EMPLOYMENT TRIBUNALS

Claimant: Ms. G. Kekati

Respondents: (1) Skinfluencer Ltd
(2) Mr D. Pires
(3) Dr. U. Desai
(4) Ms S. Shafer

Heard at: London Central (hybrid hearing) On: 20-21, 24-26 April 2023

Before: Employment Judge Goodman
Mr D. Clay
Ms J. Costley

Appearances
For the claimant: Lilian Caller, solicitor
For the first and second respondents: Tony Oswin, employment consultant
For the third and fourth respondents: Monica Beckles, HR consultant

JUDGMENT

1. The claim of detriment for making protected disclosures fails.
2. The claim of dismissal for making protected disclosures fails.
3. The money claims of breach of contract or of unauthorised deductions in respect of overtime, commission, deduction of an overpayment and of unpaid holiday do not succeed.

REASONS

1. This is a claim for detriment and dismissal for making protected disclosures. The detriment claims are made against the claimant's employer, the first respondent, and against the three individual respondents. The dismissal claim is against the first respondent employer. There are also money claims against the employer, whether of breach of contract or unauthorised deductions or unpaid holiday.

Issues for this Hearing

2. This 5 day hearing was listed to determine all issues, liability and remedy.

3. The issues were listed by Employment Judge Burns in the case management order in March 2022. A further detriment was added at the case management hearing before Employment Judge Khan in July 2022, at what was to have been the final hearing. The list from Judge Khan's order is appended: there are 9 disclosures and 16 detriments.

The last detriment listed is dismissal, namely, when the claimant resigned by letter of 8 February 2022.

4. There is also an issue as to whether the claims are in time. The claimant ceased work with work-related stress in July 2021. She went to ACAS for early conciliation on 24 August 2021 and the certificates were issued on 5 October 2021. The claim was not then presented to the tribunal until 20 December 202. Tthe respondent argues that all or some of the claims for detriment are out of time.

Conduct of the Hearing

5. When first listed by Judge Burns, this case was to be heard by CVP. At the hearing in July, Judge Khan ordered a hybrid hearing instead, because the claimant could not manage the technology, and she could not access the hearing link. The hearing could not proceed in any event because the content of the hearing bundle was not agreed. Witness statements had been exchanged, but the claimant's was not cross referenced to the bundle. At the time of that hearing she had recently instructed another solicitor, who was unfortunately ill when the final hearing was due to start. Ms Caller came on record formally in October 2022.

6. For the current hearing, only the judge and the claimant were present in a hybrid hearing room at Victory House. The other two members of the tribunal were on CVP, one because a London region member from the appropriate panel was not available and a member had to be taken from the virtual region, the other (a London region member) because they have no laptop of their own and no HMCTS pool laptop with internet access for the hearing bundle was available at Victory House. The respondents' representatives (Mr Oswin in Blackpool and Ms Beckles in Croydon) were remote, as were the respondent's witnesses, who with the exception of Mr Pires gave evidence from the respondent's London clinic. The claimant's solicitor did not attend Victory House with her client, but remotely from her home in north London. This was not ideal as it led to difficulty in communication for instructions. The reason for this arrangement was not known.

7. The hearing was not easy to manage because the tribunal was provided (as ordered) with an electronic bundle, but the representatives and the witnesses were all using a paper bundle, which had different pagination. The electronic bundle had a 20 page index without hyperlinks, and there had been many insertions disrupting the numbering; paper documents had been scanned into the electronic bundle were numbered (sometimes renumbered) by hand, so it could not readily be searched. All this added delay, both in the hearing and in discussion and writing these reasons. The tribunal suggests to the representatives that if they are instructed in another employment tribunal case they read the Presidential Guidelines on electronic bundles.

8. The first day was slow to start because of difficulty assembling a panel, because the hearing bundle had not been provided to the tribunal until the night before, and the respondent's witness statements were not sent to the tribunal until part way through the first morning. By the end of the first day however the panel had managed to read in to the statements and hearing bundle, and was ready to start hearing evidence on day two.

Strike Out Application

9. However on the morning of day 2 the respondents applied to strike the claims out, objecting to the claimant having filed two additional witness statements, one in September 2022, (which had been ordered to deal with an issue raised at the July hearing), the other filed on 18 April 2023, with a hearing bundle enlarged from 959 to 1106 pages (excluding the claimant's additional witness statements at pages 1107-1138) – an additional 146 pages of documents. Mr Oswin applied to strike out the claims for failure to comply with directions on grounds that it was not possible to have a fair hearing.

10. After hearing the parties and reviewing the additional material, the panel decided not to strike out the claims. Most of the documentary material had been available from July 2022. Some of it had been disclosed by then but not included in the hearing bundle. Some of the new material (documents on the money claims) was necessary and would not have taken the first respondent by surprise. The tribunal did however exclude from the claimant's April 2023 witness statement paragraphs 1, 2, 4, 7 and 8 as not relevant to the pleaded case. Paragraphs 3 and 5 were allowed as relevant to the alleged detriment of a spurious disciplinary investigation, and 6 as relevant to the money claims; the sections on unpaid pension contributions and statutory sick pay were excluded as these claims had not been pleaded, there was no application to amend, and the claimant had a remedy elsewhere.

Evidence

11. The tribunal heard live evidence from the following:

    Geraldine Kekati, claimant
    Misho Radic, director and owner of Skinfluencer Ltd
    Sharin Shafer, fourth respondent, COO of Skinfluencer, and employed by a sister company owned by Misho Radic.
    Unnati Desai, third respondent, a contractor at the time of events, now employed as responsible manager and medical director
    Danilo Ribeiro Pires, second respondent, formerly employed by Skinfluencer as an administrator
    Cory Mateer, IT consultant
    Monica Beckles, HR consultant, Inside Advantage Ltd

12. We read from the hearing bundle those pages to which we were directed.

13. After evidence, we heard the oral submissions made by Ms Caller and by Ms Beckles, whom Mr Oswin had asked to speak on behalf of all respondents. Judgment was reserved for want of time, and the panel met again the following week to discuss and reach a decision. A large part of the decision was written in the days following, but continuous listing since has meant that completion has been delayed and it is regretted if this has caused the parties anxiety.

Findings of Fact

14. The first respondent operates a non-surgical aesthetic laser clinic in London SW10, providing cosmetic skin treatments. The fourth respondent, Sharin Shafer, was the company's chief operating officer.

15. The claimant was employed by the first respondent from 1 June 2020 as a senior aesthetician providing laser treatments, for which she had NVQ level 4 training. However the lockdowns of 2020-2021 interrupted both the demand for treatment and the ability of the clinic to supply it, and she was on furlough for some of that time. As lockdown eased she became the practice manager, beginning on 7 April 2021. The clinic was trying to attract more customers and post lockdown had relatively few staff.

16. On 8 April 202 Danilo Pires, second respondent, started work for the clinic as front of house (reception). Sharin Shafer had hired him after he came to the clinic for a video demonstration of the product. He had introduced through the claimant, who was an old friend of his partner.

First Disclosure

17. As listed, this is that on 20 April 2021, "the claimant told Ms Shafer that Mr Pires was drinking alcohol during the working day. This affected the time allocated to patients". This was an oral disclosure. There is other evidence to indicate that it took place on 10 May. The claimant's notes on the online HR system show concern on 1 May that he had shaking hands, noted again on 6 May, and that she had not discussed it with him. Ms Shafer says that her own observation did not suggest he was drinking, But she did ask Mr Pires about the hands shaking and he said that it was because he was terrified of the claimant. As he was not involved in treating clients, she left it at that.

18. Another employee called Aya Mahmoud left on 5 May 2021, lodging a grievance about the claimant as she did so. Monica Beckles was appointed to investigate the grievance. The claimant says Mr Pires's behaviour towards her was difficult after this.

19. The claimant says that around this time, on the 22nd April, her e-mail account was changed, and that as a result anyone on the front of house desk could read her emails. She says she realised this in June, after Mr Pires had left. This is alleged as detrimental treatment, breaching her privacy, because Ms Shafer was said not be very interested in the problem when reported. The claimant's case is that she behaved like this because of the first disclosure. Having heard the witnesses and reviewed such documents as there are, our conclusion is that her e-mail account was not set up so that other people could read it. It was password protected, with a password only she knew. Danilo Pires set up the email, then asked her to change the password while he turned away. The claimant produced a photograph to show her e-mail account on the front of house desk, but as we understood, it was a photograph of a laptop, not the front of house desktop. Faced with the conflict, we concluded that the claimant was mistaken about this. She may have jumped to a conclusion because other people seemed to know what she put in the emails. This could have through indiscretion, hers or others. Other evidence suggests the claimant was not a sophisticated IT user, and may well have been mistaken. An IT professional was called in to see if it could be fixed, but found no evidence this occurred. An alternative explanation, in the light of her correspondence about passwords with Ms Shafer after she went sick in July, is that she had not changed her password when it was set up (which occurred before any disclosure) so the front of house desk staff could always read her emails.

