EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102498/2016

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Held in Glasgow on 25, 26 and 27 October, 21 December 2016 and 3 February 2017

Employment Judge: F Jane Garvie
10 **Members: Mr K Thomson**
Mr V P Alexander

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Mrs Mary McLaughlin	**Claimant** **Represented by:** **Mrs A Forsyth – Solicitor**

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Nurseplus Limited	**Respondent** **Represented by:** **Mrs A Bennie – Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous Judgment of the Tribunal is that the claim should be dismissed.

REASONS

1. In her claim presented on 10 May 2016 the claimant alleges that she was
35 unfairly dismissed. She further asserts that she was subjected to detriments for making an alleged protected disclosure. The respondent lodged a response in which they deny that the claimant was unfairly (constructively) dismissed. They also deny there were any detriments suffered by the claimant as a result of the alleged protected disclosure.

40 2. A Preliminary Case Management was held on 5 August 2016 following which a Note was issued dated 11 August 2016.

3. At the start of the Final Hearing it became apparent that it would be appropriate to issue a Restricted Reporting Order and an anonymization Order. This was on the basis that the respondent which is a domiciliary care provider performs services on behalf of various organisations across the United Kingdom and one of the respondent's clients involved their providing services of a complex care package to a particular service user. This was to an individual who is ventilator dependent and in a wheelchair. This service is referred to by the respondents as "the Package". The service user is referred to as C, his mother as C's mother and the family as Family C. There was no objection to such an Order being issued.

4. Evidence was given by the claimant. No witnesses were called on her behalf. Evidence was also given on behalf of the respondent by Mrs Elizabeth (Liz) MacDonald. No other witnesses were called on behalf of the respondent.

5. It was not possible to complete the evidence in the three days allocated in October and accordingly the case was continued for the completion of evidence on 21 December 2016. It was hoped that the final submissions could also be dealt with on that date. However, it was not possible to hear the closing submissions as the evidence did not conclude until approximately 3.55pm on 21 December 2016. Arrangements were then made for the submissions to be provided to the Tribunal in writing and this was to be done by 16 January 2017.

6. The parties were informed that the Tribunal would then meet in private to consider the submissions and the evidence and reach its determination which would be issued separately in writing with reasons. The date allocated for this was 3 February 2017.

Findings of Fact

7. The Tribunal found the following essential facts to have been established or agreed.

8. The claimant joined the respondent as a Registered General Nurse. She received an offer of employment dated 9 June 2009, indicating that she was being offered a contract of part time working of 20 hours per week with a salary of £14,040, (page 38). By letter dated 8 June 2010, (page 39) the claimant received copies of a contract of employment for signature. These set out the details of the terms of employment and were signed by the claimant on 27 September 2010 and on behalf of the respondent on 22 September 2010, (pages 40/42). This offer referred to the claimant's employment having commenced on 27 May 2009, (page 40).

9. By letter dated 1 March 2013, (page 45) the claimant confirmed that she had indicated in a telephone call to the respondent's management that she wished to reduce her hours from 30 hours per week (they having increased from 20 hours at some point beforehand) to 24 hours. An e-mail dated 16 May 2013, (page 46) confirmed an amended contract was required with a reduction of the claimant's hours from 30 to 24 hours.

10. A letter was issued to the claimant dated 17 May 2013, (page 47) confirming her hours would be 24 hours per week.

11. By letter dated 11 November 2013, (page 48) a pay increase was provided indicating that the revised rate would now be £14.10 per hour.

12. In the early part of 2015 the claimant applied for a new position as a Clinical Supervisor. The claimant maintained that she saw an advertisement, (page 187) for this post. It was headed, "Job Reference: CSSOUTHGLASGOW". Immediately above it in handwriting are the words, "Not sure where this job ad came from".

13. Mrs MacDonald did not recognise this as the job advert. She thought that the style was one used at an earlier stage and would not have been issued by the company. Next, at page 188 in the bundle is a page which is in a

different type and font size. This gives contact details of a Pauline Ritchie and a mobile phone number.

14. On 21 December 2016 Mrs Bennie sought to lodge additional documents. After discussion, it was agreed that these should be lodged as they were relevant. They were given page reference numbers 196A to 196K. Page 196A bears to be an e-mail from Ms Ritchie to another member of the respondent's staff. This e-mail refers to three attachments, referred to as "the approved RAF, advert and the Job Specification that I used to recruit to Mary McLaughlin's post with the user of the care package." Page 196D bears to have the same content but different typesetting and font from page 188. The Job Specification is set out at pages 196D/(i) onwards.

15. There was therefore a dispute between the claimant and Mrs MacDonald as to which was the job advert seen by the claimant. Mrs MacDonald was very clear that she did not believe that page 187 represented the actual advert issued by the respondent while the claimant maintained that it was the document she had seen. Mrs MacDonald thought it was an old advert.

16. In relation to whether page 187 was the advert seen by the claimant the Tribunal was divided. One member of the Tribunal thought the claimant was more credible in maintaining that this was the document she saw on the basis that the document at page 187 has a Job reference and place reference i.e. CSSOUTHGLASGOW. The Tribunal all noted that there is the handwritten comment above this which reads, "Not sure where this job ad came from."

17. The majority of the Tribunal preferred Mrs MacDonald's evidence that the documents provided at pages 196A-196K represented what was issued by the respondent. The majority found support for Mrs MacDonald's position in that page 196A is an e-mail from Ms Pauline Ritchie which attaches the documents which she states in her email were those used by the respondent. The Tribunal was mindful that it did not hear evidence from Ms Ritchie. However, at page 196A Ms Ritchie specifically referred to there

being three attachments, "the approved RAF advert and the Job Specification". The advert is set out at page 196C and it was this that Mrs MacDonald thought was what had been provided.

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18. Next, pages 50B and 50B(1) bears to be an undated letter addressed to the claimant. It refers to an interview on 17 March 201with Pauline Ritchie and it offers the claimant a post as Clinical Supervisor. It indicates that there would be a probationary period of 3 months and the rate of pay was to be £20 per hour. It states that the normal hours would be 36 hours per week. It bears to be signed by Mrs MacDonald, (page 50(B)(1).

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19. Mrs MacDonald accepted the letter had her "name on it" but the signature "did not resemble signature I'd have put on it" and she had "no recollection of preparing this document." Mrs MacDonald was adamant that the signature was "not the way I'd do it: usually a "c" not a line through it". Accordingly, she did not recognise the letter and she did not consider that the signature attached to it was hers.

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20. The Tribunal was unanimous in noting that the signature which appears at page 50C, (letter of 22 June 2015) looks different to the signature provided at page 50B(1).

21. Mrs MacDonald was clear that she sent a letter to the claimant which is dated 12 June 2015, (page 50C). In it, Mrs MacDonald confirmed to the claimant that her post as Clinical Care Supervisor had commenced on 27 April 2015 and that her rate of pay would be £20 per hour. The hours were specified to be "will be a minimum of 24.5 hours to 37.25 hours per week with taxable mileage being paid at 20 pense per mile.

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22. The letter also specified that the claimant would have to attend the respondent's Alva office for 2 hours per fortnight to give handover of paperwork, the staff rotas were to be done in advance and e-mailed to the Alva office and then put on to the computer system and that any gaps in the rota would be covered by the claimant and would be considered to be part of her weekly hours.

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23. Importantly, the letter then states, “This amendment will last for a period of 6 months and will be reviewed at this point.”

24. In relation to the letter of 12 June 2015, (page 50C) the claimant disputed having seen it until the stage when she raised a grievance which was then investigated by the company. Her grievance was raised on 13 January 2016.

25. The claimant maintained that, had she seen it, she would have questioned it because there was reference to 24.5 hours.

26. The Tribunal concluded that it was more likely, on the balance of probabilities, that the letter of 12 June 2015 was the one issued to the claimant. While Mrs MacDonald could not recall all the details of what is set out in the letter but she knew that she would have received some input about its terms from Ms Ritchie as she was the individual who had been responsible for recruiting the claimant to the role of Clinical Care Supervisor. Although Mrs MacDonald had worked within the respondent’s organisation for some time although she had only moved into her current role in June 2015

27. The care package at which the claimant was the Clinical Care Supervisor was with Family C. The service user required 24 hour care. This involves there being two Carers or Support Worker on each 12 hour shift. As the Clinical Care Supervisor, the claimant would attend either at the service user’s house or, on occasions, at the school attended by the service user.

28. As Clinical Care Supervisor the claimant had both clinical and administrative responsibilities. One of the latter was completing Employee Engagement and Retention Forms (referred to as “EEPs”). These are forms that are completed for Carers/Support Workers during their initial 26 weeks in employment when they undertake on the job training. These forms are used as part of the respondent’s Employee Engagement and Retention Programme. An example EEP Form for a Ms Claire Ward was set out at page 50E. She is recorded as the Support Worker and the claimant as the

Clinical Care Supervisor. The purpose of this Form was for the Support Worker/Carer to complete a self- assessment which was then reviewed by the Line Manager, in this case the claimant as the Clinical Care Supervisor. Other responsibilities as the Clinical Care Supervisor included the preparation of staff rotas, organising monthly team meetings although the latter could also be dealt with by the respondent's administrative staff in Alva. In addition, the claimant performed supervisory duties as the Clinical Care Lead on the Package. The claimant had in the past worked on other client Packages in the capacity of being the Registered Nurse. On one of these Packages her Line Reporting Manager as the Clinical Care Supervisor was a Ms Lesley Jackson.

29. As the Clinical Care Supervisor, the claimant believed that she was working well with Family C and, in particular, the mother of the service user with whom she thought she had a good relationship.

30. The claimant was informed that her hours as the Clinical Care Supervisor were to be reduced to 24 per week. This was advised to the claimant in a telephone call from a Ms Lucy Merrigan. The claimant understood the reduction in hours would be from some point in October 2015 onwards. What the claimant did not know was that the terms of the respondent's Package with Family C were such that there was a reducing requirement for the amount of hours from the Clinical Care Supervisor after a certain period of time. This was not clearly explained to the claimant by the respondent. It appears that the respondent was not fully appraised as to the terms of the Package until quite late on after it had taken over this Package from a previous provider. The claimant accepted that her weekly hours working on the Package as Clinical Care Supervisor were to reduce to 24.

31. Once the hours that the claimant was to spend as the Clinical Care Supervisor (with Family C) were reduced, initially to 24 and then to 8 per week, the respondent continued to pay the claimant at the Clinical Care Supervisor rate although they, in turn, were only paid by the Package for the

8 hours once that reduction to that number of hours was put in place in January 2016.

32. On 12 November 2015 the claimant was working a 12 hour shift at the service user's house. While there, she was in the course of dealing with the Christmas rota for the Carers/Support Workers. As always, there were two carers on the shift with her. One was a Ms Jane (sometimes referred to in the paperwork as "Jean") Wood and Ms Claire Ward. The claimant was aware of an atmosphere with Ms Wood. She thought that Ms Wood was being quite difficult. During a break the claimant approached her and asked if she was okay and was given the response, "No, far from it". The claimant understood that Ms Wood was unhappy that she was being asked to work on Boxing Day and questioned why bank staff could not be employed instead. The claimant explained that bank staff had limited availability on that date. The claimant understood that Ms Wood's suggestion was that another individual, a Ms Donna Morris could work this shift instead. Ms Wood indicated that she did not know why they "bothered with her" anyway. The claimant understood this comment to be about Ms Morris. She asked more and was taken aback when Ms Wood then indicated that staff "all do it" by which Ms Wood seemed to be saying that some or possibly many of the Care/Support Workers assigned to this Package were in the habit of taking turns to sleep when on nightshift. The terms of the Package required that on both nightshift and dayshift there were always two Carers/Support Workers on awake and on duty.

33. As indicated, the claimant was very taken aback by this comment which was made to her in the presence of Ms Ward who was a relatively new member of the Support team on the Package. The claimant had no reason to disbelieve what was being said to her although she thought that thiis was "not the first time" that this had gone on. However, in addition, the claimant's reaction was that she was "astonished by what I was hearing". There was therefore a slight discrepancy in what the claimant stated was her immediate reaction when told of the situation by Ms Wood.

