EMPLOYMENT TRIBUNALS

Claimant: Ms Don Varunika Lecamwasam

First Respondent: West London NHS Trust
Second Respondent: Mrs Grace Vanterpool
Third Respondent: Dr Christopher Hilton

Heard at: Watford Employment Tribunal **On:** 19-23, 25-27(28 & 29 February 2024 deliberations & 1 March 2024- deliberations & parties attended)

Before: Employment Judge Young
Non Legal Members: Dr B Von Maydell Koch
Mr S Bury

Representation
Claimant: Litigant in Person
Respondent: Mr Simon Cheetham KC

JUDGMENT

It is the unanimous decision of the Tribunal:

The Claimant's claim is unfounded and is dismissed.

REASONS

Introduction

1. The Claimant was employed as a Community Diabetes Consultant by the First Respondent since 1 July 2019 when she was TUPE transferred to the First Respondent from London North West University Healthcare NHS Trust. The Claimant is currently employed by the Respondent an NHS Trust and her continuous employment dates from 20 January 2014. The Claimant contacted ACAS for Early Conciliation against the First Respondent on 14 July 2021. ACAS issued the Early Conciliation Certificate on 15 July 2021. In respect of the Second and Third Respondents, the Claimant contacted ACAS on 17 August 2021 and the Early Conciliation Certificates were

issued on 19 August 2021. The Claimant presented her claim on 26 August 2021.

The Claims and Issues

2. The Claimant brings complaints of detriments for protected disclosures pursuant to section 47(b) Employment Rights Act ('ERA'); unlawful deduction from wages under section 13 ERA; direct discrimination on the grounds of disability, race & sex pursuant to section 13 of the Equality Act 2010 ("EqA"); harassment on grounds of disability pursuant to section 26 EqA; discrimination arising from disability pursuant to section 15 of EqA;

3. The issues in this case are contained in the annex to this judgment and reasons.

The Hearing and Evidence

4. The hearing was in person over a period of 10 days. We received a bundle from the Respondents of 3022 pages. All references to the page number of the Respondent's bundle are contained in square brackets. The Claimant produced 3 separate bundles which had been disclosed to the Respondents on 17 January 2024. The Tribunal learned of this on day 3, 21 February 2024. The Respondents were asked by HMCTS to collate the Claimant's 3 separate bundles into one pdf, which they did. There was no other change to the Claimant's bundle. The Claimant's bundle was referred to as Cbundle. All page references to the Claimant's bundle are preceded by C and then the number of the page or pages also contained in square brackets. The Tribunal also had a neutral chronology and cast list from the Respondents.

5. On day 1, Monday 19 February 2024, the Claimant requested that 15 pages of documents be added to her bundle (C1340 Claimant's sick note dated 01.02.24, C1341 e-mail screenshot of the Respondents' solicitors email disclosure of the Respondents' witness statements, C1342 black and white screenshot of NHS digital audit of the Claimant's deleted emails, C1343 colour version of NHS digital audit of the Claimant's deleted emails, C1344 screenshot of e-mail from Claimant's Pilates teacher, C1345 incident pathway flow chart, C1346 Claimant' explanation of documents, C1347 letter from the Claimant's consultant psychiatrist Dr Christos Dimitriou dated 12.02.24, C1348-1349 another letter from Dr Dimitriou dated 12.02.24 (2 pages), C1350 email from debbiebeh19@yahoo.co.uk Director of Trent Diabetes dated 19.11.23 20:04 to the Claimant, C1351-1354 email correspondence between NWLCCGS complaints to redacted re complaints about Featherstone diabetes clinic diabetes services C19/402 dated 29.11.19 14:54, C1355-1366 Incident reporting and management policy dated 14.01.20).

6. Mr Cheetham KC had no objection to the documents. There was one document that he had not seen which was a statement from the Claimant's Pilates teacher [C1344] that Mr Cheetham KC was seeing for the first time that morning, however, he took no issue with it.

7. On day 1, Monday 19 February 2024, the Claimant said that she wanted to rely on matters that took place before August 2020 as acts of discrimination.

Employment Judge Young explained that would require an application to amend if the matters were not in the Claimant's claim form. Employment Judge Young also added that it was her understanding that it was agreed by the Claimant at the hearing on 30 June 2022 that all the matters before paragraph 133 of the particulars of claim which starts in or around August 2020 were background narrative. The Claimant sought to rely on matters that went as far back as 2016 in her claim form. Employment Judge Young made clear to the Claimant on multiple occasions that those matters formed only background and were not acts of discrimination or unlawful deduction of wages complaints that the Claimant could rely upon.

8. It was agreed that the Tribunal would not sit beyond 5pm on a Wednesday as the Claimant had an appointment to see her osteopath.

9. The Claimant was asked what reasonable adjustments she required. The Claimant referred to the most up to date medical certificates [C1340] provided that morning and doctor' letters ([C1348-1349] which she said contained the relevant reasonable adjustments. However, those documents did not contain any relevant reasonable adjustments.

10. Mr Cheetham KC told the Tribunal based upon the medical evidence in the bundle and what the Claimant had previously indicated, the Claimant would require regular breaks and more time to assimilate the information. Mr Cheetham KC said that there had been a request that the Claimant should have had all the questions in advance, however, Mr Cheetham KC explained that was not practical and that was refused. Employment Judge Young explained to the Claimant that if she needed more time to consider her answer to a question then she would be permitted it. The Claimant requested that she be able to come back the following morning in respect of an answer to a question the following day. Employment Judge Young explained that as long as the Claimant was on the witness stand giving evidence that would be possible and she could provide clarification in respect of answers in re examination, however that would not be possible once the Respondent had started giving evidence. The Claimant accepted this.

11. The Tribunal asked the parties to try and agree a reading list. Mr Cheetham KC had also provided a chronology and cast list. However, agreement was not possible. The Claimant requested that the Tribunal read all of her bundle. The Tribunal explained to the Claimant that we would not have sufficient time to be able to read every page of her bundle and that we would read the pages that we were taken to by her witness statement. However, it became clear that the Cbundle did not have an index that referred to the page numbers on the pages of the bundle. It was therefore very difficult to navigate the bundle as the Claimant's witness statement did not have page references in respect of the electronic version of the bundle and often referred to a group of pages rather than just one page in respect of her evidence.

12. The Tribunal briefly looked at the list of issues. The Claimant said that the harassment allegation was against the Second Respondent only. The Claimant wanted to Tribunal to look at all the Datixes as protected disclosures. The Claimant said that the Datixes related to ones made in April 2021. The Claimant wanted the Tribunal to know that the Third

Respondent only started writing letters after the Datix disclosures. The Claimant wanted to Tribunal to look at Datixes in November & December 2021. Employment Judge Young explained that the Claimant would need to make an amendment application if she wanted us to consider whether she would rely upon those Datixes. The Claimant was given the break to decide whether she wanted to make the application. On return from the break the Claimant said it was not her intention for the Tribunal to explore other claims.

13. The Claimant had only provided 2 arch lever files of her bundle and had not brought the other parts of the bundle to the Tribunal. The Claimant was asked to put her bundle in to 2 arch lever files at most so that she could bring all the copies of the bundle needed for the witness stand and one of the non-legal members. The parties were asked to return on Tuesday 20 February 2024 at 14:00.

14. The Tribunal took the afternoon of Monday 19 February to read the documents and the morning of Tuesday 20 February 2024. The parties were asked to return on Tuesday 2pm. However, the Tribunal was not able to navigate the Claimant's witness statement during the reading time.

15. On day 2, Tuesday 20 February 2024, the Tribunal considered the Claimant's witness statement and noted that there was a paucity of evidence in the witness statement and explained this to the Claimant. Employment Judge Young explained that there was a lack of time and dates in her witness statement. The Tribunal gave the Claimant an opportunity to cross reference her statement with documents in the bundle so that the Tribunal could see the evidence that the Claimant was referring to and relying on, but this was not an opportunity to add evidence. Employment Judge Young specifically told the Claimant to use the Respondents' bundle if at all possible and refer to her bundle if the document was not in her bundle. The Claimant was given very clear instructions regarding what to do and how to do it and that she must provide a cross referenced witness statement. The Claimant was asked to provide a cross referenced witness statement by the following morning by 09:30 to the Watford Employment Tribunal email address.

16. On day 2, 20 February 2024 after the Tribunal retired, the Claimant sent an email. The first email at 17:09 said that the Respondent uploaded a different version of her bundle, and this misaligned her bundle. On the morning of day 3, the Claimant sent another email at 08:40 which said that there was an outstanding issue regarding her schedule of loss and 17 August 2021 email that she wanted to rely upon as a protected disclosure.

17. The Tribunal timetabled the case. Ms Catherine Murray had been given permission to give evidence by CVP. Ms Murray was only able to give evidence Monday 26 February 2024.

18. On the morning of day 3, Wednesday 21 February 2023, the Tribunal added the 15 pages to the Claimant's bundle as pages 1340- 1354. The Claimant complained that the Respondent had added another 300 pages to their bundle on 23 January 2023 that was not in their previous 23 December 2023 version. The Claimant initially indicated that she did not receive the final bundle until Monday 19 February 2024. Mr Cheetham KC confirmed

that the Claimant was sent the final bundle on 23 January 2024 as the Claimant did not send her final documents until 17 January 2024. The Claimant did not provide a cross referenced witness statement.

19. The Claimant took issue with 2 documents at pages 2972-2973 (email trail from 26 April 2021 between Second Respondent and Nina Singh) and another document at pages 2974-3022 (DICE SOP) which she said was an additional 300 pages that came in the final bundle. Mr Cheetham KC did not object to Employment Judge Young asking the Claimant what she wanted to tell the Employment Tribunal about those documents as examination in chief when she gave evidence.

20. On day 3, the Claimant added that she had not had access to datrixes although she had asked for them especially in relation to dates and times and that it put her at significant detriment. The Claimant was specifically asked by Employment Judge Young what was her complaint about that, and was she objecting to the inclusion of the 300 pages? The Claimant said that she was not.

21. The Claimant then provided additional documents one was a clearer version of page 792 of the Respondent's bundle. The other document was another email of page 1588 which completed the email trail. We added the documents disclosed on the morning of 21 February 2024 as pages 1588A. There were two clearer versions of page 792 which we added as pages 3023 and 3024 to the end of the Respondent's bundle.

22. The Claimant objected to the attendance of the First Respondent's employee Laura Fitsimmons attending the Employment Tribunal. It was explained to the Claimant that it was a public hearing, and any one could attend.

23. A copy of the List of issues was provided to the Claimant and a copy was put in the witness stand. The Claimant was asked to number the 15 pages and all copies of the extra 15 pages were also put on the witness stand.

24. We were provided with a witness bundle of 283 pages containing all the witness statements of the parties. In that bundle there was a 119 page witness statement from the Claimant. We heard oral evidence from the Claimant. The Respondents provided written witness statements from the Second Respondent, Mrs Grace Vanterpool (at the relevant time Nurse consultant and Diabetes Service Manager at Diabetes Integrated Care Ealing ('DICE'), current bank Nurse consultant), the Third Respondent, Dr Christopher Hilton (at the relevant time Clinical Director for Integrated Care, currently Chief Operating Officer (Local and Specialist Services), Dr Nicky Goater (Deputy Medical Director and at the relevant time Medical Director and Deputy Medical Director), Dr Catherine Penny (Consultant Forensic Psychiatrist, since February 2022 Clinical Director of West London Forensic Service), Mr Nathan Christie-Plummer (Deputy Director of Workforce), Katherine Murray (at the relevant time Associate Director of Operations, Integrated Care, since October 2023, Associate Director of Flow (interim)).

25. When it came to taking the oath, the Claimant said that she was a Buddhist. She was asked if there was a Holy Book she wanted to take an oath on.

The Claimant did not refer to a holy book and so said she was happy to affirm.

26. When the Claimant took the witness stand she asked if she could write down all the questions. Employment Judge Young advised the Claimant to see how it went if it was necessary to do so. The Claimant said that if she triggered in relation to her PTSD she would let the Tribunal know and Employment Judge Young said that we would take a break. Throughout the Claimant's evidence she was permitted to have a pen and paper to write down notes. The Claimant did write down questions of Mr Cheetham KC and notes.

27. When the Claimant started giving evidence on day 3, Wednesday 21 February 2024 the Claimant started crying and Employment Judge Young asked her if she was ok to continue, she said yes. The Claimant wanted to give the Tribunal page references during her evidence, Employment Judge Young told the Claimant to refer to them in her submissions. The Tribunal took an early lunch break because the Claimant said that she was triggering on the witness stand.

Late disclosure

28. On day 6, Monday 26 February 2024, the Claimant said that she was much better and had been triggering the previous week. Dr Hilton had started his evidence on Friday 23 February 2024 at 15:21 and we adjourned at 16:30. At 10:05 on Monday 26 February 2024, the Claimant produced some other documents that she wished to rely upon. The Claimant said she wished to rely upon a document from a Dr Bakai which was email correspondence between the Claimant and Dr Bakai on 16.11.23 and Dr Bakai's response on 17.11.23. The Claimant wanted to rely specifically on the 17.11.23 email. The Claimant said that the relevance of the document was that Dr Hilton reference this in the protocol. The Claimant also wanted to provide fuller email of the email on C1200 as you could not see the dated on that page. The new email displayed the date as 6 January 2022 12:26pm. The fuller email also had pictures of attachments. Employment Judge Young asked the Claimant if she wanted to rely on those attachments as well. The Claimant explained that they were already in the Cbundle. The Claimant also wanted to rely upon an email from a Carolyn Blythe dated 21.03.23 to Claimant. The Claimant said that the relevance of that document was about the Claimant being an asset. The Claimant wished to rely upon a document labelled 19.04.21 patient list, which had been redacted. The Claimant said that the document was relevant to her work load and the cause of her restriction. Finally, the Claimant wanted to add pages 5, 6, 7, 8, 9,10 of the incident reporting policy.

29. Employment Judge Young asked the Claimant why she did not disclose these documents before today and why not on Monday 19 February last week or with her bundle disclosed on 17.01.24. The Claimant was not able to explain why. Mr Cheetham KC objected to the Dr Bakai email, Ms Blythe email and the patient list. Mr Cheetham KC had no objection to adding the Incident reporting policy. Mr Cheetham KC said in any event save the incident reporting policy all the other documents were wholly irrelevant.

30. The Tribunal took time to deliberate on whether to allow the Claimant to rely upon the new documents. The Tribunal decided on the grounds of relevance to allow the patient list as being relevant to the issue of unlawful deductions. We considered that there was little prejudice to the Respondents as Dr Hilton (who was the most relevant witness in respect of the unlawful deduction of wages complaint) was still being crossed examined by the Claimant and the Claimant said she would ask about the patient list and incident reporting document and so the witness would have an opportunity to give evidence on the issue. The extracts from the incident report policy were already in the bundle and assisted in providing a fuller picture of the process. The Tribunal numbered the patient list C1366-1370. The email from Carolyn Blythe dated 21.03.23 to Claimant was not relevant to any issue that the Tribunal had to determine and so was not allowed.

31. During the Claimant's oral evidence, on multiple occasions the Claimant wished to mention matters that she had not mentioned either in her claim form and or her witness statement. Further during cross examination of Ms Vanterpool and Dr Hilton the Claimant attempted to give evidence and put matters to those witnesses that had not been mentioned in her claim form or her witness statement. It was pointed out to the Claimant in respect of both matters that we were limited to the matters set out in the agreed list of issues. The list of issues having been agreed in June 2022. The Claimant on each occasion conceded this point and accepted that her claim was limited to the issues in the agreed list of issues. The Claimant repeatedly started questions by making long speeches about historical matters that she said set the background of the question. The Claimant was told repeatedly that when she asked a question she was not giving evidence.

Amendment application

32. On day 1, the Claimant applied for an amendment to her claim to add the protected disclosure dated 17 August 2021. The Respondent had no objection to the application. The Tribunal had regard to the guidance of Selkent Bus Company Limited v Moore [1996] ICR 836. The Tribunal must carry out a careful balancing exercise of all the relevant circumstances. It must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. In determining whether to allow an amendment, Selkent elucidates the relevant circumstances to include the nature of the amendment (is it minor or substantial); the applicability of time limits; and the timing and manner of the application. The more recent authority of Vaughan v Modality Partnership [2021] ICR 535 EAT, confirms that when considering the Selkent factors the EAT explain that "n*o one factor is likely to be decisive. The balance of justice is always key"*.

33. Although the Claimant did not specifically refer to the 17 August 2021 grievance in her claim form, she referred to a grievance there abouts on the 16 August 2021 at paragraph 123 of her claim form, which was understood to be a reference to 17 August 2021 grievance which the Claimant said amounted to a protected disclosure. The Claimant had raised it at the preliminary hearing before Employment Judge McNeill. However, Employment Judge McNeill was not able to deal with the issue in the time allocated. Although the Claimant had a number of protected disclosures that she relied upon. We recognised that there are no time limits involved in the making of a protected disclosure and the Respondents did not argue that

there were prejudiced. We considered that the Claimant was prejudiced in not being able to rely upon the 17 August 2021 alleged protected disclosure. We therefore allowed the amendment.

