EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **MR T ROBINSON**
DR V WEERASINGHE

CLAIMANT **DR S TALSANIA**

RESPONDENT **BUPA OCCUPATIONAL HEALTH LIMITED**

ON: **31 JANUARY – 6 FEBRUARY 2023**

Appearances:

For the Claimant: Ms M Bouffe, counsel
For the Respondent: Ms J Twomey, counsel

This hearing was carried out on CVP (Cloud Video Platform) in view of the train strikes. The parties did not object to it being conducted in this way.

RESERVED JUDGMENT

1. By a majority (Employment Judge Spencer and Mr T Robinson) the Judgment of the Tribunal is that:

    a. The Claimant's claim that the principal reason for her dismissal was that she made protected disclosures does not succeed and is dismissed.
    b. The Claimant's claim that she was subjected to detriments on the ground that she made protected disclosures is dismissed.

2. The unanimous Judgment of the Tribunal is that the Claimant's claims that she was dismissed or subjected to detriments contrary to sections 100(1)(c) and 44(1)(c) do not succeed and are dismissed.

3. The minority (Dr V Weerasinghe) Judgment of the Tribunal is that:

   a. The Claimant was unfairly dismissed for making protected disclosures to Dr Powles.
   b. The Claimant was subjected to unfair performance management and told to lead the team and not push against what the Respondent was delivering on the ground that the Claimant made protected disclosures to Dr Powles.
   c. The Claimant's claims that she was subjected to detriments when:
      (i) she was told to leave the employment without being able to work her notice;
      (ii) the Claimant's laptop was taken away from her and
      (iii) her grievance dated 17 August 2021 was rejected,

   do not succeed.

REASONS

1. This is, for the most part, a majority Judgment. Dr Weerasinghe disagrees with the majority on some of the findings of fact and on the conclusions to be drawn. Where there are differences these are stated. Where that appears, the wording is that dictated by Dr Weerasinghe and is shown in italics.

2. The Claimant is a GP, who qualified some 14 years ago and was employed by the Respondent as Lead Medical Practitioner or Lead Physician at the Respondent's West End centre from 15 February 2021 until her dismissal (with pay in lieu of notice) on 19 August 2021.

3. On 10 December 2021 the Claimant presented a claim to the Tribunal complaining that she had been subjected to detriments and then dismissed because she had made protected disclosures and/or because she had raised concerns of a health and safety nature. The Respondent's case is that the Claimant was dismissed at the end of her six-month probation for performance reasons. The Respondent also denies that the Claimant had made any protected disclosures. A list of issues had been agreed at the case management hearing and appeared on page 44 of the bundle.

Application to amend.

4. At the start of the hearing the Claimant applied to amend her claim to change the protected disclosures relied on. The 3rd protected disclosure relied on by the Claimant was a disclosure said to have been made at the Lead Physicians' meeting with management which took place on 4

August 2021. The minutes of that meeting together with a transcript had been disclosed by the Respondent. Following that disclosure the Claimant asked to see the July minutes. The Respondent initially refused but, following an order for specific disclosure, those minutes were disclosed to the Claimant on 13 September 2022. On 16 December the Respondent also told the Claimant they had not been able to find a Teams recording of the July Lead Physicians meeting.

5. In her witness statement (which was exchanged two weeks before the start of the hearing) the Claimant said that she now believed that the disclosure that she relied on occurred at the July Lead Physicians' meeting, rather than in August. No application to amend the claim was made at that time. Instead, at the start of the first day of the hearing, Ms Bouffe applied, on behalf of the Claimant, to amend her claim to say that the relevant disclosure had been made at the Lead Physicians' meeting in July.

6. This caused very real practical difficulties. The application was made very late. The Tribunal was told that none of the Respondent's witnesses who had been called to give evidence at this hearing had attended the Lead Physicians meeting in July. The Respondent's representatives had not taken instructions on what had occurred or been said at the July meeting. It was evident that, if the amendment were allowed, we could not have a fair hearing without postponing. In the circumstances, we asked the Claimant whether, if the options were (i) allowing the amendment with a postponement or (ii) carrying on today without the amendment she would rather postpone. The Claimant said that she would not wish to postpone. We then refused the amendment for reasons given orally at the time. The Claimant also formally withdrew her reliance on the third disclosure. It was agreed that the date of the second disclosure (to Dr Rogers) was 30th July (rather than 27th July as pleaded).

7. The amended issues are reproduced below (very slightly simplified).

8. In her application to amend Ms Bouffe submitted that the third pleaded detriment was, simply, that the Claimant was dismissed. First, we do not read it that way. As pleaded the detriment relied on is that the Claimant was told to leave without being able to work her notice. The detriment is not being able to work her notice and not the dismissal. We do not accept that paragraph 14c below should read as if the pleaded detriment is the dismissal itself. She also submitted that following Tinnis v Osipov 2019 ICR a dismissal could be pleaded as a detriment. At the time we said we would reserve our decision on that point to our final judgment.

9. In the event, given our findings overall the point is now moot and so we deal with it briefly at the end of these reasons.

<u>The Issues</u>

<u>Whistleblowing</u>

10. Did the Claimant make a protected disclosure(s)? The Claimant submits that she made two disclosures; on 14 July 2021 ("the First Disclosure") and on 30 July 2021 ("the Second Disclosure").

11. Did the Claimant provide the Respondent with information? The Claimant alleges that she provided the following information to the Respondent:

    (a) The First Disclosure - raising concerns (verbally by telephone) with the Clinical Director Dr Luke Powles about the Respondent's treatment of doctors (i) the lack of support for doctors (ii) that a recent staff survey had been conducted at the centre with low scores around staff feeling heard (iii) issues with the management of appointment systems and expectations around delivery of patient care for which they were insufficiently trained (iii) doctors were being performance managed rather than properly trained.

    (b) The Second Disclosure - raised by telephone with the Associate Clinical Director, Dr Lizzie Rogers, relating to a positive covid case at the workplace and the Respondent's failure to put in place effective protection against Covid / conduct proper risk assessments.

12. Did the Claimant have a reasonable belief that the disclosures, tended to show one or more of the following?

    (a) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject namely the Respondent's obligations towards its private patients and its obligations towards its employees.

    (b) that the health or safety of any individual has been, is being or is likely to be endangered, namely the Respondent's obligations towards its patients and patient safety and its employees' health and safety.

13. Did the Claimant have a reasonable belief that the disclosures were made in the public interest?

14. Did the Claimant make the disclosures to her employer? Was the Claimant subjected to a detriment on the ground that she made a protected disclosure?

15. Was the Claimant subjected to any detriment by any act, or any deliberate failure to act, by the Respondent? The Claimant alleges that she was subjected to the following detriments:

    (a) the Claimant was performance managed unfairly.

    (b) the Claimant was sent critical emails stating that she needed to lead the team and not push against what the Respondent

was delivering. (In evidence the Claimant clarified that what this referred to was in fact the 5 month review.)

(c) the Claimant was told to leave the employment without being able to work her notice.

(d) the Claimant's laptop was taken away from her.

(e) the rejection of the Claimant's grievance dated 17 August 2021.

16. Has the Claimant shown that the alleged disclosures were the reason (or if more than one, the principal reason) for her dismissal?

<u>Automatic Unfair Dismissal and detriment for health and safety reasons –</u>

17. Was the Claimant an employee at a place where there was no such representative or safety committee?

18. Did the Claimant bring to the Respondent's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety?

19. Has the Claimant shown that the reason or the principal reason for her dismissal was the fact that she brought to the Respondent's attention by reasonable means, circumstances connected with her work, which she reasonably believed were harmful or potentially harmful to health and safety?