34. During her break on the shift, the claimant telephoned Mrs MacDonald to relay what had happened. The claimant's recollection was that Mrs MacDonald's reaction to being told about the allegation of staff sleeping when on duty was, "Not this again". The claimant was shocked by her reaction. She also understood from Mrs MacDonald that what she had been told was not to be disclosed to the service user's mother. After this the claimant completed her shift with Ms Wood and Ms Ward although she felt very uncomfortable working alongside Ms Wood. Contrary to the instruction from Mrs MacDonald the claimant did inform the service user's mother of what she had been told about some staff sleeping while on nightshift.

35. After her shift ended, the claimant, Ms Wood and Ms Ward attended a team meeting of Carers/Support Workers and management at a local hotel. These meetings were held on a regular basis, usually once a month. The meeting started at about 7pm. Minutes of the meeting were prepared, (pages 51/52).

36. As was generally the case there was quite a large turnout of staff. Mrs MacDonald and Ms Merrigan were also present and, for the first part of the meeting, the service user's mother was in attendance. After she left the meeting continued.

37. Towards the end of the Minutes there is reference to the issue of sleeping on duty. This was raised by the staff, not the claimant. This is set out at Paragraph 13 as follows:-

> "13. There were allegations by staff that a member of the team had declared that it was acceptable for 1 member of staff to 'rest your eyes' when on nightshift. This had been mentioned by previous providers Phoenix. LMacD advised that under no circumstances this was acceptable and that regardless of prior practises (*sic*) this should never happen – infact this would be a disciplinary matter. A few of the staff team were very upset at these allegations and most advised that they wouldn't dream of 'resting their eyes' at any time on shift. The shift is a waking

nightshift requiring both members of staff to be awake, coffee is available at all times for staff should they feel tired or need a break."

38. The final paragraph of the minute reads:-

5 "14. Meeting got a bit out of hand with staff insulting each other verbally which is not acceptable to management or the rest of the staff team, LMacD reminded everyone that the primary concern here was (the service user's) safety and wellbeing and that staff members should treat each other with respect and
10 dignity. If there are any issues between staff members then these should be raised to MM (the claimant) or LMacD or KG – these will be treated with confidentially and under no circumstances should staff team be gossiping between themselves about other staff members."

15 39. At some point before the meeting ended two of the staff who had been in attendance left. The claimant believed they had done so because their names had been mentioned as individuals who had been "carers sleeping on shift". The claimant did not think she was given any support from Mrs MacDonald during the meeting.

20 40. The claimant's recollection of the meeting was that it got completely out of hand and Ms Wood was "very aggressive". The meeting ended at about 9pm and Mrs MacDonald left

41. The claimant stayed on as she was very upset and physically shaken. She felt what happened at the meeting was very unprofessional. She sat on for
25 about half an hour with Ms Merrigan before they too left the hotel.

42. It was accepted by the respondent that the claimant in telephoning Mrs MacDonald and informing her of what she had been told by Ms Wood on 12 November 2015 had made a protected disclosure.

43. The claimant attended work the following day, 13 November 2015. She maintained that she sent Mrs MacDonald a text message, (page 58). In it, the claimant explained that she felt obliged to let C's mother know what she had been told about staff sleeping on duty. It was not clear whether Mrs MacDonald received that text.

44. As indicated above, the claimant did inform C's mother of what had been disclosed to her by Ms Wood.

45. The claimant's impression was that after the team meeting on 12 November 2015 she lost the good working relationship she had enjoyed with the Carers/Support Workers. Prior to this meeting the claimant had frequently received phone messages and e-mails from the Carers/Support Worker but she now felt that she was not "in the loop" and she did not feel part of the team any more.

46. The claimant sent Mrs MacDonald an e-mail on 21 December 2015, (page 76). It reads:-

> "Hi Liz
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> Can you contact me as a matter of urgency regarding concerns I am having at the moment. The team is falling apart just now. Staff are not bothering to come up to the office and are treating me with total disrespect at the moment. Have been having major issues with a new staff member Clare Ward. I really need support as I am at breaking point. After this week I will be going to my doctor for a sick line as I am not coping at all. Had a chat with (C's mother) tonight and she wants an emergency meeting. Jane Wood still hasn't been dealt with after her actions at the team meeting. I feel totally let down. You assured me that she would be getting dealt with. I tried speaking to Jacqui hull last week. Things have gone from bad to worse because of the lack of discipline to Jean Wood, it has given staff the green light to speak to me whatever way they like. I tried to

call you on my way home tonight, if you can please call me at home in the morning would appreciate it."

47. Mrs MacDonald sent a reply dated 22 December 2015, (page 77). This reads:-

5 "Hi Mary

I have been on annual leave last week and only back yesterday. I am picking up with the office staff tomorrow. Lisa was meant to be dealing with Jean but I know she has been unwell and I am not sure if she has been fully back to work but I will find out what is happening
10 and get back to you."

48. The claimant attended the respondent's office in Alva on 23 December 2015 as she paperwork to hand in. While she was there she had a short discussion with Mrs MacDonald when they were standing beside the photocopier. The claimant thought Mrs MacDonald told her that
15 management would "be dealing with Jean" and "it was in hand".

49. Until this was said to her on 23 December 2015, the claimant had not understood that there was an investigation underway by the respondent in relation to the allegations about some Carers/Support Workers sleeping on nightshift. The respondent was indeed carrying out an investigation by
20 interviewing those involved, (pages 54 – 69 inclusive).

It was also on 23 December 2015 that the claimant understood from Mrs MacDonald that her weekly hours with Family C were to be reduced to 8 hours. The claimant understood that the service user's mother felt that her hours should be reduced but she did not think that any real explanation was
25 given to her. She also accepted that had already received an email about her hours being reduced which she thought was on 7 December 2015, (page 73) as this was the date of an email from Mrs MacDonald to her. It reads:

"Hi Mary,

The initial contract that I gave you was for a six month period which is now up. We have let it roll until we found out what exactly (C's mother) was going to be looking for going forward. It is becoming clear that she is not looking for any where near full time but at the present she has not come back to me with definite hours as she said she was going to be speaking to you first

If she is now saying to you what she is looking for and it is not going to be acceptable to you then you have to decide what is best for you. I do not have any positions available at the rate of pay that was specific to the C Package.

I am going to be in Alva all day Wednesday if you want to come in for a chat."

50. The claimant did not follow up on Mrs MacDonald's suggestion that she call into the office and have a chat.

51. The claimant e-mailed or texted Mrs MacDonald on 23 December 2015, (page 83) as follows:-

> "This was a text message I sent Claire in the green after the conversation we had. I was told by her that she had no intention of going up to the office for her meeting. I reminded her yet agin (*sic*) the we still didn't hadn't received a letter about her appointment she accused me off not believing her and being unprofessional. I told her to tread very carefully in light of everything going on at the moment and she told me she didn't care as she has enough going on in my life. When asked if she would be covering shifts for Christmas and boxing night she told me that she couldn't guarantee that as she was going for surgery. That has been my concern all along covering shifts for C at Christmas considering she has already let us down three times in her probationary period. And the end of our telephone

conversation she swore at me and told me good luck covering her shifts. After that conversation this is what I messaged her below."

52. The messages set out at pages 84/85 are as follows:-

"What you have to realise Claire is I am your line manager and I have told Liz macdonald (*sic)* I will not be signing off your 26 eep. Meaning you are on probation. You have a total lack of respect and I am not going to tolerate being spoken to by a junior a member of staff especially one that is just in the door. Have sent an indepth email to Liz, Jacqui and Theresa Cull after the way you spoke to me You are not a permanent member of staff and I will be making sure you are dealt with.

I am busy interviewing at the moment Claire if you want to speak to me it will be done in the office with more senior management present. I have tried to make amends with you Claire but you have far too much to say for yourself."

53. There was then an e-mail from Ms Woods' mother with a reply from the claimant, (page 85).

54. By letter dated 29 December 2015, (page 86) Mrs MacDonald wrote to the claimant at her home address. This reads:-

"**Re Amendment to Contract**

Following no *(sic*) from your temporary post as Clinical Supervisor within the C package it was agreed that this would be reviewed in 6 months time. As a result of this following on from our conversation on Wednesday 23rd December 2015 I am writing to confirm the Clinical Care Supervisor hours for client C will be 8 hours per week. Hours to be arranged to suit the client and the needs of the business on a weekly basis. This will be paid at £20 per hour, any other work

taken on with other clients will be paid at the rates assigned to those clients.

Timesheets to be submitted to the office weekly for processing. Late timesheets may result in pay not being paid correctly.

5 This amendment will come into being from Monday 4th January 2016.

Please do not hesitate to contact me should you have any queries regarding the content of this letter."

55. The claimant received the letter on 5 January 2016. She felt "absolutely devastated" when she received this letter. The claimant understood the 10 reference to "any other work" to mean that this would be as a Registered Nurse rather than as a Clinical Care Supervisor. As such, the rate of pay would be anywhere between £10 and £14.10 per hour.

56. There was a further monthly Team meeting on Wednesday, 6 January 2016 which the claimant attended as did Mrs MacDonald and many of the other 15 Carers/Support Workers. Ms Merrigan was also present as was Ms Lesley Jackson. As indicated above, the latter had been the claimant's Clinical Care Supervisor on another Package when the claimant had been the Registered Nurse. The claimant appeared to form the impression that Ms Jackson would become involved in the Family C's Package although the 20 Minutes of the meeting, (pages 88-90) do not reflect this as having been discussed.

57. The claimant sent an e-mail to Mrs MacDonald on 13 January 2016, (page 91) in which she indicated that she wished to raise an internal grievance with the respondent's HR department as she was not "agreeable to my 25 change in hours from full time to 8 hours a week". The e-mail continued:- "If you can please contact me at home and I would like to speak to Sharon Traynor tomorrow. Is it possible to have a meeting with her. I spoke to Pauline Ritchie yesterday and she also agreed that at interview and after our sit down and discussion with (C's mother) it was agreed that my hours would

be full time for a 6 month period and then reviewed. After this period an agreement was made that I would work 24 hours which I was happy with. Never was I agreeable to a reduction in hours 8."

58. Mrs MacDonald replied by e-mail of 13 January, (page 92) in which she explained that Sharon was only in on Thursday and Friday but was not certain if she would be in the Alva office. Her e-mail continued:-

> "As far as the 24 hour verbal agreement this was done until we had time to go through the contract and by then it was decided that it would have to drop to the 8 hours. Mears Nurseplus have been honouring the 24 hours as Clinical Supervisor at the rate agreed until the end of the year 2015, but going forward contractually with the C package it is only requiring the 8 hours and that is all I have at present as Clinical Supervisor within the area you wish to work in.
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> You have stated you will work as a qualified nurse at the nurse rate for the job in Blantyre but again as you have already stated you are not happy for this to continue as you are not keen to work within this package. As already stated this is the only other nurse led package that we have a (*sic*) present. Should anything else come in I will certainly keep you in mind for it.
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> I will find out where Sharon is going to be and get back to you but it may not be until tomorrow morning."

59. The claimant replied later that afternoon, (again page 92). It reads:-

> "Hi Liz
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> Thank you for getting back to me. I understand what you are saying but due these fundamental changes in my contract I am now having to seek employment elsewhere as I cannot financially get by on 8 hours a week. I was given written confirmation in January that my hours are confirmed as 8 going forward after verbally agreeing that I

would get at least 24 hours a week. There was no timescale on this. Going forward in my mind I would always get at least 24 hours a week. The work at Blantyre is a temporary fix to ensure that I get a decent wage at the end of the month and is not at the hourly rate that I am on as a clinical supervisor so again I have unlawful deductions to my earnings. This is surely a breach of contract. As advised by my Union I want to take an internal grievance. Is Sharon Traynor head of HR. Can you please confirm her email to me please as I really want to get the ball rolling and would like to draft an e-mail to her today."

60. The claimant subsequently sent an e-mail to Ms Traynor on 13 January 2016, (pages 94/95).

61. Separately, by letter dated 14 January 2016, (page 95A) Mrs MacDonald wrote to the claimant referring to a brief meeting on that date when the claimant was advised that following a review of the service provided to Family C there was a need to consult on the claimant's working hours. The claimant was invited to attend a consultation meeting to discuss:-.

1 The reduction in hours to 8 hours per week as Clinical Supervisor within a specific package.

2 What the role will specifically entail.

62. The claimant was advised that the consultation would run from 20 January 2016 for 30 days. She was invited to attend the consultation meeting on 20 January 2016 in Alva and was informed that she was entitled to bring a companion who could be a colleague or trade union representative.