Reasonable adjustments

34. The Claimant produced a sick note from her GP dated 1 February 2024 [1340]. The sick note covered the period of 31 January- 8 March 2024 which included the hearing as listed. The sick note stated that the Claimant was off work because of "exacerbation of post traumatic stress disorder. The adjustments suggested were *"please divide the disciplinary decision. Please agree to a meeting to finalise COT3 settlement form".*

35. The Claimant also produced a letter from her consultant psychiatrist Dr Christos Dimitriou dated 12 February 2024. The Respondents had received this letter on 16 February 2024 by email. Dr Dimitriou's report stated that the Claimant had been reviewed by video consultation on 7 February 2024. Dr Dimitriou reported that *"In short, aside from her established diagnosis of complex PTSD there was no evidence of any psychiatric disorder that would require further assessment and I did not prescribe any medication. We discussed how the way the cases progressed over the previous months has also been challenging from the point of view of often triggering Veronika's PTSD symptoms and it is only reasonable to expect that some accommodations are put in place to help mitigate this."* However, the mitigations outlined in no way related to the Employment Tribunal hearing. Although not addressed to the First Respondent, it is clear from the mitigations set out that the letter was addressed to the First Respondent.

36. We took the Claimant's medical evidence into consideration. However, the Claimant was told on day 1 that the process of an Employment Tribunal was stressful in itself and that she may want to think about how that would affect her and how she would deal with that. The Claimant said that she was fit to proceed with the hearing and did not ask for any other reasonable adjustments other than as already set out above.

Findings of fact

37. Our findings of fact are made on a balance of probabilities. We have had careful regard to all the evidence that we have heard and read about. It is not necessary for us to rehearse everything that we were told in the course of this case in this judgment, but we have considered all the evidence in the round in coming to make our decision. Extracts from witness statement evidence is referenced by the initial of the witness and the @ sign, followed by the paragraph number of the witness statement.

38. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.

39. During cross examination it was put to the Claimant repeatedly that she had not mentioned that the reason for an act she complained of was because of race, sex or disability discrimination or because of whistleblowing, the Claimant's explanation was that she was up all night triggering because of her PTSD whilst writing her witness statement. This explanation was on the first page of the Claimant's witness statement. We took this into account in respect of the Claimant's evidence.

40. When on 1 July 2019, the Claimant transferred her employment to the First Respondent, the Claimant was transferred in to a brand new role of Community Diabetes Consultant. The Claimant was placed in a Diabetes specialist team called Diabetes Integrated Care Ealing ('DICE') with other staff members from the Old Trust into the DICE team. The DICE team was a community diabetes team providing advice and support to primary care and Primary care networks and was responsible for the management of patients with (almost exclusively) Type 2 diabetes without significant complications, and diabetes education. The DICE team historically allowed some flexibility to support housebound patients and nursing home residents, but it was the expectation that complex patients, and almost all Type 1 care would be referred into the acute-hospital-run outpatient departments.

41. The Claimant's line manager was Dr Christopher Hilton, a Consultant Psychiatrist who was at the relevant time the Clinical Director for Integrated Care. Dr Hilton's role was a combined role of service director and clinical leadership. Dr Hilton was responsible for both strategic, operational and financial management as well as the clinical governance and clinical leadership of the service line. The DICE team was just one service out of 40 that dealt with physical healthcare that Dr Hilton was responsible for. The DICE team was made up of mostly diabetes specialist nurses ('DSN'), 1 Community Diabetes Consultant (the Claimant), 2 Dieticians and consultant podiatrist and a consultant nurse (who was Grace Vanterpool). The operational management of the team was led by Susan McCabe. Ms McCabe also had 2 roles, one as Deputy Head of Operations and the other as Head of Nursing. Ms Vanterpool reported to Ms McCabe. When the Claimant transferred to the First Respondent, Dr Romero- Urcelay was the medical director, unfortunately he passed away in August 2020 and Dr Nicky (Nicola) Goater became the interim medical director, from her deputy medical director role. Dr Goater's role included covering the portfolio of the Medical Directorate. Dr Goater had over sight of clinical governance issues, but the clinical governance process did not report to the medical director.

42. Prior to 1 July 2019, the Claimant worked for the Acute Trust as a consultant physician for London North West University Healthcare NHS Trust ("the Old Trust") from 20 January 2014. Immediately preceding the transfer, the Claimant's role involved Diabetes Medicine and Endocrinology.

43. The Claimant said in oral evidence that she was told by the Occupational Health Doctor Kevho that her Occupational Health reports from her former employer would transfer with her employment on the transfer. However, the Claimant was not able to say that she knew that her Occupational Health report transferred with her.

44. The Claimant said that on the second day of transfer, Dr Hilton showed up. The Claimant said that she already knew Dr Hilton since 2013. The Claimant said that she had worked with him before, for 4-5 years by then, she considered him a friend and a colleague. The Claimant said that on day 2 she told Dr Hilton about the last 33 months that she had endured. The Claimant had been investigated for that period, the Claimant says that she was not told why she was taken off clinical duty for that period or what she was specifically being investigated for. The Claimant says it was then she told Dr Hilton the origin of her trauma, that she had suffered a broken ankle and been off work because of her ankle and for post-traumatic stress disorder (PTSD). The Claimant did not say what Dr Hilton said in response to her medical disclosure.

45. The Claimant was originally supposed to transfer to Hillingdon NHS Trust, however before 1 July 2019 the position changed, and the Claimant was transferred to the First Respondent on 1 July 2019. The Claimant had been led to believe that her transfer would be a consultant led service when she was to transferred to Hillingdon based upon a document [C197]. Whilst it was the case that the initial specification for the DICE team was that it would be a consultant led team, due to COVID 19, this part of the specification was not implemented, and the DICE team was a multi-disciplinary team.

46. On transfer to Respondent, the Claimant was provided with an induction pack. In that pack was the First Respondent's Freedom to speak up guidance. Dr Hilton wrote to the Claimant on 24 July 2019 to confirm the Claimant's transfer to the First Respondent and that she had agreed to her role as diabetes community consultant. Dr Hilton said in that letter *"Following our recent discussions however, it is evident that your clinical work will be exclusively in the community service for the time being"* [580]. The Claimant's evidence was that she did not agree to this but agreed to be the lead consultant on the basis of having the opportunity to continue practicing her specialities of in-patient diabetes medicine, in-patient endocrinology, in-patient acute medicine, in-patient general medicine, out-patient endocrinology, out-patient general medicine and out-patient diabetes medicine. The Claimant refers to a letter she was sent by Jacqueline Dochery, Chief Executive of London North West University Health Care NHS Trust dated 11 June 2019 [565-566]. However, it is notable that the letter refers to the Claimant transferring to Hillingdon Hospital NHS Foundation Trust [565]. The Claimant did not transfer there in the end but to the First Respondent. Neither is there any evidence that we were shown that demonstrated that the Claimant had ever raised the issue of only doing community diabetes medicine before bringing her claim. The Claimant said that she raised the issue through her BMA representative to Mr Christie- Plummer, however we were not provided with any evidence of when this was and in particular whether it was before she brought her claim. Mr Christie Plummer's evidence was that the Claimant did not raise anything with him about doing only diabetes community medicine. We therefore find that the Claimant did agree to the role of Community Diabetes Consultant.

Disability

47. The first time that the Claimant attended Occupational Health with the First Respondent was on 30 October 2019. By letter dated 5 November 2019,

the Occupational Health advisor Doctor Khan reported and referred to the Claimant's *"on-going stress in her current role"* and informed him that the Claimant was attending to *"weekly psychotherapy… [the Claimant was] not on any medication and there are no other current health issues involved".* The report did not refer to any underlying formal diagnosis of PTSD or reactive stress disorder or disability. Dr Khan reported that the Claimant felt stressed with the interpersonal problem between herself and 'one of her colleagues' (which we understood to be Ms Vanterpool), and the lack of secretarial support. This report did not refer to any other Occupational Health reports. We therefore find that the Claimant's previous Occupational Health report did not transfer to the First Respondent otherwise Dr Khan would have referred to the previous reports. We find that the Claimant did not report to Dr Khan of her PTSD or reactive stress disorder, and she was not experiencing any symptoms related to those conditions at the time.

48. The Claimant attended Occupational Health on 8 January 2020 with Dr Khan. Dr Khan reported on 10 January 2020. Again, there was no mention of PTSD or reactive stress disorder in Dr Khan's report. Dr Khan said the Claimant was fit for work. [694]

49. On 29 September 2021 and 5 October 2021 and 12 November 2021 the Claimant attended Dr Dimitrou a consultant psychiatrist who reported on 19 November 2021 [2393-5]. We noted that the medical evidence provided by the Claimant at pages C1340, C1348-1349 contained much the same information as contained in Dr Dimitriou's 19 November 2021 report. Dr Dimitriou records in his report that the Claimant told him *"Varunika described experiencing symptoms of PTSD in response to the issues outlined above. Re-living experiences in particular, in the form of flashbacks that will take her back to traumatising interactions with colleagues, were prominent in 2017-2018 and she described how the distress caused by this also led to sleep disturbance. She did not recall being particularly troubled by nightmares and it was therefore the flashbacks during her waking hours that caused the most distress.*" [2395]. However, the Claimant does not mention when these symptoms happened. Dr Dimitriou records in his report that the Claimant had symptoms of hypervigilance, significant anxiety, avoidance tactics to interact with colleagues. The Claimant was not prescribed any psychiatric medication in November 2021. Dr Dimitriou records, it was his *"understanding that she has never been treated with any psychiatric medication or had any psychological therapy.*" [2396]. Dr Dimitriou's view regarding the effect of attending meetings concerning her legal case in persons was *"My view is that she is in fact likely to do better attending in person, given that my experience during her consultations in my clinic was that she presents consistently well and is able to advocate for herself very effectively."* [2399]. We find that the symptoms that the Claimant refers to did not happen before September 2021 when the Claimant first attended with Dr Dimitrou as the Claimant does not say that they did at any point. We find the Claimant did not experience any PTSD or reactive stress symptoms during the Claimant's employment with the First Respondent until August 2021 when she brought her Employment Tribunal claim.

50. Dr Khan saw the Claimant on 26 May 2021 and reports the same day. Dr Khan states that the Claimant *"does not have any known underlying health problems"* [2374]. Dr Khan does suggest that the Claimant see a

psychiatrist but in the context of the Claimant being faced with what she said were allegations questioning her personality.

51. The Claimant then saw Dr Khan next on 6 October 2021. In his report dated 7 October 2021[C117], he refers to a suggestion of PSTD referred to by the Claimant's GP in 2018. There is a fit note from 2018 where the Claimant's GP refers to the Claimant being off work due to post traumatic stress [2363]. The sick note covered the period 6 November 2018-12 December 2018. There is no other sick note that indicates that the Claimant was off work for more than 3 weeks in 2018 for PTSD. The Occupational Health report around that time dated 8 January 2019 from Dr Kehoe, states that *"Dr Lecamwasam has been diagnosed recently with PTSD by her GP but there is no evidence of medical issues prior to sickness absence since October 2017. There is no evidence of any health related reason that could have affected Dr Lecamwasam's conduct and or behaviour at work prior to her sickness absence. She relates all symptoms to the ongoing investigation. Symptoms have improved in the last month and she is medically fit to have a phased return to work in a non-clinical role until the investigation is complete."* [2365]. We find that the Claimant only took off 3 weeks in respect of PSTD symptoms and by January 2019 she was no longer experiencing significant symptoms preventing her from attending work. There is no evidence that the Claimant took any time off for sickness during from August 2020 until August 2021. We find that she did not.

52. The Claimant relied upon the letter from Dr Hilton dated 24 July 2019 [579] and in particular the line in the letter that states, *"Given these recent stressful matters, we believe that to support you as a good employer it is appropriate for WLT to provide closer support to you through direct employment, line management, local access to occupational health,"*. We have no doubt that the Claimant told Dr Hilton of her traumatic experiences regarding the previous 33 months, however, we do not accept that the Claimant told Dr Hilton that she had PTSD or reactive stress disorder. The Claimant did not say what Dr Hilton's reaction was to her PTSD disclosure and we find that if the Claimant had told Dr Hilton he would have responded to her disclosure, the fact that there is no response indicates to us she did not tell him.

53. However we note that the letter from Dr Hilton dated 24 July 2019 also says "*We are also aware that you have had a long period of sickness absence, and although information about your absence has not yet been made available to us from LNWH, you have shared with me the recommendations of the recent Occupational Health discharge letter, which recommended that your new employer supports you to transition gradually back into clinical work, includes within job plan time to participate in counselling and physiotherapy, and seeks to support you by arranging for a mentor."* [580] We find that Dr Hilton did not know about the Claimant's PTSD until receipt of the 9 April 2020 letter from the Claimant's solicitors [711-718]. The letter does not mention reactive stress disorder. The Claimant added that Ms Vanterpool also knew of her reactive stress condition. The Claimant gave evidence about her attending sessions on Wednesday's and that Ms Vanterpool knew that she had Wednesday afternoons off. However, the Claimant provided no evidence as to how Ms Vanterpool knew that she had reactive stress disorder. We find that the Claimant did not tell Dr Hilton or anyone else in the First Respondent of her reactive stress disorder.

54. The Claimant was the only medical doctor in the DICE (Diabetes Integrated Community Ealing) team. However, the Claimant was not the only consultant in the DICE team. The Second Respondent was also a consultant nurse and specialist in diabetes medicine.

55. During the process of mobilisation and transfer to the First Respondent, Dr Hilton said the First Respondent was not told what programs or databases were used by the clinicians working in the DICE team including the Claimant. Dr Hilton understood that the program SystmOne was to be used as the patient recording system and would be sufficient to deal with the requirement of the clinicians to carry out their work. It was only later that Dr Hilton found out that the clinicians used Vectaletter and a diabetes database whilst at the Old Trust. Within a month of joining the First Respondent the Claimant complained that she did not have any secretarial support and had to type up her own letters. Dr Hilton recognised that the Claimant did not have the administrative support that she needed. The administrator Thomas Sejnowicz in the Old Trust had transferred to the First Respondent but would not assist her with her secretarial needs. Dr Hilton admitted that at that point he did not fully understand Thomas' role within the First Respondent and only realised later than Thomas Sejnowicz was the Patient Pathway Co-ordinator and secretarial support was no longer his role. Dr Hilton started the process to obtain additional secretarial support for the Claimant.

56. Dr Hilton referred the Claimant to Occupational Health and on 5 November 2019, Dr Hilton received the Occupational Health report [659 – 660]. The report recommended that the Trust undertake a work stress risk assessment, provide further secretarial support and allow time off to attend therapeutic sessions on a Wednesday afternoon. The Claimant's evidence was that her attendance on Wednesday afternoons was in respect of her osteopath and that she found it therapeutic, and it released muscular tension. We find that the Claimant did not attend weekly psychotherapy sessions, but her osteopath.

Protected Disclosures

57. The Claimant gave no evidence on her protected disclosures and what it is she said they disclosed, except to say that the June 2020 disclosures were contained in an email to Dr Hilton dated 26 June 2020 [C265]. The Respondent accepted that the Claimant's disclosures disclosed that the health and safety of an individual was likely to be endangered.

Breakdown of relationships in the DICE Team

58. Prior to August 2020, the Claimant raised a number of complaints about various members of the DICE team. On 12 September 2019 the Claimant complained she felt bullied by Ms Vanterpool [632] and requested mediation. On 28 August 2019, the Claimant complained in an email to Dr Hilton that she had concerns that Thomas Sejnowicz, the Patient Pathway Co-ordinator, who had accessed SystmOne, the electronic patient record system, from home whilst he was on annual leave [622]. During a one to one meeting with Dr Hilton and Ms McCabe the Claimant raised a concern that Ms Vanterpool was canvassing complaints about her.

59. On 14 August 2019, Ms Vanterpool forwarded to Dr Hilton and Susan McCabe a complaint from a diabetes nurse Armit Kalsi who complained about the Claimant that she dreaded *clinics with the Claimant. Ms Kalsi said in her email to Ms Vanterpool in reference to the Claimant "I can't talk to her about this as I find her manner condescending and patronising."* [602]

60. On 23 September 2019, Ms Vanterpool wrote to Ms Susan McCabe (her line manager) and Dr Hilton, complaining that the working relationship with the Claimant had become *"unbearable"* [638]. On 28 November 2019, the First Respondent received a complaint from Adamma Okwu, a diabetes nurse in the DICE team complaining about the Claimant [2610 – 2618]. The complaint described a number of interactions with the Claimant which had caused distress to Ms Okwu over several months.

<u>Allegation of bullying & less favourable treatment from August 2020 onwards by Ms Vanterpool</u>

61. On 4 August 2020 at 20:41 [841-842], Ms Vanterpool sent the Claimant an email where she stated *"Complicated Patients will always depict your level of competency, If you think and you cannot show your level of competence when these grey areas arise whether it is the consultant or not a sensible agreement between the team will prevail. This is not a compliment but about the needs of individual patient without playing insensitive games for your own games and accomplishments. The game is up !!! Our codes of conduct ensures patients are protected but some members of the Dice team show their insincere scrupulous method of uncommitted team member with their selfish agenda's EXPOSED FOR WHO WHAT THEY ARE The battle is on people patients and others are suffering because your selfish nature however We will be free from you bondage and lack of understanding Amen"*.

62. Ms Vanterpool's evidence was the reason why she sent the email it was out of frustration and a lack of communication from the Claimant in not supporting her in the support and intervention plan which was why she sent the email. When it was put to her that the support and intervention plan did not exist in August 2020, Ms Vanterpool explained that although the support and intervention plan did not exist in August 2020, what she was referring to was the lack of support from the Claimant in delivering the service.

