Case Number: 2501005/17

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Miss S Sheils	**AND**	Vocare Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields Hearing Centre** **On: 18-20 April 2018, and (in chambers) 21 May 2018**

Before: **Employment Judge O'Dempsey**

Members: **Ms L Georgeson**
Mr P Curtis

Appearances

For the Claimant: In person
For the Respondent: Mr A Webster of Counsel

JUDGMENT

The Claimant's claim for unfair dismissal (s98 ERA) is dismissed
The Claimant's claim for unfair dismissal (s104 ERA) is dismissed.

The Claimant's claims that she was subjected to the following detriments:

(A) Prolongation of her suspension;
(B) Being subjected to a comment by S Oldfield;
(C) Being caused (by the length of her suspension) to be unable to complete her prescribing course

Are dismissed.

REASONS

1. The complaints in this case were identified by EJ Johnson at a Preliminary Hearing which took place on 16 January 2018. At a Preliminary Hearing before the same Employment Judge on 2 November 2017 she had made clear that she relied upon the same protected disclosures for these proceedings as she had previously done for the case number 2501161/2016. There can be no dispute that the Claimant had made qualifying and protected disclosures, and the Respondent in this case does not attempt to do so.
2. We heard evidence from the following: Mr Van Zyl (solicitor) Samantha Oldfield (manager); J McLaughlin (claimant's line manager), Ms Richardson, Helen Davies, Nicola Brown, Rachel Taylor and Heather Maugham. In addition a witness statement was tendered from Julie Orr. The latter we noted but, because there was no opportunity for cross examination, we give little weight.
3. We gratefully adopt the findings of fact made by that earlier tribunal so far as they are relevant. We do not intend to repeat those findings, although there was some overlap of the evidence we heard with that earlier decision. We will therefore not set them out again. They are contained at paragraph 15 of that earlier judgment and run for 5 closely typed pages.
4. The Claimant argues that the reason or principal reason for her dismissal was the fact that she had made the protected disclosures set out in that earlier case. She also argues that the identified detriments occurred because she made the protected disclosure.
5. During the course of careful case management on 16 January 2018 Employment Judge Johnson noted the specific allegations:

(1) An allegation of "ordinary" unfair dismissal;
(2) Automatically unfair dismissal for making protected disclosures;
(3) Being subjected to the following detriments for making protected disclosure:
    a. The prolonged suspension from work from May 2016 to April 2017;
    b. An alleged comment by Ms Sam Oldfield at the disciplinary hearing on 24 April 2017
    c. That the prolonged suspension resulted in the Claimant being unable to complete her prescribing module so as to enable her to continue to prescribe medicine in her capacity as a nurse (we took this allegation to be an allegation that there was an intention to prolong the suspension in order to achieve that aim – otherwise it collapses into a consequence of (a) above).

The Facts

6. The Claimant is a qualified general nurse (level 1), with additional level 1 qualification in Sick Children's Nursing and a Bachelor of Science Degree in Practice development. Her work had been commended in April 2016, following a neonate, a 3 week old pre term baby, having been sent in error to the centre, in a life threatening critical condition. We find that this was a significant incident for the Claimant, and one which would have concerned any nurse. She has also previously been commended for her handling of a potentially dangerous and threatening patient.

7. We accept that, particularly after the incident with the new born child, the Claimant was particularly anxious about staffing levels. We note also that the Claimant told the Respondent that she was going to resign as soon as she completed her prescribing course. Around March 2016 she had told the Respondent that she would no longer work "out of area".

8. On 9 May 2016 Jacqui McLaughlin had been notified that the Claimant had concerns about staffing levels for 10 May 2016.

9. The previous tribunal has set out the email sent by the Claimant on 10 May 2016 at paragraph 15.5 of its decision. Relevant for the issues before us is the phrase the Claimant uses: "If this is correct I am unhappy to see any patients between 5.30 and 6…". We have no doubt that what this meant was that the Claimant was intending not to see patients during this time. We also find that this is how this phrase appeared to those who investigated the incident which follows. We find that it was a perfectly reasonable reading of the email. The issue for the Claimant was her concern about being a lone clinician during that time.

10. The previous tribunal then sets out what happened in paragraphs 15.6-15.10, which is the next point at which we pause to add anything. What we add is the detail of what the transcript of the telephone call between the Claimant and Andrew Griffiths was (page 424): "….

    AG: We're getting a complaint from the patient sat outside that's been there waiting for a while...
    SS Yeh
    AG: Erm, Now I appreciate that, I understand that you've had an issue and you've sent a datix in regards to it. At what point will that patient be getting seen?
    SS: Er, we're waiting for the doctor to arrive. The doctor was supposed to be here at six o'clock.
    AG: Yeh, which I know you made a comment, obviously he probably normally late...
    SS: Yeh
    AG: Erm what's the particular reason why you have to wait for the GP, because I know we have ran previously without other staff members in? ...
    SS: Well, Im here on my own. I'm only a nurse on my own and it's a doctor lead service. And I haven't got anybody. I haven't even got a nurse with us.
    AG: Right so have you had a look at the actual symptoms of the patient?
    SS: I have had a look at the actual symptoms of the patient. I've even been out and had a look at the patients as such to make sure everybody's fit and well.

