EMPLOYMENT TRIBUNALS

Claimant: Ms M Mohammad

Respondent: Kings College Hospital NHS Trust (1)
Mr C Lee (2)
Professor J Wendon (3)
Dr C Palin (4)

Heard at: Croydon Employment Tribunal by cloud video platform

On: 25 March to 14 April 2022 (save for 4 April 2022)

Before: Employment Judge Nash
Ms C Edwards

Ms B Leverton

Representation
Claimant: Ms Mayhew QC
Respondent: Ms Criddle QC

CORRECTED RESERVED JUDGMENT

1. The respondents did not subject the claimant to any detriment on the ground that she made a protected disclosure contrary to section 47B Employment Rights Act 1996.
2. The claimant was not automatically unfairly dismissed for the reason that she made a protected disclosure contrary to section 103A Employment Rights Act 1996.
3. The claimant was not unfairly dismissed under section 98 Employment Rights Act 1996.
4. The Respondents did not subject the claimant to discrimination arising from disability contrary to section 15 equality act 2010.
5. The respondents did not discriminate against the claimant contrary to section 21 Equality Act 2010 by failing to comply with a duty to make reasonable adjustments.

6. The respondents did not directly discriminate against the claimant because of her disability contrary to section 13 Equality Act 2010.
7. The first respondent did not make any unauthorised deduction from the claimant's wages contrary to section 13 Employment Rights Act 1996.

REASONS

The history of the proceedings

1. Following ACAS early conciliation from 19 December 2019 to 3 January 2020 the claimant presented her claim to the Employment Tribunal on 12 April 2019. Her claim was amended pursuant to the case management order of 5 March 2020.

2. There was a first preliminary hearing on 9 April 2020 by telephone in front of Employment Judge Cheetham. The judge ordered the parties, amongst other things, to agree a list of issues.

3. There was a second preliminary hearing in front of Employment Judge Martin on 1 March 2021.

4. There was third preliminary hearing in front of Employment Judge Nash on 28 February 2022.

The full merits hearing

5. The tribunal heard from the claimant on her own behalf. She swore to her witness statement which ran to 130 pages and 777 paragraphs.

6. From the respondent the tribunal heard from: –
    a. Mr Paul Donohoe, Corporate Medical Director for Quality Governance and Risk who made the decision to dismiss,
    b. Mr Christopher Lee Divisional Clinical Director at the material time, the claimant's line manager and the second respondent,
    c. Mr Jonathan Lofthouse, Site Chief Executive who heard the claimant's appeal,
    d. Mr Keith Loveridge Associate Director of Human Resources at the material time,
    e. Dr Christopher Palin Corporate Medical Director, the most senior doctor at the Princess Royal University Hospital and the fourth respondent,
    f. Professor Julia Wendon Executive Medical Director at the material time and the third respondent.

7. The tribunal had sight of an agreed bundle to 3913 pages. All references are to this bundle unless otherwise stated. In addition, the tribunal had a reference bundle of 98 pages containing documents relevant to these proceedings.

8. The tribunal had sight of an agreed cast list. In this judgement the names of doctors and other material persons who are not witnesses have been anonymized.

9. In this judgement the first respondent is referred to as "the respondent" unless otherwise stated.

10. The tribunal had sight of two very lengthy chronologies one from each party.

11. After the first day of reading, the tribunal ordered the claimant to provide a table setting out - in respect of each protected disclosure and each detriment - the paragraphs in her witness statement on which the claimant relied to establish her case, and if appropriate, in her chronology. The claimant provided a 27 page document. However, this document did not fully comply with the Tribunal order and was therefore of limited assistance. To illustrate, in respect of a protected disclosure the claimant relied on a large number of paragraphs in her witness statement which were not relevant to the particular disclosure. Further, the claimant did not rely on any paragraphs in her witness statement in respect of some detriments.

12. The tribunal hearing was listed for 15 days. However, the tribunal was, in the event only available for 14 days. At the beginning of the hearing, the Tribunal informed the parties that would not be sitting on 4 April and the case was timetabled around this.

The claims

13. With the tribunal with the parties, the tribunal confirmed that the claims were as follows: –

    a. detriment on the ground of making a protected disclosure under section
       47B Employment Rights Act
    b. unfair dismissal for making a protected disclosure under section 103A
       Employment Rights Act
    c. unfair dismissal under section 98 Employment Rights Act 1996
    d. discrimination arising from disability under section 15 Equality Act 2010
    e. failure to make reasonable adjustments under sections 20 and 21 Equality Act 2010
    f. direct discrimination because of disability under section 13 Equality Act
       2010
    g. unauthorised deduction from wages under section 13 Employment Rights Act 1996.

The issues

14. The issues in the case were complex. In particular the protected disclosure claim involved very considerable amounts of material. The claimant relied on 17 potential protected disclosures, a number of which contained numerous sub-disclosures. She relied on 24 detriments, a number of which included many different elements.

15. The Tribunal reminded the parties that at the most recent preliminary hearing on 28 February 2022, the tribunal had refused the claimant's application to amend and expand the existing list of issues and had ordered that the list of issues would be subject to no further changes, save for one exception. There was no appeal to this order.

16. The specific amendment to the list of issues was that the claimant provide further details about the protected disclosures made other than to her employer. The claimant had duly provided a table setting out the section number in the Employment Rights Act relied upon in respect of her non-employer disclosures.

17. The parties informed the tribunal that there had been some narrowing of the issues. The respondent agreed that the claimant was disabled, and it had knowledge of her disability in respect of anxiety depression and psoriasis from January 2019. The respondent agreed that the claimant was disabled, and it had knowledge of her disability in respect of arthritis from October 2019. The respondent confirmed that it did not agree that the claimant was disabled or that it had knowledge of any such disability at any time in respect of post-traumatic stress disorder.

18. The claimant withdrew detriments L and M in her protected disclosure claim.

19. The parties discussed the ambit of detriment K. The tribunal noted that in the list of issues "marginalization" was limited to 3 elements: a failure to be given roles, removal from roles, and not being included in decision-making. The tribunal took into account that in the original particulars of claim this detriment was entirely unparticularised. In the amended particulars of claim pursuant to the first preliminary hearing, there was no reference to marginalisation as a detriment. Following the Employment Judge Nash case management order, the witness statement referred to a number of other matters as marginalisation. However, the case management order specifically stated that the case should not be expanded beyond the list of issues. Accordingly, the Tribunal held that detriment K was limited to what was set out in the list of issues-failure to be given roles, removal from roles, and not the decision-making.

20. The tribunal sought to clarify the claimant's case as to which respondent she brought her case against in respect of each detriment. The majority of the detriments were brought against the first respondent only. Detriments M, U, W and X were expressly brought against more than one respondent. Detriments C, D and Z did not refer to any respondent. It became clear that the claimant was seeking to expand the list of issues by relying on other respondents in respect of specific detriments. The Tribunal reminded the parties that it had ordered that there be no expansion to the list of issues. In respect of detriments

C, D and Z, the claimant's submissions referred only to the first respondent and the tribunal accordingly determined that these the detriments were brought solely against the first respondent.

21. In respect of the claim for unauthorised deduction from wages, the claimant clarified that the sole issue was whether the respondent had applied the contractually incorrect policy. It was the claimant's case that the respondent had should have applied its contractual stress management guidance rather than the sickness absence policy. Accordingly, if the tribunal found that the respondent had applied the wrong policy under contract, quantum would be determined at the remedy hearing.

22. The claimant provided a schedule of disclosures and allegations which was reference in the list of issues. This has not been included in the judgement as it contained the names of many individuals.

The Facts

23. The respondent is a large NHS University Health Care Trust in South London. It operates over 2 sites, the Princess Royal Hospital and the King's College Hospital at Denmark Hill.

24. The claimant started work at the Princess Royal Hospital as a locum consultant on the 4th of December 2013. She moved on a temporary basis to the Denmark Hill site but later returned to the Princess Royal.

25. She applied unsuccessfully for a substantive consultant post in the obstetrics and gynaecology department in 2015. The claimant alleged that the job description for this post was altered to assist the successful candidate, Ms A. The claimant's case was that Ms A was appointed because she was willing to work with the departmental head, the second respondent, in his private clinic. However, the claimant also contended that the second respondent deliberately engineered the appointment to consultant posts to avoid potential competitors in the private sector getting a consultant post.

26. The claimant applied again and obtained a substantive post as a consultant obstetrician and gynaecologist with a special interest in ambulatory gynaecology and pregnancy induced hypertension on 1 February 2017. The claimant was qualified in minimally invasive surgery and a member of the Royal College and had a certificate of completion of higher training.

27. From 1 November 2016 the claimant covered the role of lead for medical education in the department whilst her colleague Ms A (the successful candidate for the 2015 Post) was on maternity leave.

28. A junior doctor, Mr AK was given responsibility for organising the rotating the department rota. The claimant's evidence was that after a number of complaints she took this role from him. It was agreed that on 13 March 2017 he sent an email to a number of recipients including fellow consultants sharply criticising her for this, including an unspecified allegation of race discrimination. The claimant was, understandably in view of the tribunal, upset by this email. The claimant complained to the second respondent. According to the second respondent, the claimant said that if Mr AK did not "pay" for this email, someone else would. The second respondent agreed that the email was "out of order". The claimant denied saying this. As a result, human resources sent an email to all the email recipients stating that any unprofessional emails would lead to disciplinary action.

29. Protected disclosure 1. On 8 May 2017 the claimant met with Dr Cottam, the medical director at Princess Royal and Ms Morrison the medical workforce manager. Prior to this she had prepared a detailed document listing concerns referring to Dr AK and the rota issue. The tribunal had sight of, in effect, two accounts of the meeting. The first account was handwritten notes made by the claimant following the meeting. In addition to the Mr AK email, the claimant alleged that some fellow consultants were not competent, and that there was bullying and what she described as "proxy undermining" in the department.

30. The Tribunal also had sight of an email sent following the meeting by Dr Cottam. The purpose of this email was not to make minutes but to record the salient points of what the claimant said and pass it on to the relevant people. The content of this email was notably different to the claimant's account of what happened at the meeting. The tribunal was satisfied that Dr Cottam had no personal involvement or stake in these matters and accordingly no agenda of his own. His email concentrated on the dispute with Mr AK. It referred to a long-standing problem in the Department and recorded the claimant as saying that another consultant may have encouraged Mr AK to send the rota email. Dr Cottam recommended mediation between the two doctors but feared there was a deeper problem within the consultant body. In the view of the tribunal, he appeared honest about the limitations of what he could do, in that he said that he feared he was only "plastering over a crack".

31. The tribunal did not accept the claimant's contention that it should draw an adverse inference from the respondent's failure to provide minutes of this meeting. The meeting was nearly 5 years prior to the hearing and was not a meeting under any formal process.

32. The Tribunal noted that the contents of Dr Cottam's email was more consistent with the claimant's material provided before the meeting which went into detail about the rota dispute. The tribunal also had concerns about the reliability of the claimant's account of meetings and

the fact that she had covertly recorded some meetings. For instance, the claimant's account in her witness statement of the second disclosure on 8 December was materially different to the agreed transcript of this meeting (see below). Further the claimant's account before the tribunal of how she came to record the 8 December meeting was inconsistent. She firstly said she did not realise that she had turned on her telephone to record because she was suffering from stress. However, when questioned she shortly contradicted herself by saying that she had turned the phone on deliberately because she had made an anonymous complaint. The Tribunal found that the claimant's credibility as to her account of meetings was adversely affected.

33. Accordingly, the Tribunal preferred the account of the meeting set out in the email by Dr Cottam as opposed to the claimant's notes.

34. About two weeks after this meeting Mr AK suffered a heart attack and went on longterm sickness absence.

35. On 12 May 2017 Dr Penna, at the time Clinical Director Women's Services, emailed the claimant and a fellow consultant following a meeting that day. It referred to a breakdown in communication between the two doctors. She stated that they were both highly valued members of the Department. She advised them on how to work better together and in effect instructed them to stop undermining each other. Dr Penna particularly advised both doctors to avoid gossip and to try to resolve any disagreements in private and without copying in other members of the department.

36. In June 2017 a vacancy arose for the post of Clinical Lead for Obstetrics and Gynaecology following Mr Lee's appointment as clinical director. The role involved, according to Mr Lee's statement, providing operational day-to-day leadership and overseeing the operational and strategic direction of the department, governance, safety, service, leave and sickness.

37. The claimant was one of two internal candidates, together with a fellow consultant Mr O. The claimant was interviewed by a panel including Mr Lee on 18 July. Mr O was successful in his application and appointed.

38. On 1 October 2017 the claimant made an anonymous complaint to the respondent and the General Medical Council about the second respondent and his wife (also a gynaecologist). This was a serious complaint that they had appointed at least 10 substandard consultants to NHS appointments and undermined patient care for personal gain in their private clinic. The complaint was wide ranging and included that the second respondent and his wife were responsible for a large number of post-surgery complications. The claimant alleged that there was "a massive failure of governance and a national scandal".

39. The claimant did not rely on this anonymous complaint as a protected disclosure. Accordingly, the tribunal did not consider it in detail. However, the tribunal noted that some elements of the anonymous complaint were simply factually inaccurate. For instance, the claimant alleged that Mr Lee's wife was inexperienced in gynaecology. However, according to unchallenged documents in the bundle, she had 19 years postgraduate experience in clinical obstetrics and gynaecology.

40. The third respondent commissioned a joint independent investigation with Lewisham NHS trust (where the second respondent's wife worked) under a Dr Viren.

41. The claimant had an appraisal meeting with Dr Penna in October 2017. On the claimant's case, at that time she had no reason to believe that Dr Penna was acting in anything other than good faith. Nevertheless, she covertly recorded this meeting. In view of the tribunal, she was not able to provide a satisfactory explanation as to her conduct. Further, the claimant's case was unclear as to whether or not she had covertly recorded previous meetings. Her case was that she had lost a previous phone.

42. On 15 November 2017 the claimant had a mediation meeting with Mr AK. He personally apologised to the claimant and followed this up with an email. However, the claimant was dissatisfied with the apology and wanted further action against him.

43. On 30 November 2017 the claimant made an application for a clinical excellence award. It was not in dispute that this was the first year the claimant was eligible, because she had only recently been appointed a consultant. It was also agreed that the claimant was assessed against other consultants and that there was a limited number of awards available to the consultants in the pool. The clinical excellence award applications were considered by a panel including the second respondent. The claimant was not awarded a clinical excellence award.

44. Protected disclosure 2. The claimant met with the third respondent and Dr Penna on 8 December 2017. The tribunal had sight of an agreed transcript. In the view of the tribunal, this was essentially a discussion about a department where in particular the consultants were not working well together. The claimant said the problem might be herself. The claimant again raised the issue of the rota email and said she had information that two other consultants had encouraged Mr AK to send the email but did not provide any details or substantiation. She complained that the second respondent in general did not support her. She also complained that a fellow consultant had been appointed over her to the clinical lead role but said that it was fair enough and the second respondent did not feel she was experienced enough. She wanted more support in education training and she wanted a lead role.

45. The tribunal noted that the account in the claimant's witness statement was notably different from the transcript. According to the witness statement she stated that governance in the Department was having a "dramatic impact on patient care and safety". This was not reflected in the meeting transcript.

46. In December the claimant became embroiled in a disagreement with the clinical lead Mr O (who was the successful candidate in the lead role for which the claimant had applied) who allocated her a shift which she was unable to do due to childcare issues. When she explained her problem, he overruled her. On 18 December the claimant emailed the clinical lead about the 3 clinical areas she would have to cover whilst on duty. The next day Mr O replied that there was in effect no problem with the rota and the consultant cover. The claimant then forwarded this exchange to Dr Penna by way of an email on 19 December (protected disclosure 3). The claimant told Dr Penna that junior doctors were rostered to cover consultant level work, and the risk profile was worsening because of insufficient consultant overview. The claimant's case was that there was no action following her email.

47. Dr Penna emailed Mr Lee and the clinical lead on 18 December, essentially backing up the claimant's view that she should not be covering three distinct areas and the junior should have sufficient consultant supervision. She went on to state, "there is no doubt (the claimant) is becoming difficult to manage it is essential you don't give her "ammunition" as this might do".

48. From about December 2017 to February 2018 the second respondent stated that he received a number of complaints from her colleagues about the claimant.

49. On 3 December 2017 a patient sent a serious complaint to the respondent. The patient's bowel had been stitched to her skin and follow-up had been extremely poor. The practice in the obstetrics department was that patient complaints were given to an individual consultant to lead. (Consultants did not lead investigations into complaints against themselves). The claimant was tasked with this investigation.

50. In 2018 this complaint was raised in a hospital complaints meeting with Dr Donohoe (Corporate Medical Director for Quality Governance and Risk) who sent the claimant a professional email enquiring after progress of the investigation and explaining that it was important that it was handled promptly and properly. The claimant emailed him back within a few minutes saying that the complaint had not been handled properly and she had been told that she was not responsible for it. After some discussions about the whereabouts of the notes, the claimant sent Dr Donohoe an email 22 January 2018 (protected disclosure 4a).

51. In this email the claimant told Dr Donohoe that the complaint had not been handled properly and there were other complaints with some delays and confusion. The claimant in effect alleged that Dr O had been responsible for lack of clinical oversight on the day. When she was tasked with the investigation, she was going on leave shortly. She was told that someone else would take over investigation. However, this other person had not yet made a start due to a problem with the notes. She enclosed various emails concerning the history of the investigation, or lack thereof. This email trail was far from clear. In effect, the claimant contended that someone else had agreed to take responsibility but there was no direct evidence of this in the email chain. The claimant was asked to speak to Dr O but there was no evidence she did so. Finally on 18 January the second respondent asked the claimant in terms to deal with the matter. Whilst the tribunal was not able to determine where the fault lay, the tribunal found that in effect the ball had been dropped and the complaint had not been investigated.

52. The claimant then sent a second email to Dr Donohoe (protected disclosure 4b) referring to "another complaint… has not been handled properly with multiple delays". The claimant informed Dr Donohoe that the respondent's complaints team had delayed significantly in passing on her response to the complaint.

53. This matter was a GP complaint that the claimant described in her witness statement as alleging negligence on her part. The GP referred to the hospital's treatment as "entirely incorrect and indeed negligent" in that endometriosis was not correctly diagnosed.

54. In January 2018 the respondent commissioned a serious incident investigation report into a patient, JT. There was no dispute that the report had to be commissioned and had to be shown to the family of JT. The incident investigated was a delay in cancer diagnosis and the respondent had been informed that it would receive a clinical negligence claim. The investigation was carried out by two consultants in the claimant's department, the lead nurse in the Department and a senior patient safety manager.

55. Put briefly, the claimant saw patient JT in April 2017 when cancer was suspected. The patient was discharged. She was referred back by her GP in July 2017, seen by another doctor, and again discharged. She was referred for a third time in January 2018 and diagnosed with advanced cancer. The report stated, "potential nine-month delay in cancer diagnosis". The patient died two months later.

56. On 7 February 2018 Alison Mitchell Hall, general manager, forwarded a complaint from Mr O (the clinical lead in the claimant's department) about the claimant to HR stating "this is the second complaint regarding (the claimant). Can you advise the best way for me to take this forward?" According to Mr O's email, the claimant in her email to Mr Donohoe

concerning the delay in complaint management (protected disclosure 4) had invented a conversation with him, in order to blame for the poor patient outcome. Mr O alleged that the claimant had shown a lack of probity and that she had falsified and fabricated information because of an adverse outcome in patient care. He stated that he felt strongly that this matter should not be left unaddressed.

57. HR forwarded this to Dr Palin referring to a recent conversation between HR and Dr Palin as to how it should be progressed as a probity and conduct matter. HR stated, "we are now needing something more formal to try and tackle the challenges if possible faced (sic)". On 12 February Dr Penna sent an email to Dr Palin referring to another concern about the claimant, being a misdiagnosis of an ovarian torsion. She stated, "I think we are going to have no alternative but to undertake investigation but I think (the claimant) will immediately submit a counter grievance and so ordering the background will be helpful…"

58. Dr Vinen on behalf of the respondent had been investigating the claimant's anonymous complaint and was interviewing doctors in the relevant departments. On 9 February 2018 the claimant had a telephone conversation with Dr Vinen. When the claimant was asked if she was aware of the anonymous complaint letter she denied it, although this was untrue. There was no reason to believe that the investigators at this time knew that the claimant was the author of the anonymous complaint. The investigators took her through the matters in the anonymous complaint to take her views. Protected disclosure 5

59. The claimant told the tribunal that she told the investigator that Mr Lee took on consultants only if they agree to work for his private clinic. She was pressurised to work for his private clinic as a condition for obtaining a substantive NHS consultant position. Further, risks in the obstetrics and gynaecology department were not being properly assessed. There was a blame culture in the Department and junior doctors were doing consultant level work. There was a lack of support for new consultants and consultants were generally of poor quality. Some consultants were marginalised in decision-making. She stated that on one specific occasion she approached the admissions team to say that a case on her surgery list was not suitable but was told that the clinical lead had insisted she did the list. The claimant did not carry out the operation because there was a high risk of cancer and it was not appropriate.

60. The respondent decided to commence an MHPS (Maintaining High Professional Standards) investigation into the claimant, according to Dr Palin, on or around 2 March 2018. Dr Palin's role, as Corporate Medical Director had lead responsibility within the respondent for the handling of concerns about individual doctors. He worked with the Responsible Officer Advisory Group which advised. At this time the members of the group were Dr Palin, Prof Wendon and the Deputy Director of HR. Dr Palin's evidence was that Mr Lee and Dr Penna brought serious

concerns about the claimant to him in early 2018. According to Dr Palin, these included a complaint from one of the claimant's fellow consultants Ms A on 26 January about the claimant's confrontational, rude and intimidating behaviour and about the claimant's patient care, the probity allegation from Mr O: and a complaint by another consultant Ms O that after she had submitted an incident form about the claimant, she felt the claimant was "trying for revenge" and failing to cooperate. The tribunal saw copies of all of these email complaints.

61. Dr Palin's oral evidence about the decision to commence the MHPS investigation (which had happened 4 years prior to the hearing) was vague and imprecise.

62. Dr Palin made a number of attempts to meet with the claimant to tell her about the investigation process. The tribunal accepted his evidence that it was his practice to meet with any doctor who might be investigated before taking any action. It was difficult to advise a doctor that they were subject to the process, and it was therefore preferable to first tell them in person. The tribunal saw emails between Mr Palin and the claimant where he sought to invite her to a meeting. However, the claimant was reluctant to attend the meeting without further information. Mr Palin was reluctant to tell her what the meeting was about as he wanted to discuss the MHPS process in person. He told her by email on 7 March 2018 that "multiple concerns about the behaviour have reached me and I need to meet with you to discuss how these should be managed". On 8 March 2018 the claimant asked for a list of concerns prior to the meeting. Dr Palin replied reassuring her as to process and again told her to fix a meeting. The claimant contended this was not a reasonable management request This email exchange came to an end when on 13 March 2018 the claimant went absent sick. In the event she never returned to work.

