



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Miss L Roganavic

v

(1) iPlato Healthcare Limited
(2) Ms L Okachi

Heard at: London Central

On: 4 – 8 January 2021

Before: Employment Judge Hodgson
Mr J Carroll
Mr P de Chaumont-Rambert

Representation

For the Claimant: Ms C Urquhart, counsel

For the Respondent: Mr C Kelly, counsel

JUDGMENT

1. The claim of direct age discrimination fails and is dismissed.
2. The claim of detriment contrary to section 47B Employment Rights Act 1996 fails and is dismissed.
3. The claim of automatic unfair dismissal pursuant to section 103A Employment Rights Act 1996.
4. The claim of wrongful dismissal will be decided at a further hearing. The parties should give their proposal for hearing this claim within 14 days of receipt of this judgment.

REASONS

Introduction

- 1.1 By a claim form presented to the London Central employment tribunal on 13 June 2019, the claimant's brought claims of direct discrimination, dismissal and detriment for whistleblowing, and wrongful dismissal.

The Issues

- 2.1 As noted below, the issues in this case were agreed and the amendment allowed on day two was incorporated. They were supplied to the parties and set out below. The numbering has been adapted, as necessary.¹

Direct Discrimination (s.13 Equality Act 2010)²

- 2.2 The protected characteristic the claimant relies on is age. The claimant was 50 years old at the time of the conduct complained of.³ The claimant makes one allegation of direct age discrimination. She alleges the second respondent, Ms Linda Okachi, referred to her as 'old school' on or about 24 January 2019.⁴

Protected Disclosures (ss.43B and 47B ERA)

- 2.3 Did the claimant make disclosures of information? The claimant relies on the following alleged disclosures:
- 2.3.1 Disclosure 1 - on 27 December 2018, the claimant made a verbal disclosure to Ann Cartwright, Data Protection Officer, that Wendy Hughes had disclosed to one GP surgery (Frances at Darwin Health Link) the total number of patients at another GP surgery who were affected by the incorrect smoking status incident (the second surgery is unclear the contact was Ann Neville at Darwen Healthcare).⁵
- 2.3.2 Disclosure 2 - on 27 December 2018, by an email to Ms Cartwright, copied to Martin Rowden, Michael Lewis, and Erika Collinson which expressed concern about the disclosure of information by Ms

¹ Minor amendments have been made where they aid understanding.

² The respondent's draft issues refer to section 109 Equality Act 2010. It is not clear why and the respondent was invited to confirm if any point was taken.

³ The claim form refers to race, but no claim of race discrimination was intended or pursued.

⁴ Para. 31 of the claimant's POC puts it as follows: "31. The second respondent would have been very well aware that capitalisation of hashtags was a much utilised practice by some of the world's leading global brands. With reference to the length of hashtags also being commented upon by Ms Okachi as the claimant being old school (reference the utilisation of 6 words in the full use of #SAVEAWOMANSLIFEADAY) there is also further contemporary evidence that Buxtons £1.8 million 2019 advertising and digital campaign uses 6 words for its social media campaign (#HeresToTheUpAndComing)."

⁵ It is said that the claimant relies on an email of 21 December 2018 at 10:52 from Wendy Hughes. She relies on para 162 of her statement.

Hughes “reiterating concerns about the disclosure of confidential information and data relating to the incorrect smoking status incident.”⁶

- 2.3.3 Disclosure 3 - in January 2019 the claimant raised verbal concerns with Mr Alpsten and Mr Lewis regarding the respondent's intention, by any means necessary, to achieve the closing down of the NHS app and to divert funding away from the NHS to IPLATO/my GP in order to use this critical £150 million funding which was assigned by government to benefit patients, CCG's and GP surgeries for the digital development of NHS services and the specific development of the NHS app which directly competed with the myGP app.⁷
- 2.3.4 Disclosure 4 - on 28 January 2019, the claimant sent an e-mail to Mr Lewis raising concerns that the first respondent did not have sufficient evidence to substantiate its claims that the myGP app could promote emotional welfare and improve quality of life.⁸
- 2.4 In relation to disclosures 1 and 2 the claimant relies on section 43B(1)(b) Employment Rights Act 1996. Specifically, she alleges she had in mind the following:
- 2.4.1 the disclosure of information about one practice to an unassociated practice was a breach of GDPR;
- 2.4.2 she was concerned that the personal details of individual patients may be disclosed between practices; and
- 2.4.3 she was concerned that there may be a future (unspecified) disclosures of individual patient's information.⁹
- 2.5 In relation to disclosures 3 and 4 the claimant relies on section 43B(1)(d) Employment Rights Act 1996 in that the health or safety of young people had been endangered because the public might place undue reliance on an app which purported to promote emotional welfare and improve quality of life.
- 2.6 In relation to disclosures 3 and 4 the claimant relies on section 43B(1)(b) Employment Rights Act 1996 and states: “The claimant claims the first respondent, which works with NHS GP practices and clinical commissioning groups, owes a duty of care to members of the public and, in particular, NHS patients. By trying to divert funding away from the NHS app with a view to closing it down, the claimant was concerned about the potential impact this could have had on the health and welfare of NHS patients and therefore the claimant claims the respondent's actions, as

⁶ PoC para 36(b).

⁷ Taken from para 36(c) PoC. The conversation with Mr Lewis is said to have occurred at a meeting on 23 January 2019 and with Mr Alpsten orally at a different meeting at or around the same time. The claimant relies on page 589 of the bundle and para. 189 of her statement.

⁸ The claimant relies on page 660 of the bundle being an email of 28 January 2019 sent at 15:14.

⁹ The nature of the alleged breach is not set out adequately or at all in the claimant's PoC and the record is a reflection of the discussion with claimant's counsel on day one. This was reviewed on day two and agreed as an accurate statement of the issues.

described at paragraph 36(c)¹⁰ above, were negligent for the purposes of S.43B(1)(b) ERA '96.”¹¹

- 2.7 Did the claimant have a reasonable belief that the making of any of the alleged disclosures was in the public interest and tended to show one of the above failures or potential failures as identified.
- 2.8 The claimant relies on the following alleged detriments:
- 2.8.1 an email from Mr Rowden on 28 December 2018, relating to the alleged disclosures 1 and 2 stating “*There is no security/data breach incident to report or follow-up here. Please don't waste any more of Ann's time on this incident...*”; and
- 2.8.2 an email from Mr Lewis dated 28 January 2019 in which he did not address her concerns as raised in the alleged disclosure 4.
- 2.9 The respondent does not accept all alleged detriments have been brought within the time period allowed by s.48(3) ERA).

Automatic Unfair Dismissal (s.103A ERA)

- 2.10 Was the reason or principal reason for the claimant's dismissal that the claimant made a protected disclosure? The claimant relies on the alleged disclosures.

Wrongful Dismissal

- 2.11 What was the applicable notice period?
- 2.12 It is agreed that the claimant was entitled to one week's notice if still within her period of probation and three months, subject to the remedy issue set out below, if she was no longer in a probation period.
- 2.13 The terms of the contract and the facts are disputed.

Remedy

- 2.14 The tribunal will not consider any remedy evidence, as there is insufficient time.
- 2.15 The respondent alleges in relation to wrongful dismissal that it did not dismiss because of any breach of contract but that it subsequently discovered acts of gross misconduct which would have justified her summary dismissal. The respondent relies on **Boston Deep Sea Fishing and Ice Co v Ansell** (1888) 39 Ch 339. The respondent relies on the following conduct: prior to her termination, the claimant forwarded several emails containing highly sensitive and confidential business documents to her personal email account, including:

¹⁰ This is a reference to the original particulars of claim. Para. 36(c) forms the basis for disclosure three.

¹¹ This allegation was allowed by amendment on day one of the hearing.

- 2.15.1 the first respondent's funding strategy document, on 16 November 2018;
 - 2.15.2 the first respondent's confidential Market Analysis document, on 27 January 2019;
 - 2.15.3 the first respondent's product naming and pricing information, on 28 January 2019; and
 - 2.15.4 the first respondent's marketing materials, on 31 January 2019, prior to their release on 6 February 2019.
- 2.16 The respondent alleges contributory fault. This, and any Polkey deduction, is a matter for any remedy hearing.
- 2.17 Any allegation pursuant to s.49(6A) ERA is reserved to any remedy hearing.

Evidence

- 3.1 The claimant gave evidence and relied on two statements.
- 3.2 The claimant's mother, Ms Dobrila Roganovic was called to give evidence and adopted her statement. The respondent elected not to cross-examine her. It was noted that her evidence was primarily concerned with remedy, but this hearing would deal with liability only. It was noted that she may be recalled at any remedy hearing.
- 3.3 For the respondent we heard evidence from Miss Linda Okachi; and Mr Michael Lewis.
- 3.4 We also received a statement from Ms Erika Collinson. She was not called. We received an email from the respondent's solicitor which indicated that she was unwell and did not intend to give evidence. We received no medical evidence in support. It was agreed her evidence would be included, but as it is untested, we may not be able to give any weight to it.
- 3.5 We received written submissions from both parties.
- 3.6 We received a bundle of documents, draft issues, and an opening note from the respondent and the claimant.

Concessions/Applications

- 4.1 This proceeded as a wholly remote video hearing by CVP; all parties were represented. All parties consented to the video hearing. No party indicated that there was any form of disadvantage or expressed any reservations. It was not practicable to hold a hearing in person. The tribunal was satisfied that it was just and equitable to proceed as a video hearing.

- 4.2 On day one of the hearing, the issues were considered. It was confirmed that there had been no amendment to the claim either sought or granted. The claimant had provided further and better particulars. It was confirmed that they had no status. As a result, an application to amend was made and it was granted.
- 4.3 The tribunal produced a draft list of issues. The amendment, as allowed, was incorporated in that list. There were some minor amendments made on the second day and after the hearing (as requested by the claimant). A final version was supplied to the parties. It is that final version of the issues which is set out above.