    AG: So that patient needs to be seen by a GP not a nurse?
    SS No, it needs to be seen by a nurse but I'm uncomfortable with this conversation. I've already raised this to my line manager.
    AG: Yeh.
    ...
    AG:... Because what I'm concerned about is I've got a patient complaint they're not getting seen, I've got a nurse sat there erm not actually seeing any patients when there's a patient waiting.
    SS: Yeh
    AG. So that obviously, that, the patient's going to turn around and say well hang on there's a nurse but she's not seeing me. So it comes across as a...
    SS: Yeh because it's not appropriately staffed. Erm I've raised that with Jacqui McCloughlin if you'd care to take that up with her. She's my line manager.
    AG:... But how do we get this patient seen moving forward?
    SS: Well the doctor's just walked into the building so I would imagine she's going to be getting seen.
    AG: So you are going to see this patient now then?
    SS: Yes"

11. We appreciate that the Claimant alleged that the transcript was not accurate. We were unable to establish with her how she said it was materially inaccurate.

12. The previous tribunal sets out what happened after that call (paragraphs 15.11-34).

13. Whilst we are concerned with the prolonged nature of the suspension, we note, in passing, that the Claimant has repeatedly claimed to the Respondent that she felt that she was being victimised for raising concerns. The findings of fact concerning these dates are contained in the previous tribunal's findings of fact.

14. It was not challenged that the Claimant contacted Bernadette Martin of the University to say that she felt that Jacqui McLoughlin was seeking to victimise her by making a deliberate attempt to stop her completing the prescribing qualification.

15. The length of the suspension can be accounted for by the events contained in the previous tribunal's findings of fact, to which may be added certain other dates. The chronology appears to us to be as follows.

    The suspension took place on 11 May 2016
    13 May 2016, the University was notified;
    15-16 May 2016, the Claimant lodged a grievance (p 440);
    17 May 2016 the suspension was confirmed in writing;
    19 May 2016 & 26 May 2016 the respondent held investigatory meetings in relation to the grievance (pages 457 and 477-9);
    27 May 2016, the claimant attended a grievance hearing.
    2 June 2016 the claimant was sent the outcome letter;

16. The claimant appealed against that outcome.

17. The claimant appears to have started a period of sickness (see p 530) for anxiety and depression from 9 June 2016 when she attended an investigation meeting (508). She provided a fit note dated 7 June 2016 (as recited on p 530 a letter dated 14 June 2016 when the claimant was referred to occupational health);

18. On 5 July 2016 occupational health reported that the claimant was not fit to be at work, but might be with the right interventions and support (p532). Specifically it reported that the Claimant needed closure. On 21 July 2016 after a period of sickness the claimant attended a return from sickness meeting (p535) and on the same day there was a grievance appeal meeting. On 22 July 2016 the Respondent wrote to the Claimant reflecting that occupational health and the Claimant's GP had indicated that she would be fit to return to work with certain adjustments, and reflecting that the Claimant had said that she was well enough to resume the investigative process. She said that she felt well enough to return to work "if staffing levels were right". She was told that the suspension was resuming, after the period of sickness absence.

19. On 8 August 2016 the Respondent (Julian Saul Regional Operations and Development Manager) wrote the outcome letter relating to the appeal (p554). On 12 August 2016 the claimant was signed off sick (558).

20. On 6 September 2016 the Respondent sought further occupational health advice (559). The Claimant was told that her suspension had reverted back to her sickness absence from 12 August 2016 (561).

21. There was a further fit note on 9 September 2016 running to 7 October 2016. On 20 September 2016 there was a further occupational health report stating that the Claimant was

not currently fit for work. There was a recommendation as to conducting the remaining parts of the investigation in writing.

22. There is a further sickness absence fit note covering the period 7 October 2016 to 31 October 2016.

23. Meantime the Claimant was making inquiries of the University regarding the course. This confirmed that she had a delayed submission time for the portfolio (including competencies) until May 2017 (566). A further fit note covers the period of sickness absence from 1 November 2016 to 6 December 2016 (567), and there is then a further note covering from 6 December 2016 to 17 January 2017 (568). The latter stated that she was fit to return with amended duties, workplace adaptations, altered hours and a phased return.

24. On 8 December 2016 the Claimant asked for the return to work meeting to take place at her home (570). She asked for it to take place on 9 December. On 9 December the Respondent wrote to her saying that the meeting for that day would be postponed. This was because the Claimant had queried the person who was to deal with the meeting, stating that it was not in accordance with the Respondent's written procedure. The Respondent therefore wrote p571, saying that the meeting would be postponed until the claimant had confirmed whether she wanted Jacqui McLoughlin (her line manager) to conduct the meeting.