63. On 12 March 2018 the claimant sent a formal complaint about the second respondent to the third respondent, with 22 attachments (protected disclosure 6). She stated that she had felt undermined in her role and that the second respondent's "persistent actions and behaviours have created a hostile work environment and affect my ability to work safely". The claimant raised 12 complaints as follows:

Undermining Me Among Senior Management Team

1. raising patient safety concerns to Dr Donohoe, the third respondent and Dr Penna (undermining me among senior management team)
2. escalating concerns to the fourth respondent and citing behavioural issues

Generating Concerns/Complaints (junior doctors)

3. Mr RA
4. Ms CO

Generating Conflict with Other Consultants

5. Ms YS
6. Mr O

Denied Leadership Opportunities

7. Lead For Obstetrics And Gynaecology
8. Lead For Education and Training

Exclusion from Departmental Decisions

9. requisitioning equipment for ambulatory unit
10. developing a substantive role of second consultant

Generating Clinical Incidents and Concerns

11. GP alleged negligence through CCG red alert not resolved for 4 months
12. number clinical incidents in suspicious circumstances (sic)

Unsupportive Behaviour

13. unsupportive behaviour specifically preferring verbal communication rather than email
14. failure to support when in a rota clash with childcare issues
15. failure to support when rotaed to cover 3 or more clinical areas simultaneously.

64. Dr Sinha (since deceased) was tasked with investigating the claimant's complaint under the respondent's Dignity at Work Procedure. The claimant told Dr Sinha on 23 March that she was resistant to meeting Dr Palin because she had concerns about him. The tribunal did not accept the claimant's denial that she had said this, because there appeared no reason for Dr Sinha to misrepresent her.

65. Mr Palin took no further steps in the MHPS investigation as this could not be moved forward while the claimant was absent sick. As a result, the claimant was unaware at this stage that the respondent was intending to start the MHPS investigation, although she knew there were concerns.

66. On 7 April 2018 Dr Vinen concluded the investigation into the anonymous complaint and found the allegations ill founded.

67. On 16 May 2018 nine consultants (including Mr O, Mr A, Ms A and Ms S) in the Obstetrics and Gynaecology Department wrote a letter from the "consultant body" to the third respondent, copied to Dr Sinha. They wrote, "raising awareness to our serious concerns about, (the claimant)". They stated "the concerns centre around repeated demonstration of a lack of probity with multiple episodes of dishonest behaviour and overt lying with potential for direct harm to come to patients as a result… inaccurate information has been documented in medical records pertaining to patient care. A patient had an ovary removed apparently

without clinical indication.… In the past few months (the claimant) has been involved in personal conflicts with nearly every fellow consultant in the Department and some trainee doctors… She has exhibited a deep lack of candour on several occasions. This is the more evident during the review of complications/poor outcomes arising from her clinical care… … Undermining of colleagues' clinical decision-making with patients, a refusal to communicate/handover complex clinical details to colleagues… Instances of aggressive unprofessional behaviour towards colleagues . At times threatening demeanour".

68. The letter included a specific allegation that the claimant had tried to transfer a case and, when that was unsuccessful, had called in sick to avoid performing the operation. The letter stated that extensive evidence to support the concerns was available and much written evidence had already been made available to management. The letter concluded, "our primary concern is alerting the senior hospital management team to what we perceive to be an immediate and grave threat to patient safety".

69. On 30 May 2018 the claimant sent Dr Sinha an email from a junior doctor complaining about staff shortages. (Protected disclosure 7) The original email dated 30 May had been sent to a large number of recipients, including Mr Lee and what appeared to be many consultants in the Obstetrics and Gynaecology Department.

70. In the email the junior doctor referred to "the dire situation we are in with locums in June". There were currently 14 unfilled night shifts. "I understand that this had been escalated … today." The claimant's covering email to Dr Sinha stated that there were junior doctor shortages and "consultant-led undermining". The claimant essentially stated that she had ameliorated shortages by recruitments. However, "inexplicable decisions" were made not to keep trainees on. She stated that, "I am not surprised that we have ended up in this situation with severe shortages again and consequent impact on the morale of the junior staff".

71. On 29 May 2018 the respondent advertised the post of Associate Director of Medical Education and Lead for Undergraduate Education. Those interested were invited to contact the Medical Education Manager for an informal discussion.

72. The claimant emailed the Director of Medical Education (referred to in the advert but not the correct contact) asking if he thought she would be suitable and seeking guidance. The Director did not reply in time.

73. According to an email from the Medical Education Manager on 14 June 2019, the claimant in her application for the post did not provide a CV and supporting statement as required. Nevertheless, the panel considered her application because she had shown interest in post. She was not appointed.

74. The claimant was reviewed by occupational health on 4 July 2019. According to occupational health, the claimant was not fit to return to work due to her perception that she had been placed in unsafe situations at work and complaints had been fabricated against her.

75. On 24 July 2018 Mr Sinha rejected the detriment at work complaint.

76. The claimant attended occupational health again on 7 September 2018.

77. The respondent held a number of meetings and communicated with the claimant in an attempt to manage her sick leave and get her back to work.

78. A first formal sickness review meeting was held on 11 September 2018. The claimant stated she did not want to return to work at Princess Royal but would be willing to return to work if she were relocated to Denmark Hill upon a permanent basis with a phased return. The respondent asked the claimant to consider what she would do if Denmark Hill turned out not to be an option.

79. On 17 September 2018 the claimant raised a grievance (protected disclosure 8) against a fellow consultant in the Obstetrics and Gynaecology Department Mr A concerning an incident on 31 January 2018. The claimant alleged that a junior doctor (Ms I) had failed to follow the consent procedure correctly. She reported this to the responsible consultant Mr A and asked him to speak to the junior. Mr A emailed the junior doctor explaining the claimant had made a complaint against her and asking her for a statement. In this statement, the junior made in effect an allegation against the claimant. Mr A then forwarded the junior's allegation about the claimant to management. The claimant's grievance was that Mr A had undermined her, that he had failed to provide appropriate feedback to his junior doctor, and without seeking her views, had escalated this to management. She made no allegation that the patient had been subjected to poor care or that this was done deliberately to cast doubt on her.

80. This grievance related to the same incident which the claimant had raised under her dignity at work complaint (protected disclosure 6).

81. On 12 October 2018 the claimant raised a grievance against Mr. O, the clinical lead for Obstetrics and Gynaecology (protected disclosure 9). The claimant stated that these issues had been included in the dignity at work complaint, but she felt they had not been addressed. She stated it was unclear if Mr O was acting on his own account or at Mr Lee's behest.

82. The first complaint in the grievance against Mr O provided more details of what she described as offensive and unprofessional emails sent to the claimant. The grievance set out a conflict between Mr O and the

claimant about how the rota was operating. The claimant stated that she had escalated the matter to Mr Lee who had failed to support her. She stated, "I would like to know why (Mr O) interfered in my role looking after rota/education/training". She stated that she felt that he undermined her by not communicating, sending offensive emails and persistently harassing her with multiple emails.

83. The second complaint was the claimant wanting to know whose decision it was to "take away the role of education and training".

84. The third complaint referred back to Mr O putting the claimant on a shift she could not cover due to childcare issues.

85. The fourth complaint was that when she did not attend work because of weather problems, Mr O sent an email stating, "can you let me know exactly why you're unable to get in? I believe trains are running", copied to a number of people.

86. The 5th complaint related to the clinical incidents previously raised - that a high risk case had been inappropriately added to her theatre list. The claimant also alleged that the number of cases in her clinic had been increased without her discussion, that paediatric cases were inappropriately listed in the gynaecology clinic, and that equipment had been unavailable. Further it was alleged that Mr O had denied her annual leave.

87. The 6th complaint was that Mr O was "totally unsupportive and failed to consider my well-being or work life balance" in reducing her workload or giving her time off.

88. On 12 October 2018 the claimant emailed Dr Sinha about her return to work but did not copy this to HR. She stated she was not happy to discuss returning to work in the context of a sickness meeting. She requested changes to her job plan, work schedule and governance structure.

89. The respondent attempts to get the claimant back to work were significantly adversely affected by the claimant discovering that the respondent had a pending MHPS investigation against her. The claimant found out about the investigation when her BMC representative referred to it, not realising the claimant was unaware, on 4 September 2018. The claimant, unsurprisingly, was extremely upset.

90. She wrote to the respondent on 15 October explaining that she was entirely unaware of the investigation. She accused two people from HR of lying about the MHPS investigation and stated they were working on behalf of Mr Lee, who was influencing them. She stated she would like to return to work soon, and it would be easier to relocate to the Denmark Hill site. She stated there were four vacant locum consultants at

Denmark Hill and suggested that the respondent should therefore be able to accommodate the move.

91. The respondent's case was that it did not know how the MHPS investigation came to the attention of the BMC. Mr Palin told the tribunal that this should not have occurred.

92. On 15 October the claimant submitted a formal grievance against Mr Lee (protected disclosure 10.2). This grievance raised the following matters: –

a. There was an improper conflict of interest between Mr Lee's private clinic work and his influence over recruitment for substantive consultant posts in the NHS. This was essentially the same substance as the anonymous complaint which had been investigated by Dr Viren.
b. Dr Viren's investigation was used to identify "people been raising concerns". "Subsequent to (my) interview, malicious fabricated complaints been generated by the leadership of the Department highlight non-existing concerns."

93. The claimant made a number of requests for more information about the MHPS process from October 2018 to January 2019.

94. On 16 October 2018 the claimant re-submitted her dignity at work complaint (protected disclosure 6) against Mr Lee as a grievance (protected disclosure 10.1).

95. That same day 16 October Dr Penna wrote to Dr Palin, copying in the third respondent, discussing available locum posts which might be appropriate for the claimant at Denmark Hill. She stated that previously the claimant had indicated that she wanted to continue doing both gynaecology and obstetrics. Dr Penna explained that most of the posts at Denmark Hill were either pure obstetrics or pure gynaecology.

96. On 18 October the claimant emailed the respondent to state she could not attend a formal sickness review meeting scheduled for 23 October 2018. The meeting was rescheduled to 9 November 2018.

97. On 19 October Mr Palin wrote to the claimant inviting her to a meeting. He explained that, having discussed the matter with the third respondent, he was stepping down from his role managing the MHPS process in order to "help you to return to work as a healthy, happy and valued, colleague". He invited her to a meeting on 6 November to discuss this. He explained that the trust would need to deal with her grievances and the outstanding MHPS investigation.

98. The claimant, accompanied by her husband, met with Dr Palin on 8 November. Dr Sinha also attended. The tribunal had sight of discussions

between Dr Palin and Prof Wendon and others concerning the respondent's seeking to get the claimant back to work.

99. Dr Palin proposed that the claimant come back to work at Denmark Hill. Because there was considerable overlap between the substance of the claimant's outstanding grievances and the substance of the MHPS process, Dr Palin proposed a preliminary investigation by the Corporate Medical Director of all these matters. This would not preclude either formal process after the outcome of the initial investigation.

100. The claimant proposed a number of measures to enable her to return to work. Dr Palin agreed that in the first instance she would not do on-call or emergency work, and this would be introduced later when she felt strong enough. Dr Palin also agreed that any future concerns raised about her would be handled by Denmark Hill. However, he did not agree that her line manager should be changed from Mr Lee. Mr Palin told the tribunal that he was worried about the principle that staff who raised complaints against their line manager should not effectively be allowed to use this to change their line manager. Further, it would be difficult to make such a change work in the claimant's circumstances – her line manager working from a different site.

101. The respondent's long-term sickness absence process was running concurrently. The claimant remained signed off sick and had been seen by occupational health. On 30 October she was invited to a second formal long-term sickness review meeting which was held on 9 November. The claimant told the meeting that she was feeling significantly better and was ready to return to work. A return to work date of 7 January 2019 with a phased return was discussed.

102. The claimant wrote to the third respondent very early in the morning on 12 November agreeing to the Corporate Medical Director investigating all matters but wanting her grievances to be dealt with under the grievance policy. She emailed the third respondent again later that day saying she had become upset. She referred to colleagues who had "took the half baked concerns to Mr Palin" and misled him leading to the MHPS process. Prof Wendon replied to the claimant on 12 November stating in effect that the respondent thought it best that the Corporate Medical Director carry out an initial investigation.

103. The HR general manager wrote to the claimant on 13 November enclosing a draft job plan dated back to March 2018 and suggesting a return to work date of 7 January 2019. The claimant had a number of annual leave days to take and it was suggested that she took 7 December to 7 January as annual leave. The claimant agreed. The claimant on 19 November provided some suggested amendments to the job plan. The general manager confirmed on 22 November that she would find out whether these changes were practicable. She confirmed a return to work date of 7 January 2019. She set out a phased return to

full duties over 7 weeks. The claimant would do no on-call commitments until the 7th week. Mr Lee had agreed to act as a second "on-call" when the claimant first returned to on-call commitments.

104. The claimant attended occupational health on 22 November 2018. The assessment was that the claimant could work in her current role with adjustments and could return on 7 December 2018. A phased return was recommended. The claimant was saying she was feeling much better.

105. On 20 November 2018 the clinical lead, Mr O, wrote to senior management asking for an update as to the claimant's absence. He stated that the absence had turned out to be longer than initially anticipated. He explained that colleagues had been covering her job full-time including on calls for up to 6 months but "the goodwill to continue to do this is now wearing thin". Matters had come to a head the previous day when no one was prepared to pick up further on-call sessions. If the claimant was to continue absent, a locum appointment would be needed. If she were to return, he presumed there would be a phased return so they would need to plan for that.

106. The respondent encountered a difficulty in getting the claimant back to work when Dr Penna emailed the third and fourth respondents on 3 December 2018. Dr Penna stated that the claimant could only come to Denmark Hill "subject to being able to do the job that is required and being able to fit into the department here (both of which are by no mean certainties)". She stated that the Denmark Hill role should at least for now be a temporary solution. The tribunal saw an email from the Deputy Director of Workforce to Dr Palin stating, "are they pulling back?" Dr Palin replied to Dr Penna that this was the first time there was any suggestion that the consultants at Denmark Hill did not want the claimant on a permanent basis.

107. After discussion of these matters and a re-drafting process involving a number of persons, Dr Palin wrote a letter to the claimant on 6 December 2018. He accepted that the claimant wanted her grievances investigated by the grievance process. This would be effected. Therefore, her MHPS process would proceed. He stated that concerns were raised about her in 2018, were discussed with the third respondent and a decision was made to investigate under MHPS. He confirmed that the investigation process, which had yet to start, would commence when she returned to work. Given this and her dissatisfaction with Mr Lee, he offered a vacant consultant role at Denmark Hill from 2019. This would be purely obstetric with no gynaecology but with a special interest responsibility in perinatal mental health. Although this was not one of her specific skills, it was believed that she would be capable of developing this with support. A permanent transfer to Denmark Hill could be considered in future. As she had been out of practice for months, she would return at first in a supernumerary capacity. Dr Penna would be happy to discuss the consultant role with her over the phone. He asked her to let the

respondent know her views as soon as possible. He confirmed he would continue to provide support to her.

108. The claimant decided that she did not wish to take up this position because it was not suitable. The respondent's case was that the claimant did not reply to this letter despite the respondent chasing her on a number of occasions. The tribunal found no evidence that the claimant had replied.

109. On 24 December 2018 the claimant made a complaint to the Care Quality Commission (protected disclosure 11) against the third respondent, the fourth respondent, the second respondent, Mr O and Mr A about "misuse of MHPS policy against whistle-blowers and pervasive bullying culture". The complaint covered matters already raised in previous protected disclosures internally. She alleged that Dr Viren's investigation into her anonymous complaint was a "sham" to try to identify whistle-blowers. She made further very wide-ranging complaints about mistreatment of whistle-blowers at the Trust. She alleged that the third and fourth respondents were directly responsible for the misuse of the MHPS policy.

110. On 31 December 2018 the claimant made a complaint to NHS Improvement about a bullying culture and misuse of MHPS policy at the respondent (protected disclosure 12). She sent subsequent emails on 10, 21, and 24 January 2018.

111. The NHS Improvement complaint contained substantially the same material as the CQC complaint. In addition, the claimant repeated her allegations about conflict of interest over Mr Lee's private clinic and her allegations that at different times Mr Lee sought to appoint candidates who were not suitable for work or, at the time the claimant was appointed, were suitable but for improper reasons.

112. The claimant's subsequent emails on 24 January and 1 February 2019 contained new allegations. In addition to some allegations concerning appointment of consultants and the generation of complaints by management, the claimant provided considerable detail of allegations about poor patient outcomes, birth trauma, babies requiring neonatal admission, poor consultant supervision, poor practice, and incident investigation.

113. On 3 January 2019 the claimant emailed the National Guardian Office to make a complaint against the respondent (protected disclosure 13). In addition to covering matters already raised before to the respondent, she alleged that (multiple) senior consultants had left the respondent (in suspicious circumstances) or had suffered detriments in the last 12 to 24 months due to whistleblowing. The claimant also stated that she had been discriminated against because of her race, religion and/or gender. The claimant conceded before the tribunal that such allegations were

included speculatively in legal correspondence. She put forward no case as to why she believed she had been subjected to discrimination on unlawful grounds.

114. The claimant was further signed off sick from 3 January 2019 and remained absent signed off sick until her dismissal. The respondent referred the claimant again to occupational health. An appointment with occupational health was made which the claimant did not attend. The appointment was subsequently remade for 7 March 19 and then for 11 April 2019. The claimant did not attend these appointments.

115. On 14 February 2019 the respondent invited the claimant to a second formal long-term sickness review meeting scheduled for 19 March 2019. The respondent reminded the claimant on 13 March of the appointment. The letter advised her that she could obtain further support from the independent employee assistance programme. On 18 March 2019 the claimant emailed to advise she was too ill to attend the sickness review meeting. She enclosed a sickness certificate stating she was unable to attend any meetings.

116. A further sickness meeting was scheduled for 16 April 2019. On that day the respondent received an email on behalf of the claimant stating she was unable to attend. The respondent was directed to contact her GP or occupational health. The respondent responded advising that the claimant had not attended occupational health appointments, but received no response

117. In April 2019 the claimant exhausted her entitlement to sick pay. The respondent informed her that she had been overpaid in error and the overpayment would be recouped from her. There was no dispute that, if the sickness absence policy governed the claimant's entitlement to sick pay, the respondent had mistakenly overpaid the claimant.

118. On 17 April the respondent invited the claimant to a rescheduled long-term sickness review meeting on 8 May. The respondent stated that it was concerned that it had not met with her since 9 November 2018, and had no further advice from occupational health. On 24 April the respondent received an email on behalf of the claimant stating that she was too ill to attend the meeting on 8 May.

119. On 30 April 2019 the claimant raised a complaint to the General Medical Council (GMC) fitness to practice panel about Mr Lee and Dr Palin (protected disclosure 14). She alleged that Mr Lee was responsible for failures of leadership and governance critically involving patient safety. Patient safety was compromised, and patients may have come to harm. She believed that Dr Palin actively colluded with the Department to victimise her.

120. The subject of this complaint was the same as the matters already raised either internally or to other external bodies as protected disclosures. The claimant specifically contended that her discussions with Dr Cottam (protected disclosure 1) led Mr Lee, in collusion with others, to "run a sustained campaign of bullying and harassment… and generate complaints and conflicts". The claimant stated in terms that the endometriosis complaint from the general practitioner was initiated by Mr Lee's wife. The claimant referred to the investigation of the anonymous complaint and stated "I was asked provide information as a confidential witness" but did not say that she was the complainant. She alleged that it was possible that a full report about her had been submitted to the GMC. She included specifics of clinical incidents.

121. In respect of the negligence complaint concerning JT, the claimant alleged that the respondent had prepared a fabricated report which was provided to the dead patient's family. In respect of JT's subsequent treatment, the claimant stated "I am now concerned that this patient may have been deliberately managed in this way by denying therapy which may have shortened her life (this section was in bold). This may have been done in order to generate an effective complaint against me.… I believe this patient has come to fatal harm.… and this may have been done deliberately by the Department." She asked the GMC to escalate these concerns to the police. She further alleged that the medical records had been tampered with and that the department had "clearly altered" the final report sent to the patient's family.

122. Before the tribunal the claimant confirmed that when writing this report, she believed that Mr Lee and Dr Palin had deliberately sought to shorten the patient's life in order to generate a complaint against her.

123. On 2 May 2019 the respondent emailed Mr Ahmed (who had been corresponding on behalf of the claimant) explaining that the stage 2 sickness meeting had been rescheduled three times and that the meeting scheduled on 8 May would go ahead. The respondent proposed that the claimant arrange for someone to attend on her behalf or she could respond to specific questions in respect of her absence. No response was received to this email. The respondent accordingly proceeded with its meeting on 8 May without the claimant being in attendance.

124. As a result of the meeting the respondent wrote the claimant. The respondent stated that whilst it was sympathetic to the claimant's circumstances, her current level of sickness was unsustainable within the department and the respondent could not continue to support it indefinitely as it impacted on the service and patient care. If there was no confirmed foreseeable return to work date or further advice on her continued absence over the next 4 weeks, the respondent might invoke a final full sickness review meeting. The Respondent explained that possible outcomes could include dismissal on the grounds of capability.

125. On 8 May 2019 the claimant wrote to the Secretary of State for Health. Her complaints related to "bullying culture, leadership-governance failures and patient safety issues in the maternity and gynaecology department" (protected disclosure 15). She alleged the trust "has been actively identifying whistle-blowers… and getting rid of them". She alleged that Dr Palin was involved. She has previously complained to the National Guardian Office, National Health Service Information, the GMC and the CQC. The Department replied to the claimant stating that it did not get involved in individual cases.

126. On 10 June 2019 the claimant reported a complaint to the police and the tribunal had sight of the incident report form. She stated that staff members at the Obstetrics and Gynaecology Department "may have deliberately cause patient… harm or death". She stated that the advert in collusion with others had deliberately provided contradictory treatment for the patient thereby denying the patient appropriate treatment and shortening her life. Further, they had tampered with patient records. She named a number of persons, whose names were blocked out but included Dr Palin, Mr Lee and Prof Wendon. Much of the police complaint related to the claimant's issues with the respondent and overlapped with previous complaints.

127. On 13 June 2019 the claimant attended a further appointment with occupational health. Occupational health reported that the claimant's health had deteriorated, and she was not fit for her current role or to attend meetings. A twomonth review was recommended.

128. On 24 June 2019 the claimant sent an email to NHS Improvement referring to her reporting to the police on 10 June "about a patient I believe may have come to harm and subsequently died".

129. On the advice of NHS Improvement, on 11 July the claimant sent an email to the respondent's freedom to speak up guardians (protected disclosure 16). This email alleged that the three individual respondents had victimised her for whistleblowing. They ran an investigation to identify whistle-blowers and remove them. She alleged that a patient (JT) was deliberately harmed in order to generate a complaint against her and that documents had been tampered with.

130. On 14 August 2019 the claimant attended occupational health on a twomonth review. According to the report prepared after this meeting, the claimant was suffering health problems related to work which would likely be made worse by work. She was not fit for work or for an interview. She was not suitable for ill-health retirement or a phased return. She continued to feel overwhelmed by the situation and her mental health had further deteriorated. She was seeing a consultant psychiatrist and a psychotherapist, and remained on prescribed medication.

131. The respondent invited the claimant to a final sickness management hearing on 6 September 2019. The claimant's husband, on the claimant's behalf, requested a postponement until the next occupational health review (scheduled for 26 November 2019) and said the claimant was currently unable and unfit to attend. The respondent rescheduled the hearing to 26 November 2019. The respondent brought the next occupational health review forward to 23 October 2019.

132. In the event the claimant was still too unwell to attend the occupational health meeting on 23 October 2019. It was rescheduled to its original date of 26 November 2019. The final sickness management hearing was rescheduled for 6 December 2019.