The Facts

- 5.1 The respondent is a health technology company which creates digital products in the health care industry. One such product is the myGP app. This app enables users to book GP appointments, order repeat prescriptions, and set up medication reminders. It is suitable for use on a smartphone. At the material time, the NHS was developing, a similar app. GP practices are free to adopt and use apps from any provider; they may choose to adopt none.
- 5.2 The claimant was employed as the respondent's head of marketing, from 25 October 2018. Her contract was subject to a 12-week probation period. She was given one week's notice of termination of employment on 31 January 2019.
- 5.3 The claimant was a senior employee who represented herself as having significant relevant experience. It is her case, which is not challenged, that during her time with the respondent her achievements included:
- a) **Creating the 'Saving Lives with Patient Messaging' PR campaign which was picked up by wider media, despite PR not being the Claimant's specialism ([288], LR@81-83);**
 - b) **Successfully negotiating discounted advertorial space [294];**
 - c) **Created a digital marketing campaign that brought in 23 new GP practices to the app and some 100,000+ users ([17; 419-420], LR@87, 99-103);**
 - d) **Created a cervical cancer awareness campaign;**
 - e) **Completed a thorough re-branding of the Respondent's image and re-designed marketing materials working long hours throughout late January (including when off sick), completing it on 31 January – hours before she was dismissed – to acclaim from colleagues [684-687];**
 - f) **Secured a top tier speaking slot for the CEO at the Digital Primary Care Conference in February 2019.**
- 5.4 The claimant was given little guidance as to the respondent's requirements. Mr Lewis, who was the executive chairman, recognised that the marketing function was underdeveloped. The claimant was hired, in part, to provide strategic development. He describes her remit as "greenfield."

- 5.5 There were discussions between Mr Lewis, who acted as the claimant's line manager, and the claimant. There is no documentary evidence which would suggest that the claimant ever indicated that she did not understand her role, or that she needed further guidance as to how to identify, or implement, strategy. As noted above, it is her case that her achievements were significant.
- 5.6 The claimant's probation period ended on 17 January 2019. The respondent accepts her probation period was not extended automatically because of any sickness absence, nor was the probation period extended in writing.
- 5.7 The first meeting dealing with the claimant's probation occurred on 21 January 2021 with Mr Lewis. There was a further meeting on 23 January 2019. The claimant denies that the second meeting was a continuation of the initial probation meeting. The final meeting occurred on 31 January, when the claimant was dismissed. We will consider the detail of this in due course.
- 5.8 It is common ground that the claimant was never given any formal notice in writing that her probation period had concluded.
- 5.9 It is the respondent's case that there were difficulties with aspects of the claimant's performance and behaviour, which ultimately resulted in her dismissal. The respondent alleges that there were numerous concerns which, taken together, caused Mr Lewis to reach the decision that the claimant should be dismissed. In summary, he had the following concerns: she had a tendency to forward long email chains with colleagues and copy in other members of the senior team; many of the email chains were disproportionately long and excessive which was an inefficient use of time; she was critical of other members of staff; she failed to complete basic tasks; she failed to complete data protection training; she failed to initiate timeously recruitment of a junior, despite complaining about having too much work; she failed to review CVs; she was frequently late; she had significant issues with other members of staff which were detrimental to team working; and the state of the claimant's planning for the upcoming launch of the company's biggest product. We will consider the relevant evidence when we look at the alleged protected acts and the reasons for dismissal.
- 5.10 The claimant alleges that she was dismissed because she was a whistleblower. She alleges she made four specific disclosures of information. We will consider the relevant evidence when looking at each alleged disclosure.

The law

- 6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

- 6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question of why the claimant was treated as she was. Accordingly:

...employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. (para 10)

- 6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept that there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

- 6.4 Section 23 refers to comparators.

Section 23 Equality Act 2010 - Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

- 6.5 Section 136 Equality Act 2010 refers to the reverse burden of proof.

Section 136 - Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

- (a) an employment tribunal;
- (b) ...

- 6.6 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd** [2003]

IRLR 323 which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258**. We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246**. The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Appendix

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

6.7 Under section 43A Employment Rights Act 1996, a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. Qualifying disclosures are identified in section 43B Employment Rights Act 1996.

Section 43B - Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

- 6.8 The following questions must be addressed: first, is there a disclosure of information; second, does the disclosure of that information tend to show one of the matters referred to in section 43B(1)(a)-(e); third, what was the belief of the employer making the disclosure; and forth, was the belief that there was a public interest reasonably held. All of these elements must be satisfied, if the claim is to succeed.
- 6.9 Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. Mere allegations may not be a 'disclosure' for these purposes (see **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38. It should be recognised that the distinction between allegation and information may not be clear-cut. Any argument based on this alleged distinction should be viewed with caution. It is possible an allegation may contain information, whether expressly or impliedly (see **Kilraine v Wandsworth LBC** [2018] EWCA Civ1 1436). Each case will turn on its own facts. It will be necessary to consider the full context.
- 6.10 In **Simpson v Cantor Fitzgerald Europe** [2020] ICR 236 (EAT), Choudhury P considered whether a question can amount to the provision of information for the purpose of making a qualifying disclosure:
Whether or not something is merely a query, or amounts to the provision of information albeit framed as a query, is for the tribunal to determine. If an employee sets out sufficiently detailed information that, in the employee's reasonable belief, tends to show that there has been a breach of a legal obligation, then the fact that such information is contained within a communication that can be described as a query will not prevent it from amounting to a qualifying disclosure. (Para. 42)
- 6.11 The court of appeal in **Simpson v Cantor Fitzgerald** [2020] EWCA 1601, at [52], noted that statements which were "devoid of factual content" would not qualify for protection, and that in order to qualify for protection, a statement "has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)"
- 6.12 It may be possible to aggregate disclosures, but the scope is not unlimited and is a question of fact for the tribunal.
- 6.13 It may be necessary to indicate the legal obligation on which the claimant is relying, but there may be cases when the legal obligation is obvious to all and need not be spelled-out (see **Bolton School v Evans** [2006] IRLR 500 EAT). However, where the breach is not obvious, the claimant may be called upon to identify the breach of obligation that was contemplated when the disclosure was made. It may be necessary to identify a legal obligation (even if mistaken), as opposed to a moral or lesser obligation (see **Eiger Securities LLP v Korshunova** [2017] IRLR 115, EAT.)
- 6.14 The reasonable belief of the worker must be considered. The test is whether the claimant reasonably believed that the information 'tended to show' that one of (a) to (f) existed; the truth of disclosure may reflect on the reasonableness of the belief.

- 6.15 'Reasonable belief' is to be considered by reference to the personal circumstances of the individual. It may be that an individual with specialist or professional knowledge of the matters being disclosed may not have a reasonable to belief whereas a less informed, but mistaken, individual might. Each case must be considered on its facts.
- 6.16 The public interest element was added in 2013 in order to reverse the decision in **Parkins v Sodexho Ltd** [2002] IRLR 109, EAT. This has been considered by the Court of Appeal in **Chesteron Global Ltd v Nurmohamed** [2017] EWCA Civ979.
- 6.17 Underhill LJ gave the lead judgment in the Court of Appeal and addressed whether a disclosure made in the private interest of the worker may also be in the public interest, because it serves the interests of other workers as well (see Underhill LJ, paragraph 32). Underhill LJ declined to interfere with the tribunal's decision and set out his reasons at paragraph 37.

.. the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker... The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool... but that is subject to the strong note of caution which I have sounded in the previous paragraph.

- 6.18 Whilst it is clear that the basis of decision revolves around a simple question that the tribunal must consider all the circumstances, Underhill LJ also gave some general guidance. Starting at paragraph 26, he dealt with some "preliminaries." He reiterated that the tribunal must first ask whether the worker believed, at the time he or she was making the disclosure that it was in the public interest and if so, whether that belief was reasonably held. At paragraph 27 he stated:

First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in *Babula* (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable

- 6.19 Underhill LJ reiterated the need to consider what was actually believed at the time of the disclosure. He says at paragraph 29

... a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all...

- 6.20 At paragraph 28 he noted that it was not for the tribunal to substitute its own view, but stated that importing tests from other areas of law may not be helpful.

...I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking...

- 6.21 The employee does need a qualifying period of service before she can bring a claim under s103A ERA 1996 (s108(3) ERA 1996). However, if she does not have sufficient qualifying service to bring a claim of “ordinary” unfair dismissal under s94 ERA 1996, the burden of proving the reason for dismissal lies with the employee: **Ross v Eddie Stobart Ltd** UKEAT/0068/13/RN, applying **Smith v Hayle Town Council** [1978] ICR 996. In practice, there is an evidential burden.

Conclusions

Wrongful dismissal

- 7.1 The claimant alleges that she was wrongfully dismissed. The respondent accepts that, at the time of the dismissal, there was no allegation of gross misconduct. However, the respondent alleges that after the dismissal the respondent has discovered serious breaches of confidentiality which were fundamental breaches of contract. It is the respondent's case that no damages should be paid. We have treated this contention as a remedy issue.
- 7.2 It is agreed the claimant was entitled to receive one week's notice during her probation period. When probation had concluded, she was entitled to three months' notice. The dispute is whether she was entitled to notice of one week or notice of three months when she was dismissed. The parties alleged that the relevant clause or clauses of the contract are as follows:

The first 12 weeks of your employment with us will be a probationary period, during which either you or we may terminate your employment by giving to each other not less than one weeks notice in writing (which may expire after the end of the probationary period).

We may extend the duration of your probationary period for such period as we consider appropriate by giving you notice in writing before the expiry of the probationary period. If we consider it appropriate, we may exercise the power to extend on more than one occasion. Your probationary period is not deemed to have expired until you have had your review meeting and you have received a written confirmation from HR that this has been passed.

- 7.3 As noted, it is common ground that the probation period was not extended by giving notice in writing prior to the expiration of the 12-week period, which is agreed as being 17 January 2019.

- 7.4 We must have regard to the totality of the contract. The contract also provides, under a subheading which deals with “termination of employment,” that

Until the completion of the probation period the length of notice required on either side to terminate employment is one week. Thereafter your entitlement to notice is the greater one week for each complete year of continuous employment (subject to a maximum of 12 weeks) or one month.

- 7.5 Further on 9 November 2018, Ms Collinson wrote to the claimant following:

I am writing to confirm the following changes to your terms and conditions of employment.

The length of notice required on both sides for the employer and employee to terminate your employment has been changed from one month to three months.

Date effective: after successful completion of probationary period.

All other terms and conditions of your employment remain the same.