63. On 15 January 2016 the claimant wrote to Ms Traynor, (page 98) and received a reply on the same date, (also page 98). This indicated that Ms Traynor was to look at the content of the grievance and allocate the most appropriate person to deal with it but she might need some further information from the claimant.

64. The claimant replied by e-mail of 15 January 2016, (page 99) and this was acknowledged by Ms Traynor on 15 January 2016, (again page 99).

65. By letter dated 20 January 2016, (page 101) Mrs MacDonald wrote to the claimant about the consultation meeting, indicating that the date was being changed to 28 January with the consultation to run from that date.

66. The claimant then e-mailed Ms Traynor on 20 January 2016, (page 102) indicating that she had written to Mrs MacDonald advising that she did not think it appropriate to have a consultation meeting.

67. By e-mail of 20 January 2016 the claimant set out her position regarding a separate grievance to Ms Traynor, (pages 103/104). This reads:-

> "Following on from my initial grievance I would like to on a separate grievance highlight some other concerns that are happening at the moment.
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> As you are aware my hours have been reduced to 8. In the meantime Lesley Jackson who is also Clinical Supervisor has been introduced to the service user package that I was employed for. If my hours have been reduced then why is there a need for another clinical supervisor in the package. I was told verbally by Liz MacDonald that she had became available because her work load has reduced. I was told by Liz that all supervisions, appraisals return to works and EEPs would now be done by Lesley. These are tasks that I was doing and have now been taken off me without my consent and given to Lesley. I have been told that in my 8 hours I will be supervising staff to ensure they are carrying out and are competent in carrying out the care to the service user I work at. For the first six months as you are aware I was working full time hours, some weeks I would work more. For my hours to be reduced to 8, less than half the hours I had been working is fundamental. I have been offered work at another package but at a lower hourly rate. Why is it that if Lesley the other clinical supervisor had become more available has she not

been asked to work at this other package. This would allow me to work the extra hours that are required for the service that I was employed to work at. I have given up so much and invested lots of time and energy in getting to know my clients care inside out I have built relationships with the team I have been in charge of up until now. I have established good relationships with my clients family. I have been half way through EEPs that have now been taken away from me. I feel very let down and upset.

I look forward to hearing from you."

68. The claimant replied to Mrs MacDonald's letter of 14 January 2016 by letter dated 21 January 2016, (pages 113/115) setting out the issues which she considered had arisen.

69. Then, in an e-mail dated 22 January 2016, (page 116) the claimant wrote tp Mrs MacDonald as follows:-

"Hi Liz

I am aware that you have agreed to pay me for 24 hours throughout my consultation meeting. However as explained to you my hours were down from last month due to the fundamental changes made in my contract and at very short notice. Would therefore ask that the hours I was down from last month are backdated and paid to me this month. Looking back at my timesheets and payslips I should have been paid at extra 11 hours. If you need a copy of my timesheets from last months am happy to resend."

70. Mrs MacDonald replied by e-mail of 22 January 2016, (page 117).

71. By e-mail dated 5 February 2016, (pages 125-126) a Ms Theresa Cull the respondent's Regional Director for Scotland and Northern Ireland wrote to the claimant confirming that there was to be a meeting on 11 February 2016 with Mr Alistair Fitzsimons, Area Manager for Northern Ireland.

72. Then, by e-mail dated 7 February 2016, (page 128) the claimant wrote to Ms Hull, (another member of the respondent's administrative team) asking what she was to do that week during the 8 hours she was to be working on the service user package as she had no EEPs supervisions or appraisals which the claimant believed had been given to Ms Jackson.

73. By e-mail of 8 February 2016, (page 129) Ms Hull replied as follows:-

> "Hi Mary
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> As I informed you on the phone you will need to ask C's mother (i.e. the service user's mother) what she wants you to do. Lesley Jackson will be doing all the other work required for the C package. You really have to decide what is best for you if 8 hours is not enough. There is no other work available.
>
> Your reference came in so I have filled it in for you."

74. The mention of a reference was to one which appears to have been sought by a potential employer as Ms Hull had sent an acknowledgment letter dated 18 December 2015 to this potential employer in response to their request for a reference for the claimant, (page 75).

75. The respondent did not have many nurse led Packages by late 2015 and into early 2016. The Package on which Ms Jackson had been working in Dunfermline had come to an end and another referred to as the Bridge of Earn Package ended when the service user was admitted to hospital.

76. Separately, by letter dated 8 February 2016, (page 130) Mr Fitzsimons wrote to the claimant confirming that a grievance meeting would be held on Thursday, 11 February 2016. The claimant attended that meeting and a Ms Fotheringham was in attendance as the Note Taker. Minutes were prepared, (pages 131/138).

77. There was also a document entitled "Grievance Investigation Timeline", (Page 139).

78. By e-mail dated 16 February 2016, (page 140) from a Nikola Brown, Healthcare Co-ordinator South the claimant was informed:-

5 "Hi

Zoe is going to cover tomorrow day and cover until 1000 on Friday then donna will take over. Hope you are doing ok. I don't think you were allowed to cover the shift anyway and they are don't want you at the team meeting as you are on annual leave. There is stuff going on
10 behind the scenes here just now. There is no work here for you just now and Jacqui Hull won't let you in at the Bridge of Earn package that's how I had to pull you out of the shifts I had you booked in for in January. Am really sorry."

79. By e-mail dated 18 February 2016, (page 143) addressed to Mrs
15 MacDonald, the service user's mother advised that she wanted the claimant removed from the Package "due to reasons discussed on the phone". This was in relation to a call made to Mrs MacDonald by the mother.

80. The claimant was on annual leave that week and so Mrs MacDonald wrote to her, (page 149) as follows:-

20 "Dear Mary

I know you are on annual leave for the week commencing 22nd February 2016. I am not sure what shifts you have arranged to go over to C's package week commencing Monday 29th February 2016, however can you please refrain from going on duty and contact me
25 on my mobile (*number then set out*) on Monday 29th February 2016 to discuss, and make arrangements for you to come in and speak to me.

During this time can you please not make contact with anyone within the C package."

81. In an e-mail dated 20 February 2016, (pages 144-145) the claimant wrote to Mr Fitzsimons. She attached copies of letters from and to Mrs MacDonald. She noted that there was to be a meeting and that she had been asked what she wanted. The claimant was not sure what was meant by this but she then stated:-

" (i) I will not be returning to Mears under any circumstances.

(ii) I believe that the professional relationship took a 'turn for the worse' upon receipt of Liz MacDonald's letter to me.

(iii) I believe there is a complete breakdown in the mutual trust and confidence expected between the employee (me) and you the employer which cannot be fixed under any circumstances.

(iv) I believe I have been subject to a 'detriment' going to the root of my contract which absolves me of any further responsibility to my Terms and Conditions of Employment.

(v) In consideration of point (iv) I shall be looking for compensation in regard to loss of office and 7 years clear unblemished continuous employment. If we are unable to come to an amicable settlement then I shall take immediate steps to lodge my case with ACAS for Conciliation.

(vi) I consider Liz has breached procedure not for the first time but for the second and third."

82. By recorded delivery letter dated 20 February 2016, (pages 146-147) the claimant wrote to Mrs MacDonald setting out her position in relation to various matters and indicating that she considered this to be "the last straw

doctrine" and in doing so that she (Mrs MacDonald) "have constructively dismissed me from my post as Clinical Supervisor".

83. By letter dated 22 February 2016, (page 150) Mr Fitzsimons advised the claimant that she was invited to attend the grievance outcome meeting to be held on 24 February 2016 in Perth. That meeting duly took place. Then, by letter dated 24 February, (pages 151/156) Mr Fitzsimons set out his conclusions. Some parts of the claimant's grievance were upheld; others were not.

By letter dated 27 February 2016, (pages 157-159) the claimant replied to Mr Fitzsimons appealing against the overall outcome of his findings.

84. By letter dated 29 February 2016, (pages 163/165) Mrs MacDonald set out her position in response to the claimant's letter of 20 February 2016. The claimant sent a reply dated 3 March 2016, (pages 166/168).

85. By letter dated 3 March 2016, (page 170) Ms Cull wrote to the claimant, inviting the claimant to attend an appeal meeting on 8 March 2016 which she was to chair.

86. The claimant acknowledged this by letter dated 3 March 2016, (page 171) in which she queried the level of impartiality and neutrality which Ms Cull could provide. A reply was sent dated 3 March 2016, (page 171) advising that Ms Cull was happy to assign an alternative senior manager.

87. The claimant then replied by letter dated 4 March 2016, (page 174) indicating that she did wish to proceed with the hearing on 8 March 2016. Ms Cull replied on 7 March 2016 advising that she did not feel it would be appropriate for her to chair the meeting, (page 175/176).

88. By e-mail dated 7 March 2016, (page 177) the claimant was informed by Ms Cull that the meeting would now be chaired by a Ms Gwyneth Morrison.

89. The appeal was heard on 8 March 2016 and notes were prepared, (pages 179/180).

90. Mrs MacDonald by letter dated 10 March 2016, (page 181) wrote as follows:-

5

> "Further to my letter dated 29 February 2016 regarding your resignation dated 20 February 2016 the letter was to address points raised but also for you to be given the opportunity to meet and discuss your resignation hence a weeks cooling off period to consider.
>
> 10 I received a further letter from you dated 03 March 2016 where you clearly state you have left your employment and having received no further correspondence from you this letter is to acknowledge receipt of your resignation your last working day will be Monday 07 March 2016."

15 91. The letter then dealt with various details such as final salary, P45 and company property.

92. By letter dated 14 March 2016, (pages 182/183) Ms Morrison wrote to the claimant as to the outcome of the meeting held on 8 March 2016. The outcome was that the decision already made by Mr Fitzsimons was to stand
20 as the claimant had not provided any further evidence to support her claims. This was in relation both to the letter of 12 June 2015 where the claimant stated that she had not seen that letter before while in relation to the letter regarding lack of consultation, the decision already taken stood and in relation to the Team meeting on 6 January 2016 the claimant had not
25 provided further evidence to support her claims.

93. The claimant resigned with immediate effect as set out in her letter dated 20 February 2016, (page 146/147).

Claimant's Submissions

94. The Claimants case is based on the definition of dismissal under s.95(1)(c) of ERA 1996:

‘An employee is dismissed by his employer if.

(c) *the employee terminated the contract under which he is employed* 5 *(with or without* notice) *in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct’*.

95. The Claimant has 3 separate grounds on which to base a claim for Constructive Unfair Dismissal;

1. Breach of fundamental term of the contract

   10 a. Reduction of hours from 24 hours per week at £20 per hour to 8 hours per week.

2. Automatic unfair dismissal due to detriment suffered as a result of a whistleblowing disclosure.

3. Breach of implied term of trust and confidence based on the 15 unreasonable course of conduct by the employer

96. Under each heading I will invite the ET to conclude that the Claimant has been dismissed. The ET has, as a matter of law, to conclude whether or not the dismissal is unfair in line with the statutory test at s.98(4) of ERA 1996. This assessment is irrelevant in relation to 2 above. However it is an 20 assessment relevant under 1 and 3 above.

97. The reason the Claimant’s resignation can be found in per Document 146 and 147 and at the end her evidence in chief. Her reason for resigning supports all 3 types of dismissal narrated above.

1. Breach of contract by the Respondent unilaterally reducing the 25 ***Claimant’s working hours from 24 hours to 8 hours.***

98. Evidence which is relied on to show that the terms of the contract are as follows:

99. Document 187 is the internal job advert for the care of child B. It refers to 35 – 40 hours per weekly is unequivocally advertised as a full time post. No reasonable or objective person could interpret the job advertised as anything less than a full time permanent post.

100. The Claimant, who was already working in a permanent position as a nurse with the respondents, was offered the post by way of undated letter at Document 50b. The principal version of that letter has been exhibited.

101. The letter refers to 'your hours of work will be 36 hours'.

102. The Respondents have produced a letter at Document 50C dated 12 June 2015 which is different and the Claimant's clear evidence is that she did not receive this letter. Further it should be noted by the Tribunal that this letter invites the Claimant to sign it but no signed copy has been produced. We would ask the ET to conclude that this supports the position that the letter was not received by the Claimant and to conclude that the terms of the Contract are as per Document 50b.