63. The Claimant made an allegation that Ms Vanterpool racially abused her in her witness statement. In oral evidence the Claimant referred to her complaint that she alleged that Ms Vanterpool allegedly said in September 2019 that "you do not understand English" [640-641]. However, in the Claimant's witness statement at paragraph 32 where she refers to racial abuse she refers to an email dated 12 May 2021 where there is no mention of racial abuse in the email, just an allegation that the Second Respondent shouted at her [C213]. The Claimant said in oral evidence that she had a witness to the incident, Edle Tmaskal but there was no evidence in the bundle of the witness confirming her allegation. In the email complaint to Ms Vanterpool (copied to Dr Hilton and Ms McCabe) the Claimant did not say that she considered that you do not understand English to be racially discriminatory. The Claimant said in the email *"I do not expect to be shouted*

at by staff members including you. This is becoming a recurrent pattern. This statement is unprofessional and is verging on bullying and harassment." [641] Ms Vanterpool denied saying those words. We accept Ms Vanterpool's explanation that she sent the 4 August 2020 email because she was frustrated at the lack of engagement of the Claimant which made it difficult for Ms Vanterpool to deliver the service. We find that Ms Vanterpool did not say to the Claimant "you cannot speak English". The Claimant's evidence was wholly inconsistent, and we prefer the evidence of Ms Vanterpool who consistently denied the allegation at the time and in evidence. Furthermore, we consider that if the Claimant really regarded the allegation as race discrimination she would have said so at the time.

64. The Claimant also said in evidence that the less favourable treatment she was subjected to was Ms Vanterpool's failure to provide cover for nurses on planned annual leave, leaving all the clinical work for the Claimant to undertake. It was put to Ms Vanterpool in cross examination the occasion that the Claimant was referring to was an email dated 15 January 2021, 17:14 [C577], which the Claimant said that she was asking for a helping hand. Ms Vanterpool denied that she did not provide cover for the Claimant and said that on that occasion referred to, the patients had already been triaged so there was no need to provide assistance to the Claimant. We noted that the Claimant did not provide any other dates she said that Ms Vanterpool failed to provide her with cover.

65. We find that Ms Vanterpool did provide cover for the Claimant on the occasion referred to in January 2021. Dr Hilton told the Claimant in September 2020 whilst discussing job planning with the Claimant, that she was not to carry out any overtime work and that she was not to work beyond her contractual hours of work. The Claimant claimed initially that she had to work outside her contractual hours because she did not have any administrative assistance. Dr Hilton provided the Claimant with her own administrator by March 2020 [C735], Albena Karagiozova. On 22 January 2021, the Claimant requested a payment for overtime that she alleged she had worked since January 2020 [1295 – 1296]. Dr Hilton explained that there was a system for claiming ad hoc overtime in accordance with the First Respondent's processes. The Claimant did not make any claims for overtime using the system and in any event Dr Hilton would not have approved any overtime as he considered that the Claimant did not need to work outside her contractual hours. Dr Hilton had repeatedly told the Claimant not to work overtime on 5 February 2021 [1341], 21 April 2021 [1432], 6 May 2021 [1482] and 18 May 2021 [1582]. The Claimant's contract of employment [460] states that "*Where the unpredictable emergency work arising from a consultant's on-call duties significantly exceeds the equivalent of two Programmed Activities on average per week, the clinical manager and the consultant will review the position. In exceptional circumstances, the employing organisation may agree additional arrangements with the consultant to recognise work in excess of this limit, either by additional remuneration or time off. The clinical manager and the consultant should also consider whether some of the work is sufficiently regular and predictable to be programmed into the working week on a prospective basis. If no arrangements are made the default position is to trigger a job plan review"* [470].

66. We accept Dr Hilton's evidence on this point as it is supported by documentation. The Claimant did not provide any explanation as to why she did not make a claim for overtime using the overtime system in accordance with the First Respondent's process. We find that Ms Vanterpool did provide cover for the DICE service patients as this was her role. The Claimant was not required to pick up extra work having been told in September 2020 not to work beyond her contractual hours by her line manager. We find the Claimant did not make a claim for overtime using the over time system but even if she had done so, her overtime would not have been approved as there was no requirement for the Claimant to work outside her contractual hours and the Claimant's applicable contractual terms say that emergency work is only paid in exceptional circumstances and that must be agreed by the First Respondent which it was not.

67. Following 4 August 2020, Ms Vanterpool was disciplined for the email sent on 4 August 2020 [841]. Ms Vanterpool was performance managed by her line manager Ms McCabe. Dr Hilton was not Ms Vanterpool's line manager and had no management responsibility for Ms Vanterpool. Nonetheless, Dr Hilton agreed that the discipline and performance management did take place. Ms Vanterpool was not aware of the Claimant's June 2021 emails [1762-1763, 1817-1824, 1832-1833], the Claimant's email to Dr Goater dated 14 May 2021 [1546], Claimant's 21 May 2021 dignity at work grievance [1613] and 17 August 2021 [2080-2028] grievance made by the Claimant. Ms Vanterpool was aware of the Claimant's 26 June 2020 email, Datix disclosures in April 2021 and the August 2020 grievance [729]. We accept Ms Vanterpool's evidence on this point, as Ms Vanterpool was not copied into the emails dated 14 May, 21 May or the letter to Dr Goater dated 17 August 2021 and she was not challenged that she did know about these emails or the 17 August 2021 letter.

68. The Claimant said from August 2020 onwards Ms Vanterpool failed to provide cover resulting in the Claimant having to do Ms Vanterpool's work and that she was overworked and had to work weekends. However, the Claimant did not provide any dates or times where she said that she worked outside her contractual hours. We therefore find that the Claimant did not have to cover Ms Vanterpool or the DICE team outside of her contractual hours.

<u>The Karen Wise Cultural Review</u>

69. In August 2020, the Claimant sent a grievance [729- 812] under the dignity at work procedure [2878-2892] The Claimant sent this grievance after 13 August 2020 [857]. The Claimant labelled the grievance "dignity at work". However, Dr Hilton decided on 26 October 2020 that the Claimant's August 2020 grievance would be dealt with informally with other complaints raised by other staff as part of a cultural review to be undertaken by an external HR specialist called Karen Wise and Karen Wise would be in touch with the Claimant [2224-2225]. The Claimant did not at that time object to her August 2020 grievance being dealt with in this way.

70. Karen Wise was employed by the First Respondent to undertake a cultural review of the DICE team due to the recurring complaints within the team and the breakdown of the relationship between the Claimant and Ms Vanterpool in particular. The Karen Wise cultural review the ('Wise Report')

was to consider not only the Claimant's grievance but the other grievances from the DICE team. Karen Wise reported in December 2020. Whilst the Wise Report did refer to dealing with the complaints separately, this was by way of supplement to her report in respect of the specific complaints made by members of the DICE team and in particular the Claimant's complaints [1364- 1367] and her findings in respect of them. The Claimant received the Wise Report on 17 February 2021 [1361]. The Wise Report also had an updated supplement in relation to the complaints made by the Claimant which was amended by request of Dr Hilton on 3 February 2021 [1221-1225].

71. In her report Karen Wise made 12 recommendations [1202-1204]. The Claimant said that she received the Wise Report around 8 March 2021, but she could not be sure when she read it. The First Respondent was not able to implement all the recommendations of the Wise Report by August 2021 as subsequent to the publication of the Wise Report, the country went through another wave of COVID, and the NHS was under significant pressure and the most senior clinicians and senior management were dealing with the fall out of the Omicron wave of COVID 19. Dr Hilton gave evidence in respect of the recommendations at 7.1-7.12 that he did speak to the Claimant about the finer points of Ms Vanterpool's role. The First Respondent drew up some standard operating procedures ('SOP') which formed part of the support and intervention plan to implement the recommendations of the Wise Report. He said that the First Respondent did carry out a half day away on 17 May 2021 in order to begin an organisation development plan by August 2021. The Claimant said that what was stated by Dr Hilton was not a fulfilment of the recommendations in 7.1-7.12.

72. In order to implement effective feedback mechanisms, the First Respondent set up the support and intervention plan and simplified SOPs. Dr Hilton and the Claimant had regular meetings about the support and intervention plan. Dr Hilton set up additional meetings to talk about SOPs and hear concerns about clinical practice between the Claimant, Dr Hilton, Ms Vanterpool and Ms McCabe. Furthermore, feedback was provided in one to ones on a regular basis. Dr Hilton wrote to the Claimant about considering multi-disciplinary working fully but said that the Claimant did not contribute to this. Dr Hilton provided administrative support for the Claimant regarding the administrative processes undertaken by the clinical team.

73. Dr Hilton accepted that in respect of the patient safety matter that the Wise Report had referred to under point 7.7 [1203], that recommendation had not been fully implemented but explained that the omicron wave of COVID 19 meant that there were other things going on which meant that implementation had not been completed. The support and intervention plan had been put in place to implement it and a simplified SOP had been put in place, but implementation was continuing throughout. There was no specific timeline we were pointed to of the First Respondent implementing the recommendations of the cultural review.

74. We find any deficiencies in fully implementing the recommendations of the Wise Report by the time the Claimant made her claim was because of the pressures attributable to dealing with COVID 19 following the publication of the Wise Report. We find that any deficiencies do not amount to a failure to implement the recommendations, as implementation was ongoing.

Alleged breaches of confidence by the Third Respondent in relation to what the Claimant told him regarding potential danger to patients from June 2020 onwards

75. On 7 September 2020, Susan McCabe attended the DICE team meeting, in which the Claimant was present, [925 – 957] to discuss Datix Incident reporting forms, how the process of a Datix is handled, Datix events and logging Datixes [929]. Datix is the First Respondent's incident reporting system. Whilst the DICE team had been using the system for a while, the Datix system was relatively new to the First Respondent in 2020. The system required those reporting incidents to fill in an online form. The incident reporter had a choice of who they could allocate the form to as to who would handle the form at the initial stage. Depending on the seriousness of the incident reported it could be escalated upwards by the handler, but if was being dealt with at the first level, the handler should log how the incident was dealt with or would be dealt with, and this would be sent to the incident reporter who would receive an email that their incident had been logged. All Datixes raised were automatically copied to a circulation of approximately 20 individuals in the DICE team including members of the governance team, and service managers. As Clinical Director, Dr Hilton was also copied into any Datixes where the reporter selected the potential for severe harm or death. The point of the Datix system was to learn lessons and improve the provision of service. We accept Dr Goater's evidence that departments and service lines had some flexibility as to how they operated Datix so the way that the system was used and operated varied between service lines.

76. Ms McCabe's presentation on Datixes took place ahead of an anticipated CQC visit to community services, and as the Datix team had advised that the quality of the DICE service's Datixes could be improved as information was not always clear [929]. It was agreed that some further training would also be offered on Datixes [932].

77. From April 2021 until 1 June 2021 when she was taken off clinical duty, the Claimant submitted Datix incident forms, which were generally referred to as Datixes. The Claimant initially chose Dr Hilton as the handler but later chose another consultant psychiatrist, Dr Samantha Scholtz. The Claimant thought that when she submitted Datixes to Dr Hilton, only he received it. The Claimant was not aware that the Datixes were copied to a number of different people regardless of who she chose to be the handler. In particular, the Claimant did not know that anyone else would read the Datixes. The Claimant did not explain why she considered that the Datixes were confidential from Ms Vanterpool. Dr Hilton explained that he would redirect Datixes back to Ms Vanterpool to deal with if appropriate (not when the Claimant complained about Ms Vanterpool in the Datix) that is if they needed investigation, this also happened in respect of Datixes reviewed by the governance team. We find that the Datixes were not confidential from Ms Vanterpool and that is was proper that the Datixes be referred to Ms Vanterpool either by Dr Hilton or the governance team, where Ms Vanterpool who was the appropriate person to deal with the Datixes from a learning perspective for the diabetes specialist nurses.

78. Initially Dr Hilton encouraged the Claimant to allocate Ms Vanterpool as the handler for Datixes raised in the team. However, the Claimant would not do this. The Claimant never explained to Dr Hilton or the Tribunal why she would not choose Ms Vanterpool as the handler in respect of Datixes. However, we note that Ms Vanterpool was named in a number of the Claimant's Datixes. We find there was no evidence as to why the Claimant did not choose Ms Vanterpool as a handler.

79. On 23 January 2021, Ms Vanterpool wrote to the Claimant advising that she had submitted incorrect details in a Datix, asking her to amend them [1319 – 1320]. The Claimant had included incorrect allegations regarding Ms Vanterpool.

80. On 20 April 2021, Ms McCabe wrote to the Claimant regarding the allocation of a Datix handler [1431]. She noted that the Claimant had allocated Jo Manley, Dr Hilton's Deputy Director who did not have a formal role in the operational or clinical management of Community Health Services or DICE, as the handler for two Datixes but was unclear why the Claimant allocated it to Jo Manley as the Datixes would normally have been allocated to Ms Vanterpool as the Team Manager. Ms McCabe advised that the governance team had reallocated the Datixes to the Team Manager and asked that she ensured they were allocated correctly going forward otherwise it added to the workload of the governance team [1431].

81. On 23 April 2021, the Claimant submitted a Datix and allocated the handler as Samantha Scholtz, the Director of Research and Development who had no role in the Diabetes service [1456 - 1457]. Dr Hilton wrote to the Claimant asking her to make sure she selected the appropriate handler to avoid the need for reallocation or delay in the investigation of incidents [1456]. The Claimant had already been spoken to by Ms Vanterpool and Ms McCabe about the correct allocation of handler.

82. Yet, on 26 April 2021, Ms Vanterpool wrote to Dr Hilton explaining that the Claimant had submitted a number of Datix incidents on 23 April 2021 misrepresenting clinical and managerial facts and using the Datix to 'discredit' and personally 'attack' her [1458]. Dr Hilton wrote to the Claimant on 26 April 2021 [1459 – 1466], explaining the Claimant should report incidents using Datix, but that the Claimant should ensure that the Datix Incident System was only used to record incidents or near-miss incidents and an appropriate handler should be chosen. Despite Dr Hilton instructing the Claimant in writing not to select Dr Scholtz as a handler on 23 April 2021, and reiterating this in a 1to1 meeting on 5 May 2021 [2228 – 2229], the Claimant went on to allocate a further 95 incidents to her between 26 April and 26 May 2021 [1461 – 1462]. Dr Hilton offered further Datix training. Dr Hilton considered that the Claimant failed to follow a reasonable management instruction in how she was submitting Datixes.

<u>The alleged failure to investigate properly the unsafe practices disclosed from June 2020</u>

83. On 23 June 2020, the Claimant raised issues of Thomas Sejnowicz changing her patient appointments without asking her [C265]. The Claimant raised the dignity at work grievance in August 2020 where she says she highlighted unsafe practices by members of the DICE team. The Claimant

also raised Datixes in April 2021. The Claimant sent emails to Dr Goater on 14 May 2021 [1546] raising the issue of patient insulin initiation breaching national guidance in that the consultation should be face to face or video link consultation, in the Claimant's 17 May 2021 email [1558] the Claimant raised the issue of the DICE team not reviewing urgent patients in an urgent manner i.e. the SOPs guidance says that the urgent review means that the urgent patient should be seen by the DICE team within 48 hours. The Claimant also sent on 21 May 2021 [1613] another dignity at work grievance complaining of the failure to implement the Wise Report recommendations to HR and repeated the patient safety issues in the 14 & 17 May 2021 grievances. This dignity at work grievance dated 21 May 2021 was later forwarded to Dr Goater.

84. On 25 June 2020, Dr Hilton responded to the Claimant's 23 June 2020 concern. Dr Hilton stated that he had already mentioned it to Ms McCabe, and that the Claimant should consider raising a dignity at work grievance [C265]. Dr Hilton also addressed the Claimant's concerns in a one 2 one on 29 June 2020 where he advised the Claimant that he had previously told her to mention it to Thomas Sejnowicz's line manager. We find that Dr Hilton did deal with the Claimant's concerns properly. At that stage, the Claimant was advised to raise it as a dignity at work grievance which she later did in August 2020. Those grievances were investigated by Karen Wise and reflected in an informal response as part of her report at pages 1221-1222.

85. The Claimant's Datixes in April 2021 were considered by Dr Hilton where examples were raised of high levels of glucose in patients. The Claimant raised an estimated 176 Datixes. When Dr Hilton examined each case, including looking at the duration of the patients' abnormal blood results using the tools within the First Respondent's record systems, in many cases the patients did have abnormal results, but a large number of these were very long standing, and in some cases the glucose levels appeared to be on a downward (improving) trend as a result of the DICE team's interventions. However, around 26 of the Datixes raised in April 2021 related to emails being allegedly deleted from the Claimant's nhs.net account. Dr Hilton referred this to IT who looked into it. 6 Datixes related to just one meeting being missed by an Allied Health Professional. Some Datixes were rejected because they were not incidents in accordance with the First Respondent's processes. All the Claimant's Datixes were reviewed, the First Respondent looked for evidence of actual harm, and where there were repeated incident reports with themes, remedial actions were incorporated into ongoing action plans for the wider team e.g. around retraining, supervision, record keeping, policy development etc.

86. The First Respondent commissioned a review of all Datixes raised by the Claimant during April 2021 by a clinical governance staff member unconnected with the DICE service. The review was discussed at the service line and Trust wide Clinical Governance Group. We find that Dr Hilton did investigate the Datixes properly.