25. On 12 December 2016 the Claimant wrote to the Respondent (574) to discuss the taking of annual leave during the period of her suspension and certain absences she would need to take as a result of the need to have a MRI scan. On 13 December 2016 the Respondent replied to the Claimant concerning who was to chair the meeting, which was now due to take place on 20 December2016 (575) and dealing with the requested annual leave, and leave for the MRI scan.

26. On 13 December 2016 (577) the Claimant wrote saying that she had not agreed to Julian Saul to conduct the meeting. On 16 December 2016 the Respondent wrote to the Claimant confirming the meeting would take place (with a change of venue at the request of the Claimant) on 20 December (579).

27. On 20 December 2016 the claimant attended a return to work meeting at which it was indicated by her that she was fit to return to work but that she needed the investigation completing. The meeting at page 581 and following. The claimant stated that the Respondent's desire to go to occupational health again was "just a delaying tactic". She again repeated her belief that she was being victimised, but said that she could not comment on it. The stress risk assessment at page 583 also shows that she was complaining that the investigatory interview was in her view being delayed. She stated that she felt victimised following raising concerns.

28. On 3 January 2017 the Claimant wrote to the Respondent's Mr Saul asking for correspondence following the meeting (p587) and again on 4 January (587). On 5 January 2017 Penny Needham (head of the Respondent's HR function) wrote to the Claimant saying that she was sure that Mr Saul would respond. On 5 January 2017 (p586) he did respond saying that he had not received the Claimant's email, and explaining that the follow up letter from the meeting was going out that day. We do not regard the small delay that occurred over the Christmas and new year period as having any significance whatsoever.

29. On 6 January 2017 the letter was duly sent out (p589). It reflected the fact that the Claimant had been ill; that the claimant was saying that she did not feel that she could return to practice until the investigation had been concluded, at which point the adjustments such as alteration of

duties and/or hours could be implemented. This letter stated that the Respondent agreed (p590) to the outstanding questions being dealt with in writing.

30. On 11 January 2017 the Claimant wrote to the Respondent asking where the written questions were (591).

31. On 13th January 2017 the Claimant received the outstanding written investigation questions (593-594) from Julian Saul and responded on the 14th January 2017. Pausing at that point it is notable that one of the questions asked was "Reviewing the event line for 10 May 2016 can you explain in full what caused the delay in your assessment of the patient in the waiting room at Houghton UCC at 18.15 hrs?".

32. The Claimant's response is on p595-598. The Claimant said that the time line had not been include, but did not ask for a copy of it. Instead the Claimant set out a version of events for the Respondent to consider.

33. What is interesting about that account is that there is very little effort by the Claimant to set out the version of events which she told the tribunal had occurred on that day. It is perhaps a pity that the Claimant did not set out fully the version and order of events which she told the tribunal about when she was asked to do so by the Respondent.

34. Initially the Claimant's document reflects on what she was told on 9th June 2016, by the Respondent: that the patient arrived and self-presented at 15.34, but was not given an appointment to be seen, until 17.00. The Claimant then sets out that she could recall that the service was running approximately a further 30 minutes behind schedule by 17.00 hours. She again repeated the point that it was known that the centre was below safe minimum clinical staffing level. She said that she had been told that this point had been escalated to senior management.

35. The document asked the Respondent to note that the situation was of a lone clinician experiencing an episode of being unwell. The tribunal was puzzled as to why, if this was the explanation for what happened it was not offered immediately to Mr Griffiths when he called. The Claimant's document then pointed out that the GP arrived over 15 minutes late and delayed starting his duty. It was clear that it was the arrival of the GP which ensured the patient got seen. That is the obvious conclusion which is to be drawn from the contemporaneous call with Mr Griffiths.

36. The Claimant stated that the patient had arrived and self-presented to receptionist desk , and that increased delay in being seen arose from not being given a clinical assessment appointment until 17.00.

37. The Claimant then said that she had informed the Respondent at the investigatory meeting on June 9th 2016, that she had been suffering throughout the day with symptoms of increased anxiety and stress due to the working conditions she had expected to work in and lack of support.

38. She mentioned the fact that at about 17.50 the receptionist told her that there was a patient complaining about the length of time that she had been waiting . The Claimant said that she had informed the receptionist that she was feeling unwell and asked her to inform the Senior Team Leader. She said that at this time she was suffering with rapid heart rate, headache, blurred vision, shaking, and was trying to calm her breathing rate. The tribunal notes that in the meeting of 9 June 2016 she had said that the absence of staff at 17.30 had at 10.00 stressed her straight

off (508). She said that she was stressed because of the rota. She had mentioned being stuck with an unusual orthopedic fracture patient. She refused to answer what was so stressful about working for 30 minutes without a GP (509). Eventually she said that this was unacceptable because she was stressed and could not cope with it. When asked why she had refused to see the patient (510) the Claimant replied with a question: "did I refuse?". It is unfortunately that what she thought was a denial of refusing was not expressed more clearly, and the Respondent's investigator must have found this way of replying evasive.