103. In October 2015 the Claimant agreed to reduce her hours from a guaranteed 36 hours per week at £20 per hour to a guaranteed 24 hours per week at £20 per hour.

104. At an informal meeting beside the photocopier the Claimant was advised by Liz MacDonald of the Respondent that her hours were to be reduced to a guaranteed 8 hours per week. That unilateral decision by the company to reduce the hours of the Claimant was followed up in a letter from the Respondent dated 29 December 2015 which is found at Document 86. The terms of the letter are unequivocal. The Claimant was being reduced to a guarantee of only 8 hours per week at her rate of £20. The remainder of any earnings were up to whatever work could be given to her and at those rates of pay.

105. The terms of the letter at Document 86 show that the Employer was clearly advising they no longer intended to be bound by the term so the contract

with the employee. The same intransigent position of the Respondent can also be seen in Document 129.

106. Such a clear repudiatory breach cannot be justified on grounds of reasonableness nor can it be cured by any subsequent actions by the Respondent. It is a straightforward example of what constitutes constructive unfair dismissal.

Western Excavating (ECC) Ltd v Sharp [1978] ICR221

> *'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment,* ***or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract,*** *then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'*

107. If a repudiatory breach is established then it is not curable. It cannot be cured by attempting to make amends or undo what has been done. See ***Buckland.***

Reasonableness of Dismissal under s.98(4)

108. The ET has, as a matter of law, to conclude whether or not the dismissal is unfair in line with the statutory test at s.98(4) of ERA 1996.

109. It is difficult for an employer to bring itself within a range of reasonable responses in circumstances where it has fundamentally breached an express term of the contract of employment.

110. The ***Buckland*** case discussed this point and demonstrates how the 'reasonableness' test in relation to s.98(4) has its limitations when it comes to cases of constructive UD based on a repudiatory breach of contract. It does this by highlighting the hypothetical situation of a company not being paid by a large client. That loss in income means that the company cannot pay wages. The non-payment of wages is a repudiatory breach of contract;

however the reason for the breach is a reasonable response to the company not having enough money to pay wages. This hypothetical set of circumstances highlights why a Tribunal therefore should not go on to consider the 'reasonableness' of the dismissal or breach by reference to s.98(4). Once a repudiatory breach is established the reasonableness test in s.98 (4) is irrelevant as it cannot cure the breach.

111. The Court of Appeal in the relevant part of the ***Buckland*** case commented that:

> "Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement. Take the simplest and commonest of fundamental breaches on an employer's part, a failure to pay wages. If the failure is due, as it not infrequently is, to a major customer defaulting on payment, not paying the staff's wages is arguably the most, indeed the only, reasonable response to the situation. But to hold that it is not a fundamental breach would drive a coach and four through the law of contract" (*paragraph* 28).

112. The Respondents attempt to justify the breach by reference to the terms of the contract between the company and the trust. A unilateral high handed presentation of a reduction in hours with no meaningful consultation with the Claimant cannot possibly be viewed as a reasonable response. Therefore, we submit that on an s.98(4) analysis the dismissal was unfair.

2. <u>Unfair Constructive Dismissal based on Whistleblowing disclosure</u>

113. The dismissal of an employee will be automatically unfair if the reason, or principal reason, is that they have made a protected disclosure.

114. The Respondents have conceded that the disclosure of sleeping on duty was a whistleblowing disclosure.

115. Detriment includes loss of work, loss of pay or damage to career prospects.

116. The Claimant has narrated a timeline of events which allow the ET to conclude that, following a whistleblowing disclosure, the following events occurred.

117. The Claimants contractual hours were unilaterally reduced.

118. The Claimant was sidelined from the team and was excluded from team meetings. In January a team meeting was deliberately set down for when the Claimant was on holiday, however the Claimant came in to attend the meeting. In February the team meeting was again set down for when the Claimant was on holiday. Up until the whistleblowing disclosure team meetings were normally organised by the Claimant and attended by her.

119. The Claimant's duties were significantly eroded in the following way;

    1. The responsibility for making up staff rotas was removed.

    2. Another member of staff, Lesley Jackson, took on duties to do with the ED package at the same time as the Claimant's hours were being reduced

    3. The responsibility for dealing with staff holiday requests was removed.

    4. The responsibility for dealing with EEP's, supervisions and appraisals were removed.

    5. The Claimant was removed entirely from the ED package.

120. In addition, the Claimant gave evidence that since the whistle blowing disclosure she had been experiencing hostility towards her by her team. The Claimant asked the Respondent to help deal with these issues but no help was forthcoming.

121. On 3 separate occasions the Claimant raised these issues with the Respondent, see documents 113, 103 and 94.

122. The Claimant's letter of resignation refers to these events as one of the reasons for leaving.

123. The facts and evidence allow the ET to conclude that the principal reason for the detrimental treatment of the Claimant was due to here whistleblowing disclosure and that conclusion can be drawn even without reference or a finding in relation to 5 above.

5 124. As such, the resignation of the Claimant should be treated as automatic unfair dismissal

3. ***Unfair Constructive Dismissal based on Last Straw Doctrine***

125. If the ET cannot conclude that the detrimental treatment was not due to the whistleblowing disclosure, the unreasonable behaviour of the Respondent

10 based on the above points can be construed as constructive unfair dismissal based on the 'last straw doctrine'. In other words, the course of conduct by the employer, taken cumulatively, amounts to a breach of the implied term of trust and confidence. The test is whether or not, viewed objectively, the course of conduct showed that the employer, over time, has demonstrated

15 an intention not to be bound by the Contract of employment.

126. Reference is made to the established case ***of Malik & Another v Bank of Credit & Commerce International SA [1998] AC20***, 'the employer must not, without reasonable and proper cause, conduct itself in a manner calculated to destroy or seriously damage the relationship of trust and

20 confidence between employer and employee'

127. In making the assessment of whether or not there has been a repudiatory breach of the implied term of trust and confidence the ET must consider whether or not the employer acted reasonably.

128. The Respondent has put forward evidence to suggest that the acting of the

25 employer in relation to the above were justified due to the conduct of the employee. This position lacks credibility. If the employer has such serious concerns as to justify the erosion of key element of the Claimant's job role, then why was there no disciplinary process in play? Why is there no evidence of any informal discussions concerning conduct or performance?

We would therefore ask the ET to conclude that there is no reasonable proposition for this erosion of duties and therefore the facts justify a finding of dismissal.

Reasonableness of Dismissal under s.98(4)

5 129. Once again, the ET has, as a matter of law, to conclude whether or not the dismissal is unfair in line with the statutory test at s.98(4) of ERA 1996.

130. As the reasonableness issue will already have been considered in arriving at whether or not events amounted to a dismissal then this assessment is a replay of the same factors and as such the same finding must follow. As
10 such we would ask the ET to conclude that the dismissal was unfair.

131. ***Loss***

Basic Award

Compensatory Award.

Given the fluctuation of the Claimant's earnings we would ask that earnings
15 be averaged out over a period of 12 months. This would then even out fluctuations.

All as per the SOL

Contributory Fault

The ET asked for submissions on whether or not contributory fault is
20 applicable in constructive UD cases. There is case law to support this proposition but the amount of case law and guidance is very limited. It is not usual for such a concept to be applied to constructive UD cases.

The application of this principle differs in its application between

Basic award; where any conduct or complaint before the dismissal was such
25 that it would be just and equitable to reduce of further reduce the amount of the basic award to any extent.

Compensatory award; where the dismissal was caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award any such proportion as it considers it just and equitable having regards to that finding.

5 To be contributory the conduct must be culpable or blameworthy. It is difficult to see what the claimant might have done to justify a unilateral variation of her hours or an erosion of her duties.

132. The EAT in Firth Accountants Ltd v Law UKEAT/0460/13 said that it would be unusual for a constructive UD to be caused or contributed to by any 10 conduct on behalf of the employee.

133. In relation to Dismissal 1 above, it is impossible to make any link between the employee's conduct and the unilateral reduction of hours.

134. In relation to Dismissal 2 above, it would thwart the purpose of the whistle blowing protection to make any link between the employee's conduct and 15 the dismissal on the grounds of detriment.

135. In relation to Dismissal 3 above, if the ET have found that there was unfair dismissal then reasonableness and conduct of the employee has already been considered and by definition there will be no reasonable or proper cause for the employer's behaviour.

20 136. Further, again we would refer to the EAT decision in Firth where it observed:

> 'it would be difficult to argue that cases concerned purely with performance, particularly performance that the employer had not considered warranted improvement through use of any formal proceedings, could fall within the heading of culpable or blameworthy 25 conduct.'

> 'where the fundamental breach is one of implied term of trust and confidence, then by definition there will be no reasonable or proper cause for the employer's behaviour. That is because the accepted formulation of the test for a fundamental breach of implied term is that

an employer must conduct itself in such a way as is calculated or likely to destroy or damage the relationship of trust and confidence without reasonable ore proper cause.'

137. In submission, we believe no causation has been made out for the ET to apply a reduction on the grounds of contributory conduct.

SCHEDULE OF LOSS

138. The attach schedule of loss has been updated to reflect figures up to the date of the ET, namely 21 December.

139. If the Claimant were successful in her case loss should be calculated as per the schedule of loss.

140. The Claimants earnings with the Claimant varied significantly on a month to month basis. For that reason we would submit that to establish the correct average earnings the ET should look to a lengthy period of time. Thus the schedule of loss narrated a monthly net wage of £2,469 p/m. This figure is calculated from the P45 which is contained within the productions/ the P45 is for an 11 month period and the figure of £2,469 is brought about by dividing the net figure of £27,205.44 in the P45 by 11. The figures agrees by both parties is that the figures in the P45 brings out a weekly net pay of £566.78 if the pay is averaged over the entire 48 week period which the P45 covers. This figure is within a few pounds of the monthly net figures contained within the Claimant's schedule of loss.

141. The earnings to date figures were agreed up until the hearing in October. The attached Schedule takes account of the additional earnings between October and 21 December 2016 and the paperwork in relation to these additional figures were produced to the Respondent.

142. We would therefore hope that the Respondent will be able in a position to agree those updated earnings figures within their own submissions.

143. As such, we would submit that the Claimants loss to date (21 December 2017) is as per the Schedule and sits at £8,656. A further award to future

loss should also be awarded and we would submit that figures should be for a further 6 months. That further figures of 6 months uses the same net loss figures as before and predicts the same level of earnings as before. The future loss figures are therefore £5,772.00.

5 144. An award for loss of statutory rights at £500 should also be awarded.

The Respondent's Submissions

Introduction

1. This submission is structured in 9 chapters namely A – I. In Chapter A I summarise my submissions. In Chapter B, I set out the relevant law as applying to this claim. In Chapter C, I discuss the terms of the contract of employment and breach. In Chapter D, I discuss the evidence. In Chapter E, I comment on the reason for dismissal, if any. Chapter F, I attach a schedule of loss and in Chapter G, I discuss Polkey deduction, in Chapter H I discuss contributory fault and Chapter I is my submission conclusion.

15 2. The figures in brackets are a reference to the numbered documents in the joint bundle of productions.

Chapter A. Summary

3. It is the Respondent's primary position is that the Claimant resigned from her employment; that she was not dismissed and that being so there is no dismissal for the purposes of the 1996 Act.

4. The Respondent's secondary position is that if ET conclude that the Claimant was dismissed, the reason for dismissal is not that she made a protected disclosure. The reason for the dismissal is the employee's conduct or redundancy or some other substantial reason and that, in the whole circumstances, the dismissal was fair.

5. The Respondent's third position is that the Claimant was dismissed (which is denied) and that the dismissal was unfair (which is also denied), any sum awarded by way of compensation should be reduced to reflect a Polkey deduction and contributory fault.

5 **Chapter B. The law and relevant statutory provisions**

Unfair Dismissal

6. The start point in consideration of unfair dismissal is **section 94 of the Employment Rights Act 1996** (hereinafter referred to as the 1996 Act). **Section 94** confers the right not be unfairly dismissed.