87. Dr Goater did not respond directly to the Claimant's 14,17 & 21 May 2021 grievances as she was on annual leave from 14 May 2021, and she had an out of office email set up which was sent to the Claimant who emailed her on these dates. When she returned on 24 May 2021, there was already a meeting set up with Dr Hilton to discuss the Claimant's grievances on 28

May 2021 and Dr Hilton was going to respond to the Claimant's grievances directly. None of the Claimant's concerns raised were ignored as the issues the Claimant raised had been raised historically over a long period. Dr Hilton had looked at the issues raised with him. Dr Goater's view was that it was unhelpful to look at every single example that the Claimant raised. Although Dr Hilton did not see the 14 May 2021 email to Dr Goater, the email raised the same issue of insulin initiation and Dr Hilton had been investigating this issue by speaking to colleagues including Ms Vanterpool who had attended a national diabetes consultant nurse group on 21 May 2021 and writing to the chair of the national Diabetes Medicine Nurse Consultants Forum, Amanda Epps. Ms Epps who confirmed that members of the Forum did what the DICE team did [1680] and Ms Vanterpool received confirmation that other diabetes services did what the First Respondent did. Dr Hilton addressed the issue in email to the Claimant dated 25 May 2021 [1684-]. Dr Hilton told the Claimant that he had commissioned a piece of work to review the differences of clinical opinion in the interpretation of the national diabetes guidance and urgent reviews [1684]. The insulin start process had been in place since March 2020, however the Claimant did not raise an issue about it until April 2021 when it had already been in place for 1 year. The urgent reviews the DICE teams SOP [2993] set out that the referral criteria explained that those classed as urgent would be triaged and referred to within 48 hours.

88. By email 22 May 2021 [C597] Dr Hilton told the Claimant her 21 May 2021 dignity at work grievance was being dealt with via the support and intervention plan [1684].

89. We accept the evidence of Dr Hilton and find that all the Claimant's patient safety concerns were properly investigated.

90. From March 2020, the Claimant worked from home but continued to work in the team. The Claimant was expected to continue to work in the DICE team. The First Respondent had a limited portfolio of community health services and there were no opportunities for internal reassignment in an equivalent service. Dr Hilton's evidence was that at no point did the Claimant say she could not work in the team or request to leave the team. In fact, on 22 January 2021 at a one 2 one meeting with the Claimant, Dr Hilton offered the Claimant temporary redeployment which she refused. [1297]

91. We find that at no point did the Claimant ask to be removed from working in the team or complain that she had to work in the DICE team following her raising of unsafe practices from June 2020.

<u>Dr Hilton's 26 April 2021 letter and the required action set out within it [1459-1466]</u>

92. On 21 April 2021, the Claimant had lost her work mobile phone. The Claimant and Ms Vanterpool were exchanging emails which caused confusion for the team. Ms Vanterpool complained about the Claimant's 23 April 2021 Datixes about her. Dr Hilton was contacted by Datix system on 23 April 2021 that the Claimant continued to misallocate the handler for her Datixes [1456].

93. Dr Hilton wrote to the Claimant a letter on 26 April 2021 to address these issues. The Claimant's evidence was that Dr Hilton's 26 April 2021's letter was trying to "fudge patient safety" and that Dr Hilton in his letter was trying to blame the Claimant for the problems in the team, but the Karen Wise Supplement did not say that it was the Claimant's fault. Dr Hilton mentioned in the 26 April 2021 letter that the Claimant should log her annual leave and ask the Claimant to do it via Healthroster in the future. At that time there was in place a hybrid system of logging annual leave and the First Respondent was moving towards using only Healthroster but not everyone had been trained. The Claimant said that Dr Hilton was trying to say that she was nuts by asking her to record her annual leave as she already logged it with the help of an assistant in the First Respondent. We find there was no problem with the actions required of the Claimant and the only action that the Claimant had a problem with concerned annual leave and we find that Dr Hilton asked the Claimant to log her annual leave because the First Respondent was trying to move to the Healthroster system rather than have a hybrid system. We find that the reason why Dr Hilton wrote 26 April 2021 letter to the Claimant was because of the further break down in relationship between the Claimant and Ms Vanterpool and the Claimant's failure to comply with Dr Hilton's reasonable management instructions.

Decision to commence an investigation into the Claimant's conduct on 1 June 2021

94. As the Claimant had failed to comply with Dr Hilton's actions set out in his 26 April 2021 letter and Dr Hilton had continuing concerns about the Claimant's behaviour, Dr Hilton spoke to Dr Goater about his continuing concerns. Dr Goater suggested a Responsible Officer Advisory Group ("ROAG") meeting to discuss the Claimant, the next steps and whether there was any scope to commence an investigation under the D4a policy, which is the First Respondent's policy for handling concerns about a Doctor's performance. [162-167]

95. The ROAG held an emergency meeting on 11 May 2021 with Dr Hilton, Dr Goater, Ms Nina Singh, Director of Workforce and Organisational Development and Nathan Christie-Plummer, Deputy Director of Workforce and Organisational Development [1513–1514]. Dr Hilton's concerns about the Claimant were discussed, in particular, the Claimant's escalating behaviour and that, since Dr Hilton's letter of 26 April, the Claimant had raised a further 92 Datix incidents to Ms Scholtz, despite Dr Hilton's explicit requests not to do so. ROAG agreed that the inappropriate use of the Datix system could impact on governance processes and that the Claimant was not following a reasonable management request.

96. Following this meeting on 14 May 2021 the Claimant sent a number of emails setting out her escalating concerns to various members of the DICE team, but within 5-10 minutes the Claimant would forward her concerns to Dr Hilton without there being any evidence of an effort by the Claimant to resolve any issues with her colleagues. The concerns raised were about matters that the Claimant had been raising since the start of her employment at the First Respondent [1528 – 1540, 1544]. Ms McCabe wrote to the Claimant on 14 May advising that she had misrepresented what was discussed in an earlier meeting [1540]. Additionally on the same day, Ms Vanterpool raised a further complaint that the Claimant had continued

to include incorrect information about herself and team members in Datix incident forms [1543].

97. On Monday 17 May 2021, Ms McCabe and Dr Hilton conducted a half-day session for the DICE whole team as part of the support and intervention plan to implement the Wise report recommendations. At the away day, the dynamics within the team were considered, the Wise Report findings were shared, values and professional behaviours and the need for service transformation were discussed, and action plans were put forward to address the support and intervention needs within the team. It was an opportunity to for the DICE team consider how the Trust planned to interpret best practice guidelines and was a helpful opportunity to ensure that the whole team understood the concerns identified within the team, including some of the safety matters the Claimant was highlighting. One of the diabetes nurses, Edle Tmaskal requested Dr Hilton to meet with the group of all DSNs to hear their concerns about patient safety which related to the Claimant's behaviour. Dr Hilton discussed the request with Ms Vanterpool and asked her to request a written summary of their concerns. On 20 May 2021, Ms Tmaskal provided a document at page 1512 citing many concerns in regard to the Claimant and it was later confirmed that this was the shared view of the entire nursing team within DICE.

98. The Claimant was at that time being investigated in relation to a patient complaint [1561] and the investigator Dr Bickford reported to Dr Hilton that the Claimant had tried to contact the patient despite being told explicitly not to and had failed to engage with Dr Pickford in the investigation. Dr Hilton wrote the Claimant to request that she engage with Dr Pickford no later than 28 May 2021, however the Claimant did not do this.

99. On 19 May 2021, Ms McCabe wrote to Stephanie Bridger (Chief Nurse and Executive Director for Allied Health Professions) expressing her concerns around patient safety in the DICE team, caused by the Claimant [1590-1591] and seeking advice. Ms McCabe advised that the Claimant had continued to raise inappropriate Datixes which were highly critical of a number of staff and sent those Datixes to an inappropriate handler. In addition, the Datixes were often about patients that had been seen by Ms Vanterpool and it appeared that the Claimant was reviewing or auditing Ms Vanterpool's patient notes. Ms McCabe also said that she found the Claimant to be uncontained, disruptive, resistant to discussing the detail of process and dismissive if a different view to hers was suggested. In her 19 May 2021 letter, it was Ms McCabe's view that the situation was not sustainable as the First Respondent could not identify and address patient safety concerns when the Claimant was not willing to engage in the process or acknowledge her responsibilities. This view was supported by Dr Hilton in his 19 May 2021 email and Dr Hilton requested that the ROAG meeting scheduled for 28 May 2021 be brought forward [1589–1590].

100. On 20 May 2021, Dr Hilton wrote to Ms Bridger informing her that he had received three Freedom to Speak Up concerns and a letter from the whole nursing team (comprising seven staff members) expressing their concerns about the Claimant's ongoing behaviour [1589]. Dr Hilton considered that the repercussions of Claimant's behaviour felt entirely uncontained, and the First Respondent needed to take urgent action in order to protect patients and staff.

101. On 20 May 2021, Ms Tmaskal, wrote to the Claimant stating that the Claimant's allegations of her not doing her job properly was placing a lot of pressure on her health and asked her to stop immediately. Ms Tmaskal also alleged that she was being bullied and harassed by the Claimant [1593]. Later that day, Navnita Gill, Head of Operations Support, whose role it was to oversee all administrators within the community health services, advised Dr Hilton and Ms McCabe that the Claimant was refusing to meet with her and Ms Karagiozova [1596] regarding support for Ms Karagiozova around Trust policies as Ms Karagiozova was not adhering to those policies in her work [1600]. The Claimant falsely stated that Ms Karagiozova was permitted to write clinical notes in a particular way [1599] because the Claimant obtained special permission from Dr Hilton.

102. A further ROAG meeting took place on 25 May 2021, to discuss the Claimant, in attendance was Dr Hilton, Ms Bridger, Dr Goater, Ms Singh and Sarah Rushton, Executive Director for Local Services [1691 – 1693]. The meeting was brought forward from the planned date of 28 May 2021 as per Dr Hilton's request. At the meeting, Dr Hilton explained that he did not consider that the Claimant was able to engage in addressing issues within the team or her own behaviour and this was impacting on patient care and safety. In all, by the end of May 2021 Dr Hilton had received two written letters of concern about the Claimant's behaviour from colleagues, Ms Tmaskal [2664 – 2665], Mirelle Isalu [2657]. The DSN had a meeting where it was agreed that that the Claimant had failed to provide support, clear medical guidance, teaching or training and the Claimant put undue pressure on the DNS who did not trust her [1512].

103. Some staff (Kanchan Bains, Podiatrist, Ms Isalu and Ms Tmaskal) were refusing to attend further MDT meetings where the Claimant was present. Furthermore, the patient complaint had been upheld and the Claimant had not adequately engaged in the process despite clear instructions from Dr Hilton. Dr Hilton had made a management referral to Occupational Health and instructed the Claimant to attend, to make sure that her behaviour was not related to any underlying health concern, but the Claimant had cancelled the initial appointment offered and refused to attend because the appointment was not with the Occupational Health Doctor that she wanted.

104. It was the recommendation of the ROAG that an investigation was likely to be required into the Claimant's behaviour, with restrictions to practice which prevented interactions with clinical records or the team. The reason for this was to ensure an objective review and to allow the team to continue to provide care for patients due to the impact the Claimant's actions were having on the team [1692].

105. By letter dated 25 May 2021, Dr Hilton summarised his concerns to Dr Goater of the quality and patient safety concerns that had arisen due to the Claimant's recent interventions and behaviour within the First Respondent [1694 – 1705].

106. Dr Hilton explained in his 25 May 2021 letter that the Claimant had not yet completed any of the actions which he had required her to do within his 26 April 2021 letter [1702 – 1703]. Dr Hilton explained that he had no confidence that any future management instructions would be adhered to.

Dr Hilton detailed that, of the sixteen staff within the team, ten had raised written concerns about the Claimant [1695]. One member of staff, Albena Karagiozova, who had been employed directly to support the Claimant administratively, had resigned. The Claimant's evidence was that Albena Karagiozova had resigned because of unsafe working practices, but Albena Karagiozova was the administrator for the Claimant and not a clinician.

107. Dr Hilton also pointed out in his 25 May 2021 letter that Amrit Kalsi, a Health Care Assistance, asked to be redeployed due to the Claimant's behaviour. Dr Hilton also advised that the Claimant was undertaking patient care outside of hours against his explicit instructions, given that the First Respondent's service was not an emergency service [1695]. Dr Hilton gave a number of examples of the Claimant saying she worked outside contractual hours in direct contradiction of his reasonable management instruction. Dr Hilton explained by way of example, the Claimant contacted a patient four times after 10pm and insisted they attend A&E as an emergency for insulin initiation. The patient declined and no harm occurred [1695]. Dr Hilton was concerned that the Claimant was not considering safe and planned alternatives to emergency interventions in line with NHS Guidance [1696]. Dr Hilton also referred to the outcome of the patient complaint received on 29 April 2021 was that the Claimant departed from the standards set out in Good Medical Practice (2020) and made interventions regarding the patient's care without his consent and despite his explicit request that his care continued to be managed instead by other clinicians. The letter also detailed that the Claimant had unilaterally referred several patients to acute hospital care, despite the clinical judgment of the team appearing reasonable that this was not required and with no clear criteria for escalation. In some cases, this resulted in hospital referrals being rejected and patient care being unnecessarily delayed. This was and is not the standard the First Respondent expected of an experienced Consultant and Dr Hilton decided that the First Respondent were unable to safely tolerate or manage the behaviour further.

108. Dr Goater as Medical Director and as Responsible Officer decided to proceed to an investigation under the First Respondent's D4a policy [162–197], which adopts the Maintaining High Professional Standards ("MHPS") Framework [1706]. Dr Goater's evidence was that ROAG decided that an investigation under D4a was required given the increase in concerns as expressed by Dr Hilton since the last ROAG on 11 May 2021. Dr Goater decided to commence the investigation following ROAG's decision and the concerns raised in Dr Hilton's 25 May 2021 letter to her and because she considered that the situation was untenable, and it could not safely continue any longer. The Claimant denied in evidence that there were genuine concerns about her conduct that formed the basis for the commencement of the investigation into her conduct. The Claimant said that they were false concerns.

109. We find that the reason why the First Respondent through ROAG decided to commence an investigation into the Claimant was because of ROAG's view that the Claimant's conduct was not the standard the First Respondent expected of an experienced Consultant, there was clear evidence that the Claimant was unable to get along with her colleagues as she was subject to multiple complaints from them, and this was affecting patient safety, she had already had a patient complaint upheld against her and she repeatedly

refused to follow reasonable management instructions. Matters had escalated to the point of being untenable.

110. Dr Goater considered that it was necessary to restrict the Claimant's contact with her team whilst matters were investigated under the D4a. The reason for this was to ensure the DICE team could focus on patient care, and to avoid any potential disruption to the investigation. This was done in line with the D4a Policy [167, 172]. The rationale was discussed and agreed at the ROAG on 25 May 2021 where it was also agreed that the Claimant could not work clinically in the team if a review was required. Dr Goater's evidence on her reasons for restricting the Claimant were challenged on the basis that Dr Goater did not understand diabetes medicine. However, we accept Dr Goater's evidence as to why she restricted the Claimant as she had sufficient evidence from Dr Hilton's 25 May 2021 letter to restrict the Claimant and the decision of ROAG.

111. Following a referral by Dr Hilton of the Claimant to Occupational Health, Dr Khan gave Occupational Health advice in a letter dated 26 May 2021 [1707 – 1708]. Dr Khan advised in the letter that the Claimant did not have any known underlying health problems but felt that her personality had been questioned by the department and her colleagues. Dr Khan went on to explain that he had offered the Claimant the opportunity to be referred to an Occupational Psychiatrist for an assessment, to help rule out any specific traits or personality issues or look at a treatable cause being found. The Claimant declined the offer. The Claimant believed that at some point prior to Dr Khan's May 2021 advice letter, Dr Hilton encouraged him to refer the Claimant to a psychiatrist because the Claimant had alleged that her emails had been deleted. The Claimant did not explain why she believed this to be the case. We do not accept the Claimant's evidence, she never mentioned in her claim form that it was Dr Hilton who asked Dr Khan to refer her to a psychiatrist it was not mentioned in her witness statement. We find Dr Hilton did not recommend that the Claimant submit to a psychiatric assessment either to Dr Khan or anyone else.

112. However, once Dr Goater became involved having attended the ROAG meetings in May 2021 following receipt of the Claimant's grievances, Dr Goater was concerned for the Claimant's wellbeing. Dr Goater was entirely unaware that the Claimant believed that colleagues her questioned her personality due to her allegation that her emails had been deleted. Dr Goater did not see Dr Khan's Occupational Health letter dated 26 May 2021 which mentioned the allegation until sometime later in October 2021. Dr Goater recognised that the Claimant had gone through a highly stressful process during the pandemic. Dr Goater consulted with Mr Christie Plummer who recommended referring the Claimant to Occupational Health. This was usual practice for the First Respondent in such circumstances. Dr Goater was worried about the impact of the stress on the Claimant. So, Dr Goater recommended on 25 June 2021 that the Claimant be referred to a psychiatrist within Occupational Health. Dr Goater regarded it as an ordinary request, it was entirely voluntary for the Claimant and there was no requirement for the Claimant to attend. We find that Dr Hilton did not request Dr Khan nor require the Claimant to submit to psychiatric assessment and neither did Dr Goater in May 2021. We also find that there was no requirement for the Claimant to attend a psychiatric assessment.

Meeting on 1 June 2021

113. Dr Goater invited the Claimant to attend a meeting on 1 June 2021 in order to inform her of her decision to investigate the Claimant under D4a and restrict her practice. In the invite letter dated 26 May 2021 the Claimant was told that Dr Goater had concerns that were brought to her attention which is why she was being invited to a meeting on 1 June 2021 [1706].