39. In any event, at that meeting, (510) the Claimant stated that she had spoken to Genna at 17.25. At that point she finished the orthopedic patient. She told Genna that she was going to a 5-10 minute break. Jacqui McLoughlin then came into the corridor and told Genna that she was going home. The Claimant said that she was surprised by this because the Claimant had raised concerns about her own health. She mentioned her earlier email to Jacqui and asked what was "happening now". At the meeting on 9 June the Claimant complained that Jacqui went home knowing the Claimant was stressed. Genna had then told the Claimant that Dr Uday had refused to see patients as he was the only practitioner. Chiara had said that she would be no use in an emergency. The Claimant said that she had said that she was "stressed to the hilt" with continually being short staffed. She wen out for a break to the toilet and explained that she has IBS, and must have gone to the toilet 10 times that day.

40. This conversation must have taken place at some point between 17.30 and 17.50. There was some talk of the doctor being late (p511) and the claimant then said that she noticed patient notes from the fracture case that needed faxing to the clinic for the next day. She explained that she was trying to control her breathing, her mouth was dry and she was feeling sick. She tried to calm herself down and looked at the literature for the orthopedic case. It was at that point (round 17.50) that the receptionist told her that the patient was complaining.

41. The claimant did not make the point, as she did later on, that she was too ill to see the patient during that meeting. What she did say was in the context of being challenged on what she had said in the telephone call with Mr Griffiths. When asked why she needed GP to see the patient (512) she said "did I refuse?". Sam Oldfield, fairly we think, said that she thought that the claimant had refused. Looking at the transcript of the phone call, we think that this interpretation was a perfectly reasonable one. In that context the Claimant said that she was unwell and could not remember anything after the phone call. We accept that this is probably the case.

42. When she came to write her response on 14th January 2017, we consider that the Claimant knew what she was being asked to do: set out her recollection of events. In this context on p 597 she stated that she had been aware the patient being within the outer area as "I had viewed her sitting in the outer waiting area, only 10 minutes previously, whilst faxing the previous patient's notes". We think that the faxing of the patient notes must have been occurring after 17.30, and that the Claimant must have become aware of the patient at around 17.40. Whatever the precise timing, it was plain that the Claimant was aware of the patient some time before the patient complained. She does not say that she was too sick to see the patient. In her explanatory document she goes so far as to say that she had looked at the patient and "she did not appear to have any sign of being acutely unwell".

43. The Claimant's reply to the written questions then goes on to say that she was pressured into seeing the patient. The document then recounts her being sick.

44. What is noticeable, putting the transcript and this account together, is that the Claimant appears in it to be claiming that before she spoke to Mr Griffiths she had felt unwell she had

spoken to the receptionist to say that she felt unwell and asked her to inform the Senior Team Leader. However it is apparent that this happened after the receptionist told her that the patient was complaining about the length of time she had been waiting. It is very surprising indeed if the real reason that she was not seeing the patient was that she felt, even momentarily, unwell, she did not tell Mr Griffiths immediately.

45. On 19 January 2017 (599) the Claimant wrote to Penny Needham stating that she emphasised the importance for her professional practice that the suspension and investigation should be concluded ASAP. She did this under the subject heading: "Unnecessary delay".

46. On 10 February 2017 the Claimant wrote to Bronwen Gililand stating that she was going to take annual leave from 10 February until 23 February.

47. On 2 March 2017 (613) the Respondent wrote to the Claimant inviting her to a reconvened investigative meeting with Sam Oldfield.

48. On 5 March 2017 the Respondent's Ms McLaughlin wrote to Bernadette Martin at the University asking what was outstanding for the Claimant to complete her course (615). There was a response on 7 March (616), which was copied to the Claimant setting out what she still needed to do.

49. On 13 March 2017 (604, wrongly dated February) the investigation meeting reconvened. This meeting covered what the Adastra (patient processing record) showed. The fracture patient record was closed at 17.30. Sam Oldfield tried to get some clarification of what happened after that time. The Claimant said she believed she had already answered that point. Sam Oldfield tried to clarify why it was a problem that there were not 2 practitioners for a 30 minute period when regularly this would occur when one practitioner was on a break.

50. It was at this meeting that the Claimant expressed the view that when she had a break for 5 minutes at about 17.20 she was unwell and told people she was unwell. She said she felt "horrendous". Not unnaturally Sam Oldfield asked her who she told and she was told that Genna had been told. She expanded on the point that she felt horrendous by saying (p605) that she felt stressed. She did not say that she was experiencing any physical symptoms because this stress at the time.

