with the Claimant (para. 65 GoC).

170. On 10 October the claimant returned to work. Meanwhile the CFO had been suspended in connection with the matters described above. Mrs Kirkby had arranged a handover meeting with Ms Otley, whose last day was 11 October. The claimant had already done an exit interview with her in September as required by the September PDR discussion with Mrs Kirkby. Mrs Kirkby, with reason, considered a handover meeting with Ms Otley was appropriate before she left, not knowing whether the claimant would return or not. She had also

indicated in her email to the claimant that she would undertake matters which were urgent on her behalf.

171. When the claimant attended work, Mrs Kirkby could have said, in relation to Ms Otley's departure meeting, "I'll leave you two to it", but she did not. The claimant attended that meeting and it did not go well. Ms Otley became upset and Mrs Kirkby said she would finish the meeting and the claimant left. Ms Otley then said she was leaving because the claimant was awful to her. Mrs Kirkby then arranged for Mr Jeffers to contact Ms Otley the next day for an exit interview by phone. She permitted Ms Otley to work her last day at home. Mr Jeffers recorded various criticisms of the claimant from Ms Otley.

172. There was then a scheduled quarterly meeting with insurers by Teams, which was again in Mrs Kirkby's diary as cover for the claimant. Again, on her return, Mrs Kirkby could have said, I'll leave you to it, but she did not, she attended with the claimant and the claimant considered, again, the meeting was not a success.

173. Later Mrs Kirkby came to the claimant's office, where Ms Somers was also sitting, confirming the merger of the posts would go ahead for resource reasons (having had the claimant's objections on the 28th); she also explained that they would be holding back recruitment of another admin post. She further let the claimant know that she was going to move the Health and Safety Manager post back to Housing, because she considered Mr Webb was not engaging with Housing and Estates. Mr Munday had also recommended it. Mrs Kirkby said matters could be discussed at another PDR for the following week.

174. The claimant was also expecting that day to have a meeting with a trustee, likely Ms Sully to discuss the agenda for the next board meeting. Ms Somers told her the preparation had already been done by Mrs Kirkby, who had already sent out draft agendas to management colleagues and the meeting was cancelled. It was cancelled because the chair could not make it. The Board Meeting for which it was preparation was on or around 26 October 2024.

175. Mrs Kirkby did not conduct a return to work meeting with the claimant on 10 October. Her explanation was that she had a full diary and intended to complete it within a day or two.

<u>Conclusions on the allegations above</u>

176. We find the reasons Mrs Kirkby did not step back from the meetings that would otherwise have been undertaken by the claimant included: she did not have forewarning the claimant would attend work that day; she had as good as lost confidence in the claimant, both as to her resilience/health and as to her capability; she was focussed on doing her own and the claimant's jobs; and she was unprepared to sit down with the claimant to tackle head on that day, as she

had said to the chair she would, that the organisation was let down by emails overlooked. It was her first day back in the office, as it was the claimant's.

177. Is the claimant justified in her sense of grievance about these matters? With one exception, she is. The exception of course is the presence of Ms Somers when Mrs Kirkby spoke to them both – given matters were affecting both, and the proposed cuts would impact both, there was nothing untoward in that of itself. The claimant's use of, or approval in her grounds of claim, of the word "subordinate" to describe Ms Somers was unfortunate. We consider that although the claimant sought to explain it away, her frequent reference to "Head of Corporate Governance" and the tone of her 4 August email, it was clear that status and hierarchy mattered very much to her. Mrs Kirkby did not want to exclude Ms Somers because matters affected her too – this was reasonable and proper cause. It was also wholly unconnected with the claimant's 4 August email.

178. As for the other matters, if Mrs Kirkby could spare 5 minutes to tell the claimant and Ms Somers about the structural change in the team, she could have invited the claimant to see her to ask about her health on a return to work, asked the claimant if she wanted to continue with the meetings in her diary or not, and discussed with her the extent of the email issue and her deletions.