114. Dr Goater was aware of the Claimant's Datixes from April 2021 as she had spoken to Ms McCabe and Dr Hilton that the usual process was being followed in relation to all Datixes and that the issues raised were known to them. Dr Goater did not review the Datixes individually, but as part of the Trust Clinical Governance meeting, was aware that Support and Intervention plans and the planned review of Datix in the service would be discussed in the service line and the Trust Clinical Governance's usual process.

115. At the meeting on 1 June 2021, which was held via Teams the Claimant sought to have both her MDU representative and BMA representative present. Mr Christie-Plummer told the Claimant that she could not have her MDU present at a meeting concerning the Claimant's conduct. Mr Christie-Plummer explained in evidence that it was not normal practice to have MDU and BMA representatives at the same meeting. MDU representatives deal with issues of capability. The Claimant said that it was after raising issues of patient safety that Mr Christie-Plummer rolled her eyes and that she was being belittled by Mr Christie-Plummer. Mr Christie-Plummer denied rolling his eyes at the Claimant and said that he did not know about the Claimant's protected disclosures dating from August 2020 until May 2021. We found the way Mr Christie-Plummer gave evidence and in his tone, we considered that he appeared to us frustrated with the Claimant's approach and attitude. On a balance of probabilities, we find that Mr Christie-Plummer did roll his eyes at the Claimant. We find that Mr Christie-Plummer rolled his eyes because of the Claimant's tendency to repeat the same issues and avoid dealing with the issue at hand. It was the approach of the Claimant not what the Claimant was talking about that caused Mr Christie-Plummer to roll his eyes. We find that Mr Christie-Plummer was aware of the Claimant's protected disclosures of 17 & 21 May 2021 but not the Claimant's earlier protected disclosures.

116. The notes of the meeting 1 June 2021 are contained the Dr Goater's letter to the Claimant dated 3 June 2021 [1765-1769]. Dr Goater attended the meeting on 1 June 2021 with the Claimant and had met the Claimant soon after the Claimant's transfer. Dr Goater did not know that the Claimant was Sri Lankan. The outcome of the meeting was the Claimant was advised that the First Respondent would be investigating her under the D4a policy. We note that the D4a policy states at point 2.6 [172]
"Exclusion will only be used:
    - *To protect the interests of patients or other staff; and/or*
    - *To assist the investigative process when there is a clear risk that the practitioner's presence would impede the gathering of evidence. It is imperative that exclusion from work is not misused or seen as the only course of action that could be taken. The degree of action must depend on the nature and*

seriousness on the concerns and on the need to protect patients, the practitioner concerned and/or their colleagues."

117. We also note point 2.14 [174] *"Immediate exclusion 2.14. In exceptional circumstances, an immediate time-limited exclusion may be necessary for the purposes identified in paragraph 2.6 above following:*
    - *A critical incident when serious allegations have been made; or*
    - *There has been a break down in relationships between a colleague and the rest of the team; or*
    - *The presence of the practitioner is likely to hinder the investigation.*

    Such an exclusion will allow a more measured consideration to be undertaken and the NCAS should be contacted before the immediate exclusion takes place. This period should be used to carry out a preliminary situation analysis, to seek further advice from the NCAS and to convene a case conference. The manager making the exclusion must explain why the exclusion is being made in broad terms (there may be no formal allegation at this stage) and agree a date up to a maximum of two weeks away at which the practitioner should return to the workplace for a further meeting. The case manager must advise the practitioner of their rights, including rights of representation."

118. Dr Goater's letter also explained Dr Hilton's concerns set out in his 25 May 2021 was explained to the Claimant and her representative in the meeting. The Claimant was told that Dr Goater had taken the decision to restrict the Claimant's practice for an initial period of 4 weeks. The restrictions were set out in the letter as "-*You must only undertake non-clinical work in any setting. In line with this access to the clinical records system has been removed for the period of the restrictions.*
    - You must only have contact with Katherine Murray in your service line or the contacts listed at the end of this letter. She will agree work with you and can facilitate contact with clinicians if this is required for your work." The period of restriction was extended another 4 weeks by letter dated 25 June 2021 from Dr Goater [1967]. However, the Claimant was supposed to have her interview on 23 July 2021 however the Claimant's solicitors requested the interview be delayed so the Claimant could take annual leave and have a psychiatric assessment. The Claimant's restriction continued during August in light of this delay.

119. We find that it was Dr Goater who decided to restrict the Claimant in the terms set out in her letter dated 3 June 2021. The Claimant was excluded from having contact with anyone else except Dr Goater and Katherine Murray from 1 June 2021 at least until 26 August 2021 when the Claimant presented her claim.

    <u>The Terms of Reference on 3 June 2021</u>

120. The terms of reference in relation to the review to take place of the Claimant's behaviour under D4a are set out in Dr Goater's 3 June 2021 letter [1767- 1768]. The Claimant complained in the meeting on 1 June 2021 that she did not want to comment on the allegation against her until she received all the information about the allegations. Dr Goater responded that

was a reasonable request. Dr Goater does set out what the restrictions are in the letter which is a note of what was said in the meeting. Neither the Claimant nor her BMA representative in attendance Gail Tatsis complained that the information had not been provided that day in the meeting. The Claimant admitted that she received Dr Goater's 3 June 2021 containing the terms of reference on 4 June 2021. The Claimant did not explain what was wrong with the terms of reference. We find that there was nothing wrong with the terms of reference.

The failure to provide the information requested by the Claimant or her representative in relation to the 1 June 2021 restriction on 1 June 2021

121. After the meeting on 1 June 2021, the Claimant sent Dr Goater an email making a subject access request for all the information that was taken in her decision to restrict her [1742]. There is no date when this information should be provided by in the email. Following that email, the Claimant sent another email to Dr Goater on 2 June 2021 asking for Dr Goater's input into the Claimant's 21 May 2021 dignity at work grievance, the First Respondent's MHPS policy and the allegations against her. The Claimant then sent a further email on 4 June 2021 to the SAR team [2647] stating she would like to make a Subject Access Request for all information the Trust held about the Claimant. This included "*1) all Human Resources records, 2) Disciplinary file 3) Occupational Health records, 4) Copies of any internal emails, attendance notes and call records that relate to me*". The Claimant requested that the records be given as soon as possible and no later than 4 July 2021. There was no evidence that the Claimant's representative made a request to Dr Goater or the First Respondent on 1 June 2021 and it is not recorded in Dr Goater's letter. The Claimant's BMA representative made a request on 5 August 2021 for information about the Claimant's restrictions [C1101-1104]. We find that the Claimant was told what the restrictions were in the meeting on 1 June and the Claimant's representative did not make a request to the First Respondent or anyone in the First Respondent for information in relation to the Claimant's restriction on 1 June 2021 to be provided on 1 June 2021.

122. Dr Goater contacted the Claimant and asked her to be more explicit in her request. The Claimant wrote to both Dr Goater and the SAR team on 11 June 2021 referring to her 4 June 2021 email where she makes a request for all emails, attendance notes and call records that refer to her. On 22 June 2021 [2127-2128] the SAT team respond to the Claimant's SAR with the requested information. However, on 22 June 2021 the Claimant responded to the SAR team that the information was not sufficient. However, the Claimant did not say how the information was not sufficient in her email, but she said she wanted the information (as yet unidentified) within the 30 day statutory period. The Claimant put in a further 2 SARs [22.06.21-09:17 C1129, 22.06.21- 09:36, C1130]. In response to the further SARs by email dated 30 June 2021 the SAR team requested that the Claimant narrow the scope of her request [1975]. On 15 July 2021, the SAR provided a partial response to the SAR request which was a 140.8 GB size document [2648]. The Claimant was chased for a response by Dr Goater on 26 July 2021 [2652]. The Claimant responds on 31 August 2021 and refuses to narrow the scope of the request [2125]. We find that the First Respondent complied with the Claimant's 1 June 2021 for information about the allegations that form the subject of the review initiated on 1 June 2021.

In respect of the 2 other SARs, it was not reasonable for the First Respondent to respond any further than their response on 15 July 2021 because the Claimant would not narrow the scope of her request. The Claimant did not request information about her restriction on 1 June 2021 to be provided on 1 June 2021.

Selection of the case investigator- Dr Katherine Penny

123. Dr Katherine Penny was selected by Dr Goater as the case investigator for the D4a process. Dr Goater selected Dr Penny because in her role as medical director she was tasked with appointing an appropriately experience or trained case investigator. Dr Goater considered who was available and suitably trained and experienced within the Trust to act as the case investigator. Dr Goater wanted to recruit someone outside the diabetes service to ensure that person was objective. Dr Penny fulfilled these criteria and so she was chosen by Dr Goater. Dr Penny had a conversation with Dr Goater before she was selected and asked about any conflicts of interest in her being the case investigator. Dr Penny explained in an email to Dr Goater 19 August 2021, that she was at medical school with Dr Hilton for the second half of her medical training, and she recalled going to a party at Dr Hilton house once with loads of other people there. She said she thought Dr Hilton and her were in the same year. However, in evidence Dr Penny corrected herself to say that Dr Hilton was a year above her. Dr Penny said that she and Dr Hilton had overlapping friends but were never close friends. [2085]

124. Dr Hilton was clear that he and Dr Penny were not in the same year and Dr Penny was two years ahead of him and that he was not a university friend of Dr Penny. He had no recollection as to Dr Penny attending his house.

125. Before being selected as a case investigator Dr Penny did not know the Claimant and had never met her. Dr Penny was made aware of the existence of Datixes that the Claimant had submitted by email from Ms McCabe on 18 June 2021 [C424]**.**

126. We find that Dr Goater chose Dr Penny because she was suitably experienced and objective to the extent she did not work in the diabetes service. We find she knew about the Claimant's April 2021 Datixes.

Allegation of Catherine Murray's failure to respond to the Claimant's August 2021 emails

127. Ms Murray, who was the Claimant's point of contact from 1 June 2021 and responded to all the Claimant's emails in a timely manner despite a period of annual leave between 2 and 12 July 2021, a period of Covid-19 sickness absence between 3 and 9 August 2021 [2483], annual leave from 27 August 2021 and a Friday non-working day each alternate week because Ms Murray works a 9-day fortnight). Ms Murray explained that the process for requesting annual leave by consultants required them to give a month or 2 months' notice. Ms Murray said the Claimant did not give the appropriate notice period when requesting leave when the Claimant reported to her, but Ms Murray granted her leave requests anyway. We accept Ms Murray's unchallenged evidence on this point.

128. The Claimant stated in her witness statement that she had highlighted to the Case Manager and Human Resources (HR) Head at the time Ms Nina Singh that due to racial discrimination, our younger Asian female colleagues have been bullied out of our department. But the email to Nina Singh is dated 7 June 2021 [1783] and in that email the Claimant says *"To be clear, I have submitted over 200 pages evidencing negative cultural bias. As a result of this cultural bias members of staff have left to be clear these are Asian Female colleagues, and I find myself now being restricted."* The Claimant identified these as 2 Dietitians in her oral evidence. The Claimant's evidence was these 2 Asian females left the work place because of unsafe work practices and they were overloaded with work. The Claimant's explanation for why she considered that it was race discrimination was *"they were upset that no one said thank you for working with us".* We find that the Claimant's evidence does not suggest the 2 Dietitians left because of race discrimination.

Allegation of Second Respondent's Grievance in July 2021

129. The Claimant's evidence was that she now did not believe that Ms Vanterpool raised a grievance in July 2021 against her, she believed that on having the Respondents' bundle, the grievance was in November 2021 from Ms Vanterpool. We were not taken to the alleged email that the Claimant believed was the grievance against her. Ms Vanterpool said that she raised a grievance against the Claimant because of the deteriorating and difficult relationship, which she considered was compounded by the Claimant's behaviour towards her. Ms Vanterpool said she raised a grievance before the Wise Report. Ms Vanterpool did not comment on whether she raised a grievance in July 2021 or not. We were not pointed to any grievance by Ms Vanterpool in July 2021. We find that there is no evidence that the Second Respondent raised a grievance against the Claimant in July 2021.

130. The Claimant explained that she had been receiving legal advice in respect of her complaint against the Old Trust. She said that she had remortgaged her home to pay for legal fees of £100k. The Claimant raised issues about all the Respondents conduct towards her from August 2020 and in terms of the background to her claim since the start of her employment with the First Respondent. For example, the Claimant said in oral evidence that she had been bullied by Ms Vanterpool since the transfer of her employment to the First Respondent and actually before with the Old Trust. The Claimant knew about her claim for wages in January 2021 as that is when she first asked Dr Hilton for payment. The Claimant complained that the 4 August 2020 email from Ms Vanterpool was harassment in her August 2020 grievance [738]. The Claimant's claim form was completed by the Claimant's solicitors in August 2021. The same solicitors who had been advising the Claimant as early as April 2020 when they wrote to Dr Hilton (among other people) on 9 April 2020 [711-718] when they say that the Claimant was being subjected to harassment.

131. The Claimant's evidence was that the reason she delayed in bringing her claims was because she was getting legal advice at the time, and she believed that the acts she complained of were continuing acts. She said that she did not want to complete her claim form during work hours and that she was prevented from working on her claim form because Ms Murray was

making it difficult for her to obtain annual leave so she could work on her claim form. The Claimant said that she did not look at other options regarding free legal advice because she did not know about them. We find that the Claimant had access to and had been receiving legal advice since April 2020 and she would have been advised on time limits in respect of claims that she may want to bring in the Employment Tribunal. We do not accept the Claimant's evidence that she was prevented from bringing a claim because she was not able to take annual leave. The Claimant was not prevented from taking annual leave at all. She did not comply with the process for giving the appropriate notice for annual leave and her leave requests were not refused by Ms Murray in any event. We find the Claimant was not prevented from bringing her claim earlier when she had not been restricted in June 2021 and there was nothing preventing her from doing so.

Law

Time limits

(i) Reasonably Practicable

132. Section 48, Employment Rights Act 1996 ('ERA') sets out the applicable provisions to the time limits in respect of whistleblowing detriment:

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

(2) On the complaint under subsection (1A) it is for the employer to show the ground on which any actual deliberate failure to act was done

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

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

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

(4) For the purposes of subsection (3)

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

(b) a deliberate failure to act should be treated as done when it was decided upon and in the absence of evidence establishing the contrary an employer shall be taken to decide upon failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."

133. The reasonably practicable test applied to whistleblowing detriments is the same as for unfair dismissal as set out in the seminal decision of **Palmer v Southend on Sea Borough Council [1994] ICR 372**.

134. The burden of proving that presentation in time was not reasonably practicable falls on the Claimant. The reasonably practicable jurisdiction "imposes a duty upon him to show precisely why it was that he did not present his complaint" (Porter v Bandridge Ltd 1978 ICR 943, CA). Accordingly, if the Claimant fails to argue that it was not reasonably practicable to present the claim in time, the Tribunal will find that it was reasonably practicable (see Sterling v United Learning Trust EAT 0439/14).

135. The time limits in respect of deductions from wages is set out in section 23 Employment Rights Act 1996 ('ERA'), which says:

> "*(2) Subject to subsection (4), 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—*
>
> *(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or*
> *(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.*
>
> *(3) Where a complaint is brought under this section in respect of—*
>
> *(a) a series of deductions or payments, or*
> *(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,*
>
> *the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received."*

136. The EAT provides guidance in the case *Taylorplan Services Ltd v Jackson and ors 1996 IRLR 184, EAT* on the question for Employment Tribunal deciding time limits for protection of wages claims. EAT set out the steps that need to be taken as (1) Is this a complaint relating to one deduction or a series of deductions by the employer? (2) If a single deduction, what was the date of the payment of wages from which the deduction was made? (3) If a series of deductions, what was the date of the last deduction? (4) Was the relevant deduction under (2) or (3) above within the period of three months prior to the presentation of the complaint? (5) If the answer to question (4) is in the negative, was it reasonably practicable for the complaint to be presented within the relevant three-month period? (6) If the answer to question (5) is in the negative, was the complaint nevertheless presented within a reasonable time?

137. Bear Scotland Ltd v Fulton and anor; Hertel (UK) Ltd and anor v Woods and ors (Secretary of State for Business, Innovation and Skills intervening) 2015 ICR 221, EAT, Mr Justice Langstaff sitting in the EAT, ruled whether there

is a 'series' of deductions is a question of fact. There needed to be a sufficient factual and temporal link between the underpayments. This means that that there must be a sufficient similarity of subject matter, so that each event is factually linked, and a sufficient frequency of repetition.

138. This part of the Bear Scotland Ltd decision has been affirmed in the recent supreme Court decision of *Chief Constable of the Police Service of Northern Ireland and anor v Agnew and ors [2023] UKSC 33.* The Supreme Court said in Agnew that in answering that question of whether there has been a series of deductions where there is more than 3 months gap between 1 or more of the deductions, all relevant circumstances must be taken into account, including the deductions' similarities and differences; their frequency, size and impact; how they came to be made and applied; and what links them together.

