EMPLOYMENT TRIBUNALS

Claimant: Mrs A Abhyankar

Respondent: Cardiff and Vale University Local Health Board

Heard at: Cardiff **On:** 3 – 19 October 2022
9 December 2022 (submissions)
10-13 January 2023 (chambers)

Before: Employment Judge C Sharp
Members: Mr M Lewis
Mrs J Beard

Representation:
Claimant: Mr E Kemp (Counsel)
Respondent: Ms H Barney (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's claims of protected disclosure detriment are not well-founded and are dismissed;

2. The Claimant's claims of victimisation are not well-founded and are dismissed.

3. The duplicate claim with case reference 1600710/21 is dismissed by consent.

REASONS

Background

1. Mrs Aruna Abhyankar, the Claimant, is a consultant paediatric surgeon employed by the Respondent, Cardiff and Vale University Local Health Board,

in its paediatric surgery department. There is a dispute between the parties as to when in 2012 she became a substantive consultant in the employ of the Respondent, but nothing of any import turns on this issue, which will therefore not be determined by the Tribunal.

2. The Claimant has been excluded from the workplace since 16 December 2020 when a decision was made to take her through the UPSW process ("Upholding Professional Standards in Wales"), a policy designed to deal with concerns about medical practitioners employed in the NHS in Wales, agreed with the British Medical Association ("BMA"). However, the dispute between the parties goes as far back as 2016, where the Claimant says she first made a public interest protected disclosure about inadequate consenting by Mr Ahmed Darwish, a locum consultant surgeon in the paediatric surgery department. The Claimant remains employed by the Respondent.

3. The Claimant, having gone through ACAS conciliation between 4 March - 15 April 2021, presented her complaint to the Employment Tribunal on 13 May 2021. In fact, according to the administration's records, it appears she presented two claim forms on this date, given case references 1600708/21 & 1600710/21, but as the claims were duplicates, Employment Judge S Jenkins ordered that the later claim be effectively closed for administrative purposes. As discussed and agreed with the parties at the outset of the case, 1600710/21 is dismissed in this Judgment following the determination of 1600708/21.

4. The complaint has gone through case management and has been subject to amendment on more than one occasion. The parties provided an agreed list of issues to assist the Tribunal during these proceedings; the agreed list of issues and amended annex of claims are Appendix 1 to this Judgment. The Tribunal at the outset of the final hearing also checked points within the agreed list of issues and has marked on Appendix 1 any agreed alterations. There were also unopposed amendment applications to change dates within the agreed list of issues on Day 7 (11 October 2022) and Day 8 (12 October 2022), which were approved by the Tribunal, and these amendments are reflected in Appendix 1 as annotated. The Tribunal was also provided with an agreed chronology, which is attached as appendix 2 to this Judgment.

5. The Tribunal proceeded on the basis that the annex was part of the statements of case, rather than an ordinary list of issues (which is not a statement of case). This was because the annex was part of the Grounds of Complaint, a statement of case, and amended when the claim was amended, including during the hearing as outlined above.

6. In summary, the Claimant has brought two claims:

   a) protected disclosure detriment under s47B Employment Rights Act 1996 ("ERA") and;

b) victimisation under s27 of the Equality Act 2010 ("EqA").

7. A final hearing took place between 3 and 19 October 2022 (13 days) with an additional day given for submissions (both written and oral) on 9 December 2022. Three witnesses attended remotely, and the solicitors for the parties had permission to view the proceedings remotely. During the course of the hearing, it became clear that the Claimant was at times absenting herself from the hearing, though those representing her confirmed that she was content for the hearing to take place in her absence. The Tribunal offered to permit the Claimant to view the proceedings remotely at any time, which was accepted (the Respondent did not object to the proposal); this was not a formal reasonable adjustment but made on pragmatic grounds to ensure full access to justice as the CVP access had been set up for other purposes - no additional resource was required.

8. The Tribunal reserved its decision and deliberated in chambers on 10-13 January 2023. This Judgment deals with liability only.

9. The Tribunal was originally provided with two hearing bundles; a core bundle totalling 3253 pages, and an additional bundle (principally to be referred to when required during cross examination) totalling 673 pages. The Tribunal was also provided with a witness statement bundle of 341 pages (of which 121 pages comprised of the Claimant's witness statement). A third and fourth bundle were provided during the course of the hearing, but they were comparatively small.

10. The Tribunal noted that most of the alleged protected disclosures and protected acts were either conceded by the Respondent as a protected act or withdrawn by the Claimant, and therefore most of its determinations would centre on the alleged detriments.

11. The Tribunal had a day and a half for pre-reading before the hearing commenced, and made the point to the parties that it would generally only read documents to which it was referred in the course of the evidence. The Tribunal also noted that no permission to call expert witnesses had been given but the Claimant had called two witnesses who appeared to be attempting to give opinion evidence in the main. It confirmed at the outset of the hearing that it would not treat such evidence as expert, to which no objection was made. This meant that as Professor Gregory had no evidence as to facts or events he witnessed, his evidence did not assist the Tribunal. Mr Lander did witness some matters, and was of assistance.

12. The Tribunal encouraged the representatives to focus on the issues that the Tribunal had to determine, and was provided with an agreed timetable of witnesses. The 17 witnesses heard by the Tribunal are set out below.

The Claimant's witnesses:

13. Mr Anthony Lander, a consultant neonatal paediatric surgeon, based in Birmingham Women's and Children's Hospital (by CVP);

    Professor John Gregory, an Emeritus Professor in Paediatric Endocrinology of Cardiff University School of Medicine;

    The Claimant (who gave evidence over the course of 5 days due to the length of her statement), a consultant paediatric surgeon, Clinical Director of the paediatric surgery department between August 2016-January 2017, and the Training Programme Director for paediatric surgery ("TPD") November 2014-January 2020.

The Respondent's witnesses:

14. Dr Jenny Thomas, a consultant physician and Clinical Board Director for Women and Children's Services at the Respondent between 2014 – March 2018;

    Dr Graham Shortland, a consultant paediatrician and Executive Medical Director at the Respondent between June 2010 - April 2019;

    Mr Ahmed Darwish, locum paediatric surgeon at the Respondent between approximately April 2015-April 2017 (by CVP);

    Professor Meriel Jenny, a consultant paediatric oncologist, Clinical Board director for women and children's services at the respondent between April 2018–January 2020 and later deputy medical director between April 2021-October 2021, and Executive Medical Director from October 2021;

    Professor Charles Jancezwski, Chair of the Respondent since August 2019;

    Ms Angela Hughes, Head of Concerns and Claims from July 2010 and Assistant Director of Patient Experience from February 2016;

    Mr Martin Driscoll, Executive Director for Workforce and Organisational Development from October 2017 and also deputy Chief Executive Officer from early 2019 until his departure in February 2021;

    Mr Len Richards, Chief Executive Officer of the Respondent between June 2017 and November 2021 (by CVP);

    Ms Selena Curkovic, consultant paediatric surgeon at the Respondent since October 2019 and Clinical Lead for the paediatric surgery department since September 2020;

    Ms Anjli Khakhar, locum consultant paediatric surgeon at the Respondent since September 2019;

Dr Richard Skone, a consultant paediatric anaesthetist, Clinical Lead of the paediatric surgery department between July 2018 and September 2019, Clinical Board Director for Clinical Services between September 2019-November 2020, Assistant Medical Director for Workforce and Revalidation in 2020, and the Deputy Medical Director since April 2022 – he was the UPSW case manager between December 2020 and March 2021;

Dr Stuart Walker, Medical Director from July 2019 to September 2021 and then Interim Chief Executive Officer until departing the Respondent in February 2022;

Ms Sarah Evans, Head of Workforce and Organisational Development at the Respondent between July 2015-December 2018;

Professor Christopher Fegan, consultant haematologist and the case manager for the Claimant's UPSW proceedings from March 2021.

Ms Nicola Robinson, the Head of People and Culture, Capital, Facilities, Estates Service Board and Children and Women's Clinical Board for the Respondent since January 2019, was not called by the Respondent due to a recent close bereavement, though a statement was provided. The parties agreed that the Tribunal should put the weight it saw fit on her statement.

15. Due to lack of time, written submissions were provided and considered by the Tribunal together with oral submissions. This Judgment does not summarise those submissions, but deals with them where they were of assistance below. During those submissions, the Claimant withdrew D3 and D21; the Tribunal does not deal with those matters as a result.

16. The Tribunal has borne in mind that it is not a fitness to practice panel investigating whether all the criticisms made by the Claimant of a substantial number of professional colleagues are correct; it does not actually matter whether the Claimant is right or wrong, provided she has the requisite reasonable beliefs. However, this is a public judgment and the Tribunal has considered that it would not be fair to unnecessarily name criticised colleagues of the Claimant who have not been given an opportunity to defend themselves in this Tribunal. Accordingly, any individual accused of wrong-doing by the Claimant will not be named in this Judgment unless they have been a witness (though they have been named in the agreed documents provided by the parties and annexed to this Judgment). This ensures that open justice is undertaken in a proportionate and fair manner.

17. The Tribunal is conscious that throughout the bundle and witness statements there are frequent references to "*BAME*", which is understood to mean Black, Asian and Minority Ethnic. This is a contentious term, though the Tribunal appreciates that it has been used by the parties (and was created as such) to be a shorthand to refer to those who are from a wide variety of backgrounds

and communities. The Tribunal will use this term as the parties, including the Claimant, have used it, but accepts that it is a term with which many people intended to be covered by it do not identify. No discourtesy is intended by the Tribunal, the parties or their representatives by the use of the term BAME.

18. References to pages in the core bundle are marked with square brackets. Other bundles or documents are referred to specifically where appropriate.

<u>The Law</u>

Detriment due to the making of a protected disclosure

19. The relevant legislation is found in the following provisions of the Employment Rights Act 1996 ("ERA"):

> *"43A Meaning of "protected disclosure"*
>
> *In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*
>
> *43B Disclosures qualifying for protection*
>
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*
>
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed…*
>
> *(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).*
>
> *43C Disclosure to employer or other responsible person*

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

(a) to his employer, or

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

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

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.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.…

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.

48 Complaints to employment tribunals

(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 43M, 44(1), 45, 46, 47, 47A, 47C(1), 47E 47F or 47G…

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B…

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

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."

20. The first question is whether a disclosure happened as alleged. If so, the Tribunal must ascertain if it is a qualifying disclosure. If it is, and has been made to either the employer or a prescribed person (if the necessary belief is established), then it is protected. In this case, the Respondent accepts that the vast majority of alleged protected disclosures are protected but

there is a dispute about PID5, PID11, GMC2b, GMC2e and GMC2f, which the Tribunal will need to resolve.

21. In respect of PID5, the Respondent disputes that the Claimant made the disclosure as she alleges. In respect of PID11, the Respondent challenges that the Claimant had a reasonable belief that the disclosure was made in the public interest. For GMC2b, GMC2e and GMC2f, the Respondent asserts that the Claimant did not reasonably believe that the information disclosed to the General Medical Council, and any allegation contained within it, was substantially true.

22. The necessary components of a qualifying disclosure to an employer were summarised helpfully by HHJ Auerbach in Williams v Michelle Brown AM (UKEAT/0044/19/00):

"*9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."*

23. The Tribunal bore in mind the warning from the Employment Appeal Tribunal in the case of Kilraine -v London Borough of Wandsworth UK EAT/0260/15 that tribunals should take care when deciding if the alleged disclosure was providing information as in practice information and allegations are often intertwined and the fact that information is also an allegation is not relevant.

24. To be a qualifying disclosure, there has to be a disclosure of information. As the case of Cavendish Munro Professional Risks Management Limited -v- Geduld [2010] ICR 325 makes clear, there is a need to convey facts, and not just make an allegation. It is this point that triggered the warning in the *Kilraine* case. An opinion does not equate to information (Goode -v- Marks and Spencers PLC EAT 0442/09). There appears to be no dispute between the parties on whether the Claimant made a disclosure of information for the disputed protected disclosures.

25. Was the information, in the reasonable belief of the Claimant, made in the public interest? This requires an analysis of the case of Chesterton Global Limited and others -v- Nurmohamed [2017] EWCA 979. Within that Judgment, the Court of Appeal made a number of useful observations when dealing with the issue of public interest. It made the point that simply considering whether more than one person's interest was served by a public

disclosure was a mechanistic view and required the making of artificial distinctions. The Court of Appeal said that instead a Tribunal should consider four relevant factors. It reiterated that Employment Tribunals should be cautious when making a decision about what "*is in the public interest*" when dealing with a personal interest issue because "*the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistle blowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never*."

26. The four factors that the Tribunal should consider when looking at public interest are:

(a) The numbers in the group whose interests the disclosure served (if one is considering the entire workforce of the NHS, the sheer number of employees affected are likely to render a disclosure in the public interest for example and such a belief reasonable);

(b) The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) The identity of the alleged wrongdoer – the larger or more prominent the wrongdoer, in terms of the size of its relevant community i.e. staff, suppliers and clients, the more obviously should a disclosure about its activities engage the public interest, though this point should not be taken too far.

27. It is relevant to point out there can be more than one reasonable view as to whether a disclosure has been made in the public interest, and the Tribunal should not substitute its view for that of the Claimant; it must consider whether the Claimant subjectively believed the disclosure was in the public interest, and whether that belief was reasonable. *Chesterton* established that the necessary belief is that the disclosure is made in the public interest; the particular reasons why the worker believes that to so be is not of the essence. Also, while the worker must have a reasonable belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – the Court of Appeal doubted whether it need be any part of the worker's motivation.

28. A matter that is of "*public interest*" is not necessarily the same as one that interests the public. Parliament chose not to define "*in the public interest*" but the *Chesterton* factors are a useful tool.

29. The Employment Appeal Tribunal in Dobbie v. Felton (t/a Feltons Solicitors) [2021] IRLR 679 provided further guidance on the meaning of "*in the public interest",* particularly at paragraphs 27-30. Disclosures about certain subjects are, by their nature, likely to be "*made in the public interest*" (see paragraphs 30-31).

30. The question of the reasonable beliefs of the Claimant needs to be determined. As the Claimant's Counsel reminded the Tribunal, a mixed objective and subjective test should be applied. The subjective element is that the Claimant must believe that the information disclosed tends to show one of the relevant failures and the objective element is that their belief must be reasonable (Phoenix House Ltd v Stockman [2017] ICR 84).

31. For the disputed disclosures to the GMC, the Tribunal must consider whether the Claimant reasonably believed that the information given to the GMC was substantially true; if such a belief is not established, then the disclosure does not qualify for protection. It appears that no-one could find any relevant authority to assist on this point, including the Judge, Mr Kemp on behalf of the Claimant submitted that the phrase should not be interpreted too stringently as there is a public interest in raising concerns; he submitted that a reasonable belief that the core of the disclosure was true would suffice. Ms Barney on behalf of the Respondent submitted that the Tribunal should focus on the words of the statute itself; it should look at the information conveyed and not approach a "*gist*" approach.

32. The Claimant submitted that the Tribunal should determine the issue of good faith; the Respondent said that it should not as it was a remedy issue and the Tribunal had conducted the hearing on a liability only basis. The Tribunal agreed with the submissions of the Respondent on this point; it had carefully gone through the list of issues at the start of the hearing and Mr Kemp on behalf of the Claimant had not asked for the issue of good faith to be considered in relation to the protected disclosure claim. A fair hearing requires the issues to be identified at the start of the hearing. The only discussion that took place about good faith was in relation to s43F ERA.

33. Once the existence of a protected disclosure is established, the Tribunal must then consider whether the alleged detriment happened. If so, it must consider if it is actually a detriment, and if so, whether the making of the protected disclosure was a material influence when the decision-maker carried out the detriment. The Respondent accepts some detriments happened as alleged and were detriments; however, it disputes entirely that

the making of a protected disclosure materially influenced the decision to impose a detriment upon the Claimant.

34. In the case of Blackbay Ventures Ltd v Gahir [2014] ICR 747 the Employment Appeal Tribunal gave guidance about the definition of the word "*detriment*". In paragraph 84 of the judgment, reference was made to the speech of Lord Hoffmann in Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065 quoting in turn Brightman LJ in Ministry of Defence v Jeremiah [1980] ICR 13, 31 *"a detriment exists if a reasonable worker would or might take the view that the [treatment] is was in all the circumstances to his detriment.*" In paragraph 85 of *Blackbay*, the opinion of Lord Hope in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 was quoted which also referred to Brightman LJ's formulation, Lord Hope adding, "*An unjustified sense of grievance cannot amount to 'detriment'*". Mr Kemp relied upon the case of Jesudason v Alder Hey Children's NHS Foundation Trust [2020] ICR 1226, but it makes the same point as the cases cited above that the threshold for a detriment is not high, adding in paragraph 28:

"28 Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective."

35. In paragraph 98 of *Blackbay*, tribunals were reminded that:

"*Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant to the date of the act or deliberate failure to act relied on by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act."*

"*Act*" mirrors the language of s.48(3) – detriment is an act or failure to act, not a consequence.

36. Recent case echo the above cases; in the case of Warburton v The Chief Constable of Northamptonshire Police [2022] EAT 42, the Judge said that the key test is: "*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment*?"

37. Detriment is to be interpreted widely; it is not necessary to establish any physical or economic consequence. Although the test is framed by

reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. Mr Kemp drew the Tribunal's attention to Deer v. University of Oxford [2015] ICR 1213 which confirmed that in the context of treatment suffered during internal procedures or processes, it is well-established that the conduct of internal procedures can amount to a detriment, even if proper conduct would not have altered the outcome.

38. The next question the Tribunal has to ask is did the information, in the Claimant's reasonable belief, show that the health and safety of an individual was endangered or there had been a breach of a legal obligation by the Respondent? Again, the key points are whether the Claimant had a belief that the information tended to show this and if so, whether that belief was reasonable.

39. It is a key part of the test to determine whether the information disclosed in the reasonable belief of the Claimant tended to show one or more of the points set out in s43B(1) ERA (Twist DX Limited v Armes UKEAT/0030/20/JOJ). In this case, the focus regarding the disputed disclosures is mostly on other parts of the test; it may be relevant to PID5.

40. The last question to be determined is whether the Claimant suffered a detriment which was materially influenced by her protected disclosures. In the case of NHS Manchester -v- Fecitt and others [2012] IRLR 64, the Court of Appeal held that the test in detriment cases is whether "*the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle blower*." *Fecitt* shows that if the making of a protected disclosure was an effective cause of the detriment, the causation test is met. S48(2) of the ERA confirms that if the Claimant shows that there was a protected disclosure, a detriment and that it was done by the Respondent, the burden of proof shifts to the Respondent to show the ground on which the detriment was done (which if not met, will result in the Claimant succeeding).

41. In this case, the Claimant seeks for the Tribunal to draw inferences from the primary facts as a whole (Anya v University of Oxford [2001] ICR 847); her Counsel encourages the Tribunal to "*see both the wood and the trees"* (quoting then HHJ Eady QC in Fraser v University of Leicester UKEAT/0155/13).

42. In relation to knowledge in respect of both claims, Mr Kemp submitted that "*it is sufficient for the decision-maker to have knowledge of the general substance of the putative disclosure or protected act. Knowledge of the original communication or of the detail of the disclosure is not pre-requisite."* (paragraph 45 written submissions).

43. The Tribunal considered it vital to bear in mind the wording of the statute itself and did not discount Mr Kemp's submission; however, it considered that it remained its duty to establish the reason for the act complained of and would only need to engage with this point if it found general knowledge of the protected disclosure but not specific knowledge was a material influence.

Victimisation

44. The relevant legislation for this claim is found within the following provisions of the Equality Act 2010 ("EqA"):

"27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual…

39 Employees and applicants

…(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment…

123 Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

45. The starting point is whether the Claimant undertook any protected acts; the Respondent accepts that PA2-PA6 were protected acts and the Claimant no longer pursues PA1. The Tribunal therefore does not need to determine this issue.

46. In passing, the Tribunal noted that the agreed list of issues stated that one issue would be that the Claimant suffered a detriment due to the Respondent's fear she would carry out a protected act; however, this has not been pleaded and no detriment in the list of issues is asserted to be due to such a fear. The Tribunal therefore will not engage with this argument and made this clear to the parties at the outset of the hearing. There was no objection; Mr Kemp on behalf of the Claimant accepted no detriment had been pleaded as occurring due to such a fear.

47. The Tribunal will need to determine whether the detriments that the Claimant asserts she suffered due to the protected acts happened, and if so whether they were detriments. The same definition of "*detriment*" applies to this claim as used for the protected disclosure claim. The Respondent accepts that some did happen as alleged and that some are detriments; again, what it fully disputes is whether the detriments were imposed because of the protected acts.

48. Causation for detriments for victimisation claims applies a different test to whistleblowing claims. The case of Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL (a case dealing with the predecessor act to the EqA), where Lord Scott said the Tribunal had to identify "*the real reason, the core reason, the causa causans, the motive*" for the treatment complained of. The Tribunal when considering whether a detriment was because of a protected act must ensure that the protected act is identified clearly and the relationship between the detriment and that act is determined.

49. As it is rare for there to be direct evidence of victimisation, the establishment of a prima facie case of victimisation by a Claimant can rely on inferences drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. As the case of Nagarajan v London Regional Transport [2000] 1 A.C. 501 (though dealing with direct discrimination) notes, it is whether the protected act is the material cause for the treatment of which the Claimant complains that the Tribunal must establish. A finding that the discriminator was consciously motivated in treating the complainant less favourably is not required. It is sufficient to support a finding of victimisation if it can properly be inferred from the available evidence that, regardless of the discriminator's motive or intention, a significant cause of his decision to treat the Claimant less favourably was that person's undertaking of a protected act. A significant influence is an influence which is more than trivial.

Time

50. For both claims, there is a potential issue about the jurisdiction of the Tribunal due to time limits. Certain detriments asserted by the Claimant are viewed by the Respondent as being outside the primary limitation period. However, it may be that such acts form part of a continuing series of acts, the last of time is within the limitation period; if so, all the connected acts are in time. In the alternative, if the acts are not part of a continuing series of acts and have been brought to the Tribunal too late, the Tribunal can extend time, but different tests apply to each claim. The relevant legislation is set out above.

Burden of proof

51. The burden of proof for the protected disclosure detriment claim is that the Claimant must prove that they have made a protected disclosure and that there has been detrimental treatment on the balance of probabilities. The Respondent then has the burden of proving the reason for the detrimental treatment if the Claimant meets the threshold.

52. In International Petroleum Ltd & Ors v Osipov & Ors UKEAT/0058/17 the Judge said:

    "84. Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference: see by analogy Kuzel v. Roche Products Ltd [2008] IRLR 530 at paragraph 59 dealing with a claim under s.103A ERA 1996 relating to dismissal for making a protected disclosure."

53. In the more recent case of Malik v Csenkos UKEAT/0100/17/RN, Choudhury J agreed with earliest judgments that:

    "Prudent tribunals in dealing with victimisation claims will no doubt prefer, wherever possible, to make positive findings as to the grounds on which the employer acted rather than to rely on s.48(2) until its effect has been authoritatively established."