<u>Detriment for health and safety reasons</u>

20. Was the Claimant subjected to any detriment by any act, or any deliberate failure to act, by the Respondent because she brought to the Respondent's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety?

21. The Claimant alleges that she was subjected to the detriments as set out in paragraph 15 above.

Evidence

22. We heard evidence from the Claimant. For the Respondent we heard evidence from Dr Elizabeth Rogers, Mr Paul Andrews, Mr Luke Powles and Ms Caroline Hemingway. Mr Finch provided a witness statement but was not called. We had a bundle of documents in electronic form and a number of additional documents were provided during the course of the hearing.

The law

23. The Employment Rights Act 1996 ("ERA") provides two key protections for whistleblowers in a work context:

a. The right of a worker not to be subjected to any detriment by their employer on the ground that they have made a protected disclosure (section 47B); and

b. Protection from dismissal where the reason or principal reason for the dismissal was the making of a protected disclosure (section 103A).

24. In order to attract these protections, any disclosure relied upon must:

a. Be a "qualifying disclosure" as defined by section 43B of the ERA, i.e. a 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 matters listed at sub-sections 43B(1)(a)-(f); and

b. Be made in accordance with any of sections 43C to 43H of the ERA, which include making the disclosure to the worker's employer (section 43C (1)).

In this case the Claimant relies on ss 43B(1)(b) i.e., that a person has failed, is failing or is likely to fail to comply with any legal obligation to which it subject; and on 43B(1)(d) that the health and safety of any individual has been, is being, or is likely to be endangered.

25. The first requirement for a qualifying disclosure is that it is a disclosure of information. Vague allegations and expressions of opinion will not suffice. The requirement is not that the disclosure consists solely of information, but that it contains sufficient information to fall within the definition in section 43B(1). Section 43L specifically provides that a disclosure of information will take place where the information is passed to a person who is already aware of that information. On the other hand a disclosure must involve the provision of information in the sense of conveying facts. In Kilraine v London Borough of Wandsworth 2018 EWCA civ 1436 the Court of Appeal said that "In order for a statement or disclosure to be a qualifying disclosure it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)". A communication which asks for, rather than supplies, information is also not a disclosure. (Blitz v Vectone Group Holdings Limited EAT 0253/10)

26. In order to be a qualifying disclosure, a worker must have a reasonable belief (i) that the disclosure is made in the public interest and (ii) that it tends to show one or more of the matters listed at subsections 43B (1) (a-f). In relation to the public interest test, a disclosure will not be disqualified from protection because it may also be made in the worker's self-interest, provided there is sufficient public interest in the disclosure being made to mean that the belief was objectively reasonable. As to the matters listed at 43B (1) (a-f), the Claimant in this case says that the information that she

disclosed tended to show that the Respondent was failing in its obligations towards its private patients and its employees and its obligations in health and safety.

27. If the Claimant can establish that she made a qualifying disclosure as defined she will have the protection of section 103A and 47B(1) of Employment Rights Act 1996.

28. Section 103A of the Employment Rights Act 1996 provides that: - "An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure". Where a Claimant does not have the necessary two years service to claim ordinary unfair dismissal, the burden will be on her to show the principal reason for the dismissal was because of her disclosure(s).

29. Section 47B(1) gives an employee the right not to be subjected to a detriment on the ground that she has made a protected disclosure. It is for the Claimant to show that she made a protected disclosure and was subjected to a detriment. If she does that, then Section 48(2) provides that it is for the employer to show the ground on which any act or deliberate failure to act was done. In *Fecitt v NHS Manchester 2012 IRLR 64* the Court of Appeal held that, for the purposes of a detriment claim, a Claimant is entitled to succeed if the Tribunal finds that the protected disclosure materially influenced the employer's action.

30. There are similar provisions in Employment Rights Act 1996, providing protection to limited classes of persons who raise health and safety issues. So far as relevant to this case Section100(1) (c) provides that

> "*An employee who is dismissed shall be regarded for the purpose is of this part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that:*
>
> *i. being an employee at a place where there was no health and safety committee, or*
>
> *ii. there was such a representative or safety committee that it was not reasonably practicable for the employee to raise the matter by those means,*
>
> *he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety***.**

31. Section 44(1)(c) provides similarly that:

> "*An employee has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that,*
>
> *(i) being an employee at a place where there was no such representative or safety committee, or*
>
> *(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,*
>
> *he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*

Findings of fact

32. The Claimant began work with the Respondent on 15 February 2021 as the Lead Medical Practitioner for BUPA's London West End Health and Dental Centre. Just after she began to work for the Respondent her father died, and she was away from work for 2 weeks on compassionate leave from 24th February until 11 March 2021.

33. The Claimant was never provided with a formal job description (one appears in the bundle, but it postdates the Claimant's employment), but she had seen the advertisement for her role (97). She accepted in evidence that she understood her role and her duties.

34. As Lead Medical Practitioner the Claimant's role was partly clinical; (conducting BUPA health assessments, which the Respondent referred to as "products", and private GP appointments) and partly managerial; managing a team of salaried, self-employed and locum GPs who were working at the centre. She worked 32 hours a week over 4 days (excluding Tuesdays) . This was made up of 8 sessions, 4 of which were clinical and 4 were managerial. Her working pattern of managerial and clinical sessions is set out in Mr Andrews's witness statement at paragraph 9. Her clinics were scheduled for all day on a Thursday and in the afternoons on Mondays and Wednesdays. She had admin and managerial time scheduled all day on a Friday and in the morning on Monday and Wednesday.

35. The Claimant's contract of employment sets out that her employment was subject to a probationary period of 6 months, and that there was an option for the Respondent to extend the probationary period by a further 3 months.

36. The Claimant was line managed by Mr Andrews, the centre manager. Mr Andrews is not a clinician. His role was to ensure the centre's business and financial objectives were met. During her probation the Claimant's clinical work was overseen by Dr Rogers, who is an Associate Clinical Director for the Respondent, but is not based at the West End centre.

37. The Claimant's clinical duties were to undertake health assessments and private GP appointments and then to deal with the record-keeping required by the Respondent. Her managerial duties involved appraising, developing and managing the other 7 or so GPs working at the centre, including auditing their record-keeping.

38. Before the Claimant could fully undertake her managerial duties and to supervise and appraise others, she needed to be "signed off" in relation to the Respondent's record-keeping requirements. Dr Rogers was tasked with doing this; by observing clinical sessions and by auditing her paperwork. Until the Claimant had been signed off as of sufficient quality, in terms of both clinical competence and compliance with Bupa's record-keeping practices, she could not be signed off to deal with the managerial aspects of her role. It was Dr Rogers' evidence that the Respondent would normally expect a lead practitioner to be fully signed off within 3 months of taking up the role, though this was not clearly explained to her at the start of her employment.

39. The process towards obtaining a sign off required the Claimant to meet the Respondent's expectations in terms of BUPA's record-keeping. This was measured by a series of "clinical note audits" and by requiring the Claimant to achieve a green result for all metrics on the doctor's dashboard and the pathology dashboard. The dashboard is the Respondent's platform for measuring a doctor's performance against various data metrics.