(ii) Just and Equitable

139. Section 123 EqA sets out that time limits in respect of discrimination claims brought under the Equality Act 2010. The section 123 EqA 2010 says:

"(1) [Subject to [[section 140B]]] proceedings on a complaint within section 120 may not be brought after the end of—

a. the period of 3 months starting with the date of the act to which the complaint relates, or
b. such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

c. the period of 6 months starting with the date of the act to which the proceedings relate, or
d. such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

e. conduct extending over a period is to be treated as done at the end of the period;
f. failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

g. when P does an act inconsistent with doing it, or
h. if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

140. The EAT in South Western Ambulance Service NHS Foundation Trust v King IRLR 168 EAT, establishes that where a Claimant wishes to assert that there is a continuing act or an act extending over a period of time, there must be findings made that there had been discriminatory acts committed by the Respondent in order to form part of an act extending over a period of time or a continuing state of affairs,

Disability

141. Disability is defined under Section 6 of the EqA as:

"(1) A person (P) has a disability if— (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

142. When deciding at which point in time the Claimant is disabled, the Tribunal is to look at the time of the alleged discriminatory act: Cruickshank v Vaw Motorcast Ltd [2002] I.C.R. 729. 52.

143. It is for the Claimant to prove that she is disabled, that is to show, on the balance of probabilities, that she satisfies all four elements, that is that: a) she has a mental or physical impairment, b) the impairment affects his ability to carry out normal day-to-day activities, c) the adverse condition is substantial, and d) that the adverse condition is long term.

144. In J v DLA Piper UK LLP [2010] ICR 2010 Underhill J (President, as he then was) suggested that although it was still good practice for the Tribunal to state a conclusion separately on the question of impairment, there will generally be no need to actually consider the 'impairment condition' in detail: *"In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected on a long- term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues*." (paragraph 40)

145. The EHRC Code of Practice on Employment, at paragraph 7 of Appendix 1, puts it succinctly "*What it is important to consider is the effect of the impairment, not the cause."*

146. In Aderemi v London and South Eastern Railway Ltd 2013 ICR 591, EAT, the EAT furnish guidance as to the Tribunal's role in applying the words of the statute. The EAT state: *"14. It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is on adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial," it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."*

The Burden of Proof in Discrimination cases

147. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why she has acted in a certain way towards another, in circumstances where she may not even be conscious of the underlying reason and will in any event be determined to explain her motives or reasons for what she has done in a way which does not involve discrimination.

148. The burden of proof is set out at Section 136 EqA. The relevant part of section 136 EqA says: -

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision…"*

149. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of any other explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts she will fail – a mere feeling that there has been unlawful discrimination, harassment or victimisation is not enough.

150. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise. Could conclude means "a reasonable Tribunal could properly conclude from all the evidence."

151. As set out above, at the first stage the Claimant must prove "a prima facie case." Each case is fact specific, and it is necessary to have regard to the totality of the evidence when drawing inferences. Once the burden of proof has shifted, it is the second stage and is for the Respondent to show that the relevant protected characteristic played no part whatsoever in its motivation for doing the act complained of.

152. It is, however, not necessary in every case for the Tribunal to specifically identify a two-stage process. There is nothing wrong in principle in the Tribunal focusing on the issue of the reason why. As the Employment Appeal Tribunal pointed out in Laing v Manchester City Council [2006] IRLR 748 *"If the tribunal acts on the principle that the burden of proof may have shifted and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever".*

153. This approach to the burden of proof has been confirmed by the Court of Appeal in Ayodele v City Link and another [2017] EWCA Civ 1913.

Direct discrimination

154. Section 13 EqA sets out the statutory position in respect of claims for direct discrimination because of a protected characteristic.

> *"(1) person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*
>
> *(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."*

155. The comments of the Court of Appeal in Madarassy v Nomura International plc [2007] EWCA 33, albeit a sex discrimination case under the pre Equality Act 2010, Sex Discrimination Act 1975, are still very much applicable to direct discrimination under the Equality Act 2010. Mummery LJ giving judgment says at paragraph 56, *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

156. It can be appropriate for a Tribunal to consider in a direct discrimination case, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as she was. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285)

157. Failure to properly investigate a grievance will only give rise to a claim if the employer would have behaved differently in response to a similar complaint from an appropriate comparator — (see *Eke v Commissioners of Customs and Excise 1981 IRLR 334, EAT*.

Harassment

158. Section 26 EqA, sets out the legislative framework for harassment:

> *"(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
> *(i) creating an intimidating, hostile, degrading, humiliating or offensive environment for B […..]*

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are— ..disability;"

159. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 the EAT stressed that the Tribunal should identify the three elements that must be satisfied to find an employer liable for harassment: (a) Did the employer engage in unwanted conduct, (b) Did the conduct in question have the purpose or effect of violating the employee's dignity or creating an adverse environment for him/her, (c) Was that conduct on the grounds of the employee's protected characteristic?

160. In a case of harassment, a decision of fact must be sensitive to all the circumstances. Context is all-important. The fact the conduct is not directed at the Claimant herself is a relevant consideration, although this does not necessarily prevent conduct amounting to harassment and will not do so in many cases.

161. Richmond Pharmacology v Dhaliwal confirmed that not every comment that is slanted towards a person's protected characteristic constitutes violation of a person's dignity etc. Tribunals must not encourage a culture of hypersensitivity by imposing liability on every unfortunate phrase.

162. Tribunals must not devalue the significance of the meaning of the words used in the statute (i.e., intimidating, hostile, degrading etc.). They are an important control to prevent trivial acts causing minor upset being caught in the concept of harassment. Being upset is far from attracting the epithets required to constitute harassment. It is not enough for an individual to feel uncomfortable to be said to have had their dignity violated or the necessary environment created. (Grant v Land Registry [2011] IRLR 748).

163. Considering whether there has been harassment includes both a subjective and objective element. Underhill J in Pemberton v Inwood [2018] EWCA Civ 564 summarised the position as follows: *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))"*

Deduction from wages

164. The general prohibition on deductions from wages is set out at section 13 ERA which provides, as far as is relevant:

"(1) *An employer shall not make a deduction from wages of a worker*

employed by him unless –

(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) The worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision" in relation to a worker's contract, means a provision of the contract comprised –

(a) In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) In one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

165. Under section 27 ERA, 'wages' means any sums payable to the worker in connection with his employment and covers any fee, bonus, commission, holiday pay or other emolument referable to the employment.

166. For a payment to fall within the definition of 'wages properly payable', there must be some legal entitlement to the sum in question (New Century Cleaning Company Limited v Church [2000] IRLR 27, CA). To determine whether any sum is properly payable to an employee as part of an unlawful deduction from wages claim, the Tribunal can resolve any dispute as to the meaning of the contract relied on (Agarwal v Cardiff University and anor [2018] EWCA Civ 2084).

Protected Disclosures

167. Section 43A ERA provides that a protected disclosure is 'a qualifying disclosure' as defined by section 43B ERA.

168. To summarise: a qualifying disclosure is (i) a disclosure of information that (ii) in the reasonable belief of the worker making it, is made in the public interest and (iii) tends to show that one or more of six 'relevant failures' has occurred, is occurring or is likely to occur. The Claimant relies upon the relevant failures under section 43B (1) (b) & (d) ERA.

169. In determining whether the worker has made a protected disclosure that discloses information and is made in the public interest the worker must have a reasonable belief. The test of what is a reasonable belief is both subjective and objective. Subjective because the worker has the required belief as a matter of fact and on a subjective basis and objective because if

they do have that belief, that their belief is a reasonable belief to hold on an objective basis.

170. Section 43B ERA sets out what the relevant failures are. Sub-sections 43B (1) and (5) say:

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—…..
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject ……
(d) that the health or safety of any individual has been, is being or is likely to be endangered, …..
(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)."

171. A belief which is wrong still meets the requirements of section 43B ERA, provided it is reasonably held (Babula v Waltham Forest College [2007] EWCA Civ 174, CA).

172. The definition of a qualifying disclosure requires the '*disclosure of information which, in the reasonable belief of the worker, is made in the public interest*'. Disputes that are essentially personal contractual disputes are unlikely to qualify (Millbank Financial Services Ltd v Crawford [2014] IRLR 18, EAT).

173. It is not sufficient that the Claimant has simply made '*allegations'* about the wrongdoer especially where the claimed whistleblowing occurs within the Claimant's own employment, as part of a dispute with his or her employer (Cavendish Munro Professional Risks Management v Geduld [2010] IRLR 38).

174. Under section 43B(1)(b) ERA there must be an actual or likely breach of the relevant obligation by the employer (Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540, EAT). The word 'legal' must be given its natural meaning.

175. The fact that the Claimant making the disclosure thought that the employer's actions were morally wrong, professionally wrong or contrary to its own internal rules may not be sufficient (Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT). The source of the obligation should be identified and capable of certification by reference for example to statute or regulation. 'Likely' means probable or more probable than not. It is not sufficient that the Claimant reasonably believed that the relevant disclosure of information tended to show that a person 'could' fail to comply with a legal obligation, or that there was a possibility or risk of non-compliance (Kraus v Penna Plc [2004] IRLR 260).

176. A Claimant wanting to rely on the whistleblowing protection before a Tribunal bears the burden of proof on establishing the relevant failure (Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT).

Detriments

177. It is for the Claimant to show that she was subjected to a detriment by an act or a deliberate failure to act by her employer or co-worker. A claim can only be made out if the Claimant shows she was subjected to the detriment on the ground that she had made the protected disclosure. The relevant test is whether the protected disclosure materially influenced, in the sense of being more than a trivial influence, the treatment of the Claimant (Fecit & Others v NHS Manchester [2011] IRLR 111).

178. Section 48(2) ERA states that the onus is on the employer to show the ground on which the act or deliberate failure to act is done. The 'on the ground that' test focuses on the relevant decision-makers mental processes. The test is not satisfied merely because there was some relationship between the protected disclosure and the detriment complained of, or because the detriment would not have been imposed but for the disclosure (London Borough of Harrow v Knight [2003] IRLR 140).

179. The Court of Appeal decision in Jesudason v Alder Hay Childrens NHS Foundation Trust [2020] IRLR 374 stated '*It is now well established that the concept of a detriment is very broad and must be judged from the view point of the worker. There was a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment*'.

Burden of proof in protected disclosure detriment

180. In a complaint of detriment, section 48(2) ERA provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. This means that the burden shifts to the employer where the other elements of a complaint of detriment are shown by the Claimant.

181. Unlike the operation of the burden of proof under the Equality Act 2010, a failure by the employer to show positively the reason for an act or failure to act does not mean that the complaint of whistleblowing detriment succeeds by default. It is a question of fact for the tribunal as to whether or not the act was done 'on the ground' that the Claimant made a protected disclosure (Ibekwe v Sussex Partnership NHS Trust UKEAT/0072/14/MC).

Submissions

182. Both parties submitted written submissions which we read and were grateful for. The parties were given 20 minutes each to give oral submissions. Mr Cheetham KC's submissions in summary were that the Claimant did not appreciate the scope of the issues in the case and the Claimant did not engage in the claim. The Claimant did not pass the evidential burden of proving her case. It was difficult to make a cogent response to the Claimant's submissions although the issues are embedded in it the submission did not reflect the issues. It appeared to the Respondents that the Claimant was seeking things from the Tribunal that they cannot provide like seeking validation of her expertise in diabetes.

183. The Claimant's submissions were that she had an exacerbation of PTSD, and it was not her intention to irritate Mr Cheetham. The Claimant said she is disabled and worked overnight in order to produce her written submissions. The Claimant said that her point 13 on page 12 of her

submissions points 13(m) & 13(n) apply to 13(q) & 13(r). The Claimant accepted that the November 2021 grievance was outside the scope of the list of issues. The Claimant said her story was straight forward, she arrived at the First Respondent, and she realised they were failing patients and tried to uphold standards of care, from that moment staff tried to make her life difficult, people did not measure blood pressure and cut her from training opportunities, ultimately she was restricted, in effect she was like a concert pianist and they took away the keys. That was her story, the Claimant thanked the Tribunal for listening.

Analysis and Conclusions

Disability

184. We have found that the Claimant was not given medication at any time for her PTSD neither did she have psychological therapy. We had to consider the period where the Claimant said that she was discriminated as to whether the Claimant was disabled. From August 2020 until the Claimant's claim form the Claimant did to take any sick leave at all. There was no mention at all to the Occupational Health of the Claimant's PTSD either by the Claimant or by Dr Khan before 26 August 2021. Even the PSTD diagnosis in 2018 was for a short period, the Claimant recovered in a month from her symptoms. Dr Dimitriou's reports regarding the Claimant's symptoms of PTSD only date from September 2021 at the earliest we found that the Claimant did not have any PTSD symptoms between 1 July 2019 - August 2021.

185. There was no evidence of any impact of the Claimant's PTSD or reactive stress disorder on the Claimant's ability to attend work or carry out her work either from August 2020 or in January 2019. Also, there was no evidence that the PTSD symptoms affected the Claimant outside of work either. We considered whether the Claimant's PTSD and reactive stress disorder fell within the definition of disability under section 6 EqA. We find that the Claimant did not have a disability. There was no evidence that during the relevant period that the Claimant had a mental impairment of PTSD and or stress reactive disorder. Even if we are wrong that the Claimant has no mental impairment. There was no evidence of any substantial adverse effect on the Claimant's ability to carry out her day to day activities. There is no evidence that the effects of the impairment were long term. As we have found that the Claimant did not have a disability all the Claimant's claims for direct disability discrimination, harassment related to disability and unfavourable treatment because of something arising as a consequence of disability falls away.

Protected disclosures

186. The Respondent accepted that 10 (a) & 10(c)-10(h) were protected disclosure. They did not accept that all the Datixes were protected disclosures but there were some that were capable of being protected disclosures. We conclude that in the Datixes there were matters that did refer to patient safety, there was no dispute that the Claimant made disclosures about patient safety in good faith. The Claimant relied upon the likely legal obligation and health safety in respect of section 48B ERA we considered that the Datixes fell within these categories. The Claimant

disclosed the Datixes to her employer. In those circumstances we conclude that the Claimant's Datixes which we considered to be the Datixes from April 2021 which mentioned patient safety issues amounted to protected disclosures.

Issue 13 (a), 13(c), 14(a), 14(b) Bullying from August 2020 & Less favourable treatment of the Claimant from August 2020 by the Second Respondent on the grounds the Claimant made protected disclosures.

187. We conclude that the Second Respondent did not send the 4 August 2020 email because of the Claimant's made protected disclosures. The Second Respondent was aware of all the Claimant's protected disclosures until 4 August 2021, however we found that the Second Respondent sent the email because the Second Respondent was frustrated with the Claimant in not engaging with her to deliver the diabetes service. We conclude the Second Respondent was not materially influenced in her decision to send the 4 August 2020 email because of the Claimant's protected disclosures. We found that there was no incident where the Second Respondent did not provide cover for the Claimant and so we conclude there can be no less favourable treatment of the Claimant by the Second Respondent. In those circumstances the aforementioned complaints against the First & Second Respondents for detriments in respect of protected disclosures is unfounded and are dismissed.

Issues 34(a), 36(a), 36(b), 38(a) & 40- Bullying from August 2020 & less favourable treatment of the Claimant from August 2020 by the Second Respondent on the grounds of race or sex.

188. We conclude that the Second Respondent did not send the 4 August 2020 email because of the Claimant's sex or race but because the Second Respondent was frustrated with the Claimant's lack of co-operation. This is not a reason because of the Claimant 's sex or race. There were no findings on which we could conclude that the Claimant was discriminated against by the Second Respondent on the grounds of her race or sex. In those circumstances the Claimant's complaints of sex and race discrimination against the Second Respondent are unfounded and are dismissed.

Issues 13(d), 14(c), 34(c) & 40 -The Second Respondent's grievances against the Claimant.

189. The Claimant accepted that she was not complaining about a grievance by the Second Respondent in July 2021. The Claimant complained that the actual grievance she was referring to was in November 2021. During the hearing the Claimant accepted that a grievance brought in November 2021 was outside the scope of the list of issues as she had not mentioned it because she did not know about it until she received the bundle from the Respondent in January 2024. We conclude we did not have jurisdiction to consider the November 2021 grievance as it was not in the Claimant's claim or in the list of issues.

190. There was no evidence that there was a grievance in July 2021, and we found that there was no grievance from the Second Respondent in July 2021. The Claimant sought to argue that in respect of her complaint against the Second Respondent she was not only referring to the Claimant's

complaint in July 2021, but all the Second Respondent's grievances made against the Claimant which she argued were retaliatory because she had raised grievances against Second Respondent. The Claimant did not even point the Tribunal to what she considered to be a grievance made by the Second Respondent. The Claimant did not provide any evidence that any grievances made by the Second Respondent were because the Claimant had made protected disclosures or because of the Claimant's race or sex. We conclude that the complaint must fail as the Claimant did not meet the evidential burden that there were grievances made by the Second Respondent that could form the basis of her complaint. The Claimant's complaint under issues 13(d), 14(c), 34(c) & 40 are unfounded and are dismissed.

Issue 13 (b) 15 (a), 34(b), 38(a) & 40- The failure to consider the 8.20 Grievance under the Dignity at Work Policy by the First Respondent and Third Respondent

191. We found that there was not a failure to consider the Claimant's August 2020 grievance under the dignity at work policy. The Claimant had been told that her August 2020 grievance would be considered as part of the Karen Wise's cultural review and the Claimant did not object in any way at the time. The Claimant's August 2020 grievance was considered as part of Karen Wise's cultural review and Karen Wise's findings are contained in the supplement to her report at pages 1364-1367. As there was no failure we are bound to conclude that there was no detriment and no less favourable treatment in respect of this allegation. The Claimant did not provide any evidence that she was subjected to a detriment on the grounds of making protected disclosures nor was she treated less favourably because of her sex or race. In the circumstances, the Claimant's complaints in respect of the aforementioned issues are unfounded and are dismissed.