<u>Second disclosure</u>

20. On 13 May 2021, a patient was booked for a two hour treatment with the claimant. The patient was running late and got her PA to ring the clinic. The patient eventually arrived 55 minutes late. The claimant, who had not apparently been updated with the position, went ahead with the treatment, but felt under pressure to do so in the remaining hour. She believed that Danilo Pires had only booked the client in for a one hour session, and reported orally to Ms Shafer that Mr Pires was not booking the claimant's clients into two-hour appointments as he should. Danilo Pires came into the room while she was saying this and started to talk over her.

21. Next day, 14 May, Ms Shafer asked the three of them to meet to discuss scheduling. The claimant was still angry. She said that by being forced to rush complex laser treatments, there was a risk to the health and safety to patients and staff. She became vehement, getting up out of her chair and pointing at Mr Pires from time to time when he insisted he had done nothing wrong. He responded that the claimant was a bully - she recalls him saying she was a "boss bitch". Miss Shafer recalls the claimant being extremely agitated, and after Mr Pires had left the meeting, counselled the claimant that an aggressive approach to staff was not helpful. She should try to remain calm and professional. The claimant however (this is the second detriment alleged) recalls Ms Shafer telling her to get her hormones checked. That could dismissively imply that she was not acting rationally because of pre-menstrual tension or the menopause. Miss Shafer denies using those words or dismissing the claimant as irrational. She said she wanted to help and support her staff. We prefer her evidence, not least because in other respects, as we see when reading the emails and texts (of which there are many, on all kinds of routine matters, as Ms Shafer was often working elsewhere), she was constantly objective and supportive when the claimant raised problems with her.

<u>Third Disclosure</u>

22. The next disclosure alleged is that on the 18th May the claimant told Ms Shafer on the phone that Mr Pires was treating her badly, and that she felt unsafe with him. There is no detail. All we have is a note the claimant made for herself, reflecting on the 13 May episode, about the "false accusations of bullying", referencing her good record of employment with other reputable clinics, and that she was only managing as a favour, not because she had sought the job. The note itself states it is made on 18 *April*. This must be an error. Nothing in the note suggests that the content had been spoken, or that it was sent to anyone. We concluded the note was probably made in preparation for a meeting and something along these lines was discussed. Ms Shafer agrees they did meet and discuss relations with Mr Pires.

23. The claimant complains that on 21 May she was demoted by being required to train new staff on lasers, without help from the front of house staff. Ms Shafer's evidence was that it had been decided, and the claimant had agreed, as a concession to managing her high workload, that Mr Pires would train the new administrative staff to free up the claimant's time to train new staff on laser treatments. Further demotion was in evidence, on her case, on 26 May at a weekly meeting. The claimant understood she was leading the meeting, as practice manager, but Mr Pires took over. The claimant objected that this was her role. It was explained to her at the meeting that it was for Mr Pires to lead on the front of house administrative items, and the claimant the rest. The emails from the next few days (by now Ms Shafer was in Dubai) show the poor relationship: Mr Pires

was not updating the claimant with changes, failing to include breaks in the rosters, and Ms Shafer was picking this up with him.

24. On 27 May the claimant wanted to use the clinic phone so she could make an international call on clinic business - for most purposes she used her own phone. There are two handsets for the clinic line. The claimant took one from the front desk. Mr Pires followed her. There were angry words. He gave her the finger and threw another handset at her. The claimant became very upset and angry and called Dr Unnati Desai (then a contractor working for Skinfluencer two days a week), who was working at another clinic that day. Dr Desai counselled her to shut herself into a room until help came. As Ms Schafer was in Dubai, the owner, Misha Radic came round, though by now things were quiet. He had a text from Mr Pires offering to resign. Next morning he had a meeting with Mr Pires at a cafe. Following that meeting Mr Pires did not return to work. It is not relevant to this case whether he resigned with immediate effect or was dismissed.

<u>Fourth Disclosure</u>

25. Following Danilo Pires's departure, on 1 June 2021, the claimant reported to Ms Shafer alleged financial irregularities by Mr Pires: petty cash had not been updated, missing cash was not covered by receipts, and (on 2 June) £450 of product had been taken and not paid for. On this last, it seems the arrangement was that staff could take products from the clinic for own use and pay for them by deduction from wages. The amount would have been deducted from his wages had he still been employed. Ms Shafer replied she would have him settle. However, when she looked into it she found that Mr Pires had been made a final payment of wages and holiday without the deduction, and the respondent decided to write it off.

<u>Sixth Disclosure</u>

26. On 21 June 2021 (the list of issues only says "in approximately June 2021" and we take it out of order to maintain the chronology), the claimant was interviewed by Monica Beckles about Aya Mahmoud's grievance. We have the claimant's own notes of the ways in which she had found Ms Mahmoud an unsatisfactory employee. She reported to Ms Beckles that she had been attacked by Mr Pires.

<u>Fifth Disclosure</u>

27. On 29 June 2021, the claimant reported to Ms Shafer, first by telephone and then, she said, in a blind copy of an email, which we have not been able to find, that clients were being told by Dr Desai to cancel appointments with the first respondent so that Dr Desai could book them privately. The respondent's account is that during lockdown, Skinfluencer could carry out treatments as its clinic, not being CQC registered did not fall within the relevant exemption and had to remain closed, and so Dr Desai was authorised to continue booking treatments at her other place of work, which was registered; this arrangement ceased when lockdown eased.

28. The claimant's cue for this complaint seems to have been the cancellation of an appointment by one of Dr Desai's patients who the claimant would have treated (and thereby earned commission).

<u>Seventh Disclosure</u>

29. There is a concurrent background of complaints about staff removing stock for £0, though they were permitted to do so at cost, the claimant saying this had occurred since Mr Pires took over the front desk, or that staff were making refunds for customer stock purchases, refunds which were attributed to the claimant. As we read the exchanges on this, they are factual and businesslike, with the claimant reporting discrepancies to Ms Shafer and her queries being answered.

30. On 2 or 3 July 2021 the claimant reported to Ms Shafer, via text, financial irregularities, not just in the product refunds, but an entry of £450 on Mr Pires' card which was unjustified. It seems this was the entry made to write off Mr Pires's unpaid debt for product taken.

<u>Ninth Disclosure</u>

31. The list of issues records a ninth disclosure, that on 8 August 2021,the claimant wrote to Ms Beckles with details of the financial irregularities by Danilo Pires, such as the £450 refund and petty cash deficit, as already outlined to Ms Shafer. There is such an email dated 8 *July*, and we can find none for 8 August, so we assume the date given is an error, and that this was a follow up to the report of financial irregularity the claimant made to Ms Shafer on 1 or 2 July. Again we note this out of order, so as to maintain the chronology.

<u>Eighth Disclosure</u>

32. On 10 July 2021, the claimant reported, orally and in writing, to Ms Shafer, prescription stock irregularities linked to Dr Desai.

33. Our understanding after hearing evidence is that many products had to be thrown away after lockdown, because they were out of date, but that the respondent's audits do not show *in date* stock being disposed of.

34. Towards the end of July the claimant corresponded with Ms Shafer about ordering more uniform for clinical staff. Ms Shafer told her to order what was needed. Existing uniforms were about three months old, but the claimant was concerned that they did not wash well. The supplier had a long lead time for some of the sizes on new order, her size was one of them. It troubled the claimant that the front of house staff, who wore their own clothes, had recently been complimented by Ms Schafer on their designer clothing, and there were even suggestions that the business order them YSL suits for work use. She felt slighted by the comparison.

35. She was also troubled that Dr Desai was taking over the schedules. She felt that Dr Desai was treating her as a secretary. In our finding this arose from Dr Desai having to take charge (as a qualified doctor) of a particular training session at the product manufacturer's insistence.

<u>The Claimant's Stress and Absence</u>

36. On 15 July Ms Beckles carried out a second follow-up interview with the claimant on the Aya Mahmoud grievance. The claimant understood a decision would be made on grievance against her in about two weeks from then. Ms Beckles indicated there was no evidence of disability discrimination on the claimant's part (as the grievance had alleged) but there were "potential weaknesses in the claimant's management style".

37. The claimant found the worry of the wait for the outcome overwhelming. On 29 July 2021 she was signed off sick from work with work related stress. On 13th August 2021 she was referred for counselling through the NHS IAPT team, though we can see from the emails that not until December was she asked to complete the screening questionnaires for an appointment. Her GP prescribed medication.