179. In our judgment there was not reasonable and proper cause to simply continue with the meetings which would otherwise have been done by the claimant, and tell her health and safety was moving back to housing, without having discussed matters with her. With the other matters discussed above, this was conduct which was objectively likely to destroy the trust and confidence which the claimant had in her employer. This was an escalation of the conduct on 26 September – it was not on the ground of the 4 August email – that was not material cause given the events since - it was because Mrs Kirkby was determined on making sure business as usual was covered irrespective of the impact on the claimant.

180. On 12 October the claimant provided a fit note from her GP which identified she was unfit for work for a month due to work related stress. On 14 October Mrs Kirkby advised HR that she would be on full pay for a month and then straight to half pay, and that Mrs Kirkby would be securing an agency temp. Again, unforgiving was Mrs Kirkby's position.

<u>Disclosure 5: A grievance letter dated 17 October 2022 (para.30 GoC)</u>

181. The claimant's grievance letter is reproduced above. When discussed with her in evidence she identified the PID content as the paragraphs beginning "firstly" and
"secondly", namely concerns about the DAC. Her written statement referred to content indicating the PID was the conduct of Mrs Kirkby and Mr Munday which she believed was because of whistleblowing, and the impact on her health, saying she

was signed off with work related stress. She referred in her statement about the PIDs to the Equality Act harassment and victimisation provisions (which appeared to have no relevance), and more significantly the respondent's health and safety obligations. Her reasonable belief statement can be summarised as this: giving information about a publicly funded employer's conduct, which she believed to be whistleblowing victimisation, and to have damaged her health and breached health and safety obligations, was always in the public interest. In those circumstances, although the claimant did not refer to these matters in her evidence, we do not consider it unjust to find the grievance was a PID, because the respondent had the opportunity to take her through her written statement on these matters, but did not do so. We also consider her belief as expressed in her written statement was genuinely held.

182. In the event, Mr Jeffers was very soon in contact with the claimant and engaged with her on various matters, including occupational health, the grievance, without prejudice solutions, and others. He met with her on 4 November. He arranged for Mr Fennnelly, a nurse by profession and former colleague of the claimant in whom she could have confidence, to investigate the grievance. Mr Fennelly was also in touch with the claimant.

<u>Detriment 14: As at the date of the Claimant's claim to the Tribunal (20 March 2023), the Respondent failed to investigate her grievance of 17 October 2022 (para. 66 GoC).</u>

183. In her cover email to Mr Jeffers attaching her grievance she said this: *It is with the heaviest heart that I have now shared with you a grievance, in m 30 plus years of employment never have I had to do this. Whilst I have a great deal of respect for Azra, I cannot ignore the circumstances which surround this issue, and the impact that this has had on health. The work related pressure was already in place and together with Azra this was being managed, but this was the final straw. Grievances (I don't believe) are not the answer, they are simply a paper exercise/audit trail on record, talking and agreeing a way forward is the right thing to do. Whilst there might be another solution, I can only see one outcome that will leave me in take [sic]. I would welcome a conversation to move this forward. "* That was reflected in the closing lines to the grievance itself (recorded in full above): "I *need to have trust and confidence in my employer to be able to do the job I do. However this is sadly lacking, and whilst, there might be, I see no other outcome but to concede a settlement agreement and terminate my contract with immediate effect. I would be grateful if you could let me know when you wish to meet."*

184. Conversations to reach an agreed solution took place and thereafter the claimant was not well enough to attend a meeting for her grievance. Mr Fennelly and the claimant did meet when the claimant was well enough, and a grievance outcome was subsequently given in June 2022 after a detailed investigation. There was substantial correspondence about the contents of the claimant's meeting notes, correspondence with her solicitor, and interviews with all witnesses.

185. The claimant has a wholly unjustified sense of grievance in relation to this allegation. It took until 28 March (after her resignation and claim) for the claimant to take part in a meeting with Mr Fennelly. Mr Menon made no criticism about that in his questions – the claimant was unwell – but thereafter matters were investigated in a reasonable timescale. The alternative would have been to investigate without having further details from her, and the claimant did not suggest that was reasonable. We find no detriment in this respect, much less on the ground of the grievance or 4 August PID.

Detriment 15: At some time after the Claimant presented her grievance, Ms Kirkby told the Chair of the Respondent's Board of Trustees not to communicate with the Claimant (para. 67 GoC).