- 7.6 The respondent submits it may rely on the part of the clause which states, "Your probationary period is not deemed to have expired until you have had your review meeting and you have received a written confirmation from HR that this has been passed." This sentence was added by Ms Collinson after she had attended an employment law briefing. It is alleged her intention was to modify the clause to prevent the possibility of an employee successfully completing a probation period simply by the passage of time. It is agreed that the tribunal must interpret this contract and determine whether the amendment had the effect as envisaged by the respondent.

- 7.7 To interpret the contractual term as relied on by the parties the tribunal must consider the objective meaning of the language which the parties have chosen to ascertain what a reasonable person would have understood the parties to have meant. We are not concerned with the subjective understandings of the parties to the contract. The contract must be interpreted objectively. In **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1997] UKHL 28 Lord Hoffmann said:

Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

- 7.8 The claimant relies on the contra proferentem rule. To the extent it exists, it is normally applied when considering exclusion clauses in cases where there is existing ambiguity. It does not assist us in this case. To the extent that there is a more general principle that a contract should be construed more strongly against the grantor, it is only relevant when

removing doubt or ambiguity, and should not be used to create doubt or ambiguity. It may be relevant if general principles of construction cannot be applied.

- 7.9 This is a badly constructed and ambiguous clause because it deals with two separate concepts, being probation and the right to terminate by notice, but fails adequately to separate them. It is that failure which leads to the ambiguity.
- 7.10 The first part of the clause deals with the first 12 weeks of appointment. That first 12 weeks is deemed to be a probationary period. Further, and this is a separate matter, during that 12 weeks the employment may be terminated by either side giving one week's notice. Notice must be given within the 12-week period.
- 7.11 The second part of the clause allows the extension of the probation period. It is clear that any extension must be set out in writing. It says nothing about extending the right to continue to give notice of one week.
- 7.12 The respondent seeks to argue that extending the probation period also extends the 12-week period for the purpose of giving notice, but this is, at best, implied by the clause quoted by the parties.
- 7.13 Viewed objectively, the intention appears clear. There is a default contractual position. The parties have assumed that the letter of 9 November 2018 extended the default position from one month to 3 months. We will consider if that is consistent with our interpretation of the contract. Whatever the position, despite the ambiguity, we find that the intention is that there should be a default notice position. In the original written contract that was one month. In the amended contract it was extended to three months following the "successful completion" of the probationary period.
- 7.14 It is accepted, in principle, that extending the right to give notice of one week, as opposed to the default notice period, requires some form of contractual reservation. In order to exercise the initial right to give one week's notice the mechanism is provided by obliging the employer to give clear notice in writing during the initial 12-week period.
- 7.15 The second part of the clause allows the extension of the probation period, but this requires notice in writing in the first 12 weeks. It says nothing about extending the right to give notice of one week.
- 7.16 The third part of the clause is an add-on. We are not concerned with the subjective intention of the employer. We must construe this clause objectively. The clause states "Your probationary period is not deemed to have expired until you have had your review meeting and you have received a written confirmation from HR that this has been passed." It says nothing about giving notice in writing. It says nothing about notice periods. It does not purport to modify the second part of the clause.

- 7.17 One possible interpretation is that the initial 12-week period, during which there is a right to terminate the claimant's contract with one week's notice, is in some manner extended indefinitely by the third part of the clause, pending confirmation that probation has ended, and that this overrides the obligation to give written notice to extend either.
- 7.18 We find that the clause deals with two separate concepts, first the length of the probation period and second the right to depart from the normal default notice period by giving one week's notice.
- 7.19 The first part of the clause provides, first, for a probation period of 12 weeks and second, for the right within that period of 12 weeks to give one week's notice.
- 7.20 The second part of the clause extends probation, but only if notice has been given in the first twelve weeks. It does not extend the right to give one week's notice.
- 7.21 The third part of the clause deals only with the deemed ending of the probation period. It says nothing about extending the right to give one week's notice. It appears to contradict the obligation to give notice of the intention to extend probation in the first 12 weeks.
- 7.22 Giving one week's notice is potentially a denial, or variation, of the contractual right to receive the default notice period.
- 7.23 If we were to interpret the third part as simply extending the right to give one weeks' notice indefinitely, until the probation is deemed to have been concluded (if ever) this would potentially deny the contractual right to the default notice period indefinitely for arbitrary reasons, and it would nullify the obligation to give notice in the second part of the clause.
- 7.24 We find notice was not given to extend. The contract obliges the respondent to give notice. The failure to give notice prevented the extension of the probation period.
- 7.25 As the third part of the clause is in conflict with the second part of the clause, we take the view that the correct interpretation is that it can only apply in circumstances when there has *already* been an extension notice served in accordance with the second part of the clause. In those circumstances, there would be a potential for the probation period to last indefinitely, as provided for on in the third part of the clause.
- 7.26 Here no notice was served and the probation came to an end after 12 weeks.
- 7.27 As the probation period was completed, the wording provided under "termination of employment" adds nothing.

7.28 As to the default period. We find that the probation period was completed. The adjective “successful” adds nothing. The period of notice that was applicable is three months.

Age discrimination

7.29 Ms Okachi joined the first respondent as its digital marketing manager on 7 January 2019. The claimant was her line manager. She had experience, but wished to expand her portfolio beyond social media. She welcomed the opportunity of working with the claimant. Ms Okachi was unhappy with the treatment she received from the claimant. She says the claimant appeared to have "issues with multiple people in the office." The claimant took issue with the head of IT, Mr Ben Kelly-Taylor, and advised Ms Okachi to write to him and mislead him by saying that she did not have a laptop she could use. She states the claimant would make passive-aggressive comments about being the only person who worked in the team. She alleges the claimant was unduly critical of her work. After three weeks, Ms Okachi raised a complaint about the claimant to Ms Doris Namigadde. The complaint was escalated to Ms Erica Collinson who was the head of people and talent.

7.30 On 22 January 2019, Ms Collinson wrote a report to Michael Lewis. Ms Okachi’s complaints concerned the behaviour of the claimant, which included a lack of direction, being kept late at work, and being excluded from meetings. She was also concerned that the claimant had started to ‘cc’ Mr Lewis into routine correspondence.

7.31 The claimant alleges,, on 23 January 2019 the second respondent used the term “old school” as an act of age discrimination.

7.32 The claimant was critical of the second respondent, as confirmed at paragraph 68 of her statement. It is apparent from the documents that by the time of the alleged discriminatory act, the claimant had formed a negative view of Ms Okachi and it is necessary for us to set out some of the relevant history leading up to the alleged act of discrimination.

7.33 The events directly leading up to the alleged act of discrimination, said to have occurred on 23 January 2019, appear to flow from work which was proceeding on 21 January 2019. Ms Okachi sent to the claimant a suggested text for a post which was designed to link the cervical cancer project and the Chi Chi project on which the claimant was working.

7.34 The claimant expressed dissatisfaction. Her email included the following

The copy needs to feature the correct reference for products and services." It stated, "Please can you read this article again as it has a plethora of information that can provide you with detailed information creating a more powerful/accurate post featuring some critical data relating to the cervical cancer programme – all available within this article.

It also referred to Ms Okachi developing a social media plan and calendar. Other than referring to the article, and requesting a plan, it gives no guidance.

- 7.35 Ms Okachi's response, at 11:54, was balanced. She gives a further proposed post which amends the post to read

Since the launch of our text messaging reminder service, there is now clear clinical evidence that lives have been saved by sending out messages to remind women to attend the cervical screening appointments.

It has a link. She states that she can start to look at the calendar.

- 7.36 It is not clear that we have all the relevant emails. However, on 23 January 2019, Ms Okachi sent a further email to the claimant at 3:23 PM stating she had redrafted the copy and taken into consideration the article. She sent some suggested images.

- 7.37 The claimant's response at 15:40 is again negative. She enquires whether Ms Okachi has read the article. Ms Okachi is told to reread the article with reference to "how many lives does our programme save per week/day etc?" She is told to bring out the main "attention grabbing" information in the main copy.

- 7.38 Ms Okachi's next email, 16:27 is also positive. She sends further copy for approval. She asks for feedback about the images.

- 7.39 At 16:40, the claimant gives her feedback where she appears to request Ms Okachi capitalise a hashtag to read – #SAVE1WOMANSLIFEPERWEEK. This is not a hashtag that appears in Ms Okachi's copy, and it is not clear who drafted it. She states, "The images are not outstanding not sure about relevancy again." She asked Ms Okachi to think about how to "develop a hashtag that could trend around this theme."

- 7.40 Ms Okachi, in her email of 23 January at 4:57 states:

It isn't good practice to use caps. – It's a bit old school and also connotes to shouting. Not sure how many people would actually search for the suggested hashtag as it is quite complicated. – From my experience, it is too long.

- 7.41 She goes on to be positive about deploying a new hashtag and she asked for an image the claimant would consider relevant and states

From your feedback I am not really grasping how the picture should be as you haven't provided me with an example. – I'd like to use this as a guide, so I can add it in my strategy document.

- 7.42 The claimant's response at 17:14 is lengthy. On an objective reading, we find that much of the tone appears harsh and admonishing. It starts

The reason for asking you to utilise the below is that the copy needs to bring out the MAIN POINT OF THE POST and actually shouting about SAVING WOMENS LIVES is something worth doing Linda as I am sure you will agree Linda.

7.43 As acknowledged by the claimant in her evidence, the use of capitals in an email in this manner is the equivalent of shouting. By capitalising reference to the main point of the post, and repeating Ms Okachi's name, we find this appears to be an unpleasant tone and the claimant should have realised that it may appear unpleasant and aggressive.

7.44 Later in the email the claimant states "Old school or not (re capitalisation) this was the only way to make your copy work harder – as I explained this needs to be brought out more obviously in your post." The tone appears harsh and appears to be an admonishment. Her email continues:

Sometimes it is also necessary Linda to create imagery that works as opposed to bland stock photography as I spent my time showing you the solution to the obesity image issue (please use that as your reference point it has already been provided to you) please try to think outside the 'obvious' image box, thanks.

I also cannot spend all my time solving these issues for you for every post and tweet it is hugely time-consuming.