133. The claimant's consultant psychiatrist Dr Isaacs wrote to the claimant's GP on 20 November 2019 following a review. He stated that there had been a "significant deterioration". She continued to suffer "severe depressive symptoms". She was in effect unable to cope with everyday tasks such as driving or cooking. Her husband had had to reduce his hours to part-time in order to support her. When her husband was out, the claimant sister-in-law stayed with the claimant. The claimant was also suffering from physical symptoms -arthritis and psoriasis. It was unfortunately not possible to increase her psychotropic medication because of issues with liver function tests. In effect, the psychotropic medication needed to be withdrawn in order to see if it were possible to start medication for the psoriasis and then to try treatment with a different antidepressant. The psychiatrist stated, "there does not appear to be a clear way forward a present".

134. The claimant provided this letter to the respondent.

135. Occupational health prepared a further report following the review on 26 November 2019. It stated that the claimant's health had undergone a significant deterioration. The claimant was suffering severe depressive symptoms. Occupational health confirmed that there was an underlying health problem relating to attendance that the claimant indicated it was likely to be a work-related problem and that it was likely to be exaggerated by work. The claimant's condition might be considered a disability under the Equality Act. She was unfit to attend an investigation/formal meeting as part of the trust's formal process. Occupational health did not find that a risk assessment should be undertaken, or that she needed to be considered for ill-health retirement, or that a phased return to work programme was recommended.

136. Two days before the final sickness review hearing, on 4 December 2019, the claimant submitted a formal grievance against Dr Palin (protected disclosure 17). She alleged that he had "identified me as a whistle-blower, actively colluded with the Department of Obstetrics and Gynaecology… to victimise me and subjected me to detriments, abuse HR processes to prevent return to work, initiated secret

disciplinary/MHPS process against me, threatened with GMC referral.…" "I have found (Dr Palin) extremely untrustworthy and without any professional integrity".

137. Part of this grievance was not directed against Dr Palin but were matters contained in the claimant's previous internal complaints or were allegations against Mr Lee.

138. The allegations against Dr Palin included that "as HR director he ran a confidential trust whistleblowing investigation to identify and detriment a whistleblower". She believed that the investigation into the anonymous complaint had been concealed and a false/ incorrect report was submitted to Lewisham Trust and possibly other bodies including the GMC. He instigated the MHPS process against the claimant. He "offer an exchange of my outstanding MHPS with my formal grievances". He refused to provide details of the MHPS complaints. He refused to let the claimant return to work and only provided an unsuitable post at Denmark Hill. She alleged that Dr Palin was aware that the department had generated the JT false clinical negligence claim against her and intended to "ambush" her with this on return. He stopped her salary in April 2019.

139. The next day, 5 December 2019 the claimant requested that the respondent postpone the final sickness management hearing scheduled for the following day, 6 December. The claimant told the respondent that she had clinical documents saying that she was medically unfit to attend. The claimant stated that the respondent had generated a clinical negligence claim against her by providing false documents and information to JT's family. She asked that the meeting be postponed until the outcome of her grievances.

140. The claimant also informed the respondent that the final occupational health report had not been sent to her. It was sent at 13.32 on the day of the meeting, 6
December 2019.

141. The respondent informed the claimant that she could send a representative or make written representations to the meeting. The claimant did not take advantage of this offer. However, the claimant's email of 5 December requesting a postponement provided a good deal of detail and the respondent took this into account.

142. The final long-term sickness review hearing took place on 6 December 2019 by Ms Meredith Deane (Director of Operations at the Princess Royal site) with Mr Donohoe. The purpose of the meeting was to decide whether to extend the claimant's sick leave or dismiss her on capacity grounds. The panel had sight of an absence management report prepared by Ms Mitchell Hall, General Manager, in October 2019. This set out the claimant's absence record and a chronology. Ms Mitchell Hall recorded that in conversations with the claimant under the sickness

absence procedure the claimant had stated that she could not consider returning to work until her grievances had been resolved.

143. According to Ms Mitchell Hall, from April to August 2019 the department had employed an agency locum consultant to cover the claimant's workload as substantive staff were no longer willing or able to support. From September 2019 the respondent had employed a locum whose contract was extended in line with the claimant sickness absence. The respondent was unable to put in place a more sustainable solution due to the short periods of time covered by each sickness certificate.

144. At the review hearing the respondent dismissed the claimant on the basis that a nine-month sickness absence had a significant impact. The respondent said that it considered the reasons for the Claimant's sickness absence, the impact of her absence on the department and service, any progress made towards improving her attendance, the effectiveness of any adjustments made, medical advice, any support that could be given, and redeployment options.

145. The respondent concluded that no foreseeable return to work appeared likely in light of the medical evidence including the 26 November occupational health report. The claimant had been off sick since March 2018. Mr Donohoe said the claimant had been off work for nearly 2 years which was an exaggeration. The claimant had provided no timetable for her return. The respondent told the tribunal that employing a locum to cover the claimant's role would cost 140% of the cost of employed staff. The respondent also took into account that the length of the claimant's absence had resulted in other consultants starting to refuse to cover for her.

146. The respondent's evidence was that it specifically considered if any reasonable adjustments might allow the claimant to continue in employment. It considered that there were no effective reasonable adjustments. Mr Donohoe stated that he was unaware of any of the claimant's protected disclosures save PD 4 and a letter from Mr Matthew Trainor in July 2018 to the claimant about the results of her dignity at work complaint.

147. The respondent informed the claimant of the decision to dismiss, with reasons, by way of a letter of 10 December 2019.

148. The claimant submitted a detailed 10 page grounds of appeal against the decision to dismiss on 17 December 2019. The claimant grounds of appeal were as follows:

a. The decision was made in her absence despite occupational health stating that she was not fit to attend meetings. She stated in terms that this was discriminatory and a detriment because she had made a protected disclosure on 5 December 2019.

b. The panel's decision that she could not return to work in the foreseeable future was not based on objective evidence. The recent deterioration in her medical and physical health was due to side effects of recent change in medication. It was likely to be reversible.
c. The respondent had not considered alternatives to dismissal including reasonable adjustments including disciplining those she believed subjected to her to detriments and consideration of alternative roles in and outside of the respondent. Occupational health had recommended a review in 4 months, and therefore the trust should have waited until the results of that review.
d. The trust could have waited longer until dismissing.
e. At least some of her absence should have been considered under the trust management of workplace stress policy instead of the sickness policy because it was the trust's actions including attempts to generate multiple malicious false complaints against her which had led to her sickness. Further, her BMA representative was ineffective.
f. It was not true that her absence was having a material impact on the Department. The Department was a dysfunctional unit with toxic culture with a number of consultants with poor professional practice and under disciplinary process. Further, there had been extensive use of locums in the past.
g. The respondent had frustrated rather than assisted her return to work, including creating a clinical negligence claim against her by feeding false information to a patient's family
h. the respondent should consider offering her ill-health retirement.

149. Mr Loveridge, Associate Director of Human Resources for the Princess Royal, drafted terms of reference for the claimant's grievance against Dr Palin on behalf of the chief medical officer.

150. Ms Hannah Jackson, a general manager was tasked with investigating the grievance. She met with Dr Palin on 18 December concerning the claimant's grievance. She wrote to the claimant on 20 December enclosing the terms of reference for the grievance and inviting to her to a meeting on 6 January.

151. On 3 January 2020 the claimant wrote to a number of senior staff at the respondent copied to Ms Jackson stating that she was unable to attend the grievance investigation meeting, and she considered the outcome of the grievance to be predetermined. She complained that Ms Jackson was not sufficiently senior. She asked that another more senior member of staff be appointed. She asked that the trust send her written questions so she might submit a written response. Mr Loveridge replied on 6 January agreeing to her suggestion that the trust email questions. Mr Loveridge stated that Ms Jackson was a senior member of the Princess Royal management team with no previous involvement in the matter. Further, Dr Palin had stepped down from his medical management role. He asked her to confirm if any aspect of her grievance had not been effectively covered in the terms of reference.

152. On 14 January 2020 Ms Jackson, wrote to the claimant with questions, as the claimant had proposed. The claimant replied at length and enclosed a considerable number of documents. She also sent a document stating that a number of senior colleagues had raised concerns about Dr Palin and senior management. She said that she enclosed evidence. The claimant provided a document referring to anonymous comments about Dr Palin or the third respondent. There was no reference to dates

or names or any information. Some of the comments appeared to be verbatim such as "I don't know, I suppose I am not, I am not, you know… I don't want to cause trouble, but I don't have any confidence in him, I am sorry".

153. Ms Jackson picked up the reference to the four earlier grievances. She requested the claimant provide copies, which she did together with her detailed answers to Ms Jackson's questions. Ms Jackson did not investigate the earlier four grievances.

154. Having investigated, Ms Jackson wrote to the claimant on 5 March 2020 stating that her grievance against Dr Palin was not upheld and enclosing her 13 page investigation report. She confirmed that the appeal against the claimant's dismissal would now proceed.

155. The appeal against the claimant's dismissal was assigned to Mr Lofthouse, Site Chief Executive. By an email of 17 April, he invited the claimant to the hearing of her appeal. He offered the option of dialling in via telephone. He set out the procedure: the claimant would highlight the main points in her statement of appeal and would be asked questions. Then Dr Donohoe would summarise the management case, and the claimant and the panel would question Dr Donohoe. Mr Lofthouse confirmed the claimant could send a written statement in advance. In respect of the claimant's comment that the outcome was predetermined, he stated "I would like to assure you that this is not the case".

156. On 4 May 2020 the claimant wrote to Mr Lofthouse stating that she did not wish to participate or engage in the appeal process any further. She stated she had lost trust and confidence in the respondent. She feared for her mental health if she continued to participate. She preferred to concentrate on the employment tribunal process.

157. As the claimant had not confirmed in terms that she had withdrawn her appeal, the panel proceeded with the hearing in her absence. Mr Lofthouse heard the appeal on 5 May 2020 advised by the Associate Director of Human Resources. the Medical Staffing Coordinator took notes. Dr Donohoe presented the management response. The appeal panel considered the claimant's grounds of appeal and her email of 4 May. The purpose of the meeting was to review any new evidence which the original panel had not seen, to decide whether any errors had been

made and to decide whether the dismissal was fair and reasonable in the circumstances.

158. Mr Lofthouse upheld the decision to dismiss and confirmed this by way of a letter dated 7 May 2020. Mr Lofthouse's evidence was that he had dealt with the appeal as best he could, although the claimant did not participate. There was a full appeal panel. He read both respondent and claimant cases. He heard submissions from the respondent but was unable to do so from the claimant. He considered her grounds of appeal which were essentially that there was a workable alternative to dismissal. He concluded that the decision to dismiss was a reasonable decision primarily because there was little reasonable prospect of her returning to work based on the medical evidence. According to the decision letter, he concluded that she had not been actively engaging in the process of returning to work. He confirmed that if she sought ill-health retirement, she should make an application which was a separate process.

The applicable law

159. The applicable law on protected disclosures is found in the Employment Rights Act as follows

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 — S.43B(1)(a)

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

…(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1) 43F Disclosure to prescribed person.

(1)A qualifying disclosure is made in accordance with this section if the worker—

(a)makes the disclosure ... to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b)reasonably believes—

(i)that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

(ii)that the information disclosed, and any allegation contained in it, are substantially true.

(2)An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

47B Protected disclosures

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

103A Protected disclosure.

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.

160. The applicable law on unfair dismissal is found in the Employment Rights Act 1996 as follows

98 General.

(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 this subsection 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,

(3)In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason 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.

161. The applicable law on discrimination is found in the Equality Act 2010 as follows

13 Direct discrimination

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

…

(3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

15 Discrimination arising from disability

(1)A person (A) discriminates against a disabled person (B) if—

(a)A treats B unfavourably because of something arising in consequence of B's disability, and

(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20 Duty to make adjustments

(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2)The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case. (2) The circumstances relating to a case include a person's abilities if—
(a) on a comparison for the purposes of section 13, the protected characteristic is disability…

136 Burden of proof

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

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

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

162. The applicable law on unauthorized deductions from wages is found the Employment Rights Act 1996 as follows

13 Right not to suffer unauthorised deductions.

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Submissions

163. Both parties relied on lengthy and detailed written submissions and also provided brief oral submissions.

Applying the facts to the law

Detriment for making a protected disclosure section 47B Employment Rights Act

Did the claimant make any qualifying protected disclosures?

164. The tribunal firstly considered each of the 17 disclosures to determine if they amounted to a qualifying protected disclosure.

165. Under statute, a qualifying protected disclosure is made up of a number of elements.

166. As the claimant submissions stated, section 43B firstly requires a disclosure of information and fact. According to the Court of Appeal in Kilraine v London Borough of Wandsworth [2018] ICR 1850:-

"In order for a statement or disclosure to be a qualifying disclosure … it has to have a sufficient factual content and specificity such as is capable tending to show one of the matters listed…"

There must be a "minimum factual content".

167. Secondly, the worker must reasonably believe that the disclosure was made in the public interest and tends to show one of the relevant failures under section 43B.

168. It is well established that if a worker incorrectly believes that a relevant failure under section 43B has occurred, this does not necessarily prevent there being a protected disclosure. To put it another way, there can be a protected disclosure even if the worker is wrong. The tribunal must be careful to assess the reasonableness of the worker's belief on the facts

known to them at the time, not the facts later established by the tribunal. The Tribunal reminded itself of the distinction set out by the Employment Appeal Tribunal in Soh v Imperial College of Science, Technology and Medicine EAT 0350/14 (a case where the worker had no personal knowledge relating to the relevant failure) between saying, 'I believe X is true' and 'I believe that this information tends to show X is true'.

169. The tribunal also directed itself in line with the case of Darnton v Surrey [2003] IRLR 133 at paragraph 29

"In our opinion, the determination of the factual accuracy of the disclosure by the tribunal will, in many cases, be an important tool in determining whether the worker held the reasonable belief that the disclosure tended to show a relevant failure…. The relevance and extent of the employment tribunal's enquiry into the factual accuracy of the disclosure will, therefore, necessarily depend on the circumstances of each case. In many cases, it will be an important tool to decide whether the worker held the reasonable belief that is required by s.43B(1). … We consider that as a matter of both law and common sense all circumstances must be considered together in determining whether the worker holds the reasonable belief. The circumstances will include his belief in the factual basis of the information disclosed as well as what those facts tend to show. The more the worker claims to have direct knowledge of the matters which are the subject of the disclosure, the more relevant will be his belief in the truth of what he says in determining whether he holds that reasonable belief.

170. The question of whether a worker has a reasonable belief under section 43B(1) is a mixed objective and subjective test. The worker must themselves genuinely believe that the information disclosed tends to show one of the relevant failures. In addition, that belief must be objectively reasonable for someone in the worker's personal situation and with their personal characteristics, including their skills and knowledge. It is not a question of whether a hypothetical reasonable person would have had that belief, but whether a reasonable individual with the personal characteristics of the worker would have had that belief.

171. According to the Employment Appeal Tribunal in Korashi v Abertawe Bro Morgannwg University Local Health Board , the threshold for the reasonable belief is a low one.

<u>Protected Disclosure 1 (meeting with Dr Cottam)</u>

172. The tribunal considered whether, on the facts it had found, there was sufficient factual content disclosed to show that a relevant failure had occurred. Whilst a worker does not need to know which criminal offence or legal obligation they had in mind when making a disclosure, it must nevertheless be reasonable for a person in the worker's position to believe that the information related to a criminal offence/legal obligation.

173. The discussion at the meeting dealt with an internal matter within the claimant's department, mainly relating to an argument over the rota and an unprofessional email sent by a junior doctor. In the view of the tribunal, there was no possible reasonable belief on the claimant's part that any criminal offence had been committed.

174. The tribunal went on to consider whether the claimant reasonably believed that the information tended to show that a legal obligation had not been complied with. Some of the matters did not disclose sufficient information, for instance a reference to subliminal undermining and a GMC survey of junior doctors sometime in the past, because they were simply too vague.

175. There was sufficient information concerning the rota issue and the Dr AK email. However, the tribunal found that the information disclosed by the claimant at this meeting did not in the claimant's reasonable opinion tend to show that a legal obligation was not being complied with. The claimant was understandably upset about both the content and the tone of Dr AK's email. However, she was not complaining to Dr Cottam about a breach of any legal obligation, she was complaining about an unprofessional and unjustified email being sent to her department. The tribunal accepted that this would have been distressing to the claimant. The tribunal was not in position to judge the rights and wrongs of the rota dispute, but this email was the wrong way to go about resolving it, as Dr AK later accepted.

176. The Tribunal considered whether the claimant reasonably believed that the information tended to show that health and safety had been or was likely to be endangered. In the view of the tribunal, the claimant's focus at this meeting was on her being victim of an unjustified and unprofessional email from a junior, and the wider conflict and difficulties with the rota. There was no suggestion that the claimant's health and safety was endangered; she was distressed and annoyed.

177. The tribunal understood her to say that the information reasonably tended to show that there was a health and safety issue in respect of patients. In the view of the Tribunal the claimant focused on her belief that other consultants were trying to stir up difficulties for her with juniors (for instance by somehow encouraging Dr AK to send the email) rather than the endangerment of patient health and safety. The tribunal, therefore, found that the claimant did not reasonably believe that the information disclosed tended to show that health and safety of any individual was being endangered.

178. Accordingly, the Tribunal found that this was not a protected disclosure.

<u>Protected disclosure 2 (meeting with Dr Penna)</u>

179. The tribunal understood that the claimant was relying upon criminal offence/ legal obligation/ health and safety.

180. The tribunal, having considered the agreed transcript of the meeting, found that this was a complaint by the claimant about the way the Department worked, or, rather as she saw it, failed to work. It was very much focused on the claimant's personal dissatisfactions, such as not being appointed to the lead role or the delay and manner in Dr AK apologising to her. These were internal matters in the Department relating to personnel matters and how colleagues interacted with each other. This information did not tend to show any relevant failure.

181. The meeting went beyond the claimant's personal concerns with one brief statement, "there are a few concerns that I couldn't ignore… towards the standards of care for the patients and there are a few things I couldn't ignore like undermining…". This was a general statement which did not contain sufficient factual content to tend to show a relevant failure.

182. Accordingly, this meeting did not amount to a protected disclosure.

Protected disclosure 3 email to Dr Penna

183. The tribunal accepted that this was a protected disclosure in respect of health and safety for following reasons.

184. The claimant's email focused on insufficient consultant cover for rotas, and the overlapping problem of excessive annual leave. In this email the claimant provided sufficient factual content in that she mentioned specific people and specific incidents. She also made it clear that this was an overarching complaint about the level of consultant cover. In the view of the tribunal the reasonableness and genuineness of the claimant's belief may have been coloured by her personal disagreement with Dr O (who had been appointed to the lead role in preference to her). Nevertheless, the tribunal accepted that her belief was reasonable for a person in her position, that is a consultant working in her specialist field with a high level of skill and knowledge of clinical matters. The tribunal bore in mind the guidance of the Employment Appeal Tribunal in Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, that a tribunal should have due respect for specialist knowledge when assessing the reasonableness of belief in such circumstances.

185. The Tribunal was bolstered in this view by the fact that Dr Penna in effect agreed with the claimant's concerns in a similar matter about consultants covering three clinical areas at the same time.

186. It was reasonable for the claimant to believe that this disclosure was in the public interest as it related to patient care in the NHS.

Protected disclosure 4 email to Dr Donohoe

187. Disclosure 4a was the claimant's email replying to Dr Donohoe's enquiry concerning a delayed response to a complaint from the patient whose bowel had been stitched to her skin. The tribunal considered whether this email contained sufficient factual content, which in the claimant's reasonable belief, showed a relevant failure.

188. Dr Donohoe was chasing up the investigation into a serious complaint. The claimant's email to Dr Donohoe was in the view of the tribunal written to explain to him why any failures in the investigation were not her fault. She made allegations against a colleague, Mr O, about clinical poor performance, in effect seeking to put the blame on him. However, this allegation against Mr O was not relevant to Dr Donohoe's enquiry. Dr Donohoe had not enquired about the substance of the complaint, but about the delay to the investigation. The claimant also in effect made allegations against Mr Lee in this email.

189. Later events showed that the claimant had not previously made Mr O aware of her allegation against him before referring to Dr Donohoe. When Mr O later saw the email to Dr Donohoe (protected disclosure 4a) he made a complaint in strong terms against the claimant on 6 February 2018. He stated that she had invented a conversation in order to place the blame on him for the poor patient outcome. He alleged that the claimant had shown a lack of probity and that she had falsified and fabricated information because of an adverse outcome in patient care. He stated that he felt strongly that this matter should not be left unaddressed.

190. The claimant's case, in her submissions, was that she had a reasonable belief that this disclosure tended to show endangering of health and safety, and/or a criminal offence had been committed, and/or that a legal obligation was not complied with : "It is important that patient concerns are investigated properly and thoroughly to prevent further serious incidents and to learn as part of training and development". The claimant's case was that the information disclosed tended to show a relevant failure because of a failure to investigate a complaint, rather than that the information tended to show a relevant failure in respect of the subject of the complaint. This made sense to the tribunal because the recipient of the disclosure, Dr Donohoe, was involved in the investigation process, in that he was chasing the claimant as to resolution, rather than the subject of the complaint.

191. Therefore, the tribunal considered whether the information disclosed tended to show a relevant failure relating to complaints handling.

192. The Tribunal determined that the claimant may have reasonably believed that there was a legal obligation to ensure that NHS complaints

were dealt with professionally and timeously. However, the tribunal did not accept that the claimant's belief that this information tended to show such a failure was objectively reasonable. In view of the tribunal, the purpose of this email was to deflect any blame from the claimant herself, rather than to disclose information tending to show a relevant failure in complaints handling. The claimant alleged that the delay was caused by others. The email chain was not entirely clear. It was not possible for the tribunal to determine with any precision where the blame lay, four years after the event. However, the email trail indicated that the claimant made a material contribution to the delay. Further, the claimant included irrelevant matters (the subject of the complaint) into her email. This undermined the argument that the claimant reasonably believed that she was disclosing information tending show a relevant failure in the handling of complaints because it indicated she was concerned with other matters.

193. The tribunal did not accept that the information tended to disclose anything relating to a criminal offence. The claimant cannot have reasonably believed that delays in complaints handling amounted to criminality. The tribunal also did not accept that the email contained information which in the claimant's reasonable belief tended to disclose that an individual's health and safety had been endangered. Even if the claimant reasonably believed that the information tended to show a failure in the complaints process, this was not information which tended to show that the health and safety of any individual had been endangered.

194. Protected disclosure 4b was the claimant's second email to Dr Donohoe the same day. This was an unsolicited email in that Dr Donohoe was not enquiring about this complaint.

195. The tribunal did not accept that the claimant in disclosing the information in this email reasonably believed that it tended to show a relevant failure. This was because she unreasonably believed that the complaint was part of an orchestrated campaign to undermine her. In paragraph 275 and 276 in her witness statement, she described this as one of "multiple attempts to show me in a poor light". In paragraph 345 she described it as a concern that "had been generated against me".