186. Mrs Kirkby did not tell the chair of trustees not to communicate with the claimant. On 17 November the claimant sought a meeting with the chair, we find, because the parties had not been able to agree a settlement as the claimant wished, through direct negotiations. Mr Jeffers advised the chair that as the matter would likely now involve the investigation of a grievance (and/or legal proceedings), she had better not have a separate channel of communication with the claimant. Mr Jeffers was then conducting matters with the claimant in terms of her absence, occupational health and so on, and then with her solicitors after they were appointed, or with her where permitted. The claimant's factual case is not made out. It was Mr Jeffers' decision and the claimant has an unjustified sense of grievance about this in all the circumstances. It was reasonable to have one point of welfare contact from the respondent while the claimant remained unwell.

Disclosure 6: A letter from the Claimant's solicitors to the Chair and Vice-Chair of the Respondent's Board of Trustees dated 21 December 2022.
Detriment 16: On 13 January 2023 the Respondent sent the Claimant a letter making spurious and untrue allegations of misconduct (paras. 69 and 70 GoC).
Detriment 17: As at the date of the Claimant's claim to the Tribunal (20 March 2023), the Respondent failed to notify the Claimant what process it would be following to process these allegations.

187. On or around 18 November the claimant instructed specialist solicitors. They wrote a letter before action on her behalf on 21 December 2022, indicating the nature of her claims, including assertions that:
    187.1. On 27 July Mr Munday had told the Board that all due diligence had been carried out relating to the sale and repurposing of three buildings in Leeds City Centre;
    187.2. The claimant was asked to backdate letters of appointment for consultants working on the project;

187.3. Commitment was made to the appointment of the developer when it was not clear whether the properties had been advertised for sale, or how the developer had come to know they were available;

187.4. The Board had been told compliance and due diligence had been undertaken when this was not the case;

187.5. This was questioned by the claimant in written and oral disclosures (including in an August email).

187.6. A response to that email was deleted with many other emails by the Chief Executive while the claimant was on annual leave in September;

187.7. The claimant suffered detriments (listed in summary form);

187.8. The claimant considered the respondent should self report to the Charity Commission as a serious incident report.

188. The letter requested the restoration of the claimant's emails. The letter included: "S*he is suffering from severe stress, anxiety and depression and has been signed off sick until the beginning of January. Her mental health has been seriously affected by this damaging series of events"*.

189. As the respondent accepted, the content of this letter could amount to information tending to show legal obligations had been, or would be breached, or concealment of those. The claimant's PID statement included reference to the Computer Misuse Act 1990 and other provisions. The issue was again reasonableness of belief and public interest. In relation to the DAC information involving Mr Munday and others, this was an expansion of the 4 August email, to reference matters of open advertisement and commitment to the developer and "all due diligence having been carried out". The claimant could not have reasonably believed those matters given the content of the paper and the subsequent events and scrutiny of the trustees. There was no commitment to the developer and the claimant knew Mr Munday had said - "its no skin off my nose" etc, and included a great deal of conditionality in the paper.

190. As to the email deletion matters, and that the claimant had been subject to detriment and ill health as a result of having made a protected disclosure, the claimant's belief was reasonable (because she was not to know of the respondent's changed financial circumstances and the impact of that on Mrs Kirkby's interactions with her). Including such matters in a letter before action served the claimant's purpose - to indicate the matters to be litigated by the claimant and to give the respondent an opportunity to resolve them and respond formally in the hope of avoiding cost – but she also reasonably believed she was doing so in the public interest because her belief was in profound wrongdoing by a charity – hence the recommendation to refer. The letter before action contained protected disclosures in this respect.

Spurious and Untrue Allegations?

191. Mrs Kirkby and Ms Somers were in the office around Christmas time when that letter before action was received. Mrs Kirkby had also discovered, we were told, that Mr Webb had had ill advisedly sent emails to his personal email account on his departure from the respondent (this was not put to him).Mrs Kirkby said she had worked with him to make sure they were deleted from his personal account and it was all very embarrassing at the end of his employment. Ms Somers searched Companies House.