54. For the victimisation claim, a shifting burden of proof applies as set out by s136 EqA:

    "(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."

55. At the initial stage of the claim, the burden of proof is on the Claimant on the balance of probabilities (more likely than not), to establish a prima facie case, i.e. facts from which discrimination can be established in the absence of a reasonable explanation from the Respondent (Igen v Wong [2005] EWCA Civ 142, Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 and Hewage v Grampian Health Board [2012] UKSC 37). A simple complaint of unfair treatment does not, on its own, provide sufficient facts for the burden to move to the Respondent or for the Tribunal to find that this treatment was unlawful discrimination. It is trite law that an allegation of mere difference in treatment between the Claimant and any comparator or between the protected characteristic of the Claimant and others is not sufficient to shift the burden of proof to the Respondent (Madarassy v Nomura International plc [2007] IRLR 246).

56. There are times where it is more appropriate for the Tribunal to use a less structured approach and ask the "*reason why*" for the treatment complained

of, if established that it happened (*Shamoon*). If the reason why the treatment occurred is not discriminatory, then whether or not the burden of proof has shifted is an academic point as the claim will fail.

Evidence

57. Given the passage of time in relation to events relied upon and claims made by the Claimant, the Tribunal bore in mind the principles articulated (and as set out in the Claimant's submissions) in the cases of Gestmin SGPS -v- Credit Suisse (UK) Ltd [2013] EWHC 356 (factual findings are best based on inferences drawn from the documentary evidence and known probable facts, rather than a witness' memory which can be affected by many factors) and R (Dutta) v General Medical Council [2020] EWHC 1974 (Admin) where Mr Justice Warby set out commentary by Mr Justice Stewart in the case of Kimathi v Foreign and Commonwealth Office [2018] EWHC 2066 (QB) on the *Gestmin* principle:

    "The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose… But its value lies largely….in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

58. The Tribunal bore in mind though the possibility that contemporaneous documents may not be reliable. It was plain that the Claimant in essence was suggesting a conspiracy against her involving the most senior individuals at the Respondent existed for years. The Tribunal generally placed more weight on such documents when the parties had seen them at the time (enabling a prompt challenge), but this did not mean no weight was placed on documents not meeting this test. It simply meant that the Tribunal had to proceed with heightened caution when weighing evidence.

59. The Tribunal also reminded itself that it was open to it to accept part of what a witness said, while not accepting other parts.

Conduct v actual disclosure

60. It is accepted by the parties that there is a difference between the disclosure or protected act itself and the manner in which the disclosure or protected act is carried out. The cases of Martin v Devonshire Solicitors [2011] ICR 352 and Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 are the leading authorities on this topic, though Kong v. Gulf

International Bank (UK) Ltd [2022] ICR 1513 also has an important warning for tribunals to bear in mind.

61. In essence, it can be possible to separate *what* an individual discloses from *how* they have disclosed it, but tribunals should be cautious when considering whether to separate the disclosure from the conduct – there is a high level of protection for whistleblowers for public policy reasons and it should not be undermined because "*their behaviour is challenging, unwelcome or resisted by colleagues. As Mr Laddie emphasised, whistleblowing by its nature, frequently involves an individual raising concerns about wrongdoing committed by individuals, frequently colleagues, commonly working in the same workplace. It is a natural human response to be defensive and resist criticism. Not only is it likely that the subject or content of a protected disclosure will be unwelcome, the manner in which it is made, repeated or explained, may also be unwelcome, leaving individuals feeling it necessary to restate their concerns, and increasing the prospect of being perceived as an irritant or thorn in the employer's side…Some things are necessarily inherent in the making of a protected disclosure and are unlikely to be properly viewed as distinct from it. The way in which the protected disclosure is made is also, in general, part of the disclosure itself, unless there is a particular feature of the way it is made (for example, accompanying racist abuse) that makes it genuinely separable.*" (*Kong* paragraph 61).

Concessions & withdrawals

62. The parties in the agreed list of issues recorded the following concessions and withdrawals -

Conceded by the Respondent:

That all the alleged protected disclosures were protected, with the exception of PID5, GMCPID2b, GMCPID2e, GMCPID2f, and PID11;

That all the alleged protected acts were such, following the Claimant's withdrawal of PA1;

That D4, D5, D24, D26, D29, and D39 factually happened as alleged by the Claimant;

That D4, D5, D24, D26, D29, and D39 were or could be detriments.

Withdrawn or accepted by the Claimant:

That PID8 is limited to the concession by the Respondent in paragraph 93c of the amended Grounds of Resistance (in other words, if the Respondent has not conceded an element of this disclosure is protected, the Claimant does not rely on the contention that it is protected);

That PA1 is withdrawn;

That D8, D11, D12, D19A, D20, D27, D31, D33, D36, and D38 are withdrawn.

D3 & D21 were withdrawn at the submission stage.

63. Given the above concessions, it means that the parties mainly disagree on the issue of detriments (factually, whether they are in law detriments, and whether the making of the alleged detriments were materially influenced by the asserted protected disclosure or because of the protected act). Rather than repeat the same points within this Judgment, the reader should consult appendix 1 to understand in summary each of the conceded protected disclosure or protected act.

Findings/Conclusions

64. Due to the volume of detriments asserted by the Claimant and evidence put before the Tribunal, it considers that the best approach is to deal with each disputed issue in full below.

PID5 – 17 January 2019 by Claimant to Maria Battle and Len Richards in writing

65. The Claimant asserts that within this disclosure [1154-1159] in a letter sent on 17 January 2019, she gave information which in her reasonable belief tended to show that the health and safety of the patient had been/was being/likely to be endangered and/or there was a failure to comply with the legal obligations regarding the duty of care owed to patients to perform surgical procedures or give medical advice with reasonable skill or care or comply with regulatory duties as registered medical professionals, and was in the public interest. The Claimant alleged that she disclosed information as to clinical concerns about Mr Darwish's operations and that patients were harmed or misled by inconsistent recording of comments and outcomes on DATIX.

66. DATIX is the system used within the Respondent to report incidents using a standard form, and are designed to address issues about patient safety. The Claimant said in paragraph 32 of her statement that they are also used to raise clinical concerns; Dr Shortland in paragraph 25 of his statement said that Datix forms were used by any member of staff to raise concerns and complaints.

67. The Claimant in paragraphs 146 & 147 of her witness statement asserted that she had a reasonable belief that the disclosure had been made in the public interest on the basis that her disclosure was that "*an unsupervised locum consultant with known consent violations had continued unfettered*

access to vulnerable child patients and their distressed parents and later the RCS review that was meant to deal with this, was manipulated to avoid it being reviewed. This also affects appraisals and the information that subsequent ROs need to be aware of." The Claimant pointed out that she made similar disclosures in PID1-PID4, which the Respondent accepts were made in the public interest, and that misusing the UPSW process to silence whistleblowers undermines patient safety.

68. The Respondent disputes whether the Claimant factually made the disclosure as asserted by her. It also disputes whether the disclosure did tend to show (in the Claimant's reasonable belief) that the health and safety of patients had been, was being or was likely to be endangered due to the exposure to risk or harm by the surgical practice or showed that the Respondent was failing or likely to fail to comply with its legal obligations.

69. The legal obligations that the Claimant relies upon and claims as part of her reasonable belief is two-fold – a) that there was a failure in the Respondent's duty of care in tort owed to patients to perform surgical procedures and/or advise patients as to medical procedures with reasonable skills and care (which the Claimant said had been breached by Mr Darwish and three other surgeons), and b) that the four surgeons named had regulatory duties owed as doctors to the GMC to act at all times in the best interests of the patient. The Respondent also challenged the Claimant's reasonable belief that the disclosure was in the public interest.

70. Under cross-examination, the Claimant accepted that within the alleged disclosure, she was complaining about the UPSW brought against her in 2017, and that the only reference to Mr Darwish was in relation to the review undertaken by the Royal College of Surgeons ("RCS") in the summer of 2017. She accepted that the letter was about her and her concerns about the UPSW in 2017, but asserted that it was in the public interest.

71. The first question to answer is whether the Claimant's disclosure was a disclosure of information. The Tribunal analysed the letter to see what facts it conveyed. In essence, it set out points surrounding the UPSW brought against the Claimant in 2017 and the patient involved from the Claimant's perspective. Did any of those facts disclose information, which in the reasonable belief of the Claimant, tended to show the health and safety of the patient had been put at risk or a breach of a relevant legal obligation by the doctors involved in their care? In particular, did the Claimant disclose what she alleges in paragraph 27 of the amended Grounds of Complaint – "*information as to clinical concerns in respect of AD's operations on patients with patients being harmed or misled by inconsistent recording of comments and outcomes on DATIX forms*"?

72. The points disclosed by the Claimant in her letter do not deal with Mr Darwish or the issues asserted about comments and DATIX forms. The letter is lengthy but does not make the disclosure asserted. There is no information as to clinical concerns about Mr Darwish or DATIX forms.

73. Looking at PID5, the Tribunal concluded that it dwelled extensively on the UPSW against her in 2017 and her criticisms of both the process and those involved. In the judgment of the Tribunal, the whole letter is about the Claimant personally and her belief that somehow the UPSW in 2017 was inappropriate and unfair; the references to patients and colleagues are made in this context.

74. In his submissions on behalf of the Claimant, Mr Kemp submitted that "*Turning to Issue 5, while the letter does go into detail in respect of the Claimant's UPSW, the letter also contains information of the requisite specificity as to clinical concerns in respect of AD's operations on patients with patients being harmed or misled by inconsistent recording of comments and outcomes on DATIX forms. The letter stated: "Throughout 2017-2018, major clinical concerns as well as my D@W case where patient safety by Dr Darwish was in question, have not been investigated though recurrently raised to Dr Shortland" [1159]. This information needs to be viewed in context of the Claimant having already provided Maria Battle with detailed information about her clinical concerns in respect of Mr Darwish by email on 13 October 2018 [1049-1100]."*

75. The Tribunal notes that the disclosure does not set out any detail of the alleged harm to patients. It is possible to rely upon an earlier document and use more than one document to construct a protected disclosure, but that is not what the Claimant says in her statement or pleaded in her amended Grounds of Complaint (for example, paragraph 27). This submission overlooks the concession made by the Claimant in cross-examination that the protected disclosure was about the UPSW brought against her in 2017. The Tribunal dealt with the disclosure on the basis of the contents of the letter of 17 January 2019 alone. It did not consider that it contained information as asserted by the Claimant and required to underpin a protected disclosure. It is an allegation of unfair treatment of her.

76. The Tribunal finds that the Claimant cannot have held a reasonable belief that the information she allegedly disclosed tended to show health and safety of a patient was put at risk or there had been a breach of the legal obligation by doctors involved in their care as the points she claims were made in her witness statement are not within PID5.

77. The Claimant's belief as to how this was in the public interest as set out in her witness statement is not consistent with the contents of PID5; the disclosure is about the UPSW in 2017 and her criticism of it. The Claimant

in her statement (both in relation to this issue and many others) makes sweeping generalised but serious accusations against others that is not founded by the evidence. For example, here she talks about a *"unsupervised locum consultant with known consent violations*"; what the Claimant is referring to is an incident on 4 – 5 January 2019 when Mr Darwish with a more senior consultant was due to operate on a patient. The operation was cancelled due to the intervention of the Claimant (who was Clinical Director at the time); she asserts that the parents cancelled the operation, but only after she had spoken to them and told them a different procedure could be offered elsewhere. It was the Claimant who told the theatre staff the operation was cancelled. These basic facts show that Mr Darwish was not unsupervised (as he was due to operate with another and the Claimant was able to take action to prevent the operation) and that there was no actual consent violation as the operation did not proceed. The Claimant knew this at the time – her witness statement is not accurate.

78. The Tribunal was not persuaded that the Claimant had a reasonable belief that PID5 was in the public interest. It was willing to accept that she subjectively believed so as the overwhelming picture of the evidence before it was that the Claimant asserted everything she raised was a patient safety issue, whether or not this was the case, despite the inaccurate evidence in her witness statement about her belief, but it did not objectively consider this belief to be reasonable given the focus of the letter was about the Claimant's UPSW in 2017 and because her reasoning was based on inaccurate beliefs and ignoring facts known to the Claimant at the time.

79. The Tribunal finds that PID5 is not a protected disclosure.

GMCPID2 – 14 August 2020 by Claimant to the GMC

80. The Claimant emailed a spreadsheet to the GMC [1946-1953], which she asserts was a protected disclosure and that she reasonably believed it to be in the public interest to disclose. The Respondent accepts the majority of the disclosure was protected, with three exceptions. For all three exceptions, the Tribunal must consider whether the Claimant believed that any such information disclosed was substantially true.

81. GMCPID2b was about a clinical incident in respect of a consultant surgeon which the Claimant says raised concerns about patient safety due to "*suboptimal management*" of a child patient with a worsening abscess cavity [1948 – case 12].

82. The Claimant's evidence at paragraph 251 of her statement was that it was true that a seton had been placed outside the anal canal of a child which

resulted in a persistent cavity that did not heal for four years, and Mr Lander agreed with her view of the matter.

83. Mr Lander in his witness statement at paragraph 67 dealt with this patient, having been the external reviewer who reviewed the records and had conducted a clinical examination of the patient. He confirmed that he had found no convincing evidence of negligence, but this was based on his hypothesis about the underlying issues. Mr Lander made the point that this was *"an unusual and challenging case for the clinicians",* that the seton/suture had served a useful purpose, but more aggressive treatment may have benefitted the patient, and that it was correct to involve the gastroenterologists in dealing with the patient. In short, Mr Lander did not appear to agree with the Claimant's assertions that the patient had suffered from suboptimal management of its health condition. Indeed, during her cross-examination the Claimant accepted that it was untrue to claim the management of this patient had been suboptimal. The Respondent's submissions noted that the Claimant knew of Mr Lander's view; this is confirmed in her spreadsheet to the GMC where she talked about his view and disagreed with it [1948].

84. The Tribunal finds that the Claimant did not believe reasonably that this allegation was substantially true at the time it was made to the GMC. She had strong views about how the patient should have been treated, but Mr Lander did not agree and the Claimant knew that; instead she sought to explain away his view. The Claimant's concession at cross-examination undermines any argument that such a belief was reasonable, either subjectively or objectively.

85. GMCPID2e [1952] was about concerns raised about a junior surgeon (which the Respondent accepts were protected) not being dealt with by Professor Jenney. The Claimant asserted that Professor Jenney had not ensured a safe and consistent mentorship for the junior surgeon that ensured delivery of a quality of care that patients deserved. The Respondent says that the Claimant has not shown that she had a reasonable belief that the disclosure tended to show that the Respondent was failing, had failed or was likely to fail to comply with its duty of care in tort owed to its patients and its staff in providing management oversight of the department by failing to provide safe and consistent mentorship to surgeons, including the Claimant. It also challenges whether she had a reasonable belief that the disclosure was in the public interest.

86. The Claimant's evidence at paragraph 252 on this issue was that what she said was correct and it was a patient safety issue as it meant the same mistakes would be made by the surgeon without a mentor, and that the surgeon would spread misinformation to his colleagues. She said it also

meant that it was possible to ignore her concerns and consider her a bully as without the appointment of an external mentor, there was no-one to challenge this view (the Claimant by implication appears to be assuming that the mentor would agree with her views).

87. It was put to the Claimant that she was implying to the GMC that there was something wrong with the junior surgeon's competency; she denied this. This was consistent with the evidence in existence at the time that the Claimant would say to staff at the Respondent, including Professor Jenney, she had no concern about the junior surgeon's competency, but make repeatedly DATIX referrals about him, criticising his performance.

88. The evidence also showed that Professor Jenney was engaged in finding a mentor for the junior surgeon, who was also being informally mentored by a senior locum surgeon in the department. The mentor suggested by the Claimant in April 2019 was ultimately not selected, and a mentor from Bristol was appointed around May/June 2019 [1343 & 1372]. The Claimant was not involved or updated about all the steps taken to secure the mentor as she was not a clinical lead or the junior surgeon's line manager, but was aware Professor Jenney was arranging for one to be appointed as the Claimant suggested a possible candidate. Mr Kemp in his submissions dwelled on the Claimant's lack of knowledge about the Bristol consultant's appointment as the mentor, but does not address what the Claimant did know about Professor Jenney's attempts to get a mentor, including asking the Claimant for suggestions.

89. The Tribunal finds that the Claimant did not have a reasonable belief that this allegation was substantially true; on the contrary, she was aware Professor Jenney was actively seeking a mentor for the junior surgeon, sought the Claimant's suggestions and there was a history of informal mentorship from a consultant respected by the Claimant.

90. GMCPID2f [1952] was an allegation that Dr Walker had subjected the Claimant to detrimental treatment due to her raising patient safety concerns, which included him allegedly making false allegations against the Claimant in February and July 2020 in meetings and describing her actions in raising her concerns as vexatious. The Respondent says that the Claimant has not shown a reasonable belief that Dr Walker had breached a legal obligation to protect employees who made protected disclosures or that her disclosure was in the public interest.

91. The Claimant's evidence at paragraph 253 of her statement was that she believed Dr Walker had a legal duty as the Responsible Officer ("RO") and Medical Director to implement the provisions of "*Good Medical Practice*" (a document produced by the GMC telling doctors what was expected of them in terms of professional standards) and to appraise doctors (including going

through the revalidation process). The Claimant's position was that if Dr Walker in these roles allowed unfair and inaccurate information about the Claimant to stand and did not effectively investigate her concerns with the assistance of surgical expertise, it enabled him and others to consider the Claimant as a person who "*chased frivolous concerns, vexatiously*" and undermined patient safety.

92. In cross-examination, the Claimant denied making so many allegations to the GMC due to her anger and feelings of injustice, or that she had lost any sense of objectivity. The Tribunal noted that the allegation to the GMC was that Dr Walker had made false allegations about her in the two meetings in 2020, but this is not what she said in her witness statement. This is a change in position by the Claimant that was not explained. The same applies to the allegation made to the GMC that Dr Walker described her actions as vexatious in those meetings; this is not in her witness statement. [1787] shows that Dr Walker did ask the Claimant about two matters in the February 2020 meeting regarding her access to the DATIX system and her dealings with the Deanery ("HEIW"), and then left the matter. Effectively, he dropped those issues after the Claimant explained the position.

93. There is no reference to her being vexatious in the minutes of Dr Walker's meetings with the Claimant. There is one reference in an internal email of 22 October 2019 where Dr Walker wondered if the Claimant was potentially in the vexatious category [1513], saying "*I will have to consider putting this into a vexatious complaint arena",* but he does not reach a conclusion. The Claimant was not a recipient of this email and has not given evidence that she was aware of it when making her allegation to the GMC.

94. The Tribunal finds that the Claimant did not have a reasonable belief that the allegations that Dr Walker made false allegations and had described her as vexatious were substantially true.

PID11 – 22 November 2020 by Claimant to Charles Jancezwski

95. The Claimant asserts that within this disclosure [2067-2072], she gave information about her detrimental treatment by the Respondent to date which tended to show endangerment of her own health and safety and breach of the duty of care owed to her by her employer (an alleged breach of a legal obligation).

96. The Respondent challenges the Claimant's reasonable belief that the disclosure was in the public interest; it accepts that the disclosure was information and the Claimant had a reasonable belief that it tended to show a breach of both aspects of s43B ERA pleaded.

97. The Claimant's evidence at paragraphs 390-394 of her statement on this point was that this disclosure should be seen in the context of the NHS "*Freedom to Speak Up*" report dated February 2015 which highlighted the difficulties faced by BAME staff in raising concerns. The report's Executive Summary was provided to the Tribunal [420-442]. Her evidence was that she believed the disclosure was in the public interest as it reflected wider issues in the Respondent about negative attitudes to ethnic minorities, both staff and patients.

98. In cross-examination, the Claimant accepted that in this disclosure she was trying to remove Dr Walker from his role as her RO, but denied this was a private matter as this was not the only aim of the disclosure. She accepted that she had only met Dr Walker twice (in February and July 2020) before making the allegations in her letter.

99. Mr Driscoll investigated the Claimant's complaint against Dr Walker. In his statement at paragraph 7 he sets out that he preferred the accounts of Dr Walker and Ms Robinson (who was absent at the time of the investigation on leave and could not easily have agreed her account with Dr Walker in Mr Driscoll's view). Mr Driscoll considered that the Claimant's account of those meetings was undermined by her failure to complain for months about the asserted conduct of Dr Walker despite the fact that her BMA representative had been present. His report to Professor Jancezwski is set in an email of 10 February 2021 [2163], and highlighted the Claimant's tendency to complain about colleagues formally as background to his conclusion that if Dr Walker had acted as claimed by the Claimant, she would have complained much sooner.

100. The Tribunal analysed the disclosure. The whole context of the letter is an assertion that the Claimant has done nothing wrong (despite a claim at page 2071 that she could improve in some aspects) and complaining of her treatment over several years. She was openly attempting to stop the RO from setting another UPSW investigation in progress against her [2071] and the focus for the outcomes the Claimant seeks were about herself. The fact that the disclosure was made in a healthcare setting does not automatically render the matter in the public interest.

101. What the Tribunal must consider is whether the Claimant had a reasonable belief that her disclosure was in the public interest. There is both a subjective and objective element. The Tribunal finds that the Claimant subjectively was only interested in herself and her position; it does not accept the evidence in her witness statement as reflecting her mindset at the time of disclosure. PID11 was about her perception of the treatment at the hands of the Respondent and her concern about facing a new UPSW.

102. The Tribunal considered the *Chesterton* questions, and considered that while the letter was about the Medical Director, the most senior clinician in the Respondent, there was no element of public interest in the letter as the Claimant was focussed on herself alone and her historic treatment. Objectively, the Tribunal is not persuaded that the Claimant's alleged belief that her disclosure was in the public interest was reasonable given the wider context. It is useful to review the agreed chronology to note by this point, the Respondent was already in the process of responding to the GMC about the concerns raised to it by the Claimant. More substantially, the "*nurse-led review"* by Ruth Walker and Angela Hughes had concluded in January 2020, including external reviews of some of the cases raised by the Claimant (involving Mr Lander). Mr Scott-Coombes, a very senior surgeon at the Respondent, had reviewed DATIX's raised by the Claimant on the papers and raised concerns about the Claimant's conduct. In 2018, the previous Chair of the Respondent had met the Claimant and the RCS had reviewed the department and provided a draft report. By this point, the Claimant's concerns had been investigated more than once, but fundamentally the Claimant did not accept the outcomes and criticised the findings of both the external reviewer, the RCS and anyone else with whom she disagreed.

103. The Tribunal considered that the Claimant was raising personal issues as part of her wider campaign to justify her conduct, including the conduct towards Mr Darwish in January 2017 for which she apologised and her actions towards colleagues which had led to complaints, and to avoid the UPSW that she knew was possible following a meeting with Dr Walker in July 2020 (see below) and her refusal to remediate her behaviour. There was no reasonable belief that this was a public interest disclosure, either subjectively or objectively. PID11 is not a protected disclosure.