51. When asked for an account of what happened after the fracture patient had been seen, she refused to answer the questions saying that she had already answered these questions the previous occasion. It seems to the tribunal that the Claimant adopted a style in that meeting which was uncooperative and unhelpful. Sam Oldfield attempted nonetheless to try to obtain more information about what had happened after the fracture patient had been seen. Whilst saying that she felt unwell, she said, when asked what she had talked to Genna Bulley about she mentioned staffing levels.

52. Finally the Claimant said that she did not know how the Respondent could not make a decision from what it had (608).

53. The next day the Claimant wrote asking how long her suspension would continue (p610). On the same day Ms McLaughlin was writing to Bernadette Martin informing her of what the Claimant said she would need to do to complete the prescribing course (625-6). Also on that day the Claimant wrote saying she believed it would be helpful if Sam Oldfield wrote her questions down and send her a copy, so that there was no confusion about what Sam Oldfield was trying to establish. The tribunal has to say that there was no confusion about what Sam Oldfield was

trying to establish. However the Claimant also stated that she hoped that the suspension would not be delayed further. This was an unrealistic wish.

54. The tribunal can see nothing in the sequence of events which is suggestive of undue delay on the part of the Respondent in conducting this investigation. The delays which had occurred up to this time appear to be attributable to sickness on the part of the claimant, and attempts by the Respondent to obtain the information it needed to conduct a fair investigation into the allegations.

55. As a result of the points made by the Claimant concerning her conversations with Genna Bulley, the latter was interviewed on 17 March 2017 (628). She confirmed that the claimant had not told her that she was too sick to work. She did, however, note that the Claimant was agitated and upset at being asked to see patients during the disputed time. She said that the Claimant had said that she would not see patients during this time as to do so would leave her, without another clinician, "clinically unsafe".

56. On 21 March 2017, the Respondent sent to the Claimant the outcome letter (630). This made clear that there was a case to answer in respect of the core allegation of failing to see a patient.

57. On 22 March 2017 the investigation was completed.

58. The Claimant's evidence is that on 14 March 2017 Jacqui McLoughlin contacted Bernadette Martin (the relevant university tutor) to establish what support the Claimant would need to complete prescribing module. We accept that Bernadette Martin contacted the Claimant after this. On the Claimant's evidence it appears that there may have been a delay at the university at this point.

59. The Claimant relied on a conversation at the tribunal with the Respondent's solicitor Mr Van Zyl. She says that he handed papers to her stating that the investigation had been completed and was progressing to a disciplinary hearing. She refers to a conversation she had with him the day before concerning the lack of reply from the University concerning the hours and supervision needed to complete the prescribing course.

60. She, and her witnesses, state that Mr Van Zyl told her that the prescribing was never going to happen and never would, or words to that effect. Mr Van Zyl denies categorically saying the words attributed to him. We note that the Claimant wrote on 21 March 2017 to Bernadette Martin (629) asking whether Dr Eva had sent confirmation through to say that she said 30 hours required. Bernadette Martin replied that Dr Eva had not. The Claimant then replied "I knew they had no intention of ever having me back to do the prescribing. Their solicitor said today, that they had had confirmation that Eva had said 30 hours, I said well the uni hasn't heard from her and he said well your prescribing element was never going to happen and never will". This is a slightly different account than that which was given in the Claimant's witness statement. However we accept the gist of it.

61. We accept Mr Van Zyl's evidence that he did not use the words attributed to him. However we find that he used words to a similar effect. However we do not think that this indicates that the Respondent was deliberately delaying the process so that there would be no time for the Claimant to conclude the course.

62. We rather think that in the light of the considerable work which had been done, by both parties, to see whether a settlement could be achieved in the case, it is more probable that Mr Van Zyl said something that related to the difficulty of that negotiation. It was very clear from his

demeanour when giving evidence that he had experienced considerable frustration at the way in which settlement could not be reached in the case. The Claimant had increased the sum she was seeking in settlement to a point which was not, in the view of Mr Van Zyl, realistic. We conclude therefore that Mr Van Zyl did say something, if not the exact words attributed to him, but that what he said was an expression of exasperation, at worst, in the context of what must have been a difficult negotiation.

63. We do not think that his expression, whatever the precise formulation he used was any indication of what was in the mind of the Respondent concerning the prescribing course. All the other evidence points to the fact that the Respondent was seeking to explore the prescribing course as an option, and there is no reason to suppose that the delays which occurred in relation to finding out whether it could form part of a settlement negotiation should be attributed to the Respondent. It appears more likely to us that the delays at this point were the responsibility of those at the university.

64. It is also of interest to note that on 6 April 2017 the Claimant wrote again to Bernadette Martin asking whether she had received confirmation of the 30 hours that the Claimant still needed to complete. The reply was that she had not (647).

65. On 28 March 2017 the Claimant wrote to the Respondent to ascertain when her disciplinary hearing would take place (641).