192. Ms Somers was also Mrs Kirkby's p.a and there was little she did not know of matters in which Mrs Kirkby was involved. As a result of those searches they discovered the entries for De Leigh Limited discussed above, and the claimant's trusteeship of the downs charity. In November Mrs Kirkby had also found the original email from the Charity Commission about the pensions deficit.

193. On 13 January 2023 the respondent's solicitors sent a measured response to the claimant's letter before action, part of which recited the chain of events. It included three paragraphs responding to the claimant's information about her health – it explained Mr Jeffers "experiencing considerable difficulty in contacting and communicating" with the claimant and that it had "sought to obtain an occupational health report". It did not say the claimant had "failed to engage" in terms. The letter asserted that Mr Jeffers had agreed amendments to the referral form proposed by the claimant on 16 November, and that he (the author) was not aware of outstanding issues.

194. The claimant had wished to include in the occupational health referral that the cause of her stress at work was whistleblowing detriment. Mr Jeffers' email on 16
November said "once we have agreed the content I can arrange for the appointment". He had not, by 16 November, agreed the claimant's amendments to the referral. In this respect, the 13 January letter was wrong. The letter also recorded that the OH provider had not received the claimant's consent forms, and a request was made that she re-send them or clarify the position if she did not wish to give consent.

195. The letter also said that Mr Jeffers had wished to raise with the claimant when they met: behavioural issues (these related mainly to the exit criticisms Ms Otley had made). He had also wished to raise a conduct issue - the pensions deficit email issue - in a second meeting with her, which had not been able to take place later in November. The letter said that in those circumstances the respondent would look to investigate in the normal course when the claimant was well enough. It was also said that further conduct matters concerning undeclared actual or potential conflicts ("the Mr Webb issue"), and an undeclared appointment (the downs charity) had come to light. It was said the team issues would be raised in PDR when the claimant was well enough, and the conduct matters would be investigated formally when the claimant was well enough. The letter encouraged the claimant to cooperate with the respondent's grievance investigation and that her intention to submit and ET claim was premature.

196. On 20 February 2023 Mr Jeffers wrote two letters to the claimant. The first invited her to a meeting on 27 February to discuss her absence and attendance management. The second letter confirmed that while without prejudice negotiations were under way between advisers, alleged gross misconduct breaches had not been notified directly to her. As those negotiations had ended unresolved, he said it was necessary to set them out and he invited the claimant to meet him on 2 March 2023 to enable him to explain the alleged breaches the following week and to tell her who would be investigating them. The claimant did not attend that meeting.

197. On 3 March the claimant resigned from her employment with immediate effect. Her letter rehearsed: the events concerning the DAC, alleged PIDs, alleged victimisation for speaking up around the lack of controls in the process in order to silence her and meet the developer's timescale, and her grievance. She ended by saying she had now been invited to a gross misconduct disciplinary hearing relating to baseless allegations. She also said she believed that to be retribution for the PIDs and "claim for compensation I have made". The claimant had, by then contacted ACAS, but she had not yet presented her claim to the Tribunal.

<u>Conclusions on allegations 16 and 17</u>

198. It is convenient to address Detriment 17 first – failing to notify the claimant what disciplinary process would be followed. The claimant did not meet with Mr Jeffers or respond to his invitation to do so. She resigned citing his letter as the final straw, in effect. She would have known what process would be followed had she met Mr Jeffers. She did not do so. She did meet Mr Fennelly later in March to discuss her grievance. These facts cannot amount to the detriment alleged.

199. As to Detriment 16 – untrue and spurious allegations – the claimant did not address this allegation in her statements (or allegation 17) directly. We have concluded that the claimant has an unjustified sense of grievance in relation to the notifying of conduct issues. There was no declaration (or review of the claimant's previous declaration) for the resumption of the downs charity trusteeship, there was an unexplained series of events in relation to the pension deficit email, and, given the records available to Mrs Kirkby, there was a potential concern in relation to the appointment of Mr Webb (which had no doubt been fuelled by the events in his last week).