D1 – 4 January 2017 – Dr Thomas instructing the Claimant to speak to Mr Darwish, knowing the risk of reprisal

104. The background to this alleged detriment is that the Claimant was the clinical lead for the paediatric surgery departments, and Mr Darwish was a locum consultant paediatric surgeon. On 4 January 2017, the Claimant discovered that Mr Darwish proposed to carry out a thoracotomy (open surgery) on 5 January 2017 and she was concerned that the patient's parents had not received proper advice about the possibility of carrying out a thoracoscopy (keyhole surgery) in the alternative. This gave rise to a concern as to whether informed consent had been given for the operation to proceed.

105. Both parties agree that the Claimant approached Mr Darwish at around 5 PM on 4 January 2017 on the Owl ward and had a discussion with him about the proposed surgery. There is a dispute about whether families and staff overheard that conversation, but the investigation by the Respondent indicated that they did. There is equally no dispute that on 4 January 2017, the Claimant texted Dr Thomas, the Clinical Board Director of the relevant directorate, and had a discussion through that media about the situation.

106. The Claimant asserts Dr Thomas deliberately instructed her to speak to Mr Darwish in the evening, despite knowing of a risk of reprisal by Mr Darwish, and that Dr Thomas should have intervened and managed the situation directly. Dr Thomas' position is that she did not instruct the Claimant to take the action she proposed, but that she did support it as the operation was not urgent and it was appropriate to take time to ensure that the appropriate procedure was carried out. The Claimant says that the Respondent has conceded this in its Response and that the instruction was given in an earlier telephone call; however, the Claimant's submissions also go on to say that the instruction was implied through the words "*You are the CD and a substantive surgeon and I will support the decision even if AD is furious"* [611] and then argues in the alternative that Dr Thomas knew of the risk of reprisal so instructed the Claimant to call Mr Darwish.

107. The amended Grounds of Resistance (paragraph 13) say that Dr Thomas "*told*" the Claimant; it does not say "*instructed*" as asserted by the Claimant. The Tribunal does not consider this to be a concession that the Claimant was instructed, given this was a discussion between two senior consultants with managerial responsibilities.

108. The text messages show that the Claimant volunteered to speak to Mr Darwish [613], saying "*Call him right now I guess*" after Dr Thomas said Mr Darwish needed to know first thing in the morning the operation would be cancelled as that was the decision of the Claimant having consulted others about the issue. During her cross examination (day 3 of the hearing), the Claimant accepted that Dr Thomas had not instructed her to call Mr Darwish – "*not instruction, no*" – and she did not ask Dr Thomas to deal with the matter. The Claimant accepted that Dr Thomas was supportive and collaborative on this issue.

109. In light of the Claimant's concession that Dr Thomas did not instruct her to call Mr Darwish and the contemporaneous evidence showing that the Claimant offered to call him, the Tribunal finds that the allegation has not been proved by the Claimant and is dismissed.

D2 – 4 January 2017 – Mr Darwish threatening the Claimant in a call

110. The Claimant called Mr Darwish in the evening of 4 January 2017. She asserts that Mr Darwish threatened her saying "*there will be personal consequences for you*". Mr Darwish denies threatening the Claimant. In his witness statement, he says it is not the type of language he would use and would be a foolish course of action for a locum consultant to say to the clinical lead of his department (bearing in mind that a locum is not a permanent member of staff).

111. In cross-examination, the Claimant accepted that her account at the time did not assert that Mr Darwish had threatened her with "*personal consequences*". She would not absolutely accept that it had not been said, but ultimately said she could not say for sure the phrase had been said.

112. Ultimately, there are no other witnesses to this conversation other than the Claimant and Mr Darwish. The Tribunal must decide whose account, six years later, it prefers. The Claimant has provided evidence that the next day she emailed herself an account of the conversation [832]; in that account there is no reference to the alleged threat. What is set out is "*More than once he said Remember you are making it very difficult not only for everyone else but also specifically for yourself. You are making your life rather difficult, and you should be careful."*

113. On 7 January 2017, the Claimant wrote another account [627], addressed to Graham but sent to herself. In that email, there is no reference to the alleged threat, but instead refers to a locum colleague (not named as Mr Darwish) saying she should "*be careful, I am making things very difficult for all and particularly for myself*".

114. The Claimant's response to Mr Darwish's Dignity at Work complaint about her behaviour [839] was the first time the Claimant asserted that he had threatened "*personal consequences*" [847], despite claiming that it was a phrase ringing in her head repeatedly. This was asserted after she was made aware of his complaint. In a fact-finding report by Mr Stephens, a consultant surgeon, carried out in 2017, there is an account of what both said happened in this conversation [770]; again, there is no reference to these words.

115. In the Claimant's submissions, it was said that the Claimant "*confided*" in a third party on 5 & 6 January 2017 and was emotional when she recalled the statement of personal consequences [811]; the Tribunal did not regard this as strong or cogent evidence. There is no confirmation from the third party, and it still did not positively assert Mr Darwish expressly made the threat alleged.

116. The Tribunal placed more weight on the documents from January 2017 as they are the closest in time to the event in question and predate Mr Darwish's complaint. The Claimant has not proven that Mr Darwish made the statement alleged, and cannot for certain recall it at the hearing. The allegation is dismissed as the Claimant has not proven it.

D4 – 11 January 2017 – Mr Darwish raised a Dignity at Work complaint against the Claimant

117. Following the discussion that took place in the Owl ward at around 5pm 4 January 2017 between the Claimant and Mr Darwish, the phone call between them around 10pm on the same day, and Mr Darwish attending theatre on 5 January 2017 with the surgeon with whom he was meant to be carrying out the operation with to discover that the Claimant had cancelled the operation after speaking to the patient's parents in his absence (the Claimant asserts that the parents cancelled but accepted it was due to what she told them) and had so informed the theatre staff, Mr Darwish made a complaint of bullying and harassment against the Claimant [618-620] to Dr Shortland, the Executive Medical Director.

118. This led to a meeting with Dr Shortland in the presence of Mr Darwish's professional supporter and Ms Sarah Evans who took contemporaneous notes of the meeting [635 – 636] on 12 January 2017. The complaint was raised on 6 January 2017 [618], but there was no meeting on this date. The Claimant originally asserted that in a meeting on 6 January 2017 Dr Shortland recommended that Mr Darwish made a formal complaint against the claimant. Mr Darwish, Dr Shortland, Ms Evans and the notes of the meeting that did take place on 12 January 2017 all say that this is not the case and Mr Darwish made it plain he wanted the matter dealt with on a formal basis. The Claimant was not present at that meeting and has withdrawn her allegations about it.

119. There is no dispute following his meeting with Dr Shortland, a Dignity at Work complaint process against the Claimant began as Mr Darwish wanted the matter dealt with formally. There is no separate complaint from the one he made on 6 January 2017. Factually, therefore this complaint struggles to succeed as Mr Darwish did not act on the date asserted; the complaint was made on 6 January 2017.

120. Taking a wider view, the Tribunal noted that the Claimant asserted that Mr Darwish was materially influenced in his decision to raise a Dignity at Work complaint because the Claimant undertook her protected disclosure PID2 (by disclosing to Dr Thomas the Claimant's concerns that Mr Darwish had not sought adequate consent and that he intended to perform the case on

his own). Mr Darwish disagreed. His evidence was that he made the complaint because he had had enough of the Claimant's attitude towards him over the last two years and he believed it was impossible for him to work with her anymore.

121. Mr Darwish said he was unaware of the emails and texts to Dr Thomas on 4 January 2017 at the time he made his complaint. There was a meeting between Dr Thomas and Mr Darwish (plus HR and Mr Darwish's professional supporter) on 10 January 2017 about the issues raised by the Claimant and where Mr Darwish said the Claimant was repeatedly raising concerns. The meeting is summarised at pages 629-630 of the core bundle in a letter from Dr Thomas to Mr Darwish. The evidence shows that Mr Darwish raised his complaint about the Claimant before he met Dr Thomas on 10 January 2017. It is likely that he knew the Claimant had made complaints about him, particularly as he told Dr Thomas it was part of a pattern of behaviour towards him, but there is no evidence he knew of the emails and texts sent by the Claimant to Dr Thomas on 4 January 2017 (PID2) when he complained on 6 January 2017. Given their nature, being sent to and from mobile phones and email addresses, it is implausible that Mr Darwish would have known of their existence as he was not a recipient.

122. In contrast, apart from the understandable upset a surgeon would feel in circumstances where his operation is cancelled due to the clinical director deciding this is appropriate and speaking to the parents in his absence causing them to withdraw consent but telling the theatre staff the operation was cancelled for "*governance issues*", the likely reaction is set out by an independent surgeon who investigated the matter. Mr Stephens at page 771 in his fact-finding report commented:

"Intervening in another surgeon's case in this way, even as a clinical director, is not standard practice and it is undermining the surgeon to do so, although there may be very rare occasions when this is necessary to protect patient safety. From a professional perspective to not talk directly to the surgeon and explain what has happened could be seen as disrespectful, and informing the theatre staff that the case was cancelled for governance reasons (rather than saying the parents withdrew consent) unnecessarily raised uncertainty."

123. Mr Stephens went on to find that "*There is no doubt there has been a significant problem with their professional relationship for many months and that the events of the 4th and 5th January 2017 were just the tipping point*."

124. The Claimant's response on being cross-examined on these issues was to say perhaps she had been "*overly truthful*" to the theatre staff and it might have been better to say the parents had withdrawn consent. Her written apology to Mr Darwish [744] was put to her, where she accepted how she

spoke to him was inconsistent with the values and behaviours expected of staff.

125. The Tribunal finds that while factually Mr Darwish raised his complaint about the Claimant on 6 January 2017, it was not materially influenced by PID2. It was done because of how the Claimant had behaved on 4 & 5 January 2017 (the discussion in front of staff and parents on the Owl Ward and the theatre staff being told the operation was cancelled for governance reasons and the general feeling she was undermining him). The allegation is dismissed.

D5 – 12 January 2017 – Dr Shortland asked the Claimant to step aside as clinical director

126. There is no dispute between the parties that Dr Shortland (in the presence of Ms Evans from HR) did ask the Claimant to step down as clinical director of the paediatric surgery department. The Claimant asserts that Dr Shortland asked her to do so because he was materially influenced by PID1, PID2, and PID3. Dr Shortland says that he asked the Claimant to do so because the allegations made against her by Mr Darwish were that effectively she was misusing her powers as clinical director to bully him. Dr Shortland's evidence was that the Claimant agreed to step down and the reason for the request according to paragraph 25 of his statement was that:

"I felt the concerns were significant enough to possibly interfere with other staff members, so I felt that stepping aside as clinical director was a reasonable request and the correct approach for the Claimant. The Clinical Director has a position where they actively manage the medical workforce and other members of staff on a day-to-day basis. This requires day to day engagement with many staff that would include Mr Darwish and colleagues and working with senior managerial colleagues. The nature of the allegations made by Mr Darwish were significant and the incident was alleged to have taken place in front of other staff. This potentially leads to a loss of confidence in the Clinical director and an inability to carry out their role."

127. The Claimant in paragraph 70 of her witness statement denies that she decided to step down independently, despite this assertion in the letter from Ms Evans on 18 January 2017 recording the position [647]. Dr Shortland in paragraph 23 and 26 of his witness statement admits he requested the Claimant to step down and sets out why. This is confirmed in his letter to the Claimant dated 15 November 2018 [1113]. Ms Evans does not deal with the point at all in her statement.

128. In cross-examination, it was not put to the Claimant that she had agreed to step down, though she accepted she did not resist at the time. Indeed, the Claimant was shown a letter from herself to Dr Shortland dated 15 January 2017 [637] where she said she was very happy to abide by due process and agreed that she had seen the sense of her stepping down at the time (but she also did later complain about the advice given to her by the BMA on the issue). The questions put to the Claimant were on the basis that it was entirely appropriate for Dr Shortland to ask her to step aside as clinical director. The Claimant's response was that "*perhaps yes, but should've let me reflect or move me to managerial responsibility without having direct line management*". The Claimant remained of the view that she had been asked to step aside due to the raising of consent issues and not because of how she had conducted herself in dealing with those concerns.

129. Dr Shortland under cross-examination was unable to point to what part of the Dignity at Work process enabled him to require a clinical director to step aside. He made the point that the role of clinical director was not a substantive appointment, and the postholder needed to have the confidence of all the staff. Dr Shortland also explained that by the time the investigation had concluded, and the Claimant apologised to Mr Darwish in October 2017, unfortunately she had to take leave to deal with her mother's death. Due to questions from the Tribunal, Dr Shortland confirmed that he had previously asked other clinical directors to step aside due to them facing UPSW or other investigations; he thought one had asserted that they had raised concerns.

130. Dr Shortland's evidence was that he did not know if he had been aware of PID1; he pointed out that the emails were not sent to him and the matter was well within the sphere of Dr Thomas to whom the emails were sent so there was no need to tell him. Due to the passage of time, Dr Shortland was unable to assist as to whether he ever saw these emails. Dr Shortland confirmed in his evidence that he was aware of the Claimant generally being concerned about Mr Darwish's practice through informal contact with Dr Thomas and that he was in particular aware of the emails and texts sent by the Claimant to Dr Thomas on 4 January 2017 (but the texts were not forwarded to him). Dr Shortland accepted that PID3 was sent to him directly by the Claimant on 16 January 2017, but this was after he had met with Mr Darwish, after Mr Darwish had raised a Dignity at work complaint, and after asking the Claimant to step aside as clinical director. PID3 post-dates the alleged detriment.

131. There is insufficient evidence to support a finding that Dr Shortland was aware of PID1; it therefore could not have materially influenced his decision to ask the Claimant to step down from the position of clinical director. PID3 was not made until after this conversation and therefore could not have

materially influenced this action. PID2 is the only protected disclosure that could have materially influenced Dr Shortland.

132. The Tribunal accepts that being asked to step aside as the clinical director is a detriment; a reasonable employee would consider that to be disadvantageous.

133. The critical issue is whether the Claimant sending the emails and texts to Dr Thomas on 4 January 2017 materially influenced Dr Shortland's decision to ask the Claimant to step down as clinical director. The Tribunal agrees that there is no express power in the Dignity at Work process permitting this step, but this is not enough to infer the reason Dr Shortland did so was materially influenced by the protected disclosures. The Tribunal found Dr Shortland's explanation to be plausible and credible; the allegation was that the Claimant had misused her power as a manager to bully a colleague – it would be difficult to continue in such a role, and arguably impossible when she had undertaken the complained of acts in front of staff. The Claimant admitted to speaking to Mr Darwish in public about the operation and telling the theatre staff the operation was cancelled – there was little dispute about what she had done. There was no challenge to Dr Shortland's account of asking others in the same position as the Claimant to step down.

134. The Tribunal finds that the reason the Claimant was asked to step down was not because of her protected disclosures, but because of the nature of the allegations against her and the nature of the management role requiring the confidence of the consultants and the staff. The allegation is dismissed as the act was not materially influenced by the making of a protected disclosure.

D6 – from May 2017 Dr Shortland, Dr Thomas and/or Mr Durning deliberately failed to offer the Claimant any options for managerial career rehabilitation

135. Mr Durning, an associate medical director at the Respondent, was asked to deal with the complaint made against the Claimant by Mr Darwish. The fact-finding investigation was carried out by Mr Stephens, but Mr Durning was the decision maker for the complaint. On 7 September 2017, Mr Durning wrote to the Claimant [703-704/1779-1780] following their meeting the previous day in the presence of Ms Evans and the Claimant's BMA representative. He set out that both the investigator and he felt that while the reason for the Claimant's contact with Mr Darwish on 4 January 2017 was reasonable, the way she had conducted herself was not appropriate, particularly as it had been done in the presence of witnesses on the Owl ward.

136. However, Mr Durning did not feel using the UPSW process was the way forward and was content to require the Claimant to voluntarily agree to undertake the following actions:

"1. Issue an agreed and open apology for your behaviour to Mr Darwish for the manner in which you spoke to him and the impact this has had on him. We agreed that Sarah Evans would help you develop a draft apology and check the content of this with me before;

2. Include the Case Investigation report and your response in your annual appraisal documentation (you confirmed that you had already done this) in a recent appraisal meeting, followed by discussion and reflection in your appraisal summary.

3. Participate in a programme with an external agency/equivalent Body to add insight into your behavioural traits, communication skills and their impact on others. Within your Personal Development Plan, the Medical Director will require appropriate entries to confirm consolidation of learning and monitor your behavioural change. You confirmed that you had already approached the Learning and Development Department for Communication skills support and indicated that you would also seek 1-1 support from Debbie Cohen in this area.

4. Comply with the four dimensions detailed in "Good Medical Practice' at all times, paying particular attention to Dimension Three. As such, you will be expected to ensure that you work in a harmonious and collaborative manner with all colleagues in the Paediatric Surgical services, respecting colleague's skills and contributions, treating colleagues fairly and with respect and being cognisant of how your behaviour may influence others within and outside the team.

5. Comply with Cardiff and Vale's University Health Boards Values into Action 2 and the Children and Women's Clinical Boards guidance (attached) on how the Health Boards' values and behaviours should be applied within the workplace."

137. The Claimant provided the apology to Mr Darwish [1113].

138. In her witness statement, the Claimant set out extensively her feelings of grievance about the matter but the relevant section is within paragraph 81 where she says "*I was not restored or rehabilitated to the post of CD [clinical director]. There was absolutely no conversation by anyone with me to discuss a pathway back to the managerial structure."*

139. In her cross-examination, the Claimant accepted that Mr Durning's action plan in dealing with appraisals, insight training and a personal development plan was a pathway allowing her to improve communication skills, and that

what was required was for her to reflect and improve. She further accepted that appraisals were an opportunity to deal with career prospects. In essence, what the Claimant argued before the Tribunal was that she should have been given a discussion about how to use her skills at the end of a complaint process that found she had behaved inappropriately as a manager, but would not result in a UPSW if she undertook the required action plan.

140. Mr Durning did not give evidence, but Dr Thomas and Dr Shortland did. Dr Shortland confirmed in his statement that appraisals was when doctors discussed their career plans, and Mr Durning's action plan was the type of action that would assist the Claimant. Under cross-examination, Dr Shortland repeated this view and made the point that in clinical leadership roles, communication skills were required. He also said that it was not Mr Durning's role to decide if the Claimant became a clinical director again, but events had overtaken the situation and the issue was not considered due to the Claimant's bereavement.

141. Dr Thomas in paragraph 22 of her statement made the point that it was for the Claimant to reflect on her behaviour and its impact on others, and that career development was a matter for appraisal discussions. Dr Thomas confirmed that the Claimant never raised the point with her. The Claimant did not put to Dr Thomas that she had carried out this detriment due to the making of a protected disclosure.

142. The allegation is that Dr Shortland and/or Dr Thomas and/or Mr Durning deliberately failed to offer the Claimant any options for management career rehabilitation. There is no evidence of any deliberate failure. The point was not put to Dr Thomas; Mr Durning set out an action plan that would assist the Claimant, given the findings about her behaviour as a clinical director. Dr Shortland explained why the issue of her re-appointment to the role of clinical director never arose, while Dr Thomas' unchallenged evidence was that the Claimant never raised the matter with her. There is no appraisal evidence before the Tribunal that shows the Claimant raised the matter.

143. The Tribunal finds that there was no deliberate failure as asserted by the Claimant, and in any event, she was effectively given an action plan to rehabilitate her management career by Mr Durning. The allegation is dismissed as it has not been factually proven.

D7 – 20 October 2017 – Dr Thomas arranged for an email to be sent to the Claimant while she was away from work due to a bereavement

144. The background to this alleged detriment is that the Respondent had invited the RCS to review the paediatric surgery department and report. A draft

report appears to have been received by the Respondent in August 2017 and the draft was formally issued on 4 October 2017. All the consultant surgeons in the department were to be given an opportunity to comment on the draft report.

145. In the meantime, the Claimant's mother had died, and the Claimant had to go abroad to deal with the matter. The Respondent also said that it had received a serious concern from a family of the patient regarding the Claimant. The written complaint was received on 22 October 2017 [749] but it was verbally made earlier to ward staff according to Dr Thomas' oral evidence. This was how the Respondent was aware of it before the written complaint was received.

146. As a result, Dr Thomas asked Ms Evans to write to the Claimant on 20 October 2017 and let her know that the draft report from the RCS had been received and that some point they would need to talk to her about the serious concern raised. The Claimant was deeply distressed by receiving this email and felt that it had been sent without regard for her grief.

147. Dr Thomas' evidence was that she wanted to treat all the consultants equally in terms of the RCS report (paragraph 26) and she knew the Claimant would want to know about the complaint as soon as possible and it was a very serious concern (paragraph 27 & oral evidence), and that was why she told Ms Evans to send the email, but she accepted that it was insensitive. Ms Evans confirmed this account and said the email had been sent to flag to the Claimant that these two important points had arisen so she could deal with them when she was ready (paragraph 14). Both deny any connection between the email and any protected disclosures.

148. Factually, the detriment occurred as alleged, and the Tribunal was willing to accept that a reasonable employee may perceive receiving such an email when away from work as a detriment.

149. The Claimant asserts that the protected disclosures PID1 and PID2 materially influenced Dr Thomas to arrange for this email to be sent. PID1 and PID2 are dated 20 September 2016, 4 October 2016 and 20 October 2020 for PID1, and 4 January 2017 for PID2.

150. The Tribunal could not see any connection between disclosures made several months earlier (or made in the future) about consent concerns and the sending of this email. The explanation given by Dr Thomas is plausible and consistent with the evidence that shows the issues within the email had arisen recently; the Tribunal considers it likely that the Claimant would have complained about any delay, given the voluminous evidence in the bundles that she complained regularly about any matter with which she was unhappy or felt was a slight on her professional skills or standing.

151. The Tribunal finds that the reason the email was sent was nothing to do with any protected disclosures by the Claimant; it was sent for the reasons given by Dr Thomas. The allegation is dismissed on the grounds that the act was not materially influenced by the making of a protected disclosure.

D9 – 25 October 2017 – Dr Shortland removed the Claimant from clinical work without explanation

D10 – 25 October 2017 – Dr Shortland decided to escalate the matter to UPSW without any proper assessment or verification of evidence

152. These two alleged detriments marked as D9 & D10 were considered together by the Tribunal (and dealt with together by Counsel when cross-examining the relevant witnesses and making submissions).

153. The background is that the Claimant faced allegations (arising from the parent complaint mentioned within the email in D7 above), which led to the UPSW process being commenced against her and her removal from clinical work by the Respondent.