10 7. The right involves 2 elements, dismissal and fairness. Fairness is governed by the terms of **section 98 of the 1996 Act**. [See paragraphs 28 and 29 below]

(a) Dismissal

8. In any unfair dismissal proceedings before an Employment Tribunal the
15 employer must establish the reason for the dismissal. However even before one looks to the reason for the dismissal, an employee must establish that he/she was in fact dismissed by the employer. If the employee leaves but is not dismissed there is no dismissal for the purposes of the 1996 Act.

9. In most cases the fact of dismissal is not in dispute. In this case the
20 claimant terminated her own employment. She resigned on 20 February 2016. Reference was made to the letter dated 20 February 2016, [144]. The Claimant claims she did so by reason of the Respondent's conduct. The claimant claims that the respondent dismissed her and she relies on **Section 95(1)(c) of the 1996 Act**. **Section 95** provides:

25 "For the purposes of this Part an employee is dismissed by his employer if…or

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

10. **Section 95 1(c)** is what is known as constructive dismissal.

5 11. What conduct of an employer entitles an employee to terminate his or her contract and claim that he or she has been dismissed by the employer? The answer is, conduct amounting to a breach of the contract of employment – ***Western Excavating (ECC) Ltd v Sharp 1978 Q.B 761 at 762***. In that case the Court of Appeal made it clear that questions of constructive
10 dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of reasonable conduct by the employer.

12. ***Harvey*** on ***Industrial Relations and Employment Law*** at paragraph **D1 [403]** states:

15 "In order for the employee to be able to claim constructive dismissal four conditions **must** be met:

(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

(2) That breach must be sufficiently important to justify the employee
20 resigning or else it must be the last in a series of incidents which justify his leaving.

(3) He must leave in response to the breach and not for some other unconnected reason.

(4) He must not delay too long in terminating the contract in response
25 to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract."

I propose to consider each condition.

(i) Breach by the employer

13. When considering the question of constructive dismissal the focus is on the employer's conduct and not the employee's reaction to it. In my submission this is especially relevant in this case given the number of times during examination in chief that the Claimant was asked how she felt in relation to documents and the Respondent's alleged conduct.

14. In deciding whether there has been a breach of contract the tribunal must reach its own conclusions. The question is not whether a reasonable employer might have concluded that there was no breach: it is whether on the evidence adduced before it, the tribunal considers that there was.

15. What term does the claimant say has been breached: Is it an express term or an implied term?

16. If express, the employer's actions will not constitute a breach of contract if the express terms permits the contract to be varied in the particular manner adopted – see ***Dal v Orr [1980] IRLR 413.***

17. The law has long held that an employer has some responsibility for its employees.

18. The House of Lords affirmed the existence of the implied duty of trust and confidence in the employment relationship *in* ***Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606.*** [Please see the judgment of Lord Steyn on pages 46/47 of copy lodges with this submission]. The term was held to be as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

19. This test was interpreted ***in Baldwin v Brighton and Hove City Council [2007*] **ICR 680** as meaning "calculated or likely as opposed to calculated and likely."

20. And in the recent case of ***Leeds Dental Ltd v Rose [2014] ICR 94*** **at page**
5 **94**, the EAT held that the employer's subjective intention is irrelevant.

> "If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…."

10 21. If, on an objective approach there has been no breach then the employee's claim will fail – see ***Omilaju v Waltham Forest London Borough Council [2005] ICR 481*** at pages 481 and 489.

22. Such implied terms may include:

- Implied duty of trust and confidence
15
- The duty of co-operation and support
- The duty promptly to address grievances
- Fairness in disciplinary sanctions; and
- Duty to provide a suitable working environment

20

(ii) Repudiatory

23. The conduct needs to be repudiatory see ***Morrow v Safeway Stores Limited [2002] IRLR 9*** [Please see the Judgment of MS Recorder Cox Q.C. on page 9 of copy lodged with this submission]

24. Many of the constructive dismissal cases which arise from undermining trust and confidence involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may itself be insufficient to justify leaving but when viewed against a background of other incidents it may be considered sufficient to warrant treating the resignation as a constructive dismissal. It may be the last straw which causes the employee to terminate the relationship.

25. In ***Omilaju,*** **supra** the Court of Appeal held that the final act must contribute something to the breach even if relatively insignificant. If the final act did not contribute or add anything to the earlier series of acts, it was not necessary to examine the earlier history.

(iii) Must resign in response to the repudiatory breach

26. The employee must leave in response to the breach committed by the employer.

(iv) Affirming the contract

27. The employee must make up his mind soon after the conduct he complains about.

(b) Fairness

28. It is important to note that a constructive dismissal is not automatically unfair in itself. The terms of **section 98** still apply see paragraph 14 of ***Wells v Countrywide Estates t/a Hetheringtons UKEAT/0201/15/BA*** – [Please see page 4 of the copy attached with submission] which provides:

"14. Looking at the unfair dismissal claim, assuming that Mr O'Brien is right that there was a constructive dismissal that took place on 28 June 2014, one nevertheless has to look to the terms of Section 98 of the **Employment Rights Act 1996**. When one looks to those terms it is the reason for the dismissal that one must look at, and one must consider whether it was a sufficient reason for dismissing the employee. The reason for the dismissal in this case, albeit a constructive dismissal, was clearly the gross misconduct of the Claimant. The matter had been properly investigated, and dismissal was within the range of reasonable responses. In my view, that was the end of the case. The notion that the idea of demoting the Claimant was so brutal that the previous events, including his own behaviour, somehow evaporated and were put to one side in considering fairness is just fanciful, as is the notion, if it is one that is seriously being advanced, that demotion was somehow a harsher penalty than dismissal. The Employment Judge was therefore clearly right to find, as he did at paragraph 14.7, that the constructive dismissal (if it was such) was fair."

29. Section 98 provides:-

(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair,* ***it is for the employer to show***

(a) ***the reason (or, if more than one, the principal reason) for the dismissal and***

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) *A reason falls within the sub section if it –*

> (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> (b) *relates to the conduct of the employee,*
>
> (c) *is that the employee was redundant or*
>
> (d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

(4) W*here the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reasons shown by the employer) –*

> (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> (b) *shall be determined in accordance with equity and the substantial merits of the case."*

<u>Protected Disclosure</u>

30. **Section 103 A** provides**:**

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

31. ***"*Section 43A, B, C, G,H, K and L of the 1996 Act** provides:

43A. Meaning of "protected disclosure"

In this Act a "protected disclosure" means a Qualifying Disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H

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 been endangered,

(e) that the environment has been, or 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, is being or is likely to be deliberately concealed.

43C – Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with the section if the worker makes the disclosure… to –

(a) his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to –

1) the conduct of a person other than his employer,

2) any other matter for which a person other than his employer has legal responsibility, to that other person…"

Chapter C. Breach by the employer and discussion

32. It is the Respondent's position that they did not dismiss the claimant. My submission in support of this are explained with reference to the 5 propositions discussed below.

Proposition 1 – express terms – the change from 36 to 24 hours

33. As I read the ET1 the only claim being advanced by the Claimant is that she was unfairly dismissed. What then is the breach of contract that she relies on? What term does she say was breached? She refers in her ET! To her hours of work being cut from 36 to 24 to 8 and as such the potential for redundancy. Presumably therefore it is the terms of the letter at [50b]. Letter [50b] is undated, and it states contract of employment to follow. It is not therefore the contract document. The Respondents say that the contract document is the letter at [50c]. The same expressly provides that the amendment will last for a period of 6 months and will be reviewed at this point. The document is termed an amendment to contract. That begs the question, what is the contract. In my submission the contract is pages [39 – 43]. The hours are noted as 30 hours per week. The document is dated 8 June 2010. The contract was then amended as per letter dated 1 March

2013 [45 – 47]. Hours were reduced from 30 to 24. The amendment to contract at [50c] is an amendment to the contract at [39 – 43], as subsequently varied. The amendment was to increase the hours from 24 to 36 for a period of 6 months. That is what the Respondents say they issued. In my submission however it is immaterial to the issue before the Tribunal what was discussed in March/April 2015 for the evidence of both the Claimant and Mrs McDonald was that the hours to be worked in the Family C package were reduced from 36 to 24 in or around October 2015. As I have noted it. It was put to the Claimant in examination in chief as follows:-

> "As I understand it hours were reduced to 24. Answer, "yes". When? Answer, "I was working on shift in October and I got a call from Liz McDonald. She referred to a meeting with Trustees. I wasn't in the loop with how all work. To be a review of hours and reduced to 24." Accordingly, taking the claimant's evidence at its highest, by October 2015 the Claimant was working 24 hours per week as Clinical Supervisor in the care package.

34. In my submission, whether unilateral or not, and whether material or not, the Claimant did not, in my submission, resign in response to the reduction in hours from 36 to 24 hours. In this regard I refer to [115.point 5] and [95] – "I was happy with this." I also refer to [91].

35. In my submission there was no dismissal.

Proposition 2 – express term – the change to 8 hours

36. This then leaves the change to 8 hours. But the change is not in the Respondent's submission to 8 hours full stop. The Claimant still had a contract for work as a Registered Nurse. The amendment was to vary the hours she worked as Clinical Supervisor. In my submission the terms of the contract are set out at 50c. In examination in chief I have noted Mrs McDonald as stating "She (meaning Mary) had a contract for working as a nurse in complex care package. The amendment depended on if we had a contract at the end of the period." I say that inviting the ET not only to prefer

the evidence of the Respondent (which I do where there is a conflict) but also the Claimant's own correspondence. Again I refer to [91]. In her own words the claimant accepted that the contract terms included a provision that the contract hours would be reviewed. That e-mail in my submission is in all fours with [50C].

37. The Claimant said in evidence in chief said that she believed [50C] had been "brought out when I raised grievance." She said she would have queried it had she received it. In my submission such a position is not consistent with the other contemporaneous evidence in the case such as [72] and [73] - both of which were written long before this dispute or any grievance. The Claimant did not query the email of 7 December 2015 [73]. And importantly it was the mother of the child who raised the change in December 2015 with the Claimant not Mrs McDonald or anyone else within the respondent. We see that when we read the Claimant's own words [72] I also invited the Tribunal to hold that the advert which the claimant responded to was what was set out at [188] and not [187].

38. Against this background, in my submission, there was no breach of contract. The contract as amended expressly provided for a review. This review was not a probation period as referred to in [50b]. The contract was reviewed.

39. I refer again to paragraph 16 above. The employer's actions will not constitute a breach of contract if the express terms permit the contract to be varied in the manner permitted. If there is no breach there is also no dismissal for the purposes of the 1996 Act.

Proposition 3 – express term – the change to 8 hours

40. If the ET does not accept my submission in paragraphs 33 to 38 above and were of the view that the terms of the Claimant's contract as at December 2015 were such that the Claimant's hours of work were at least 24 hours per week as a Clinical Supervisor and with no provision for review (which is

denied) the Respondent accepts that a unilateral variation of hours from 24 to 8 per week is a breach of an express term of the contract. I say that for the Respondents accept that there was no evidence before the Tribunal that the Claimant agreed to such a reduction. Going back then to the 4 conditions set out set out in paragraph 11 above, I submit that condition 1 and 2 is satisfied. In my submission conditions 3 and 4 are not satisfied. The Claimant on the evidence did not leave in response to the breach, the breach being the unilateral variation of contract hours to 8 per week. She left after, and because, she received a letter from Mrs MacDonald at [149]. Her response to that letter is [146/147]. Further, even if she did resign in response to the breach (which is denied) she delayed doing so. The Claimant knew on 6 December 2015 that her hours would be further reduced. We see that [72]. She was told again on 23 December 2015. She then received the letter dated 29 December 2015. She says she received that letter on 6 January 2016. She submitted a grievance on 13 January 2016. She mentioned breach of contract in her grievance e-mail dated 13 January 2016 – see [92]. It was not until 20 February 2016 that she terminated her employment, 7 weeks after the **latest** possible date of the breach. In these circumstances, in my submission the 4 conditions are not met. There is therefore no dismissal for the purposes of the 1996 Act.

Proposition 4 – implied term – the undated letter received by email on 19 February 2016 [149]

41. In my submission support for these propositions also comes from the Claimant. The Claimant does not say that she resigned because her hours were reduced per se. It is not altogether clear from the ET1 what term the Claimant says was breached but she does refer in paragraph 21 of the paper apart to the last straw and in document [144] to "a complete breakdown in the mutual trust and confidence expected between employee and you the employer which cannot be fixed under any circumstances." The Claimant appears to be relying on an implied term of the contract and not an express term.