200. It cannot be said that fake and untrue allegations were notified. We have had to decide these allegations of gross misconduct and we have found them not to be made out. We have heard the claimant's evidence at length and reviewed a wealth of documentation. The fact that we concluded they do not amount to gross misconduct is not equivalent to a finding that they were fake and untrue

from the beginning – they were matters which, adopting the "comply or explain" framework, required explanation and the respondent had good reason to raise them. They were not raised on the ground of the claimant having made protected disclosures in her 4 August email, her grievance or her solicitors' letter.

201. As to the letter's contents concerning engagement on sickness absence and occupational health, there was an untrue suggestion that Mr Jeffers had agreed the amendments to the referral form on 16 November, when this was not so. This was a factual inaccuracy. The context was that Mr Jeffers was also agreeing notes of their meeting at the time. Is the factual inaccuracy in the letter (the contents were later agreed), suggesting difficulties in progressing occupational health were down to the claimant, a detriment – something justifiably to complain about. In our judgment it is not, in the context of an otherwise measured and careful letter – it is a date inaccuracy which is innocuous in context. If we are wrong about that, it is inconceivable that it was an inaccuracy done on the ground of the claimant's disclosures. It was a mistake as to date.

<u>Review of findings conclusions, limitation and affirmation</u>

202. It will be apparent from the conclusions above, that even if we were to find that Mrs Kirkby's adverse conduct towards the claimant in September and October 2022 was on the ground of the 4 August email, the presentation of those complaints in March 2023 was outside the ERA time limit, and no evidence or application was made by the claimant to assert it was not reasonably practicable to present them in time. They would, therefore, be dismissed on time limit grounds in any event, given our conclusions about the later alleged detriments.

203. It will also be apparent that we have found breaches of the implied term of trust and confidence principally in treatment of the claimant by Mrs Kirkby on 13 and 26 September and 10 October. The claimant had the right to resign and treat her contract at an end at that time – at the time she presented her grievance. Did she affirm her contract between then and her resignation? We have concluded she did not, applying the directions above. There are no bright lines. Yes this was a long delay, but for the majority of that time the claimant was not receiving any remuneration beyond SSP from the respondent, and was unwell. She was taking steps to agree an exit and otherwise she was continuing to complain about her treatment. In no way was she "letting bygones be bygones". She did not affirm her contract.

204. Did she resign at least in part in response to those breaches? Did she resign to avoid the investigation of misconduct and dismissal, as was the respondent's case? The resignation letter referred to victimisation and that she would be bringing a claim for constructive unfair dismissal in which she would seek payment in full for her three month notice period as well as compensation for losses. This resignation letter is to be read with her grievance which

included..."*Since this time, I feel I have been victimised in the form of overt bullying in meetings, told that others will be brought in over me to do my job, removed from key pieces of work, and had line management responsibility removed. I have received increased work-related pressure, ignoring, undermining and attempting to discredit my professional integrity."*

205. The Tribunal has not agreed that the claimant was victimised – as a whistleblower – but this description of adverse treatment - the matters we have found to be breaches of the implied term - has been established. It is clear to the Tribunal that her resignation was substantially because of that treatment and in response to it, albeit she took time to call matters to an end. No doubt the prospect of a conduct investigation was also unwelcome given her health, but that does equate to a finding that she resigned because of that prospect and not because of the respondent's treatment of her. Her resignation was substantially in response to the breaches we have found.

206. In light of all these conclusions, it cannot be said (although the claimant believes it to be true) that the principal reason for her dismissal is that she made one or more protected disclosures. It is not the "but for" test – the claimant's case that if she had not sent the 4 August email and done the appointment letters, she would still have her job. The Tribunal has addressed the reasons for the respondent's adverse treatment of her, and we have concluded it was not on the ground of the disclosures found. The claimant was not to know of the trustees' meeting with Mrs Kirkby seeking a new company secretary appointment, nor the changed financial circumstances of the respondent. The unfair and wrongful dismissal complaints succeed and the detriment and section 103A allegations are dismissed.

JM Wade
Employment Judge JM Wade

3 April 2024
RESERVED JUDGMENT SENT TO THE PARTIES ON

3 April 2024

All judgments (apart from those under rule 52) and any written reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents.

The Tribunal's practice direction concerning recording can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislationpractice-directions/