40. Dr Rogers audited the Claimant's health assessment records/notes by reviewing the health assessments records of 2 customers (randomly chosen) who had been assessed by the Claimant. The format was for the Claimant to set out her own assessment of the notes and for the reviewer then to add hers in a separate column**.** Audits took place on a number of dates as follows:

    a. 14th April 2021. (186) This was an audit of paperwork relating to a BUPA health assessment. No rating was recorded. Dr Rogers gave evidence that she believed that the Claimant's comments were insufficiently detailed and, in the review, form she *records "I wonder if this was done under speed – some sections rated good when not applicable".* (In other words that Claimant had rated her notes as "good" when it was not applicable.) They agreed to do another note audit in one month.

       Dr Weerasinghe wishes it to be recorded that it was Dr Rogers responsibility to record an overall rating. He considers that the Claimant should have been rated good. See analysis below:

       12 topics assessed, 2 'customers'. Therefore 24 assessments in total
       Out of the 24 assessments, 14 good
       5 not rated either good or RI,
       2 RI
       3 rated good when not applicable,

       In consideration of the above analysis, he accepts the Claimant's assertion that it should have been an overall good, see para 104 of the Claimant's submissions

    b. 28 April (211). (This is dated 14th April as the date that it was intended to take place, but actually took place on 28th April.)This was an audit of the Claimant's records relating to a "Be well" health assessment. Dr Rogers recorded this as RI (requires improvement)

    c. 12 May.(221) This was a further audit of a Be Well Health Assessment. Dr Rogers noted that there were some areas that had improved but in other areas there was room for improvement.

    d. 16 June.(242) This audit was rated Good (There were some areas where improvement was required). *Dr Weerasinghe adds that in the outcome summary, Dr Rogers notes: "We have now completed the Health Assessment Notes Audits with an overall rating of good."*

e. 28th July.(353) This was a review of the Claimant's' notes taken during 4 private GP appointments. This was rated "requires improvement". There are detailed notes in the comments box with advice for record-keeping.

f. Dr Rogers undertook one clinical observation and rated that as "good". Nonetheless Dr Rogers said that clinically she had concerns about 2 matters which had been picked up on the audits.

41. As a result of these audits the Claimant was not signed off by the Respondent as competent to audit the record-keeping of other GPs working at the centre or to carry out appraisals. This meant that she was not able to perform a large part of her managerial duties which had to be undertaken by others. In cross examination the Claimant said that a lot of the record-keeping was about policies that she had not been told about and that, for example, when she was criticised for sending two individuals for a mammogram, when they should have been sent straight for ultrasound, this was a BUPA policy of which she had been unaware. Dr Rogers, refuted that assessment and said that (as the Claimant had found lumps in the patient's breasts) the right clinical choice was to order ultrasound investigation). It was a question of clinical judgment rather than BUPA policy*.*

42. On 16th June and 28th July Dr Rogers also discussed the Claimant's dashboard figures with her. (239 – 240 and 360). On 16th June it was Dr Rogers view that the Claimant was ordering considerably more tests than other GPs at the centre, and was ordering investigations or tests which were not clinically indicated. In her opinion this was a problem because it caused unnecessary anxiety for the patient and additional work for the Claimant, and for any other doctors who would have to review and report on the results. By 28th July there had been an improvement in the Claimant's dashboard statistics, (which was mainly showing green) and also in her test ordering but it was Dr Rogers view that there remained 3 areas in the Claimant's dashboard statistics which were not satisfactory (360).

43. In cross examination the Claimant said that she thought that the price for some health assessments included certain tests and she had thought that where that occurred, she was required to order the tests. Dr Rogers rejected that explanation, saying that she could not have believed that, as the Claimant had not ordered tests on every occasion that a test was included in the health assessment.

44. The Tribunal considered that Dr Rogers was a good and honest witness and responded thoroughly and consistently to the questions that were put to her in cross examination

45. The Claimant also said that, having come from a National Health background, the volume and type of paperwork that was required was a steep learning curve. Dr Rogers acknowledged this, but nonetheless she expected the Claimant to have got up to speed within 3 months.

46. In relation to the day-to-day matters of work at the centre the Claimant reported to Mr Andrews. It was apparent, from the evidence which we saw and heard, that Mr Andrews and the Claimant had not seen eye to eye. At

the beginning of her employment the Claimant had sought to change her working pattern (to change the times when she would be doing clinics against the times when she would be doing administrative or managerial tasks). Mr Andrews had not agreed to the change. He told the tribunal that it was part of his role to make sure that consulting rooms were used in the most efficient way (i.e. without any rooms remaining empty at any time) and the Claimant's suggested pattern would not allow for this.

47. *Dr Weerasinghe wishes to record that the Claimant's evidence was that Dr Rogers agreed with the Claimant's proposition, saying that it was a sensible solution that she and other LPs had adopted. The Claimant's concern was that under the existing diary arrangements, she was often a lone worker with one receptionist after 5.30pm.* (This was not put to Dr Rogers in cross examination).

48. On 14 May the Claimant complained to Mr Andrews about her review with Dr Rogers, and complained that the Respondent was a very "top-down" company (229).

49. The Claimant had raised the issue of her working pattern again with Mr Andrews on 4th June. She wanted all her clinical sessions in the mornings. This had clearly irritated Mr Andrews, and he noted at the time *"I feel Shivali is all about Shivali and not for the business and she needs to offer the service we provide and is pushing back about things that do not suit her".* The criticism may not have been justified, but it was made before any protected disclosures alleged by the Claimant.

50. On 14th May Dr Rogers contacted HR to express concerns about the Claimant (590-591). She noted that, as an external candidate, the process for the Claimant to get to grips with their policies and procedures was harder. She said that concerns had been raised at the induction about her ability to take feedback. Dr Rogers had also found her challenging. She referred to the Claimant's decision-making and the audit of her notes and to the fact that the Claimant had been turning up late to appointments and meetings. Dr Rogers said that she did not feel that the Claimant was at a stage to end probation - she was considering whether an extension was appropriate and had arranged for the Claimant to buddy with an experienced Lead Physician.

51. On 25th May the Claimant called HR, worried about the three-month probation review the next day and said her notes were not of the standard the managers were expecting of her. She said she wanted it recorded that she did not leave confidential information on an answerphone as the manager had said she wasn't taking feedback on it. (592).

52. On 9 June (595) Mr Andrews and Dr Rogers called to receive further advice from HR. The note of that meeting records that they expressed concerns about the Claimant, and reference was made to the fact that she was not currently taking on "any LP duties she needs to have clinical sign off" and that other doctors were doing her doctors appraisals, notes audits and inductions. The manager had set an expectation that she needed sign off in June. It referenced that her results of this from the dashboard were "very poor."

53. *Dr Weerasinghe's has a different finding from the majority as to that meeting. He finds that the primary concern which was discussed was the*

impact of the bereavement of the Claimant's father. The reference to not taking on LP duties was a statement of fact, not a complaint. He finds that there was no expectation for the Claimant to be signed off at three months, having acknowledged her delayed start and that it was harder as an external candidate.

54. On 18 June Dr Rogers and Mr Andrews had a three-month review with the Claimant. (250). The majority consider that it was clear from this that the Respondent genuinely considered that the Claimant was not performing as well as they had wished. There were some good points, but the Claimant was told she had to focus on the clinical aspects of the role until she had been signed off to deal with the managerial aspects. The issue of the Claimant's time management was raised. There were concerns that she was arriving late on Thursday and was overrunning on her appointments. There was a reference to the need for the Claimant to maintain and improve her dashboard statistics, to test ordering and to the audits which had been performed by Dr Rogers.