38. Ms Shafer wanted to know the claimant's password, so that they could access her work e-mail account while she was away. She checked with Ms Beckles whether it would be in order to ask this when the claimant was off with work-related stress, and then wrote to the claimant saying she "hated to disturb" her while on medical leave, but she needed to check that client emails to her account were being attended to in her absence, and asked for the password. The claimant's reply was a history of grievance over access to her emails, in particular that the original password had been set by Danilo Pires, and the claimant had not changed it. She did not however say what it was. When Ms Shafer replied that the claimant had set her own password, and it was not known to Mr Pires, the claimant responded again that she had *not* reset her password, and Mr Pires would know what it was. Miss Shafer checked the master password sheet. The claimant's password was not there.

39. On 7th August Ms Beckles sent the respondent her investigation report. The tribunal has only seen the extracts that relate to the claimant . She did not uphold the grievance that the claimant had bullied Ms Mahmoud generally or because of dyslexia, the claimant was unaware she had dyslexia. However, she recommended that the first respondent arrange some management training for the claimant, commenting "the evidence does show that most, if not all, staff at Skinfluencer find GG (the claimant) to be a challenging manager and can be affected by the weaknesses in her management style and potentially high expectations".

40. On 6 August the claimant queried her salary payment for July. The accountant replied on 11 August that she had been paid an extra 30 hours, to reflect the 24 hours overtime she had done over three Saturdays.

41. In mid-August 2021 (it is common ground that the reference in the list of issues to August 2022 is an error) the claimant approached a recruitment consultant she had previously used to find staff for Skinfluencer, John Sellars, saying she was looking for a job. He declined to take her on, giving as his reason that he could not poach staff from Skinfluencer as they were a regular client. It is alleged that Ms Shafer prevailed on the recruiter not to work for her. There was no evidence of contact between them, and our reading of the exchange is that not wanting to poach was a perfectly proper commercial consideration, and that word of the claimant's approach to him had never reached Skinfluencer.

42. The claimant instructed solicitors. They wrote to the respondent on 13th August 2021. (Because the letter is headed "settlement offer - without prejudice", and might have been included by the respondent in the bundle in error, we did not read this document until the claimant had been able to confer with her solicitor, who confirmed that privilege in this correspondence *had* been waived.) The writer told the respondent that the claimant had been bullied for over a year by multiple staff members, at times actively enabled by Sharin Shafer, and more recently singled out for reporting health and safety concerns and financial irregularities which amounted to whistle blowing. She could not

continue to work like this and intended to resign, and claim automatically unfair constructive dismissal. There would also be a claim for unpaid commission. The letter went on about treatments she had done being deleted from the system and covered up. By contrast, the claimant's complaints about Danilo had been set up so that everyone, including Danilo, could see them. This was because of her whistle blowing, as was the matter of the uniforms, and changes in her job remit without notification, and conflict with Dr Desai over training. Ms Shafer had promoted the work of staff who no longer worked for the company while refusing to promote the claimant's work, and had taken credit for the claimant's treatments in magazine interviews. There was a claim of disability discrimination related to ADHD and stress, because of conversations with Dr Desai about her medication for these conditions which were unwelcome to the claimant. There was a harassment claim related to Danilo's conduct in the 27 May episode. There was a refusal to investigate it by checking CCTV. This was related to sex. She had been allocated 1% commission when the industry standard was 5%. She had been missing her May 2021 pay slip until it was recently requested. She had only been paid commission twice, in December 2020 and May 2021, in a sum of under £600, whereas it was calculated she was owed 5% of earnings which amounted to £6,629. The system understated the value of her treatments because of financial irregularities. The letter ended with a proposal to settle the claim as an alternative to litigation, and with the suggestion that she would remain on sick leave until an exit agreement had been reached.

43. The respondent had recruited staff who needed to be trained on new equipment, and wanted to do the training in mid- August. At this point Ms Shafer asked the claimant where her laptop was, as it could not be found at the clinic, and she was asked to bring it back or tell them where it was.

44. The trainer identified that some of the equipment was not in a suitable state. A lack of cleaning to a needle was noted, and damage to a lens.

45. Monica Beckles had been asked to respond to the solicitor's letter. She wrote on the 31st August 2021. She suggested that "bullied for over a year" was an exaggeration, as the claimant had started work in July 2020. There *had* been some trouble with the previous practice manager, but she had left in December 2020. The clinic had been closed in November 2020, and then from December 2020 to April 2021, at which point the claimant became the practice manager. They were aware of the incident with Danilo, but not of other threatening incidents. They were in the dark about the health and safety allegations, but understood this was to do with two former employees not returning their clinic keys on leaving; in other respects their health and safety policies exceeded those of an anaesthetic clinic. There was a specific explanation of why some of Dr Desai's clients had been treated at her private clinic during lockdown when the respondents clinic was closed, but asserted that since reopening she treated the respondent's clients at the respondent's premises. It was denied that Dr Desai had ever given other than favourable reports of the claimants work: they were good friends. Dr Desai did not supervise the claimant, as she was not an employee. The grievance investigation was not designed to manage the claimant out of the company but to investigate a grievance by another member of staff about her. The grievance report would be shared in due course. The claimant had never raised the concerns in the letter in her two investigation interviews, other than the incident with Danilo, and with the former practice manager. The uniform issue is explained, her requests for new uniforms had not been obstructed. It was denied that Ms Shafer wanted to get the claimant out of the business, it was Ms

Schafer who had invited the claimant to work there, and given her continuous support when out of the country. The change in front of house responsibility related to the claimant's need to train 2 newly recruited aestheticians. On workload, the claimant had been given a back dated pay increase in June 2021, from £60,000 to £70,000 per annum, a salary double that of the previous practice manager. Aestheticians, her main role, were paid £45,000 per annum. There was an account of the training episode involving Dr Desai and the equipment provider Allegan – that Dr Desai supervise this session was the requirement of the equipment provider, not Skinfluencer. Both the claimant and Dr Desai were required to train. The allegation of suppressing the claimant's social media presence was denied. Explanations were given: the claimant had drafted web content herself. On the disability discrimination allegation, it was pointed out that Dr Desai was a personal friend, not an employee of the company, when talking to the claimant about her medication, and she had not reported on any disability to the respondent. Turning to the harassment, they had believed the claimant's account and had terminated the employment of the alleged assailant. The claimant's duties had not been changed by Ms Shafer taking responsibility for managing front of house staff. There was no CCTV footage relevant to the 27 May incident and she had not been discouraged from going to the police. They had earlier attempted to mediate between the two. On the commission claim, there was no written agreement about the level of commission in the contract of employment. She had never generated enough monthly revenue to trigger more than 1.5% commission in the structure that had been shown to her. They were concerned about her health, but did want her to tell them where the laptop was, and also her (paper) personal file, which was missing.

46. On 8th September Ms Beckles wrote to the claimant direct, copying her solicitors, about returning the laptop if she had it, as it was "causing significant difficulties to clinic and hindering revenues". If it was not returned by 10th September they would have to take disciplinary proceedings. They also wanted the personal file back – not having it had prevented them from posting her a letter.

47. There had been another training session on 7th September. The external trainer had noted that the wrong size pin had been left in the hand piece of the equipment used by the claimant.

48. The claimant did return the laptop and HR file, but, as Ms Beckles wrote on the 15th September, the claimant's signed contract of employment, and her confidentiality agreement, had been removed from the file. The password to the laptop had been changed, and so Skinfluencer could not access it. She was also told that "a number of issues have arisen over the past two weeks" which they wanted to discuss. She was invited to a meeting about this on 20th September, or, if not convenient, to propose another date.

49. The claimant's solicitor replied on 16th September with more detail of Mr Pires's alleged drinking, the appointment booking, the allegations of financial irregularity, and emails displayed on a public computer. The letter concluded with a reference to having started early conciliation, and a desire to settle as an alternative to tribunal proceedings.

50. The claimant did not attend the proposed meeting. Miss Beckles proposed an alternative date, on the 14th or 15th of October, to investigate issues which had come to light in her absence.

51. At the beginning of October the external trainer had reported damage to a six millimetre lens, which had not come to light at the earlier training on 18th August because it was a type of training. They concluded it been damaged at an earlier stage. There is a detailed report of the technicalities. The conclusion was that the fault was likely to have occurred because the lens had been dropped. The cost was £800 and £3,000 (it is not clear which of these is the lens, and whether any other damage was being attributed to the claimant).

52. On 25th October the respondent wrote to the claimant’s solicitor again, having tried to phone or e-mail to set up a meeting without success. The allegations of lack of communication with the CEO, website images, the complaint made about the claimant, training and working hours, were discussed, with comment that the claimant had been seeing private clients on Sundays and Mondays, her days off, which would account for why she felt strained. The explanations of the financial irregularities, role changes and health and safety were repeated. On meetings, no decision had been made about disciplinary action, they were simply investigating. Coming to the final point, the suggestion they should negotiate a settlement, she said the claimant had the right to terminate her employment if she wished to do so, and Skinfluencer was prepared to discuss whether she needed to give notice, but that would be the extent of any negotiation.