42. As indicated above, many of the constructive dismissal cases, which arise from undermining trust and confidence involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident, which causes the employee to leave, may itself be insufficient to justify leaving **but when viewed against a background of other incidents** it may be considered sufficient to warrant treating the resignation as a constructive dismissal. It may be the last straw, which causes the employee to terminate the relationship.

43. So what other incidents? Before considering them I refer to the case of **Omilaju supra**. In that case, the Court of Appeal held that the final act had to contribute something to the breach of contract even if relatively insignificant. If the final act did not contribute or add anything to the earlier series of acts, it was not necessary to examine the earlier history. Standing the above, in my submission the ET are best to work backwards.

44. What did the letter at [149] contribute or add to the earlier series of acts? The contention is that the Claimant's hours were cut deliberately by Mrs MacDonald because of the incident of 12 November 2015 (the whistleblowing/protected disclosure) and that the letter was another act of Mrs MacDonald being vindictive because of the whistleblowing. What objectively does this letter contribute to a breach of the implied term of mutual trust and confidence? When considering the question of constructive dismissal, the focus is on the employer's conduct and not the employee's reaction to it as already mentioned in paragraph 13 above. There is no doubt the Claimant made assumptions in relation to the letter. She admitted so in evidence. For example, in cross examination she said "I had no idea what the letter was about." She said she felt it was "premeditated". But that is neither here or there. The focus is on the employer's conduct. In my submission the Respondent did what an employer reasonably ought to do in such circumstances. Family C had instructed that the Claimant was not to return to their home which was for the Claimant a place of work. The letter makes clear that Mrs MacDonald did not know if the Claimant had planned to go to Family C's home or not. The letter simply requested the Claimant to

contact Mrs MacDonald prior to reporting for duty. If the letter does not contribute or add anything to the earlier series of acts then that is the end of the matter. In my submission on an objective basis the letter did not add anything to the earlier conduct whatever that earlier conduct may be. That being so the letter is not the last in a series of acts, which justifies the Claimant resigning and that being so, there is no dismissal.

Proposition 5 – implied term – a series of acts

45. If the ET is not with me on proposition 4, what then of the earlier incidents? In my submission, the earlier conduct of Mrs MacDonald was not conduct amounting to a breach of the contract of employment nor indeed was any other conduct of the respondent. It is further my submission that if I am incorrect in that regard then any breach (breach being denied) was not repudiatory in nature. In support of this submission I propose to comment on the evidence. In doing so I accept that the submission I make is based on my notes and that it is the Tribunal's recollection of the evidence that prevails.

Chapter D. Proposition 5 and the Evidence

46. I accept on one view there seems to be confusion about each other's respective level of understanding of the contractual position. What was clear is that the Claimant availed herself of the Respondent's grievance procedure as she was entitled to do. Indeed a grievance procedure exists for precisely such situations. The working hours were reduced to 8 hours with effect 4 January 2016. The Claimant was aware of the reduction at the latest on 6 January 2016. The Claimant submitted a grievance on 13 January 2016 and thereafter had few dealings with Liz MacDonald.

47. Liz MacDonald's position is that in June 2015 she commenced full time in her post with the Respondent having been appointed at the end of March 2015.

48. What is a "Care package"? On the evidence of Liz MacDonald it is what the Respondent is asked to provide to a service user such as Family C, based on individual needs and available funding. Despite the Claimant's alleged naivety, the Respondents are not the NHS. They are a business and their business is the provision of care to individuals who unfortunately require it. What about this package? Liz MacDonald's evidence was that the claimant was "To be Clinical Supervisor for the individual package" a ventilated boy with complex medical needs.

49. The Claimant's evidence was that she was recommended for the position of Clinical Supervisor by her former Clinical Manager whom we heard was Lesley Jackson.

50. That she commenced in the position of Clinical Supervisor on 27 April 2015 and that all was going well until 12 November 2015. That her hours as Clinical Supervisor by October 2015 had been reduced to 24 hours but she made up her hours by "I required to take the place of carer essentially."

51. That on 12 November 2015 she sensed that Jean Wood, a carer on the package was unhappy. That she spoke with Jean and Jean complained about the Christmas rota the Claimant had drawn up. The Claimant said in evidence "I felt I shouldn't have to explain myself." Thereafter Jean Wood spoke of another member of staff and mentioned that she slept all night and stated "in fact we all do it". The Claimant reported the conversation to Liz MacDonald. The Respondent accepts that she did so and that she was right to do so. The Claimant stated that she expected Liz MacDonald to speak with her at a meeting that evening. Liz MacDonald instead raised the fact of the report with all staff present at the meeting. In my submission Liz MacDonald was right to do so. The matter was an important one. The Respondent could have been criticised had they not raised the issue with all staff at the earliest possible opportunity. The child concerned is a vulnerable child. Staff were employed in the care of a vulnerable child. But in any event it is, in my submission, a matter of judgment. The Claimant's evidence is that Liz MacDonald "warned her not to tell the

mother of the child." The Claimant's position is that she did tell the mother and before the meeting. Liz MacDonald in her evidence said that she too raised the matter with the mother but after the meeting. For present purposes, in my submission the Tribunal does not have to resolve this conflict. What we know as a matter of fact is that if a team meeting did take place on 12 November 2015, the same day as the disclosure and that the matter was raised at the meeting. We see that in the minutes at [51]. Indeed it is recorded that the meeting got out of hand – see point 14 of the Minute. There is no effort to hide that fact. It was also important, in my submission, to note that the Minutes were taken by Karyn Gilmour whom the Tribunal had heard was a senior person within the Respondent's organisation. The tenor of the Claimant's evidence, in my submission, was that not just one person was out to get rid of her but multiple persons including Lesley Jackson, Jacqui Hull and Karyn Gilmour.

52. The Claimant's position is that Liz MacDonald at the meeting acted in a calculated way, in a way designed to impact adversely on her, all of which is denied by Liz MacDonald. I have it noted that the Claimant said of Liz MacDonald the following, "I felt it was a deliberate attempt as I had disclosed to [mother of child]. I felt revenge to be honest. She watched the carers abuse and attack me at the meeting. I got the impression she couldn't have cared less how I was feeling – it was really awful….. Liz MacDonald sat there and didn't interfere. She knew the consequences and sat back and let it happen…. I couldn't believe she brought it up in the way she did – she was very unprofessional…." [Day 1 evidence]. If the Claimant is correct then that would fall within the test set out at paragraph 18 above. In my submission she is not correct. It was never explained how Liz MacDonald would know the consequences nor was this explored with her in cross examination. I invite the Tribunal to prefer Liz MacDonald's evidence. Liz MacDonald, in my submission, was a credible and reliable witness on the essentials. On the other hand what was clear is that the Claimant had a very negative attitude towards Liz MacDonald and that was a factor to be taken into account in assessing her evidence. The Claimant sought at every turn to paint the Respondents and Liz MacDonald in the poorest light. As an

example, in relation to [95A] the Claimant said “I just thought it was Liz MacDonald backtracking.” Moreover if Liz MacDonald acted in this calculated and vindictive way, Mrs Gilmour must have permitted it, a senior person in the Respondent’s organization.

53. The Claimant in her stance, in my submission, ignores the fact that Jean Wood would always know, in the circumstances, where the report had come from no matter who raised it; Jean Wood had spoken directly to the Claimant. The cause of the issue was Jean Wood’s reaction to what was said at the meeting. It remains reasonable, appropriate and prudent, in my submission, for the employer to raise the fact of the report at a meeting of all relevant staff.

54. The Claimant said that she sent the email at [58] to Liz MacDonald. Liz MacDonald stated she has no recollection of receiving it. But what we do know is that an investigation was carried out by employees of the Respondent namely Lisa Ferris and others. In this regards see [54-57], [65], [59a, 69 74, 79 and 80]. It is therefore incorrect for the Claimant to say, as she did, that the Respondent did nothing in relation to the matter or the concerns raised by the Claimant. The claimant accepted in cross examination that when we look at the e-mails it is unusual for Liz MacDonald not to promptly respond to emails. She also accepted that she did not chase up a response until 21 December 2015.

55. The next mention of whistleblowing was on 21 December 2015 in email at [76] some number of weeks later. That is also around the same time as the text messages we see [83-85] which Liz MacDonald described in her evidence as inappropriate and unprofessional and the email at [78]. In my submission the text messages to Claire Ward, a carer the Claimant line managed, were and are inappropriate and unprofessional. What was the response of Liz MacDonald’s? That is set out at [77]. In my submission that was not conduct calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Such conduct does not point to the breach of an implied term. On this point I also

refer to what the Claimant says in [104] namely that she had built relationships with the team. The Claimant's own correspondence, namely the emails, was not conducive to good relationships within the team. Again, in my submission this is a chapter of evidence in which the Claimant endeavoured to paint Liz MacDonald in the most negative light. In cross examination the Claimant conceded that Liz MacDonald replied to her and that Liz MacDonald had just returned from holiday.

56. The Claimant stated that Liz MacDonald spoke to her on 23 December 2015. She said Liz MacDonald stated "Just to let you know, we will be dealing with Jean – it is in hand – I didn't know if looking into it or anything." The mistake the Claimant made, like many employees who raise issues, is that she expected to be appraised of the detail but of course that is seldom appropriate. Liz MacDonald in my submission provided appropriate information. In my submission that does not point to a breach of contract. In my submission that was not conduct calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. In cross examination the Claimant maintained her position that Liz MacDonald could have given her more.

57. On 23 December 2015 there was also the conversation about reduction in hours to 8. Bearing in mind the reduction had already been mentioned on or around 6 and 7 December by the child's mother. In this regard see paragraph 37 above. The Claimant's evidence in chief was, "it wasn't really a discussion." The Claimant was then asked in evidence in chief about production [86], that is the letter dated 29 December 2015 and how she felt **when she received the letter**. It is my submission that the Claimant's evidence in response was total exaggeration. I have her noted as saying, "I was devastated and over the Christmas period to get a letter like that on 29 December 2015 – it ruined my Christmas – my Christmas holidays – I took calls round the clock – I covered shifts at drop of hat so a real blow to get hours reduced. I had agreed to reduction to 24 but not to 8 – it floored me." In cross examination when it was put to the Claimant that she did not receive the letter until 6 January 2016 she tried, dare I say to "backtrack"

and say that she was talking about the verbal conversation she had with Liz "verbal conversation I had with Liz ruined my Christmas." In my submission this chapter of evidence was again given in the most negative manner and required to be viewed with caution.

58. We see also that with the letter of late February 2016. In relation to the letter of [149] where the Claimant stated "I was really alarmed when got letter as it sounded like I was suspended. It sounded serious in fact it was sent by Recorded Delivery – I was quite alarmed by it." The letter does not say the Claimant was suspended and moreover it was the Claimant who had started to send letters by RD. See [112]. Employers, such as the Respondent, will however require to raise, from time to time, serious matters with employees. [149] is nothing other than an example of a letter that may require to be sent to an employee.

59. Again it is the employer's conduct which is relevant and not the reaction to it. In what way can the letter be said to be a breach of contract or one in a series which justify a termination of contract?

60. The background is also that the Respondent business did not at the material time have many nurse led packages and that was causing the claimant anxiety, not the whistleblowing incident or any breach on the part of the Respondent. It was the reduction in hours and the fact that the Respondent did not have many other nurse led packages. Employees who had worked with the Claimant in her former package had recently been made redundant – that is the Dunfermline package. In my submission the claimant did attempt to paint much of her evidence of the Respondent's conduct in the most negative light, even just with her choice of language. As a result her evidence must be viewed with caution. In my submission, she was not credible nor, on the essentials, reliable. For example, she said that she was told to hand in paperwork. She refers to being told the day before to the team meeting. We know that the team meeting was on 6 January 2016 and on 5 January 2016 there is an email [87] in which Mrs MacDonald asks "Did you email over the EEP for Clare Ward as I really need this." Not the girls

eeps' – 1 girl, Claire Ward. Clare Ward by that time had made a serious allegation – [81]- and that would be an explanation for the Respondent wanting the eep's. The Claimant points to the removal of the eep's as evidence of a detriment. In my submission the evidence does not support the removal of the eep's being because of the whistleblowing nor indeed the removal of any other tasks. The tasks that were removed were administrative in nature. The administrative tasks that were removed were removed because of the reduction in hours. Again, in my submission the employer was entitled to ask for the EEP. When one looks at the Respondent's conduct there was no breach.