55. *Dr Weerasinghe wishes to add that the Claimant had time off just after she started, so effectively this was a 2-month review. He does not accept that the Claimant was not performing as well as they had wished because the review form at p250, p254 does not say this. He says that the Respondent had no expectation at this point that every aspect was good. Dr Weerasinghe notes that there were many positives identified at the Claimant's review and quotes the following.*
    - *"In May Shivali completed the ECG Training and passed first time. This is a paper that takes four hours of prep work and then an exam.*
    - *NPS has been very good, customers feedback will be placed in your HR folder, the same for your team when you meet with them. Well done on your feedback.*
    - *Shivali has also assisted with customer complaints and this has helped close them down.*
    - *You had a clinical observation and that was rated good overall. Being the LP for the site this is important because the team will come to you for assistance with problems/ observations/where to go next."*

56. On 20th July there was a one-to-one in which Mr Andrews raised again with the Claimant issues of timekeeping and diary management (307). "Talking to others will not change your diary pattern, you need to show willing and be the best. You are a leader and need to show that leadership. Currently this is lacking. You need to be top of your game, and lead by example. If you do not like something, you go to others to seek a better result (you went to Sophie about diaries)."

57. First disclosure. In March 2021, shortly after she had joined the Respondent the Claimant applied for a more senior role of Associate Clinical Director. She was interviewed by, Dr Luke Powles, Clinical Director and Alexandra Oliver, Medical Director. She was scored as "consider" for the role but was ranked 5th out of 7 candidates. *Dr Weerasinghe wishes to record that it was the Claimant's evidence she was encouraged to apply by Paul Andrews and Dr Oliver.*

58. It is the Claimant's case that on 14 July 2021 she made a protected disclosure to Dr Powles. Dr Powles evidence was that the Claimant did telephone him, but that she made no protected disclosures.

59. The Claimant said that in her call to Dr Powles she had complained about the Respondent's treatment of doctors; specifically the lack of support for them, and said that the doctors were not feeling heard or listened to. She said that she referred to the recent staff survey conducted at the centre which had shown low scores around staff being heard. She said she had mentioned issues with the management of appointment systems and expectations around the delivery of patient care for which they were insufficiently trained and doctors being performance managed rather than properly trained.

60. In cross examination the Claimant expanded upon the evidence which she had given in her witness statement. The Claimant said that she told Dr Powles that the doctors at BUPA were "profit service monkeys" and he had responded by telling her to mind her language. She said that she had not referred specifically to patient safety, but if doctors were stressed, it would lead to patient safety issues and it was an obvious link.

61. On the other hand Dr Powles says that the Claimant had contacted him to arrange a chat "nothing urgent" on 2nd July, and that this was then diarised. It is not in dispute that the Claimant told him, at the start of the telephone call, that she wanted an off the record chat. She had begun by mentioning that they had both trained at Barts. Dr Powles said that the Claimant told him she had been chatting to another lead physician who told her that he (Dr Powles) had given him some useful career advice during his induction and that she wanted to seek his guidance about how to make a success of her career at BUPA, and to discuss how working for the Respondent differed to working in the NHS. Dr Powles's evidence was that the Claimant wanted to understand the key performance indicators and how they managed doctors in the corporate world. He said that they talked about the importance of the dashboard as quality assurance and that the focus of the conversation was on career coaching for the Claimant, rather than on any safety concerns. He said that the call was constructive and lasted about an hour. Dr Powles denied that the Claimant had raised any concerns with him about how doctors were treated, beyond her own "slight sense of being micromanaged". He says that she did not mention training.

62. The day before the phone call with Dr Powles the Claimant received an email from another doctor (295) who referred to a "formulaic way of doing medicine." The Claimant responded she would raise his concerns with senior managers. Ms Bouffe relied on this as broad support for the Claimant's version of events, and we accept it does add support to the fact that the Claimant was disenchanted with the audit system, but even on her case she does not say that the Claimant raised those specific concerns with Dr Powles.

63. On 23rd July 2021, a week after the conversation with Dr Powles there was a telephone conference between Dr Rogers, Paul Andrews and a person from HR. (602) This conference was arranged at the request of Dr Rogers. The HR notes of this conference record that the Claimant had expressed (to Mr Andrews or Dr Rogers) concerns that rushing may cause a safety issue to the customer, and had said: "BUPA are putting profit over safety",

and that the HR representative then discussed whistleblowing. The notes also record that the GP notes audits were still "room for improvement" and that she was not performing her Lead Physician job duties as she had not been signed off.

64. *Dr Weerasinghe considers that the notes of that telephone conference support the Claimant's evidence as to the conversation she had with Dr Powles.*

65. The **majority** of the Tribunal (EJ Spencer and Mr Robinson) prefer Dr Powles evidence as to the content of that phone call. His evidence was clear and consistent. The Claimant emailed Dr Powles on 2 July 2021 (290) as follows "hi Luke, I hope you're well. I wonder if you have a window for a chat and some advice, nothing urgent." The tone of that email supports Dr Powles evidence that the Claimant was calling for advice rather than to make a complaint or a protected disclosure. We note that the day before the Claimant began working for the Respondent, she had specifically asked for the policy on raising concerns (97). The response (95) was as follows

"*Usually concerns will be raised to the line manager e.g. Paul, the ACD e.g. me but if someone felt this was not appropriate or was unhappy with either of us, they would go to the regional operations manager who for the West End is Stuart Finch or the clinical director – Petra Simic. If however it was more of an incident this will be recorded on Datix and an investigator/manager assigned. The governance teams oversee the Datix's and look for specific patterns etc. They are then discussed within the various governance meetings. We also have Speak up which can be used where people have concerns but feel unable to raise them within the usual routes."*

When asked in cross-examination why she has not followed that advice if she wished to raise a concern, the Claimant said she had not met Stuart Finch, and that Ms Simic had moved on horizontally. She had been told not to "push back" so she couldn't go to Mr Andrews. She had met Dr Powles at her interview for the Associate Clinical Director position.

66. In the view of the majority, the Claimant's answer to this question made little sense. She had met Dr Powles only at a formal interview. The reporting line for disclosures had been made clear to her and, if she could not go to Mr Andrews, then the obvious port of call was Mr Finch. The majority of the tribunal considered that if the purpose of the call was to raise concerns that doctors were being insufficiently supported – and that this was an issue that impacted on the health and safety of patients - the Claimant would have sought to raise this more formally.

67. The majority also consider that if the Claimant had genuinely referred to the doctors at the Respondent as "profit service monkeys" in her conversation with Dr Powles she would have referred to this much earlier in the litigation. That phrase does not appear in her grievance, in her particulars of claim or in her witness statement, and it threw doubt on the Claimant's credibility.

68. On the balance of probabilities the majority consider that the Claimant called Dr Powles for a chat because, by then, she was already having

performance issues and that she wanted some coaching regarding the various difficulties she was having with overrunning, passing the audits and the dashboard. She wanted to be a success. While the Claimant told Dr Powles that she felt that she was being micromanaged, and expressed concerns about the audit system, this was in connection with her difficulties in being signed off, rather than because she was disclosing general concerns about doctors' well-being. We find that the tenor of the conversation was a request for advice rather than a disclosure of information which suggested wrongdoing or the breach of a legal obligation on the part of the Respondent. The majority find that the Claimant did not make a protected disclosure (as defined) to Dr Powles.

69. In a WhatsApp message sent at 13.03 on the 14th July the Claimant told Mr Andrews that she had spoken to Dr Powles that morning "about a couple of things" (168). Mr Andrews asked Dr Powles about it subsequently. Mr Andrews said that he was told it was a coaching call. He denied that Dr Powles had told him the Claimant had raised concerns that doctors were not being supported. He said "If he had said that it would be a reflection both on the Claimant as their line manager and on me." The majority accept that as they have preferred Dr Powles account of his call with the Claimant.