53. A member of staff informed Ms Beckles that some of the claimant’s clients were returning for treatment under packages of treatments they had purchased, but as no notes had been entered by the claimant to show the parameters used in treatment, they would have to start the packages again with preliminary consultation and patch testing. This would cause loss to the clinic, as they could not charge the patient twice for this. Ms Shafer wanted to add this to the matters to be investigated.

54. The claimant was next asked whether they could get a medical report from her GP, and also whether the GP fit notes stating that she was not fit for work could specify whether she was able to attend meetings. Ms Beckles also sent the claimant a draft letter of instruction to her GP on 2nd December, and invited her to fill in a consent form. The dray letter was asking about SDHD, which the client had reported to Ms Shaker in June 2021. The claimant’s response (16th December) was to ask if they would correct the name on the authority from Shaker (the surname by which she was known at work) to Kekati, her real surname. The change was made, and the claimant signed the form authorising disclosure of records for the purpose of making a report to her employer. However the doctor was never instructed.

55. Moving into the new year, on 17 January 2022 the claimant sent Misho Ravic and Monica Beckles a “formal complaint” against continued victimisation stemming from whistle blowing concerns. She said she had escalated her concerns about health and safety and financial irregularities between April and June 2021 and they were dismissed. As a reaction to workplace stress, and being victimised for whistle blowing, she had been on sick leave from the end of July. Once on sick leave there had been further acts of victimisation - misuse of disciplinary process, withholding the conclusion of the investigation into her conduct (the Aya Mahmoud grievance) and discrediting her name to other members of the aesthetic community. She asked for a response, with proposed action, in two weeks.

56. By 8th February 2022 there had been no reply. The claimant resigned. She listed bullets as examples of victimising conduct for making protected disclosures, such as not taking action on her report of a health and safety concern, a staff member's drinking, interference with her job duties and humiliation from that, failing to obtain the CCTV of the attack on her by Danilo Pires, not changing the entry code, or investigating reports of health and safety prior to the attack, covering up financial irregularities and substance abuse, not promoting her online, not paying commission or overtime, tampering with evidence, trying to access medical records of no relevance when on sick leave, misusing disciplinary processes, giving her promotion to a new recruit, and discrediting her name with suppliers, recruiters and regulating bodies. That continued failure to address her concerns and to prevent further victimisation was incredibly disappointing. Her position was now untenable and she was resigning. They should collect the clinic keys from her.

57. Mr Ravic wrote on 11th February accepting her resignation.

58. The reference to a promotion mentioned in the resignation letter concerns an appointment as "Global Trainer". The respondent needed to train someone in Dubai. Earlier in the year it had been suggested the claimant would be suitable. In December 2021 they recruited externally (in fact someone resident in the Middle East). They say this was because the need for someone to train staff was now acute, and they did not know when or if the claimant would be returning to work.

Relevant Law

59. The statutory protection of whistleblowers is set out in the Employment Rights Act 1996. The purpose of the legislation is:

> "to protect employees…for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have an early knowledge of them, and protecting the respective interests of employers and employees" –

L. J. Mummery in **ALM Medical Services Ltd v Bladon (2002) IRLR 807.**

60. Section 43B of the Employment Rights Act 1996 sets out how a disclosure qualifies for protection. It is:

"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—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
….
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
…."

61. The disclosure qualifies for protection if made to the employer (among others) - section 43C.

62. There must be a disclosure of information, rather than a bare allegation - **Cavendish Munro Professional Risks Management Ltd v Geduld (2010) ICR 325**, although an allegation may accompany information. **Kilraine v L.B. Wandsworth(2018) EWCA Civ 1436** makes clear that the disclosure must have "sufficient factual content" to make it a disclosure of information and not just an allegation.

63. The disclosure need not identify the breach of obligation by name, provided it is clear from context what is meant. Breach of legal obligation means more than something being immoral or wrong- **Kilraine v Wandsworth LB (2018) IRLR 846, Korshunova v Eiger Securities LLP (2017) IRLR 115.** Reasonable belief is subjective (the worker must actually believe it) and objective (the worker must have good reasons for believing it).

64. Tribunals must approach the question of whether there was a protected disclosure in structured way. They must consider whether there has been a disclosure of information. They must then consider whether the worker held a belief that the information tended to show a class of wrongdoing set out in section 43B (the subjective element), and whether that belief was held on reasonable grounds (the objective element). This is not to say that the belief in wrongdoing must have been correct, as a belief *could* be held on reasonable grounds but still be mistaken - **Babula v Waltham Forest College (2007) ICR 1026, CA.** Then the tribunal must assess whether the claimant believed he was making the disclosure in the public interest, and finally, whether his belief that it was in the public interest was reasonable. The belief in wrongdoing or public interest need not be explicit. As was said by the EAT in **Bolton School v Evans**, "it would have been obvious to all that the concern was that private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to potential legal liability".

65. **Chesterton Global Ltd v Nurmohamed (2017) IRLR 837** confirms that a claimant's genuine belief in wrongdoing, the reasonableness of that belief in wrongdoing, and his belief in public interest, is to be assessed as at the time he was making it, though *reasons* for believing it was in the public interest to make the disclosure can come later. Public interest need not be the predominant reason for making it. Public interest is not defined. It can be something that is in the "wider interest" than that of the whistleblower- **Ibrahim v HCA International**. The whistleblower may have a different *motive* for making the disclosure, but the test is whether at the time he believed there was a wider interest in what he was saying was wrong. Finally, although the belief must be reasonable, the disclosure does not have ti be nade in a reasnabke way. As the Court of Apeal said in In **Beatt v Croydon Health Services NHSTrust (2017) EWCA Civ 401**, the Court of Appeal said:

> " it is all too easy for an employer to allow its view of a whistleblower as a difficult colleague or an awkward personality (as whistleblowers sometimes are) to cloud its judgement about whether the disclosures in question do in fact have a reasonable basis or are made (under the old law) in good faith or (under the new law) in the public interest."

66. Each of these five questions must be answered for each disclosure in order to decide whether it was made and whether it qualified for protection.

67. By section 47B(1)A:

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

68. Detriment means being put at a disadvantage. The test of whether someone has been disadvantaged is set out in **Shamoon v Chief Constable of RUC (2003) UKHL 11,** and the test is whether a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment - **Jesudason v Alder Hay Children's NHS Foundation Trust (2020) EWCA Civ 73.**

69. The test of whether any detriment was "on the ground that" she had made protected disclosures is whether they were materially influenced by disclosures– **NHS Manchester v Fecitt (2012) ICR 372**. This is less stringent than the sole or principal reason required for claims about dismissal. When it comes to dismissal, rather than detriment, section 103A provides:

    An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

70. The Tribunal is required to make a careful evaluation of the respondent's reason or reasons for dismissing her - or subjecting her to other detriment. This is in essence a finding of fact, and inferences to be drawn from facts, as a reason is a set of facts and beliefs known to the respondent - **Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA,** and **Kuzel v Roche Products Ltd (2008) IRLR 530, CA**.

71. In assessing reasons, tribunals must be careful to avoid "but for" causation: see for example the discussion in **Chief Constable of Manchester v Bailey (2017) EWCA Civ 425 (**a victimisation claim), and **Ahmed v Amnesty International [2009] IRLR 884.** However, it is not necessary to show that the employer acted through conscious motivation – just that a protected disclosure was the reason for the dismissal (or grounds for detriment)– what caused the employer to act as he did - **Nagarajan v London Regional Transport (1999) ITLR 574**. These cases concern the Equality Act, but the same considerations apply to analysis of why the employer acted as it did in the context of a protected disclosure.

72. Thus, when deciding whether disclosures were protected, the tribunal focusses on the employee's state of mind at the time, and when deciding what followed from any disclosures being made, the tribunal examines the employer's state of mind.

73. There may of course be more than one reason why something occurred, and there have been cases where a tribunal finds that although the disclosure was the occasion of detriment, it is not the disclosure itself, but some feature of the way it was made that is the reason for unfavourable treatment. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment, for example, but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances, for a distinction to be

drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed. Tribunals must however take care not to diminish statutory protection for whistleblowers by accepting arguments about there being a different reason. For example, in **Aziz v Trinity Street Taxis, (1988) ICR 134,** making covert recordings was held to be the reason for expulsion, not that they were intended for use in tribunal proceedings**,** and in **Bolton School v Evans (2017) IRLR 140** an IT technician was dismissed for hacking into the school IT system to prove a point he had been making (in protected disclosures) that the system was insecure, and it was held he was dismissed for hacking, not for his disclosures insisting it was insecure. In **Martin v Devonshires (2011) ICR 352** (a victimisation case) the person making extravagant allegations was ill, and it was held her difficult behaviour was the reason for dismissal, not making the allegations themselves. In **Panayiotou v Hampshire Police (2014) IRLR 500,** a police officer who had made a series of disclosures (which were heeded and investigated) was eventually dismissed because he persisted because the outcome of his complaints was not as he wished, and his complaints took up too much management time. While the employer's decision was upheld, in so doing the EAT drew attention to a passage in **Martin** as a warning:

> "Of course such a line of argument is capable of abuse. Employees who bring complaints often do in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purposes to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle."