196. The claimant believed that the GP complaint had been improperly instigated or orchestrated by Mr Lee and his wife as part of a wider campaign to undermine her. The tribunal found no reasonable basis for the claimant's belief. The facts of the complaint were straightforward and did not appear in any way remarkable. The complaint was made by a GP following a failure at the respondent hospital to correctly diagnose Endometriosis (a condition with a poor diagnosis rate). A complaint from a GP in the circumstances was unremarkable. The complaint was not made by Mr Lee or his wife. Further, in her witness statement the claimant blamed the GP for the delay. She stated, "the GP should have

chased the hospital after not receiving any communication instead of waiting for 9 months". She also alleged that a fellow consultant (Ms A) was "clearly negligent" in this case.

197. The tribunal did not accept that the claimant reasonably believed that the information tended to show a relevant failure, rather she believed that this was a complaint which had been "cooked up" against her as part of an orchestrated campaign, and in respect of which she made serious allegations against fellow professionals.

198. Accordingly, the tribunal did not find that PD 4 was a protected disclosure.

Protected disclosure 5 telephone call with Dr Vinen

199. In the view of the tribunal, much of what was said by the claimant to the investigator did not have sufficient factual content to amount to a protected disclosure. For instance, she made various unspecified allegations about grading and blame culture.

200. The tribunal did not accept that what was said about the link between appointment as an NHS consultant and working in the second respondent's private clinic amounted to a protected disclosure for the following reasons. The claimant did provide some factual content. However, this content was confused and contradictory. It was unclear how the claimant maintained a belief in the link between NHS appointment and private work, when on her first application she was not appointed to a substantive post but was successful on later application. Her contention appeared to be that when she was unsuccessful in her application, Mr Lee was deliberately taking on poor quality candidates. However, later when she was appointed, he had changed and decided to take on good quality candidates. The claimant simply asserted that she was a superior candidate than the successful candidate. The lack of reasonableness in the claimant's allegation was reflected back to her by the investigator when they said, "what you are saying is that you were concerned that some people were appointed preferentially in one round because they said they weren't going to do private work then on another occasion it felt like you yourself have been specifically asked to commit to doing private work for another job".

201. The Tribunal determined that the claimant's belief in this disclosure was not objectively reasonable for a person in her circumstances. It was inherently inconsistent. The claimant appeared to start from the premise that she should have been appointed and accordingly there must be some improper reason when she failed. This premise became more unreasonable when she was appointed later.

202. The tribunal took into account the claimant's personal circumstances. She had specialist knowledge of how NHS consultant appointments

operate. She would have known that Mr Lee was only one of a number of decision-makers determining appointments. Accordingly, his ability to favour candidates was limited. Her belief was less reasonable because she did not believe that Mr Lee had managed to improperly affect consultant appointments occasionally, as might be the case given his limited input. She believed that he did so on numerous occasions.

203. The Tribunal considered whether the claimant's allegation to the investigators in this telephone call, that the clinical lead insisted she operate on a cancer patient on 31 January 2018, amounted to a protected disclosure. There was sufficient factual content in that she referred to a general concern about risk levels in operating lists and a specific patient example. In determining the reasonableness of her belief, the tribunal bore in mind that she was a consultant working in her specialist field. It reminded itself it must have due respect for her knowledge. It was difficult for the tribunal to in effect second-guess the claimant's specialist skill and knowledge as to whether or not an instruction to operate on this particular patient had endangered health and safety. However, the tribunal noted that the claimant had in the event refused to operate on the patient and accordingly there can have been no risk to patient health and safety on that day.

204. In seeking to ascertain the reasonableness of the claimant's belief that she disclosed information tending to show that health and safety had been endangered, the Tribunal took into account the claimant's dignity at work complaint and her witness statement because they contained information indicating what the claimant's beliefs were and how she had arrived at them. At paragraph 301 of her witness statement the claimant, when referring to this incident, stated that "the first respondent was setting me up to fail". At paragraph 221 she stated "after raising protected disclosure on 8 December 2017, the respondent made repeated and multiple attempts to involve me in a clinical incidents … Essentially "setting up" high risk scenarios (where patients were put risk) so as to generate poor outcomes and generate complaints against me. She included the incident on 31 January as an example.

205. Accordingly, the claimant believed that this patient had been placed on her list deliberately in order to generate a poor outcome and therefore a complaint against her. The tribunal was satisfied that the claimant had this belief at the time she spoke to the investigators on 9 February 2018 because she submitted her dignity at work complaint just over one month later on 12 March.

206. The tribunal did not accept that, in respect of the cancer operation, the claimant disclosed information which in her reasonable belief tended to show that the patient's health and been endangered. Firstly, the claimant believed that she was been set up to fail by the respondent. The tribunal did not find it reasonable for the claimant to believe that her claimant's colleagues, whether Mr O or Mr Lee, were deliberately putting patients

at risk (leading to poor outcomes for the Department and potential clinical negligence claims) because of a grudge against the claimant and/or a plan to undermine. Secondly, and less importantly, the claimant refused to operate on the day and accordingly there was no risk to health and safety.

207. Accordingly, the Tribunal found that this did not amount to a protected disclosure.

Protected disclosure 6 Dignity at Work Complaint against Mr Lee

208. The complaint began with an introductory paragraph setting out the claimant's overarching concerns, such as being undermined and the work environment affecting her ability to work safely. The introductory paragraph did not provide sufficient factual content to be a disclosure of information. Accordingly, the Tribunal considered each of the numbered complaints.

209. One difficulty for the claimant in establishing that she had a reasonable belief that this disclosure tended to show a relevant failure was that she did not explain why Mr Lee should have gone to considerable time and trouble to orchestrate a campaign against her. The claimant appeared to contend that Mr Lee had targeted her without reason. Whilst such motiveless malignity is not necessarily impossible, it made it more difficult for the claimant to establish a reasonable belief in his campaign against her, that is the factual basis for her belief that her disclosure tended to show a relevant failure.

210. The first complaint was that she had been undermined amongst the senior management team and by Mr Lee to management. She referred to an email sent by Mr Lee on 22 January 2018 to the senior management, "I am very concerned that you have refused to engage in issues pertaining to patient safety on more than one occasion". She stated that this was an unsubstantiated claim and "I believe this is an attempt to show me in a poor light". The tribunal could not find that this was information that in the claimant's reasonable belief tended to show that a relevant failure had occurred. The email of 22 January 2018 was a clinical director's criticism of a consultant's conduct and performance. There were no grounds on which a reasonable person in the claimant's position could believe that this tended to show a relevant failure.

211. The second complaint was that Mr Lee had escalated concerns to Dr Palin Corporate Medical Director - citing behavioural issues. The claimant alleged that Mr Lee and other colleagues had orchestrated further colleagues to express concerns about the claimant's behaviour to Dr Palin. The claimant did not explain why she believed that Mr Lee was orchestrating any action against her. She accepted that colleagues

other than Mr Lee had contacted Dr Palin about her. However, there did not appear to be any reasonable basis for her to believe that Mr Lee was orchestrating this. Even if it was reasonable for her to believe that Mr Lee was coordinating colleagues to contact Dr Palin with concerns about the claimant's behaviour, the tribunal could not see how this might relate to any relevant failure. A clinical lead escalating concerns to management does not tend to show that anyone has failed to comply with a legal obligation or that health and safety has been or is likely to be endangered.

212. The third complaint was that Mr Lee had generated concerns and complaints by junior doctors including Mr AK. However, the claimant did not say that Mr Lee had generated or was responsible for Mr AK's email (before the tribunal she made allegations against two other doctors), only that he failed to support her as she wished. The claimant's complaint was that she did not receive an unreserved apology and reflection from Mr AK, and that no disciplinary actions was taken against him. Mr Lee had deliberately delayed the matter and she had been undermined.

213. The tribunal could not find that this was a disclosure of information which in the reasonable belief of the claimant tended to show a relevant failure. There were no grounds on which the claimant might reasonably believe a criminal offence had been committed. This was a complaint that Mr Lee did not deal with her complaint against Mr AK as the claimant wished. She was dissatisfied with the apology from Mr AK and that no disciplinary action had been taken against him. Whilst the claimant might disagree with Mr Lee's management of the conflict between her and Mr AK, it was hard to see what legal obligation might, in her reasonable belief, have been breached. Further, the claimant knew that Mr AK had a suffered a heart attack shortly after sending the email and so a significant delay was inevitable.

214. The tribunal could not see that Mr Lee's management of the conflict between the claimant and Mr AK tended to show that health and safety was likely to have been endangered. There was a conflict between two doctors in his team which Mr Lee sought to manage. The fact that one of the doctors was dissatisfied with his failing to discipline the other doctor did not tend to show there was a health and safety issue.

215. The fourth complaint related to an incident on 31 January 2018 when a junior doctor had, in the claimant's opinion, failed to follow the consent procedure correctly concerning an operation. (The claimant later repeated the substance of this complaint but against the junior doctor's educational supervisor Mr A in a separate grievance, protected disclosure 8).

216. In the dignity at work complaint, this was presented as "an attempt by Mr Lee in collusion with other colleagues to generate complaint/concerns

against me". The tribunal considered whether the information tended to show the claimant's reasonable belief in a health and safety failure because she was concerned about the junior doctor failing to follow the consent procedure. However, the tribunal did not find that the claimant reasonably believed that this information tended to show a relevant health and safety failure because she stated in terms, "I have clearly not complained about this junior doctor", and she referred only to "feedback" to the junior doctor. If the claimant had genuinely believed that there was a health and safety issue, there was no reason that she would not have said so, in circumstances where she was making a number of other allegations. In contrast, this incident was presented as an attempt by the second respondent to collude with other colleagues to generate concerns about her. The tribunal could not see how such a belief was reasonably held.

217. There was no suggestion that Mr Lee was involved in this incident or how he might have become involved. The claimant accepted that the junior doctor made what she described as "profound allegations" against her. The claimant provided no explanation as to how Mr Lee could have manipulated the junior doctor into making a serious allegation against the claimant. The tribunal could not see how the claimant could reasonably believe that recounting this incident to the respondent disclosed information tending to show a relevant failure.

218. In the view of the tribunal these two incidents showed the claimant unreasonably, and with little if any evidence, assuming that Mr Lee was somehow orchestrating junior colleagues to complain about her.

219. The fifth complaint was that Mr Lee had generated conflict with another consultant, Ms S. The information provided by the claimant was confused. She complained that Mr Lee arranged several short notice meetings which she could not attend. The claimant alleged that she was "made to look like I was avoiding a meeting". This prompted an angry email from her colleague consultant.

220. In the view of the tribunal, the claimant's concern was Mr Lee's management style in that, "I felt that Mr Lee could have easily resolved this matter…" She complained about what she referred to as miscommunication and misunderstanding between consultants which Mr Lee could have resolved. Further, there were no grounds on which the claimant could reasonably believe that Mr Lee was generating conflict with Ms S over what the claimant described as "a trivial matter". The tribunal found that this information did not tend to show in the claimant's reasonable belief a relevant failure.

221. The 6th complaint related to Mr O, the lead in obstetrics and gynaecology (a post for which the claimant had unsuccessfully applied). The claimant alleged that Mr O, "started interfering in my role as education training lead". The claimant alleged that she had received

offensive and unprofessional emails from Mr O and that Mr Lee left her so unsupported that she felt she could not continue in her educational role. She stated that "I feel that this was a deliberate attempt by Mr Lee to take away my lead role in the department and generate a conflict…"

222. The tribunal could find no reasonable basis for the claimant's belief that Mr Lee had manipulated Mr O into interfering in the claimant work and sending any offensive and unprofessional emails. The only basis for this belief appeared to be that Mr Lee did not intervene in this matter to the claimant's satisfaction. Further the Tribunal could find no reasonable basis for the claimant's belief that recounting this matter amounted to information tending to show the reasonable failure had occurred. Again, this was a complaint by the claimant about Mr Lee's management style and that he did not intervene to her satisfaction in conflicts between her and her colleagues. This did not relate to any criminal offence, there was no reasonable belief that a legal obligation had been breached or that there was any endangerment of health and safety.

223. The 7th complaint was that she was "denied" the role of lead for obstetrics and gynaecology by Mr Lee, in favour of Mr O. The claimant asserted that due process was not followed for this appointment and that Mr Lee was biased against her. This allegation contained no particulars. The tribunal did not find that there was any reasonable basis for the claimant's belief that this tended to show a relevant failure. The claimant as a consultant in the NHS was aware of the NHS recruitment procedures and practices and that Mr Lee was only a member of a panel who made recruitment decisions. Further, at the relevant time she had only recently been appointed a consultant and there was no reasonable basis for her to believe that she was denied a role, a word that indicated that she believed she had some expectation
or entitlement. The tribunal found that this information did not in her reasonable belief, tend to show a relevant failure.

224. The 8th complaint was that Mr Lee asked the claimant to give up her role as lead for education. She alleged that she was the only substantive consultant without a lead or management-related activity, which hindered her professional development. Taking the claimant's case at its highest and accepting this allegation, there was no basis for any reasonable belief that this tended to show a relevant failure. If an NHS consultant lacks a local lead role which might be helpful to their professional development, this did not show that there was a failure to comply with any legal obligation or endanger health and safety. It was a personal matter relating to the consultant's professional development.

225. The 9th complaint was that the claimant was deliberately excluded by Mr Lee from a departmental decision when requisitioning equipment for the ambulatory unit. This undermined her role in the Department. The claimant did not say that the equipment or changes to the service were inappropriate or might constitute a health and safety risk. What she

disclosed was that she was not involved in obtaining the equipment and developing the service, and so was deliberately undermined.

226. It was not a reasonable belief by the claimant - who had considerable work experience in large NHS trusts - that a failure to consult a consultant in respect of equipment or changes which might be relevant to them constituted a deliberate exclusion by the clinical lead. The claimant would be well aware that equipment is requisitioned and changes occur in large NHS organisations without all stakeholders necessarily being consulted. In the view of the tribunal this was another occasion when the claimant believed that Mr Lee was somehow manipulating matters in order to undermine her, based on little evidence. Further, were the tribunal to accept that the claimant reasonably believed that Mr Lee was manipulating matters, the tribunal could not see how this tended to show any relevant failure. There was no question of a criminal offence. The claimant did not allege any health and safety issues. There was no suggestion of any legal obligation.

227. The 10th complaint was that the department had recently advertised for a new consultant post without consulting the claimant, although the post might have some overlap with her role. The claimant alleged that Mr Lee had taken this decision and, "I felt undervalued. This has given me an impression that the process of development of new posts/service within the department is neither transparent nor fair".

228. Again, taking the claimant's case at its highest in accepting that it was reasonable for the claimant to believe that Mr Lee had excluded her from the decisions, this was not information which tended to show a reasonable belief on the claimant's part that a relevant failure occurred. Whilst it might be good practice for relevant consultants to be consulted in developing new consultant positions within a department, failure to do so did not tend to show any criminal offence, or a failure to comply with legal obligation or that health and safety was likely to be in danger. It would be at worst, poor management and planning.

229. The 11th complaint was that Mr Lee had generated clinical incidents and concerns, being the GP complaint of negligence following the missed endometriosis diagnosis. In the view of the tribunal there was no reasonable basis for the claimant believing that Mr Lee had generated this incident. The claimant's account made clear that the claimant had attended the relevant patient on her theatre list. Thereafter, the GP sought a second opinion (from Mr Lee's wife, a senior consultant at a nearby trust) who diagnosed endometriosis. "Following this… this GP raised a red alert complaint… in the main… issue of critical negligence on my part…" There was no reasonable explanation as to how Mr Lee procured the GP complaint.

230. The claimant also stated that the Complaints team at the respondent were responsible for a two-month delay in processing the complaint. She

stated that "Mr Lee was aware of this red alert and could have resolved this easily…" thereby leaving the negligence allegation in circulation. However, there was no reasonable basis for the claimant's allegation that Mr Lee was responsible for the delay. She herself accepted that the delay was in the complaints team. Her complaint appeared to be that Mr Lee failed to chase up the complaints team. The tribunal could not see how alleging any such failure on Mr Lee's part could in the claimant's reasonable belief have amounted to information tending to show a relevant failure. At its highest, the claimant's allegation was that the clinical lead failed to chase the complaints department when they were slow in dealing with a matter relating to one of his team.

231. The 12th complaint was that Mr Lee had generated a number of clinical incidents and concerns against the claimant.

232. The first incident was a DATIX (an internal report) raised on 19 December 2017 by colleague consultant Ms S following what the claimant described as an unannounced, internal retrospective audit of her cases. Ms S's report essentially disputed the claimant's findings following an operation on 13 October 2017. The tribunal understood the claimant to be saying that there was something suspicious about the 19 December 2017 report and it had been orchestrated by Mr Lee. In her witness statement the claimant explained her reasoning behind this allegation. She stated that "I was concerned that this investigation was not genuine" and that it had been demonstrated that "the allegation had been entirely falsely fabricated". The claimant detailed a number of concerns she had about the report, including that there was no documentary evidence, that the report was delayed by 2 months, and that the reporting consultant had left the respondent very shortly afterwards.

233. Essentially, the claimant was alleging that a fellow consultant had fabricated an allegation against her, orchestrated by Mr Lee. In the view of the tribunal this was not an objectively reasonable belief for the claimant to hold. There was no rational reason to believe that a consultant would endanger their professional standing by entirely falsely fabricating an allegation against a colleague. There was no explanation as to why this consultant would do so. There was no indication that Mr Lee was involved in this incident. The tribunal accepted the respondent's evidence that the claimant was aware of a practice of so-called rolling audits which sometimes resulted in issues being identified some months later.

234. The second clinical incident was on 30 January 2018 when a third (high-risk and complex) case was added to the claimant's operating list at the last moment. There was insufficient factual content to establish why the claimant believed that this matter was suspicious or had been orchestrated by Mr Lee. In determining the reasonableness of her belief that this had happened, the tribunal considered the claimant's witness

statement. The claimant stated that "the respondent made repeated in multiple attempts to involve me in clinical incidents, patient complaints, conflicts and essentially "setting up" high risk scenarios (where patients were put at risk) to generate poor outcomes and generate complaints against me". At paragraph 300 she stated that the respondent "was setting me up to fail".

235. The tribunal did not accept that the claimant's belief that Mr Lee deliberately put patients at risk (thereby risking poor patient outcomes, clinical investigations and lawsuits) because of a grudge was objectively reasonable. It was still less reasonable for her to believe that he did so in a conspiracy with colleagues and admin staff. The tribunal accepted that claimant would have been aware from her experience that it was far from unusual for an extra case to be added to a theatre list late in the day. The claimant at paragraph 301 of her witness statement stated that another consultant operated on this patient the following day which was not consistent with her allegation that in effect she was targeted.

236. The third clinical incident was a report that the claimant had missed a cancer diagnosis in January 2018. The claimant alleged that the relevant notes for this case were missing from the respondent system. She also alleged that images relating to a different patient appeared to be "deleted". The tribunal understood the claimant to be alleging that Mr Lee was directly or indirectly responsible for records being deleted or altered in order to put the claimant in a poor light. The tribunal could find no reasonable basis for this belief on the claimant's part. The claimant, as an experienced NHS doctor, would be aware that if a misdiagnosis or other issue had arisen, it was very likely that the trust would have to investigate and give an account, either internally or externally, and potentially face legal proceedings. It would therefore be inherently unlikely for a clinical lead to deliberately handicap his department's ability to investigate, to discover what had happened and, potentially provide a defence in clinical negligence proceedings, by removing relevant documents, simply because of hostility towards a consultant. The reasonableness of the claimant's belief was further undermined by her alleging that he had involved a number of admin staff. If a clinical lead were genuinely seeking to falsify records in order to undermine a consultant, it would not be likely for him to take the risk of telling a number of admin staff what he was doing.

237. The 13th complaint was that Mr Lee preferred to use verbal communication rather than email, so that it was hard for the claimant to follow through on matters which were agreed, such as a review of her job plan, or that Mr Lee did not consider her appropriate for a particular role. In the view of the tribunal the claimant here was simply complaining about Mr Lee's preferred method of management. This was a workplace dispute and did not disclose any information which in the claimant's reasonable belief could tend to show a relevant failure.

238. The 14th complaint was that Mr Lee failed to support the claimant in a conflict with Mr O concerning her being rota'd at short notice which conflicted with childcare issues. This, again, was a workplace dispute between colleagues. Taking the claimant's case at its highest, being asked to work when this conflicted with childcare issues would have been inconvenient and frustrating. However, the tribunal could not see that stating Mr Lee's failure to manage any such error to her satisfaction amounted to disclosure of information which in the claimant's reasonable belief tended to show a relevant failure. This was a workplace dispute between individuals.

239. The 15th and final complaint was that the claimant had been rostered to cover 3 clinical areas simultaneously, thus increasing the clinical risk. She had raised this matter with Mr O and, after some difficulty, it was resolved. Mr Lee was copied into the emails but did not support her. This complaint was that Mr Lee had failed to support the claimant in reducing clinical risk, rather than a complaint that clinical risk had been increased. Nevertheless, in the view of the tribunal and bearing in mind the low threshold for reasonable belief, this complaint disclosed information which in the claimant reasonably tended to show that health and safety had been endangered. The reason for this is the reference to clinical risk and Mr Lee's failure to interfere. Again, the tribunal had due regard to the claimant's specialist knowledge. Accordingly, the 15th complaint was a qualifying protected disclosure.

Protected disclosure 7- email to Dr Sinha enclosing an email from a junior doctor

240. The tribunal accepted that the claimant's stated belief in her email that there were significant staff shortages in her department was reasonable, as evidenced by the precise information given by the junior doctor (for instance the number of unfilled shifts.) Further the Tribunal accepted that her belief that this information tended to show that health and safety of patients was likely to be endangered was objectively reasonable. Again, the tribunal had due regard to the claimant specialist knowledge this decision. Accordingly, the Tribunal accepted that this amounted to a protected disclosure.

Protected disclosure 8-grievance against Mr A

241. The incident giving rise to this grievance was the same as that raised in the fourth complaint in the Dignity at Work complaint (protected disclosure 6). However, protected disclosure 8 was a grievance against her fellow consultant Mr A

"for his handling of an incident… Involving my patient and (a junior doctor)", rather than against the clinical lead Mr Lee.

242. The claimant gave a detailed account of the junior doctor consenting the patient for surgery. The claimant did not raise the consent procedure by the junior doctor as a failure to comply with a legal obligation or a risk to

health and safety, but rather stated that she asked Mr A to provide the junior doctor with feedback. The Claimant summed up her grievance by stating she was concerned that the junior doctor was making unsubstantiated allegations against a consultant providing legitimate feedback.

243. In the view of the tribunal, the sense of this grievance was that the claimant was defending herself against the junior doctor's allegation and complaining of being undermined in front of juniors. This was not information tending to show that there had been a relevant failure, rather a dispute between the claimant and her colleague.

244. The only exception to this was the claimant's allegation that the junior doctor's conduct "is in my view extremely poor practice and cause for concern". But her consultant colleague disagreed and did not provide feedback to the junior. The Tribunal considered whether the claimant reasonably believed that this sentence disclosed information tending to show that health and safety had been endangered. (The tribunal did not accept that this information tended to show that the failure to comply with any legal obligation or a criminal offence had been committed.)

245. The Tribunal took into account the claimant's treatment of this incident in her dignity at work complaint in seeking to shine a light onto the objective reasonableness of the claimant's belief. In her dignity at work complaint the claimant did not state or indicate that health and safety had been endangered. Indeed, she stated in terms "I had clearly not complained about this junior doctor". In contrast, in her witness statement she stated in terms that the junior doctor's conduct was "potentially negligent". Nevertheless, she went on to state at paragraph 298 that she did not view this as a complaint or concern but simply a training need.