Issues 13(e) & 15(b)- Breaches of confidence by the Third Respondent in relation to what the Claimant told him regarding potential danger to patients from June 2020 onwards on the grounds that the Claimant made protected disclosures

192. We have found that there was no breach of confidence by Dr Hilton. The Claimant's Datixes were automatically copied to Ms Vanterpool as well as other people. The point of the Datix was to ensure lessons learned. We conclude that there was no detriment to the Claimant in the disclosure of her Datixes to Ms Vanterpool or anyone else. The Claimant did not provide any evidence of detriment to her. We conclude that the Claimant was not subjected to a detriment on the grounds of any protected disclosures she had made. The Claimant's complaint for detriment in respect of protected disclosures is unfounded and is dismissed.

Issues 13(f),15(c), 34(d), 38(b) & 40- The failure to discipline and/or performance manage the Second Respondent from June 2020

193. We found that Ms Vanterpool was disciplined for sending the email on 4 August 2020 and performance managed by Ms McCabe. Dr Hilton was not Ms Vanterpool's line manager, there would have been no reason for him to have disciplined or performance managed Ms Vanterpool. We therefore conclude that there was no failure to discipline and or performance manage

Ms Vanterpool from June 2020. We conclude that there was no detriment to the Claimant, and neither was there any unfavourable treatment. The Claimant provided no evidence that she had suffered a detriment or that she had been subjected to less favourable treatment or that she had been subjected to a detriment because she had made protected disclosures or suffered less favourable treatment because of her race or sex. We determine that the Claimant's aforementioned complaints are unfounded and are dismissed.

Issues 13(g), 15(d), 34(e), 38(c) & 40- The failure to implement the recommendations of the Karen Wise Cultural review

194. We found that there was no failure to implement the Wise Report recommendations. Whilst it was the case that implementation of all the recommendations had started but not all had been completed, there was no timeline as to when the implementation should be completed, we did not consider that there was a failure particularly since everything was delayed from December 2020 as the NHS was dealing with the Omicron wave of COVID. We conclude that there was no detriment to the Claimant, and neither was there any unfavourable treatment since there was no failure. The Claimant provided no evidence that she had suffered a detriment or that she had been subjected to less favourable treatment or that she had been subjected to a detriment because she had made protected disclosures or suffered less favourable treatment because of her race or sex. We determine that the Claimant's aforementioned complaints are unfounded and are dismissed.

Issues 13(h), 15(e), 34(f), 38(d) & 40- The requirement that the Claimant continue to work in the team despite the First Respondent's alleged failure to investigate properly the unsafe practices which she had disclosed from June 2020

195. At no point did the Claimant complain that she was required to work in the team and when the Claimant was offered temporary redeployment she turned it down. We conclude that there was no detriment to the Claimant, and neither was there any unfavourable treatment. The Claimant provided no evidence that she had suffered a detriment or that she had been subjected to less favourable treatment or that she had been subjected to a detriment because she had made protected disclosures or suffered less favourable treatment because of her race or sex. We determine that the Claimant's aforementioned complaints are unfounded and are dismissed.

Issue 13(i)-The belittling of the Claimant and her disclosures by Nathan Christie-Plummer in June 2021

196. We found that Mr Christie-Plummer did roll his eyes at the Claimant. Mr Christie-Plummer was aware of the Claimant's protected disclosure of 17 & 21 May 2021. We consider that Mr Christie Plummer's eye rolling does amount to detriment as the Claimant said that she was belittled by the eye rolling. However, we considered that Mr Christie-Plummer was not materially influenced by the Claimant's protected disclosures in rolling his eyes. Mr Christie-Plummer rolled his eyes because of the Claimant's tendency to repeat issues and avoid dealing with the issue at hand. It was the way that the Claimant put her points across not because the Claimant

had made protected disclosures. In the circumstances, we conclude that the Claimant was not subjected to a detriment because she had made protected disclosures. The Claimant's complaint is unfounded and is dismissed.

Issues 13 (j), 34 (g) & 38(e) & 40 -The request and/or requirement that the Claimant submit to a psychiatric assessment in May 2021

197. It was Dr Goater who requested that the Claimant submit to a psychiatric assessment, but it was not in May 2021 it was in June 2021. The Claimant admitted in evidence that she was referring to Dr Hilton was requesting or requiring that she submit to a psychiatric assessment. We did not accept the Claimant's evidence on this point. We conclude that there was no request that the Claimant submit to a psychiatric assessment in May 2021 by the First or Third Respondents. Even if we considered Dr Goater's request we do not consider that it amounted to a detriment, as it was not a requirement. It was standard practice to request that the Claimant attend the Occupational Health psychiatrist which was who Dr Goater was requesting the Claimant see. The request was to help the Claimant. We conclude that there was no detriment to the Claimant, and neither was there any unfavourable treatment. The Claimant provided no evidence that she had suffered a detriment or that she had been subjected to less favourable treatment or that she had been subjected to a detriment because she had made protected disclosures or suffered less favourable treatment because of her race or sex. We determine that the Claimant's aforementioned complaints are unfounded and are dismissed.

Issues 13(k), 15(g), 34 (h), 38 (f) & 40-The 26 April 2021 letter and the required action set out within it

198. We found there was nothing wrong with the actions set out in the Third Respondent's letter dated 26 April 2021. We consider that the actions do not amount to a detriment, the actions were reasonable management instructions. We conclude that there was no detriment to the Claimant, and neither was there any unfavourable treatment. The Claimant provided no evidence that she had suffered a detriment or that she had been subjected to less favourable treatment or that she had been subjected to a detriment because she had made protected disclosures or suffered less favourable treatment because of her race or sex. We determine that the Claimant's aforementioned complaints are unfounded and are dismissed.

Issues 13(l), 15(h), 34(i), 38(g)- The First Respondent's decision to commence an investigation into the Claimant's conduct on 1 June 2021

199. We found that the reason why the First Respondent decided to commence an investigation into the Claimant was because Dr Goater considered that the situation was untenable, and it could not safely continue any longer. ROAG had decided that were concerns that required investigation, there was clear evidence that the Claimant was unable to get along with her colleagues as she was subject to multiple complaints from them, and this was affecting patient safety, she had already had a patient complaint upheld against her and she repeatedly refused to follow reasonable management instructions. The reason for the investigation into the Claimant's conduct

was not because the Claimant made protected disclosures. Although Dr Goater knew of some of the Claimant's protected disclosures by the time she made the decision to investigate the Claimant based upon the patient safety and the Claimant's escalating conduct. We consider that the decision to commence an investigation was a detriment, as the Claimant regarded the basis of the investigation to be false. We consider for the same reasons it amounted to less favourable treatment. However, we conclude that Dr Goater's decision was not materially influenced by the Claimant making protected disclosures. Furthermore, nowhere does the Claimant say that the decision to commence the investigation was because of her race or sex or even that it was discriminatory. There was no evidence or primary findings on which we could conclude that the Claimant was discriminated on the grounds of her race or sex. We conclude that the Claimant was not subjected to a detriment because she had made protected disclosures, nor did she suffer less favourable treatment because of her race or sex. We determine that the Claimant's complaints are unfounded and are dismissed.

Issues 13(n), 34(k) & 40-The failure to provide the information requested by the Claimant or her representative in relation to the 1 June 2021 restriction on 1 June 2021

200. The Claimant did request information about her allegations on 1 June 2021 in her email on 1 June 2021 to Dr Goater but did not request this information in the meeting on 1 June 2021, neither did the Claimant's representative at the meeting. The Claimant's request on 1 June is an SAR and does not request the information to be provided on 1 June 2021. In the circumstances, we consider that the Claimant has not suffered a detriment by not receiving the information about her restriction requested on 1 June 2021, the Claimant received the information about her actual restrictions on 1 June 2021 and further information within 30 days by 22 June 2021. We conclude that there was no detriment to the Claimant, and neither was there any unfavourable treatment. The Claimant provided no evidence that she had suffered a detriment or that she had been subjected to less favourable treatment or that she had been subjected to a detriment because she had made protected disclosures or suffered less favourable treatment because of her race or sex. We determine that the Claimant's aforementioned complaints are unfounded and are dismissed.

Issues 13(m), 15(i), 34(j), 38(h) & 40- The Terms of Reference on 3 June 2021

201. We found that the Claimant offered no evidence to explain what was wrong with the terms of reference. The Claimant did not explain why they were a detriment to her. We consider that the Claimant was not subjected to a detriment regarding the terms of reference. We conclude that there was no detriment to the Claimant, and neither was there any unfavourable treatment. The Claimant provided no evidence that she had suffered a detriment or that she had been subjected to less favourable treatment or that she had been subjected to a detriment because she had made protected disclosures or suffered less favourable treatment because of her race or sex. We determine that the Claimant's aforementioned complaints are unfounded and are dismissed.

Issues 13 (O), 15(j), 34(l) 38(i), 40, 41- The exclusion of the Claimant from contacting anyone within the First Respondent save for Nicky Goater and Katherine Murray in or around July/August 2021

Protected disclosure detriments

202. Issue 13(O) in respect of the First Respondent on the grounds that the Claimant made a protected disclosure. The Claimant provided no evidence to support her allegation. She did not refer to it in her witness statement or oral evidence. We therefore find this allegation fails and the Claimant's complaint for detriment in respect of protected disclosures is unfounded and is dismissed.

203. Issue 15(j) relates to the Third Respondent. Whilst we accept that Dr Hilton knew of some of the Claimant's protected disclosures by 1 June 2021, again it was not put to Dr Hilton that he had excluded the Claimant contacting anyone within the First Respondent save for Nicky Goater and Katherine Murray in or around July/August 2021. In any event it was not Dr Hilton's decision to exclude the Claimant, but it was Dr Goater's decision. We therefore find this allegation fails and the Claimant's complaint for detriment in respect of protected disclosures is unfounded and is dismissed.

Discrimination Race & Sex

204. Dealing with issue 34(l) respect of the First Respondent and issue 38(i) Third Respondent and issues 40 & 41, the Third Respondent did not have anything to do with the decision to exclude the Claimant. There were no findings upon which we could conclude that the First Respondent made the decision to exclude the Claimant on the grounds of her race or sex. Dr Goater made the decision to exclude the Claimant and did not know that the Claimant was Sri Lankan and there were no findings upon which we could conclude that the Claimant's sex played any part in her decision. We therefore conclude that the Claimant was not discriminated against on the grounds of her race or sex. The complaint of direct discrimination on the grounds of race or sex is unfounded and is dismissed.

Issue 13(p)- The failure of Katherine Murray to respond to the Claimant's emails in August 2021

205. We found that Ms Murray was aware of the Claimant's protected disclosure in respect of some of the Datixes. However, the Claimant sought to cross examine Ms Murray about a request for annual leave on 27 August 2021. The Claimant did not provide any evidence of any other examples of when Ms Murray did not respond to her emails. The Claimant could not therefore have contemplated Ms Murray not responding to her email when she submitted her claim on 26 August 2021 as the events that she sought to challenge Ms Murray about had not yet happened. In those circumstances we conclude that there was no failure for Ms Murray to respond to the Claimant's emails in August 2021. We consider as there was no failure the Claimant was not subjected to a detriment. The complaint is unfounded and is dismissed against the First Respondent.

Issues 13 (q), 15(k), 39(j) -The selection of Catherine Penny as an investigator on 1 June 2021

206. We found that it was Dr Goater who selected Dr Penny to be the investigator not Dr Hilton. Although Dr Goater was aware of the Claimant's Datixes when she made the decision to select Dr Penny as the case investigator, we conclude that the Claimant's protected disclosures were not the reason why Dr Goater chose Dr Penny. The Claimant's protected disclosures did not materially influence in any way the selection of Dr Penny. Dr Goater picked Dr Penny because she was available appropriately trained as a case investigator and was outside the diabetes service. The Claimant's complaint for detriment in respect of protected disclosures is unfounded and is dismissed against both First Respondent and Third Respondent.

Issues 13(k) & 38(k) & 40 -The restrictions imposed on the Claimant on 1 June 2021

Protected disclosure detriments

207. We found the restrictions were imposed by Dr Goater on 1 June 2021 and not Dr Hilton. We conclude that Dr Hilton did not impose the restrictions and therefore there did not subject the Claimant to that detriment at all whether on the grounds of her protected disclosures or otherwise. The reason why Dr Goater imposed those restrictions was because Dr Goater considered that it was necessary to restrict the Claimant's contact with her team whilst matters were investigated under the D4a and to ensure the DICE team could focus on patient care, and to avoid any potential disruption to the investigation. The Claimant did not present any evidence that the reason why the Claimant was restricted was because of her protected disclosures. Dr Goater did have knowledge of her protected disclosure under issue 10(b) But we conclude that the Claimant had not established her protected disclosures materially influenced in any way Dr Goater's decision to impose restrictions on the Claimant on 1 June 2021. We conclude that there was no link between the two. The Claimant's complaint for detriment in respect of protected disclosures is unfounded and is dismissed.

Discrimination Race & Sex

208. We found the restrictions were imposed by Dr Goater and not Dr Hilton. We conclude that Dr Hilton did not impose the restrictions and therefore did not subject the Claimant to unfavourable treatment on the grounds of the Claimant's race or sex. The reason why Dr Goater imposed those restrictions was because Dr Goater considered that it was necessary to restrict the Claimant's contact with her team whilst matters were investigated under the D4a and to ensure the DICE team could focus on patient care, and to avoid any potential disruption to the investigation. The Claimant did not present any evidence that the reason why the Claimant was restricted was because of her race or sex. We conclude that the Claimant had not shifted the burden of proof by establishing any primary facts from which we could conclude that the reason Dr Goater imposed restrictions was because of the Claimant's race or sex. We conclude that there was no discrimination by the First Respondent against the Claimant on the grounds of race & sex. The Claimant's complaints for direct discrimination on race and sex are unfounded and are dismissed.

Issues 16 & 17, 18 Claim for unlawful deduction from wages

209. The Claimant was pursuing a complaint of unlawful deductions against all the Respondents. The obligation to pay the Claimant's wages lies with the Claimant's employer, and that is the First Respondent. In those circumstances the complaints of unlawful deduction of wages against the Second Respondent and Third Respondent are dismissed.

210. In respect of the complaint against the First Respondent, we found that the Claimant did not work authorised excess hours. The Claimant did not detail the amount or dates of specific excess hours that she did and so there were no amount in excess work that we could determine. Any excess work the Claimant did was voluntary. We found that the Claimant's extra hours were not authorised by her contract of employment, and they were not authorised by the Third Respondent. We conclude that there was no authorisation, and neither should there have been. In the circumstances, the Claimant's excess hours were not properly payable to her as she did not follow the First Respondent process for claiming overtime neither was she authorized to do the extra hours. There was no deduction from her wages and the unidentified excess hours of work were not properly payable to the Claimant. There has been no series of deductions. We conclude that the Claimant has not suffered any unlawful deduction of wages. The Claimant's complaint is unfounded and is dismissed.

Time issues

211. A number of the Claimant's complaints that took place before 15 April 2021 were out of time. In respect of the Claimant's discrimination claims we did not make any determinations that the Claimant had been subject to discrimination on the grounds of disability, race or sex. In those circumstances there can be no continuing acts in respect of any allegations of discrimination. In respect of allegations that took place before 15 April 2021 we considered whether it was just and equitable to extend time. We had regard to the guidance in Keeble and considered the relevant factors of the length and reason for the Claimant in delaying the presentation of the complaints that are out of time, the Claimant's knowledge of that facts giving rise to the action and the extent to which the Claimant took legal advice. The Claimant had been in receipt of legal advice since April 2020. The Claimant was not prevented from presenting her claim form because she did not have annual leave to do the claim form. The claim form was submitted by her solicitors in any event. The Claimant knew the facts of the basis of her claims at the time. We did not consider that it was just and equitable to extend time in respect of the allegations that were out of time.

212. In respect of the claims for unlawful deduction of wages and detriment by reason of protected disclosure we considered first whether there was a series of deduction and whether series of similar failures. We have already concluded that there was no series of deductions. We did not find any similar acts that took place in respect of detriment. The only detriments we found that took place i.e. Mr Christie-Plummer rolling his eyes and the Claimant being investigated and restricted were in time. In those circumstances there were no acts or failure to act that formed part of a series of acts or failures.

213. We then considered whether the Claimant had shown that it was not reasonably practicable for her to bring her claims in time. We were not convinced that the Claimant was prevented from bringing her claims in time before June 2021 and certainly after June 2021 as she was not refused the annual leave she said she needed to be able to complete her claim form. In considering whether to exercise our discretion to extend time we had regard to whether the claim was presented within a reasonable period of time following the expiry of the primary time limit. In respect of some of the Claimant's claims more than 1 year had expired since the alleged act took place before the Claimant presented her claim for detriment by reason of protected disclosure. In those circumstances we determine that the Claimant did not present her claims for detriment or unlawful deduction of wages within a reasonable period of time, and we did not exercise our discretion to allow the Claimant's complaints that were out of time under the reasonably practicable jurisdiction.

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Employment Judge Young

Dated 18 March 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

20/3/2024

N Gotecha

FOR THE TRIBUNAL OFFICE

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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

Annex -Agreed list of issues

INTRODUCTION

1. The Respondent notes that the Claimant sets out a lengthy narrative within her Particulars of Claim, which are over 40 pages long, but it appears that her claims are as set out from paragraph 133 onwards. For the avoidance of doubt, this List of Issues only deal with those allegations from paragraph 133 onwards. Should the Claimant seek to rely on the narrative as forming part of her claim, the Respondent will object and, in any event, there is a potential time point issue. The Respondent respectfully requests that this issue be dealt with at the Preliminary Hearing on 30 June 2022. The Respondent reserves the right to apply to amend its Grounds of Resistance upon receipt of clarification.