Discussion and Conclusion

74. We discuss detriments and disclosures in chronological order where we can, as a clearer way to test the relationship between disclosure and detriment.

75. The first disclosure is the report that Danilo Pires had been drinking as his hands shook. This is information. The claimant states this suggests a matter of health and safety. Conceivably it is also a breach of legal obligation, since it might be implied into most employment contracts that employees must not be impaired by alcohol when at work.

76. Her belief was real, and reasonable, even though mistaken if she did not detect other evidence of alcohol consumption or consider alternative explanations. The respondent argues that as Danilo Pires did not treat patients, there was no risk of injury through alcohol impairment and no element of public interest. The panel concluded that although an employer would want to know whether reception staff were under the influence, because they might not be working effectively, or damage the reputation of the business, it was not a matter of public interest that a receptionist and administrator had been drinking. The risk to health and safety, whether of staff or patients, is hard to detect. For instance, he did not enter treatment details, that was the task of staff carrying out treatments. This disclosure was not protected.

77. The list of issues says the report was that he was booking patents into the wrong slots. We find this is mistaken. The short appointment was not until after the report of

shaking hands. In other evidence the claimant suggests that if drinking he might become violent. In our finding this is a later addition, not something she believed at the time.

78. The detriment following this is the email setting on the front desk. In our finding this is not made out. Further, even if the first disclosure is protected, it had no influence on the setting son the claimant's email account.

79. The second disclosure is that Mr Pires was booking patients for only one hour for certain treatments when it should be two. The claimant's belief arose from the patient running late. It is also the only example of insufficient time. Her belief was not reasonable. Even when explained, then or now, she did not accept that the patient had been booked for two hours. She was annoyed because she had felt under pressure. Had her belief been reasonable, we would accept that there was a public interest element of the safety of patients undergoing laser treatment.

80. The detriment that follows is the remark at the meeting held the following day to discuss the episode. We do not accept that there was detriment because she had brought patient booking times to Ms Shafer's attention, although it was the reason for having the meeting and the occasion of the remark. Ms Shafer noted the claimant's anger and agitation and she was counselling her to remain calm when managing colleagues. This because of the claimant's behaviour, not because she had raised a patient booking issue.

81. As for the third disclosure, as discussed, the date is unclear. We accept the claimant did tell Ms Shafer she felt bullied by or unsafe with Mr Pires. We cannot see that this was a matter of public interest. Her relations with him may have been difficult, as they were with Ms Mahmoud. However there was no reason at the time to feel a threat to her safety. Nor did the claimant see it as a matter of public interest. It was about her difficulty working with Mr Pires. The third disclosure is not protected.

82. The detriments alleged that follow in time reflect the conflict between the claimant and Danilo Pires. In our finding Ms Shafer separated their duties partly because the claimant was (as she was complaining) struggling with the workload and it made sense to devolve some administration to Mr Pires, and partly because on occasion it made sense to allocate the training to the claimant, which Mr Pires was not qualified to do.

83. As for the episode on 27 May, in our finding this was simply an extreme example of the poor relationship between the claimant and Mr Pires. He lost his temper when she took the handset from his desk; she has never suggested she said anything to him when she took it. It was not because she had disclosed information about his drinking (we do not know if he had become aware of it). He may have been irritated by her accusations of booking a one hour appointment instead of two, but irritation is more likely to have been from the client's agitated and accusatory manner when she spoke about it, as noted by Ms Shafer. There is also evidence from her own contemporary reflections on the relationship that it was difficult before the patient booking episode. In reaching this conclusion we are aware of the discussion in **Martin** and **Panayiotou** about taking care to distinguish content from manner, and are clear that it was not the content, but that they already had a very difficult relationship.

84. The fourth disclosure is protected. The claimant disclosed information about financial irregularity. There were discrepancies. They might be bookkeeping errors or they might be evidence of pilfering. The belief was reasonable. The claimant did not have to be right, but it was reasonable to believe they required investigation. The disclosure tended to suggest that a criminal offence could have been committed.

85. The next (sixth) disclosure is the report to Ms Beckles that Mr Pires had attacked her (the episode when he threw a handset at her). This was a disclosure of information, the claimant reasonably believed he acted aggressively towards her, conceivably it was a criminal assault, although it was not reported to the police by the claimant or anyone else. The lack of report tends to suggest the claimant did not make it in reasonable belief that it was in the public interest. She has suggested she was told not to report it and this is explicitly denied. She was reporting it to Ms Beckles now a month after the event (Ms Shafer and Mr Radic already knew), more particularly after Mr Pires had left, so there was no question of making the disclosure to protect herself or other staff from aggression. The context was an interview about accusations Aya Mahmoud made about the claimant. In our finding the disclosure was not made in the public interest.

86. Around this time (last week in June or early July) the claimant says she was no longer able to get emails from some clients – clients had asked why she had not replied to their emails. There was very little information about this. On 8 July Ms Shafer asked the IT contractor, Naveed, to check, as the claimant reported not finding client emails. The claimant had already involved Cory Mateer. Neither could find a fault specific to the claimant and it was concluded on 10 July that there as some wider system issue. The claimant complained to Ms Shafer on 22 July that access to personal email (rather than clinical email) was an ongoing problem. We concluded that there is no evidence this was more than some unexplained IT glitch. It did not occur because of any disclosure.

87. The fifth disclosure (29 June, Dr Desai booking Skinfluencer patients at her own practice) is potentially one tending to suggest breach of obligation by Dr Desai, but there was almost no evidence of what the claimant said, or in what context, or why she believed this – in her witness statement she refers to documents but the page numbers, whether electronic or paper, do not help. In the absence of evidence it is not possible to say whether or when it was said or whether the belief was reasonable, or whether she made it in the public interest. This disclosure is not shown to be protected.

88. The seventh disclosure reports further financial discrepancies, and, like the fourth, is protected. The same goes for the ninth (8 July), when the same matter was reported to Ms Beckles.

89. The eighth disclosure (10 July) concerned Dr Desai allegedly deleting in-date stock. Stock (both clinical supplies and equipment) was being checked after the interruptions of lockdown. By then all rooms had been checked bar one. We concluded there was not enough evidence of when the claimant said this, in what terms, or why, to be able to conclude that the claimant had a reasonable belief in what she said or that she made it in the public interest. The bundle pages she refers

to are not about disposing of in date stock but about discrepancies in client refunds and are not about Dr Desai. The respondent's explanation (that only out of date stock was thrown away) does not help establish when or whether the disclosure was made. Insofar as it might suggest dishonest appropriation (for use in a private practice for example) it could be capable of being made in the public interest, but there is not enough evidence to find that this was a protected disclosure.

90. The next detriment concerns uniforms. The fact suggest the claimant was jealous of front of house staff being admired, but not that Ms Shafer should have given the claimant better uniform. The evidence shows that Ms Shafer responded promptly and reasonably to request for new uniform, authorising the claimant to order it.

91. Next is a general allegation of Ms Shafer sending disparaging emails in July 2921. The witness statements do not specify what they were. We comment only that when the claimant brought matters to Ms Shafer's attention (such as financial discrepancy or uniform) the responses were practical and prompt. The claimant has not established there was detriment, let alone on grounds of any protected disclosure. Nor do we accept that Dr Desai treated the claimant as a secretary. There was one occasion when she was asked to transcribe a dictated letter. The claimant does not discuss it in her witness statements. Ms Shafer knew nothing about it. There is no indication that it was because of any disclosure.

92. The next detriment alleged is that Ms Beckles "tampered with" the statement she prepared after the interviewing the claimant in the course of her investigation of Aya Mahmoud's grievance. We can see that Ms Beckles did edit the statement, and the claimant was not asked to approve the statement, as would be expected. However, we could not see that any of the edits were to the claimant's detriment.

93. As for the request on 1 August for her password, we do not accept this was detriment. There are just two emails. They are respectfully and carefully phrased. It was objectively reasonable to ask what it was so that emails addressed to the claimant by patients and suppliers of the business could be answered. The claimant's replies were unhelpful. The claimant's sense of grievance is not reasonable.

94. The next detriment in time is that the respondent impeded the claimant's search for another job. On the facts they did nothing, and were not aware she was looking for work. The scruples were those of the recruiter and are for good commercial reasons, not because of any disclosure.