246. The tribunal further noted that the claimant did not raise any potential patient care issues over this incident for over 7 months. She did not raise a DATIX incident report, which she had done on at least one other occasion. This was not consistent with the claimant reasonably believing that the information tended to show health and safety had been endangered. In view of the tribunal the emphasis in this grievance was on the effect of this incident on the claimant, rather than any issue of health and safety. Taking the claimant's evidence in the round as to this incident and fact that she did not raise a potential patient care issue for 7 months, the tribunal did not accept that she reasonably believed that this information tended to show that the patient's health and safety had been in danger. Accordingly, the Tribunal found that this did not amount to a protected disclosure.

<u>Protected disclosure 9-grievance against Mr O</u>

247. Some of the substance of this complaint had already been raised in protected disclosure 6, the dignity at work complaint. Mr O was the clinical lead in the claimant's department.

248. The first complaint in this grievance related to Mr O interfering in her role excluding her from discussions and in particular conflict over the rota. In bold type she questioned why he interfered in her managing the rota, education and training and why he did not communicate, wrote offensive emails and persistently harassed her with multiple emails.

249. In view of the tribunal, it was not objectively reasonable for the claimant to believe that these matters tended to show a relevant failure. The claimant was here recounting a conflict with a senior colleague over how the rota operated. The claimant again complained that when she sought to involve Mr Lee he failed to get involved. Taking the claimant's case at its highest (as the tribunal did not hear sufficient evidence on this) even if Mr O had unjustifiably interfered in the claimant's role and did not manage the rota effectively, this was a workplace dispute. The claimant believed that she had been "denied" Mr O's clinical lead role and she objected to how he was carrying out the role. It was not objectively reasonable for her to believe that she was disclosing information tending to show that he was failing to comply with any legal obligation or putting health and safety at risk.

250. The second complaint was a question, not information – whether Mr O had decided to remove the education training role from the claimant. This was not a disclosure of information.

251. The third complaint was a further reference to Mr O wanting the claimant to cover a colleague's shift when she had childcare issues. For the reasons set out above, the claimant did not have an objectively reasonable view that this tended to show that any legal obligation had been breached or that any health and safety had been endangered. Taking the claimant's complaint at its highest, Mr O was failing to fit around her childcare needs.

252. The fourth complaint was an email (copied to others in the Department) asking the claimant to explain why she was unable to come into work. She stated in bold type that she felt humiliated and he had implied that she had not been truthful. In view of the tribunal, it would have been upsetting for the claimant that this email was sent around the department, although it was reasonable to ask the claimant to explain why she was unable to attend. However, the tribunal did not accept that the claimant reasonably believed that recounting this incident disclosed information tending to show that the clinical lead was failing to comply with any legal obligation. The claimant was upset at the way that Mr O managed her.

253. The 5th complaint was the clinical lead, Mr O, interfered in her clinical work. This was a further reference to a third (high risk) case added to the claimant theatre list, already referred to in the dignity at work complaint. The claimant stated in terms "I felt it was unsafe to proceed with procedure…" The claimant did not allege in terms that Mr Lee or anyone else had deliberately put the case in her list "to set her up to fail", but rather that the case "was almost certain to result in a failed procedure or complication" and was "forced specifically onto with incomplete work up".

254. The tribunal had regard to its findings in respect of protected disclosure 5 concerning the disclosure about this incident. However, the claimant went into more detail in this grievance. The tribunal accepted that there was sufficient factual content in this disclosure to amount to information. The difficulty for the claimant was whether the belief was reasonably held. The tribunal relied on the same factors as in protected disclosure 5, briefly that the cancer case was deliberately added to the claimant list to generate a poor patient outcome and a complaint against her as part of orchestrated campaign. It found that her belief that the disclosure tended to show a relevant health and safety failure was not objectively reasonable because her attitude to this incident was based on an unreasonable assumption that this was, in her words, a "setup".

255. Accordingly, the tribunal found that this did not amount to a protected disclosure.

Protected Disclosure 10 Grievances against Mr Lee

256. It was not disputed that that protected disclosure PD 10.1 was the same as protected disclosure 6. The tribunal therefore repeated its findings that this did not amount to a protected disclosure save in respect of allegation 15.

257. The tribunal did not accept that PD 10.2, the grievance relating to the private clinic was a protected disclosure for the following reasons. The tribunal had found that, when making her earlier allegations about the clinic, the claimant did not have an objectively reasonable belief that the disclosure had tended to show a relevant failure. The tribunal found that the claimant did not reasonably believe that this grievance tended to show a relevant failure for the same reasons. The tribunal had also previously found that the claimant's allegation that malicious and fabricated complaints were manufactured by Mr Lee was not reasonably held. Accordingly, the 2 grievances did not amount protected disclosures.

Protected disclosure 11-email to the CQC

258. The respondent accepted that, if this was a qualifying disclosure, it would be protected although not made to the claimant's employer.

259. Much of the complaint to the CQC overlapped with the substance of previous disclosures. The claimant stated that Mr Lee in collusion with Mr A and Mr O ran "a sustained campaign of bullying and harassment to undermine my role in the Department and generate complaints and conflicts". In addition, the claimant alleged that there was a possibility that senior management were actively seeking out doctors who were raising concerns. She stated "I believe that the trust has run a sham investigation in January 2018 with the explicit aim of identifying whistleblowers and I have been identified as one.… A decision is made at the highest level to go after these doctors." She alleged that the third and fourth respondents were directly responsible for misuse of the policy. She stated that "As HR director Mr Palin has complete control over HR managers and HR processes e.g., grievances complaints sickness policy job planning and suspension/dismissals". She alleged that the trust's practice was to not make any attempt "to see the evidence or establishing facts". She alleged without providing names or details that other consultants at the hospital had been targeted in this way.

260. The tribunal did not find that the claimant disclosed information which she reasonably believed showed a relevant failure for the following reasons.

261. The claimant did not provide the Care Quality Commission with the full relevant information in respect of the investigation of the anonymous complaint. It was at least disingenuous not to state that she was the anonymous complainant. The claimant deliberately misspelt a relevant factor. If the claimant had reasonably believed in her allegations, there was no reason for her not to explain that she had felt it safer to make an anonymous complaint and to go on to say that her fears had been proven right because she had still been targeted when the respondent worked out that the complaint came from her. She insisted that the Care Quality Commission keep the grievance confidential, so there was no reason not to tell them that she was the anonymous complainant.

262. The claimant characterized Dr Vinen's investigation of the anonymous complaint as a sham investigation intended to identify whistle-blowers. There was no reasonable basis for this belief.

263. The claimant, an experienced NHS doctor who had worked at the trust for several years was aware that Mr Palin was not as she alleged HR director. She was also aware that he did not have "complete control" over all HR processes including dismissals. She knew that he was a consultant and Corporate Medical Director for Medical Workforce and Professional Standards. The claimant had received a number of communications from Mr Palin and had met him at a formal meeting. She can have been under no reasonable illusions as to his role.

264. Further, as time went on the claimant's allegations had expanded. She had steadily increased the number of those said to be involved in the campaign against her. The original allegation was that Mr Lee was manipulating the Department. However, by the time of the allegation to the CQC she also included Mr O and Mr A. Having previously said that Mr Palin was misled, she now alleged that he and the third respondent were "going after" doctors such as herself and were making no attempts to establish the facts or find evidence. She further expanded her complaint to cover a widespread practice at the respondent of targeting whistle-blowers. However, she provided only vague and unparticularised allegations of this.

Protected disclosure 12 - email to NHS Improvement

265. The respondent accepted that the 24 January and 2 February emails to NHS improvement were a qualifying disclosure, but were not protected under section 43F because NHS Improvement was not a prescribed person. The respondent denied that the original complaint and the emails up to 21 January amounted to qualifying disclosures.

266. The respondent contended that as NHS improvement was not specifically named in the Public Interest Disclosure (Prescribed Persons) Order 2018, the otherwise qualifying disclosure was not protected. However, the tribunal accepted the claimant's case that NHS Improvement was a prescribed person for the purposes of s43F Employment Rights Act as follows. During the period of the qualifying disclosures (up to February 2019) an organisation called Monitor was a prescribed person under the relevant Order. From 2016 Monitor became part of NHS Improvement. The signature from NHS Improvement in an email to the claimant referred to NHS Improvement as including Monitor. Further NHS Improvement considered itself to be a prescribed person.

267. Accordingly, the tribunal found that the emails of 24 January and 2 February were qualifying protected disclosures.

268. The tribunal went on to consider the original complaint and the emails up to 21 January. The substance of these complaints very substantially overlapped with

the substance of protected disclosure 11 and the tribunal applied the same reasoning. For the same reasons as set out above in respect of the Care Quality Commission, the tribunal did not accept the claimant's allegations of a sham whistleblowing complaint was objectively reasonable. Again, the claimant failed to inform NHS Improvement that she was the anonymous complainant. Again, the claimant incorrectly identified Dr Palin as HR director who had full control over all matters including dismissals.

269. For the same reason as set out above, did tribunal did not accept that the claimant had an objectively reasonable belief that her disclosures concerning Mr Lee's private clinic tended to show a relevant failure.

270. Accordingly, the tribunal found that the original complaint and emails up to and including 21 January did not amount to a qualifying protected disclosure.

271. The tribunal went on to consider whether any of the respondents were aware that the claimant had made this qualifying protected disclosure.

272. The claimant stated in her submissions that it was likely that Dr Palin was aware of the disclosure to… NHSi and it can be inferred he was informed of this at the same time NCAS [National Clinical Assessment Service, now Practitioner Performance Advice Service] informed him that the claimant had made a subject access request under data protection legislation against the respondent.

273. However, there was no evidence that the respondents were aware of the complaint to NHS Improvement. The Claimant had during proceedings applied for third-party disclosure orders against organisations such as NHS Improvement. However, an Employment Judge had found that this application was in effect a fishing expedition and the application was rejected. The Tribunal did not go behind this decision and was not invited to do so.

274. The tribunal did not accept that the fact that the respondent was told that the claimant had made a subject access request under data protection legislation against it, indicated that the respondents were aware of the claimant's complaint to NHS Improvement. NHS Improvement and the National Clinical Assessment Service were separate organisations. The claimant in terms asked that her identity be kept confidential from the trust.

275. Accordingly, the tribunal found that none of the respondents were aware at the material time that the claimant had made any disclosure to NHS Improvement.

Protected Disclosure 13-to the National Guardian Office

276. The respondent accepted that the element of the complaint relating to high rates of HIE injury amounted to a protected disclosure. However, it denied that this was a qualifying disclosure because the National Guardian office was not a prescribed person the purposes of section 43F.

277. The tribunal accepted the claimant's case that the National Guardian Office was a prescribed person as follows. The National Guardian Office was set up in 2016

by the Care Quality Commission, NHS England and NHS improvement to tackle specific issues relating to whistleblowing. It is a non-statutory body which relies on the powers of its funders including those set out above, all of whom

are prescribed Persons. It referred to itself as a prescribed person. It has reported annually in accordance with the requirements in the Prescribed Person (Reports and Disclosure of Information) Regulations 2017. Accordingly, the Tribunal accepted that the allegations in respect of HIE injury amounted to a qualifying protected disclosure.

278. The tribunal went on to consider the other elements of the putative disclosure. The tribunal accepted that the claimant provided sufficient factual basis in that she provided names and some details of what had allegedly occurred. However, it was difficult to assess the reasonableness of the claimant's allegations as they appeared to be thirdhand and the claimant had little personal knowledge of the events. Nevertheless, the fact that a claimant does not have personal knowledge of the information contained in a disclosure does not prevent it from being a qualifying disclosure. In the circumstances and taking into account that the threshold for reasonable belief is low, the tribunal accepted that the allegations in respect of other consultants amounted to a qualifying protected disclosure.

279. The tribunal did not accept that the allegations in respect of the trust investigation into the anonymous complaint were objectively reasonable for the following reasons.

280. The tribunal, for the same reasons as relied upon in respect of the earlier disclosures, did not accept that the claimant reasonably believed that her allegations in respect of the trust's treatment of her complaints tended to show a relevant failure.

281. Before the tribunal, the claimant accepted that she had made allegations of unlawful discrimination against the respondent because she was Asian, Muslim and female on an essentially speculative basis. Nevertheless, she stated in her complaint, "I believe the trust is engaged in active discrimination against me" on that basis. As the claimant accepted that she had no evidential or other basis for these allegations, and that they were made as a matter of speculation, she cannot have reasonably believed that they tended to show a relevant failure.

282. Finally, the claimant misled the National Guardian Office by stating that "the trust claimed to have received anonymous concerns". In reality, the claimant knew that the trust had received the anonymous complaint because she had sent it. Accordingly, the tribunal did not accept that she reasonably believed that disclosure of this information tended to show a relevant failure.

283. The tribunal went on to consider whether the respondents were aware of the disclosure to the National Guardian Office. In contrast to other organisations such as the Care Quality Commission, in her submissions the claimant did not contend that the NGO was aware of the disclosure.

The claimant provided no evidence in her witness statement that the respondents were aware of the disclosure.

284. The tribunal could find no evidence indicating the respondents were aware of the disclosure and accordingly made a finding that they were not aware.

Protected disclosure 14-the General Medical Council

285. The respondent accepted that the GMC was a prescribed person and that the information disclosed in respect of specific patient details amounted to a qualifying protected disclosure. It denied all other matters were protected disclosures.

286. The tribunal did not accept that the claimant reasonably believed that the other information contained in this disclosure tended to show a relevant failure. At no point prior to this disclosure had the claimant contended that Mr Lee or Dr Palin or anyone else been involved in deliberately bringing about the death of a patient as possible orchestrated campaign or because of a grudge against the claimant. The tribunal was of the view that this was another, albeit extreme, example of the claimant expanding her allegations over the course of time. She provided no evidence that either of the doctors were involved in the care of this patient or would have been in a position to bring life to a premature end. This was an exceptionally serious allegation which could have caused very material distress to the bereaved relatives as well as professional embarrassment to the doctors accused. It was telling that no party thought that the GMC or any other body, including the police, had taken any action in respect this allegation.

287. Save for those matters accepted by the respondent, the tribunal could not find that a complainant who had alleged that 2 doctors had deliberately brought a patient's life to an end because of a grudge against her, could be said to have reasonably believed anything related to that contained in that disclosure. Accordingly, apart from the respondent's specific concession, nothing amounted to a qualifying protected disclosure.

288. The tribunal went on to consider whether any of the respondents were aware of the disclosure to the GMC.

289. On behalf of the claimant, it was submitted "it… Seems likely that Dr Palin was aware of the claimant's disclosure to the GMC in his capacities as responsible officer. It is also likely that the information which had been fed to the trust."

290. In her witness statement the claimant contended that the GMC investigate concerns by discussing them "with you and your RO [reporting officer]". As the third and fourth respondents were reporting

officers for the first respondent, she contended that they would have known about the disclosures made to the GMC. However, the claimant in the previous paragraph (659) stated that the GMC told her on 24 June 2019 that they were not able to investigate the adequacy of the local investigation.

291. Further, Dr Palin gave oral evidence to the tribunal that he was unaware of any referral against him to the GMC and that he would have certainly remembered one, particularly in relation to a death, and particularly a death he was accused of orchestrating. The tribunal found Dr Palin's evidence to be compelling and plausible and accepted that he had no knowledge of the GMC referral. The Tribunal was bolstered in this finding by the fact that the GMC did not investigate and it was therefore plausible that they had not contacted relevant reporting officers at the respondent.

292. Accordingly, the Tribunal found that the respondents were not aware of the claimant's protected disclosure to the GMC.

Protected disclosure 15-the Secretary of State

293. No case was made by the claimant in submissions that the respondent could or had been aware of this email. This was in direct contrast to contentions that the respondent was aware of the disclosures to the Care Quality Commission, National Health Service information and the GMC. The claimant in her witness statement made a bare assertion that the respondent would have been aware of this disclosure. However, she provided no explanation, or evidence, as to how. The respondents for their part denied any knowledge.

294. In these circumstances, the tribunal did not find it proportionate to consider whether this amounted to a protected disclosure because it made a finding that none of the respondents had any knowledge of this disclosure.

Protected disclosure 16- freedom to speak up guardians

295. It was not proportionate to consider whether this amounted to a protected disclosure because the claimant in her submissions conceded that the respondent was not aware of this disclosure.

Protected disclosure 17-grievance against Dr Palin

296. The Tribunal reminded itself that the claimant had met Mr Palin only once, in November 2018 when he was seeking to arrange her return to work and to manage the MHPS investigation and her grievances. She also believed at the time she submitted the grievance (December 2019) that he had been involved in deliberately shortening the life of a patient in order as part of a campaign against the claimant. She was so certain

that she had made a complaint to the GMC and police alleging this. In the view of the tribunal, this shed a useful light on the reasonableness of her belief that the information in this grievance tended to show a relevant failure. The claimant was capable of believing an exceptionally serious and entirely unsubstantiated allegation against Dr Palin, based on one meeting and a number of exchanges by email and telephone. Finally, she unreasonably believed that he was HR director, despite being in possession of information to the contrary.

297. The tribunal found that much of the claimant's belief as to Dr Palin's involvement in these events was based on her unreasonable belief, stated in the grievance, that he was HR director. This was her explanation of his being responsible for the allegedly fake investigation into her anonymous complaint. She had no other reason to believe that Dr Palin was involved. Further, there was no reason to believe that the findings of this investigation were concealed, or a full report was not submitted to third parties. The investigation of the anonymous complaint was commissioned by the third respondent and carried out by Dr Vinen.

298. The claimant's belief that Dr Palin had instigated the MHPS investigation because he had secretly identified her as a whistle-blower and had generated complaints against her by her colleagues had no reasonable basis. Dr Palin did not work in her department, and she had previously made the same allegations against a different person, Mr Lee. There was no reasonable basis for her expanding her allegations to include Dr Palin. Her belief that Dr Palin had been responsible for instigating the MHPS investigation was correct but there was no reasonable basis to link that with the investigation of her own anonymous complaint or the complaints against her from her colleagues.

299. There was no reasonable basis to her belief that Mr Palin had offered to "exchange" the investigation with her grievances. She knew from his letter that he had proposed a preliminary general investigation of all matters and has not ruled out formal investigation under MHPS or the grievance procedure, as appropriate.

300. There was no reasonable basis for her belief that he had refused to provide details of the complaints. He had intended to provide details by way of a face-toface meeting in March, but the claimant had resisted attending the meeting and then been absent sick. She knew that he had proposed a preliminary investigation of all matters including the complaints against her.

301. There was no reasonable basis for her allegation that he refused to let her return to work. Her allegation that it was unsafe for her to work under Mr Lee's clinical supervision when he was department clinical director was not reasonable. Further, it was not reasonable to allege that the offer of a temporary position at Denmark Hill failed to take into account her ongoing health issues. She was aware that she was offered a seven-

week phased return including considerable support in dealing with on-call work after 7 weeks.

302. There was no reasonable basis for her allegation that he threatened her with a GMC referral. The Tribunal was taken to no evidence that this had occurred.

303. There was no reasonable basis for the allegation that he was aware that the department had generated a false clinical negligence claim against the claimant in respect of the patient JT and intended to "ambush" her with this on return. This was because there was no reasonable basis for her belief that the respondent had generated a false clinical negligence claim. Again, the claimant appeared to believe that there had been a conspiracy in respect of a deceased cancer patient where there was no such evidence.

304. Further, there was no reasonable basis for her belief that that he had had some patients contacted in order to raise false and malicious concerns against the claimant. This was an even less reasonable belief than the earlier allegation against Mr Lee. Mr Palin did not work in her department there was no reason to believe that he would know who her patients were often might be useful to contact. As the respondent pointed out, Dr Palin had allegedly been active in this conspiracy months before he met the claimant. This was self-evidently unreasonable.

305. Finally, there was no reasonable basis for her belief that Mr Palin was involved in stopping her salary in April 2019. The claimant would have been aware that she had simply exhausted to entitlement to sick leave.

306. Accordingly, the claimant did not disclose information which in her reasonable belief tended to show a relevant failure in her grievance against Dr Palin.

<u>Causation</u>

307. The tribunal went on to consider the question of causation, that is what if any influence did the protected disclosures of which the respondents were aware have on the decision-makers in respect of any detriment.

308. The tribunal had established on balance of probabilities that the claimant made the following protected disclosures of which the respondents were aware:

a. Pd 3 The claimant's email to Dr Penna on 19th December 2017;
b. Pd 6 The claimant disclosing that she had been rostered to cover three clinical areas at the same time in her dignity at work complaint of 12
March 2018;

c. PD 7 – the claimant passing on a junior doctor's complaint about staff shortages on the rota on 31 May 2018.

309. According to the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL, "detriment" means suffering a disadvantage of some kind. Whether something that amounts to a Detriment must be assessed from the point of view of the victim. It is not necessary for there to be physical or economic consequences. An action or failure to act may amount to a detriment.

310. The tribunal went on to consider whether the claimant was subjected to a detriment on the ground that she had made any or all of these 3 disclosures. The tribunal directed itself in line with Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA. A tribunal must determine whether the protected disclosure materially (that is more than trivially) influences the decisionmaker who subjected the claimant to detriment.

311. The case law recognises that it is relatively rare for an employer to admit that it has subjected a worker to detriment for making a protected disclosure. On many occasions a tribunal will be invited to draw inferences to this effect. The Employment Appeal Tribunal under its President in International Petroleum Ltd and ors v Osipov and ors EAT 0058/17 set out at paragraph 115 the correct approach to the burden of proof as follows:

(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.
(b) By virtue of s.48(2) ERA 1996 , the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight at paragraph 20.
(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

Detriment a failure to consider the claimant for a clinical excellence award

312. It was unclear on the facts whether the decision not to award the claimant a clinical excellence award was made before or after her email to Dr Penna on 19
December 2017. However, as respondent could not show that it was made before the protected disclosure, the tribunal proceeded on the basis that it happened after the protected disclosure.

313. The tribunal was not satisfied that PD 3, the claimant's email to Dr Penna concerning the risk profile having deteriorated significantly due to rota and supervision issues, constituted a more than trivial reason for the

claimant's failure to obtain an award. Even if Mr Lee was aware of this email, and there was no evidence that he was, it was only a supposition on the claimant's part that this had any bearing on the failure to make an award.

314. However, if the claimant had discharged the burden upon her, the tribunal would find that the respondent had shown a lawful reason why the treatment was done. The claimant applied for an award in her first year of eligibility; she was a relatively recent appointee. The claimant had not provided evidence to the tribunal showing that her of standard work was "excellent". The tribunal had sight of a respondent internal email recording that she was 1 of 11 unsuccessful candidates. The decision, it was not disputed, was made by a panel, not Mr Lee alone. The tribunal declined to draw an inference, as invited by the claimant, from the lack of documents relating to this decision. This decision occurred in 2017, about 5 years prior to the hearing. Further, as the claimant accepted in her submissions, by 7 March 2018 there was a complaint from another doctor about a failure of information about the application for the award. This was consistent with any delays or procedural shortcomings not being due to the claimant's protected disclosure, but to generic problems in the process.

Detriment b failure to consider the claimant for Education Lead role, June 2018

315. This detriment was not made out on the facts. The claimant was considered for the Education Lead role. The claimant failed to follow the correct process set out in the advert, to contact the medical education manager. She sent an email to in effect the wrong person. Further she failed to comply with the process, that is provide a CV and supporting letter. Nevertheless, she was considered for the role.