154. The Claimant in her witness statement (paragraph 93) said that she was informed on 1 November 2017 in a meeting with Dr Thomas and Ms Evans that the complaint was going to an UPSW and she was removed from clinical work. In paragraph 94, she says there was no proper explanation and the decision must have been made by Dr Shortland as he was the Executive Medical Director. The Claimant asserted that Dr Shortland must have made the decision before the meeting where she was informed and pleads the date of 25 October 2017. The Claimant said in paragraph 97 the decision to exclude must have been made without the complaint from the parents having been received and without telling her of the complaint in full or seeking her explanation. The Claimant in paragraph 98 went on to say that only serious concerns justify restrictions on clinical practice, and that the UPSW process [2920] requires consideration of alternatives to restriction of clinical work. The Claimant believes that her removal from clinical work was due to PID3 (16 January 2017) & PID4 (17 May 2017), several months earlier.

155. Dr Shortland in his statement explained that the Respondent received the complaint from the parents [751-756] dated 22 October 2017 and confirmed that he decided to commence a UPSW given the nature of the complaint, adding in cross-examination after taking advice from Ms Evans and Mr Scott-Coombes. Dr Shortland at paragraph 42 said that the complaint was serious and "*on the face of it, it seemed that the child had been operated on and a procedure performed for which the parents believed they had not consented to*". At paragraph 46, he said that the Claimant was placed on

restricted duties as the complaint related directly to her clinical practice and it was of a serious nature. Dr Shortland added:

"*Based on the allegations it was felt that her behaviour was potentially detrimental to patient safety and/or it was felt the nature of the investigation would have been affected by her presence at work. This approach is a common one as there could be potential contact with the patient's family as they were under active management. This could affect the ongoing nature of the investigation."*

156. Dr Shortland said that instigation of an UPSW is a neutral act and was the best process to find out exactly what had happened. During cross-examination, he said that he evaluated the seriousness of the concerns raised, satisfied himself that it was not a systemic issue, and explained that he had not been able to talk to the Claimant beforehand as she was absent due to her mother's death. As he was unclear when she was returning, Dr Shortland confirmed that he made his decision to restrict the Claimant's practice and start an UPSW based on the information he had.

157. In a letter dated 4 December 2017 [765], it was set out to the Claimant that she had been told on 28 November 2017 in a meeting with Ms Evans and Mr Scott-Coombes, the case manager for the UPSW, that she was on restricted duties and she would meet Dr Thomas to agree an interim job plan.

158. The Claimant had been on sick leave due to the death of her mother; the Tribunal is not certain exactly when the Claimant returned and was fit for work (the agreed chronology is silent). Dr Thomas in her witness statement was silent on the subject of the Claimant's removal from clinical duties or any meeting with the Claimant. No explanation has been provided as to why the Claimant asserted 25 October 2017 as the date of the decision, though the agreed chronology gives this date. A letter from Ms Evans of 3 November 2017 [761] to the Claimant records that on 1 November 2017 Dr Thomas did tell the Claimant of the restriction though it was also agreed that the Claimant would remain on sick leave. It also records that the complaint was discussed, but Dr Thomas was not aware of the full details:

"Dr Thomas indicated that although she was at this stage not fully aware of the details of the concern she understood that the family's unhappiness related to a number of factors including your communication with them and your application of the consent process. Additionally, she understood that some concerns had been expressed about your management and communication skills in relation to this patient by colleagues. Dr Thomas also confirmed that the family of patients had requested that the child's care was given to another Consultant Paediatric Surgeon and Mr Prabhu Sekaran had taken over the care of the child.

Dr Thomas explained that because of the significant concerns raised, your care of the patient would be investigated under Upholding Professional Standards in Wales…

Dr Thomas advised you that while the investigation was ongoing you would be restricted from carrying out clinical duties. This decision had been made for your protection while the investigation was ongoing…"

159. The UPSW policy confirms that [2919] *"2.4 The organisation's Medical Director has overall responsibility for managing exclusion procedures. The decision to exclude a practitioner must be taken only by persons nominated under paragraph 2.5. The case will be discussed fully with the Medical Director, the Workforce & OD Director or nominated deputy, NCAS (where appropriate) and other relevant interested parties prior to any decision to exclude a practitioner."*

160. At [2920], the policy deals more specifically with restriction from practice:

"2.8 When serious concerns are raised about a practitioner, and as an alternative to exclusion, the organisation will consider whether it is necessary and sufficient to place temporary restrictions on their practice. The advice of NCAS advice may be sought where practicable.

2.9 Alternative ways to manage risks, avoiding exclusion, include:

- *supervision of clinical duties;*
- *restricting the practitioner to certain clinical duties or duties at another hospital/clinical site;*
- *restricting activities to administrative, research/audit, teaching and other educational duties;*
- *In cases relating to a practitioner's capability, consideration will be given to whether an action plan to address the specific issue of concern can be agreed with the practitioner. Advice on the practicability of this approach may be sought from NCAS."*

161. The Claimant in her witness statement (paragraph 102) asserted that the case manager should have carried out a review of the "*basic evidence*" and conducted a *"thorough review*" within the first few weeks. However, the initial stages of the UPSW process does not require a full assessment; [2912] says that:

"1.2 Where the Medical Director considers that an investigation into the nature of the problem or concern is required then he or she will appoint a Case Manager to take the matter forward.

Role of the Case Manager

The Medical Director will assign the role of Case Manager to a Deputy, Associate or Assistant Medical Director unless it is impracticable for them to do so, in which case the role will be discharged by a senior clinician nominated by the Medical Director.

The Case Manager's role will be to evaluate the nature of the problem or concern raised about a practitioner and to assess the seriousness of the matter based on available information. He/she will undertake an initial assessment of the concern(s) raised and will determine whether a formal investigation needs to be carried out or whether the issue can be resolved informally.

Where it is determined that a formal investigation should be instigated the Case Manager will;

● *formulate the Terms of Reference for an investigation;*

● *appoint a Case Investigator;*

● *provide progress reports to the Designated Board member;*

● *determine what action should be taken in response to the findings and recommendations of the Case Investigator*."

162. Under cross-examination, the Claimant agreed that the complaint made by the parents was serious, but was of the view that Dr Shortland should have read the case notes before acting. She said Dr Thomas did explain that the concern was significant on 1 November 2017, but the Claimant felt she should have been given "*more context*".

163. It was a theme throughout the Claimant's evidence and her communications with the Respondent throughout the raising of her concerns that she would say that "*context*" was required. It appeared that when the Claimant was asked for specifics, she would revert to talking about "*context*".

164. The Claimant agreed under cross-examination that the alternative to exclusion was restricted practice. She accepted that Mr Scott-Coombes then appointed an investigator for the 2017 UPSW, who reviewed extensive medical records and interviewed those involved in the care of the patient; it was not a quick review of the case notes.

165. It is not for the Tribunal to substitute its own view for that of Dr Shortland; however, it is useful to look at the complaint to assess the credibility of his position. The Tribunal did so and concluded that it was a serious complaint regarding a patient still being treated by the Respondent. The complaint was not only about the Claimant, but also about nursing staff and other doctors. There was more than one complaint about the Claimant, but a recent one (from 12 October 2017) was about whether the Claimant had

carried out surgery without consent. The Claimant herself when talking about Mr Darwish emphasised repeatedly how serious such concerns are; indeed, she continued to raise the same concern for years in respect of 1 patient seen by him. The Tribunal accepts Dr Shortland's explanation as to why he viewed the complaint as serious and why it was necessary to restrict the Claimant's practice while the matter was investigated. It equally accepts his explanation why the UPSW was chosen; many serious concerns had been raised and it was a reasonable mechanism to get to the bottom of what happened.

166. The Claimant's allegation is not that she was restricted from practice, but that she was given no explanation; similarly, her allegation about the UPSW is that there was no proper assessment or verification. However, the Tribunal finds that this is not a fair analysis of what happened. Dr Shortland reviewed the complaint, concluded that it was serious and activated the procedure for further investigation. No more was required under the UPSW process. The Claimant was unavailable to be spoken to by Dr Shortland in any event in later October/early November 2017 but was spoken to in two meetings in November and an explanation given then and in writing. The Claimant has not established that there was no proper assessment or verification, but she has also failed to establish any connection between the decision to remove her from clinical work and start a UPSW and her protected disclosures. A serious allegation about the Claimant and her clinical work had been made by parents; this was why she was removed and the UPSW commenced. The allegations are dismissed.

D13 – January 2018 – Dr Shortland deliberately failed to notify RCS that the Claimant could be identified by her pronouns in its report and did not seek further correction of the report until August 2018

167. The Claimant asserted that she was the only female consultant in the paediatric surgery team. This meant that the references to "*she*" identified her as the surgeon in question while her male colleagues had the benefit of anonymity when the RCS provided its draft report [717 is an example]. The Respondent asserted while the Claimant at the time was the only female consultant, shortly after the draft report was received in October 2017 this ceased to be the case, and the report had very limited circulation in its draft form.

168. The Claimant's case is that Dr Shortland deliberately delayed in asking the RCS to change the report in this respect, and this was materially influenced by the making of PID3 (16 January 2017) and PID4 (17 May 2017).

169. In her statement (paragraph 116), the Claimant said that this request was made by her on 8 January 2018, and she was not shown a draft letter asking for the change until 28 August 2018. The Claimant noted that it seemed Dr Shortland had been speaking to the RCS earlier, but had not made the request until August. Under cross-examination, it was put to her that it was not a deliberate failure; the Claimant's position was that she believed it was as it was unaddressed, though she accepted she did not know the time pressures of Dr Shortland's role caused by the situation with the department. When it was pointed out to her another consultant had raised an issue which was raised by Dr Shortland with the RCS when he raised the Claimant's concerns, the Claimant was forced to accept this.

170. Dr Shortland's evidence was that the Claimant made the request on 22 January 2018 in a letter [856]; he is silent about any meeting on 8 January 2018. RCS was asked by him to alter its report to take out the gender specific pronouns [1016] on 15 September 2018 and it did so [1025]. He accepted that it took time for him to make this request, but this was because it was more efficient to collate all the views of the consultants involved and go back with a list of proposed amendments (paragraph 70) in a comprehensive response (cross-examination). Dr Shortland said it took time to do this. He said that the report in its draft form was confidential to the Respondent and only seen by a limited list of people for comment. Dr Shortland denied deliberately failing to correct the report to ensure only gender-neutral pronouns were used.

171. The Tribunal considers that it is irrelevant when in January 2018 the Claimant sought the amendment to the RCS report. It is a fact that it took about nine months for the point to be raised by Dr Shortland. Was it a deliberate failure?

172. There is no evidence on which the Tribunal finds the failure was deliberate. Dr Shortland was the most senior doctor in the Respondent, dealing with a wide range of matters, including serious concerns about the paediatric surgery department (hence the request for the RCS to visit). It accepted as plausible and credible his evidence that it was best to send a comprehensive response to the RCS, and that other consultants had been treated the same way. In any event, the Tribunal considered that a reasonable employee would not consider the delay as a detriment; the report was in draft form and only seen by a limited number of people. The allegation is dismissed on the basis that it was not factually proven and in any event there was no detriment established.

D14 – from January 2017 (ongoing) – Dr Thomas, Dr Shortland and Dr Walker deliberately failed to carry out any or adequate or timely investigation of PID1-4

173. The four protected disclosures relied upon for this alleged detriment range from 20 September 2016 to 17 May 2017 (though repeated on 20 October 2020). They start with the Claimant's concerns about Mr Darwish's approach to consent, move to her specific concerns raised on 4 January 2017 about patient JC (the patient where there were consent concerns), are widened in the disclosure of 16 January 2017 and end in the fourth disclosure with the Claimant's concerns again about consent and the potential or actual harm suffered from patients between January and March 2017.

174. The Respondent denies failing to investigate such concerns or doing so in an inadequate or slow manner.

175. The Claimant relied upon the RCS review not dealing with consent issues or *"access of locum consultants*" (paragraph 128) and asserted that she was forced to raise DATIX concerns repeatedly. She said that the external legal review did not deal with her concerns as it had no clinical remit (paragraph 139) and led to PID5 being made on 17 January 2019 (paragraph 140).

176. The Claimant did in her statement accept that the "*nurse-led review*" (her description of the review conducted by Ruth Walker, Director of Nursing with a specific remit for patient safety, assisted by Angela Hughes, Assistant Director of Patient Experience, to deal with the many concerns raised by the Claimant carried out between late 2018-January 2020) did deal with concerns about Mr Darwish (paragraphs 149-151), as well as her concerns about other matters.

177. This review led to some cases being referred for external review to Mr Lander. The Claimant was critical of the Lander review, saying that he did not have access to patients, and more critical of the review of the other cases that was carried out internally, asserting that the internal review "*lacked any paediatric surgery expertise or awareness of consent and literature evidence*" (paragraphs 150 & 152). While these criticisms were made by the Claimant in relation to D15A, the Tribunal considers that it would be an error to overlook this evidence when considering D14. The nurse-led review concluded in January 2020, and is covered by the timeline asserted within the allegation (from January 2017 ongoing).

178. The Respondent denies failing to address these concerns; Dr Thomas in her statement said that she supported the Claimant in raising her concerns on 4 January 2017 and the texts messages support this view and that Dr Thomas expressly said she would support the Claimant. She pointed out

that on 6 January 2017 [621] she had spoken to Mr Scott-Coombes who wanted a root cause analysis ("RCA") carried out into the issue of inadequate consenting by Mr Darwish and a meeting was to be arranged (paragraph 35). Dr Thomas admitted that she could not remember if the meeting took place, but anticipated that it did in her absence as it was not a matter for her as Clinical Board Director to deal with. Her position was that the concerns about Mr Darwish could be managed with "*an educative and supportive approach*" (paragraph 38). The RCS review was also mentioned.

179. The Tribunal was provided with two copies of the RCS review carried out in July 2017; the draft version was dated 4 October 2017 [713-743] and the final version had the same date, but it must have been finalised after amendments were proposed by Dr Shortland in August/September 2018 [fourth bundle 3-32]. The RCS review was a report on 18 clinical records relating to paediatric surgery at the Respondent, carried out at the invitation of Dr Shortland. The selected cases were chosen by the Respondent as they had been found to be of concern. The RCS found a number of issues arising from the cases and criticised more than one surgeon, including the Claimant. Strikingly, the RCS made findings about the persistence of the Claimant's beliefs regarding clinical matters, despite being incorrect in the opinion of its reviewers [717], and the need for her to reflect. The RCS review made 11 recommendations to improve patient safety and to support team working, both within the department and with other departments.

180. In the view of the Tribunal, the RCS team was asked to review the standard of care provided, to identify any themes regarding the standard of paediatric surgical practice and possible courses of action [719]. The word "*consent*" was not expressly used, but consent is part of surgical practice; indeed, the Claimant's position is that it is a key part, and the Tribunal accepts this. The unchallenged evidence was that the cases to be reviewed by the RCS were chosen through a multi-disciplinary process jointly with Ms Walker and Dr Shortland and after wide discussions with members of the Children and Women's Clinical Board and senior members of the Corporate Clinical Governance committee (Shortland, paragraph 62). Both locum and substantive consultants were reviewed. However, the patient (JC) from the events of 4 January 2017 was not reviewed by the RCS team. The evidence from the Respondent's witnesses consistently was that this was because the patient had not come to harm as the operation was cancelled due to the actions of the Claimant (see Hughes paragraph 38 as an example).

181. Dr Shortland in his statement said that PID1 & PID2 was not made to him, and the Claimant's other disclosures were missing patient details and confirmed that a DATIX would be submitted. He was asked during cross-examination about his efforts to find out if the Claimant's concerns about consent had been dealt with; an email of 7 August 2018 to Ms Hughes

[1005] showed him expressly asking if these matters had been complained about or any RCA undertaken. The response on the same day [1003] was lengthy but did not obviously seem to address the point. Mr Kemp did not pursue the point.

182. Dr Walker in his statement said that he had no involvement in the investigation of PID1-PID4 as they pre-dated the start of his employment in July 2019. Ms Hughes, as part of the nurse-led review, in her statement at paragraph 38, said that she did review the case at the heart of the events of 4 January 2017 and found "*I recall that there was lots of evidence of discussions with the parents about consent. Consent is not a one-off event, and a number of discussions took place in respect of this matter*." She referred to her notes made at the time in her statement [additional bundle 588-590; dated 22 October 2019]. Ms Hughes was cross-examined on this issue; she said that as there was no harm to the patient, the case was closed. Ms Hughes was not asked why a RCA was not carried out at that point; however, by this point Mr Darwish had long left the employ of the Respondent and more than 2 years had passed.

183. It is accepted by all that the RCA into the patient at the heart of the events of 4 January 2017 (sought by Mr Scott-Coombes, Mr Darwish and his professional friend) does not appear to have been carried out. The Claimant asserts that this was deliberate; the Respondent says that it struggles to explain why it was not done and suggests that it was overlooked.

184. The evidence before the Tribunal shows that within PID4 (made on 17 May 2017) [640], the Claimant accepted that she had recently met Dr Shortland and he dealt with the issue of consent by asking the Claimant to provide detail. The Claimant accepted this under cross-examination; she also agreed that the nurse-led review team undertook enormous work to identify precisely her concerns and worked with the Claimant to do so.

185. The nurse-led review was a substantial piece of work. It arose from the various concerns raised by the Claimant, through both protected disclosures and DATIX forms. Ms Hughes was designated to assist Ms Walker with the process and she became involved in late 2018. She met with the Claimant on 25 January and 23 April 2019 [1271], and then had calls and emails with her to compile a list of the Claimant's concerns to investigate. Ms Hughes confirmed in her oral evidence that her approach was to go through the Claimant's concerns, get the necessary details from her directly (as the disclosures/concerns often lacked specific detail – examples being pages 1177-1179, 1188-1191, 1196-1197 & 1347-1348 core bundle) and then created a table for the investigation [additional bundle 587-609]. The Claimant was involved in the creation of the table and Mrs Hughes' unchallenged evidence was that it was checked whether the

concern had been reviewed by the RCS or at a previous clinical review and there was a column to allow the Claimant to add her comments or questions in the table (Hughes; paragraph 11). The Claimant accepted under cross-examination that the nurse-led review had been extremely transparent about its approach, who it consulted and how it reached its conclusions.

186. From a review of the table, it is plain that JC, the patient at the heart of the events of 4 January 2017, was reviewed in this process [additional bundle 588-589], and there is a clear reference to the consent issue. The table records the case as closed at the end of the process; the reasoning is not set out, but other cases equally do not have the explanation for closure in the table. A letter from Ms Walker [1755] on 20 January 2020 to Board members, which Ms Hughes said in her statement was copied to the Claimant, specifically refers to this case. Ms Walker asks for an investigation into the professional conduct of Mr Darwish when consenting this patient to be considered. Professor Jenney was one of the recipients; Dr Walker, Dr Shortland and Dr Thomas were not.

187. Ms Hughes' evidence in paragraphs 14 - 16 of her statement was that each case raised by the Claimant was reviewed, including with her, 4 cases were sent to Mr Lander for external review in 2019. A further report from Mr Lander was obtained at the Claimant's request; the Claimant remained unhappy with his report [1746 is an example from 12 January 2020]. The review ended in January 2020 after a review of the concerns, DATIX forms from the Claimant and the evidence gathered by Ms Hughes and two other senior professionals and a feedback meeting with the Claimant. The Claimant proceeded to raise historical concerns in March 2020, which Ms Hughes' evidence (paragraph 22) was that they had already been investigated and closed.

188. The Tribunal reviewed the cross-examination of Ms Hughes. Her evidence was consistent with her statement in terms of the approach to the investigation of the Claimant's concerns, the involvement of the Claimant in raising questions generally and the instruction of Mr Lander, and the need to work with the Claimant to precisely identify the patient and the concern. Ms Hughes remained adamant that the Claimant had chosen Mr Lander as the external reviewer. Mr Kemp asked Ms Hughes about the seeming failure of the Board to investigate Mr Darwish; she explained that it was a matter for the Board, but she did not accept it had so failed.

189. The Tribunal reviewed next the cross-examination of Professor Jenney, a recipient of the letter from Ms Walker of 20 January 2020. She was not asked about this letter. Professor Jenney's witness statement does not expressly deal with D14 (understandably as she was not accused of carrying out this detriment), but did refer to a letter to the Claimant of 25

October 2019 [1476], following a meeting with her the day before. Professor Jenney in that letter set out the discussion that had taken place about the 8 most recent DATIX forms from the Claimant and that the historical concerns raised had already been investigated, and four cases were with Mr Lander. There is nothing in the statement about Ms Walker's request that the Board considered investigating Mr Darwish about his consent of the patient who was at the heart of the events of 4 January 2017. January 2020 was when Professor Jenney moved Boards; Ms Walker's letter was addressed to her as Clinical Board Director for Children and Women, the role she left that month (on a date unknown to the Tribunal).

190. The Tribunal reviewed again the contents of PID1-PID4. While the events of 4 January 2017 involving patient JC are the most dramatic example in some ways before the Tribunal due to the cancellation of the operation and the allegations surrounding this, the general theme of these disclosures are about Mr Darwish and consent. The Claimant's pleaded case is that there was a deliberate failure by Dr Thomas, Dr Shortland and Dr Walker to investigate, and the nurse led review was inadequate as it did not fully address these disclosures.

191. The allegation is that from January 2017 and ongoing, Dr Thomas, Dr Shortland and Dr Walker deliberately failed to carry out any or adequate or timely investigation of PID1-4. Given Dr Walker did not join the Respondent until after 17 May 2017, the only potential relevant PID was the repetition on 20 October 2020. By this point, various investigations had been carried out by others. The Tribunal does not consider that Dr Walker failed to carry out investigations of disclosures made to others years before his arrival or failed to ensure a timely investigation.

192. Dr Thomas was the Clinical Board Director until March 2018. The evidence before the Tribunal shows that she clearly supported the Claimant in raising her concerns on 4 January 2017; the text messages and emails sent 4-6 January 2017 show this. Dr Thomas consulted Mr Scott-Coombes and was aware of his proposal for a RCA into the matter to be carried out [621]; she informed the Claimant of this. Dr Thomas honestly admitted that five years later, she could not remember if the proposed meeting with Mr Darwish took place; Mr Darwish did not mention such a meeting in his statement; he was not asked about it in cross-examination. Mr Darwish left the Respondent only a few months later in March/April 2017; his Dignity at Work complaint concluded after his departure.

193. Dr Thomas under cross-examination accepted that the Claimant had raised concerns for some time before 4 January 2017 about Mr Darwish's consenting practices. She was asked about the RCA and why it had not taken place; Dr Thomas' evidence was that it was not her role to insist a

RCA regarding patient JC took place and she agreed her view was that the matter could be addressed through an educative and supportive approach. Dr Thomas accepted that the RCA's absence was an inadvertent oversight, but denied it was her role to ensure it was conducted. She also said she thought the case was on the potential list to be reviewed by the RCS.