95. Detriment number 11 is about the respondent's application to CQC for a clinic licence. They did not need one for the type of work, but would have found it useful to have one during lockdowns and they would not then have had to close to the public. In February 2022 the claimant rang CQC on whether the respondent was in breach of regulation or needed a licence. We have the transcript of her conversation with an informed call handler. From this we learn that the respondent had applied during lockdown for registration. Misho Radic had not been accepted as a registered manager and they had not proceeded with the application. The call handler said "the only issue is that it needs a registered manager", to which the claimant replied "that's me, I'm the manager". We understand from the evidence that the claimant did not have the qualifications to be a registered manager. She mistook that term for being practice manager. In any case, at the time of the alleged detriment, which is that in

September 2021, Ms Shafer told the regulator that it was the claimant's fault registration had been refused, the claimant was not involved in any application, and she was on sick leave. Ms Shafer had not suggested that the claimant was the registered manager or should be the registered manager and was unsuitable. The respondent had never had a licence to suspend The claimant has simply got the wrong end of the stick about being the relevant manager.
There was no detriment.

96. Detriment 12 is about "spurious disciplinary allegations". These are the concerns about damage to equipment caused by the claimant's failure to clean it, alternatively the claimant dropping it, that Ms Beckles wanted to investigate. We do not find that allegations were spurious. Equipment faults came to the respondent's attention when third parties were called in to train other staff and procedures the claimant was not able to carry out because she was away sick. There are written reports from two different trainer visits which go into detail. No one else had used it since the claimant went sick. There was something to investigate. It may not have been the claimant's fault or it may have been a mistake. There may have been a good reason why she was said to be using the wrong size needle. The respondent was not able to follow this up or come to a conclusion because the claimant did not come to a meeting. For the same reason the tribunal is not able to make findings about whether the claimant was or was not at fault. We can only conclude that there was something to investigate based on third parties information, and there is no reason to hold that any previous disclosure in wanting the claimant to explain damage to equipment, missing equipment, that caused expense.

97. Possibly the only error on the respondent's part was not informing the claimant what it was about before summoning her to a disciplinary meeting, as opposed to an investigation meeting (as to begin with it was). In our finding, it was not to the claimant's disadvantage to want to discuss damaged equipment, nor, if it was an investigation not to give her details of what the meeting was about. It was part of the normal procedure where an employer is concerned about competence or conduct. By the time she was invited to a disciplinary meeting, the respondent's concern was that her failure to attend any meeting was not reasonable: she been asked if a GP would say whether she was fit to attend a meeting, rather than just unfit for work; a discussion with her solicitor showed that she would not was not prepared to attend any online meeting, but might reply to written questions. The invitation to a disciplinary meeting without saying what it was about was not because she had made any protected disclosure, but because she was not prepared to answer questions.

98. Detriment 13 is about the first respondent's marketing blogs and whether they promoted the claimant. On 30 July 2021 she asked why someone called Nadine (in fact the claimant's predecessor as practice manager) was named as carrying out treatments on respondent's website, but the claimant was not there. Nadine had left some time before. This is relevant because it was part of marketing that potential patients would ask for aestheticians by name, and they could then earn commission. The respondent's explanation was that they had decided not to name individuals except in press releases. Nevertheless, the claimant found Nadine's name still there in March 2022. As far as we could see, Nadine was the only exception to the respondent's policy of not naming staff. There is no evidence that any other staff were named in blogs. Our conclusion is that Nadine was left on by accident, and the

claimant not named in accordance with a policy of staff not being named, not because the claimant had made a disclosure**.**

99. Detriment 14 is about the claimant not being considered for the post of global trainer. Sometime earlier she had been told that she might be considered for this post in due course. By December 2021 the respondent needed a trainer (the immediate need was in the Dubai clinic) and could not wait. The claimant was not in the workplace and there was no sign of her returning to work. They found someone in Dubai with suitable qualifications. The tribunal is satisfied that these are good business reasons why the claimant was not considered for the post, and that protected disclosures played no part in the decision.

100. Detriment 15 is the factually incorrect letter to the claimant's doctor. The evidence demonstrated that the claimant was upset that she was named as Shaker not Kekati. When pointed out the change was made immediately. The erroneous consent form was not sent to the claimant's GP or to anyone else. It is readily explainable as an error unrelated to any disclosure. It was not (reasonably considered) a detriment. There was no intent to disparage or insult the claimant.

Constructive Dismissal

101. Detriment 16 is the constructive dismissal. Dismissal of itself is not a detriment. The claimant's solicitors submitted that the respondent acted in breach of contract by pressing the disciplinary hearing without any input from the claimant, who reasonably felt victimised. She presented a grievance and asked for a reply, but after three weeks when nothing came back, she resigned in distress. The cause of the resignation, it was submitted, was negative treatment because she had raised protected disclosures, the respondent did not want to deal with them, they just wanted to run a clinic, the claimant was to keep quiet, they would not deal with regulatory issues; they wanted to manage her out, and eventually succeeded.

Constructive Dismissal – Relevant Law and Discussion

102. Where an employee resigns she must first establish that in law this amounts to a dismissal. By section 95 of the Employment Rights Act 1996, a dismissal can occur where:

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

103. As made clear in **Western Excavating (ECC) Ltd v Sharp (1978) IRLR 27**, it is not enough that the conduct is unreasonable. It must amount to a fundamental breach of the contractual employment terms such that the employee can treat the contract as at an end by reason of the employer's repudiatory conduct. **Woods v WM Cars (Peterborough) Ltd (1981) IRLR 347**, upheld in the Court of Appeal, and approved by the House of Lords in **Malik v BCCI** makes clear there can be:

> "implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of

confidence and trust between employer and employee. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract. The Industrial tribunal's function is to look at the employer's conduct as a whole and to determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

104. Where there are a series of actions they can be looked at cumulatively. The precipitating cause may not be weighty of itself but prove to be the last straw – **Omilaju v Waltham Forest (2005) ICR 481**.

Discussion and Conclusion – Constructive Dismissal

105. The claimant identified in her January 2022 formal grievance that the respondent had misused the disciplinary process, that they had discredited her within the profession, and that they had withheld the report into Aya Mahmoud's grievance.

106. In our finding, the disciplinary process had not been misused. There were questions to answer it cannot be said that inviting the claimant to a meeting to discuss allegations was a breach of the duty of trust and confidence entitling her to treat the contract as at an end. We do not understand why it is said that she had been discredited within the profession. No one (except Nadine) was identified, and it was plain to us that the first respondent overlooked her blog being still on the net, as she had left a year earlier. They had not been in contact with any recruiters about her. They hoped she would return to work. As for withholding the grievance outcome, it seemed to us that it was reasonable for an employer to wait for an employee to return to work to discuss it with her, as the conclusion was going to be difficult news that required discussion with the claimant. It would be damaging to the employment relationship simply to send a report that concluded that while the bullying was not upheld the claimant was a difficult manager who required some training. Clearly a reasonable employer want to discuss this in person. We can understand why the claimant was very anxious about being under investigation, but not that this is a breach of the duty of trust and confidence. We cannot see that the claimant ever enquired about the outcome, or suggested that any of her stress was because of the impending investigation. Had the employer understood from her that some report back - even while she was off sick with stress - would be welcome, they might have made arrangements, but as it was, the news required a meeting, and the claimant was not fit for meetings. The suggestion that the claimant was being "managed out" in some way does not stand up. When she was working Ms Shaker had dealt with her queries in a straightforward way. The investigation was conducted by Mr Beckles neutrally and properly. Interaction after she had gone sick was complicated by the intervention of solicitors seeking a financial settlement, the announcement suggestion that she would not return without one, but correspondence, whether with the solicitors or with the claimant herself, was conducted straightforwardly and in a factual way. As for the respondent's failure to answer the formal grievance in January as promptly as the claimant wished, it would have been desirable for Mr Beckles to respond with some indication of the likely timescale for response, but we cannot say that this failure of itself, in a period of two to three weeks, is a breach of trust sufficient to treat the contract at

an end. It is suggested that this was a “last straw”. In our finding, there was by that date not enough straw heaped up by any breach of trust and confidence alleged for this last straw to break a camel’s back.

107. In her resignation letter the caimant complained of the failure to investigate whether Mr Oires had assaulted her the day before he resigned. We were tod they had not pulled CCTV because it faced the client entrance, not where the claimant sat, and it had never been said she should not report it to the police. In our finding, any failure to investigate what happened was because he had left. He could not be disciplined for misconduct. There is nothing to suggest the respondent disbelieved the claimant’s account, or that a failure to do so was because she had made a protected disclosure.