Detriment c - the claimant not being informed until October 2018 of the decision to instigate MHPS

316. The tribunal accepted this amounted to a detriment particularly as the claimant found out, to her surprise via her union. This decision was taken by Dr Palin. The tribunal took into account the respondent internal emails, in particular from Dr Penna to Dr Palin on 12 February that, as soon as the investigation was started it was expected that the claimant would submit a counter grievance. The tribunal accepted that this was evidence that the respondent was wary of the claimant raising issues. However, this email was evidence that the respondent was preparing to tell the claimant about the investigation and was preparing for her reaction. There would be no need to prepare a reaction if the intention was not to tell the claimant.

317. The tribunal had sight of emails from Dr Palin seeking to invite her to a meeting to inform her about the process. She proved reluctant without

further information and Dr Palin was reluctant to tell her about the process by email. The tribunal accepted Dr Palin's account that he wanted to give a doctor a personal introduction into the process, which could be troubling and stressful. Further, the tribunal accepted that Dr Palin had sought to give the claimant some idea of the situation by referring to multiple concerns about her behaviour. The tribunal did not accept the claimant's contention that Dr Palin telling her to attend a meeting was not a reasonable management request. Dr Palin's role required him to have meetings with doctors in such a situation.

318. The tribunal accepted Dr Palin's evidence that it was his practice not to tell a doctor about such an investigation until they were recovered. The tribunal took into account the email from NCAS confirming that management of the case was put on hold until the claimant returned to work. Considering the email chain between the claimant and Dr Palin, the tribunal found that it was due to the claimant's actions that she was unaware of the process before she went off sick. If she had agreed to the reasonable management request to attend the meeting, she would have been aware.

319. Further, whilst the decision to instigate the process was not relied on as a detriment, it shed a useful light on the failure to inform. The tribunal had sight of correspondence between senior members of the respondent and complaints from the claimant's colleagues. Further, the letter from the consultant body in May 2018 (after the decision to instigate the process) was good evidence that grave concerns existed in the consultant body about the claimant's conduct and performance. The letter stated that consultants had raised concerns with management previously, and logically this must have been before 13 March. This was consistent the claimant's colleagues having raised concerns about her as contended by Dr Palin.

320. There was nothing obviously untoward about the decision to instigate a MHPS process in the opinion of the tribunal. The tribunal had determined that the claimant's belief that the issues raised about her by her colleagues were part of an orchestrated campaign by Mr Lee was not reasonably held. The claimant's belief that the MHPS process was started in bad faith was inextricably linked to her belief that her colleagues were deliberately putting her in situations (such as putting a high-risk patient into her list) in order to produce poor patient outcomes and hence a complaint. The tribunal had not found this to be a reasonable belief.

321. The claimant contended that the tribunal should draw an inference that the process was started in bad faith because according to the respondent's internal tracking system, the process started in January, and this was repeated in the respondent's grounds of resistance. However, the tribunal noted in an email on 23 March 2018 the Medical Workforce Manager stating that they needed to record the process of

the tracker but had not been able to do so. The tribunal on the balance of probabilities found that the most likely explanation to the date of January was a poor record-keeping system, as contended by the respondent.

322. The tribunal found that the decision not to tell the claimant about the process until October was not materially influenced by the 3 protected disclosures.

Detriment d - failure to provide information about the MHPS process following requests from October 2018 to January 2019

323. The tribunal was satisfied that the respondent had failed to provide information about the process on the number of occasions from October through to January 2019. However, the tribunal did not accept that a more than trivial reason for this was the 3 protected disclosures.

324. In the view of the tribunal by October 2018, it was inherently unlikely that the respondent viewed the 3 protected disclosures as in any way material. The third disclosure simply passed on a letter from a junior doctor listing concerns which, it was clear from the text, were already known. The tribunal was satisfied that this had no influence on the respondent's thought processes. The other 2 disclosures related partly to risk management in the claimant's department but predominantly to matters concerning rostering. In clear effect all disclosures focused on a shortage of consultant staff and medical resources in general.

325. By the time the respondent failed to provide details about the process in October 2018, a very great deal of water had passed under the bridge. The claimant had made significant allegations about Mr Lee's private clinic in Dr Viren's investigation and, on her case, this had identified her as a whistle-blower. Further she had made a wide-ranging dignity at work complaint against Mr Lee and, on her case, this this resulted in her being victimised as a whistle-blower. The respondent had instigated an MHPS process. The claimant had raised grievances against 2 of her colleagues. The respondent had received a letter making serious allegations against the claimant from her consultant body in May 2018. In view of the tribunal, it was, on the balance of probabilities, improbable that the respondent's failure to provide the information requested was in any sense whatsoever influenced by 2 relatively brief protected disclosures which had occurred sometime previously.

326. Until the claimant refused the respondent offer of a general investigation into both MHPS and her grievances against her colleagues, (which soon included 2 further grievances against Mr Lee), the tribunal accepted the respondent's case that there was nothing to reveal to the claimant and it would not be appropriate to do so prior to the generic investigation. The respondent's internal emails showed that Dr Palin and colleagues were putting a good deal of effort into getting the claimant back to work.

This was shown by frustration from Dr Palin and others when Dr Penna, from their point of view, threw a spanner in the works as to the post at Denmark Hill. The tribunal accepted that Dr Palin would not want to provide the claimant with details of the complaints as this could easily derail both the generic investigation and prospects of getting the claimant back to work.

327. The third respondent accepted that she could have told the claimant more after the claimant's request for information by email on 12 November 2018, especially as the claimant had rejected the idea of the generic investigation and therefore the MHPS was going ahead. The tribunal had sight of an email by the respondent to the claimant referring to the MHPS, but this was edited out of the final version. However, the tribunal accepted that the respondent did not want to interfere in the usual MHPS process by providing information prior to a meeting. The respondent was also still concentrating on trying to get the claimant back to work. The tribunal accepted that this lack of information would have caused the claimant distress and worry. Nevertheless, the tribunal did not find that there was a link between the earlier 3 protected disclosures and the respondent's failure to provide information.

328. When the claimant sent a letter from a lawyer on 22 January 2019 requesting information, the respondent also put this matter in the hands of its lawyers. At this point with solicitors involved, both sides would inevitably be less flexible and show much more caution. In effect both parties were digging in. On the balance of probabilities, the respondents would have concentrated on the more significant recent matters, such as the claimant's dignity at work complaint and ongoing grievances.

Detriment e the respondent not dealing with the claimant's protected disclosures accordance with policies and escalating concerns

329. This detriment was in reality made up of a number of separate detriments. However, the claimant did not say who was responsible for each detriment and on which of the 3 protected disclosures she relied. For the tribunal, this constituted a significant difficulty for the claimant in establishing liability. Further the tribunal understood the claimant to say that a failure to deal properly with all disclosures in the list of issues, whether the tribunal had found them to be qualifying protected disclosures or not, were relied on as detriments.

330. PD 1, the meeting with Dr Cottam occurred before the first of the protected disclosures and accordingly cannot have been influenced by it.

331. PD 2 also occurred before the first of the protected disclosures.

332. PD 3 was a protected disclosure. The tribunal did not accept the claimant's somewhat difficult contention that failing to investigate a

protected disclosure was in itself a detriment arising out of that disclosure. Nevertheless, if the claimant's case on this point was correct, the tribunal would have found no basis for the claimant's contention that the respondent had failed to deal appropriately with this matter because of the nature of the claimant's complaint. The documents show Dr Penna telling Mr O that he was not managing the lists and roster appropriately and that he had permitted to take too many people taking annual leave. In effect, she was acting on the claimant's concerns and taking steps to avoid the risk. The tribunal accepted that her email indicated that she was concerned that the claimant would raise a complaint if these matters were not attended to. Nevertheless, Dr Penna took active steps to deal with the claimant's concerns. The tribunal did not accept that this was a detriment.

333. PD 4 were the emails to Dr Donohoe. The tribunal accepted Dr Donohoe's evidence that he was not aware of the email to Dr Penna (PD 3) as there appeared no reason that he should be. His role did not overlap with any of the substance of the disclosure. He was only involved because a matter had come up at a relatively high management level. Whilst the tribunal had concerns about the quality of the rest of Dr Donohoe's evidence (for instance his statement did not refer to PD 4.2 at all), the tribunal found on the balance of probabilities it was more likely that as a senior employee who had been briefly involved in this matter nearly 5 years ago, it was matter of poor recollection rather than his trying to mislead the tribunal.

334. PD 5 was the claimant's telephone conversation with Dr Vinen. The tribunal accepted that Dr Vinen dealt with the claimant's interview in the investigation of the anonymous complaint in line with policies. She was based at the Denmark Hill site and her speciality was entirely separate from that of obstetrics and gynaecology. There was no evidence to suggest that Dr Vinen was aware of PD3 to Dr Penna. This was inherently unlikely as, when she was appointed, the identity of the anonymous complaint was unknown. There was accordingly no reason for anyone to tell her about the claimant's protected disclosure which was in no way related to the allegations about Mr Lee in a private clinic.

335. There was no evidence that the investigation was carried out other than in line with the respondent and NHS policies on anonymous complaints. The tribunal had sight of a considerable number of interviews carried out by Dr Viren. The tribunal's opinion was bolstered by the fact that it was a joint trust investigation.

336. Accordingly, the Tribunal found Dr Viren did not know of the protected disclosure and that her investigation report was in no way whatsoever influenced by it. In any event the tribunal did not accept that the investigation subjected the claimant to a detriment. Dr Vinen considered the evidence and reached her conclusions. The claimant was the only person to corroborate materially the allegations in the anonymous

complaint. In affect her testimony was very significantly outweighed by contradictory testimony from her colleagues.

337. PD 6 was the dignity at work complaint against Mr Lee. The claimant did not contend in her evidence that Mr Sinha knew about her protected disclosures. She relied on the fact that he knew about the MHPS and that this may have biased him against her. Accordingly, whilst the tribunal made no finding on bias, on the claimant's own case there were other explanations for any shortcomings in the investigation no suggestion that Mr Senna was aware of the disclosures and could have been influenced.

338. In any event, the tribunal did not accept the claimant's case in submissions that the investigation was superficial. Mr Sinha supported the claimant in certain matters. As the claimant acknowledged at paragraph 418 of her witness statement, Mr Sinha stated "there is a risk and (the claimant) was right to raise it at the time when she was in that situation". Mr Sinha met with Mr Lee, Mr O and Alison Mitchell Hall, the relevant general manager. The tribunal did not accept the criticism that Mr Sinha should have investigated Mr O. Mr Sinha was investigating a complaint against Mr Lee.

339. Accordingly, the Tribunal found that the claimant had not established that any shortcomings in the investigation were influenced in a more than trivial way by the 3 protected disclosures.

340. PD 7 was the email to Mr Sinha on 31 May 2018. For the reasons are set out above, the tribunal did not accept that Mr Sinha was aware of the protected disclosures when he received PD 7. In any event, there was nothing untoward in his failing to consider her complaint about staffing. He was investigating harassment/bullying by Mr Lee. Her email on 31 May 2018 was about general staff shortages. It was at best tangential to the claimant's complaint against Mr Lee. Accordingly, the Tribunal did not find that the protected disclosures had more than trivial employment on Mr Sinha's treatment of this email.

341. PD 8, 9 and 10 were four grievances, against Mr O, Mr A and Mr Lee. The Respondent initially proposed dealing with these grievances in a generic investigation together with the MHPS investigation. The tribunal did not accept that this put the claimant to disadvantage and accordingly this was not a detriment.

342. However, from November 2018, the claimant had rejected the respondent's generic investigation plan. The tribunal accepted that from November 2018 the claimant was subjected to detriment by reason of the failure to investigate the 4 grievances.

343. The tribunal had to determine whether the 3 protected disclosures had a more than trivial influence on the respondent's failure. In view of the

tribunal, it was very unlikely that these 3 disclosures had any influence. The tribunal's reasons were the were same as for earlier detriments, that is that a great water had passed under the bridge by the time the respondent failed to deal with the grievances in November 2018. At the time the respondent was focusing on getting the claimant back to work. Whilst the respondent was not focusing on the 4 grievances, neither was it focusing on the MHPS investigation. In the view of the tribunal the respondent in effect "parked" consideration of all these matters until the claimant could be got back to work. When the claimant failed to return to work, the matter was left to drift.

344. In any event, most of the matters contained in the grievances had already been investigated. The link between Mr Lee's private clinic and his NHS work had been investigated by Dr Vinen. The other grievance against Mr Lee was a copy of the dignity at work grievance which had been investigated by Mr Sinha. The subject of the grievance against Mr O and grievance against Mr A had also been investigated previously. In the view of the tribunal this was the explanation why the respondent did not treat for grievances as seriously as they might.

345. On 14 January 2020 Ms Jackson, investigating the grievance against Dr Palin, picked up the claimant's reference to the 4 earlier grievances. She requested the claimant provide copies, which she did on 2 February 2020. However, Ms Jackson did not investigate the earlier 4 grievances. The tribunal determined that it was even less likely that the 3 earlier protected disclosures had any influence on Ms Jackson in January 2020 than they had on the respondent in November 2018. More than one year had passed. Ms Jackson had no previous involvement with the claimant. Ms Jackson was reluctant to go outside of her terms of reference. She was already dealing with a very lengthy grievance against Dr Palin. She was aware that the claimant's appeal against dismissal could not proceed until she had completed her grievance investigation and that there was therefore a downside to extending the remit of her investigation.

346. Accordingly, the Tribunal found that the 3 protected disclosures had a less trivial effect on the respondent's failure to investigate the four grievances.

347. Protected disclosures 11 to 16 were not relevant as they were made to independent bodies. The claimant did claimant did not allege in her submissions that there any failure by the Freedom to Speak up Guardian was influenced in any way by any the 3 protected disclosures.

348. Protected disclosure 17 was the grievance against Dr Palin. (This was also the subject of detriment q.) The claimant submitted that Ms Jackson was too junior to be an effective grievance investigator against a senior employee such as Dr Palin.

349. The tribunal did not accept the claimant's submission that Ms Jackson had failed to consider points raised during the process. The claimant relied on her forwarding a document in which she provided what she said were anonymous complaints about Mr Palin (and the third respondent). These were vague and no more than hearsay and could not form part of any properly constituted investigation.

350. The claimant also complained that Ms Jackson had failed to investigate Dr Vinen's investigation into her anonymous complaint (although she did not tell Ms Jackson that she was the author of the complaint). The claimant made the bare assertion that there were 2 versions of Dr Vinen's report and a falsified version had been sent to Lewisham Trust in order to cover up wrongdoing. The claimant provided no explanation or evidence for this allegation. (She provided none in her witness statement.) In these circumstances there was nothing remarkable about Ms Jackson's failure to investigate. This allegation did not form part of the original grievance against Dr Palin and the claimant provided no evidence for an allegation in which she expressed total confidence. Further, as previously stated there was good reason for Ms Jackson not to extend the terms of reference of the grievance which had been previously agreed with the claimant.

351. The tribunal could not find that there was any other material failing in Ms Jackson's investigations. She invited the claimant to meet in person, but the claimant replied she was not well enough to attend. Ms Jackson complied with the claimant's suggestion that she provided questions. She provided her investigation meeting notes with her interview with Dr Palin.

352. For the avoidance of doubt, the tribunal considered whether any shortcomings in Ms Jackson's report were in anyway influenced by the 3 protected disclosures. The tribunal found that there was no material influence for the following reasons. As the tribunal had found in previous detriments, which were much closer to the protected disclosures in time, it was very unlikely that the protected disclosures had any influence. By the time Ms Jackson investigated, the protected disclosures were between 2 years and 3 months and one year and 10 months old. Since the protected disclosures , a very great deal of water had passed under the bridge. The claimant had raised a number of formal grievances and complaints against the respondent and its employees. The claimant has started employment tribunal proceedings against the respondent. The claimant had been absent sick for over a year. Accordingly, the tribunal did not accept that this Jackson's investigation amounted to a detriment. However ,for the avoidance of doubt if the claimant was subjected to detriment, the 3 protected disclosures had a less than trivial influence.

Detriments m, g and h

353. It was accepted during the hearing that these were repetitions of parts of detriment e.

Detriment i -failing to change the claimant's line manager from Mr Lee in November 2018.

354. The tribunal did not accept that this claim was made out. The claimant's case appeared to be that, had she not complained about Mr Lee, Dr Palin would have agreed to change her line manager. However, if she had not complained about Mr Lee, she would not have wanted her line manager to change. In the view of the tribunal this was a circular argument.

355. Nevertheless, the tribunal went on to consider whether there was any basis to the claimant's assertion that the 3 protected disclosures had a more than trivial influence on Dr Palin's decision. The tribunal could find no link. Even if such a link were established, the respondent had provided an adequate explanation. Dr Palin had agreed to significant changes to the claimant's work in order to accommodate her return to work. He had agreed, when it was envisaged returning to Princess Royal, that complaints going forward would be managed at Denmark Hill. He agreed that the claimant would not have to do emergency work. A plan of a phased return to work over 7 weeks was put in place. Further support was provided after the end of that 7 weeks.

356. There was a sound reason for Mr Lee to remain the claimant's line manager. The tribunal accepted the respondent's evidence that it would not be practicable to have anyone other than the clinical director in the Department line manage the claimant. Further, the tribunal accepted Dr Palin's evidence that permitting this change, risked setting a precedent that staff could opt out of their line manager, and this would be unworkable.

357. Accordingly, the Tribunal found that the 3 protected disclosures did not have a more than trivial influence on Mr Palin's decision.

Detriment j - failure to provide the claimant with a suitable role on return to work

358. The claimant in her submissions clarified that this related to the terms of the claimant's return to work offer made by Dr Palin on 6 December 2018. The role at Denmark Hill was unsuitable simply because it related to obstetrics only and did not include gynaecology.

359. It was the claimant's wish to return to work at the Denmark Hill site. She raised the issue that there were 4 locum consultants and accordingly contended that there were potentially 4 possible roles available. In her grievance against Dr Palin, she stated that an offer of return to work at Princess Royal would not permit her to return to a safe working environment.

360. The email from the Clinical Lead at Princess Royal on 20 November 2018 indicating that the team could not carry on covering for the claimant's vacant position added to the pressure on the respondent to find a "home" for the claimant.

361. The tribunal did not accept the characterisation in her submissions that the offer of role at Denmark Hill amounted to "stripping out a component of the claimant's consultant role that of gynaecology". The claimant wanted to work at Denmark Hill. The claimant pointed to no evidence that there was any other role available at Denmark Hill than the one offered. The tribunal accepted that Dr Palin and other members of management went to some trouble in liaising with Denmark Hill to obtain procure a role for her.

362. The tribunal did not accept that the respondent subjected the claimant to detriment by failing to create a role specifically for her at Denmark Hill irrespective of clinical need. Whilst it would have been more attractive for the claimant to return to a role involving obstetrics and gynaecology, such a role was not available. The respondent had very little room for manoeuvre, and the role offered at Denmark Hill was the best available option.

363. In any event, the claimant did not reply to the respondent's offer. Dr Palin chased on 18 December 2018 and again on 3 January 2019 saying that if she did not reply, they would assume that she was returning to the Princess Royal, rather than Denmark Hill. Accordingly, from January 2019, the claimant's position was not at Denmark Hill but back at the Princess Royal. In the circumstances the Tribunal was not persuaded that the claimant was subjected to a detriment. She in effect refused the offer at Denmark Hill position and reverted to Princess Royal where the role involved obstetrics and gynaecology.

364. The avoidance of doubt, the tribunal considered whether the offer of the role of 6 December was influenced in any way by the 3 protected disclosures. The claimant had not shown that there was any reason to connect the two. Again, a good deal of water had passed under the bridge by December 2018. The claimant had been absent sick for over 8 months and the tribunal accepted Dr Palin genuinely wanted her back at work. Dr Palin was not involved in the 3 protected disclosures. The 3 disclosures were extremely unlikely, even if he was aware of them, to have any influence on his decision to offer the claimant the role of Denmark Hill.

Detriment k - the respondent marginalising the claimant

365. It was established at the beginning of the hearing that this detriment was limited to 3 matters: a failure to offer the claimant roles, her being removed from roles and not being included in decision-making. The

claimant in her submissions relied on removal of the education lead role, a failure to obtain the clinical lead role and comments around patient safety. The tribunal did not accept that detriment k encompassed comments around patient safety. This was an attempt by the claimant to impermissibly expand the list of issues to which no further amendments had been permitted.

366. According to Mr Lee in his witness statement (paragraph 5), the claimant role covering as interim educational lead was due to come to an end because Ms A was due to return to work. Mr Lee wrote to the claimant on 18 October 2017 confirming that the role would be handed back. The 3 disclosures had not yet occurred and so cannot have had any influence on this decision.

367. The decision to offer the clinical lead role to Mr O in July 2017, also occurred prior to the 3 protected disclosures.

Detriments l and m were withdrawn

Detriment n failing to follow a fair procedure prior to dismissal

368. The Tribunal considered the dismissal procedure under the unfair dismissal claims. For the avoidance of doubt the Tribunal considered whether the 3 protected disclosures had a more than trivial influence on the procedure adopted by the respondent. The tribunal noted that the persons involved in the dismissal procedure were not involved in the detriments. It was unclear exactly when the claimant contended that the procedure prior to dismissal commenced, but the Tribunal took the view the most likely date was 14 February 2019 when Ms Hall invited claimant to a further second formal long-term sickness meeting, a month after the claimant had not returned to work in January 2019 as originally planned. The claimant was dismissed on 6 December 2019.

369. The tribunal could find no basis for the claimant's assertion that the 3 protected disclosures which were made between December 2017 to May 2018 had an influence on the dismissal procedure. By the time of the dismissal procedure starting and also by the time of the decision to dismiss, a very great deal has happened since the original 3 disclosures. Most relevantly, the claimant had been absent sick (save for a month's absence from December 2018 to early January 2019) at the time of dismissal for one year and 9 months. The procedure adopted was the sickness management procedure. There was nothing remarkable in this.

370. The tribunal did not accept that the third protected disclosure had any effect on the respondent as it did nothing more than provide a second copy of an email already sent to the respondent concerning a matter about which respondent was already aware. The earlier 2 disclosures related to staffing rostering and risk profiles in the claimant's department. There was no reason to believe that those involved in operating the dismissal procedure were aware of the protected disclosures. The

tribunal found that the protected disclosures had a no more than trivial effect on the respondent's operation of its dismissal procedure.

Detriment o-failure to postpone the dismissal meeting

371. The tribunal accepted that this was a detriment in that, at the very least, it brought forward the date of any dismissal by 4 months.

372. The tribunal accepted the respondent's case that the 3 protected disclosures did not have a more than trivial impact on the respondent's decision to go ahead with the dismissal meeting. The tribunal's reasoning echoed its reasoning as to detriment n. The third protected disclosure had had no impact on the respondent as it was already aware of the matters contained. The earlier 2 protected disclosures related to rostering and staff shortages in the unit department. There was no evidence that those responsible for the dismissal procedure were aware of any of the disclosures.