7.45 Whatever the claimant's intention, the tone adopted appears to be harsh. The reference to thinking outside the box appears to be rude. The word "Thanks" appears to be sarcastic. Stating she cannot spend time solving issues for Ms Okachi appears to be patronising.

7.46 It is the claimant's evidence to us that she was extremely upset by the use of the term old school and considered it to be direct age discrimination. The claimant was at the material time 50 and Ms Okachi younger, we do not know her exact age. The email makes no reference to age discrimination. It is the claimant's case that she was so upset that she was in tears when she left the office.

7.47 Ms Okachi responded at 17:24. She states that she is not asking for resolution of her issues but is seeking support "as mentioned in my employee handbook." She does defend her actions in relation to the obesity sign as the claimant had cc'd other people; she states "I'd like to state that you wanted to go ahead with a yellow sign for the obesity app and I pointed out to you that it was an American sign and it was not relevant in the UK." It is clear that Ms Okachi reacted, in a limited manner, defensively. However, the tone is more defensive than rude.

7.48 The claimant responded by escalating the matter to Mr Michael Lewis at 17:28. She states the following:

I have tried my best to turn this around and support Linda but this is just not going to work.

Please see below she is incredibly abusive and attack's and lashes out when she is given clear direction.

This is going to cause huge delivery problems for us.

I have no idea where this attitude is coming from but it's not a normal or professional response.

I did feel this would only escalate and unfortunately it is.

- 7.49 We note that this email went to Mr Lewis at a time when the probation meetings had started on 21 January, and there had been no final resolution. It is clear from his evidence to us, that Mr Lewis was concerned about the claimant's behaviour, and we find that this was one email that contributed to his concern.
- 7.50 Shortly after, the claimant wrote a further email to Mr Lewis, copied to Ms Collinson, concerning the claimant's reference to the yellow sign. She defended her position and described Ms Okachi's image as "body shaming." We have not seen the image and can form no judgement about it. Her email concluded "It is genuinely impossible to work with Linda and her attitude and responses are causing huge distractions and unnecessary drama preventing us from carrying out what we need to execute urgently."
- 7.51 At no time during her employment with the respondent, did the claimant suggest that the term old school was an act of age discrimination. She did not refer to age discrimination in writing.
- 7.52 On 24 January 2019, 16:14, Ms Okachi sent a further email. Again, her tone is reasonable and upbeat. She states:
- No worries! I did address the points in my email yesterday but I'm happy to go ahead with all caps if you want to.**
- As you are aware hashtags are not case sensitive so it wouldn't affect my data. I thought your suggested hashtag was too long and wasn't easily searchable and it is old school but I'll work on something else :)"**
- 7.53 The claimant's response was again negative she states at 16:25:
- Linda in terms of public posts you need to be meticulous so please make sure when you are looking for sign off that this is checked prior to sending.**
- I am currently having to pick this up and this is something you are required to do as part of your role.**
- 7.54 By a further email sent almost immediately at 16:27, the claimant wrote:
- Also when you are given direction by your line manager it is important to follow that input derogatory remarks such as 'old school' is one not accurate and two inappropriate.**

7.55 Ms Okachi responded at 16:33. It is clear that the claimant's remarks had upset her, and she is defensive. She said:

I definitely didn't mean in a derogatory way. You have made inappropriate comments about my physical appearance in my first week and I didn't address any of those comments. However, apologies if 'old school' has offended you.

7.56 The final relevant email post from the claimant was sent on 24 January 2019 at 17:03. It states:

Linda I have only been completely complimentary about you so that is something that is absolutely not correct.

7.57 It is probable that this is a response to the claimant's reference to comments about physical appearance. Clearly, the claimant had not been complimentary about Ms Okachi's work, either directly to Ms Okachi, or to the claimant's managers.

7.58 It is clear that by this stage, serious difficulty had developed; it is in the context of that difficulty, that we must consider the allegation of age discrimination.

7.59 It is important to stand back and to consider the context. The respondent is a private company and is in the business of selling products. Part of the role of marketing is to create an image for the company and to assist in its positioning within the marketplace. That no doubt includes supporting campaigns. It also involves reaching target groups and doing so in appropriate ways. The exchange, which ultimately refers to 'old school' occurs whilst discussing marketing strategy.

7.60 Social media may be used in a way which promotes messages and scaffolds the corporate image. In principle, it is agreed that there are trends and there is clearly an argument as to what was the current trend. On the claimant's case, the use of capitalised hashtags is current; Ms Okachi did not share that opinion.

7.61 It is not possible for us to resolve whether one or the other is correct. We have limited evidence. It was agreed that we may take notice of the fact that there are probably millions of hashtags. The claimant has pointed to a handful that include capitalisation. It is accepted that many do not include capitalisation and are written in lowercase. As to the proportion that include capitals, we have no evidence. Neither party has made any attempt to research the position or give any relevant evidence. Moreover, we have no evidence as to whether the use of capitals has increased or decreased in recent times.

7.62 It is not unusual for disciplines to need and develop terminology. Individuals may adopt phrases which have particular meanings and are shorthand for concepts. As to whether old school is commonly used, we have no evidence. However, there can be no doubt that those involved in

marketing will seek to tap into current trends, as well as seeking to create trends, in an effort to communicate any relevant message in an effective way and to reach a target audience. There may be disputes about current usage, whether it be of hashtags, or otherwise. It follows, that there must be language which allows those concepts to be discussed. The fact that discussion is necessary means that there may be disagreement or even dispute.

- 7.63 Old school is a phrase which is in common usage. In general, it appears to refer to trends or practices and it may suggest that they are not cutting-edge. It may suggest that they are old fashioned. It may simply suggest that they are no longer used. It can also suggest approval, especially if the implication is a careful or thorough approach. Old school can be used to refer to practices. It does not necessarily tell you anything about the individual who is adopting the practice. A person who is young may adopt a view or practice which may be described as old school. An older person may equally adopt a view or practice which may be acknowledged as cutting-edge. Many terms can also, in context, be used negatively. It may be possible, at least in theory, to refer to a person as old school, rather than the practice that person adopts. It would also be possible to assume that a person had old school ideas because a person was older. It is necessary to consider the context.
- 7.64 We have to decide whether the burden shifts. There is at least a possibility that the term old school could be used in a negative and derogatory way to suggest that a person has an old school attitude because the person is older. There was clearly a developing situation. Ms Okachi had been unhappy with the claimant about comments concerning her physical appearance and it is clear that the claimant was intensely unhappy with Ms Okachi. In those circumstances, it is possible that the use of old school could be sarcastic or negative. Having regard to those facts, we think the burden does shift, although we do not come to that view without hesitation. We have to decide on the balance of probability whether Ms Okachi has made out her explanation.
- 7.65 Her explanation is that the use of the term old school had nothing to do with the claimant's age, but was simply a reference to a practice that she considered to be outdated, as the modern practice is, almost exclusively, to use lowercase for hashtags.
- 7.66 The evidence provided by the claimant as to the use of capitalisation is sparse and unconvincing. Reference to a handful of examples when there are millions of examples does not provide reliable evidence. It does nothing to persuade us that Ms Okachi did not hold the view that lowercase is the contemporary use. The objective evidence we have is limited, but it is common ground that many hashtags are lowercase. On the balance of probability, we find Ms Okachi believed that lower case was the contemporary use. We accept her explanation that the term old school denoted a practice that was not current.

- 7.67 We have to consider whether that is in answer to the claim. Ms Okachi's evidence was that she would have used the term regardless of age. We accept it was a term that she commonly used.
- 7.68 The question is whether she used the term to refer to the practice on this particular situation. We doubt it is necessary in this case to construct a comparator. If we were to construct a comparator, it would have to be someone in the same circumstances but who was younger than the claimant. That person would have behaved towards Ms Okachi in the same way. She would have used the hashtag with capitals. She would have made the same criticisms of Ms Okachi's work. We find that the claimant would have used the same term. To the extent that old school can be seen as a negative comment, we are satisfied that the claimant would have used it regardless of age. The claimant was challenging the use of capitals which she saw as outmoded and hence the term old school. We have considered all the circumstances and it is clear that the claimant was taking issue with the hashtag as constructed. 'Old school' was not the only criticism. She did not like the way capitals appeared to shout. She thought it too long and not easily searchable. It follows her focus was on usage and we find on the balance of probability that the term old school was referring to usage and not to the claimant's age. We are satisfied it was not because of age.
- 7.69 We would observe this case has been brought entirely as a case of direct discrimination. What must be established is that the alleged detrimental treatment was because of the protected characteristic. It has not been brought as a case of harassment. In the case of harassment, there is the possibility of an action having the purpose, or effect, of harassment. In the case of effect, an objective analysis is engaged, albeit one must always have in mind the perception of the individual receiving the treatment. Moreover, the connection to the protected characteristic, in claims of harassment, is that it must relate. It does not have to be because of the protected characteristic. There are terms which, by their very nature, may have the relevant relation. It may be possible to argue that there is some form of relationship between age and the term old school in that old school attitudes may be perceived as more commonly held by older people. The exact distinction between "because" and "relates" is unclear. But it is clear that because may suggest some form of causation, even if subconscious, whereas relates does not require this.¹²
- 7.70 In the context of harassment, it is not every unfortunate comment, which relates to protected characteristic, which would be seen as harassment. However, no claim of harassment has been pursued and we need say not more.
- 7.71 Finally, we note that the respondent suggests the action of the second respondent could not be a detriment as any harm was de minimis. The

¹² The claimant has not sought to suggest that Ms Okachi's motivation was subconscious. The case has proceeded on the assertion that her action was conscious and deliberate.

respondent relies on **Peake v Automotive Products Ltd** [1978] 1 QB 233, at p.239G, for the proposition conduct which was de minimis did not involve a detrimental act even if there was a difference in treatment which might be technically unfavourable. It is said this was affirmed by **Ministry of Defence v Jeremiah** [1980] 1 QB 87. We do not need to consider these cases. We would approach those authorities with some caution. An action that appears innocuous may nevertheless be serious, particularly if there is an intention to wound. It is important the context is considered. An act may be detrimental if a reasonable employee would consider it to be detrimental. We have found that the alleged detrimental act was not because of a protected characteristic, so we do not need to consider if the action was de minimis, and therefore not detrimental.