70. *The minority, Dr Weerasinghe, finds that the Claimant's conversation with Dr Luke Powles was neither focused on career progression/corporate structure/career guidance nor on her probation assessment/ performance; and that the primary focus and purpose of her call to Dr Powles was to raise concerns about the matters set out at paragraph 59. To a reasonable observer, matters disclosed do point to the health or safety of doctors and patients have been, is being or is likely to be endangered in breach of the Respondent's duty of care under Health and Safety legislation; Health and Social Care Act 2008 and s2 Health and Safety at Work Act 1974. In reaching this decision, the minority considers the following:*

71. *Dr Powles does not say in his witness statement or in oral evidence that the Claimant expressed concern about her probation assessment. In fact, during cross examination, Dr Powles confirmed that the Claimant did not raise any performance concerns. Dr Weerasinghe finds no evidence that the Claimant was unduly concerned about her performance assessment. In fact, she said that she was baffled to learn that she had failed her probation. Therefore, Dr Weerasinghe concludes that there is no supporting evidence for the majority view. As regards the Claimant's email to Dr Powles on 2 July 2021, Counsel for the Respondent put to the Claimant that her email requesting the meeting states "nothing urgent". The Claimant explained that this was just her style and meant that she did not require him to "step out of clinic." In fact, she had used the same wording "not urgent" in another email, p302. As regards the use of the word 'advice', this might have been used in an abstract manner relating to the concerns she had firmly in her mind. As regards the Claimant's comment "profit service monkeys", Dr Weerasinghe finds that the Claimant did say this. He accepts that the phrase does not appear in her grievance, in her particulars of claim or in her witness statement but in his view the reason for this was because of the offensive nature of the comment particularly because it referred to other doctors. In fact, she used it only in response to a question from the Respondent's Counsel. The corroborating evidence in support of his finding is the Claimant's comment referred to in HR notes that BUPA was putting profit over safety. Dr Weerasinghe*

disagrees with the Majority view that her reference to this in cross examination threw doubt on the Claimant's credibility. Dr Weerasinghe found the Claimant to be an exceptional witness and believes her evidence to be entirely credible.

72. *Dr Weerasinghe does not accept Dr Powles' assertion that the conversation with the Claimant was focused only on career progression matters and that no other concerns were raised by the Claimant. He reasons as follows:*

73. *Dr Powles told the Tribunal that he was very busy at the time. Therefore, it is not plausible that he spent more than one hour of senior management time to discuss Claimant's personal career progression. Moreover, at the time when the Claimant was still on probation, on the balance of probability, career progression would have been unlikely to be foremost in her mind to the extent that she made an appointment to speak with the Medical Director, Dr Powles, who had not known the Claimant particularly well, para 6 w/s. In fact, at the probation review meeting at which she was dismissed, the Claimant said: "My designs were never to aim for ambitious role at the start, I was made aware I needed to come in and understand the nuts and bolts of the business", p412*

74. *With reference to a record of contemporaneous text messages between Mr Andrews and the Claimant, p168, the Claimant says to Mr Andrews: "I'd like to catch up. Have spoken to Luke this morning about a couple of things". Evidently, the Claimant was seeking to talk to Mr Andrews, her line manager, about the conversation she had had with Dr Luke Powles that morning. If the conversation had been only on career progression matters, there was no reason for the Claimant to discuss those matters with Mr Andrews. Moreover, tellingly, there was no subsequent response from Mr Andrews because most likely, he would have already been informed by Dr Powles of the concerns the Claimant had raised, para 16, Dr Powles' w/s. On the day prior to the Claimant's conversation with Dr Powles, she was copied into an email from a doctor in her team complaining about the methodology used in his probation assessment: "there were 4 areas I fell down on that were related to box ticking", P295. The doctor further said: "In my opinion, we are at great risk of becoming 'paper-centred' rather than patient-centred". The Claimant replied: "Thanks for your feedback, I fully acknowledge your email. I too shall be raising your concerns on the assessments and training with appropriate senior leaders". There is no evidence that the Claimant or her team doctor was concerned about their performance. Their concern was the tick box assessment methodology and not their performance. The Claimant also had in mind the negative results of a recent staff survey. Furthermore, in response to a question from the Panel, Dr Powles said the Claimant might have said that she felt a bit micro- managed. This is outside the scope of 'career guidance' and consistent with matters she disclosed.*

75. *In consideration of the above factual background, Dr Weerasinghe finds that the Claimant might have started the conversation with Dr Powles talking about career progression and the corporate structure by way of 'breaking the ice', but the focus of the conversation would have been her disclosure concerns. Dr Weerasinghe does not accept Dr. Powles' assertion that it was the fact of the conversation, not the substance, that was mentioned to Mr Andrews. The reasons are as stated above,*

76. *Of particular relevance is her disclosure about the issues with the management of appointment systems because she had had first-hand experience of this. She was criticised for overrunning the 15-minute appointment slots. During her cross examination she said: "Health cannot be fitted into nice time slots. Health is multi-factorial". At para 15 of her witness statement, she says: "As a medical doctor who cares about patients, it is very difficult to take a corporate response and cut the patient short and let them leave with unresolved issues which could be serious" and further explains: "….if a patient came in with multiple potentially serious problems you would not simply send them on their way. You would point out that next time you would expect them to ask for a longer appointment" and she compares and contrasts her experiences at the NHS. She further elaborates on this issue in her grievance document, p423. Her other concerns were grounded on the feedback she was getting from her own team doctors and the staff survey. Her contemporaneous comment in the HR notes: "BUPA are putting profit over safety" referred to in para 63 above is further evidence of her concerns. Therefore, Dr Weerasinghe concludes that the Claimant did have reasonable belief in the matters at paragraph 59 that she disclosed to Dr Powles and those matters are evidently of public interest and constitute a protected disclosure in compliance with s43B of ERA 1996.*

77. Second disclosure. Mr Andrews tested positive for Covid on 27th July. It is the Claimant's case that Mr Andrews refused to talk to her about her Covid concerns and those of the staff, and that he told her to raise the matter with Dr Rogers. The Claimant then telephoned Dr Rogers on 30th July. The Claimant was unclear as to exactly what she told Dr Rogers - tending to confuse what she was concerned about, with what she actually told Dr Rogers.

78. In the Claimant's witness statement she says this "*I raised my concerns verbally in a telephone call with my clinical line manager Dr Rogers who was not interested and just said "read the SOPs and take it up with the Centre Manager.*" The witness statement is not clear about what the Claimant meant by her "concerns". In her witness statement she refers to concerns (i) that PPE was not being adhered to and staff were removing their masks (para 115) and Mr Andrews had himself removed a mask at a meeting and that (ii) no individual risk assessments were being carried out ('para 113). However when asked by the Employment Judge to clarify what she had said, the Claimant did not refer to masks but focused on risk assessments. She said that she told Dr Rogers that "*I was concerned about the risk assessments of staff at the centre. I wasn't sure we had risk assessed them – were they vulnerable –did they live with vulnerable people? Were they keeping staff safe? She [Dr Rogers] said there's an SOP around it, speak to Paul, but he was sick. The risk assessment had not been communicated to me."*

79. Dr Rogers said that the conversation with the Claimant on 30 July was a conversation about the Respondent's Covid protocols in the event of a positive case, but that the Claimant did not express concern about any potential breaches of Covid protocols and did not suggest that Mr Andrews had not been wearing a mask. She says that she suggested that the Claimant should read and familiarise herself with the SOPs and that the Respondent had a dedicated Covid mailbox which could be used for specific queries. She told the tribunal that the Respondent regularly risk assessed its staff, and it was for the Lead Physician (i.e. the Claimant) to

work alongside the Centre manager to ensure that this was done. The SOPs had a specific section dealing with what to do in the event of a positive case. Emails were sent every week with a link to the SOPs; she would have expected the Claimant to be familiar with them. It is notable that, having been directed to the SOPs by Dr Rogers, the Claimant then did not go back to Dr Rogers to say that she considered them insufficient or that there had been breaches of those SOPs by Mr Andrews or others.