66. On 31 March 2017 the Respondent wrote to the Claimant concerning her suspension stating that the investigation was almost complete and that she would be written to about the next steps.

67. The Claimant complains that there was a delay at this point, and that eventually the date for the hearing was set for 24 April 2017. What was happening in this time, it appears, is that Sam Oldfield produced on 10 April 2017 (648) the management case document for the disciplinary hearing. Tellingly the report makes clear that the claimant had claimed that she felt too ill, but that she had not mentioned that she was too ill to work to Genna Bulley or Ms McLaughlin or Mr Griffiths.

68. On 12 April 2017 (653) the claimant was invited to the disciplinary heairng and the allegations against her were set out. She was provided with the pack of documents relating to her case (655). On 12 April 2017 (658) Sam Oldfield appears to have contacted Mr Griffiths who confirmed that the Claimant at no point said she was ill. That was something which was apparent from the transcript of the conversation.

69. There is evidence of several emails between the Claimant and the Respondent over the next few days.

70. The minutes of the meeting on 21 April 2017 (674) show that the Respondent's decision maker (Rachel Taylor) had evidence that the Claimant had not advised Genna Bulley that she was unwell until after the conversation with Mr Griffiths. (674). Genna Bulley said that the Claimant was very clear that she was not working alone. The Claimant, although she did ask a question of Genna Bulley, did not challenge either of these points. It was reasonable therefore of Rachel Taylor to accept that as the evidence of what happened.

71. Ms McLaughlin then gave evidence (675). She too said, and was not challenged on this point at the meeting, that the Claimant did not mention at any point that she was unwell.

72. After that it appears that the Claimant was allowed to ask Sam Oldfield the questions she wished to ask. She did not challenge the above assertions.

73. Rachel Tayler then asked the Claimant questions. For the first time the Claimant said that she felt she could not see the patient because she had a migraine (676). She claimed, again for the first time, that she had reported sickness early in the morning. She claimed that she had stated that she was stressed and this caused her migraines. She then went on to that the centre was clinically unsafe in that she had to see the patient alone. She said it was not a safe environment for the patient. She claimed that she saw the patient and did not leave the patient for the GP to see. She claimed that the patient was not seen until the GP arrived on site because "I had loss of vision and was doing other things at the time". She was referring to the photocopying. Then she said, when challenged as to whether it was more important to see the patient or do the photocopying that she was not aware that the patient wa in as the reception had forgotten to book them in.

74. The tribunal notes that this contradicts the earlier account she gave. Moreover there was no mention until this point of her being too ill due to a migraine to see the patient (whether in the sense of having vision of the patient or in the sense of attending to the patient).

75. Rachel Taylor adjourned at the end of that meeting to consider her decision. She produced the letter of dismissal on 24 April 2017 (680). We do not set out the details of that letter here. However it seems a detailed, thoughtful and reasoned letter.

76. We find that Rachel Taylor's reason for dismissing the Claimant is that set out on page 681. The Claimant had made a conscious decision not to see patients in the half hour gap to which the Claimant had objected in the morning. The letter sets out the basis for the decision. Rachel Taylor reached the conclusion that the Claimant had committed an act of gross misconduct namely that she had committed negligent behaviour: any action or failure to act which seriously threatens the health safety or welfare of a patient. She had also fallen short of the relevant NMC standards. The Claimant was told of her right to appeal (682).

77. The Claimant complains that on arrival at Ballilol House for that meeting her friend (and trade union official) Michael White were caused difficulties in that he was asked for identification. It had to be explained that he was there in the capacity of a companion rather than representative. At one point during the disciplinary meeting there was also an adjournment and whilst Sam Oldfield and the Claimant among others sat in the meeting room, Sam Oldfield is alleged to have made the comment about the building in which they were sitting to the effect of "Who knows where we will be after all this".

78. The Claimant complains that the notes recorded by Leigh Butterfield were inaccurate but as with all the other matters in which she claimed that minutes or transcripts were inaccurate she has not provided the tribunal with any sufficient information on which it can conclude that there were any material inaccuracies in the Respondent's minutes, notes or transcripts.

79. Heather Maugham stated that the Claimant had appealed by letter of 25 April 2017 (687-688). Heather Maugham also took account of later correspondence in May 2017 (701-709). In this latter letter the Claimant asked for the appeal to dealt with in her absence. Heather Maugham asked Rachael Taylor to prepare a written response (716A-D). The appeal conducted a review, therefore, of the previous decision. We cannot see that there are any proper criticisms of that appeal. It rejected the Claimant's grounds. Heather Maugham concluded that there was no evidence that Marianne Donnelly had instigated the process of suspension. She reached the conclusion that Rachel Tayler had reached a reasonable conclusion that the Claimant had made

a premeditated decision not to see the patient or patients during the period when she was the only clinician. We consider that the appeal was a careful review of the earlier evidence and decision making.