108. If we are wrong in our conclusion, and this was a dismissal, the reason for the respondent’s conduct that caused the claimant to resign was not for the sole or principal reason that she had made disclosures. They invoked the disciplinary process because of reports by independent trainers which would have prompted investigation absent any disclosure. The Aya Mahmoud investigation was because Ms had alleged the claimant discriminated against her because of disability. It was not because the claimant had made any disclosure. We also note that the report said that all staff found the claimant a difficult manager. The conclusion that her management style was problematic was based on evidence not limited to her relations with Danilo Pires and her disclosure that she believed him to be drinking. The complaint by Aya Mahmoud about her was *not* upheld. If the claimant is right that it was a breach of trust not to share the outcome report with her by the time she resigned, we do not find that was because the claimant had made disclosures, but because a reasonable employer could decide that it would do more harm than good to share it with her when she was off sick with stress.

109. We record that the claimant lacked the qualifying service required to make a claim for unfair dismissal under section 98, rather than section 103A of the Employment Rights Act.

Commission

110. This is the first of three claims for unpaid money: the others are for overtime and for a deficit on final payment. They are either brought as claims in breach of contract, or as unlawful deductions from wages. An unlawful deduction claim is brought under section 23. The tribunal must find what was ‘properly payable’ (section 13) on the relevant date, and how that differs from the amount actually paid. Time to bring a contract claim runs from termination.

111. The claimant was paid commission on two occasions: £219 in December 2020 and £235.60 in May 2021. She claimed £6,628.90 by the solicitor’s letter in August 2021. The schedule of loss claim is £6,135.85.

112. The contract of employment refers only to there being a commission structure. The respondent says the claimant was shown it. This was not disputed, and we can see a message dating from December 2020 that it was sent to her. The commission structure document is a table showing staged commission depending on earnings. For earnings between £15,000 and £30,000 commission is paid at 1%, from

£30,000 to £50,000 at 1.5%, and the maximum is 10% on earnings between £150,000 and £200,000. Ms Shafer said she had considered raising the threshold in view of the claimant getting a higher salary on promotion to practice manager, but left it as it was, at £15,000. Despite what was said in the solicitor's letter in August 2021 about 5% being the industry standard, we have been taken to no other document, or to other evidence on this. In our finding this document was the agreement about commission.

113. In the late supplementary witness statement the claimant disputed the figure for commissionable earnings for June (£30,976 rather than £23,559) but we were not taken to any record on which this is based and Ms Shafer was not challenged on the calculation either. We can see that when queried in August 2021 Ms Shafer had confirmed no payment was due for July because the claimant's revenue was only £12,000. We are not satisfied that the respondent's calculation is wrong. The claim for unpaid commission is not proved.

Overtime

114. When an aesthetician, the claimant worked 30 hours over three days for £45,000 per annum, and when she became practice manager she worked 40 hours over four days for £60,000 per annum, a pro rated increase. The contract of employment states: "normal working hours are 10:00 am to 8:00 pm. As with all service industries… fulfilment of your responsibilities may naturally require flexible or extended working hours. You may be, upon occasion, be required to work such additional hours during your normal working days as may be necessary for the proper performance of your duties without remuneration". There is no provision for overtime, and the claimant's assertion in the claim form that "my contract also states that overtime is paid" is not made out.

115. In July 2021, the claimant worked three Saturdays in addition to four days in the week. Miss Shaffer instructed the accountant to pay her 30 hours pay in addition. In evidence she said a Saturday was 8 hours, not 10, but she wanted to be generous. She recognised that as practice manager the claimant was in any event working long hours, and it was partly for that reason that she had increased her pay on 16 June 2021 from £60,000 to £70,000, backdated the 1st June.

116. In our finding, the claim for unpaid overtime is not proved.

117. Unlawful Deductions

118. An overpayment of £1,382.21 was deducted from the claimant's final pay of February 2022.

119. By section 14(1)(a) of the Employment Rights Act an exception is made to section 13 were the deduction reflects an overpayment.

120. The respondent's explanation for the deduction from the final salary payment was given to the claimant in a letter from Ms Beckles, on behalf of the first respondent, dated 13th April 2022. It was explained that in April 2021 she had inadvertently been paid her gross salary of £4,469 and the salary due net of deductions, of £3,2804.48. It was said the accountant had explained this at the time. She was referred to the

April 2021 pay slip, and a further copy was enclosed. The difference was £1,382 21. They had then credited to her a payment of £548.74 which had been due to her in November 2021, but for some reason not paid. Consequently the difference had been deducted from her final salary, £833.47.

121. We have checked the relevant pay slips in the bundle. They show the figures on which the explanation was based, in particular, on the final payslip for February 2022 the November 2021 figure appears as a payment and the April 2021 £1,382.21 as a deduction. The claimant has produced no evidence (for example, her bank statement) to show that she was paid the net sum in April 2021, rather than the gross sum as the respondent states. We concluded that the deduction from final pay was because of an earlier overpayment, such that this was not an unauthorised deduction.

Holiday Pay

122. The contract provides for 28 days including bank holidays, reflecting the statutory minimum.

123. The holiday year ran from January to December. In December 2020 the respondent agreed to paying the claimant, exceptionally, for some holiday not taken. The accountant was instructed to pay her for 10.5 days not taken, rather than carrying them over into 2021, and she was paid £3,028.84, which on a salary of £45,000 represents 3.5 weeks holiday.

124. According to the respondent, not disputed by the claimant, she also asked to be paid her 2021 holiday at the start of the year, and she was. The payslips show her receiving £2,500 holiday pay in January 2021 and £2,500 in February 2021.

125. At the time of these payments her annual salary was £45,000 so a week's pay was £865. The two payments represent 5.78 weeks of holiday – 28 days is 5.6 weeks, so she was paid her entitlement for the whole year. The claimant in evidence did not mention these payments early in 2021. On the evidence, she was paid for 2021, and had nothing to carry over, as might otherwise be permitted, despite the explicit wording of the Working Time Regulations, if she had been unable to take holiday because she was ill.

126. For 2022, she worked for 5 and a half weeks to the date of resignation. Her holiday entitlement for 2022 to the date of resignation amounted to three days, 0.6 weeks, and on a salary of £70,000 a week's pay was £1,361.15. The final salary slip shows she was paid £1,009.62. On a 5 day week this is an overpayment, so is explained by taking a 4 day week. We find no holiday pay was due on termination.

Time Limit for Presenting Claims

127. The claims for detriment for making protected disclosures and dismissal for making protected disclosures are brought under the Employment Rights Act 1996, which provides that a claim must be presented within three months of the detriment or the dismissal.

128. Time limits are extended for early conciliation by virtue of section 18 of the Employment Tribunals Act 1996, as amended. Before presenting a claim for an employment tribunal, a prospective claimant must approach ACAS for early conciliation. The date when he does so is day A. After six weeks ACAS issue an early conciliation certificate, on day B. The clock is stopped between day A and day B. Once a certificate is issued, a claimant has an extra month in which to present a claim.

129. Had the claimant presented her claim on or before 5th November 2021, that is, one month after day B, she would have presented a claim in time for all detriments occurring after 25th May 2021. In fact she presented her claim on 20th December 2021. That was five weeks after day B. Of the original three month time limit, that left an additional two weeks before day A, so on the face of it any detriment occurring before the 10th August 2021 is out of time

130. When on the face of it a claim is presented out of time, a tribunal may extend time. Section 47 governs claims of detriment:

> An employment tribunal shall not consider a complaint under this section unless it is presented—
>
> (3) (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
>
> (4) For the purposes of subsection (3)—
>
> (a) where an act extends over a period, the "date of the act" means the last day of that period, and
>
> (b) a deliberate failure to act shall be treated as done when it was decided on;

131. What is "reasonably practicable" is discussed in **Walls Meat Company Limited v Khan 1979 ICR52**. The tribunal must consider what in practice was preventing the claimant from presenting her claim in time. That might be some physical constraint, or it might be a state of mind.

132. In the context of the facts of the detriments this claim, none of the detriments that are potentially out of time (notably, all those that occurred while she was at work, that is, up to 29 July) were argued to have extended over a period. Argument on the time point in submissions was sketchy, so we considered whether they could be so argued, but the tribunal concluded that none of the detriments which occurred before the claimant went off sick, that is, detriments (1) – (7), can be said to have extended over a period while she was away from work, unless they can be included with (8) to (16) as part of series of similar acts or failures.

133. In **Arthur v London Eastern Railway (2006) EWCA Civ 1358**, it was held there must be some link between them and they must be similar. That could mean the same perpetrators were involved, or considering whether acts were organised or concerted, or the reasons why perpetrators acted as they did. They could also form a series if all were on grounds of a protected disclosure. Looking at the first

seven detriments, the first five could loosely be said to revolve round Mr Pires, or suspected shortcomings uncovered when he left, and to have been perpetrated by Ms Shafer. It is not easy to link this with any detriment after she went sick. The requests for her email and laptop were made *because* she had gone sick and they were needed. The investigation was because of equipment damage that came to light in her absence. The factual findings show that recruiter detriment and the clinic licence are unconnected to other detriments. They are not linked to what went before.