194. The allegation against Dr Thomas is that she deliberately failed to investigate. It is not that she merely failed, which is established and accepted. The allegation to be established by the Claimant is that the failure was deliberate. Given Mr Scott-Coombes' wish for a RCA, the parallel Dignity at Work procedure against the Claimant due to her conduct towards Mr Darwish which involved a fact-finding process by Dr Stephens, and Dr Shortland's involvement in receiving Mr Darwish's complaint where even Mr Darwish wanted a RCA, it is evident that many individuals at the Respondent were involved. The Tribunal accepts Dr Thomas' evidence that she believed the issue with patient JC was being addressed by others and it was not a matter for her to progress it. The risk of involving so many individuals is that matters are overlooked as each think someone else is dealing; the evidence does not support a finding of deliberate failure. The matter of patient JC arose again in the nurse-led review (see D15A below); it remains unexplained what happened next after Ms Walker asked the Board to consider investigating, but by this point Dr Thomas was no longer in her role.

195. Dr Shortland was involved for a longer period of time than Dr Thomas due to her change of role from March 2018. It was he who invited the RCS to review the department. He had meetings with the Claimant with a BMA representative in attendance on 26 October 2018; his letter summarising that meeting to the Claimant [118-1124] recorded a *"key action was to establish the outstanding issues so that we could provide a clear way forward in order to address these and support you further*." Dr Shortland set out the investigations carried out to date into some of 17 cases raised by the Claimant earlier in the month, and that another meeting between the Clinical Board Director and the Claimant would take place to record formally what needed to be recorded on DATIX and the seriousness of the concern realised. That meeting took place on 23 April 2019 with Ms Walker and Ms Hughes as part of the nurse-led review [1271], though there was an earlier meeting between the Claimant and Professor Jenney and Ms Hughes [1239] on 12 April 2019 on a similar topic.

196. Several of the Respondent's witnesses made the point that the difficulty with the Claimant was that she would write lengthy documents raising concerns, but they were unfocussed and lacking details; having read those documents the Tribunal agrees. It was also evident that the Claimant was raising the same or similar concerns to several individuals and in DATIX forms which

caused confusion; the creation of the nurse-led review was an attempt to consolidate and deal with the Claimant's concerns in a structured manner.

197. Dr Shortland left his post in April 2019, one month after Mr Richards asked Ms Walker to review the Claimant's concerns and conclude the matter [1198]. Again, the Tribunal is not persuaded that Dr Shortland deliberately failed to investigate or that he failed at all. The Executive Medical Director's role is very senior, and it is reasonable for him to involve others; he commissioned the RCS review (which did deal with consent generally, but not patient JC), the evidence shows he was aware of the various investigations carried out and he met with the Claimant repeatedly to discuss her concerns. Once the nurse-led review was underway in late 2018, Dr Shortland stepped back to allow it to deal with the matter, which in the Tribunal's view is reasonable. The Claimant has not established a deliberate failure by any of the alleged wrongdoers, and so the allegation fails factually. The unresolved issue of the action taken by the Board on receipt of Ms Walker's letter of 20 January 2020 cannot be the fault of the alleged wrongdoers for the reasons given by the Tribunal.

198. In any event, the Tribunal struggled to understand the detriment as asserted by the Claimant in paragraph 126 of her witness statement. Taking her case at its highest, an employer who investigates serious complaints of bullying by a clinical director or complaints regarding a doctor is acting properly. The Claimant's position appeared to be that because in her view her concerns about consent and Mr Darwish were not investigated, any complaints or concerns about <u>her</u> should not have been investigated and doing so was a detriment. That is not a contention that a reasonable employee would consider reasonable or a detriment in the Tribunal's view. If the Claimant had for this detriment asserted that she was subjected to the Dignity at Work process or UPSW in 2017 due to the making of a protected disclosure (as she has alleged for other detriments), the Tribunal would accept that in theory this could be a detriment. However, the Claimant in her statement clearly argues that the failure to investigate the protected disclosures relied upon caused her a detriment as she was investigated in 2017 for other matters. The Tribunal does not accept that this is a detriment.

199. The Claimant in her statement then argued that due to the lack of investigation, the detriment to her continued as she was working "*in a culture which was unsafe for both for patients and for me…led to a groundswell of opinion and gossip that I was in the business of raising vexatious complaints and bullying colleagues"* (paragraph 127). However, the Claimant provides in her statement no evidence supporting this serious allegation; for example, what led to the accusations of bullying was her alleged conduct towards others, including conduct witnessed and complained of by those not involved in any of these matters (for example,

Dr I Davies). Another example is the Dignity at Work complaint brought by Mr Darwish led to the Claimant apologising for her conduct [744]; it was not an alleged failure to investigate Mr Darwish that led to this outcome; it was her conduct.

200. It is also relevant that regardless of the Claimant's concerns about Mr Darwish, they objectively have no link to her conduct; a whistle-blower cannot defend unacceptable conduct in the workplace by saying they have made a protected disclosure which has not been investigated. The two issues are separate, as confirmed in the *Martin* and *Panayiotou* cases cited above. The *Kong* warning was considered but the Claimant did not behave appropriately when dealing with Mr Darwish on 4 January 2017, which was why she apologised. Again, the Tribunal does not accept that this is a detriment for the reasons given by the Claimant.

201. This finding means that in the event that the Tribunal is incorrect in finding that there was no deliberate failure to investigate, the allegation still fails as the detriment required has not been found. The allegation is dismissed it has not been proven and detriment has not been established.

D15A – April/May 2019 – Mr Richards, Dr Shortland and Dr Walker – deliberate failure to address the surgical concerns raised by the Claimant regarding the practice of Mr Darwish and another surgeon

202. This detriment refers to PID5-PID9, which are five separate disclosures made by the Claimant to the then-Chair of the Respondent, Mr Richards, and Dr Skone between 17 January 2019 and 8 April 2019. The disclosures centre on the Claimant's concerns about Mr Darwish (who had left two years previously) and two other surgeons. The Claimant dealt with the allegation in her witness statement, asserting that "*there has been no proper investigation into the issues I have raised about Mr Darwish's inadequate consenting practices*" (paragraph 125), and said it was a detriment to her because she had been investigated under the Dignity at Work process in 2017 (in respect of Mr Darwish's complaint about her conduct) and also under an UPSW in 2017 (in respect of the complaint raised by parents) (paragraph 126). The Tribunal has already found that PID5 is not protected.

203. The Claimant asserts at paragraph 153 of her statement that this was a detriment suffered by her as two of the patients externally reviewed by Mr Lander were under her care for follow-up, saying "*this exposed me to the risk of blame for any adverse consequences arising from their [other surgeons] surgical management of these patients as I was the only person they [the parents] knew who had been involved in their care on an ongoing basis".* The Claimant did not point to any incident of this occurring. She also

said that it was a detriment as she was "*left without a path to justice and left me exposed to allegations that I was incorrectly raising these matters through DATIXES rather than M&M meetings*".

204. The Tribunal's findings about the nurse-led review above in D14 are equally applicable to this allegation. It is also relevant to reiterate that the Claimant has chosen to allege a <u>deliberate</u> failure.

205. As Dr Walker was not employed by the Respondent until July 2019, it is difficult for the Tribunal to understand how he is alleged to have committed a detriment against the Claimant in April/May 2019. It reviewed the pleaded case, which does not specify a date. However, the annex to the amended Grounds of Complaint, which therefore is part of the pleaded case does specify April/May 2019. It is a document prepared by Counsel. It was a document to which the Tribunal itself pointed out during the hearing contained many incorrect dates and had to be amended during the course of proceedings as a result. A list of issues is not a statement of case, but an annex to grounds of complaint is and so the Tribunal in fairness to both parties must engage with the allegation as pleaded. As the specified date is April/May 2019, it finds Dr Walker could not have committed it.

206. In a similar vein, Dr Shortland left the Respondent on 18 April 2019; this gives him at most 18 days to have allegedly carried out this detriment. Given the nature of the protected disclosures, the Tribunal does not consider 18 days to be a fair timeframe to assert Dr Shortland deliberately failed to do anything. The reality is that he would have been preparing to leave the Respondent (he did not start his current role as a locum until December 2021). This allegation also ignores the previous meetings and letters between the Claimant and Dr Shortland; for example, his letter of 17 February 2019 [1164] where Dr Shortland addressed the complaints of the Claimant on personal matters and confirms that the 17 cases she has raised concerns about will be further investigated by Professor Jenney at a future meeting with the Claimant. He also answers specific points raised by the Claimant in that letter and said:

"I appreciate that you feel that a number of enquiries are not being dealt with, but I do feel that I have given appropriate responses with formal written responses on a number of occasions and have been active in taking forward the issues you have raised. I have responded to you supportively through various meetings and confirmed matters within my letters, (specifically those mentioned previously and also those dated 28 June 2018 and 15 November 2018.). I do not think it helpful to continue to go back over and repeat the matters and apologies already included within those letters. With the purpose of supporting you through informal meetings and dialogue with Dr Thomas, Sarah Evans and Dr Jenney. I have confirmed the matters we

have covered within subsequent correspondence. I have sent copies of your letters, where relevant to the Chair, Chief Executive and Director of Workforce and Organisational Development and my response has been copied to those individuals also."

207. This leaves Mr Richards, the then Chief Executive of the Respondent. Mr Kemp submitted that Mr Richards created the expectation of a response from him to the Claimant in his letter of 7 March 2019 saying "*I will get back to you*" [1198]. It is accepted that Mr Richards did not "*get back*"; his position is that Ms Walker had been asked to review the matter; this became the nurse-led review, and his letter confirmed that (paragraph 12). Mr Richards at paragraph 6 of his statement said the Claimant knew from a meeting with him that Dr Shortland as the Executive Medical Director had been asked to lead on dealing with her concerns and he had instructed external lawyers to review governance in the department (paragraph 10 – in cross-examination, he agreed the instruction was in 2018). Mr Richards also explained that the Claimant did write to him again in May 2019 more than once, but the matter was now with Ms Walker and he was concerned that the Claimant was undermining the process by continuing to contact him (paragraph 14).

208. In the Tribunal's view, it was a bad point raised by the Claimant to seek to argue Mr Richards had deliberately failed to address surgical concerns, and it noted that Mr Kemp's submissions only relied on PID5-7, not PID5-9 as set out in the annex. Mr Richards was not a surgeon. The nurse-led review which he initiated as a result of the Claimant's disclosures was accepted to be a significant task and took time to complete, involving an external surgical reviewer. The review did not conclude until January 2020. It is also reasonable for the Chief Executive of a health board to expect senior personnel to deal with matters delegated to them by him; it is common practice and does not support the inference the Claimant seeks to draw.

209. The Claimant was aware of the outcome, as evidenced by her refusal to accept it and her criticisms made at the time. She described it as inadequate in the pleaded case, but in the Tribunal's view, the Claimant viewed it as such because the outcome was not what she sought. When Mr Lander did not agree with her, the Claimant criticised his report; the Tribunal having viewed the evidence before it and heard from the Claimant concluded that it was fair to say that the Claimant was unable to accept other points of view or conclusions that disagree with her. The RCS made a similar finding. Disagreement does not equal inadequate. The emphasis on the phrase "*nurse-led*" by the Claimant potentially denigrated both the professional skills of those specialising in patient safety and Mr Lander who advised them where relevant. Ms Walker was an executive board member and both her and Ms Hughes specialised in patient safety.

210. The Tribunal does not consider the Chief Executive of a large health board failing to write further after the outcome of the review was delivered by the Executive member responsible for patient safety to be evidence justifying the conclusion sought by the Claimant that it was a detriment. A reasonable employee would not consider it to be so. In addition, the review specifically looked at the issue of consent and Mr Darwish, and asked the Board to consider investigating the matter. It is difficult to see what more Mr Richards was expected to do to; the review he initiated agreed with the Claimant that there was something to investigate further and asked the Clinical Board to consider doing so, notwithstanding Mr Darwish's departure. There is no evidence of a deliberate failure.

211. The Tribunal does not find this allegation factually proved or that any detriment is established. It is dismissed.

D15B – 3 May 2019 – Professor Jenney sought to silence the Claimant and brush her disclosures under the carpet, and deliberately failed to provide a safe working environment for her to make protected disclosures without the risk of reprisal from colleagues

212. This detriment centres on a meeting between the Claimant and Professor Jenney, in with Ms Robinson from HR in attendance. The meeting took place on 3 May 2019 and Ms Robinson's handwritten notes were within the bundle [1325-1326].

213. The Claimant in her witness statement asserted that the meeting "*was a deliberate attempt by Professor Jenney to call into question my mental health, to undermine the historic concerns about disclosures 1-4 that I continued to pursue, and to seek to shut down the ongoing matters that I raised regarding [the junior surgeon]."* (paragraph 188). She went on to assert that Professor Jenney aggressively challenged the Claimant's reasons for filing DATIX's (paragraph 189), "*was belligerent in her approach and her tone was brusque*" (paragraph 190) and said that "*raising concerns and refusing to stop chasing a response would be considered a threat*" (paragraphs 190 and 193).

214. The Claimant asserted that Ms Robinson did not take any notes and the Claimant's email of the same day [1327-1330] outlined the discussion at the meeting. Within that email, the Claimant thanked Professor Jenney and Ms Robinson for their time and responds to points discussed in the meeting; she does not complain of Professor Jenney attempting to silence her, or threatening her, or deliberately failing to provide a safe working environment.

215. Professor Jenney's evidence was that the meeting took place as she was concerned about the Claimant's well-being, as confirmed in her letter of 7 May 2019 to the Claimant following the meeting [1332-1334; paragraph 55 Jenney statement]. She said that the trigger for the meeting was a combination of concerns raised by the GMC about the Claimant's conduct, the Claimant's conduct in relation to the bladder service, and the ill-health of a close family member. Professor Jenney firmly denied brushing the Claimant's concerns aside or threatening her, but said it was her role to ensure that given the large number of concerns raised by the Claimant, some of which appeared to be unsubstantiated, the reviews and investigations had to be proportionate (paragraphs 60 and 62-64). Professor Jenney pointed out that external reviews were underway for a small number of cases. She was concerned about the impact of the Claimant, a senior consultant, repeatedly raising concerns about the junior surgeon through the DATIX system (paragraph 64), and said this was discussed with the Claimant.

216. Ms Robinson was not able to attend the hearing due to a bereavement. Her absence was unfortunate as she witnessed the meeting and could have been challenged about her notes. The Tribunal did not consider that it was appropriate to wholly ignore her evidence, given the reason for her absence, but it bore in mind that the evidence had not been subjected to cross-examination.

217. In her statement, supported by an unsigned statement of truth, Ms Robinson confirmed that pages 1325-1326 of the core bundle were her notes of the meeting, and it was a discussion about the DATIX forms and the behaviours around those DATIX's forms (paragraph 10). Ms Robinson asserted that the Claimant shouted at Professor Jenney and was unable to stick to the point being discussed.

218. The contemporaneous evidence shows that on 13 May 2019 the Claimant wrote again to Professor Jenney [1336-1337], copying Ms Robinson. The letter opens with *"I appreciate the time you spent with me, plans for an inclusive meeting for bladder service and help to secure final version of apology."* Within it, the Claimant went on to say "*I believe UHB's values do not support a view that "raising concerns and refusing to stop chasing a response is a threat." The word reflects a warning to me."* There is no explanation within the letter as to whether the Claimant was quoting someone, and if so, who.

219. The notes of Ms Robinson could not be challenged due to her non-attendance at the hearing [1325-1326]. The notes are handwritten and are not verbatim. It is not clear whether they were written at the meeting or afterwards; under cross-examination Professor Jenney said that the notes

were written during the meeting. The topics that both parties agree were discussed are within those notes with the exception of the closure of DATIX forms; there is no record of Professor Jenney threatening the Claimant or trying to silence her. There is a record in the notes that the Claimant was angry and upset.

220. Both the Claimant and Professor Jenney were cross-examined about this alleged detriment. The Claimant accepted that she was agitated and upset due to the conversation and the context. It was pointed out to the Claimant that in her email to Professor Jenney of 3 May 2019, there was no reference of closing DATIX forms; the Claimant was confused in her response but on further questioning, accepted that was correct and she had confused meetings (it was the October meeting where the topic had been discussed). The Claimant was invited to withdraw the allegation in light of that concession, but declined to do so. The Tribunal had the benefit of a transcript of a meeting with the Claimant and Professor Jenney (with others in attendance) on 25 October 2019 [1478-1511]; within that meeting there was substantial discussion about DATIX forms and their closure.

221. Professor Jenney continued to deny threatening the Claimant at the meeting on 3 May 2019 under cross-examination.

222. The Tribunal has to decide whose account of the meeting on 3 May 2019 it prefers; it prefers Professor Jenney's. Applying the *Gestmin* principle, the Claimant's email of the same date is wholly silent about Professor Jenney allegedly threatening her or trying to silence her. In addition, the Tribunal accepts that Ms Robinson's notes of the meeting were contemporaneous – it is plausible as it is common practice to minute meetings (as shown by the numerous examples in the hearing bundle of minutes and recordings) and there is no reason for her to lie.

223. The Claimant's account is undermined by the concession that she has confused the two meetings of May and October 2019 and the discussion about closing DATIX forms did not happen in May. Even the Claimant's later email of 13 May 2019 does not positively assert Professor Jenney threatened the Claimant. The Claimant has been found to have misremembered statements she asserts were made to her (see the allegation regarding Mr Darwish); this does not mean none of the Claimant's evidence is considered to have weight, but it is relevant.

224. Equally, while demeanour is not a safe basis on which to weigh evidence, the Claimant in her evidence made many unsubstantiated allegations and speculation and would not withdraw or concede points when under cross-examination it was shown that her account was incorrect. The pattern of the Claimant refusing to accept points with which her disagreed was evident through the five days of cross-examination. In contrast, Professor Jenney

immediately conceded when it was pointed out to her she had sent information to Mr Scott-Coombes that made adverse comment against the Claimant; she did not seek to resist and was in the view of the Tribunal greatly surprised by her error. The wider evidence in the bundle showed that Professor Jenney worked hard to understand and address the Claimant's concerns; the conduct of which she is accused at the meeting of 3 May 2019 was not consistent with those actions.

225. The Tribunal finds that the allegation has not been factually proved by the Claimant and is dismissed.

D16 – 25 October 2019 – Professor Jenney adopted an aggressive, defensive position to the Claimant, mentioning that she had made "unofficial enquiries" about her and sought to close the DATIX reports without due process

226. As referred to when dealing with the previous allegation, the Claimant had another meeting with Professor Jenney on 25 October 2019, with the Claimant's BMA representative in attendance, as well as Ms Robinson and Carol Evans, Assistant Director of Patient Safety & Quality. There is a recording of this meeting in the core bundle [1478-1511]. At the end of the meeting, the Claimant asked for the tape to be turned off so she could say something. She asserted that at this point, Professor Jenney said she had made "*unofficial enquiries*" about the Claimant, and it was "*clearly intended as a threat*".

227. The Claimant in her witness statement (paragraphs 216-228) sets out her account of the meeting. During the recorded element of the meeting, the Claimant said Professor Jenney showed no interest in understanding the surgical context, frequently spoke over her and interrupted. She relied upon Professor Jenney saying at the meeting "*get through as many Datexes [sic] as we can within the next 30 minutes or so and then if we haven't got through them all, we'll cut, draw a line under the Datexes [sic] otherwise we'll be here all day*" as evidence she was wanting to close them down. The Claimant explained that "*To close a Datix means that the manager makes a decision on the concern that all appropriate review and assessment into the concern has taken place and the next steps outlined.*"; this appeared to be agreed as an accurate explanation of how the system worked.

228. The Tribunal did not consider that the Claimant's account in her witness statement demonstrated aggression by Professor Jenney. It reviewed the transcript and did not consider any sign of aggression by Professor Jenney evidenced in it either.

229. A letter to the Claimant (copied to the BMA) from Professor Jenney dated 25 October 2019 [1476-1477] summarised her account of what happened

at the meeting; the letter said that it was to discuss the 8 most recent DATIX forms from the Claimant, to update her about a number of historic concerns she had raised and to discuss team relationships. It also said that each DATIX form was discussed with her and most would be closed, and the Claimant had consented, and recorded her views about the junior surgeon (including that outside of complex cases, she had no concerns about his clinical competence). Professor Jenney in the letter recorded her concerns about team working and in particular the Claimant's relationship with the junior surgeon, and that it was agreed to explore the possibility of mediation. There was no reference to "*unofficial enquiries*".

230. The Tribunal noted that the BMA representative did not attend the proceedings to give evidence or supply a statement. There was an email from the BMA representative to Professor Jenney on 11 December 2019 [1604]; there is no complaint by her that Professor Jenney behaved inappropriately or said she had made "*unofficial enquiries*". This is inexplicable if the Claimant felt threatened at the time as she asserts.

231. Ms Robinson's perspective of the meeting was set out in paragraph 18 of her statement:

"I do not think that Professor Jenney was trying to brush the Claimant's concerns under the carpet nor attempting to silence her. We wanted to look at what concerns were outstanding, clarify those issues and what had been actioned and reviewed. Some concerns raised were still out for external review, which I believe was with Angela Hughes. I cannot recall Professor Jenney stating that she had made 'unofficial enquiries' about the Claimant."

232. Professor Jenney's account is set out in paragraphs 68-84 of her statement. She said at the meeting she did raise concerns that the Claimant had raised so many DATIX's about one surgeon and added:

"69. I was extremely concerned at that time of this meeting regarding the very large volume of concerns that the Claimant had made. The vast majority of the latest concerns raised appeared to have no merit in so far as they contended that harm had been caused to any patient. Some of the complaints appeared to be vague and based on second hand information and about which the Claimant had no personal knowledge. Further, the manner in which the concerns in some instances had been expressed appeared to suggest that there was a 'personal element' to some of them.

70. I considered that I had a responsibility to:

a. ensure the correct investigations were undertaken,

b. ensure the Claimant was supported and I was concerned about her wellbeing;

c. ensure the team as a whole were supported as there was increasing tension and the feeling that the Claimant, at times, was undermining her colleagues."

233. Professor Jenney explained that the review at the meeting was brief as the more complex ones had already been sent for external review, and "*On reviewing the Datix's and the investigations into them it was agreed by the Claimant that some of them required no further review e.g. where she had no direct knowledge of what she had complained about."* Professor Jenney denied saying that she had made "*official enquiries*" about the Claimant and pointed out that the nurse-led review was also dealing with her concerns, as was Mr Scott-Coombes.

234. In cross-examination, the Claimant accepted that in the meeting Professor Jenney went through each DATIX, quoting what the Claimant had said, and discussed it. The Claimant accepted that she was told a review had been carried out, but her position was unless she had personally seen it, she would not accept it had happened. The transcript recorded at one point during the meeting the Claimant said she was afraid of Professor Jenney; the Claimant accepted that Professor Jenney tried to reassure her. Objectively, the Tribunal could see no good reason for the Claimant to say this to Professor Jenney; the transcript shows nothing that would reasonably trigger such a comment. In cross-examination, Professor Jenney described this comment as "*very worrying";* the Tribunal considers that to be a plausible answer, given the Claimant was a senior consultant who was repeatedly raising the same or similar issues time and time again, focusing on particular individuals while saying she had no concerns about them (see Mr Darwish and the junior surgeon), but without giving precise details and claiming to be afraid of Professor Jenney. At times, the Claimant was raising concerns about matters which she knew nothing about or based on her supposition or rumour; this is not reasonable conduct.