Law

80. Section 47B ERA 1996 provides as follows (as relevant):
"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

81. Section 48 ERA 1996 provides as follows (as relevant): "(A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1). (1ZA), (1A) or (1B)] it is for the employer to show the ground on which any act, or deliberate failure to act, was done"

82. Section 103A of the ERA 1996 provides as follows:
"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."

83. We were referred to Fecitt v NHS Manchester (2011} EWCA Civ 1190 at [43] for the proposition that if a protected disclosure is a material factor in the employer's decision to subject the claimant to a detriment this will form the basis of liability under section 47B and to paragraph [44] for the proposition that in the case of automatic unfair dismissal under section 104 ERA 1996, the protected disclosure must be the sole or principal reason for the dismissal.

84. Bolton v Evans [2007] IRLR 140 seemed to the Tribunal to be an important statement of principle of the need to distinguish between the conduct which surrounds a disclosure for which a person may be disciplined or dismissed and the disclosure itself (see paragraph 18 of that judgment).

85. We were also referred to BHS v Burchell [1978] IRLR 379, Iceland Frozen Foods v Jones [1982] IRLR 439 Sainsbury v Hitt [2003) IRLR 23 at para 30, Shrestha v Genesis Housing Assoc Ltd [2015] IRLR 399; Santamera v Express Cargo Forwarding t/a IEC Ltd [2003] IRLR 273; and Hadjouannou v Coral Casinos [1981] IRLR 352 [1981] IRLR 352 at para 25.

Submissions

86. In each case the parties made oral submissions to us and the summary below is just that. We are grateful to both parties for the careful submissions they made.

87. The Respondent's submission was that the Claimant was fairly dismissed by reason of her conduct. Her disclosure was not the reason (or principal reason) for dismissal. The Claimant was not subjected to any detriment but if she was the disclosure had not material influence on the Respondent to act in the way we might find to be a detriment.

88. The Claimant submitted that she did not refuse or delay to see the patient. The Respondent did not give credit for her previous work or the impact that its finding would have on her nursing

career. She had raised her health concerns and nothing had been put in place. The investigation could have been finished earlier.

Conclusions

89. The tribunal needs to ask itself whether the public interest disclosure made by the claimant had a material influence on the length of the suspension, or the other detriments. The burden of proof is on the Respondent to show the ground for the treatment of the Claimant.

90. It is for the Respondent to show the reason for dismissal. The tribunal must consider whether the reason for the dismissal (or the principal reason for dismissal) is the protected disclosure. If it is not, and if conduct is established by the Respondent as the reason or principal reason for dismissal, then the tribunal must look at whether the dismissal was fair having regard to ordinary principles. In that regard we have to ask whether the Respondent genuinely held a reasonable belief the Claimant had committed the misconduct. Second we must examine whether there were reasonable grounds for that belief. Third we must examine whether the Responded conducted a reasonable investigation, and finally ask whether the dismissal was within the band of reasonable responses open to a reasonable employer. We must not substitute our own view of what should have happened for that of the employer.

91. The protected disclosure at the heart of this case was the email of 10 May, which is set out in First ET, para 15.5. The Respondent was concerned about this email. At about 13.15 on 10.5.16 (p421) there was an email in which the Respondent expresses concern that the Claimant was not prepared to see patients from 17.30 for half an hour. This was the period the surgery would be understaffed, as the claimant believed.

92. We find that the Respondent's decision maker Rachel Tayler had the following beliefs and we find those beliefs reasonable
- the Claimant did know that there was a patient waiting at this time.
- the Claimant had decided that she was not going to see patients during this time.
- the transcript of the telephone conversation between the Claimant and AG (p424-5) was accurate and genuine.

93. We therefore find that the reason for dismissal was conduct. We find that the protected disclosure was not the reason or principal reason for dismissal. The conduct was deliberately not seeing a patient for assessment or treatment. The Claimant before us accepted that she could understand why the Respondent concluded from the transcript that she was refusing to see a patient, when read in the context of the email she had previously sent. The Tribunal considers she was right to accept that, and it is a conclusion we reached independently of that acceptance.

94. On the evidence before us we find that the Respondent reasonably concluded that the Claimant did not mention that she was unwell, or the other reasons she relied upon before us, during the transcript of the Griffiths phone call. We find that the Claimant was suspended for her conduct and the length of that suspension was not influenced in any way by the fact that she had made public interest disclosure. The reasons for the delays appear from our findings of fact above as a combination of multiple procedures being in operation at the same time, sickness, investigation and administrative arrangements. The respondent rightly wanted to be able to give the Claimant the opportunity to set out her version of events in a clear way.