134. The real issue for us to decide to save claims based on detriment before 10 August is whether it was "not reasonably practicable" for the claimant to present her claim by the 5th November, but instead delay another 6 1/2 weeks. The claimant's solicitor submitted that the claimant was unwell over this period. She had been referred to Lewisham IAPT for counselling on or before 13 August 2021. We can see from several emails in December and January that the service was asking her to complete some questionnaires, but we do not know when she did, or indeed whether she has had any counselling, as her three witness statements are silent about her health, or on why she presented the claim when she did. However, her health is mentioned in the correspondence between the parties at the time, and she was of course certified unfit for work. The complicating factor is that from August 2021 she had instructed a firm of solicitors instructed, and there was correspondence between them and the employer through August, September and October. In her long letter of 25 October 2021 Ms Beckles told the solicitor they had not heard from ACAS – the context being that the solicitors had told her on 16th September that the claimant was going to ACAS and intended bringing a claim - and Ms Beckles also told them in that letter that the company did not intend to negotiate a settlement. By that point there had been a handover between solicitors acting at the firm. On 5 November the new solicitor, responding to a telephone call from Ms Beckles, said he was about to meet the claimant, and he replied in substance on 9 November that the claimant was not able to attend an investigation meeting but was able to respond to questions in writing.

135. It is hard then to see why the claimant was well enough to answer questions in writing in early November, but not, by herself or by her solicitors, to present a form ET1 to the employment tribunal. She or they had approached ACAS, said they intended to bring a claim, ad had been told there was no prospect of a negotiated settlement. Nor is it explained why she was well enough to do it on 20 December, when she was still unwell and awaiting counselling. She does not discuss this period at all, in any of her three witness statements.

136. We concluded that it was reasonably practicable for the claimant to present a claim in time for the tribunal to have jurisdiction to decide claims of detriment occurring before 10 August. Consequently, those claims are out of time. There is no jurisdiction.

137. The claim for *unfair dismissal* was added by amendment at the case management hearing in March 2022. At that time the claimant was within the 3 months time limit, running from the effective date of termination. She did not have to go to ACAS again because she had already referred a dispute to them, which in our view was within the scope of "any related matter" required by the statutory provision on early conciliation- **Mist v Derby Community NHS Trust UKEAT/0170/15, Drake International v Blue Arrow Limited UKEAT/0282/ 15, and Compass Group UK and Ireland Limited v Morgan 2016 IRLR 924.**

138. The unfair dismissal and claims for later detriment are not therefore statute barred. Nor are the claims for breach of contract (commission, notice pay and overtime) brought under the Extension of Jurisdiction Order, where the same three month time limit applies where the money was outstanding as of the date of termination, .

EMPLOYMENT JUDGE GOODMAN

17 July 2023

Sent to the parties on:

19/07/2023

For the Tribunal Office:

APPENDIX- LIST OF ISSUES

A.**Protected disclosures -sections 43A –H & 47B of the Employment Act 1996**

1.Did the claimant make disclosures of information to her employer as alleged?

(1) PD1: On 20 April 2021, she told Ms Shafer that Mr Pires was drinking alcohol during the working day. This affected the time allocated to patients.

(2) PD2: On 13 and 14 May 2021, the claimant reported orally to Ms Shafer that Mr Pires was booking the claimant's clients into two-hour appointments.

(3) PD3: On 18 May 2021, the claimant reported to Ms Shafer, over the phone, that Mr Pires was treating the claimant badly, marginalising her and making her feel unsafe.

(4) PD4: On 1 June 2021, the claimant reported to Ms Shafer, alleged financial irregularities by Mr Pires–e.g. petty cash not updated and missing cash not covered by receipts, £450 of product taken and not paid for.

(5) PD5: On 29 June 2021, the claimant reported to Ms Shafer, orally and by email, that clients were being told by Dr Desai to cancel appointments with the first respondent / claimant so that Dr Desai could book them privately.

(6) PD6: In approximately June 2021 at a meeting with Ms Beckles, the claimant reported that Mr Pires had been aggressive and that he had attacked her.

(7) PD7: On 2 and/or 3 July 2021 the claimant reported to Ms Shafer, via text, financial irregularities: a refund of £450 on Mr Pires' card which was unjustified, many other refunds had been given by Mr Pires to clients and had been ascribed to the claimant who had not treated the patients and not given the refunds.

(8) PD8: On 10 July 2021,the claimant reported, orally and in writing, to Ms Shafer, prescription stock irregularities linked to Dr Desai.

(9) PD9: On 8 August 2021,the claimant reported to Ms Beckles sending her details of numerous financial irregularities by Mr Pires.

2.If so, did the claimant make the disclosures in the reasonable belief that:

(1) the information tended to show:

(a).PDs 1 & 2: that the health or safety of clients and/or staff had been, was being or was likely to be endangered.

(b).PD5: that Dr Desai had failed to comply with a breach of a legal obligation i.e. she had breached her contract of employment with the first respondent.

(c) PDs 3, 4, 6-9: that a criminal offence had been committed or was likely to be committed.

(2) the disclosures were in the public interest?

2. Did the following alleged treatment alleged occur?

(1) On 22 April 2021, the claimant's email account was downloaded onto the front of house computer by Ms Shafer.

(2) The claimant's complaint on 14 May 2021 was rejected by Ms Shafer who told her to get her hormones checked.

(3) On 21 May 2021, the claimant's job remit changed: her Front of House role was taken away and she was required to train laser to new staff. She was not allowed to ask Front of House staff for help.

(4) On 26 May 2021, Ms Shafer gave the claimant's morning meeting duty to Mr Pires.

(5) On 27 May 2021, Mr Pires attacked the claimant when he followed her, screamed at her, threw a phone at her, lunged at her, threw his middle finger up at her, yelled "fuck you" and then walked off.

(6) In around the last week in June/first week of July 2021, Ms Shafer / the email administrator stopped the claimant being able to communicate with clients by email.

(7) In late July 2021 Ms Shafer:

(i) denied/refused to give the claimant a new uniform while copying the claimant into messages praising the appearance of other staff;

(ii) sent emails to the claimant disparaging her work and criticising her; and

(iii) giving her instructions which would adversely affect her ability to work, Ms Shafer allowed Dr Desai to take over the claimant's schedule and did not stop Dr Desai treating the claimant as a secretary, giving the claimant administrative work such as dictating letters to her.

(8) In around July or August 2021, Ms Beckles tampered with the claimant's grievance statement (the claimant says that she first knew about this when she reviewed documents disclosed following an SAR, in around January 2022).

(9) On 1 August 2021,Ms Shafer sent a harassing email about email password changes.

(10) In August 2022, Ms Shafer had a meeting with a recruiter as a result of which the recruiter broke off work with the claimant

(11) In September 2021, the first respondent's licence was suspended and Ms Shafer told the regulatory body that it was the claimant's fault.

(12) In September and October 2021,the first respondent via Ms Beckles tried to start spurious disciplinary procedures against the claimant.

(13) In November 2021,the claimant's work on the first respondent's website (e.g. blogs) was changed from the claimant's name to others.

(14) In December 2021, the claimant's planned promotion previously promised to her to the role of Global Trainer was given to a new recruit.

(15) In December 2021, Ms Beckles on behalf of the first respondent emailed a factually incorrect letter written to the claimant's doctor.

(16) On 8 February 2022, the termination of the claimant's employment by way of constructive dismissal.

4.Was the claimant subjected to that treatment by the respondents on the ground that she had made one or more of the disclosures?

B. Automatic unfair dismissal (sections 94, 95 & 103A ERA)

5.Did the first respondent breach the implied term of mutual trust and confidence?

The claimant relies on the alleged conduct set out above at paras 3 (1) –(15). The final straw was the alleged failure to respond to her written complaint of victimisation dated 17 January 2022.

6.If the claimant was dismissed, was the reason or the principal reason that she had made one or more of the disclosures?

C .Breach of contract

7.If the claimant was dismissed in breach of her contract, to what notice pay was the claimant entitled? The claimant claims one month's pay in the gross amount of £5,833.

D. Unauthorised deductions from wages (sections13 & 23 ERA)

8.Did the first respondent make the following unauthorised deductions from the claimant's wages:

(1) Commission: £6,567.22

(2) Overtime: £4,674.12

(3) A payment in lieu of accrued holiday pay: £1, 346

(4) A deduction of £1,382.21 from her final pay. The first respondent contends that this was made to recover an overpayment

E.ACAS Code of Practice

9.Did the first respondent fall unreasonably to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

10.If so, what is the uplift which should be awarded pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992?