373. On its face, the respondent's decision to proceed with the hearing was not remarkable. It had agreed to the claimant's earlier request for a postponement in order to obtain a further occupational health report. This was not consistent with a respondent refusing a postponement because it was in some way influenced by protected disclosures. The claimant had been absent since March 2018 and the dismissal meeting did not occur until December 2019. Further, the respondent offered the claimant alternative means of participation. The claimant did not seek to take advantage of this despite the fact that she was well enough to, the day before the dismissal hearing, submit a further lengthy grievance (PD 17).

Detriment p - failing to permit the claimant to contribute to the meeting by written questions and answers

374. This detriment was not made out on the facts. The respondent in terms offered the claimant the opportunity to make written representations to the dismissal meeting, having provided her with the management case. Although the claimant did not in terms rely on her email of 5 December, nevertheless the respondent took it into account at the meeting.

375. The tribunal was unclear if the claimant's case was that the dismissal meeting should have sent questions to the claimant for her to reply. If this was the claimant's case, the tribunal found that there was nothing remarkable in the respondent's failure to do so. In view of the tribunal, taking into account the experience of in particular its lay members, this was not a workable way of running such a hearing. Further, the claimant told the tribunal that she had not read the management case that was sent to her. Accordingly, at the material time the claimant was not

prepared to engage in a question and answer process with the respondent. The evidence indicated that the claimant was focused on her grievance against Dr Palin (sent on 4 December 2019) rather than on the sickness management meeting. Therefore, she was not subjected to detriment.

376. The avoidance of doubt, if the claimant was subjected to a detriment, the tribunal would have found that this was in no way influenced by the 3 disclosures for the same reasons as the tribunal found in the detriments n and o.

Detriment q-failure to deal with PD 17

377. The tribunal made its determination under detriment e.

Detriment r -dismissal

378. The claimant accepted that she could not rely on dismissal as a detriment for the purposes of section 47B Employment Rights Act.

Detriment s -informing the claimant of dismissal by email and failure to pay wages after dismissal

379. Although there was no reference to this detriment in the claimant's submissions, the claimant's told the tribunal that she had not withdrawn this detriment.

380. The tribunal found that informing an employee that they had been dismissed did not amount to a detriment. The tribunal could not see how informing an employee that they had been dismissed amounted to a detriment. Once the decision to dismiss had been made, it was nothing more than good employment practice for the respondent to inform the claimant of the decision. In the view of the tribunal to find that this amounted to a detriment would be an impermissible attempt to expand the definition of detriment in the Employment Rights Act to include dismissal.

381. Further, the tribunal could not find that the choice of email as a means of informing the claimant of dismissal was detrimental. It was good practice that the claimant was informed of her dismissal in writing. Further the tribunal could not find that it was a detriment that, the decision having been taken to dismiss the claimant on 6 December, the dismissal only took effect on the date of the communication on 9 December. The claimant was exhausted her entitlement to sick pay and accordingly did not lose 3 days wages as a result.

382. The tribunal did not find that the respondent's only paying the claimant wages up to the date of dismissal amounted to a detriment. The claimant had no right to wages after dismissal. In her submissions the claimant

contended that under the Management of Workplace Stress Guidance she was entitled to be paid after termination. The tribunal could find no such provision in the stress guidance. The only part of the stress guidance to which the Tribunal was taken was paragraph 4.4 which allowed for action to be taken to remedy stress including a period of leave. This did not relate to payment of wages to someone who is no longer an employee.

383. For the avoidance of doubt, in any of these matters did amount to a detriment, then the tribunal would have found that they had were in no way influenced by the 3 disclosures for the same reasons as relied upon in the earlier dismissal related detriments.

Detriment t - failing to keep the claimant employed during her notice period and investigating suitable alternative work

384. In submissions the claimant explained that, had she remained employed during her notice period, she would have been able to access occupational health and "continue to consider and engage with the return to work if medically feasible".

385. In the view of the tribunal, in certain circumstances this might amount to a detriment. However, on the facts of this case, it did not. Occupational health had stated that the claimant was not due to be reviewed further 4 months, after the end of any notice period. The evidence indicated that this was a reasoned decision. Occupational health had previously reviewed the claimant every 2 months and had extended this period to 4 months at the last review. Further, occupational health stated that the claimant's condition had worsened.

386. The avoidance of doubt, if this did amount to a detriment, the tribunal would have found that the respondent was in no way influenced by the earlier 3 protected disclosures for the same reasons as relied upon in the earlier dismissal related detriments.

Detriment u - the first and fourth respondent failing to take reasonable steps to engage with claimant re: likely timeframe for return to work

387. The tribunal found that this detriment was not made out. The respondents did take reasonable steps to engage with the claimant by means of the sickness absence process. The respondent arranged a number of meetings including the final hearing for the specific purpose of ascertaining whether the claimant was likely to return to work and if so when. The respondent commissioned a number of occupational health reports to this end. The claimant was sent the management case for the final hearing and accordingly was aware of the respondent's

thinking and concerns about her likely return to work. She was invited to provide medical evidence as to her likely timeframe of return. When the claimant failed to reply to invitations to sickness meetings or occupational health appointments, the respondent made further attempts to engage by rescheduling the meetings and appointments.

Detriment v -the appeal

388. The claimant submissions did not address this detriment. Accordingly, the tribunal was unclear why the claimant contended that the appeal had not been adequately investigated or dealt with. Further, the tribunal was unclear why the claimant contended that was any link between any such shortcomings and the protected disclosures. In view of the tribunal this made it less likely that there was any link between the appeal and the 3 earlier disclosures.

389. In considering the adequacy of the respondent's investigation and treatment of the appeal the tribunal took into account the unprecedented circumstances at the time. From March through May 2020 the respondent as an NHS trust in London was dealing with the first wave of the Covid pandemic. The tribunal accepted the respondent's case that its resources were tightly circumscribed at this time. These very difficult circumstances provided an alternative explanation for any shortcomings in the appeal process.

390. The tribunal went on to consider whether there was any failure to adequately investigate or deal. The respondent at the claimant's request delayed the appeal until after the investigation of PD 17. If the claimant was contending that the respondent's delay resulted in an inadequate investigation this would be inconsistent with her contention in her appeal that the decision to dismiss should have been delayed until the investigation of PD 17. The respondent delayed the appeal hearing when the claimant explained that it was on the same date as an employment tribunal hearing, in order to assist the claimant. The respondent offered the claimant to the option of dialling into the hearing so as to avoid any Covid risk. The claimant had asked that Mr Lofthouse deal with the appeal by way of asking her questions. However, the claimant did not explain how this would be practicable. It was the claimant's appeal against the decision to dismiss and therefore it would be difficult for the appeal panel to put questions to the claimant.

391. The respondent's ability to investigate and deal with the claimant's appeal was limited by the claimant's express refusal to participate engage in the appeal process after 4 May 2020. Nevertheless, in the view of the tribunal the appeal process was unexceptional. The appeal was a review rather than a rehearing and so no new evidence was presented. Mr Lofthouse read the claimant's grounds of appeal and her later email and read the management case. Mr Lofthouse's letter setting out the reasons for the appeal was lengthy and explained the panel

thinking- the medical evidence suggested that there was little likelihood of a return to work in in the foreseeable future.

392. Accordingly, the Tribunal found that the respondent had adequately investigated and dealt with the claimant's appeal in unprecedented and extremely challenging circumstances and the detriment was not made out.

393. In any event the tribunal would have found that Mr Lofthouse was not influenced by the 3 earlier protected disclosures. Mr Lofthouse had joined the respondent on 3 February 2020 so he was not with the respondent at the time of the events to which the appeal related, let alone at the time 3 disclosures.

Detriment w – first and fourth respondent appointing general manager to investigate PD 17

394. The claimant did not provide any evidence that Dr Palin had been involved in the appointment of Ms Jackson.

395. The evidence before the tribunal indicated that Mr Loveridge had made the decision to appoint Ms Jackson. According to the documentary evidence, the respondent's Chief Medical Officer commissioned the investigation. The tribunal accepted Mr Loveridge's evidence that at that time the trust did not have a policy or practice of appointing external investigators. (The exigencies of Covid later changed this practice on occasion.)

396. The claimant accepted that Ms Jackson had no previous dealings with her or the circumstances of the grievance.

397. The tribunal did not accept that Ms Jackson was not an appropriate person to investigate grievance and accordingly found that no detriment was made out. However, for the avoidance of doubt, even if a more senior person would have been more suitable, the tribunal could find no basis for this decision being influenced by the earlier 3 protected disclosures. The tribunal's reasoning would have been the same as for the dismissal-related detriments. There was no evidence that Mr Loveridge or the Chief Medical Officer were aware of 3 protected disclosures. There was no reason why these 3 matters would have influenced their choice of Ms Jackson.

Detriment x -the first and fourth respondent's failure to consider ill-health retirement as an alternative to dismissal

398. The claimant submission was that the respondent's sickness absence policy procedure required the dismissing panel to consider ill-health retirement. Their failure to do so amounted to a detriment. In cross examination she contended that ill-health retirement was available to

someone who was not permanently incapable. The claimant relied on a document in the bundle from the NHS business services authority dealing with entitlement to ill-health retirement benefits. (Page 3564) According to this document, one of the requirements was that the person be permanently incapable of carrying out the duties of their employment or permanently incapable of engaging in regular employment of like duration, due to illness or injury.

399. The difficulty for the claimant was that on her case she was not permanently capable of carrying out her duties. Her case both at the dismissal and appeal meeting and before the tribunal was that the respondent should have delayed its decision to dismiss because there was some reasonable prospect of her recovering over the next 4 months. Her case was based on her not being permanently incapable of carrying out duties.

400. Accordingly, the tribunal did not accept that she was subjected to a detriment by a failure to consider her for ill-health retirement when on her own case both at the dismissal and appeal stages, she was not permanently incapable. The employer had a further good reason not to consider ill-health retirement in that occupational health had not supported this.

401. Further, the respondent advised the claimant in terms that she could make an application for early retirement. The claimant in her submissions did not contend that she was unable to make any such application after the rejection of her appeal.

402. For the avoidance of doubt, if this amounted to a detriment, the tribunal would have found that any such failure was not materially influenced by the 3 protected disclosures. There was no evidence that Dr Palin had any role in the decision process. Further, the claimant failed to explain why any protected disclosures would discourage the respondent from considering ill-health retirement. The tribunal found that the reason that the respondent failed to consider ill-health retirement was that the claimant failed to request this, made a case that diametrically opposed to her being entitled to ill-health retirement, and there was no support from occasional health.

Detriment y - failure to pay sick pay in accordance with sickness absence policy

403. According to the claimant's submissions, her case was that her entitlement to sick pay was determined by reference to the respondent stress at work guidance rather than the sickness policy. The tribunal understood that the claimant did not contend that that the respondent had failed to comply with its sickness absence policy.

404. The claimant did not contend that the sickness absence policy was not part of her contract. According to the policy, she was entitled to 6 months full pay and 6 months half Pay which the respondent sought but failed to apply correctly.

405. The tribunal considered whether the claimant was subjected to any detriment in that the stress at work guidance determined her right to sick pay. The 26 page stress at work guidance stated that its purpose was "to provide a framework for preventing workplace stress including tools to help managers and employees to identify manage and wherever possible reduce stress within the workplace". The claimant relied on a reference at paragraph 4.4 listing actions to remedy stress including "a period of leave". Paragraph 4 went on to state "normally temporary or relatively minor changes are sufficient to alleviate feelings of stress".

406. The tribunal could find no basis for the claimant's assertion that the stress guidance entitled her to paid sick leave over and above that contained in the sickness absence policy. The sickness and absence policy provided for 12 months of sick pay in total. In view of the tribunal, if the stress guidance had intended to increase an employee's entitlement to sick pay over and above their contractual entitlement, it would have said so. The claimant did not provide any examples of employees being provided with more than 12 months sick pay under the sickness absence guidance.

407. Accordingly , the Tribunal found that this detriment was not made out. For the avoidance of doubt, the tribunal would have found that the 3 protected disclosure had no material influence on the decision to apply the sickness absence policy to the claimant.

<u>Detriment z - the removal of names of other medical practitioners from the report provided to the patient's family at paragraph 40 of the particulars</u>

408. In submissions the claimant's case was that an undated report at page 3898 was sent to a deceased patient's (JT) family in respect of the alleged missed cancer diagnosis. The claimant had been contacted by the respondent solicitors in March 2019 asking her to comment on the clinical negligence claim from JT's family. The claimant was told by the respondent that the undated version p3898 had been sent to the family. However, it was the respondent's case before the tribunal that it had misinformed the claimant and that in fact a different (dated) version of this report

(at page 2111) was sent to the family. This second dated version was sent to the claimant 25 April 2019.

409. The tribunal started by taking the claimant's case at its highest, that the report at page 3898 was sent to the family. The tribunal had sight of the version of the report at page 3898. The report did not include the name of any practitioner, including the claimant. Practitioners were referred to

as "consultant" or "SHO". The only names that appeared were those of the investigating officers. The report was detailed providing lengthy descriptions of clinical attendances on the patient.

410. The tribunal found that the detriment was not made out on the facts. Paragraph 40 of the particulars of claim provided further details of the claimant's case. According to the particulars, an amended report had been provided to the patient's family "which removed details of all medical practitioners involved except for the claimant". The claimant's name did not appear on the undated version of the report and no names appeared on the other version of the report page 2111. Thus, it was not the case that "other practitioners'" names or details had been removed.

411. In the view of the tribunal the claimant's case in respect of JT was not rational. She told the tribunal that her colleagues at the respondent had deliberately provided poor clinical treatment and/or facilitated poor clinical treatment of JT leading to the patient's death. They had done so deliberately in order to cast blame on the claimant. The respondent had deliberately undermined its defence of the clinical negligence claim by destroying images on JT's file in order to cast blame on the claimant. The claimant had reported the incident to the police as a crime.

412. The claimant's interpretation of documents in respect of this matter was not reliable. For instance, in her witness statement, she stated that as a duty of candour meeting between the respondent and the patient's family the respondent admitted to the family that "the consultant mucked it up". However, the notes of the meeting recorded that it was a member of the family who made this comment.

413. In the view of the tribunal there were no grounds whatsoever to find that this amounted to a detriment. In any event, the claimant accepted that the authors of this report did not know of the protected disclosures.

414. Accordingly, the Tribunal found that claimant was not subjected to any detriment by reason of her having made 3 protected disclosures.

Automatic Unfair dismissal section 103A Employment Rights Act 1996

415. The tribunal had to decide whether the reason or, if more the one, the principal reason for dismissal was that the claimant made one or more of the 3 protected disclosures. The test in causation for unfair dismissal is stricter than the test in a detriment claim (see Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA). It is not sufficient that any protected disclosure materially influences the decision-maker, it must be the principal reason.

416. In submissions the claimant contended that this was a so-called Jhuti case. It was accepted that the claimant had a substantial period of sickness absence but the hidden principal reason for the claimant's dismissal was the making of

her protected disclosures. The claimant invited the tribunal to apply the case of Royal Mail Group Limited v Jhuti [2019] UKSC 55 that an employer may be liable for automatic unfair dismissal on the grounds of whistleblowing if an employee higher in the hierarchy deliberately hid the real reason which the decision-maker adopted and that reason for the dismissal is the hidden reason not the invented reason.

417. The tribunal could not find that any of the categories set out in the Jhuti case, in the Court of Appeal or the Supreme Court, applied on these facts. The decisionmaker was not innocently and reasonably misled by the claimant's line manager (Mr Lee). The tribunal was not taken to any evidence that indicated that Mr Lee had any input into the operation of the sickness absence policy or the decision under that policy to dismiss her following nearly 2 years sickness absence. The tribunal could not find any potential manipulator who had some responsibility for the investigation into the claimant's sickness absence and who was motivated by the claimant having made a protected disclosure so that the manipulator's knowledge might be attributed to the decision-maker. There was no evidence that someone at or near the top of the management hierarchy had procured the claimant's dismissal by deliberately manipulating evidence before the decision-maker. The simple fact was that the claimant had been absent sick for nearly 2 years and the medical evidence before the respondent did not indicate that recovery was likely in the foreseeable future. This was the reason for dismissal.

418. As Jhuti did not apply on the facts, the tribunal found that the claimant was not automatically unfairly dismissed. There was no evidence that the decision-maker was aware of the 3 protected disclosures.

Ordinary unfair dismissal-section 98 Employment Rights Act 1996

419. The tribunal found that the claimant was dismissed for a potentially fair reason, capacity on the grounds of ill-health. Save for the suggestion (which the tribunal did not accept) that the respondent should have applied its stress management guidance, there was no suggestion that respondent had failed to comply with its sickness absence procedure. There was no suggestion that the respondent had failed to follow its usual practice in respect of long-term sickness. The tribunal did not accept that the claimant was dismissed by reason of any of her 3 protected disclosures. Accordingly, the Tribunal went on to consider reasonableness.

420. The tribunal firstly considered whether the respondent had carried out a fair procedure. The Tribunal reminded itself that it must consider whether the procedure adopted by the respondent came within a range of procedures available to a reasonable employer in the circumstances. A Tribunal may not substitute its view of what constitutes a fair procedure for that of the respondent.

421. The claimant contended that procedure was unfair because the dismissal meeting went ahead in the claimant's absence, and that the claimant only received the final occupational health report on the day of the meeting, effectively too late for her to do anything practical.

422. It was not best practice that the final operational health report was not provided to the claimant in good time for the meeting, particularly when she was not attending the meeting and was suffering from severe depressive symptoms. In view of the tribunal, the respondent should look to remedy its practice in this regard as a matter of some urgency. For the claimant not to have been provided with the final occupational health report in good time cannot have encouraged her to have faith in the fairness of the procedure.

423. The tribunal considered whether this was sufficient to take the procedure outside the reasonable range. The claimant's email to the respondent (page 2924) tallied closely with the final occupational health report. There was little if any material difference between the claimant's account in her email and the operational health report. In the grounds of appeal, she addressed the final occupational health report stating that the effects of recent medication were likely to be reversible. However, the evidence from the claimant psychiatrist did not support this. According to the psychiatrist, the claimant's condition was unfortunately worsening. He therefore wanted to increase her medication but was unable to do so because of issues with her liver function tests. The medical evidence showed that there was it might be possible to increase the claimant's mental health medication at some point in the future, which might help, but it was not possible to embark on this at the present time. This did not indicate that there was any unfairness to the claimant in her not having sight of the final occupational health report in good time.

424. For the tribunal to find that the procedure fell outside of the reasonable range because the respondent did not provide the final occupational health report to the claimant until shortly before the hearing would be an impermissible substitution of the Tribunal's view of the fairness of procedure for that of the respondent.

425. If the tribunal fell into error and this flaw did take procedure outside of the reasonable range the tribunal would have found that this was cured on appeal. As stated above, the claimant had sight of the occupational health report by the time of the appeal and had the opportunity to address any matters arising. If the claimant had a substantive point arising from the final occupational health report which she had not been able to put before the dismissal hearing, the appeal hearing would have been able to consider this under its terms of reference. This was because it would have constituted evidence which was unavailable to the dismissal hearing.

426. Finally, if this flaw did take the procedure outside the reasonable range the tribunal would have found that the respondent would and could have dismissed fairly if it had delayed the hearing by a matter of days. As shown at the appeal, the claimant had made no substantively different representations and the decision of the respondent would not have been different.

427. The tribunal went on to consider whether the decision to hold the hearing in the absence of the claimant took the procedure outside of the reasonable range. At the time of the hearing the claimant had been absent by reason of ill health (save for one month when she was absent on annual leave) for nearly 2 years. Both the claimant, her treating physician and occupational health advised that not only was she unable to attend the meeting in December, but there was also no indication that she would be able to attend a meeting in the foreseeable future. Occupational health did not recommend a review for a further 4 months.

428. The respondent took meaningful steps to seek to mitigate any disadvantage to the claimant. It advised the claimant in terms the decision would be made at the final hearing about dismissal. It delayed the hearing on the claimant's request twice in order to provide an opportunity that she might recover and attend. It permitted the claimant to send a representative to the meeting which she did not do. She was permitted to provide written representations. In the view of the tribunal in the circumstances it could not be a fatal flaw that the employer proceeded in the absence of the claimant. The respondent had been without the claimant for 2 years, for the great majority of the time by reason of ill-health. It was under pressure from the claimant's colleagues to provide a long-term solution to the difficulties resulting from her absence.

429. The Tribunal accordingly found that the procedure adopted by the respondent fell within a range of procedures available to a reasonable employer in the circumstances.

430. The tribunal went on to consider whether the decision to dismiss came within the so-called band of reasonable responses test. That is, did the decision to dismiss come within a range of responses available to a reasonable employer in the circumstances. Again, a Tribunal may not substitute its view of the correct course to adopt.

431. The tribunal accepted the claimant's submission that it should direct itself in line with East Lindsey District Council v Daubney [1977] IRLR 181, [1977] ICR 566:

> "Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or other steps should be taken by the employer to discover the true medical position.

We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem."

432. In this case the employer took steps to discover the true medical position. It had sight of a number of operational health reports. The most recent occupational health report showed that the claimant's condition was unfortunately worsening and there was no reasonable likelihood of her return to work in the foreseeable future after an absence of nearly 2 years mainly by reason of ill-health. The claimant's treating psychiatrist stated he was unable to see a solution. The respondent consulted with the claimant by way of her written representations and the claimant herself accepted that she was not able to attend work by reason of illhealth. This was not a case where there was a fundamental difference in opinion between the employer and employee about the likely course of events resulting from the failure by an employer to consult with the employee. The claimant's case essentially was that the respondent should have waited a further 4 months for the next occupational health report. However, she did not contend that she would be well enough within 4 months to start even a phased return to work.

433. The tribunal directed itself in line with the decision of the Employment Appeal Tribunal in Spencer v Pendragon Wallpapers Ltd 1997 ICR 301 and considered whether the employer could be expected to wait any longer for the claimant to return from long-term sickness absence. The respondent had no indication from the claimant or from any medical evidence of any timeframe for the claimant's likely return. The claimant's condition was worsening, significantly so. As the tribunal has set out above, there was some prospect that the claimant's medication might be increased which might lead to an improvement, but this was not possible yet and there was no guarantee that such an approach would bear fruit.

434. The respondent was experiencing difficulties in having other staff carrying out the claimant's work. The goodwill of other consultants had wall thin. The tribunal accepted this was entirely plausible and was corroborated by the evidence in the bundle.

435. The tribunal accepted the respondent's evidence that engaging a locum cost 140% of the cost of a substantive post holder. Therefore, so even allowing for the fact that the respondent was not paying the claimant salary, continuing to have the claimant employed would represent a burden on the respondent financially.

436. Further, the tribunal accepted the respondent's evidence that it was not possible to engage a locum on anything other than a relatively short-term rolling basis. The nature of the claimant's absence the short-term nature of her sick certificates meant that it was not possible, for instance to engage a locum for 1 or 2 years. A locum had to be engaged on a series of short-term contracts. The tribunal accepted that this would not deliver the same quality of care as a substantive post holder or even a long-term locum. It was the claimant's case, and it was reflected throughout the bundle, that the respondent had suffered over a long period from shortage of staff in the claimant department and could ill afford further shortages.

437. There was no suggestion that the claimant, save that the stress management guidance should have been followed which the tribunal had not accepted, that the respondent failed to comply with sickness absence procedure or its normal practice.

438. The claimant did not raise any issue of ill-health retirement which in any event was not supported by occupational health. Redeployment was not a relevant consideration as the medical evidence stated the claimant was unable to carry out any duties not just the duties of her own role.