95. Although it is true that the question of completing the course came into the settlement negotiations, this is hardly surprising. In order to complete her prescribing course, she needed

to do clinical observations which would require her to be back at work at least for those. We do not think that there is anything sinister in the fact that Dr Martin originally thought that many more hours would be needed for the Claimant to complete the course and then Dr Eva apparently telling Ms McLaughlin that 30 would be needed. Dr Martin looked for confirmation of that figure from Dr Eva. Such confirmation did not come. There is nothing to suggest that Ms McLaughlin was not telling the truth when she wrote the email setting out what she believed Dr Eva had told her. No challenge was made by the Claimant on this point.

96. The claimant laid significance on the remarks Mr VanZyl was supposed to have made at the employment tribunal during the course of handing some documents to the Claimant. We find that he did say something to the effect that the prescribing course "was never going to happen". But we do not regard this as proving that the settlement negotiations were dragged out to achieve that result. We do not think this is the explanation. Mr VanZyl could not remember saying words to that effect, but we prefer the evidence of the Claimant and her witnesses who specifically recall something being said. They believe that the words were precisely to the effect that the prescribing course was never going to happen.

97. However the tribunal, looking at all the evidence relating to this point, notes that the Respondent had taken steps to set up what was necessary for the prescribing course, but the steps they had taken had not been successful. The Claimant had increased the amount she sought in settlement. We think that Mr Van Zyl said something about the generic feasibility of settling, whether it included the words alleged or not. He used words to that effect but we accept his evidence that he did not use the words ascribed to him. We find that the words he used did not, in any event, indicate that Respondent was deliberately delaying the Claimant's ability to finish the course.

98. As to the length of the suspension more generally, we find that the public interest disclosure played no role in the length of time it took to conclude the suspension. There was a reasonable explanation put forward by the Respondent which is innocent in the sense of there being nothing which suggests that the disclosure was a factor influencing the decisions which resulted in the delays.

99. As to the comment by Ms Oldfield, we accept the evidence given by Ms Oldfield. She did not say anything about how long the Respondent would be in the building being a result of what the Claimant had disclosed to the CQC. She did say something to the effect that she did not know how long the Respondent was going to be in the building. However this was related to the fact that there were other bids being made by the Respondent. On that basis we find that she did make a remark to the effect of "heaven knows how long we will be in here".

100. Hence in relation to dismissal for making a protected disclosure, we find that the reason for dismissal was the Claimant's conduct and had nothing to do with the fact that she had made a disclosure.

101. No material part of the reason for dismissal related to making a disclosure.

102. The claim for unfair dismissal for having made a protected disclosure therefore fails.

103. In relation to unfair dismissal more generally, reason for dismissal was conduct (as above). We conclude that the Respondent did have a genuine belief that the Claimant had committed this conduct. In this regard it does not matter that the Claimant may in fact have had other reasons for refusing to see the patient: she may have been ill, she may for a time have not known that the patient was there. However that is not the test we have to apply. We

have to consider whether there was a reasonable basis for the Respondent reaching the conclusion about what she had done which the Respondent in fact did reach. Here there are significant pieces of evidence. First, and independently establishing the reasonableness of the Respondent's belief, is the transcript of the conversation with Andrew Griffiths. The Respondent was entitled to reach the conclusion that the Claimant was refusing to see a patient. The second piece of evidence is that the Claimant appears to have warned that she would not be seeing patients during this period in the disclosure. She then did not see a patient during the time she said she would not be happy to do so. The third significant piece of evidence is the way in which the Claimant developed her account of what was preventing her seeing the patient. The Respondent was entitled to conclude reasonably that the reason for not seeing the patient was the deliberate decision and not the later advanced explanations.

104. The Respondent accordingly had reasonable grounds for concluding that she had committed the misconduct.

105. We also conclude that the Respondent conducted a reasonable investigation, although it was not a perfect investigation. The respondent did not interview the receptionist. The receptionist was not an employee of the Respondent. The receptionist was aware that there was a patient there and did nothing, according to the Claimant's account. However we regard this as a minor flaw in the investigation. We concluded that the Respondent was reasonable in its conclusion that the Claimant did know that there was a patient in reception but declined to see the patient. It was entitled to reach this conclusion from the email and the transcript, together with the account that the Claimant gave.

106. As to whether the decision fell within the band of reasonable responses, we conclude that it did. What we mean by this is that some employers would have, we think, issued a final written warning in order to keep the services of this experienced nurse. However we also think that an employer who decided that it could no longer be sufficiently sure that the behaviour would not recur would also be acting reasonably. In those circumstances we cannot say that the decision to dismiss fell outside the band of reasonable responses. It was clear from the evidence before us that the Respondent did not feel that the Claimant would not behave in the same way in the future. In this regard we refer to pages 716D, and the appeal outcome letter on page 726ff.

107. In the event all of the Claimant's claims are dismissed. We were heartened that the Claimant had been able to complete her prescribing course elsewhere, and that she has now obtained new employment.

EMPLOYMENT JUDGE O'DEMPSEY

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
10 August 2018