235. Having reviewed the transcript, the Tribunal does not find that Professor Jenney acted defensively. Rather, she was dealing with a very difficult situation and an individual who was continually making very serious professional allegations against colleagues, often repeatedly as she would not accept the answers given, and doing so in a way that targeted individuals, such as the junior surgeon, or in a vague manner. One example is the raising of a concern about the removal of a battery from a child by the junior surgeon, but the Claimant did not give details about which patient and not been present [1208] and accepted at the meeting what she had said was based on hearsay [1498]. It was not defensive in the Tribunal's view to shut down after discussion and review such concerns; it is keeping matters on track and based on evidence.

236. On the issue as to whether Professor Jenney said she had made "*unofficial enquiries*" about the Claimant, the Tribunal finds that she did not and prefers the evidence of Professor Jenney and Ms Robinson for the same reasons set out in the previous allegation. It is also relevant that the BMA has not supported the Claimant in this allegation, either at the proceedings or at the time as shown by the email of 11 December 2019.

237. The Tribunal dismisses this allegation as it has not been factually proved.

D17 – March 2019 (ongoing) – Professor Jenney and/or Dr Walker deliberately failed to conduct any adequate or timeous investigation into PID8-PID10

238. The three protected disclosures relied on by the Claimant for this detriment were to Dr Skone by email (the last disclosure she initially said was repeated to Dr Walker in October 2019 [1417-1418], though the letter does not expressly name the surgeon and is vague in nature; it seems to focus more on the Claimant not being blamed; the Claimant later withdrew the assertion that PID10 was repeated to Dr Walker when amending her statement before the Tribunal) and were made between 22 March 2019 and 5 September 2019. The disclosures are about allegedly unsafe clinical and surgical practices by the junior surgeon and asserting that a child patient had been put through a cystovaginoscopy that was not clinically indicated.

239. The Claimant deals with this matter in her witness statement and said at paragraph 203: "*Because of the failure to properly investigate, when [the junior surgeon] complained about me "bullying" him, he was believed."* At paragraph 328, she denied targeting the junior surgeon and explained that "*It was not a case of my being unhappy with the review – the claimed review was not a surgical consideration and all evidence was being simply bypassed, on the basis that nobody had officially come to harm*." The difficulty with this position from an objective perspective is that a review was undertaken by a surgeon; the Claimant simply did not think it was a good enough review.

240. The Claimant later raised her concerns through a series of DATIX forms. The October 2019 (not the November ones) were reviewed by Mr Scott-Coombes, a surgeon and assistant medical director, at the request of Professor Jenney. He was also provided with a copy of the Claimant's letter to Dr Skone in March. Mr Scott-Coombes set out his conclusions in an email [1597-1598] regarding the seven DATIX forms and the letter. He opened his response by observing: "*I have looked at the information that you have sent me together with [when present] the comments from colleagues who have reviewed the cases. I have not looked at any other evidence (notes, portal etc). My observations are those of a consultant general surgeon since*

1996 and I am the first to recognise that I am not a paediatric surgeon." In other words, Mr Scott-Coombes did not carry out a full investigation but simply reviewed the DATIX/letter from a surgical perspective and the comments of other reviewers.

241. Mr Scott-Coombes concluded that most of the forms should not have been submitted. He described many as vague or inappropriate, and three of them as vindictive, using selective evidence to target the junior surgeon. Mr Scott-Coombes' view of the letter was that in essence the Claimant seemed to think she was *"the senior surgeon and "guru""* and there appeared to be a breakdown in the normal review processes of the department e.g. he asked if was there a "*mature m & m meeting*" process in place to enable reviews. Mr Scott-Coombes thought the letter showed that the Claimant was in severe distress and rambling.

242. The Claimant in her statement (paragraph 242) pointed out that "*At no stage did Mr Scott-Coombs meet with me to discuss these and hear my perspective, which any reasonable investigator would have done. He did not care to verify the context or look at the evidence and factual background*." Her position was that Mr Scott-Coombes was biased against her and did not properly investigate the concerns raised. At cross-examination, Mr Kemp on behalf of the Claimant pointed out to Professor Jenney that she had forwarded a chain of emails to Mr Scott-Coombes, within which Dr Walker wondered if the Claimant's complaints should be seen as vexatious [1513]; Professor Jenney accepted she had done this, but said it was an error and had happened as she received so many emails.

243. Carol Evans, the assistant director patient safety and quality, commented in response to Mr Scott-Coombes' review [1596] that *"I have to point out that I think it would have been preferable for him to have limited his opinion to the standard of care rather than on her alleged intention in reporting."* She also noted that the Claimant's concerns here had been reviewed by two senior consultants so no further action was required, and concluded:

"If she reports any further incidents, I am very keen that we stick to our normal processes -ie an initial discussion between the Clinical Board and the patient safety team as to whether the incident meets SI criteria. If it does we hold an SI meeting and start an investigation with an nominated ID from the UHB and an agreed TOR. The expectation would then be that the I0 has 60 days to complete the RCA. If it does not meet SI definition, there is an appropriate level of investigation put in place by the Clinical Board."

244. Ms Evans' email was sent to Professor Jenney, Dr Walker, Angela Hughes, Dr Krishnan, Ruth Walker and Cath Heath – this is the group of senior clinicians and patient safety specialists at the Respondent.

245. The Tribunal considered it useful to review the October 2019 DATIX forms itself and did so. Some useful examples follow. A DATIX about a handover [1407] saw the Claimant complain about a handover from Leeds "*My on call time was spent sorting the Issues surrounding than doing a detailed ward round. I ensured each on call doctor was chaperoned by me*". No harm to the patient resulted. This was not reviewed by Mr Scott-Coombes, presumably as no surgical issues arose.

246. A DATIX form that was so reviewed [1426] was about the concerns of a parent about a particular colleague. In the form, the Claimant said *"effects of these and other concerns on me where I am left to sort out issues as senior surgeon with no acknowledgement or reflections by others*"; there is an emphasis here on her seniority and the surrounding comments appear to be justifying comments made to colleagues that may in the future become subject of complaints "*now receiving comments about tone and content of forms and possibly of my intent.".* Mr Scott-Coombes' view was that this was an example of the Claimant targeting the junior surgeon and using selective evidence, when the evidence showed the involvement of many surgeons.

247. Another DATIX [1451] from this period was about a transfer from Cornwall and urgent surgery carried out with compartment syndrome involved. The Claimant was not involved, other than wound inspection. Mr Scott-Coombes' conclusion was that a DATIX form was appropriate, though he thought the junior surgeon had acted correctly. However, he did not understand why the Claimant had completed the form; he thought the surgeons involved should have done so to ensure correct protocols had been followed.

248. The Tribunal is not a specialist medical tribunal; it is in no position to comment on clinical matters. However, from its review of the DATIX forms it could see grounds for the comments of Mr Scott-Coombes, and noted that at times he even agreed there was something to examine. It appreciated why the Claimant was unhappy with his more personal criticism of her motives, but the Tribunal considered that there were grounds for it. The Claimant wrote letters that were vague and emotional; she did specifically refer to her status as a senior surgeon and appeared to be more concerned about her status. She criticised a junior surgeon repeatedly in documents that would have a wider circulation (the DATIX forms) but also said that he was safe to practice. Mr Scott-Coombes' concerns had a basis in fact and his point about why matters were not being addressed in M & M meetings was fair. From the evidence before the Tribunal, such meetings existed to ensure concerns were raised in a supportive and educative manner within a "*no blame*" culture; DATIX forms were more for significant concerns.

249. Professor Jenney's account in her statement denied the Claimant's assertions. She pointed out Dr Skone shared the Claimant's letters and complaints with her, and they triggered significant investigation. Even before the disclosures had been made, Professor Jenney was aware of the situation with one patient and had in September 2018 asked another paediatric surgical consultant, Mr Rijhwani, to review the case given its complexities; he had put together a summary to assist in January 2019 [1394] and prepared a presentation on the case [1656-1682], referring to events both before and after his review was requested. Mr Rijhwani did criticise the drawings made by surgeons and noticed inconsistencies in those drawings, but he did not find harm had been caused to the patient.

250. At paragraph 10 of her witness statement, Professor Jenney said: "*At that time, I specifically asked him about whether he had concerns about the performance of the surgical team. He responded that it was a difficult case and that we would likely need to continue seeking expert views in respect of managing the case. He had no specific concerns about the management of any individual surgeon. This can be found on page (C/B 1394 and A/B 541). The reason I asked Mr Rijhwani to review the case was because I knew that the Claimant trusted his opinion".*

251. Professor Jenney confirmed that this particular patient was subject to ongoing multidisciplinary review and external review by Mr Lander as part of the "nurse-led" review (paragraph 11). She noted ongoing emails from Dr Skone to the Claimant about this case in April 2019 [1228-1230 as an example] and the effort made to find a mentor for the junior surgeon (agreed by May 2019 [1343]). Professor Jenney said in paragraph 38 of her statement:

"*Given the level of concern raised I spoke with the Claimant to ask directly whether she felt that [the junior surgeon] was unsafe to practice, she confirmed several times over the period April to October that she was happy that he continued to practice, to see patients and to operate."*

252. This is consistent with the Claimant's other statements about the junior surgeon, including under cross-examination.

253. Professor Jenney confirmed that she also met with the Claimant and her BMA representative in May and 25 October 2019, with the October meeting specifically focussing on the Claimant's conduct towards the junior surgeon and the vague nature of the DATIX forms raised about him. She reminded the Tribunal that the external review of four cases and the nurse-led review was also ongoing for much of 2019.

254. Dr Walker's response to this allegation is short and at paragraph 71 of his statement:

"*I did not investigate these concerns myself as I believed that an investigation was already in hand at the time. I understood Angela Hughes would be instructing an external expert to review (I think) some four reported clinical incidents.*"

255. The Claimant asserts that Professor Jenney and/or Dr Walker deliberately failed to conduct any adequate or timeous investigation into PID8-PID10. In the view of the Tribunal, this is untrue. Some concerns were being investigated before the disclosures were made (the Rijhwani investigation), others were part of the external review with Mr Lander in 2019 or dealt with in the "*nurse-led*" review, and Mr Scott-Coombes reviewed the October 2019 DATIX forms. Dr Walker did not get involved as so many others were already dealing with the matter; this decision to not get involved was not because of the Claimant's disclosures.

256. Professor Jenney herself instigated the Rijhwani investigation and the Scott-Coombes review; the nurse-led review was instigated by the then Chief Executive, but it was known to her. There is no evidence at all to support an allegation of "*deliberate*" failure; indeed, such an argument is undermined by Carol Evans' email, showing the commitment of those involved to investigate any concerns raised by the Claimant in the normal matter. What then happened was that a bespoke process was created through the nurse-led review to satisfy the Claimant. It failed to do so as the Claimant would not, and continues to fail, to accept any conclusion that disagrees with hers, even when the reviewer is a professional who she claims to respect e.g. Mr Lander. In such cases, her response is that the reviewer has been misled in some way.

257. The Tribunal dismisses this allegation on the basis that it has not been factually proved.

D18 – February 2020 – Dr Walker raised a series of generalised and unfounded concerns including about her mental state against the Claimant

258. While this allegation itself is not precise, in the grounds of complaint (as amended) the Claimant asserted that *"On or around February 2020, at a meeting with the Claimant at which she was represented by a BMA representative, Dr Walker raised a series of generalised and unfounded concerns including as to her mental state against the Claimant."* No other detail is given.

259. In her witness statement, the Claimant specifically complains about a meeting with Dr Walker on 13 February 2020, with her BMA representative, Nicola Robinson and Peter Durning in attendance. She said at paragraph 308 Ms Robinson had a notebook and Dr Walker had a dictaphone. The

Claimant does not precisely identify exactly what she complains of in her statement, which is verbose and full of opinion and speculation. The Tribunal identified the following passages as assertions supporting her allegation of detriment:

"313. During this meeting, he quotes verbatim from Professor Jenney's email to him on 16 January 2020 about my "negativity, laziness and criticism" regarding my communications with the juniors about research governance. Mention was also made of the discussion that was had in that meeting regarding Miss Khakhar's patient and the unusual x-ray patient that I had "forced" Mr Sekkaran to discuss [PAGE 1784]. Without seeking my input, he told me he had concluded that these undermined junior colleagues and left them feeling unsupported [DETRIMENT 18].

314. Dr Walker would simply not let go of the issue of my "behaviour" and kept asking me if I "recognised" this [PAGE 1787]. He referred to the fact that I had raised safety issues with the GMC and that this was part of a "pattern of behaviour" [PAGE 1786]. So now, my raising of patient safety concerns was perceived as behaviour rather than what it actually was, which was acting in the interests of patient safety due to a lack of robust or any internal investigations. This is jaw-dropping from the MD, who is supposed to be implementing Freedom to Speak Up across the Respondent to give people like me a safe space in which to raise concerns [DETRIMENT 18].

321. During this meeting, Dr Walker also raised a series of generalised and unfounded concerns about my mental health – although not with any air of concern – by abruptly asking me if I was alright [DETRIMENT 18].

322. He sought to see my occupational health record, although this is not recorded in the notes."

260. The Claimant does not actually set out the "*generalised concerns"* raised with her. It is the notes at [1784] that assist the Tribunal. The concerns raised were:

a) that the Claimant was emailing juniors and her colleagues were concerned about the tone and criticism within those emails;
b) two complaints had been made about the Claimant's behaviour in a multi-disciplinary meeting on 16 January 2020 (which she described under cross-examination as "*not a good day*") where she allegedly undermined a junior colleague and disagreed with colleagues in front of parents;
c) a complaint about the Claimant's conduct towards a colleague involving a baby with a fistular complication without giving them appropriate support and behaving in an undermining manner;

d) the Claimant's behaviour at a meeting towards a colleague (the same meeting at point b above) where she acted as Chair when she was not and forced a colleague to discuss images in such a way she caused upset.

In the Tribunal's view, the notes are not generalised (though they are not verbatim) and set out details of the concerns, particularly in the last three points. It is the Claimant's statement that is generalised.

261. Dr Walker denies the Claimant's account fully in his statement. He said under cross-examination that the concerns above were fully discussed with the Claimant and her representative. The Tribunal noted that the evidence in the bundle confirms that the concerns were raised as asserted by the Respondent (see [1767] as an example – a colleague outside of the department raising concerns about the Claimant's behaviour on 16 January 2020 and other actions by her).

262. The difficulty with which the Claimant does not engage is that there are notes of the meeting and her BMA representative was in attendance. The Claimant simply says that she did not review the notes at the time, but accepted in her statement she knew Ms Robinson was taking notes. The Claimant did not complain regarding this meeting until 20 November 2020 to the new Chair, Professor Jancezwski, nine months later [2051]. Her BMA representative never complained and has not provided any evidence in support of the Claimant's allegations. When the Claimant did complain, Mr Driscoll investigated and said that Ms Robinson's account supported Dr Walker's denial (Driscoll statement paragraph 5; Robinson statement paragraph 4 mentions the meeting but is silent about the Claimant's allegations). Mr Driscoll told Professor Jancezwski Ms Robinson supported Dr Walker in his outcome report [2163]. The contemporaneous notes of Ms Robinson do not support the Claimant's account [1783-1789]. Even the BMA's letter on the topic [1998] written seven months later does not agree with the Claimant's account.

263. Under cross-examination, the Claimant would not accept that there were grounds for Dr Walker to be concerned and to ask if she needed additional support. Given the history of the Claimant repeatedly raising vague concerns and asserting patients had been harmed or put at risk, which were not supported by the findings of various consultants, external reviewers or the nurse-led review, or even considered worthy of in-depth investigation by the GMC, and the tone in which the Claimant communicated her concerns, combined with the bereavements suffered by the Claimant (and the ongoing nature of the COVID-19 pandemic), the Tribunal understands why it would be appropriate to ask about the Claimant's mental health.

264. The complaints received from a wide range of people about the Claimant's conduct towards others (from colleagues both within and outside the department) again in the view of the Tribunal would explain the raising of concerns directly with the Claimant by the Executive Medical Director, Dr Walker. Indeed, the letter of invitation [1763] warns the Claimant that current behaviours and team dynamics would be discussed. It is relevant that in an email two months later, Dr Rowntree reports that the view of the Claimant's colleagues was that the junior surgeon had grounds to feel "*picked on*" by the Claimant, but that she was not motivated by malice and did not have insight into how her behaviour was perceived [1850]. Without discussing such matters with the Claimant, it would be difficult for her to gain such insight.

265. As Mr Driscoll pointed out to Professor Jancezwski in February 2021 after investigating the complaint, it was inconceivable that Dr Walker could have acted as asserted by the Claimant in front of a BMA representative and HR without a prompt complaint being made. Mr Driscoll pointed out there was no evidence of similar behaviour by Dr Walker and for the Claimant to be right, both Dr Walker and Ms Robinson (who was away on maternity leave) had to be lying. The contemporaneous evidence did not support the Claimant's account. The Tribunal considers it to be more likely than not that the Claimant over time has dwelled on this meeting and misunderstood or misremembered what actually happened and has drawn erroneous conclusions as a result.

266. In any event, it is difficult to see how asking the Claimant about various concerns raised about her is a detriment; it was a discussion, not a formal disciplinary process. As Dr Walker said in cross-examination, it was *"passing on a message, not an issue to investigate".* As shown by Dr Rowntree's later email [1850], the concern was that the Claimant did not realise the impact of her behaviour, even at a meeting she described as "*not a good day*", on her colleagues or how she was being perceived. Without such a discussion, matters could not improve.

267. The allegation is dismissed by the Tribunal on the basis that it has not been factually proved and in any event, there is no detriment established.

D19 – July 2020 – Dr Walker raised further unspecified concerns against the Claimant, informing her that the Respondent had taken legal advice and she could either agree to a referral to NHS Resolutions and apologise to a colleague or face a UPSW

268. Neither this allegation nor the grounds of complaint as amended sets out what were the "*further unspecified concerns"* raised, but the statement of

case does say that they were raised at a meeting. In her witness statement, the Claimant said that the meeting took place on 28 July 2020 and she knew from the invitation [1901] that it would be about managing the current concerns. The meeting took place by zoom and again the Claimant attended with her BMA representative. Mr Durning, Ms Robinson and "*Anna*" also attended.

269. The Claimant said that she was told five colleagues had given statements about her bullying behaviour and a new concern was raised, but the Respondent was willing to not start the UPSW process against the Claimant if she attended a NHS Resolutions behavioural assessment, apologised to the junior surgeon and went through an extended feedback exercise (paragraph 355).

270. In paragraph 356, the Claimant asserted that Dr Walker "*threatened*" her by saying "*you can have the deal or you can have the UPSW*". Later in her statement, the Claimant said she took a break and sought advice from the BMA representative, and after the meeting she refused to apologise to the junior surgeon, despite the advice of the BMA that she should do so. That said, the Claimant noted that the BMA told Dr Walker on 19 November 2020 [2060] that she was willing to apologise but she wanted to give "*context*" in that apology (the further information was set out in that email). At no point did the BMA accuse Dr Walker of threatening the Claimant at the meeting. On 20 November 2020 [2056], the Claimant demanded an apology from the junior surgeon - "*I ask for a written and unqualified apology from … for the selective or inadequate information or misinformation and making me complicit to whatever his agenda was in each of those cases.*" She did not apologise to the junior surgeon.

271. The Tribunal was aware that the evidence before it was not the complete copy of all the documents disclosed, and therefore there may be relevant documents absent that no party wished to refer to. It makes this point as at some point, the evidence indicates that the Claimant must have indicated a complete acceptance of the deal. A letter of 26 October 2020 [2032-2034] from Dr Walker to the Claimant records her agreement to undertake the six points of the plan set out in the meeting of July and the next steps, together with the need to reflect on the new concerns and her communication.

272. The notes of the meeting [1906-1910] record that the Claimant was told that there was a common theme in the various statements that she was perceived as bullying the junior surgeon. They further record that she was told this alone would normally justify the start of a UPSW process, but the Respondent knew she had been through a process in 2017, and some of the recommendations at the end of that were still outstanding. The notes say that Mr Durning proposed that in order to avoid the UPSW, the Claimant

had to attend a NHS Resolutions behavioural assessment, go through a 360 assessment, work on communication, apologise to the junior surgeon and look at mediation with him, and reflect on matters in her appraisal.

273. The notes then record Dr Walker saying that a new concern had been raised about a handover and a baby with a missed malrotation, and the legal advice was that this also justified a UPSW. The notes specifically record *"you must accept this or we can go down UPSW"* and that Dr Walker told the Claimant it was ok to raise concerns but she needed judgement and proportionality, and she must not confront individuals.

274. The Tribunal places significant weight on the notes as they appear to be contemporaneous and even quote the words used at times. The contents of the notes are also consistent with the letter sent by Dr Walker to the Claimant after the meeting confirming what had happened and not disputed by the BMA [1978-1981]; the only additional point was a requirement (which in the notes had the number 6 left blank; consistent with notes made during a meeting) that the Claimant reflected on the fact that she was no longer in a senior leadership role. Further information was also given about the new concern with a copy of the redacted evidence. The BMA also provided a brief account of the meeting in its letter to Dr Walker on 29 September 2020 [1998-1999] (and the earlier meeting in February 2020), and ends with the words "*thank you for your willingness to deal with the concerns raised in a constructive manner*". This is not a letter from a representative who considers their member was subjected to a detriment due to the making of a protected disclosure in the view of the Tribunal.

275. The new concern was raised by the junior surgeon [additional bundle 628] on 14 May 2020. In the view of the Tribunal, it is of a nature that is similar to the previous concerns raised about the Claimant's conduct towards colleagues and comments to parents.

276. The Tribunal finds that the Claimant was indeed given the option of a UPSW or the action plan at the meeting of July 2020; this included going through a NHS Resolutions behavioural assessment (not a general referral to NHS Resolutions). It does not agree that "*further unspecified concerns*" were raised; the notes show that the Claimant was told a new concern relating to a specific patient which was discussed. Further information was then provided for her to review after the meeting.

277. However, as the concern was linked to the ongoing issue of how the Claimant allegedly behaved to colleagues, despite the position that it could also form the basis of a UPSW, the Respondent was willing to leave it if the Claimant reflected and underwent the action plan already designed to address the theme of the new concern. No reasonable employee would consider this to be a detriment and there is no link to the disclosures evident

to the Tribunal. It is evident that the BMA did not consider the offer to be unreasonable or a detriment from the notes, its letters and even the Claimant's own account (where the BMA was advising her to apologise and the Claimant did not agree).