439. Accordingly, the Tribunal found that decision to dismiss the claimant fell within a range of responses available to reasonable employer in the circumstances. To put it another way, the employer had waited long enough.

440. The tribunal therefore found that the claimant was fairly dismissed.

Discrimination arising from disability-section 15 Equality Act 2010

441. The tribunal accepted the claimant's submissions as to the law under section 15. In first instance a tribunal must determine whether the claimant has been subjected to an act or omission which places the individual at a disadvantage (Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65. Further, according to the Employment Appeal Tribunal in Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 the tribunal must first focus on the words "because of something" and therefore has to identify "something" and secondly that "something" must be "something arising in consequence of B's disability" which constitutes a second causative (consequential) link. These are 2 separate stages.

442. According to Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, it is sufficient that disability is a significant influence or effective cause of the unfavourable treatment. The tribunal also directed itself in line with the guidance contained in Pnaiser v NHS England [2016] IRLR 170.

443. The tribunal firstly considered whether it was unfavourable treatment to hold the final long-term sickness review in the claimant's absence rather than delay to give her a chance to recover. In the view of the tribunal this did amount to unfavourable treatment. No comparator was required. If the hearing was delayed, the claimant's employment would necessarily have been extended. The decision to go ahead in the claimant's absence resulted in her being dismissed at that time rather than (at least) it being delayed.

444. In its submissions the respondent accepted that the decision to go ahead in the claimant's absence was taken because of the claimant's inability to attend the hearing which itself was because of the effect of her disability.

445. The tribunal therefore considered whether the respondent could show that the treatment was a proportionate means of achieving a legitimate aim. The tribunal considered whether the aim was legal, whether it was discriminatory in itself, and whether it represented a real objective consideration.

446. The tribunal accepted that the respondent had a legitimate aim in resolving the difficulties caused by the claimant's long-term sickness. The respondent needed to manage the claimant sickness absence effectively because it was resulting in a burden on the Department and hence affecting the quality of care.

447. The documents in the bundle showed that the respondent was experiencing difficulties in having other staff carrying out the claimant's work. The goodwill of other consultants had worn thin some time ago. The tribunal accepted this was entirely plausible and was corroborated by documentary evidence. The tribunal accepted the aim was legal, it was not discriminatory in itself, and was a real objective consideration. It was the claimant's case, and it was reflected throughout the bundle, that the respondent had suffered over a long period from shortage of staff in the department and could ill afford further shortages and disruption. The lack of a substantive consultant post holder in the Department, the tribunal, accepted, was disruptive.

448. The tribunal went on to consider whether the respondent's decision was a proportionate means of achieving this legitimate aim. The tribunal considered if an alternative was available, that is if it was possible to postpone the hearing until the claimant was able to attend. In effect, the respondent was stating that it could not wait any longer to resolve the difficulties caused by the claimant's absence.

449. The tribunal understood the claimant to contend that an alternative to proceeding with the final hearing in December 2019, was relying on locum cover. However, the Tribunal accepted the respondent's evidence that it was not possible to engage a locum on anything other than a short-term rolling basis. The nature of the claimant's absence meant that it was not possible, for instance to engage a locum for 1 or 2 years. A locum would be engaged on a series of short-term contracts. The tribunal accepted that this would not result in the same quality of care as a substantive post holder or even a long-term locum. In addition, the tribunal accepted the respondent's evidence that

engaging a locum cost 140% of the claimant's salary so even allowing for the fact that the respondent was not paying the claimant a salary, continuing to have the claimant employed would represent a financial burden. Finally, the tribunal had found that the goodwill of other consultants to make up for the disruption and strain caused by the claimant's absence had been exhausted some time ago.

450. The tribunal also accepted the respondent's case that in effect, the respondent had good reason to fear that waiting a further 4 months would not be fruitful. The hearing had already been postponed twice because of the claimant's ill health. The claimant was still unable to attend and all medical evidence indicated that her condition was worsening. There was no reasonable likelihood of her being able to attend a meeting in the foreseeable future. This was not a case where there was a good chance that a delay of a few months might result in the claimant recovering sufficiently to attend a meeting. There was little in the medical evidence to give the respondent confidence that the claimant was likely to be able to attend a meeting in 4 months' time.

451. Balancing the needs of the employer to service its legitimate aim and the discriminatory effect on the claimant, the tribunal found that the needs of the respondent outweighed the discriminatory effect for the reasons set out above.

452. The respondent accepted that the decision to dismiss the claimant was unfavourable treatment because of something arising in consequence of the disability. The tribunal accordingly considered justification. The respondent relied on the same legitimate aim and the same argument as to proportionality as under its decision to hold a long-term sickness review in the claimant's absence rather than postpone.

453. The tribunal accepted the respondent's case as to its legitimate aim for the same reason as under the decision to proceed with the dismissal hearing in the claimant's absence. Put briefly, the claimant's absence was having a negative effect on the quality of care in the Department. The tribunal also accepted the respondent's case as to the proportionality of the decision to dismiss for the same reasons. Put briefly, balancing the discriminatory effect on the claimant and the needs of the respondent in servicing its legitimate aim, the respondent had waited long enough. There was no reasonable prospect of the claimant returning in the foreseeable future and in fact her condition was worsening.

454. The tribunal considered the respondent's failure to consider alternative roles or offer the claimant redeployment. The respondent accepted in its submissions that the failure to take steps to look for redeployment in December 2019 amounted to something arising in consequence of disability. The respondent, again, contended that its decision was objectively justified on the same basis as the previous decisions.

455. The tribunal accepted that the respondent had a legitimate aim – it needed to manage the impact of the absence on the service and patient care.

456. The tribunal went on to consider whether the decision was proportionate. In effect the claimant was arguing that the alternative to dismissal was considering an alternative role or offering redeployment. The difficulty for the claimant was that there was little if any evidence that this would provide an effective solution. The claimant did not identify any alternative role or any role into which she might be redeployed. Even if such a role had been identified, the medical evidence indicated that she was unfit for any employment and did not indicate any timeframe in which she might be likely to recover. Balancing the needs of the respondent to service its legitimate aim and the discriminatory effect upon the claimant, the tribunal found that the failure to consider or offer the claimant any alternative role or redeployment was proportionate.

457. The tribunal went on to consider whether the decision not to subject the claimant to a <u>further occupational health review</u> constituted unfavourable treatment. The respondent had already subjected the claimant to a number of occupational health reviews. She had been subjected to a recent occupational health review just prior to the decision to dismiss. The most recent occupational health review was consistent with the opinion of the claimant's treating psychiatrist. The medical evidence was that she was extremely unwell, her condition was worsening and there was little if any reason to expect a material improvement in the foreseeable future. In the words of the claimant's treating psychiatrist, "There does not appear to be a clear way forward at present." The tribunal found that sending the claimant to a further occupational health review was unlikely to make any difference.

458. In the circumstances the tribunal could not accept that the failure to carry out a further occupational health review was unfavourable treatment because it did not put her at a disadvantage (see paragraph 5.7 of the Employment and Human Rights Commission Employment Code). The tribunal considered the guidance of the Employment Appeal Tribunal in Private Medicine Intermediaries Ltd v Hodkinson and others EAT 0134/15 that a claimant could not succeed under section 15 if the conduct about which they complained, if rectified, would not have resulted in a better treatment. If a Tribunal does not accept that performing a review or risk assessment would have resulted in any better treatment, it was difficult to identify any disadvantage to the employee.

459. Accordingly, the Tribunal found that the respondent had not discriminated against the claimant under section 15 Equality Act 2010.

Failure to make reasonable adjustments – section 21 Equality Act 2010

<u>Requirement to attend a final form long term sickness review hearing</u>

460. The tribunal firstly considered if the duty to make a reasonable adjustment had been triggered that is, if a PCP (provision, criterion or practice) had been applied by the respondent that put the claimant as a disabled person at a substantial disadvantage in comparison with persons who are not disabled.

461. The tribunal firstly considered whether the respondent required the claimant to attend the hearing. The documents and the claimant's evidence showed that the respondent did not impose or apply this requirement. The tribunal could not identify any contention in the claimant's submissions that this requirement had been imposed or implied.

462. The respondent expressly stated that the claimant did not have to attend the hearing. It made alternative arrangements for her to participate in the sickness absence process including permitting her to send a representative in her place or providing written representations.

463. Accordingly, the duty to make reasonable adjustments was not triggered.

Requirement to be able to maintain a certain level of attendance at work or risk facing dismissal on capability ground
Requirement/expectation to be able to carry out full contractual duties or risk facing dismissal on capability ground (sic)

464. The tribunal considered the second and third PCPs concurrently as there was a significant degree of overlap .

465. The tribunal accepted that the requirement to maintain a certain level of attendance or risk dismissal and the requirement and or expectation to carry out full contractual duties or risk facing dismissal amounted to PCPs. The tribunal directed itself in line with the EHRC code paragraph 4.5 that the definition of a PCP

'Should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A [PCP] may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision'.

466. The tribunal was satisfied that these 2 matters amounted to practices. The respondent's case was that it had subjected the claimant to the sickness absence policy and eventually to dismissal on the basis of her long-term sickness and poor prognosis. It was an inherent element of the respondent's case that it applied this policy and practice fairly and consistently to all staff and the claimant was not targeted specifically.

467. It was the claimant's inability due to her medical condition to maintain an acceptable level of attendance under the sickness policy and carry out her contractual duties which led to the application of the sickness absence policy and eventually her dismissal. It was again inherent in the respondent's case that the reason that she was subjected to the sickness absence procedure and eventually dismissal was that she was not attending work and performing her contractual duties.

468. The tribunal was satisfied that the 2 PCPs put the claimant and a substantial (that is more than minor or trivial) disadvantage in relation to a relevant matter in comparison with persons who are not disabled. There was no dispute between the parties that the reason that the claimant was unable to attend work and carry out her contractual duties was her medical condition. The medical evidence stated in terms that it was the claimant's severe depressive symptoms and to some extent the interaction with the effect of her physical disability which made her unable to attend work or carry out her duties.

469. The PCPs put the claimant at a more than minor disadvantage compared persons who are not disabled because they directly resulted in her being subjected to the sickness absence procedure and, eventually, dismissal. As a disabled employee, the claimant found it more difficult to comply with the PCPs than her non-disabled colleague because her disability resulted in a significant increase in the likelihood and actuality of her sickness absence.

470. Accordingly, the Tribunal found that the duty to make reasonable adjustments was triggered by the 2 PCPs and it went on to consider whether the respondent had discharged the burden upon it to make reasonable adjustments. The claimant relied on 11 reasonable adjustments (a to k). The tribunal considered whether each adjustment was a step it was reasonable to have taken to avoid the disadvantage to the claimant.

471. A tribunal must consider the extent to which making the adjustment would prevent the disadvantage created and this is an objective test (see Royal Bank of Scotland v Ashton [2011 ICR 632). In Burke v College of Law & Anor [2012] EWCA Civ 37 the Court of Appeal held that it was correct to consider reasonable adjustments together rather than in isolation. According to the Court of Appeal in Smith v Churchills Stairlifts plc 2006 ICR 524, CA, the question of whether a step was reasonable to take is an objective question. The range of reasonable responses test does not apply. It is in the tribunal to determine whether the step was reasonable or not.

472. According to Paragraph 6.28 of the EHRC code: –

The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage; • the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;

• the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and • the type and size of the employer.

473. A step may be a reasonable step for an employer to take even if there is no guarantee of its success; a Tribunal must weigh up the likelihood of effectiveness when determining reasonableness (see Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA).

474. The tribunal firstly considered reasonable adjustments a, b, d and g which these substantially overlapped. These adjustments were as follows: –

a. Postponing the final long-term sickness review hearing until the claimant was well enough to attend;
b. Adjusting the level of attendance at work required before facing dismissal and capability grounds due to ill-health;
d. Adjusting the first respondent's capability procedure to allow the claimant to remain off work on sick leave for longer before deciding the future of her employment:
g. postponing the decision to dismiss the claimant for longer.

475. The difficulty for the claimant was that there was no evidence that taking any of the steps would have been effective in preventing a substantial disadvantage. According to the medical evidence and the claimant herself, she was not fit to attend work and there was no likely timeframe when she might be fit. She had been absent sick for nearly 2 years (apart from one month) and her condition was unfortunately significantly worsening. The claimant did not argue that, contrary to the medical evidence available to the employer at the time, her condition had in fact improved significantly following dismissal.

476. Accordingly, the Tribunal found that, had the final dismissal hearing and hence the decision to dismiss been postponed for say another 4 months as requested by the claimant, it was very unlikely to have made any difference. The only step which would have been reasonably effective was to permit the claimant to remain indefinitely on long-term sick. This would have been effective in avoiding dismissal but in the view of the tribunal would be impractical. For the reasons set out above in this judgement, the claimant being on long-term rolling sick leave was putting very considerable strain on the respondent. Colleagues were finding it difficult to cover for her. It was not possible to engage effective locum or permanent cover of the same quality.

477. There was a financial burden to locum cover in that it cost 140% of the cost of employing the claimant. Accordingly, there was a 40% burden on the respondent compared to employing a substantive post holder. The respondent is an NHS trust of considerable size and with considerable resources. Nevertheless, the tribunal was well aware that the NHS was

at the material time subject to significant financial pressures. As an NHS trust it was caring out vital public functions and any deterioration in the quality of service it offered would have a substantial adverse impact on the local community.

478. In the circumstances therefore the Tribunal found that adjustments a,b,d and g were not reasonable adjustments.

479. The tribunal went on to consider adjustments e and f which were in effect subsets of adjustments a,b,d and g. These adjustments were as follows: –

e. Continuing to employ a locum or locums to cover the claimant's work whilst the claimant was on sick leave in order to give the claimant longer to recover:
f. Allocating certain parts of the claimant's work to colleagues to cover while the claimant remained on sick leave.

480. The tribunal had found that covering the claimant's role with locum cover was costly and failed to provide an acceptable substitute. The tribunal had accepted the respondent's evidence that it was difficult to obtain adequate locum cover on a rolling basis, that is a locum cover for each sick certificate provided by the claimant for say 2 or 4 months. There was a difficulty with recruitment of sufficiently experienced locums on such unattractive terms and also with the likely high turnover of locums. Both of these had a significant adverse impact on the quality of patient care with a knock-on effect on other members of the department.

481. The tribunal had seen evidence that whilst the claimant's colleagues had been provided cover for the claimant's absence, goodwill had been exhausted. The tribunal found this evidence inherently plausible. It was understandable that colleagues would help cover for a sick colleague in the understanding that she would soon return. However, once a sickness absence had become lengthy, pressure would inevitably build for a substantive solution. The tribunal also accepted that had been colleagues cover for the claimant's duties would have an adverse impact on patient care which would worsen over time.

482. In the circumstances therefore the Tribunal found that adjustments e and f were not reasonable adjustments.

483. The tribunal considered adjustment c as follows: –

looking for and/or offering suitable all alternative work or redeployment (with adjustments (such as changing her line management, conducting a risk assessment and removing the stressors identified, removing aspects of job duties and/or for swapping duties with colleagues), for the claimant either at the trust or in another trust or looking for longer such alternative work or redeployment.

484. The tribunal found that seeking or obtaining suitable alternative work or redeployment for the claimant would not have been effective. According to the occupational health report and the claimant's own psychiatrist, there was no likelihood of a return to work in the foreseeable future. The claimant's condition was, unfortunately, significantly worsening. Even if it had been practicable to change her line management, she was still not fit for work and there was no indication as to when she might be fit for work. Occupational health had not said that the claimant was fit to work with adjustments.

485. The tribunal considered adjustment h as follows: – obtaining specialist medical advice on the likely prognosis for the claimant's ability to return to work; including but not limited to, scheduling a further OH appointment as recommended on 26 November 2019.

486. The tribunal found that there was little chance that this step would have been effective. There was no indication in the November 2019 occupational health report as to any timeframe for a likely return to work. The claimant's psychiatrist stated in terms that he did not see any solution to the claimant's situation. The claimant's medical condition was significantly worsening. Occupational health which had been reviewing the claimant every 2 months had now extended this review to 4 months. In view of the tribunal this indicated that occupational health considered that the prospects of the claimant being able to return to work in the foreseeable had deteriorated.

487. Accordingly, the Tribunal found that this would not be reasonable or effective adjustment.

488. The tribunal considered adjustment i as follows: – taking reasonable steps to engage with the claimant on her views as to the likely timeframe for her ability to return to work.

489. In view of the tribunal this step was very unlikely to be fruitful because the respondent had already sought to engage with the claimant on her views as to when she might be able to return to work. The respondent had corresponded with the claimant on a regular basis during her sick leave. However, on a number of occasions the claimant had failed to respond. When the claimant did respond, these responses were unfortunately not always productive. For instance, an email sent on her behalf advised the respondent to rely on occupational health advice in circumstances when the claimant had failed to attend occupational health for a number of months. This meant that the respondent had no information on which to proceed.

490. The tribunal accepted that employees suffering significant debilitating depressive symptoms may be simply unable to engage with their employer. However, at the time when the claimant was failing to engage effectively with the sickness absence procedure, she was engaging with

her lawyers, engaging with statutory agencies, engaging with ACAS, presenting a claim to the employment tribunal and making a complaint to the GMC. In any event, whatever the reason for the claimant's failure to engage with the respondent concerning her sickness absence and likely timetable return to work, her track record showed that the respondent had taken reasonable steps to engage with her on her views as to her likely return and the claimant had not substantively engaged.

491. The claimant's psychiatrist's opinion was that her condition had significantly worsened and that he saw no solution to the situation. The claimant herself took the opportunity in her email of 5 December 2019 to set out the seriousness of her medical condition. The claimant stated "I am unable to carry out even normal dayto-day activities and require significant support from my husband and others… I have severe depressive symptoms and cognitive issues like concentration and forgetfulness." The claimant did not state that she believed that she was likely to return to work within any particular timeframe or at all. Her only reference was that she had offered to return to work back in February 2019 (when her medical condition was significantly less serious).

492. Accordingly, the tribunal found that this was not a reasonable or effective adjustment.

493. The Tribunal considered adjustment j as follows: – managing her absence in 2018 under the first respondent stress at work policy rather than sickness policy.

494. It was clear from the documents that there was no stress at work policy, rather a stress at work guidance. In respect of the stress at work guidance, the tribunal had found that there was no right to extended sick leave and pay due to stress over and above the contractual right to sick leave and pay in the sickness policy. The tribunal did not accept the claimant's case that application of the stress at work guidance would This Apply the sickness policy. Accordingly, this was not a reasonable step and would not remedy the disadvantage to the claimant.

495. The tribunal considered the final reasonable adjustment as follows: – removing workplace stressors such as taking appropriate disciplinary action against those who subjected the claimant to alleged unlawful detriments, which could include, but is not limited to dismissal of these individuals as a reasonable adjustment.

496. The tribunal accepted the respondent's submission that disciplining (up to and including dismissal) the claimant's colleagues on the basis that the claimant had alleged that she was subjected to unlawful detriments was plainly unreasonable. In any event, any such action was very unlikely to remove the substantial disadvantage to the claimant. The claimant believed that her colleagues had taken deliberate action to shorten the life of a patient JT in order to generate a complaint against

her. She had reported this matter to the police and the General Medical Council. In the circumstances, it was unlikely that there was any action the respondent could take to prevent the claimant being stressed by her colleagues.

497. Accordingly, the tribunal found that although the duty to make reasonable adjustments was triggered, there were no steps that it was reasonable for the respondent to have taken which would have avoided the disadvantage.

Direct disability discrimination -section 13 Equality Act 2010

498. The act of direct discrimination relied upon was dismissal. The tribunal considered whether the claimant could establish a prima facie The case that she was treated less favourably because of her disability when the decision was made to dismiss her.

499. According to section 23(2)(a) Equality Act 2010, for the purposes of establishing whether the claimant was treated less favourably, the actual or hypothetical comparator must be in the same material circumstances as the claimant and those circumstances must include the claimant's abilities.

500. The claimant did not rely on any actual comparator and the tribunal therefore had to consider a hypothetical comparator. This hypothetical comparator would have been in the same material circumstances with the same abilities as the claimant. The tribunal accepted the respondent's submission that the hypothetical comparator would have had the same sickness record and absence of any prognosis of a return to work in the foreseeable future, but without this being due to the claimant's particular disability. In view of the tribunal this was a succinct and uncontroversial account of the law. There was no material challenge to this in the claimant's submissions. On behalf of the claimant, it was simply asserted that she was dismissed because of her disability.

501. The tribunal had found that the reason that the claimant was dismissed was because of her ill-health capability, that is - the length of her sickness absence, its effect on her department and the absence of any likelihood of her returning to work in the foreseeable future. The Tribunal accepted that had the respondent been faced with another consultant in this department who had been absent from the department for nearly 2 years and who had no likelihood of return, it would have dismissed this other consultant in the same way that it dismissed the claimant.

502. Accordingly, the Tribunal found that the respondent did not directly discriminate against the claimant because of disability contrary to section 13 Equality Act 2010

Unauthorised deduction from wages-section 13 Employment Rights Act 1996

503. The claimant had clarified that her unauthorised deduction from wages claim was based solely on whether the respondent applied the correct policy to her absence. Was the claimant entitled to further sick pay over and above her entitlement in the sickness absence policy by virtue of the stress guidance? The written submissions of the claimant referred only to this case under the heading "unlawful deduction of wages claim".

504. The Tribunal accordingly had to determine the claimant's contractual entitlement to sick pay. There was no apparent dispute between the parties that the sickness absence policy formed part of the claimant's contract of employment. In her written contract of employment, she was entitled to 6 months full sick pay and 6 months half sick pay. This was the entitlement which the respondent sought, but accepted that it failed, to apply, leading to overpayment and the respondent seeking to recoup.

505. The claimant's case was that she should have been subject to the stress guidance rather than the sickness absence policy from March to December 2018. She accepted that she was subject to the sickness absence policy correctly from January 2019.

506. The tribunal could find no indication in or relating to the stress at work guidance that this was intended to be contractual. The Guidance did not state that it formed part of the contract of on a Neonatal ICU employment. Accordingly, the Tribunal found that it did not form an express term of the claimant contract.

507. Further, the tribunal did not accept that the guidance constituted an implied term of the contract of employment. The terms of the guidance did not appear suitable or likely to form part of a contract of employment. For instance, paragraph 4.4 (which the claimant relied on as contractual) "taking action to remedy stress: actions will vary according to circumstances and subject to the demands of the service they may include managing conflict between staff within the team, with support from the mediation service…. A period of leave".

508. The purpose of the guidance was said to be to manage stress at work, rather than absence management. The only reference to absence was that actions to remedy stress may include a period of leave. The guidance was silent as to whether or not this would be paid. This lack of clarity was not consistent with the guidance being contractual.

509. The contractual sickness absence policy which includes express reference to sick pay and trigger points makes no reference to the stress guidance, or any exceptions thereunder, including in the section relating to reasonable adjustments.

510. Accordingly, the tribunal found that the stress management guidance did not form part of the claimant's contract of employment.

511. The avoidance of doubt, even if the stress guidance was contractual, there was no right under the stress guidance to be paid sick pay when absent for reasons of stress over and above the entitlement to sick pay in the sickness absence policy.

512. Accordingly, the tribunal determined that the respondent had not made unauthorised deductions from the claimant's wages.

Conclusion

513. As none of the claims succeeded, the claimant's complaint was dismissed.

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Employment Judge Nash
Date 10 October 2022