Disclosures one and two

- 7.72 The alleged disclosures arise out of a technical fault with the coding of the myGP app. The fault led to smokers being recorded as non-smokers and vice versa. The problem was addressed, and it generated a public relations exercise with the GPs. By way of apology, and at the claimant's suggestion, the worst affected practices were sent Christmas hampers.
- 7.73 Only the top 150 affected practices received Christmas hampers. This generated a query from one surgery, which we understand to be the Darwin Health Link about why it did not receive a hamper. This was dealt with by Ms Wendy Hughes. As part of her explanation, it appears she may have disclosed to the person making the enquiry the total number of patients affected in both practices.
- 7.74 It is the alleged revealing of that numerical information which formed the alleged verbal disclosure to Ms Ann Cartwright, the data protection officer, on 27 December 2018.
- 7.75 It is accepted that the claimant never believed that any specific patient information was disclosed by Ms Hughes to the GP practice. It was only the total numbers affected.
- 7.76 It is necessary to understand the context. The claimant is a senior employee who was required to undertake data protection training and given the nature of her work, may be reasonably expected to have a good working understanding of the relevant principles. On 25 October 2018, she received a privacy notice for employees and contractors issued by the respondent. This sets out data protection principles. It states, "Personal data means any information about an individual from which the person can be identified." At no time did the claimant believe that any information had been disclosed outside the practice which could identify any individual patient. She alleges to us that she believed that such information may be disclosed at some unspecified time in the future.
- 7.77 There is no suggestion that any personal data was ever unlawfully disclosed.

- 7.78 On 7 December 2018, the claimant suggested that Christmas hampers should be sent, albeit there was no reference to the problem with the app.
- 7.79 The statements do not set out the full detail of the correspondence which ultimately led up to the alleged disclosure. It is apparent from the emails that there is a substantial history.
- 7.80 Ms Alice Irvine, marketing assistant, clarified in her email of 19 December 2018 at 16:03, that, in conjunction with Mr Kieran Waterstom, it had been decided to send hampers to the top 150 most affected practices. As part of this process, information about the numbers was extracted and obtained. She states, "Hampers were sent out as a gesture of goodwill to those that were genuinely most affected and not just to appease potential client/new customers."
- 7.81 On 19 December 2018, Wendy Hughes requested the claimant send her a list of the practices who had received hampers. The claimant's statement indicated she was reluctant to disclose that list as she was worried about personal data being disclosed. Her email in response simply said "Can you confirm what you need this for?" However, there was at least enquiry from one another. The claimant confirmed on 19 December that the information had been forwarded. Whatever the claimant's reservations, a list of recipients was circulated.
- 7.82 By email of 19 December 2018 at 15:38, Ms Hughes explained her concerns to the claimant and others. As the distribution had been made on the basis of total number, rather than the percentage of patients per practice, she anticipated a number of valued clients may be disgruntled and she was seeking information. She states, "Its still nice for the ones that did and I'm not complaining that you insisted I tell you so I have answered. Not sure how GDPR affects me knowing???"
- 7.83 It appears that on 20 December 2018 Wendy Hughes received an email from Ms Frances Proctor (of Darwen Healthlink). The email thanked her for the lovely hamper. It referred to working closely with a neighbour practice, Darwen Healthcare, and states, "Would it be cheeky to ask if their practice manager Ann Neville could also have one of these for all the hard work also. She is located at the same address as myself."
- 7.84 On 21 December 2018 at 10:52, Wendy Hughes sent an email to the claimant which she copied to a number of individuals. It was a long email and it conveyed a conversation that she had had with Frances.
- 7.85 It is clear that there are two GP practices which operate out of the same building and are, effectively, neighbours. It is not absolutely clear from emails who spoke to whom or at what time, but the detail is irrelevant. One practice had received a hamper, but the other had not. This led to a discussion with Ms Hughes with at least one of the practice managers, and this generated Ms Hughes email.

- 7.86 Ms Hughes refers to a conversation with Ann at 17:15 on 20 December who was disgruntled because Frances' practice had received a hamper. Ann had introduced Frances' practice and she felt that she should have one. She may have thought the hamper was a reward for loyalty. This generated a conversation concerning the fact that it was some form apology for the coding mistake. Ann was disgruntled. At the end of the email there is an explanation that Frances had pointed out that "the 98 patients/12k list was the same as their 136 patients/16k list size so they should have got one too..." We pause to note that on a plain reading of the email it would appear that the information was given by Frances to Ms Hughes. It does not follow that Ms Hughes disclosed the information. We have not been told if every GP practice was give its own number. It is possible the two practices had spoken to each other. However, we do not have the evidence. One possibility is that Ms Hughes revealed the information.
- 7.87 As noted above, exactly who revealed what to whom is unclear. Nevertheless, it is clear that both practices knew the total number of individuals affected in each practice. No one has ever suggested that this was, in itself, a breach of data protection.
- 7.88 Although Ms Hughes' email was lengthy, the tone is measured, and it is simply an explanation as to why a particular client has been disgruntled. We cannot read this as a criticism of the claimant.
- 7.89 It is clear that on 20 December 2018, the information (being the relative numbers affected in both GP practices) which the claimant later relies on as a disclosure on 27 December, was already in circulation.
- 7.90 In her statement to paragraph 163, the claimant says
- 163. It was clear that both Ms Hughes and Fran were discussing very specific individual patient data which I had not provided to her. No list had been passed on to Ms Hughes by me and I was not aware that she had any access to any other lists. So I naturally concluded that both Ms Hughes and Fran had been accessing and checking individual patient records from both related and non-related practices in order to establish and cross reference exact numbers of patient records affected in two non-related practices and so it was entirely plausible that patient's personal data was accessed, forwarded discussed etc. This in my opinion was a clear GDPR breach which is why took steps to alert the First Respondent of this.**
- 7.91 We do not accept this evidence. For the reasons we have given a natural reading of the email is the two practices had shared information.
- 7.92 Ms Hughes' email, which contained the information the claimant relies on as a breach, was forwarded to twelve individuals, including Mr Lewis, the claimant's manager and executive chairman. The claimant took no steps to ascertain how the information about the two practices had been obtained and her statement lacks cogent reasoning. It was absolutely clear that information had been extracted. If that were not the case, the

150 most affected practices would not have been identified. There was no rational basis for believing that Ms Hughes either had, or needed to, extract the relevant information herself, even less that a GP practice manager had been given access. On a fair reading of the documentation, it is clear that Ms Hughes did not have access to the relevant information, hence why she asked for a list of the practices. It is clear that the practices were ranked by reference to the total numbers, and while someone had extracted the total numbers, there was no reason to believe that Ms Hughes had the detail, or that she would disclose the details of any patient for the purpose of comparison.

- 7.93 If the claimant had any doubt, it is difficult to see how she could have maintained that doubt given the email from Ms Alice Irvine referred to above.
- 7.94 On 21 December 2018 at 11:24 the claimant wrote to Ms Hughes and this was copied to six others, including her line manager Mr Lewis. The email reads as both defensive and aggressive. It states:

Can I just say that one disgruntled practice does not justify the below. The positive feedback received far outweighs the negative so can I suggest you try to put this in perspective.

We all have to deal with disgruntled individuals on a daily basis and to pan a very well received activity is simply a very negative and counter productive attitude to take and is not appreciated by anyone within the team (across All departments!) that has worked tirelessly to deal with a serious crisis which we are still dealing with from a comms point of view and have handled to the highest possible standard in extremely difficult circumstances.

You have shown absolutely no appreciation for this effort in any of your communications to the group so far. I notice that you only cc your colleagues in communications where you wish to wrongly criticise successful activity APPROVED by EXECUTIVE AND SENIOR MANAGEMENT!

We can all look for the negative in any situation and point a critical finger but that is not showing any gratitude or appreciation of your wider colleagues at iPLATO for working tirelessly to help both sales, account management, training and operations deal with this crisis- which is immensely disappointing. How practices wish to interpret data is not something we can control and their interpretation of the FAIR criteria for selection identified for recipients of the hamper is not something we should change but we can communicate this to the very FEW who wish to complain!

To detail again Alice's email to you Wendy and the group, it is very simple, we have explained the criteria for selection BUT TO REPEAT YET AGAIN- there were 1044 practices affected so we simply cannot send hampers to them all, therefore 150 was the agreed number (AT EXEC/SMT LEVEL!!) and this was sorted by most patients affected. Within the 150 Alice took it upon herself to double check the practices selected for locations and made sure that any nearby practices received the same hamper!! So can I suggest Wendy in future rather than firing off a very inappropriate and angry email that you speak to us directly to ascertain the actual facts. Thanks!

I now will continue with other more pressing activities regarding creating yet more crisis communications that need to go out today- that I need to get on with and I trust you will be able to manage the one or two practices that have issues with 'perception'.

To add, I have even considered sending a couple of extra hampers FOR YOU, if we can get hold of them, in addition to your previous emails to me directly Wendy so I am not impressed by the below. Alice will follow up shortly.

7.95 The claimant's tone appears hostile. The use of capitals would indicate shouting. The email is critical of Ms Hughes, and it admonishes her. It is circulated to senior colleagues.

7.96 On 21 December 2018, at 11:40 Ms Alice Irvine confirmed the information she had previously given on 19 December 2018. She stated:

...the criteria for receiving a hamper was how many patients were affected per practice. This wasn't calculated by percentages or comparing how many patients were at each practice versus how many were affected, it was just sorted from highest to lowest number of patients affected and the top 150 received hampers.

...

Just as a note, there were four more practices (Wrenbury Medical Practice, Dr Grice and Partners, Bolingbroke Medical Centre, Thatcham Medical Practice didn't receive hampers that were between Darwen Healthlink number 120 on the list) and Darwen Healthcare Centre (number 155 on the list).

7.97 It follows the claimant was aware that calculations had been made in relation to each practice and numbers had been extracted from available data.

7.98 On 21 December 2018 12:08, Mr Kieran Waterson sent an email to senior managers including Mr Lewis (it was not copied to the claimant). He stated:

Please read the below. The response from Lydia I find unacceptable on every level, I don't understand how this fits with the values of our company or ethos.

Wendy is that upset at the email I am on my way to meet her.

I'm guessing it is has ruined the rest of her day, after what has been a fantastic year.