80. Text messages produced during the course of the hearing indicated that on 29th July (i.e., the day before the alleged disclosure to Dr Rogers) the Claimant had asked Mr Andrews "*what are the requirements around isolation? Government policy hasn't changed (as far as I'm aware) for healthcare workers"*. Mr Andrews responded that everyone should take a test. He said that the NHS test and trace app should be turned off while staff were at work because they were in a healthcare setting, and everyone was wearing PPE. (See the SOP 693). The Claimant then said that he wouldn't be considered as wearing full PPE at all times and that they should do a risk assessment. She sent Mr Andrews the government guidance for "healthcare workers and patients in hospital settings" which was not applicable to the Respondent as they were operating in a primary healthcare setting and not a hospital (543). Mr Andrews responded rather tersely *"face coverings and not gowns, Shivali*". He said it was business as usual and that, if she wanted advice, to talk to Dr Rogers as her clinical lead. (Here again the Claimant appears to be asking questions, not making disclosures.) Mr Andrews said he referred her to Dr Rogers as he was not a clinician and his job was just to follow the SOPs. It was a year into covid, and it was for her to read the SOPs and to give advice to the team.

81. In an email dated 30th July (338) the Claimant emailed Mr Andrews expressing concern "I had a few of the doctors come to me yesterday regarding the risk of exposure where social distancing may have been breached in offices and in clinical rooms where you and they have been, but not wearing full PPE i.e. only wearing surgical masks and what the risk may be." Following a response from Mr Andrews that fluid resistant masks were sufficient (and that everyone in the centre followed the SOP), the Claimant then said she had individual doctors asking questions about PPE not being adhered to "i.e. masks not on". In a further email the Claimant then told Mr Andrews that she *was concerned* that there had been meetings or informal chats "when masks have been taken off" … and that "I was aware that you asked about removing your mask at our meeting"

82. The Claimant's emails are somewhat confusing in that she first alleges that full PPE was required, then suggests that *other* people were suggesting that masks were not worn, and then refers to Mr Andrews asking if he could take his mask off in a meeting.

83. On balance while the Tribunal unanimously accepted that the Claimant was genuinely concerned that PPE was not being adhered to, we do not accept that this was communicated to Dr Rogers. We accepted Dr Rogers evidence that the Claimant did not say to Dr Rogers that Mr Andrews or other staff had not been wearing facemasks, and that she was calling to get advice about what the protocols were in the event of a positive case. It was clear from the various exchanges that we have seen that the Claimant did not know what those protocols were. We do not accept that the Claimant said that the individual risk assessments had not been

undertaken, as opposed to querying whether risk assessments had been undertaken.

84. The Claimant's own evidence about what she said to Dr Rogers suggests that she was not disclosing information but was asking questions about Covid protocols. Dr Rogers was irritated, as she had a reasonable expectation that the Claimant would have already been familiar with the relevant protocols and the individual risk assessments for her team. The Respondent's SOP has a specific section on staff procedures in the event of a positive case (687 – 689) and a flowchart which the Claimant should have been aware of. On 22 July 2021 (one week prior to the conversation with Dr Rogers), the Respondent had sent round an updated and improved SOP and supporting documentation.

85. Five-month review. On 23rd July (i.e. after the call to Dr Powles but before the second alleged disclosure to Dr Rogers) Mr Andrews and Dr Rogers reported to HR (602) that the Claimant continued to "have challenging conversations". See paragraph 63 above. HR's notes indicate that the Claimant had told them that she wanted to "ensure that she had done everything right", was concerned that rushing may cause a safety issue to the customer" and that "BUPA are putting profit over safety". There was then a discussion about whistleblowing. Dr Rogers told HR that the Claimant was still unable to perform her duties as Lead Physician as she had not been signed off, and they were having to bring in a lead physician from another area to do her duties. HR advised Mr Andrews and Dr Rogers to hold a five-month probation review and to set clear expectations

86. The majority find that while those notes might support the Claimant's evidence that she had made disclosures to Dr Powles, they are generalised and unspecific remarks in the context of an individual who was understandably defending herself against the application of the Respondent's performance metrics. Dr Rogers had referred to the Claimant as challenging in the HR meeting on 14th May. Mr Andrews referred to the Claimant "pushing back about things that do not suit her" on 4th June.

87. *The minority, Dr Weerasinghe,* d*isagree. He considers that this was unfair criticism because the Respondents ought to have planned for the necessity to bring in a lead physician from another area until the probation period was completed and ought to have planned for a possible extension too.*

88. The Claimant was called to an unscheduled Probation Review meeting (394) the same day. In the summary of her performance/conduct to date the following was noted "Being a doctor is what your key role here is, and not looking at what can be improved, this comes at a later date. Being a doctor and being able to deliver the product is key to passing probation because you need to lead the team and be the best that you can be, and not push against what we are delivering". (This is the critical email referred to in the list of issues. A number of objectives were set (403). *Dr Weerasinghe accepts the Claimant's view was that those objectives were not achievable and refers to her witness statement para 122 and the comments she made after her termination (413).*

89. On 28th July there was a further notes audit and review of the doctor's dashboard. There had been a significant improvement on the dashboard,

although the Claimant was still not 100% green as required, and she was rated RI- Requires Improvement in the audit. The areas for improvement were mainly related to the use and knowledge of the IT system and some identified areas for training.

90. On 2 August there was a call with HR attended by Dr Rogers, Mr Andrews, Mr Powles and Stuart Finch who discussed holding a final probation meeting and termination

91. On 10th August the Claimant was invited to an end of probation meeting. This took place on 12 August with Mr Andrews and Dr Rogers. It was very short. The Claimant was told she had failed her probation and was being dismissed. She was given three reasons for the decision:

    a. that during the interview process she had given the impression she would be competent in the role by this point

    b. that she did not actively support the Centre manager with business and financial targets

    c. timekeeping had been an issue.

92. For her part the Claimant said that the feeling was mutual. Her expectations of the role had not been fulfilled. She said the assessment of her had been unfair. She was critical of the Respondent. Mr Andrews said he would look at her feedback and respond in due course and then left the room. Dr Rogers then asked the Claimant for her laptop and pass and walked her out of the building.

93. When questioned about why he had decided to dismiss the Claimant Mr Andrews said that she did not understand the service or how to deliver it in a timely manner. She was not running an efficient service or motivating the team. She was doing her clinical role "just about", but could not undertake the management aspects.

94. Mr Andrews drafted a brief letter to the Claimant (410) confirming the termination of her employment and listing the reasons for that very briefly as "timekeeping and being unable to do the LP role". Mr Andrews dated this 12th August and sent a copy to HR on 16th August. He told the Tribunal that he posted the letter personally on 20th August, but, on balance, we do not accept that. In any event the Claimant did not receive it and the Respondent now accepts that the letter was never sent.