2. The identifiable claims are:

(i) A claim of detriment for a protected disclosure pursuant to section 47(b) Employment Rights Act ("ERA");
(ii) A claim of unlawful deduction from wages;
(iii) A claim of direct discrimination on the grounds of disability pursuant to section 13 of the Equality Act 2010 ("EqA");
(iv) A claim of direct discrimination on the grounds of race pursuant to section 13 of EqA;
(v) A claim of direct discrimination on the grounds of sex pursuant to section 13 of EqA.
(vi) A claim of discrimination arising from disability pursuant to section 15 of EqA; and
(vii) A claim of harassment on grounds of disability pursuant to section 26(1) of EqA.

CORRECT RESPONDENT

3. Does the Claimant intend on pursuing her claims (except for unlawful deduction from wages which can only be pursued against the First Respondent) against all three named Respondents, or does she agree to withdraw her claims against, Grace Vanterpool (Second Respondent) and Christopher Hilton (Third Respondent) on the basis that the First Respondent accepts vicarious liability for any act or omission carried out in the course of their employment.

TIME LIMITS

Equality Act 2010 claims

4. Has the Claimant presented claims of discrimination and harassment within the period ending three months less one day from the date of the alleged act, or the last act in a continuing course of conduct?

a. The Respondent submits that any act or omission about which the Claimant complaints against the First Respondent, which occurred before 15 April 2021 are prima facie out of time, save for if there is a continuing course of conduct or continuing act of discrimination.
b. The Respondent submits that any act or omission about which the Claimant

complaints against the Second and Third Respondent, which occurred before 18 May 2021 are prima facie out of time, save for if there is a continuing course of conduct or continuing act of discrimination.

5. If so, would it be just and equitable for the Tribunal to extend time in respect of those acts? In determining this, the Tribunal should consider:

a. How far out of time, the claim has been presented?
b. What are the reason/s for the delay?
c. When the Claimant knew or should have known that she had a potential claim for discrimination?
d. Whether it was reasonable for her to know or suspect that she had a prospective claim earlier?
e. To what extent the Claimant obtained appropriate professional advice once she knew of the possibility of taking action?
f. How promptly did the Claimant act in bringing her claim once she knew of the possibility of taking action?
g. The extent to which the cogency of the evidence is likely to be affected by the delay?
h. The extent to which the Respondent co-operated with any requests for information?

Employment Rights Act 1996 claims

6. Did the Claimant present her claims for a protected disclosure detriment;
a. before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
b. within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

7. Did the Claimant present her claim for unlawful deduction from wages;
a. within three months beginning with the date of payment of the wages from which the deduction was made, or the date payment was received, or

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

8. In relation to paragraphs 5 and 6 above, the Respondent submits that any claim for unlawful deduction from wages or detriment about which the Claimant complaints against the First Respondent, which occurred before 15 April 2021 are prima facie out of time, save for if there is continuing detriment or deduction.

9. In relation to paragraphs 5 and 6 above, the Respondent submits that any claim for unlawful deduction from wages or detriment about which the Claimant complaints against the Second and Third Respondent, which occurred before 18 May 2021 are prima facie out of time, save for if there is continuing detriment or deduction.

LIABILITY

Whistleblowing

10. The Claimant relies upon the following alleged disclosures (as set out at paragraph
133 of her Particulars of Claim):

a. The June 2020 Disclosures;
b. The DATIX Disclosures;
c. The 8.20 Grievance;
d. The 14 May 2021 Disclosure;
e. The 17 May 2021 Disclosure;
f. The 21.5.21 Grievance; and
g. The June 2021 email.
h. 17 August 2021 letter

11. In relation to each of the matters above did the Claimant make a qualifying disclosure in accordance with s.43B ERA? Specifically;

a. Did she disclose information?
b. Did she believe the disclosure was information made in the public interest?
c. Was that belief reasonably held?
d. Did she believe the disclosures tended to show that:

i. A person had failed, was failing or was likely to fail to comply with any legal obligation and/or
ii. The health and safety of any individual had been, was being or was likely to be endangered.
e. Was that belief reasonable reasonably held?

12. If the Claimant made a qualifying disclosure, was it made:

a. To the Claimant's employer?
b. To a person who was legal responsibility for the matters raised by the Claimant pursuant to s.43C ERA?
c. To a person prescribed by an order made the Secretary of State made pursuant to section s.43F ERA?

13. Was the Claimant subjected to detriment(s) on the grounds of having made a protected disclosure pursuant to s.47B ERA as set out at paragraph 138 of her Particulars of Claim and as summarised below. The Claimant relies upon the following alleged acts as detriments on behalf of the First Respondent;

a. Bullying by the Second Respondent from August 2020 onwards;
b. The First Respondent's failure to consider the 8.20 Grievance under the Dignity at Work Policy;
c. The less favourable treatment of the Claimant by the Second Respondent from August 2020 onwards;
d. The Second Respondent raising a grievance against the Claimant on or around July 2021;
e. Breaches of confidence by the Third Respondent in relation to what the Claimant told him regarding potential danger to patients from June 2020 onwards;

f. The First Respondent's failure to discipline and/or performance manage the Second Respondent from June 2020;
g. The First Respondent's failure to implement the recommendations of the Karen Wise Cultural review;
h. The requirement that the Claimant continue to work in the team despite the First Respondent's alleged failure to investigate properly the unsafe practices which she had disclosed from June 2020;
i. The belittling of the Claimant and her disclosures by Nathan Christie-Plummer in June 2021;
j. The request and/or requirement that the Claimant submit to a psychiatric assessment in May 2021;
k. The 26 April 2021 letter and the required action set out within it;
l. The First Respondent's decision to commence an investigation into the Claimant's conduct on 1 June 2021;
m. The Terms of Reference on 3 June 2021;
n. The failure to provide the information requested by the Claimant or her representative in relation to the 1 June 2021 restriction on 1 June 2021;
o. The exclusion of the Claimant from contacting anyone within the First Respondent save for Nicky Goater and Katherine Murray in or around July/August 2021;
p. The failure of Katherine Murray to respond to the Claimant's emails in August 2021;
q. The section of Catherine Penny as an investigator on 1 June 2021; and
r. The restrictions imposed on the Claimant on 1 June 2021.

14. The Claimant relies upon the following alleged acts as detriments on behalf of the Second Respondent;

a. Bullying from August 2020;
b. Less favourable treatment of the Claimant from August 2020; and
c. The Second Respondent's grievances against the Claimant.

15. The Claimant relies upon the following alleged acts as detriments on behalf of the Third Respondent;

a. The Third Respondent's failure to consider the 8.20 Grievance under the Dignity at Work Policy;
b. Breaches of confidence by the Third Respondent in relation to what the Claimant told him regarding potential danger to patients from June 2020 onwards;
c. The Third Respondent's failure to discipline and/or performance manage the Second Respondent from June 2020;
d. The Third Respondent's failure to implement the recommendations of the Karen Wise Cultural review;
e. The requirement that the Claimant continue to work in the team despite the First Respondent's alleged failure to investigate properly the unsafe practices which she had disclosed from June 2020;
f. The request and/or requirement that the Claimant submit to a psychiatric assessment in May 2021;
g. The 26 April 2021 letter and the required action set out within it;
h. The First Respondent's decision to commence an investigation into the Claimant's conduct on 1 June 2021;
i. The Terms of Reference on 3 June 2021;
j. The exclusion of the Claimant from contacting anyone within the First Respondent save for Nicky Goater and Katherine Murray in or around July/August

2021;
k. The section of Catherine Penny as an investigator on 1 June 2021; and
l. The restrictions imposed on the Claimant on 1 June 2021.

Claim for unlawful deduction from wages

16. Did the Claimant work excess hours, which should have been authorised, but not paid to her?

17. If so, were these deductions from the Claimant's wages which
a. Fall within the statutory definition of "wages" within s.27 ERA?
b. Were "properly payable" to the Claimant under contract and/or statute?
c. Amount to an unlawful deduction from wages by the Respondent under s.13 ERA?
18. If so, has there been a series of unlawful deductions?

19. If there has, has there been a break in the series of deductions of more than three months?

Direct Disability Discrimination s.13 EqA

20. The Claimant suggests that she is disabled by way of Reactive Stress Disorder and Post Traumatic Stress Disorder ("PTSD").

a. Did the Claimant's illness have a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities so as to constitute a disability within the meaning of EqA10, s6 & Schedule 1?
b. If so did the Respondent have actual or constructive knowledge of these disabilities at the relevant time?
c. If so, from what date did the Respondent have this knowledge of each disability relied upon?

21. In regard to the First Respondent, has the Claimant established that the following acts occurred as alleged as set out at paragraph 143 of her Particulars of Claim?

a. The request and/or requirement that the Claimant submit to a psychiatric assessment in May 2021;
b. The 26 April 2021 letter and the required action set out within it;
c. The First Respondent's decision to commence an investigation into the Claimant's conduct on 1 June 2021;
d. The Terms of Reference on 3 June 2021;
e. The exclusion of the Claimant from contacting anyone within the First Respondent save for Nicky Goater and Katherine Murray in or around July/August 2021;
f. The section of Catherine Penny as an investigator on 1 June 2021;
g. The failure to provide information requested by the Claimant or her representative in relation to the 1 June 2021 restriction on 1 June 2021; and
h. The restrictions imposed on the Claimant on 1 June 2021.

22. If the treatment occurred as alleged, was it less favourable treatment on the grounds of the Claimant's disability; more specifically;

a. The Tribunal will decide whether the Claimant was treated less favourably than a hypothetical comparator was treated. There must be no material difference between their circumstances and the Claimants.

23. Did the Respondent's treatment amount to a detriment?

Harassment related to disability s.26 EqA

24. Did the Second Respondent engage in unwanted conduct related to disability as alleged:

a. Bullying by the Second Respondent from August 2020;
b. Less favourable treatment of by the Claimant by the Second Respondent following August 2020; and
c. Through the Second Respondent raising grievances against the Claimant in or around July 2021.

25. If so, did that conduct have the purpose or effect of—

a. violating the Claimant's dignity, or
b. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

26. If the conduct did not have the purpose alleged:

a. Did it have the effect alleged?
b. Was it reasonable for the conduct to have that effect?
c. In determining which, the Tribunal should consider objectively whether the Claimant is being "hypersensitive" to any such alleged acts of harassment.

Discrimination because of something arising from disability s.15 EqA

27. Did the Respondent know, or could it have reasonably been expected to know, that the Claimant had the disability relied upon, namely Reactive Stress Disorder and/or PTSD at the material time (from June 2020)?

28. Did the First Respondent commit the following acts as set out at paragraph 148 of her Particulars of Claim?

a. The request and/or requirement that the Claimant submit to a psychiatric assessment in May 2021;
b. The 26 April 2021 letter and the required action set out within it;
c. The First Respondent's decision to commence an investigation into the Claimant's conduct on 1 June 2021;
d. The Terms of Reference on 3 June 2021;
e. The exclusion of the Claimant from contacting anyone within the First Respondent save for Nicky Goater and Katherine Murray in or around July/August 2021;
f. The failure of Katherine Murray to respond to the Claimant's emails in August 2021;
g. The failure to provide information requested by the Claimant or her representative in relation to the 1 June 2021 restriction on 1 June 2021; and
h. The section of Catherine Penny as an investigator on 1 June 2021;
i. The restrictions imposed on the Claimant on 1 June 2021.

29. If so, was this unfavourable treatment of the Claimant because of "something arising"
in consequence of either or both of her disabilities?

30. What was the 'something?' The Claimant relies on those matters set out at paragraph 147 of the Particulars of Claim that she is anxious that, unless matters are properly documented, she will once again be subjected to unlawful and unwarranted restriction.

31. If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

32. The Respondent relies upon the legitimate aim to protect the health and safety of patients and the running of an efficient clinical service and to effectively manage the behaviours of staff to ensure that the Respondent's reasonable standards of conduct and values are met. The Respondent submits that its actions were a proportionate means of achieving that aim because they were appropriate, necessary and reasonable actions in the circumstances

Direct Race Discrimination s.13 EqA

33. The Claimant is Sri Lankan.

34. In regard to the First Respondent, has the Claimant established that the following acts occurred as alleged?
a. Bullying by the Second Respondent from August 2020 onwards;
b. The First Respondent's failure to consider the 8.20 Grievance under the Dignity at Work Policy;
c. The Second Respondent raising a grievance against the Claimant in July 2021;
d. The First Respondent's failure to discipline and/or performance manage the Second Respondent from June 2020;
e. The First Respondent's failure to implement the recommendations of the Karen Wise Cultural review;
f. The requirement that the Claimant continue to work in the team despite the First Respondent's alleged failure to investigate properly the unsafe practices which she had disclosed from June 2020;
g. The request and/or requirement that the Claimant submit to a psychiatric assessment in May 2021;
h. The 26 April 2021 letter and the required action set out within it;
i. The First Respondent's decision to commence an investigation into the Claimant's conduct on 1 June 2021;
j. The Terms of Reference on 3 June 2021;
k. The failure to provide the information requested by the Claimant or her representative in relation to the 1 June restriction on 1 June 2021;
l. The exclusion of the Claimant from contacting anyone within the First Respondent save for Nicky Goater and Katherine Murray in or around July/August 2021; and
m. The restrictions imposed on the Claimant on 1 June 2021.

35. If the treatment occurred as alleged, was it less favourable treatment on the grounds of the Claimant's race; more specifically;
a. The Claimant relies upon the Second Respondent as an actual comparator, as someone who is Afro-Caribbean, or a hypothetical comparator in the alternative, save in relation to 16(a) where she relies on a hypothetical comparator.
b. Are there facts from which, in the absence of any explanation, a finding of discrimination could be made?
c. If so, has the Respondent established an explanation for the treatment, which is nothing whatsoever to do with the Claimant's race?

36. In regard to the Second Respondent, has the Claimant established that the following acts occurred as alleged?
a. Bullying by the Second Respondent from August 2020 onwards;
b. Bullying by the Second Respondent up to the date of the Claimant's restriction on 1 June 2021.

37. If the treatment occurred as alleged, was it less favourable treatment on the grounds of the Claimant's race; more specifically;
a. The Claimant relies upon a hypothetical comparator, namely, someone not of Sri Lankan ethnicity and/or Caucasian and or of Afro-Caribbean race, who were in the same (or not materially different circumstances).
b. Are there facts from which, in the absence of any explanation, a finding of discrimination could be made?
c. If so, has the Respondent established an explanation for the treatment, which was nothing whatsoever to do with the Claimant's race?

38. In regard to the Third Respondent, has the Claimant established that the following acts occurred as alleged?
a. The First Respondent's failure to consider the 8.20 Grievance under the Dignity at Work Policy;
b. The First Respondent's failure to discipline and/or performance manage the Second Respondent from June 2020;
c. The First Respondent's failure to implement the recommendations of the Karen Wise Cultural review;
d. The requirement that the Claimant continue to work in the team despite the First Respondent's alleged failure to investigate properly the unsafe practices which she had disclosed from June 2020;
e. The request and/or requirement that the Claimant submit to a psychiatric assessment in May 2021;
f. The 26 April letter and the required action set out within it;
g. The First Respondent's decision to commence an investigation into the Claimant's conduct on 1 June 2021;
h. The Terms of Reference on 3 June 2021;
i. The exclusion of the Claimant from contacting anyone within the First Respondent save for Nicky Goater and Katherine Murray in or around July/August 2021;
j. The section of Catherine Penny as an investigator on 1 June 2021; and
k. The restrictions imposed on the Claimant on 1 June 2021.

39. If the treatment occurred as alleged, was it less favourable treatment on the grounds of the Claimant's race; more specifically;
a. The Claimant relies upon a hypothetical comparator, namely, someone not of Sri Lankan ethnicity and/or Caucasian and or of Afro-Caribbean race, who were in the same (or not materially different circumstances).

b. Are there facts from which, in the absence of any explanation, a finding of discrimination could be made?
c. If so, has the Respondent established an explanation for the treatment, which was nothing whatsoever to do with the Claimant's race?

Direct Sex Discrimination s.13 EqA

40. Did the Respondent subject the Claimant to the following treatment:
a. The Claimant repeats the detriments pleaded at paragraphs 34, 36 and 38 of this List of Issues.

41. If so, was it less favourable treatment because of the Claimant's sex; more specifically:
a. Who is the relevant comparator? Hypothetical male Consultant.
b. Are there facts from which, in the absence of an explanation, a finding of discrimination could be made?
c. If so, has the Respondent established an explanation for the treatment which was nothing whatsoever to do with the Claimant's sex?

REMEDY

Recommendation

42. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant of the discrimination/harassment?

43. What should it recommend?

Financial loss

44. What financial losses has the Claimant suffered?

Injury to feelings

45. What injury to feelings has the discrimination caused the Claimant?

46. How much compensation should be awarded for that?

Personal injury

47. Has discrimination caused the Claimant personal injury?

48. How much compensation should be awarded for that?

ACAS

49. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

50. Did the Respondent or the Claimant unreasonably fail to comply with it?

51. If so, is it just and equitable to increase or decrease any award payable to the Claimant?

52. By what proportion, up to 25%?

Compensation

53. Did the Claimant contribute to any detrimental treatment?

54. If so, should her compensation be reduced?

Interest

55. Should interest be awarded?

56. How much?