Wendy is the one that is receiving direct feedback from customers and managing their calls, hence the feedback, which she passed on.

It seems to becoming a pattern of behaviour with Lydia as I previously highlighted the email she sent me last week with regards to CCG's and hampers.

- 7.99 It follows that Mr Lewis and Ms Collinson were receiving negative feedback about the claimant.
- 7.100 On 24 December, the claimant sent an email to Mr Lewis (it was not copied to anyone) it referred to the emails from Ms Hughes with subsequent responses. The email is critical of Ms Hughes and states

...the issue is that as part of Wendy's contribution to this situation she is required to support company initiatives and act as a team player not as a dissenting voice- without any supporting or factual evidence. As you said Mike I agree, they need more to do as they have far too much time on their hands to engage in such unproductive activity.

- 7.101 This email is critical of Ms Hughes. It appears that Ms Hughes had raised an issue relating to a single practice and had provided relevant information and evidence. She did not appear to be raising any specific criticism of the claimant. As an account manager, it is not surprising that she flagged a potential difficulty with a valued practice. The claimant's criticism appears to be an unwarranted escalation. The reference to "too much time on their hands" would indicate a degree of enmity.
- 7.102 We note that, despite the clear animosity the claimant now felt towards Ms Hughes, any alleged breach of data protection was not at the forefront of the correspondence.
- 7.103 On 26 December 2018 13:45, the claimant wrote to Ms Collinson, the first respondent's head of people and talent. Her email is headed "GDPR BREACH -Wendy Hughes Re: hamper feedback - email trail 2." Her email states:

Reference your emails to me yesterday which I have responded to today, please also see details ref Wendy's disclosure of private and confidential data relating to other practices that were affected by the smoking status incident which she clearly discussed with 'Frances' at Darwen Healthlink in detail which is very concerning on numerous levels and is potentially a GDPR breach.

The lack of professional conduct is astonishing the figures of affected patients in other practices should not be discussed with other practices no matter what the individual connections are between practice managers- this needs to be picked up with both Mike and her line manager as this is a serious breach.

Please see below excerpt from Wendy's email on 21st Dec to reiterate, it is extremely concerning that Wendy is discussing and disclosing without authorisation or authority either from iPLATO or the other practice involved details of the NUMBERS OF AFFECTED PATIENTS IN THE SMOKING INCIDENT and revealing the exact numbers of affected patients of entirely separate practices to her contact Frances??

Even if the practices were to be connected in some way discussing specific data relating to each practice without authority of the practices concerned in this way to justify the receipt of a hamper is not something that Wendy should be engaging in, it is a GDPR breach!

When I asked Wendy to reveal to me what she needed these lists for (she wanted all the data relating to the affected practices that were selected to receive a hamper??) I mentioned the issues of GDPR in my email to her directly that I needed to know what she would use these lists for?

She dismissed that this had relevance to her or that GDPR would be anything to do with her?? Again Wendy cc'd all her colleagues in her response and the irony is she is now responsible for this precise breach.

The way that data is handled and managed by account teams and sales managers needs to be looked at if the below is anything to go by.

This again is safeguarding the interests of the company. I have cc'd Mike in on this email Erika as this is a serious matter that should not happen again.

Confidential data was not provided to Wendy by Kieran H (I did not pass on the data to Wendy as I had concerns ref the utilisation of this data) so she could discuss with her practice friends to ensure they received a hamper??

As I am sure you will agree, this is an incredibly irresponsible and potentially damaging way for a member of staff to be seen to handle and share damaging PRIVATE company and practice data in such an unprofessional manner which could potentially yet again damage the reputation of the company.

7.104 At some point on 27 December, the claimant had a conversation with Ms Collinson concerning the possible GDPR disclosure. The claimant fails to set out in her statement the alleged content of that discussion. It may have occurred before the following two emails were sent. In oral evidence, the claimant suggested that she discussed with Ms Collinson the fact that there was a risk that individual patients' information may be disclosed. This is not consistent with the contemporaneous documentary evidence, which is extensive. We find on the balance of probability that the claimant did not allege that there was a risk that individual patient data would be disclosed.

7.105 On 27 December 2018 at 3:57, Ms Collinson wrote

I have checked with Martin as he is our SIRO (in copy) and this is not a GDPR breach. Therefore regarding this particular (GDPR) issue in itself Mike Lewis will be able to pick it up as a Blue Team issue.

7.106 On 27 December 2018 16:56 Ms Collinson replied

Hi Erika -thanks for the below, it certainly is not best practice to share specific numbers of affected patients regarding an incident the company is trying to control between practices without specific authority being sought from the relevant parties- this level of detail should remain confidential.

7.107 The second disclosure relied on is the email of 27 December 2018 at 21:16 to Ms Cartwright which reads:

To Ann's email earlier and for the sake of absolute clarity and comments relate to the disclosure of confidential information and data relating to the incorrect smoking status incident by Wendy Hughes to a nonrelated practice, as below:

It goes on to give the specific information relied on as follows:

However after speaking with Frances just now she pointed out that actually the 98 patient/12 K list was the same as their 136 patient/16 K list size so they should have got one too..."

- 7.108 This email adds nothing to that which had gone before, and it is clear that the claimant had already been told that there was no breach of GDPR.
- 7.109 It is apparent that Ms Collinson then escalated her concerns about the claimant's behaviour following a complaint made by Ms Hughes who filed a grievance on 24 December 2018 alleging that the claimant had bullied her. Ms Hughes was particularly concerned about the email and she described in her complaint serious emotional upset. She states, "I would also like to suggest a mediation session to be set up with yourself to try resolve whatever issue Lydia has and to stop the harassment and intimidation." She states that she is distraught that she was being accused of negative and unsupportive attitude.
- 7.110 On December 27, 2018 at 18:31, Ms Collinson reiterated to the claimant that the information disclosed was not personal. It did not constitute a breach was not reportable under the legislation. She stated, "I do agree that it was sensitive company information and therefore should have remained confidential." She sent a form to the claimant so that the incident could be "captured."
- 7.111 In addition, on 28 December 2018, Ms Cartwright sent further information to the claimant concerning the scope of data protection. It highlighted that personal data involves natural persons who can be identified from the information.
- 7.112 We need to consider whether either or both disclosures one and two are protected. We note that the claimant does not seek to rely on the email of 26 December headed as a GDPR disclosure. It is unclear why.
- 7.113 We must first ask whether there was disclosure of information. We are satisfied that for both disclosures relied on, information was disclosed. The information relied on was that Ms Hughes had disclosed to at least one practice the total number of patients incorrectly recorded as either smokers or non-smokers in another practice. That is a disclosure of information. We would also observe that the information was disclosed at other times, including by email on 26 December.
- 7.114 It was disclosed to a relevant manager.
- 7.115 Did the information in the reasonable belief of the claimant tend to show one of the matters detailed 43B(1)(b) (the claimant relies on no other subsection).
- 7.116 She alleges she had in mind the following: first, the disclosure of information about one practice to an unassociated practice was a breach

of GDPR; second, she was concerned that the personal details of individual patients may be disclosed between practices; and third, she was concerned that there may be a future (unspecified) disclosures of individual patient's information.

- 7.117 The claimant has sought to argue that she had a reasonable belief that, in some manner, details of patients would be disclosed. There was no rational basis for this. It should have been clear to the claimant, at all times, that the respondent had extracted information from some form of database to identify the total number of patients affected in each practice. That was both clear and obvious and there was no reasonable basis for confusion. It was far from clear that Ms Hughes had disclosed any information; it was at least possible that the two GP practices had exchanged their own information and then disclosed this to Ms Hughes. Even if information was disclosed by Ms Hughes, it was consistent with a simple identification of total numbers for each practice. There was no reason, at any time, to believe that Ms Hughes had access to specific patient information or that she had undertaken an analysis herself. Reaching such a conclusion would be lack rationality. The claimant makes no attempt to explain why she believed that any individual employee of the first respondent would have, in the future, disclosed individual patient information. There was no reason for it, and any such a view was irrational.
- 7.118 The claimant was a professional who should have had some appreciation of the relevant GDPR principles. There was clear information given by the respondent which made it plain that only information disclosed which would reveal a patient's identity was subject to data protection. In any event, given the claimant's position, seniority, and the field in which she worked, she should reasonably have been expected to understand the basic principles.
- 7.119 We find, on the balance of probability, the claimant did understand that in order for there to be a breach, it would be necessary to disclose information which would potentially reveal the identity of an individual. We find that she understood at all times that the disclosure possibly made by Ms Hughes concerning the total numbers of affected patients at a particular practice in no sense whatsoever was a disclosure of personal data. Her view that there may be some subsequent disclosure of patient information was irrational, and that irrationality is inconsistent with a reasonable belief. It follows the claimant did not have a reasonable belief that the disclosure of information tended to show that a person had failed, is failing, or is likely to fail to comply with any legal obligation relating to GDPR.
- 7.120 There is reference in the documentation to confidential information. We specifically sought confirmation during submissions as to whether any part of the claimant's case relies on an assertion that the failure was a failure of confidentiality. It was specifically conceded that actual or potential breach of confidentiality is not relied on by the claimant and was not relied on at

the time. It follows we need not consider any reference to breach of confidentiality further.

- 7.121 The claimant did not have the requisite reasonable belief at the time she made her oral disclosure on 27 December 2018; there was no material change prior to the second disclosure. She did not have the requisite belief at the time she made the second, written disclosure on 27 December 2018 orally. It follows that the subsequent disclosure by email is also not protected. In any event, even if she had any belief at any time, however unreasonable, by the time her email was sent, it had been reiterated that there was no breach, and that would make that maintenance of any possible belief yet more unreasonable.
- 7.122 We should also consider whether either disclosure was made in the public interest. We find none was. We have set out in detail the history. We have found it necessary to do so in order to understand context of the alleged disclosures. It is clear that the claimant, for whatever reason, had formed an extremely negative view of Ms Hughes. It was reasonable for Ms Hughes to raise the difficulty caused by the disgruntled client. This was not a criticism of the claimant. It is apparent the claimant took it personally. This led to the claimant writing aggressive and inappropriate emails and making unreasonable and unnecessary complaints about Ms Hughes. Initially, the claimant appeared to have no specific concern about any data breach. The allegation of breach occurred at the point when the claimant was complaining about Ms Hughes. We find the claimant's motivation was to damage Ms Hughes' position and standing with the company. The claimant was not, in any sense whatsoever, motivated by public interest.
- 7.123 To the extent the claimant suggests there is public interest at all, she relies on the potential public interest in there being any breach of GDPR. In theory, there could be a public interest in any breach of data protection, provided there is a reasonable belief that there was a breach. We would also note there may be a public interest in such breaches not being hidden by reliance on internal confidentiality; however, that is a matter we need not consider. In this case, there was no reasonable belief that any disclosure was made in the public interest. Each disclosure was made to damage Ms Hughes.