61. Another example, the Claimant stated that Lesley Jackson was introduced as new Clinical Supervisor in Jan 2016 and meaning for the package. The Minutes do not record that. In fact they record the claimant will continue to do the rota – [point 8 – 89; that the mother of the child was aware of the unhappy atmosphere in the home and that Liz MacDonald stated that staff needed to be able to work together as a team. In my submission this is important when one has regard to [87 -paragraph 1]. In my submission this was an example of the employer providing support to the Clinical Supervisor namely the Claimant.

62. The Claimant stated that the Minutes were different to what she had seen before. She even said the problem with Minutes is that they can be changed. There is no evidence that the Minutes were changed. That was eventually accepted by the Claimant in cross examination. The Claimant however felt able to speculate that they had been altered. She was asked about [101] and said that the company did nothing about her grievance. That is untrue. It was acknowledged on 15 January 2016 – [98]. The Respondents then attempted to resolve the grievance informally which was good employment practice. The Claimant did not agree to the same. It was also in accord with the Respondent's grievance policy – [202b – see middle paragraphs]. The policy provides that the employee will be invited to a hearing within 28 days. The Claimant was so invited. The grievance hearing took place on 11 February 2016.

63. In cross examination the Claimant stated that Lesley Jackson had lost a major package in October 2015. The Claimant's exchange in relation to this matter was illuminating, in my submission. The Claimant was asked several questions by the panel regarding the Dunfermline package. She said "Lesley Jackson was working as Clinical Supervisor and in October 2015 she lost a major package. The package came to an end in October and I felt a huge part of it was a huge part of it." It later became clear in evidence that the patient had died. It was not the case that Lesley Jackson lost the package, the need for the package ended with the death of the patient. In my submission the Claimant took quite some time to volunteer the whole picture.

64. In relation to [143] the Claimant was asked by a member of the panel if she had any idea about how it came about? What the Claimant said, in my submission, was telling. She said "On the week leading up to this I was on holiday and at odds to me as I was in contact on phone and texts and shifts needing covered. She was delighted – happy with that. I managed to get covered by carers. This week evening team meeting – again when I on annual leave – I don't know if leading question on the phone from Liz McDonald… whatever said on phone – this email sent the day after the team meeting and very co incidental." This is all speculation on the Claimant's part. What can however be said as a matter of fact is that [143] was sent soon after the Claimant discussed her employment related concerns with the mother of the vulnerable child. In this regard reference is made to paragraph 84 below.

65. The Claimant in my submission was also a little hostile in cross examination - answering "I don't understand what you mean" yet when asked similar question by the Chair and even allowing for better framed questions, she was able to give full answers as she did to her own agent – "depends on what family want and cost involved." The claimant was also very slow, in my submission, to concede that the plan/intention was always that Clinical Supervisor hours on the package would reduce. It was only when [91] was put to her in cross examination that she accepted she knew "fulltime for 6

months and then reviewed" and of course that would make sense given it was an ongoing package.

66. The Claimant suggested that the meeting of 6 January 2016 was deliberately arranged for a date she could not attend. She points to the same as duties being removed and her being ostracized. Liz MacDonald did not accept that. As accepted in evidence, when people work shifts it is not always possible for all to attend. Moreover there was no evidence before the Tribunal that the Claimant had arranged a meeting and it was cancelled. If it was the Claimant's job to organise meetings she could have done so. No meeting took place in December 2015. If it was her job she could have organised the January meeting and/or the February meeting. She did not do so.

67. I have noted the Claimant as saying, "I feel post the whistleblow it was an attempt to push me out the door. There was no way the package could run with Clinical Supervisor on 8 hours per week – it required far more support than that…" but the evidence of Liz MacDonald was that the contract provided for the Clinical Supervisor input to reduce overtime. I invite the Tribunal to prefer the Respondent's evidence on this point. I also note that the Claimant accepted that the previous Clinical Supervisor in the package worked with her in Dunfermline 16 hours per week and in Newton Means up to 24 hours. Liz MacDonald's position is that the previous Clinical Supervisor worked 8 hours. However irrespective, the same is independent support for the view that hours can and do reduce with the life of the contract, as in fact had happened and that independent of any whistleblow.

68. The grievance the Claimant raised at [94-95] does not mention whistleblow. Nor does her letter to Mrs MacDonald declining consultation mention whistleblow. What is mentioned is a reduction in hours and breach of contract. The Respondent's position has been consistent in all emails of December 2015 and January 2016. In this regard I refer to my submission set out in proposition 3 paragraph 40 above.

69. Again it is not the perception of the Claimant which is important when assessing breach of contract but the conduct of the Respondent. But what the Respondent do? The Claimant was now working reduced hours in the package. The Respondent removed the work that could be removed – the supervisions are 6 monthly, the eep's are for new staff. If no new staff, no eep's and appraisals are yearly. As Mrs MacDonald said "if stable cohort of staff no need for eep's – only clinical competencies." Where is the breach? What were removed were at best administrative tasks not clinical. The respondent freed up the claimant so she could perform her clinical supervision duties. How is this conduct calculated to and be likely to destroy or seriously damage the relationship of confidence and trust between employer and employee? In cross examination the claimant said this "She (the mother) felt it better I concentrate on the supervisory role. More important I there to lead the package but better that I didn't cover shifts or be as hands on….after the whistleblow she felt it beneficial I concentrate on being a supervisor – on the job of clinical supervisor." She also said "she (the mother) was supportive of me in role…" in relation to the text exchanges with the mother of the child.

70. In my submission, objectively the Claimant did have support. By mid January 2016 very many senior people within the Respondent organization were involved in the Claimant's case.

71. In relation to the letter of [149] again in what way can the letter be said to be a breach of contract?

72. For all these reasons, when one has regard to the whole evidence, the earlier conduct of Liz MacDonald, (that is pre the letter at [149] conduct), was not conduct amounting to a breach of contract of employment nor indeed was any other conduct of the respondent. It is further my submission that if I am incorrect in this regard any breach was not repudiatory in nature.

73. All of this being so the Claimant was not dismissed.

Chapter F. Reason for the Dismissal

74. If it is held that the Claimant was dismissed (which is denied) it is important to note that a constructive dismissal is not automatically unfair of itself as the terms of **section 98** of the **1996 Act** still apply.

75. From the outset I would state that I accept that if the ET hold that the reason for dismissal was that the Claimant made a protected disclosure, the ET does not need to go on and consider section 98(4. I accept that dismissal in such circumstances is automatically unfair. I pause to mention however, that such a claim had not been averred by the Claimant. In my submission the reason for the dismissal (which dismissal is denied) is not that the Claimant made a protected disclosure. Any dismissal is not therefore automatically unfair. That said I do accept that the disclosure of 12 November 2015 is a qualifying disclosure – see paragraphs 30 and 31 above.

76. In my submission the protected disclosure had no bearing on the hours the Claimant was to work from December 2015, on where the claimant was to work or the duties the Claimant was instructed to undertake. All of these matters were ultimately determined by the requirements of Family C. The Respondent provides services as instructed and paid for by a service user and as made clear by way of the grievance letters, the concern of the Claimant was the reduction in hours.

77. In my submission, in the event of the Tribunal being satisfied the Claimant was dismissed the reason for the dismissal was redundancy or conduct or some other substantial reason. It is further my submission that the decision to dismiss was fair. The Respondents, once the grievance was lodged, dealt with the same in accordance with the Respondents grievance procedure. They accommodated every procedural request of the claimant. They sought to preserve the employment relationship.

78. Schedule of loss (1) has been calculated with reference to the weekly sum of £450.57. The weekly sum of £450.57 is the sum the parties agreed based

on a preceding 12 weeks earning basis. In this regard I refer the ET to [37B and 37C].

79. Schedule of loss (2) has been prepared because the Respondent understands the Claimant will seek compensation based on a weekly sum calculated with reference not to the preceding 12 weeks but to the Claimant's P45. Reference is made to [37B, part A thereof]. Parties agree that if one has regard to the P45 the claimant's weekly earnings are £566.14.

80. It is the Respondent's position that to use the P45 simply serves to increase the net weekly figure in favour of the Claimant. The evidence was that the Claimant worked 36 hours from April 2015 to October 2015 and thereafter was paid, whether she worked or not, 24 hours per week. To use the P45 figure inflates the weekly earnings unfairly. The evidence was that the Claimant agreed to the reduction from 36 to 24 hours. Schedule 1 was more in keeping with the hours the Claimant worked and sums earned.

81. The respective schedules of loss are explained in the footnote to the respective schedule.

Chapter G. Polkey Deduction discussion

82. Having assessed loss, the ET must consider a Polkey deduction if there is any evidence that the employee would have been dismissed anyway or there is a realistic chance this would have occurred – See Lord Justice Elias in ***Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.*** In this case, in my submission the evidence supports the view that the Claimant would have been dismissed in any event at least by reason of redundancy. That being so the ET must consider a Polkey reduction.

83. In this regard I refer to Liz MacDonald's evidence and also to the mother's email at [143]. Liz MacDonald stated, "Mrs [the mother of the child] had a conversation with me and stated that she had lost all trust in Mary and due to other things she hearing from team members she didn't want Mary to

return and I asked her to email me to say that she didn't want Mary back." It was the mother of the child who requested the Claimant be removed from the Family C care package not the respondent. Liz MacDonald emphasised in her evidence that, persons such as the mother of the child, have a contractual right to request members of staff to be removed. In that event, the Respondent would require to seek alternative work for the employee concerned and in the event of there not being any suitable alternative employment the employee may be dismissed by reason of redundancy. In this case, the Respondent did not have any other packages requiring a Clinical Supervisor. Liz MacDonald in her evidence stated, "…there were other nursing packages but not at supervisors rate of pay." The Claimant's evidence also was that there were few nurse led packages at the material time. In those circumstances, it is my submission that the chance of the Claimant being dismissed in any event was a realistic one.

84. But for the Claimant resigning the Respondent would have had to embark on a consultation process with the Claimant following receipt of [143]. A reasonable time frame in which to conclude the consultation process is 3 weeks. The Claimant was paid her normal pay until 7 March 2016, notwithstanding her resignation. In these circumstances, it is my submission that the Claimant has suffered no loss which could be attributed to any unfair dismissal (which dismissal and unfair dismissal is denied). The Claimant would, in any event following receipt of [143] only have received her pay up to or around 7 March 2016. Accordingly no sum was due to the Claimant by way of compensatory award.

85. If the ET is not with me in relation to the date of 7 March 2016, compensation should only be awarded for the additional period of time for which the employee would have been employed had the dismissal been fair. This is the approach sanctioned by the House of Lords in the case of ***Polkey v AE Dayton Services Limited 1987 IRLR 503***. As Lord Bridge made clear, the chances of whether or not the employee would have been retained must be taken into account when calculating the compensation to be paid to the employee.

86. In my submission such additional period ought not to extend beyond the end of March 2016.

Chapter H. Contributory Fault and discussion

87. **Section 123** of the **1996 Act** provides that if the tribunal finds the employee has by any action caused or contributed to his dismissal, it shall reduce the amount as it considers just and equitable. The ET must however first assess the overall compensatory award and then apply a reduction.

88. In the event that the Tribunal concludes that a sum ought to be paid to the claimant by way of compensatory award, even after allowing for a Polkey deduction discussed in Chapter G above, it is my submission that the evidence supports a further deduction being made at that stage for compensatory fault.

89. The Claimant points to the undated letter [149] as the last straw. The letter was sent following upon an instruction by Family C. That instruction was dated 18 February 2016. What can be said as a matter of fact is that the Claimant communicated with the mother of the vulnerable child on 16 February 2016 in terms derogatory of the Respondent and its employees. In light of the terms of the Minute of the Meeting dated 6 January 2016 [88], it was, in my submission, inevitable that the Claimant would be removed from the care package at some point. She was not, as evidenced by her own written communications, assisting in managing a “happy home environment” as requested by the mother of the child.