95. Mr Andrews then went on holiday from 21st August. On 18th August the Claimant sent an email attaching a letter of grievance (dated 17th August) and also complaining that she had not yet had any contact regarding her employment status and asked for this to addressed urgently.

96. In the Claimant's grievance she said that she had been advised by BUPAs people directorate, the local Speak Up guardian and the BMA. (419). In her grievance the Claimant complains about long hours, her management by Mr Andrews and that her performance had not been judged accurately or fairly. She says that on 12th August she had expressed her desire to leave her post after only 5 months and that this was why. (We note in passing that this was misleading as she had in fact been dismissed)

97. She complained that the length of time allowed for health assessments and GP appointments was insufficient. Other clinicians had also been late with appointments - and that had not been raised with them - and she had been "singled out". She complained that Mr Andrews's focus was service provision over and above engaging with her as the new (female) lead. She complained about having to do late appointments, its impact on her work life balance and being a lone worker. She complained that she was "gaslighted" when asked to complete a stress at work form and that her performance was not being judged fairly.

98. Although the Claimant does refer to other doctors at the centre not feeling heard, and to one doctor who had said they intended to resign and another doctor whose clinical confidence had been knocked by being placed in the "requires improvement" category, the letter is primarily a complaint about Mr Andrews " a centre manager who I increasingly felt wasn't looking for me to succeed" and a justification of the Claimant's performance.

99. In Mr Andrew's absence, and understanding that Mr Andrews had not sent a termination letter to the Claimant, Ms Hemmingway and Mr Finch put together an alternative letter setting out reasons for the termination in significantly greater detail and effectively (but clumsily) responding to the points that the Claimant had raised in her grievance, without input from Mr Andrews. The letter was emailed to the Claimant on 27th August but dated 13th August with a covering note that read "Please see attached a copy of the outcome letter from your probation review meeting (493). The letter purported to be from Mr Andrews. This was wholly misleading.

100. Following receipt of the letter from the Respondent the Claimant sent a critique of the letter rejecting its conclusions, and further details of her concerns on 1 September. She did not accept that she had received regular feedback that her performance was of concern and rejected assertions about her timekeeping. She says the letter contained unsupported and unsubstantiated claims, In essence the Claimant did not accept the criticisms made of her. This was responded to by Mr Finch on 13th September (516). He dealt with each of the Claimant's points, and confirmed that the decision to dismiss her remained unchanged.

101. At the Respondent's West End branch where the Claimant worked the health and safety committee consisted of Mr Andrews, Ms Miller, Health Services Manager and Ms Hristova, Dental Services Manager. A poster about that committee was on the notice board at the Respondent.

Submissions.

102. The tribunal had very helpful submissions in writing from both counsel.

Conclusions

103. The majority view. As we set out above in our findings of fact, the majority of the Tribunal considered that the Claimant did not make any protected disclosures as defined. We are satisfied that the Claimant rang Mr Powles because she was concerned that she was not succeeding in her new role and wanted his advice as to how to navigate the new corporate world, which was very different to the environment which she had been used to in the NHS. We find that she phoned Dr Rogers to enquire about protocols and ask questions and that she did not, in that call, complain either that Mr

Andrews or others had not been wearing masks or that there had not been any individual risk assessments.

104. It follows that she could not have been subjected to a detriment or dismissed because she made those disclosures.

105. However, for completeness and if we are wrong as to the factual content of the phone calls, the majority also record that it does not accept that the Claimant was dismissed or subjected to detriments because of any disclosures.

106. The chronology of the Claimant's short employment with the Respondent shows that there had been issues with the Claimant's performance well before her first alleged disclosure. Dr Rogers had contacted HR on 14th May expressing her concerns about whether the Claimant would pass her probation period. There was further contact with HR on 25th May and 9 June. The audit notes and Dr Rogers clear and well explained evidence indicate that Dr Rogers had real concerns both as to the Claimant's record keeping and her clinical competence. Mr Andrews was less clear about why he felt the Claimant was not fulfilling her duties but referred to the fact that while the Claimant was doing her clinical role "just about" she was not able to on-board new doctors, interview new doctors, monitor candidates and carry out appraisals. He said that she was also "not motivating the team or providing any feelgood factor" and that she did not understand what the service was, or how to deliver it in a timely manner.

107. The Claimant has relied on documents disclosed during the litigation as evidence that the decision to dismiss the Claimant was taken "at regional level" and involved Stuart Finch. Certainly it would appear that Mr Andrews obtained a sign off to dismiss the Claimant from Mr Finch and Dr Powles, but we do not accept that the clumsy attempts to respond to the Claimant's grievance in the absence of Mr Andrews, and mispresenting the letter sent to her on the 27th as the dismissal letter means that the Claimant's treatment was influenced by any disclosures. The audit trail is clear.

108. Given these matters the majority could not conclude that (even if the Claimant had made disclosures as she alleged) the principal reason for the Claimant's dismissal was because (i) she had raised concerns with Dr Powles about doctors being stressed, insufficiently trained, or the management of appointment systems; (ii) or because she had suggested to Dr Rogers that there were no individual risk assessments or had raised specific concerns about mask wearing.

109. As to the detriments the Claimant says that after her disclosure to Dr Powles she was performance managed unfairly and sent critical emails. The Claimant said there was "a shift change in the way I was managed after the conversation with Luke". This is a reference to the 5-month review, but the evidential trail shows that the Claimant was not passing the relevant audits well before that date. In relation to the critical emails the Claimant accepts that this is a reference to the advice given to her in that 5-month review (315) and we repeat that this was a continuation of issues that had arisen before any protected disclosures were made. (The 5 month review also took place before any disclosure to Dr Rogers.) Mr Andrews's evidence was that the advice to lead the team and not push against what the Respondent was delivering was a reference to the fact that the Claimant felt that she was not allowed enough time to carry out her health

assessments and associated paperwork and was designed to help her pass probation. We accept it was not a reference to the conversation with Dr Powles.

110. The Claimant has spent much time explaining why she was not able to meet the Respondent's audit requirements. We accept that feedback from her patients was good. However, it is not for this tribunal to say whether the Claimant was or was not performing. We do find, however, that the Respondent genuinely believed that the Claimant was not meeting the standards that it required; and that it had arrived at this conclusion before any telephone call with Dr Powles. The Claimant also says that her performance was improving and, were it not for the disclosures, her probation would have been extended. Dr Rogers clear evidence was that it was her view that the Claimant was unlikely to improve sufficiently to meet their standards, even with an extension, and we accept that. Mr Andrews, whose ultimate decision it was to dismiss the Claimant had his own personality difficulties with the Claimant.

111. The Tribunal also unanimously do not accept that the Respondent's actions in asking the Claimant to return her laptop, or not to work out her notice were influenced by her disclosures. Such actions are standard practice for many employers following a dismissal and we accept that it was standard practice at the Respondent.

112. The Claimant's case is also that her disclosures influenced the rejection of her grievance dated 17th August, (though we include within that complaint the additional matters that she raised on 1st September). As to the outcome to her grievance Mr Finch's responded on 13th September in some detail. The Tribunal unanimously reject that claim. We have no reason to infer that he was influenced by anything the Claimant said to Dr. Powles or her conversation on 30th July with Dr Rogers about covid. *Dr Weerasinghe adds that in his view the causal link to the disclosure is unclear. There is no evidence that Dr Powles had talked with Mr Finch and mentioned the subject matters in the Claimant's disclosure. Dr Weerasinghe notes that Mr Finch was involved in amending the dismissal letter. His view is that amending the dismissal letter in the absence of the decision maker is wholly unacceptable.*

113. We stress that this case is about whether the Claimant made protected disclosures and, if so, whether they influenced the Respondent's treatment of her. This is not a case about whether the Claimant was fairly or unfairly dismissed in the "ordinary" sense. In a claim for ordinary unfair dismissal very real issues would have arisen as to whether the Claimant was given a sufficient chance and an opportunity to improve, and whether she was given a fair hearing and a chance to state her case before the decision to dismiss was taken. However, the Claimant does not have the necessary two years service to bring a claim of ordinary unfair dismissal. The issue for us was not whether the Claimant was in fact performing, but whether the Respondent took the decisions they did for reasons unconnected with any disclosures.