Disclosure three

- 7.124 We come to the third alleged protected disclosure. We can deal with this more succinctly.
- 7.125 Various attempts were made during the hearing to understand and identify the nature of this alleged disclosure. We confirmed the claimant must identify the information disclosed. We allowed an amendment on day two,

which is recorded in the issues.¹³ There had, initially, been a suggestion of some form of fraud. That allegation was abandoned. The amendment referred to negligence. However, despite allowing that amendment, there was no attempt to change the evidence.

7.126 We have considered the submissions carefully. In her evidence, the claimant stated that the oral conversation occurred with Mr Lewis on 23 January 2019. She was unable to say when the conversation occurred with Mr Alpsten; she said it was around the same time.

7.127 We have considered carefully the claimant's evidence. As we made clear during the hearing, we must first ascertain what was said before we can analyse whether it was information and thereafter whether it was protected. The claimant's evidence is as follows

184. On 23 January 2020, during my meeting with Mr Lewis, I raised concerns regarding the content of Mr Rowden's e-mail [as at tab 123 page 564] as I was in the middle of delivering the first stage of brand repositioning for mygp/iplato and had already been briefing the design agency as to the new brand proposition and direction of the new myGP brochure development. The entire brand proposition was that the premise of the branding and collateral was to pitch the First Respondent as the 'good guys' in the digital marketplace working with the NHS not against it. The company's entire brand position was that they would never work against the NHS, but for it and with it.

7.128 This fails to set out what it is alleged she said to Mr Lewis. Further, she failed completely to say what was said to Mr Alston. All she says in her statement is:

187. Around the same time I also raised similar concerns with Mr Alpsten.

7.129 The claimant refers to an email from Mr Alston of 22 January 2019. This email discusses the potential effect on the NHS. At the time, it appeared to be a potential rival, albeit we do not have full details of its development or positioning. The NHS had a substantial budget of £150 million to advance its platform. It was possible its app was a direct competitor of the respondent's app. Mr Alston outlines four potential options. One such option was the potential for cancelling the NHS app, but the email recognises that it may not be cancelled and it is concerned with the respondent's positioning.

¹³ For ease of reference the amendment is this: "The claimant claims the first respondent, which works with NHS GP practices and clinical commissioning groups, owes a duty of care to members of the public and, in particular, NHS patients. By trying to divert funding away from the NHS app with a view to closing it down, the claimant was concerned about the potential impact this could have had on the health and welfare of NHS patients and therefore the claimant claims the respondent's actions, as described at paragraph 36(c) above, were negligent for the purposes of S.43B(1)(b) ERA '96."

- 7.130 Whilst the claimant fails to set out in evidence what was said to Mr Lewis. We were referred to notes of the meeting on 23 January. However, the notes were unclear and illegible. It was not clear who had written what. The parties did not provide a clear note, or an agreed note. We noted in the hearing that it may be possible to argue that there were some notes of the meeting on 23 January 2019. However, we would expect the claimant to give evidence as to what was said, and thereafter, if there were a dispute, it may be possible to use any contemporaneous documentation to resolve the dispute. Instead, the claimant appeared to ask us to infer the nature of a conversation from an illegible document. We cannot infer such primary findings of fact.
- 7.131 Mr Lewis denied that there had been any conversation about the NHS app, its positioning, or the diverging of funds to the respondent. We accept his evidence. The claimant has failed to demonstrate that there was a disclosure of any information at all concerning the closing down of the NHS app either with Mr Lewis or with Mr Alston. It follows there was no disclosure of information. As there was no disclosure of information at all, it is impossible to consider further whether she had any reasonable belief that there was a potential breach or whether any disclosure was made in the public interest.
- 7.132 We should note that we did allow an amendment on day two, as set out in the issues. It appeared to be the claimant's case that she was arguing that diverging funding from the NHS was in some manner negligent. Taking the submissions in the round, it appears that this relates to the potential for individuals receiving inadequate care. However, there is no mention of negligence in the claimant's evidence. What she means by it remains unclear. There is simply no relevant evidence set out by the claimant.
- 7.133 It seems the reliance on the alleged contemporaneous notes is an attempt to ask us to infer a conversation. If the claimant alleges that information was given, it is for her to prove that allegation. She must give evidence to establish the facts. It is not appropriate for us to infer primary findings of fact.

Disclosure four

- 7.134 We now consider disclosure four.
- 7.135 This disclosure concerns a post made by Ms Okachi. It has a banner headline "improving quality of life and emotional well-being." The copy states:

Did you know that #socialprescribing through our preGP service can provide social & physical support to help in reducing GP appointments? Notifying patients with alternative services has never been easier. More info here: <http://bit.ly/2Th7fE5> #myGP #iPLATO #NHS

7.136 The claimant's evidence to us is that she believed there should be some form of quantitative evidence in support of the assertions contained in the post.

7.137 On 28 January 2009 to 14:06, the claimant wrote to Mr Lewis and said "who has approved this exactly?"

7.138 Mr Lewis responded at 14:28 by saying that he had.

7.139 The alleged disclosure occurred on 28 January 15:14 and states:

Mike can you also please deal with all the other issues I have had to pick up on Linda's behalf also where is the evidence that we improve emotional well being with the use of our technology - s have we actual figure to substantiate this?

7.140 The first question is whether any information was disclosed. The claimant's submissions recognise that the information alleged takes the form of question. The question is whether there are figures to substantiate the assertion that the pre-GP service may be "improving quality of life and emotional well-being." It is alleged that although the information is framed as a question it should be understood to be an accusation that the post was misleading and wrong.

7.141 We accept that information can take the form of question. The question "Can we really say this is true?" could mean "We know we have no evidence for this." That may be an accusation. It may be, taken in context, referring to sufficient information to be deemed information itself.

7.142 A simple question, which is not an accusation, is rarely going to be information. As to whether it is information, that must be viewed in context. We consider the context now.

7.143 The myGP app was concerned mainly with booking appointments and obtaining repeat prescriptions. It is not clear if the pre-GP service is the same and we have not been taken to the information referred to in the web page referred to in the post. The claimant's statement proceeds on the assumption that it is the myGP app that is referred to. The claimant's evidence does not suggest she looked at the web page.

7.144 Mr Lewis explained to us that the app has a number of benefits. In particular, it promotes, for individual GP practices, accessibility and predictability. He states that there are occasions when effects are real but very difficult to quantify or measure. He says this is one of those occasions. He gives as an example an individual who is either concerned about his or her own health, or perhaps the health of a child. The app allows an appointment to be made with the GP at the point when the need arises. The alternative may be to ring in the morning and spend considerable time in a queue of twenty or more people. By increasing access and promoting certainty, it avoids the stress of first waiting to call the GP and thereafter waiting in a long queue in the hope of obtaining an

appointment. It is that sort of accessibility, and predictability, that is welcomed by patients and inevitably improves quality of life by reducing stress and thereby promotes emotional well-being. We accept his evidence.

7.145 As to whether the claimant was disclosing information, this must be viewed in context. The claimant was providing marketing services at a senior level. One of the things she was marketing was the myGP app. In order to market it, she ought to understand its functioning. Moreover, she ought to understand the potential benefits and why individual patients and GP practices may find it useful and welcome. Inevitably, this includes issues of functionality and desirability. Part of that desirability occurs because individuals can avoid the traditional telephone queue. In that context, the suggestion that quality of life and emotional well-being may be improved is reasonable. It is clear that the reference in the post is essentially advertising. It is difficult to see how it could be objected to.

7.146 Her statement says:

192. I sent an e-mail to Mr Lewis directly asking who had approved this update [as at tab 143 page 660] to which he confirmed he did as I was absent from the office. I specifically asked Mr Lewis [as at tab 143 page 660], “where is the evidence that we improve emotional wellbeing with the use of our technology – have we actual figures to substantiate this?” To my knowledge no such data existed in the company to back up and substantiate such a wild and far reaching claim that the app specifically could improve the quality of patient’s lives and improve their emotional wellbeing.

193. My concern was that especially vulnerable patients could place undue reliance on an app which purported to promote ‘emotional welfare and improve quality of life’ (tantamount to improving psychological wellbeing) which if the patients were desperately needing urgent help, the myGP app has no proven functionality that can in anyway improve emotional wellbeing or quality of life.

194. In most instances where it is available in GP Practices the app is used by patients to primarily book online GP appointments or to utilise a repeat prescription service. Even if these vulnerable patients managed to get access to the myGP app’s triaging artificial intelligence (AI), this could result in the AI sending vulnerable patients away from their GP particularly if they didn’t answer AI questions accurately or honestly or their answers were misinterpreted by the AI.

195. Many vulnerable patients do not tick or want to input such personal data relating to fragile psychological states into an app i.e. if they are suicidal for example. So these types of scenarios could easily have resulted in vulnerable patients encountering significant delays in getting the urgent help they needed and worse still the AI could easily divert these most vulnerable patients away from their GP which it claims to do very successfully to ‘reduce GP appointments’. In situations where someone feels suicidal, urgent medical attention is needed – delaying seeking that medical attention in the hope that using an app that does not have any functionality whatsoever to improve emotional wellbeing was, in my opinion, misleading and extremely dangerous.

196. Had I not been away from the office at the time, I would never have approved this content (created by the Second Respondent and approved by Mr Lewis) for release.

197. Mr Lewis ignored all my concerns, instead asking when I was expected back in the office to which I confirmed I had already messaged Ms Collinson to say I would be back in on Wednesday [as at tab 143].