90. The Claimant also had difficult relationships with members of her team independent of any whistleblow. We see that when we have regard to the text messages sent to Claire Ward, [84, 85] and the email at [78]. Liz MacDonald stated that she regarded the text messages as inappropriate. They are inappropriate. They too are not conducive to “a happy home environment” as requested by the mother of the child. In this regard I repeat my submissions in paragraph 55 above.

91. There is also the allegation of wrongdoing made by Claire Ward and according to Liz MacDonald by the mother of the child in relation to forging signatures on eep's and other documents. Such allegations had not been investigated at the time of termination. But for the termination, such matters would have been investigated.

92. Finally, the Claimant by her actions prolonged the grievance procedure. She was not prepared to engage in an informal resolution notwithstanding her position in managing a team responsible for the care of a vulnerable child.

93. In these circumstances, in my submission, any compensatory award should be further reduced by 80%.

I. Conclusion

94. For all the reasons discussed under reference to Propositions 1- 5, the Claimant was not dismissed.

95. If an express term of the contract was breached (which is denied), the Claimant did not resign in response to the breach and if she did so resign she delayed too long in terminating her contract. As a result the Claimant was not dismissed.

96. No implied term of the contract on the evidence was breached.

97. If the ET concludes that the Claimant was dismissed, the reason for the dismissal was a potentially fair reason and the decision to dismiss was fair.

98. If the ET concludes that the Claimant was unfairly dismissed, compensation ought to be reduced to take account of a Polkey deduction and thereafter contributory fault.

Relevant Law

145. This is set out above within the Respondent's submissions so it is not replicated here.

Observations on the Witnesses

146. The Tribunal concluded that Mrs MacDonald was broadly credible in her evidence and, where it conflicted with the claimant, it preferred Mrs MacDonald's evidence except, as indicated above, where the Tribunal was split in relation to whether the claimant was correct that the advertisement to which she replied was that set out at page 187 not 196C. As previously indicated, the majority concluded that Mrs MacDonald's evidence was to be preferred where her position was that the advertisement was that set out at page 196C. This document was one of the 3 attachments referred to by Pauline Ritchie in her e-mail to Ms Hull, (page 196A). It seemed to the majority that it was more likely on the balance of probabilities that Ms Ritchie would recollect which advert she had used at the time. Also, Mrs MacDonald was very specific that the style used at page 187 was not that then in use by the respondent. Her evidence was that the style/font size was from an earlier time. For the avoidance of doubt, the advertisement set out at page 187 and the one at page 196 bear to have the same content. Page 196C does not have the heading of "Job Reference: CSSOUTHGLASGOW" nor does it have the bullet points set out at page 187. Against that, page 187 does not have any reference to Pauline Ritchie as the point of contact.

147. Having indicated that the Tribunal on crucial points preferred Mrs MacDonald's evidence, it had to say that Mrs MacDonald was at times curt in her response to questions. It was clear to the Tribunal that Mrs MacDonald was a very busy senior manager and while it could understand that she would have limited time for discussions it could understand why the claimant might, on occasions, feel that she was not being given sufficient attention by Mrs MacDonald.

148. In relation to the claimant's credibility and reliability, there were matters on which she changed her position, notably when she maintained that the letter

from Mrs MacDonald dated 29 December 2015 so adversely affected her enjoyment of the Christmas period. When it was pointed out to her that the letter post-dated Christmas and she accepted that she had received it on 6 January 2016 she did appear to "back track" as suggested by Mrs Bennie in her closing submission. It did seem to the Tribunal that, for whatever reason, the claimant had formed a view about Mrs MacDonald which the Tribunal could see may have contributed in part to the way in which the claimant reacted to communications from Mrs MacDonald. Against that, the Tribunal noted that the claimant chose not to follow up on Mrs MacDonald's suggestion that they meet in the Alva office to discuss matters as set out in Mrs MacDonald's email of 7 December 2015. It was never explained why the claimant decided not to take up that offer of a discussion face to face. The next occasion when they met in the office was more than a fortnight later on 23 December 2015.

Deliberation and Determination

149. At the outset the Tribunal wishes to record that it was extremely grateful to the representatives for the very helpful written submissions. They have been set out at length rather than summarised as there was considerable content in these submissions, particularly the respondent's submissions. This was a case where it was helpful to have written submissions rather than to have been addressed orally so the fact that it was not possible to conclude the Hearing by hearing the submissions orally was perhaps advantageous since it gave the Tribunal the opportunity to read these detailed submissions carefully and afford full consideration to all that is said by both representatives.

150. The Tribunal noted the three grounds set out on behalf of the claimant were:-

(1) Was there a breach of the fundamental term of the contract with the reduction of hours from 24 hours per week at £20 per hour to 8 hours per week?

(2) Was there an automatic unfair dismissal due to detriment suffered as a result of a whistleblowing disclosure?

(3) Breach of implied term of trust and confidence based on alleged unreasonable course of conduct by the employer.

151. In relation to the first issue, the Tribunal concluded that based on the evidence while there was a reduction of hours from 24 hours per week at £20 per hour to 8 hours per week in relation to the time that was to be spent with the service user the claimant continued to receive the same level of pay albeit she was no longer required to work those 24 hours with the service user. Her pay did not decrease from an hourly rate of £20 per hour for 24 hours per week. Instead, the respondent recognised that while the claimant was no longer to attend the service user's home as the Clinical Care Supervisor she was still to be paid and to be paid by the respondent at that rate of pay therefore there was no reduction. In relation to the e-mail (page 129) where Jacqui Hull said:-

> "As I informed you on the phone you will need to ask (C's mother) what she wants you to do. Lesley Jackson will be doing all the other work required for the (C) package. You really have to decide what is best for you if 8 hours is not enough. There is no other work available.
>
> Your reference came in so have filled it in for you."

152. That letter therefore set out what was happening with the service user. The claimant's reference request had been received by Ms Hull, (page 75) which she had replied to on 18 December 2015 this stated that the claimant had been employed since August 2009 and was still employed as at that date and she was employed as Staff Nurse/Clinical Supervisor.

153. The Tribunal noted that the amendment to contract, (page 86) which was sent to the claimant on 29 December 2015 referred to a review of the service user's Package and while it does indicate that work with other clients

would be paid at rates assigned to other clients, in practice the claimant continued to be paid at an hourly rate of £20 per hour.

154. It was apparent to the Tribunal that the respondent did not appear to have all the relevant information available in relation to that service user package perhaps as soon as might have been desirable. It was clear that they were still sorting out what was to happen with the Care Package at a time when the claimant was already working on it. The Tribunal noted was that the amendment to the contract, (pages 50B/50B1) indicated there was a three month probationary period. This had extended out to a period of six months.

155. The Tribunal concluded that it was not satisfied that there was a breach of a fundamental term of the contract in relation to the hours given the claimant continued to be paid for 24 hours at the rate payable as a Clinical Care Supervisor.

156. Next, on the issue of whether the claimant was automatically dismissed due to detriment suffered as a result of the whistleblowing disclosure, the Tribunal noted it was accepted by both parties that there was a protected disclosure and so there was no dispute that such a disclosure was made on 12 November 2015 by the claimant to Mrs MacDonald. However, the Tribunal concluded that the claimant was not dismissed in terms of Section 103A of the Employment Rights Act 1996 because she had made a protected disclosure. The Tribunal found that the explanation for the number of hours that the claimant was working with C and the family decreased as a result of a decreasing need for clinical supervision in terms of the contractual requirements of the Care Package. In the later part of February 2016, the claimant was informed that she was not to go to the service user's house but this was as a result of C's mother informing Mrs MacDonald that she no longer wanted the claimant to attend as the Clinical Care Supervisor.

157. While Ms Jackson had become involved in this Care Package the Tribunal was not satisfied that this was done as a deliberate attempt on Mrs

MacDonald's part as a way to oust the claimant from working on that Package.

158. The responsibility for dealing with Care/Support Workers holiday requests and staff rotas were administrative duties as was the completion of staff EEPs but with the latter there were no new Care/ Support Workers and these documents were only required for new staff. The respondent's explanation for staff rotas being moved from the claimant was that these could be dealt with by the office based management team.

159. While the Tribunal noted all that was said on the claimant's behalf in relation to how the Care/Support Workers were behaving towards her, the respondent was in the course of carrying out an investigation of the sleeping at work incident by interviewing the relevant staff. The Tribunal noted that the respondent did not inform the claimant that they were doing so until late in December 2015 but, nevertheless, steps were being taken to address the issue. In all the circumstances, the Tribunal was not satisfied that the claimant was side lined in the manner suggested by the claimant.

160. After careful consideration, the Tribunal concluded that it was not satisfied that there was a breach of implied term of trust and confidence based on alleged unreasonable course of conduct by the employer. The claimant instigated a grievance as she was entitled to do about various issues and these were then duly considered at a grievance meeting by Mr Fitzsimmons. Some of the points made by the claimant were upheld and others were not. The claimant then appealed against his decision as she was again entitled to do and the respondent set up an appeal hearing which the claimant duly attended. The outcome did not change the original decision taken by Mr Fitzsimmons.

161. In reaching its decision as to whether the claimant was dismissed the Tribunal noted all that was said in the 5 Propositions set out by Mrs Bennie. The Tribunal concluded that Mrs Bennie was correct in her submission that the claimant did not resign in response to the reduction in hours and

accordingly she was also correct in her submission that there was no dismissal of the claimant by the respondent.

162. In the event the Tribunal was wrong in this conclusion it would then have considered Proposition 2, the express term with change to 8 hours. The Tribunal would have concluded that Mrs Bennie was correct in her submission that the claimant still was employed by the respondent as a Registered Nurse and that the amendment to her employment was to vary the hours she worked as a Clinical Care Supervisor. Importantly, that amendment was to last for a period of six months when it was to be reviewed, the letter dated 12 June 2015 (page 50C). The claimant accepted that the contract terms included this provision. The claimant's position was that she maintained that she had not received it but the Tribunal concluded that Mrs Bennie was correct that this was not consistent with pages 72 and 73.

163. The Tribunal noted that the claimant did not query the response from Mrs MacDonald at page 73, namely an e-mail of 7 December 2015. The Tribunal concluded that Mrs Bennie was correct in her submission that there was no breach since the contract provided for a review and so there was no breach of contract where the express terms permitted the contract to be varied. The Tribunal would therefore have concluded had it not upheld Mrs Bennie's Proposition 1 that in relation to Proposition 2 she was correct that there was no dismissal for the purposes of the 1996 Act.

164. In relation to Proposition 3, the Tribunal would have concluded that there was force in Mrs Bennie's submission that the claimant did not terminate her employment until seven weeks after the latest possible date of the alleged breach when she was informed that her hours on the Care Package were being reduced to 8. The claimant's resignation letter dated 20 February 2016, (pages 146/147) suggests that she resigned in relation to Mrs MacDonald's letter at page 149. The Tribunal would have concluded that this letter was not one that, viewed objectively, could be said to be the last in

a series of acts entitling the claimant to resign. Accordingly, the Tribunal would have found that there was no dismissal.

165. In relation to Proposition 4, since the Tribunal has already indicated that it concluded there was force in Mrs Bennie's submission set out as Proposition 1, it is not necessary for the Tribunal to deal with this Proposition other than to note that it would agree that the claimant did appear to have a very negative attitude towards Mrs MacDonald. As indicated above, under its Observations on the Witnessed, the Tribunal commented That Mrs MacDonald did come across at times as being fairly short and it may well be that this shortness was perhaps perceived as abruptness which might have impacted adversely on the claimant's view of her as a Line Manager.

166. Turing to Proposition 5, implied term- series of acts, the Tribunal would have concluded that there was merit in Mrs Bennie's submissions. The respondent was in the course of dealing with the claimant's grievance. The respondent had a limited number of Care Packages which required qualified nursing staff. The Tribunal was not satisfied that there was vindictiveness on the part of Mrs MacDonald in her dealings with the claimant.

167. The Tribunal concluded that the claimant did resign but it could not find that she resigned as a result of a breach of contract, either express or implied by the respondent. That being the case it therefore follows, applying the law to the above findings of fact, that the claimant was not dismissed for making a

protected disclosure nor was the claimant constructively unfairly dismissed by the respondent. Accordingly, this claim must be dismissed.

Employment Judge: F Jane Garvie
Date of Judgment: 28 February 2017
Entered in register: 28 February 2017
and copied to parties

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