The minority view

114. *Dr Weerasinghe, in the minority, finds the principal reason for the Claimant's dismissal was the disclosure she had made to Dr Powles. Dr Weerasinghe reasons as follows:*

115. *The pivotal disclosure was the disclosure she made in relation to the issues with the management of appointment systems. Specifically, overrunning of GP appointments for which she was criticised and her team doctor's comment that there were back to back GP appointments with no spacer. The reason for this is that this issue has a direct impact on the Respondent's ability to generate income and consequently goes to the heart of its business model.*

116. *At the final probation meeting Mr Andrews gave the Claimant three reasons for rescinding the offer of employment, see para 91 above. As regards the first reason, the Claimant could not have foreseen what was required of her at interview stage given she had no experience of a corporate environment. Furthermore, the Respondent did not provide the interview notes to the Tribunal. Moreover, Dr Weerasinghe accepts the Claimant's submission that she was making progress and that her performance did not warrant dismissal. Furthermore, Dr Weerasinghe accepts the Claimant's assertion: "that there were no agreed criteria for scoring which meant grading someone as 'good', 'requires improvement', or 'unsatisfactory' was entirely assessor dependent" and consequently subjective and inconsistent. Additionally, the Respondent did appreciate that the Claimant had come from the NHS unlike from an internal promotion and the work practices in the NHS would have been different. Nevertheless, no meaningful allowance was made for this; like for example granting an extension of the probation period. Dr Rogers did say in oral evidence that the trajectory of the Claimant's progression did not indicate that she would complete in time. However, contemporaneous evidence of this is unclear and moreover she did not say this in her witness statement. In fact, Mr Andrews evidence was that there were small improvements in all of the areas where the Claimant was criticised.*

117. *Dr Weerasinghe's view is that an extension would have enabled the Claimant to address the residual shortcomings because those shortcomings were largely as a result of her different work practices she was accustomed to in the NHS and were administrative by nature and not as a result of a lack of clinical knowledge.*

118. *As for the second reason, there is a clear link to overrunning of GP appointments and the same applies to the time management issue which was the third issue. As regards the time management issue, there were two facets to this; the Claimant coming in late to work and the Claimant overrunning GP appointments. The Claimant's evidence was that she came in late only on two occasions and as regards overrunning GP appointments, addressing Mr Andrews she said at her final assessment review meeting: "Your comments on dealing with 3 problems at a time. I appreciate you are not clinical, this is very difficult to achieve. It is not retail, nor the service industry, maybe it is an ambition for me to do this", p413. In any case, the Respondent did not provide logged data to substantiate the extent of the time management issues.*

119. *In addition, Dr Weerasinghe notes that*

(i) Soon after the Claimant's disclosure to Dr Powles, an unscheduled 5-month review was convened and conducted, for which the Claimant says she was not prepared as no notice had been given. The positive feedback she had received from patients were not considered.

(ii) The Claimant's comments: "Profit service monkeys" to Dr Powles and: "BUPA are putting profit over safety" as recorded in HR notes. These comments together with her disclosure which tended to show a health and safety risk would have caused alarm for the Respondents to the extent the Claimant's continued employment would have become untenable.

120. *In conclusion, Dr Weerasinghe finds that the Claimant was automatically unfairly dismissed under s.103A ERA 1996*

121. *Dr Weerasinghe also concludes that the Claimant was subjected to a detriment on the grounds of her disclosures to Mr Powles when the Claimant's performance was unfairly managed. In reaching this decision he regards the HR notes of a telephone conference between Mr Andrews, Dr Rogers and Kate Spreckley (HR), p602, as material from which he draws that conclusion. He notes the following extracts:*

- *ST (the claimant) continues to have challenging conversations*
- *had NPs complaints where she has kept a patient waiting 25-30 mins, and a customer waiting 30 rains*
- *ST says Bupa are putting profit over safety*
- *KS discussed whistleblowing*
- *another GP gave feedback on covering LP's feedback. and that HA are tick boxes and his induction wasn't clear. ST said she would escalate this*
- *advised to hold a 5 month probation review*

The telephone conference was on 23rd July 2021. The items listed above are clearly consistent with the Claimant's disclosure to Dr Powles earlier in the month. The 5-month unscheduled probation review meeting was convened without notice to the claimant on the 23rd July. Dr Weerasinghe accepts the claimant's assertion that some of the objectives set at this meeting were unachievable, p413.

122. Dr Weerasinghe concurs with the majority that the reason that the Claimant's laptop was taken away from her and she was asked not to work out her notice was not because of her disclosures but was standard practice when someone is dismissed, They related to her disclosures only in the sense that, but for the disclosures, she would not have been dismissed.

Dismissal and detriment for health and safety reasons.

123. We deal with this shortly. The Claimant's case is that she was subjected to detriments and dismissed for raising health and safety issues. The

relevant sections of Employment Rights Act 1996 give rights to employees in limited circumstances.

124. The Claimant now accepts that there was a health and safety committee at the Respondent so that she may not rely on section100(1)(c)(i) or section 44(1)(c) (i). The Claimant says however that she was not aware of that committee at the time she was employed. She relies on sections 100(1)(c) (ii) and 44(1)(c)(ii) i.e. that it was not reasonably practicable for her to raise the matter with the health and safety committee because she was not aware that the health and safety committee existed. She says that when she spoke to Mr Andrews after he tested positive for covid he did not speak to her in his capacity as a member of the health and safety committee but referred her to Dr Rogers.

125. Given the existence of the committee and the fact that there was a poster advertising its members on the noticeboard it was reasonably practicable for the Claimant to have brought any health and safety issues to the attention of the committee. As such the tribunal unanimously finds that it has no jurisdiction to entertain this complaint.

126. Osipov . Section 47B(1) of Employment Rights Act 1996 sets out the right of workers not to be subjected to any detriment by any act or deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure. Section 47B(2) provides that "this section does not apply where the worker is an employee and the detriment in question amounts to a dismissal ".

127. On behalf of the Claimant Ms Bouffe submits that following the case of Tinnis v Osipov 2019 ICR 655, the Claimant could plead that her dismissal was a detriment which could be pursued under 47B(1A). Given our findings above that point is now moot. However for completeness (and in deference to the submissions made by both counsel) we record our view that the principles in Osipov (that it is possible to bring a claim under section 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal) only apply where there is a claim against an individual co-worker. To hold otherwise would be to completely ignore section 47B(2). In this case there was no claim against Mr Andrews, who took the decision to dismiss. The only Respondent is the employer. To succeed on the principles established in Osipov it would have been necessary, first of all, to establish another worker's personal liability- (in this case that of Mr Andrews), before a claim for vicarious liability under section 47B(1A) against the employer could be made out.

EMPLOYMENT JUDGE F SPENCER
05th April 2023

. Sent to Parties : 05/04/2023

FOR THE TRIBUNAL OFFICE