7.147 It is clear from the claimant's evidence that she had a very negative view of the app. She says, without identifying any source evidence, that vulnerable patients may not input data and may have treatment delayed. In her statement she is critical of the app that she was employed to promote. She specifically says:

...delaying seeking that medical attention in the hope that using an app that does not have any functionality whatsoever to improve emotional wellbeing was, in my opinion, misleading and extremely dangerous.

7.148 In context, the question asked by the claimant had, in her opinion an obvious answer. It was a challenge based on her negative opinion of the utility of the myGP app. We have no evidence to suggest that Mr Lewis could have, at the time, known of, or even suspected, the claimant's seriously negative view of the app which was part of her remit to promote. As the claimant is primarily advancing her own opinion, which does not appear to be based on any objective information, we find it was not a disclosure of information; it was a challenge based on an assertion that reflected her opinion.

7.149 Lest we be wrong about this, we consider whether in the reasonable belief of the claimant it tended to show a failure, or was made in the public interest. The failure relied on is some form of potential impact on the health and welfare of NHS patients by negligence and the health and safety of young people being endangered. It appears to be the claimant's position that in some manner individuals would be diverted away from proper access to the NHS and GP appointments, and that, in some manner, they would rely on an app and fail to access appropriate medical care.

7.150 If the app were to have that effect, the potential problem should have been obvious at all times. It did not arise out of what is essentially advertising copy. It would suggest she thought there was a fundamental, conceptual problem with using the app at all. Her objection or concern was not the functioning of the respondent's app, but the deployment of technology and artificial intelligence when filtering appointments. That created a specific difficulty for the claimant. Her role was to promote the app. If she had a fundamental issue with the safety and reasonableness of the app, such that she believed that its use would endanger individuals, it should have been obvious to her long before she received this post. Indeed, her evidence would suggest that it was an opinion she had held for some time, but as to why she held that opinion, she gives no explanation. Given her role and seniority, it would be reasonable to assume she could have and should have undertaken basic research. However, it appears that she

failed to take basic steps to consider available information. It seems the claimant's issue, to the extent it appears to exist at all, is with the concept of the app. The main purpose of the app is to allow online booking appointments and obtain repeat prescriptions. There may be some triaging following questions, but we have no detail of that, and any concern about triaging does not arise out of the post. In any event, any process which reduces unnecessary GP appointments may in itself ultimately assist in the promotion of individuals welfare by making more appointments available. The position is complex. Further, it would appear the NHS was developing or seeking to develop an app that would allow for appointments on line. At the very least, this may have suggested to the claimant the NHS believed in the efficacy of the approach.

7.151 Did the claimant reasonably believe that was some form of negligence or some form of endangering individuals? The answer is clearly no. The concepts of reasonable belief and reasonable belief in the public interest overlap. To the extent there is public interest, the public interest appears to lie in promoting necessary and appropriate access to, and ensuring appropriate use of, NHS resources. That is what the app is designed to do. Whether it succeeds is another matter. Had the claimant any real concerns about the operation of the app, she could have raised those at any time. We do not accept that her concern with this particular post had anything to do with potential breach or public interest. This is another example of the claimant deliberately causing difficulty for individuals with what is essentially a spurious allegation.

7.152 As there are no protected disclosures, it follows that there can be no detrimental treatment. The claim of automatic unfair dismissal must also fail. For the sake of completeness, we will consider the detriments.

Detriments

7.153 The first detriment relied on is the email from Mr Rogan on 28 December 2018. The claimant alleges she suffered a detriment when he said:

I'm not sure why I am still seeing emails relating to this. I was made aware of this yesterday and made my determination quite clear. There is no security/data breach incident to report or follow-up here. Please don't waste any more of Ann's time on this incident, there is more than enough evidence in email trails so there is no need to fill out an extra form.

7.154 In oral evidence, she alleged that she was being publicly told off.

7.155 Again, the context must be considered. The email goes on to tell the claimant that if she is unhappy with Ms Hughes's alleged lack of judgement or common sense then it should be raised internally in the blue team. He also gives approval for an extra hamper to be sent to the practice which had complained.

7.156 Mr Rogan's tone is neutral and clear. It is reasonable for him to make reference to there being numerous emails. It is clear from what we set out

that the matter escalated. The claimant had sent a number of negative emails as we have noted. The claimant had been told at an early stage that there was no breach of GDPR, but she had pursued the matter. In that context, this is a reasonable and neutral email. The claimant does not allege that telling her to raise matters about Ms Hughes within the team is a detriment. That paragraph is a clear direction and could be interpreted as a admonishment. However, it is mild and objectively justified. Moreover, as the claimant indulged in escalating the matter to many individuals, it is unreasonable for her to complain that the limited copying to senior staff was inappropriate or detrimental. We do not consider this to be a detriment of any form.

- 7.157 The second detriment is Mr Lewis's response of 28 January 2019. The claimant alleges that his failure to deal with all her concerns was a detriment. The claimant had made reference to dealing with all the other issues she had picked up on Linda's behalf. The nature of this enquiry is unclear. It appears to encompass numerous allegations made by the claimant against Ms Okachi. The background is the claimant had made it clear she considered the working relationship had broken down as a result of Ms Okachi's behaviour.
- 7.158 It follows that in no sense whatsoever could there be a simple response to a simple question. This was a complicated matter which engaged numerous difficulties, the most obvious of which was the claimant's own behaviour.
- 7.159 Mr Lewis was conscious that the claimant was off sick at the time. He had a duty of care to her and considered that engaging in detail in email correspondence about these matters was not advisable and was likely to cause distress and hinder her recovery. His reply, which is alleged to be a detriment, was neutral. He asked for an update on her absence. He assured her that all other matters he would deal with in the office. It is unclear what the claimant was expecting. It is clear that she indicated she could no longer work with Ms Okachi. It would have been inappropriate and unreasonable to deal with her continuing issues with Ms Okachi in correspondence. Mr Lewis's approach was that of a reasonable and concerned employer. It was not detrimental treatment.

Dismissal

- 7.160 Finally, we consider the reason for dismissal. As noted, there is no protected disclosure that could be the sole or principal reason for dismissal. However, even had we found that any of the disclosures alleged were protected, we would have dismissed the automatic unfair dismissal claim.
- 7.161 Shortly after Christmas, Mr Lewis went to Australia for three weeks. He came back shortly before the first interview on 21 January. Thereafter he had a further meeting with the claimant on 23 January and thereafter there was a final meeting on 31 January.

- 7.162 Mr Lewis was aware of various difficulties which involved the claimant. He was aware of inappropriate emails from the claimant, as we have set out above.
- 7.163 On 21 January he did not confirm the claimant in post. We do not accept the claimant's evidence that she was told her work was excellent or that she had no reason to believe that there was any difficulty. The fact that her probation was not approved and the fact that a further meeting was arranged should have been sufficient to alert the claimant to respondent's serious concerns about her continuing employment.
- 7.164 Serious issues were raised on 21 January 2019. Mr Lewis was concerned the claimant had been brash in the way she spoke to Mr Kelly-Taylor, head of IT. He suggested the claimant speak to him in person in future. There were specific discussion about areas of weakness which included the issues which had developed between the claimant and various senior people like Ms Hughes. He referred to her habit of copying a lot of people into email threads, which was inefficient. There were issues around the accuracy of her work and he had corrected her spelling and grammar on material intended for publication. We accept his evidence that they planned to continue the meeting on 23 January. We find the claimant could not have been left in any doubt that there were serious concerns about her continuing employment.
- 7.165 The continued meeting was arranged 23 January. In the meantime, the claimant, on 22 January, asked to work from home on 23 January. This heightened Mr Lewis's concerns.
- 7.166 When the meeting did take place on 23 January, he was concerned to ascertain what plans the claimant was making for the upcoming events and projects. This was discussed and he formed the view that her ideas were sparse and ill informed.
- 7.167 On 23 January, he was aware that the claimant, despite being ill on 22 January, had sent multiple complaints about Ms Okachi accusing her of being abusive. He considered the emails and took the view that Ms Okachi was acting professionally in the face of what he considered to be the claimant's aggressive and inappropriate tone.
- 7.168 There was clear evidence that Ms Hughes was upset by the claimant's behaviour and she had filed a complaint; he knew about this.
- 7.169 He believed the claimant was uncooperative during the meeting and did not answer in a straightforward way questions about performance.
- 7.170 On 28 January, Mr Lewis emailed the claimant to ask if she was coming into work, as she had not complied with the sickness absence policy. On 29 January 2019, the claimant questioned why there was a need for a further meeting.

- 7.171 By this time, Mr Lewis had decided, provisionally, to dismiss the claimant. He discussed the matter with Ms Collinson on 30 January 2019; he then took the final decision to dismiss.
- 7.172 On 31 January, at a final meeting, Mr Lewis dismissed the claimant. He explained his reasons at the time, which included concerns about the tone and volume of communication; sending communication to excessive recipients; delay completing basic tasks; and the failure to behave in a collaborative manner.
- 7.173 Mr Lewis had the most serious concerns about the claimant's conduct, professionalism, and behaviour. He had concerns about the quality of the work, and the sparse nature of her plans for future work. In addition, he was concerned about the claimant's behaviour and the effect on colleagues. There had been numerous complaints. Ms Hughes made a specific complaint about bullying. He was aware of the behaviour towards Mr Kelly-Taylor. He had formed an independent view that the claimant's correspondence with Ms Okachi was inappropriate. He was aware of an issue with another employee Ms Lara where the situation had become so strained that he was acting as an intermediary between them.
- 7.174 We are satisfied that Mr Lewis had the gravest concerns about the claimant's behaviour. She was causing difficulty and disruption. At times her communication, particularly in emails, was considered unacceptable. We are satisfied that he dismissed the claimant because he had issues with the quality of her work and considered her behaviour towards colleagues to be inappropriate. She was not dismissed on grounds of any of the alleged protected disclosures.
- 7.175 It follows the claims of discrimination, detriment for whistleblowing, and automatic unfair dismissal all fail.
- 7.176 We reserve any final decision on the wrongful dismissal claim until after we have heard evidence on the alleged subsequently discovered misconduct. If the parties are unable to reach agreement, they should seek a further hearing.

Employment Judge Hodgson
Dated: 26 February 2021

Sent to the parties on:

1 March 2021

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For the Tribunal Office