278. Instead, the evidence shows that the Claimant's behaviour to colleagues, especially the junior surgeon, witnessed by a range of people was being raised with the Respondent. The Respondent could not ignore it. The offer made to the Claimant was to her benefit and fairly reflected that not everything recommended after the Dignity at Work process in 2017 had been actioned. As Good Medical Practice confirms, communication and respect to colleagues are fundamental tenets of the medical profession; bullying can lead to patient safety issues.

279. If the Claimant's case was correct and the Respondent wanted to punish her for her protected disclosures (or protected acts), it is not clear to the Tribunal why Dr Walker would offer to allow the Claimant to avoid a UPSW when persistent complaints of bullying behaviour by her were being received. The offer, which is complained of by the Claimant as a threat (though described as a supportive measure by the BMA (see below), is unlikely to have been made if it was the goal of Dr Walker or the Respondent generally to punish or penalise the Claimant.

280. The allegation is dismissed as the Claimant has failed to prove the allegation factually or demonstrate detriment.

D20A – 7 December 2020 – Mr Jancezwski forwarding the Claimant's correspondence to Mr Driscoll, Ms Walker and Ms Robinson without discussing with the Claimant first

281. There is no dispute that this action actually happened. The question for the Tribunal is whether this was a detriment and whether the decision maker was materially influenced or because of GMCPID1–3, PA2, PID11, PA 3 and PA4.

282. The Claimant's case as set out in the list of issues was never put to Professor Jancezwski, Dr Walker or Mr Driscoll; the agreed list of issues (amended or updated by agreement more than once by the time this witness was called) asserted that the email was forwarded by email to Mr Driscoll, Ms Walker and Ms Robinson. It was not. It was forwarded to Ms Foreman, not Ms Robinson. More critically, the Claimant asserted that the decision maker for this alleged detriment was either Mr Driscoll or Dr Walker; this was not put to the witness by Mr Kemp. The panel in its questions asked Professor Jancezwski if he was instructed, asked or suggested by anyone, and specifically Dr Walker or Mr Driscoll, to forward the Claimant's letter on

7 December 2020; he denied this. The Tribunal considered this response both plausible and consistent with the contemporaneous documents.

283. The Claimant in her submissions that paragraph 51 of the amended Grounds of Complaint specify that the wrongdoer is Professor Jancezwski; the Tribunal disagrees. It simply says that he forwarded the correspondence. The difficulty the Claimant does not engage with is that the annex (which is part of the claim) says that the wrongdoers for this action were Dr Walker and Mr Driscoll. The Claimant is fixed with this pleading as it was not amended. The Tribunal agrees that logically Professor Jancezwski should have been accused, but the legally represented Claimant did not do so.

284. Factually, this detriment is found by the Tribunal not to have happened as alleged. Professor Jancezwski himself decided to instruct his assistant to forward the Claimant's correspondence to Mr Driscoll, Mrs Walker and Ms Foreman.

285. The Tribunal considered whether a reasonable employee would consider this to be a detriment; it concluded that a reasonable employee would recognise that the Chair of a large health board would need to share such correspondence with others. Professor Jancezwski explained that he shared it with the members of the "*Safety Valve*" team who advise him on such matters. A reasonable employee would not consider this a detriment and there was no evidence that such a common and appropriate step had any connection to the Claimant's protected disclosure or protected acts, other than her correspondence had been received and needed to be dealt with.

286. The Claimant's suggestion that Mr Driscoll was under a conflict of interest when he was present at a meeting to discuss whether to exclude the Claimant from work did not stand up to scrutiny. Mr Driscoll was the Executive Director of Workforce and OD; he was required to be informed of such a decision. The decision was not his. He was also a very senior person well-placed to investigate the Claimant's concerns raised to the Chair. A reasonable employee of the Respondent would appreciate these points. It was not explained to the satisfaction of the Tribunal why the Claimant thought this was a detriment, other than she thought the Chair should discuss her letter with her first.

287. The allegation is dismissed on the basis that the Claimant has failed to prove it factually and no detriment has been established.

D22 – 16 December 2020 – Dr Walker, Dr Skone, Professor Jenney, Dr Rowntree and/or Mr Driscoll escalated the Curkovic complaint to UPSW

288. The complaint was not raised by Miss Curkovic; it was raised by Ms Khakhar, as the Claimant ultimately conceded in the submissions made on her behalf by Mr Kemp. There was no application to amend this allegation from the "*Curkovic complaint"* to the "*Khakhar complaint*". The Claimant's submissions concede that the complaint came from Ms Khakhar but asserts the name of the complainant is immaterial and relies on the detriment as the act of escalation to UPSW. The allegation continues to assert that several people made the decision to escalate Ms Khakhar's complaint to a UPSW. The Tribunal disagrees that the name of the complainant is irrelevant – the allegation as put is that the complaint was by Ms Curkovic; this is factually incorrect. Ms Khakhar was required to attend these proceedings to confirm that it was her complaint and give evidence; this was not to the credit of the Claimant, given the overwhelming evidence it was Ms Khakhar's complaint (nor was the late concession and withdrawal of a different alleged detriment asserting the complainant was not Ms Khakhar).

289. Dealing with the substantive point that underlies the allegation, there was a meeting on 16 December 2020 attended by Dr Walker, Mr Driscoll, Dr Skone, Rachel Gidman (assistant director of OD) and Kate Evans (interim head of Workforce and OD, Children and Women's Clinical Board), where it was decided by Dr Walker as medical director that the matter had to be escalated to UPSW [2568-2569]. The Claimant was not in attendance and therefore cannot assist the Tribunal with the events of that meeting. Given the attendance list, and the fact that there is no dispute that the decision was made at this meeting, it is clear that factually Professor Jenney and Dr Rowntree were not responsible for the escalation of the Khakhar complaint. The allegation in respect of them fails.

290. While there were several attendees, the UPSW policy requires the decision to start the process to be taken by the Medical Director [2912]; this happens when they consider an investigation into the nature of the problem or concern is required. Dr Walker's evidence was that he made the decision to escalate the Khakhar complaint to UPSW, having discussed the matter with his colleagues and consulted them as to their opinion. The evidence before the Tribunal was that the other attendees who gave evidence agreed that it was Dr Walker's decision, but it was discussed by all in attendance. The Tribunal accepts this evidence, and it is both plausible and credible, and consistent with good practice for a leader to consult the team on an important decision, but to make the decision themselves. The fact that everyone agrees with the decision does not render it any the less the decision of the decision-maker. This means the allegation against Dr Skone and Mr Driscoll fails.

291. In his evidence, Dr Walker explained why he made the decision to escalate the Khakhar complaint to a UPSW and then to immediate exclusion (and did not change his position under cross-examination). In paragraphs 91-95, he said:

"…*in essence, Dr Khakhar's complaints struck as being very serious in nature. The Claimant had previously been spoken to about her behaviour but was (allegedly) continuing in the same vein. I was concerned about the functioning of the department because it was expressed that people were frightened of the Claimant to the point that this was having a detrimental impact on patient care and the health and safety of the team.*

92. We also made the decision to discuss the Claimant's exclusion with NCAS. As the minutes show [2568], our considerations were as follows:

(i) There were significant grounds of concern regarding the risk of harm to vulnerable colleagues and thus to patient safety too;

(ii) As a health board we had a duty of care to both our patients and staff to provide a safe environment;

(iii) There were valid concerns that the Claimant's presence in work could prejudice any subsequent investigation;

(iv) If the complaints proved to be founded, then there was potentially a pattern of behaviour and a failure to improve despite previous opportunities provided to the Claimant;

93. Although it was not specifically documented in the minutes, I also had in mind the point that if there was to be an investigation, we needed to ensure that it was not interfered with. We therefore felt it was within the Claimant's best interest to protect her from the other witnesses. This is not an unusual step when seeking to preserve the integrity of such a complex investigation.

94. The Claimant's alleged protected disclosures and protected acts did not come up as part of the meeting on 11th December 2020 and they were not a factor in our decision-making.

95. There was a real concern about the Claimant's apparent lack of insight into her own behaviours and the impact that it had on others and the functioning of the department. The issue was not that the Claimant had raised or would raise concerns. The real issue was the manner in which she was said to have behaved towards her colleagues and its impact on their ability to function."

292. Dr Skone had been the recipient of the Khakhar complaint and had met with her to discuss it and understand what had happened before 16 December

2020. His account of the factors underpinning Dr Walker's decision to escalate the complaint to UPSW were set out in paragraphs 41 & 43 of his statement:

"The nature of the concern, that UPSW is the mechanism for looking at competency and behaviours for consultants, the fact that this was a new concern from a new individual, but that it had similar issues to previous concerns about the Claimant and I did not feel that her behaviour had improved. There were some clinical issues which needed to be addressed also. Any concern of that level would warrant an initial assessment. This was repeat behaviour and a third complaint from a Consultant. There were serious clinical concerns. I cannot see how concerns of that level would not trigger a fact-finding process at least…

Professor Walker also raised the concern that he had previously requested the Claimant to change her behaviour following an earlier bullying complaint made against her… However, the complaints now raised by Ms Khakhar indicated a repeating pattern of behaviour from the Claimant, thus reviving Professor Walker's earlier concerns."

293. Mr Driscoll's account in his statement of the decision was:

16. We considered the complaints made against the Claimant by Dr Khakhar and the meeting was to discuss what we should do. The notes of the meeting can be found on pages [2568-2569]. We took the complaints seriously because they involved allegations of bullying and a suggestion that the team was afraid of the Claimant. The decision was made to escalate the matter under the Upholding Professional Standards in Wales (UPSW) policy because:

(i) We believed there were significant grounds of concern regarding the risk of harm to patients;

(ii) As a health board we had a duty of care to both our patients and staff to provide a safe environment;

(iii) There were valid concerns that Claimant's presence in the workplace could prejudice any subsequent investigation;

(iv) There was potentially a pattern of behaviour from the Claimant and an arguable failure to improve despite previous opportunities. Stuart Walker had previously met the Claimant on 28th July 2020 to advise her to complete a number of actions as an alternative to a UPSW investigation, this included a commitment to change her behaviour."

294. The notes of the meeting [2568-2569] echo Mr Driscoll's account, with the addition of "*The circumstances are exceptional due to the seriousness of the concerns raised*".

295. Having a complaint escalated to the level of UPSW is in the view of the Tribunal a detriment as it can lead to the dismissal or formal action against the employee. Any reasonable employee would consider it unfavourable. The Claimant asserts that GMCPID1–3, PID 11, PA3, and PA4 materially influenced or was the reason for the escalation to UPSW.

296. The Tribunal considered it worth remembering the chronology. The Claimant in 2017 went through a Dignity at Work process and was found to have behaved poorly towards Mr Darwish, for which she apologised. Concerns about her behaviour continued to arise, with the exception of when she was absent on leave, and in July 2020 it was put plainly to her by Dr Walker and Mr Durning that matters had reached the point that a UPSW could be justified as complaints of bullying continued to arise. The Claimant was given a choice – either remediate or face a UPSW. The Respondent understood that the Claimant had chosen remediation until on 20 November 2020 she demanded that the alleged victim of her bullying apologise to her (and she had not apologised to him). Then, Ms Khakhar complained of bullying by the Claimant in December 2020. The number of people raising concerns, both within and outside of the department, was increasing over time, and included individuals who had as far as the Tribunal is aware no knowledge of the Claimant's protected disclosures or protected acts (for example, Ms Khakhar). Objectively, things were getting worse, and the Claimant appeared to be gaining less insight after reflection, as shown by her demand the junior surgeon apologised to her.

297. The Tribunal concluded that the reason for the escalation to UPSW was the worsening situation and Ms Khakhar's complaint and her description of the impact on her clinical duties were the final straws for Dr Walker. The Claimant under cross-examination did not consider Ms Khakhar's complaint required a full investigation, despite it being about bullying and the impact described by Ms Khakhar, including during cross-examination. There was no acceptance on the Claimant's part that the matter could not be resolved without an investigation. The Claimant's approach in the Tribunal's view remained to be one where she was never at fault and any criticism or concerns about her were either evidence of a conspiracy or based on incorrect information.

298. The Tribunal does not accept that the disclosures and protected acts relied upon by the Claimant for this claim materially influenced Dr Walker or was the reason he escalated the complaint to UPSW. There is no basis for the inference the Claimant seeks to draw. The meeting attended by Dr Walker, Dr Skone and Ms Hughes on 8 December 2020 to discuss the GMCPID2 and the information to be provided had no relationship with the decision to escalate the complaint to a UPSW; the reasoning why the UPSW was necessary as set out by Dr Walker is accepted by the Tribunal – there was

yet another complaint of bullying by the Claimant and there were clinical issues arising. The Claimant had not accepted the terms of the deal offered to her in July 2020.

299. The allegation is dismissed on the basis that the complaint was not by Ms Curkovic (so the allegation as pleased is incorrect), and in the alternative that the action was not materially influenced by a protected disclosure or because of a protected act.

D22A – December 2020 – Dr Walker, Dr Skone, Professor Jenney, Dr Rowntree and/or Mr Driscoll immediately excluded the Claimant and escalated the UPSW before the Claimant's formal grievance was resolved/addressed or even acknowledged

300. It is necessary to understand what the Claimant means here in the reference to "*formal grievance*". She does not mean a grievance submitted in compliance with the Respondent's grievance policy [2942] which required an employee to complete the form at Appendix 2 [paragraph 5.2 page 2948], despite her pleading to that effect at paragraph 48 of her amended grounds of complaint. The Claimant is actually referring to a letter of 22 November 2020 (PID11; page 2067 core bundle) to Professor Jancezwski, sent under the Freedom to Speak Up process as stated by the Claimant in the letter. This poses some difficulty as the Claimant has asserted something that is not correct; the letter was not a formal grievance letter.

301. The Tribunal also notes that this allegation is unusual. Complaining of being excluded from work is reasonable and clearly could be a detriment; a reasonable employee would regard exclusion as a detriment, particularly a surgeon who must keep their skills and knowledge up to date. However, the Claimant has alleged that it is exclusion <u>before</u> the "*formal grievance*" was resolved/addressed or even acknowledged that she asserts is the detriment. D24 deals with the exclusion alone. Grievances and disciplinary matters are wholly separate processes; it is the Claimant that seeks to merge the two.

302. Factually, as set out above Dr Skone, Professor Jenney, Dr Rowntree and Mr Driscoll did not decide to exclude the Claimant. As required under the UPSW procedure [2919], that decision was Dr Walker's to make and the evidence before the Tribunal shows that he made it. Also, factually, the Claimant did not make a formal grievance as asserted; she wrote a letter under the Freedom to Speak Up procedure. Evidentially, the allegation is not made out.

303. The Claimant was forced to concede under cross-examination that her letter was under the Freedom to Speak Up process, and that it was not until a

year later on 31 December 2021 she sent a formal grievance letter [2444]. The Claimant admitted that she had access to the grievance policy, had union assistance and had shown that she was able to use the correct terms in respect of a "*formal grievance*" or "*Freedom to Speak Up*". Notwithstanding this, she would not accept her letter to the Chair, labelled by her as a Freedom to Speak Up letter, was not a formal grievance to be dealt with under the grievance process, rather than to be dealt with under the Freedom to Speak Up process. The Claimant did accept that her letter (and the earlier one) was acknowledged personally by Professor Jancezwski on 3 December 2020 [2082]; she argued though that it was not acknowledged as a grievance.

304. It is therefore the finding of the Tribunal that the allegation was correct in saying that the letter was not acknowledged before the decision to exclude was made. The Claimant's attempt to argue that, as the letter was not acknowledged as a grievance, the acknowledgement did not count was not accepted by the Tribunal. It was though noted as evidence that the Claimant was not willing to concede points, even when confronted with contemporaneous evidence showing that she was incorrect.

305. The Tribunal also asked itself what was the alleged detriment? If it engaged with the allegation on the correct factual basis, that the Claimant wrote a letter to the Chair under the Freedom to Speak Up process, what detriment would a reasonable employee consider they suffered by being excluded from work for an unconnected reason before the Freedom to Speak Up process concluded? The Claimant in her witness statement (paragraph 559) said if her "*grievance*" had been investigated, she would have been able to defend herself and ensured the complaint about her was reviewed "*in context*". Little else in her statement assisted the Tribunal on this point.

306. The Tribunal was not persuaded that a reasonable employee would consider that there was a detriment in being excluded from work before a Freedom to Speak Up letter was resolved/addressed. The Claimant's argument did not make sense; Ms Khakhar had raised a serious complaint of bullying against the Claimant and there was no connection between that and any protected disclosure or protected act by the Claimant. The Freedom to Speak Up letter was wholly unconnected to this complaint. The UPSW process is designed (with the full involvement of the BMA) to ensure that doctors can fully respond to allegations made against them. It does not require a doctor to be present in the workplace, possibly continuing to deal with the person who has complained about them, to respond.

307. In addition, the Claimant accepted under cross-examination that in response to the letter, the Chair told her that only the 2020 issues would be reviewed and Ruth Walker was investigating patient safety issues while Mr

Driscoll investigated the issues about management [2110 is the letter confirming this dated 9 December 2020]. The matter was in hand by the time of the Claimant's exclusion. There is no detriment.

308. The allegation is dismissed as the Claimant has not factually proved it and in the alternative, the action was not a detriment.

D22B – From 22 November 2020 onwards – Dr Walker, Dr Skone, Professor Jenney, Dr Rowntree and/or Mr Driscoll failed to investigate or substantively respond to the Claimant's formal grievance

309. The Tribunal's findings in relation to D22A apply with equal force to this allegation. Factually, the Claimant did not raise a formal grievance as asserted. The Claimant is relying on her Freedom to Speak Up letter to Professor Jancezwski.

310. Dr Skone, Professor Jenney and Dr Rowntree were not involved. Dr Walker was specifically asked by Professor Jancezwski to stand aside as Responsible Officer for the Claimant temporarily while the complaint against him was investigated by Mr Driscoll; it is therefore wholly unclear why the Claimant complains Dr Walker did not investigate a complaint in part relating to his own conduct. No reasonable employee would regard this as a detriment.

311. This leaves Mr Driscoll. He did investigate the issues regarding management and reported to Professor Jancezwski [2163] on 10 February 2021 with a further report on 24 February 2021 [2192]. As previously set out in this Judgment, Mr Driscoll interviewed Dr Walker and Ms Robinson and found no evidence to support the Claimant's allegations. Mr Driscoll made the point that the Claimant had a "*propensity to complain formally about her colleagues*" and yet did not complain in a timely way about Dr Walker's conduct, and her own union representative raised no concerns. Mr Driscoll concluded that there was no case to answer. It cannot be said in light of his report that Mr Driscoll failed to investigate; the Claimant may well (and did) criticise the investigation as she was not interviewed, but it cannot be said that there was no investigation. The fact that the investigation did not conclude within 30 working days does not change the fact that it was carried out.

312. While the Claimant does not complain that the patient safety issues were not investigated, this being the remit of Ruth Walker, the Tribunal noted that the evidence before it showed that the nurse-led review did investigate and met with the Claimant to talk about its conclusions, and this was unchallenged as a fact and accepted under cross-examination by the Claimant.

313. In terms of a response, Mr Driscoll reported to the Chair as instructed. There is no allegation against Professor Jancezwski. In any event, he did respond to the Claimant on 26 March 2021 and set out his response [2211]. The Claimant accepted this under cross-examination.

314. The allegation is dismissed as the Claimant has not factually proved it.

D23 – 16 December 2020 – Dr Skone made an unjustified comment that the Claimant was not abiding by NHS Resolutions referral parameters when the referral had not been made by the Respondent

315. This allegation is about the meeting that took place between the Claimant and Dr Skone, with her BMA representative and Kate Evans also in attendance, where she was informed that she was excluded from the workplace with immediate effect. The Claimant asserts that Dr Skone made an unjustified comment that she had not abided "*by NHS Resolutions referral parameters",* when no referral had been made by the Respondent. This allegation requires some explanation.

316. The 2017 Dignity at Work complaint against the Claimant brought by Mr Darwish could reasonably be viewed as the starting point for this allegation as the Claimant was required to undertake a number of remediation steps set out by Mr Durning, the assistant medical director [1779]. It seems not all were completed.

317. On 28 July 2020, the parties accept that the Claimant was told by Dr Walker that the only alternative to a UPSW in respect of her allegedly bullying behaviour was to comply with a package offered by the Respondent, which included having a NHS Resolutions behavioural assessment. The notes [1906] show that the Respondent accepted that some of the 2017 actions had not been actioned, which was one of the reasons given for the offer by the Respondent. The NHS Resolutions assessment required a referral from the Respondent approved by the Claimant; various drafts were prepared (and before the Tribunal), but no final version seems to have ever been agreed or sent. There is no evidence of a final draft in the bundles before the Tribunal.

318. The Claimant says in paragraphs 561 and 562 of her statement that Dr Skone "*made a comment to the effect that I had not engaged with the NHSR behavioural assessment process proposed by Dr Walker in July 2020. However, no such referral to NHSR had been made by the Respondent at that time or subsequently, in the months leading up to the exclusion. This was therefore an outrageous allegation and was clearly being relied upon to help justify the immediate exclusion under paragraph 2.14 of the UPSW [PAGE 2921]."* The Claimant argued that the Respondent was bound to

make the referral as a preliminary step before excluding her due to the new complaint received, and this was a detriment.

319. Dr Skone's letter of 18 December 2020 [2570-2572] set out his close-to-contemporaneous account of the meeting, which took place by Teams and was recorded. In that letter, the only part that could be seen as referring to the alleged comment was [2572]:

"We discussed the potential remit of the Initial Assessment and I advised that any previous unresolved concerns may be taken into consideration as part of the Terms of Reference. Both you and your representative stated that you were offered a package of support by Dr Stuart Walker in August 2020 as an alternative to proceeding down the UPSW. You believe there have been failings on behalf of the health board in not providing you with the necessary support and as a result you strongly object to any reference to this being included. Kate confirmed that the decision made regarding your exclusion was based upon the serious nature of the concerns and the ability of your presence in work to impede the gathering of evidence for the initial assessment. I advised that when undertaking the Initial Assessment it would be based on the current concerns that have been raised with me in the first instance."

320. Dr Skone in his statement at paragraphs 54 and 55 set out the six steps the Claimant was required to take by Dr Walker in July 2020, and said that *"In my view, the complaints raised by Ms Khakhar appeared to suggest that the Claimant had not been reflecting adequately on her behaviour or improving her communication. My understanding was that she had not, for example, undertaken the Equinity 360 feedback review. I believe this was a fair observation*." He did not expressly deny the Claimant's allegation, but by implication he was saying that he had criticised the Claimant on a wider basis than she was currently alleging.

321. Given that the meeting was on Teams and recorded, the Tribunal was surprised by the lack of any notes in the evidence before it. It also noted that again the Claimant's BMA representative had not been called to give evidence, nor had Kate Evans. Dr Skone's evidence under cross-examination was that his letter was in effect the notes as it was written shortly after the meeting; it was not put to him that the letter was inaccurate.

322. Dr Skone was involved in the process of agreeing the referral to NHS Resolutions; he was aware that it had not been made when he met with the Claimant on 16 December 2020. Under cross-examination, he admitted that he did not remember exactly what he said but had in mind Mr Durning's letter of 2017 and Dr Walker's offer of July 2020.

323. The Tribunal was conscious that time had passed since the meeting. There is nothing in Dr Skone's letter showing him asserting to the Claimant that she had not abided "*NHS Resolutions referral parameters".* The Tribunal considers it more likely than not that Dr Skone pointed out to the Claimant as stated in his statement that she was again facing allegations of bullying when it had been made plain to her in July 2020 by Dr Walker that she had to reflect fully on her conduct towards "*junior*" colleagues and improve her communication skills. In particular, the Claimant had been told to undertake an Equinity 360 feedback review, but she had chosen who would give feedback, rather than allowing an open feedback process to occur.

324. The Tribunal preferred Dr Skone's explanation as it was consistent with the contemporaneous evidence, was plausible given the terms of Dr Walker's offer of July 2020, and credible as he knew the referral had not been made to NHS Resolutions. The Tribunal also bore in mind that the Claimant's recollection of events generally was not wholly reliable; Ms Barney described the Claimant as "*skewing*" events to suit her own narrative. The Tribunal agreed that when the Claimant's account was placed next to contemporaneous evidence, including her own documents, her account was not to be relied upon; for example, the assertion that she had raised a formal grievance on 22 November 2020 when she actually wrote on the letter that it was a Freedom to Speak Up letter.

325. The allegation is dismissed as the Claimant has not factually proved it.

D24 – 16 December 2020 (ongoing) – Dr Walker, Professor Jenney, Dr Rowntree and/or Ms Curkovic excluded the Claimant from work

326. Ms Curkovic had no involvement in the exclusion of the Claimant as set out above in the findings of the Tribunal. Again, neither Professor Jenney nor Dr Rowntree was involved. This leaves only Dr Walker, who did make the decision to exclude the Claimant, and was ultimately responsible under the UPSW policy for its continuation by the case manager [2922 paragraph 2.20].

327. Factually, it is correct that the Claimant was excluded from 16 December 2020 by Dr Walker and remains excluded (though the UPSW was paused while the Claimant's formal grievance made in 2021 was investigated). The Tribunal accepts that this is a detriment; a reasonable employee, particularly a surgeon, would regard exclusion as a detriment. The Claimant in her statement (paragraph 567) said that suspension is not a neutral act for a doctor; given the risk of atrophy of professional skills and knowledge the Tribunal appreciates the Claimant's position, though she argued that it

was not neutral due to the risk of gossip. The Respondent concedes these points.

328. This leaves the question of causation – was the Claimant's exclusion materially influenced by PID8-10, GMCPID1-3, or PID11 or because of PA2-4?

329. The Claimant, who was not in attendance at the meeting where her exclusion was originally decided, asserts that this is why she was excluded and why the case manager (originally Dr Skone and then Professor Fegan) continued her exclusion. The Claimant at paragraph 565 of her statement said that she was not told the rationale for her exclusion, but also said that she was told it was due to the proscribed grounds permitting exclusion under UPSW.

330. The Claimant also argued that her immediate suspension was plainly due to her protected disclosures or acts because "*There was no apparent consideration given to the fact that where previous concerns were raised during the D@W, the UPSW or even with [the junior surgeon], there was no suggestion whatsoever that I did anything inappropriate in terms of my interactions with the relevant individuals or access to information*." (paragraph 569). However, this assertion by the Claimant is incorrect; she was found to have behaved inappropriately towards Mr Darwish and she apologised; it was made plain to her that her conduct to the junior surgeon was perceived as bullying; the GMC raised concerns about the Claimant's handling of patient information.

331. The Respondent explained that it was decided by Dr Walker to exclude the Claimant for the reasons set out above in the Judgment (see D21) following discussion with colleagues, including Dr Skone (whose role as assistant medical director included dealing with such issues and NCAS). Dr Walker's position in summary was that Ms Khakhar was in distress and vulnerable, that the Claimant's presence in work could affect the investigation and might lead to interaction with witnesses from which she needed to be protected, and the dynamics of the situation were such that patient safety was at risk. Dr Walker in paragraph 95 of his statement added that:

"There was a real concern about the Claimant's apparent lack of insight into her own behaviours and the impact that it had on others and the functioning of the department. The issue was not that the Claimant had raised or would raise concerns. The real issue was the manner in which she was said to have behaved towards her colleagues and its impact on their ability to function."

332. The Tribunal noted that even in the Claimant's statement, as quoted above, she was asserting that she had been found to have done nothing wrong "*in*

terms of my interactions with the relevant individuals", when this was not the case. This supported the view of Dr Walker that the Claimant simply had no insight into her behaviour towards others. The Respondent in the view of the Tribunal had substantial evidence to support such a finding – the continued complaints of the Claimant's conduct in the workplace (including from those outside of the department), the Claimant's continued and persistent raising of aged issues already investigated to several individuals, her refusal to accept any other view of a matter that differed from her own, and the fact that the Claimant's behaviour appeared to be escalating, involving a wider range of individuals who were being targeted by her, culminating in the Khakhar complaint. The fact that Ms Khakhar had been recently bereaved did not in the Tribunal's view mean she was not vulnerable or her distress was not due to the Claimant's conduct as Mr Kemp suggested in cross-examination; Ms Khakhar was a surgeon and able to explain exactly what she found so difficult about the Claimant's behaviour.

333. The UPSW process permitted immediate exclusion, but it was not to be lightly undertaken [2921]:

"2.10 A practitioner will only be excluded where:-

there are grounds for concern about the risk of harm to or the safety of patients, colleagues or the practitioner; and/or

the practitioner's presence in work would impede the gathering of evidence or prejudice the investigation; and/or

exclusion is in the practitioner's own interests.

2.11 In exceptional circumstances an immediate time-limited exclusion may be necessary following a critical incident or other event which necessitates the practitioner's immediate exclusion from the workplace by an individual authorised to do so.

2.12 This immediate period of exclusion will allow the organisation to carry out the Initial Assessment (see paragraph 1.5) and/or seek further advice from NCAS where appropriate.

2.13 The practitioner must be informed why the exclusion is being imposed (there may be no formal allegation at this stale). The Medical Director or their nominated deputy should arrange to meet the practitioner in the presence of their representative at the earliest opportunity and in any event within 5 working days."

334. The Claimant said that she was not told the rationale for her exclusion, but also said that she was told it was the reasons set out in paragraph 2.10 of

UPSW. Dr Skone's follow-up letter [2570] of 18 December 2020 said that the Claimant was told (and is echoed in paragraph 48 of his statement):

"At the meeting I advised you that this immediate exclusion was taking place under Section(s) 2.11- 2.29 of the Upholding Professional Standards in Wales Procedure. I explained that the rationale for undertaking this immediate, time-limited exclusion was in order for an initial assessment to be undertaken in relation to serious concerns that had been raised.

As explained to you during the meeting, the nature of the concerns raised are in relation to your communication style and behaviour that could be perceived as undermining to others and bullying in nature. As a number of these serious concerns raised could result in a potential risk to the safety of patients, I felt I had no option but to take immediate action under the UPSW.

I confirmed that before reaching this decision, I have explored alternatives to exclusion such as restricting your practice to non-clinical duties. However, I have considered that your presence in work may impede the gathering of evidence in relation to the initial assessment and as a result this decision was made following full discussion with Dr Stuart Walker, Executive Medical Director and Martin Driscoll, Executive Director of Workforce and OD. I confirmed I have also sought advice from the Practitioner Performance Advice Service (previously known as NCAS)."

335. Dr Skone's evidence was that at the meeting both the Claimant and her BMA representative confirmed that they were satisfied the UPSW process was being followed and applied correctly (paragraph 48). The Respondent's witnesses agreed that exceptional circumstances were required to immediately exclude a practitioner, and in the Claimant's case, there was no critical incident. As explained by Dr Walker under cross-examination, the exceptional circumstance in her case was the "*sequence of events" and "there was a very real risk identified in [Ms Khakhar's] complaint*." Dr Walker pointed Ms Khakhar's complaint contained indications that she was questioning doing operations, there were issues with handovers or discussing complex cases at multi-disciplinary team meetings, and that she felt bullied and struggling to function. He regarded this as exceptional circumstances justifying the Claimant's immediate exclusion.

336. The Tribunal, having reviewed Ms Khakhar's complaint and the notes of her meeting with Dr Skone [2564-2567], agrees that very serious concerns about the Claimant's conduct and its effect on both Ms Khakhar and the department were raised. Dr Skone was told colleagues "*don't feel that they can question any of [the Claimant's] decisions without suffering consequences",* that Ms Khakhar was in a vulnerable position as a locum, that the bullying was persistent and witnessed by others, that Ms Khakhar was doing more two-surgeon operations than before due to fear of the

Claimant and was being pressured into carrying out operations by the Claimant that she did not feel was the right course of action. Dr Skone was also told by Ms Curkovic (the clinical lead for the department) that she had to intervene in the last week with the Claimant and ask her to stop conducting herself towards a registrar in a bullying manner.

337. By any definition, the account given by Ms Khakhar reasonably justified the concerns set out by Dr Walker and Dr Skone. They were being told by a locum consultant and also by the clinical lead that the Claimant was being perceived as bullying more junior doctors, and her behaviour was affecting operations, handovers and clinical decision-making, as well as Ms Khakhar on a personal level. Matters reasonably appeared to be escalating and the clinical lead was confirming others were intimidated by the Claimant. It was reasonable for the Respondent to conclude that the safety of patients and colleagues (including the mental health of Ms Khakhar) was at risk and the presence of the Claimant could impede any investigation. The Tribunal did not accept the Claimant's position in her witness statement (paragraph 568) and under cross-examination that allegations of bullying, even if having a harmful effect on the victim, did not justify suspension; it was a demonstration of the Claimant's unreasonable beliefs.

338. In contrast, the Claimant's allegation that the decision to immediately exclude her was due or materially influenced by a number of protected disclosures and acts carried out between 22 March 2019 to 22 November 2020 has no evidential basis. It does not address the issue of the Khakhar complaint; Ms Khakhar was wholly unaware of these actions by the Claimant.

339. The allegation is dismissed as the action was not materially influenced by a protected disclosure or because of a protected act.

D24A – 1-16 December 2020 – Dr Walker, Dr Skone, and/or Mr Driscoll before the Claimant was excluded sought advice from Dr Steve Boyle of NHS Resolutions without informing the Claimant

340. Factually, it is correct that the Claimant was not told that Dr Skone had consulted Dr Boyle of NHS Resolution about her. Indeed, the evidence shows that as Dr Skone stated in his statement, the Claimant was discussed more than once with Dr Boyle; for example on 6 November 2020 [2045]. The topic of discussion was the allegations of bullying (not by Ms Khakhar) previously made and the steps that Dr Walker required the Claimant to take to avoid a UPSW.

341. However, despite the assertion to the contrary by the Claimant, there was no obligation on the Respondent to tell her about the discussions. Dr Boyle in his letters to Dr Skone did say:

"We encourage transparency in the management of cases and recommend that practitioners should be informed when their case has been discussed with us. I am happy for you to share this letter with the practitioner unless you consider it inappropriate to do so. Moreover, the practitioner is also welcome to contact us for a confidential discussion regarding their case."

342. This is not an instruction to tell the Claimant about Dr Skone's discussions with Dr Boyle or that she could contact Dr Boyle direct; there is no evidence supporting the Claimant's assertion to this effect.

343. The Practitioner Performance Advice Service appears to fulfil the role of NCAS within the UPSW process [2570]. The UPSW does require NCAS to be consulted before the exclusion takes place [2914 paragraph 1.12; 2919 paragraph 2.4; 2921 paragraph 2.8]. It does not require that the practitioner is informed first.

344. Dr Skone in paragraph 44 of his statement explained that Dr Boyle from NHS Resolution performed this function (which is supported by Dr Boyle's headed notepaper describing his role as "*formerly NCAS*") and he was consulted about the Claimant's proposed immediate exclusion. This is confirmed that Dr Boyle's letter of 14 December 2020 [2124] to Dr Skone. Dr Boyle recorded that the Claimant's behaviour had been under discussion since May 2020, that he was aware that the Claimant had been raising concerns, and that Dr Skone on 11 December 2020 had said:

"In summary, members of the team appear to be frightened of [the Claimant] and find her behaviours undermining and critical. They have noted that the team appears to function efficiently when [the Claimant] is not present. There are also concerns that [the Claimant] involves consultants external to the service in the treatment of the complex cases without including their input into the team. These matters are of a high level of concern to the Health Board given that this is an acute high risk service."

345. Dr Boyle went on to remind Dr Skone of the requirements under UPSW to exclude a practitioner; he does not expressly agree or disagree with the proposal to immediately exclude the Claimant, but gives advice about how to carry out the investigation.

346. The Claimant asserts that this is a detriment and said at paragraph 564 that she "*had the right to contact NHSR for a confidential discussion".* The Claimant went on to say at paragraph 565 that the failure to notify her of the discussion with Dr Boyle was a detriment because if she had spoken to it, Dr Skone would not have been able to say that NCAS agreed with the

exclusion at the meeting on 16 December 2020. This position assumes that Dr Boyle would have agreed with the Claimant; the Tribunal is aware that the Claimant did later meet Dr Boyle and there is no objective evidence that his position changed as a result.

347. Did Dr Skone tell the Claimant that Dr Boyle agreed with the decision to exclude her as she asserted in paragraph 565 of her statement? In his witness statement, all Dr Skone admitted that he said he had sought advice from the Practitioner Performance Advice Service. His contemporaneous evidence as set out in his letter of 18 December 2020 [2570] said the same thing- advice was sought. It is silent about Dr Boyle agreeing with the Claimant's exclusion.

348. The Tribunal places more weight on Dr Skone's letter. It was close to contemporaneous and written long before this claim was made. It is consistent with both the UPSW process, which only requires consultation (not agreement), and Dr Boyle's own letter recording the discussion. The Claimant's account is not supported by any evidence from the BMA or contemporaneous evidence; she has been found to be unreliable in her recollection of events.

349. The Tribunal is also not persuaded that a reasonable employee would consider the consultation with Dr Boyle, as required by the UPSW process agreed with the BMA, to be a detriment. The Claimant was not required to be informed and it was unreasonable for her to believe that she had the right to be told or that Dr Boyle would agree with her, or to dispute this under cross-examination. It is evident that the consultation was to ensure the process was followed correctly; Dr Boyle's consent was neither required nor given.

350. The allegation is dismissed as the Claimant has not factually proved it and in the alternative, the action was not a detriment.

D25 – Prior to 16 December 2020 – Dr Walker used false allegations in an NHS Resolutions referral to procure advice from NHS Resolutions to justify decision to exclude the Claimant

351. As the Tribunal has already found (see D23), no referral for a NHS Resolutions behavioural assessment was made. It had no bearing at all on the discussions with Dr Boyle. The Claimant complained that references to a discussion about her access rights to DATIX as the former clinical director and her contact with HEIW were included in a draft referral [2547 is one draft; 2551 is the incorrect section] for the behavioural assessment directed by Dr Walker in July 2020 constituted false allegations. Dr Skone explained that they were included in error and removed when the Claimant's

representatives pointed it out in February 2021 [the additional bundle contains the emails on this topic at pages 323-334]. In any event, as the referral was not made, it could not have been used to procure the advice given to Dr Skone by Dr Boyle in December 2020.

352. Dr Skone in his statement (paragraph 56) explained that the error arose as he was asked to arrange the referral in October 2020, during the height of the Covid-19 pandemic, when he became assistant medical director. He accepted that there had been a delay, but added that the draft was sent to the Claimant's representatives who corrected the matter. Dr Skone explained that while the form had a date for 2019, that could not be correct as the requirement to do the assessment was not raised until July 2020 and confirmed in Dr Walker's letter of late October 2020.

353. There is no evidence to support a finding that the referral was ever made (due to the pausing of matters due to the UPSW) or that it was before Dr Boyle in December 2020, as the Claimant accepted under cross-examination. Dr Skone's evidence that he did not think it was ever sent was not challenged in cross-examination, despite the Tribunal raising the point at the time. More to the point, Dr Boyle's detailed letter of 14 December 2020 [2124] sets out the history and what he knew concerning the Claimant; there is no reference to the referral form. Finally, these matters were trivial in the view of the Tribunal and were unlikely to have any impact on Dr Boyle, compared to the serious allegations of bullying and the risk to patients set out in the Khakhar complaint which was known by Dr Boyle.

354. The allegation is dismissed as the Claimant has not factually proved it.

D26 – 13 January 2021 – Dr Walker, Professor Jenney, Dr Rowntree and/or Dr Skone set out four areas of concerns raised against the Claimant

355. This allegation is about a letter sent on 13 January 2021 by Dr Skone to the Claimant (copied to her BMA representative) [2152]. It followed the meeting on 16 December 2020, where Dr Skone told the Claimant she was being referred to a UPSW and was immediately excluded from the workplace. The Claimant wanted to know more about the allegations, despite the fact that the UPSW process required an initial assessment by the case manager and the input from the practitioner later. Dr Skone was willing to give the Claimant more information, but made it clear these were not formal allegations as the initial assessment stage was underway. He wrote [2153]:

"*The four areas of concern are as follows:-*

1.) Undermining less experienced consultants and behaving in an intimidating manner

2.) Failing to work with colleagues in a way that best serves patient interest (for example by omitting important information regarding complex patients whilst transferring care)

3.) Clinical judgement errors, including:

- Failing to attend, assess and gain consent for a patient prior to emergency surgery

- Undertaking work outside of scope of practice

- Concerns raised by colleagues about clinical practice and decision making

4.) Pressuring junior doctors into raising concerns about colleagues."

356. In her statement, the Claimant complains that this was insufficient information ("*no details were provided*" paragraph 574). The amended Grounds of Complaint paragraph 56 simply sets out the quotation from Dr Skone's letter, while paragraph 57 (not referred to in the annex for this allegation) sets out the attempts by the Claimant's representatives to get more information. Given the UPSW was suspended to deal with the Claimant's formal grievance, it is striking how this is not referenced. The amended Grounds of Complaint end in asserting *"The Concerns raised have, in whole or at least individually or in part, been materially influenced by the Claimant's Protected Disclosures and/or her Protected Acts (detriment 26)."*

357. It appeared to the Tribunal therefore that the allegation is not that Dr Skone indicated to the Claimant the areas of concern, but he did so insufficiently in his letter of 13 January 2021. The later events are irrelevant. It also is not explained how Dr Walker, Professor Jenney or Dr Rowntree are involved; the letter was only from Dr Skone.

358. The UPSW process, as explained to the Claimant's representatives (who should have been well aware of the process) on 18 February 2021 by Ms Kate Evans [2197], started with an initial assessment of concerns raised. This is to decide whether a formal investigation was required or if the matter could be resolved informally [2913 paragraph 1.5]. This meant, as Dr Skone made clear in his letter of 13 January 2021, there were no specific allegations which would be formulated at a later stage if the matter was to proceed formally [2914 paragraph 1.13-1.15]. The Claimant's input in responding to specific allegations would be sought at a later stage of the process as part of the formal investigation [2917 paragraphs 1.20-1.23].

359. The Tribunal accepted the evidence of Dr Skone (paragraph 63):

"63. As part of my Initial Assessment, I had by now interviewed several of the Claimant's colleagues and these were the four emerging themes: see

pages (C/B 2151, 2521-2523, 2537 & 2564-2567). By summarising these for the Claimant in my letter I did not subject her to a detriment. I was simply responding to her request for further information and providing an update in a transparent way."

360. In paragraph 3A of the amended Grounds of Resistance, the Respondent conceded that D26 could be a detriment. In the submissions made on behalf of the Claimant, Mr Kemp said the concerns set out were vague and there was no reference to DATIX's to support the concerns, and it was insufficient to say that this is because the initial assessment had not been completed as the Claimant did not know the case she had to meet in the UPSW. Mr Kemp invited the Tribunal to infer the concerns were materially influenced by PID8-10, the GMC disclosures and PID11, or were because of PA2 and PA3. In the submissions made on behalf of the Respondent, Ms Barney submitted that there was no detriment as the Claimant agreed in cross-examination that the concerns were set out at her request.

361. The Tribunal reviewed the submissions carefully to ensure that the apparent concession by the Respondent had not misled the Claimant into thinking it was absolutely conceded that D26 was a detriment; Mr Kemp was not so misled as he dealt with the point of why it was a detriment in his submissions (the Claimant could not defend herself in essence).

362. The Tribunal does not consider that the Claimant suffered a detriment that would be perceived as such by a reasonable employee. Such an employee, and their representatives, would be aware of the UPSW process and the stage when Dr Skone set the letter was very early and before allegations had been drafted. The Claimant wanted to know more about the potential areas of concern, and Dr Skone told her as much as he reasonably could be expected to say in the circumstances while he carried out an initial assessment. The Tribunal reviewed Dr Skone's notes of his initial investigation [examples include 2537, 2535-2536 & 2538] and they do indicate the areas he outlined in his letter. The Claimant plainly wanted more, but it is not reasonable to expect a running commentary of an investigation and to be able to comment when you wish – the process, agreed with the BMA, set out an opportunity to review the evidence and respond and it was not during the initial assessment. There is no evidence anyway to find the reason why the concerns were set out as they were was materially influenced by the protected disclosures or because of the protected acts.

363. The allegation is dismissed as the action was not a detriment.

D28 – 30 March 2021 – Professor Fegan, Dr Walker, Professor Jenney and/or Dr Rowntree refused to reconsider the Claimant's exclusion

364. The background to this detriment is that Professor Fegan was appointed the case manager for the UPSW process against the Claimant in March 2021 (the Claimant was notified on 23 March 2021). This was because concerns had been raised about whether Dr Skone was sufficiently independent. Professor Fegan is a consultant haematologist and was the Research and Devolvement (though the Tribunal wonders if this is a typing error and the correct word is "Development"?) Director employed by Cardiff University between 2013 to the end of 2020. As he explained in his statement (paragraph 2), while he had technically been an employee of the University, his role was half-funded by the Respondent and he was also assistant medical director for the Respondent, thus answerable to the Medical Director. Such an arrangement is not uncommon for senior doctors engaged in research work.

365. Under the UPSW procedure, the case manager must decide every four weeks whether to continue the exclusion of a medical practitioner from the workplace [2922 paragraph 2.19]. The evidence from the Respondent's witnesses was unanimous that it was Professor Fegan's decision to continue the Claimant's exclusion, though the UPSW process requires the Medical Director (Dr Walker) to supervise the exclusion [2922 paragraph 2.20 "*The Medical Director must ensure that the Case Manager gives ongoing consideration to the necessity for the exclusion and the practicability of imposing restrictions instead.")*

366. There is no evidence at all to support the allegation that Professor Jenney or Dr Rowntree was involved.

367. Professor Fegan's evidence to the Tribunal was that he extended the extension for two weeks to give him an opportunity to properly look at the matter as he had only just been appointed. He met the Claimant and her representative for the first time on 30 March 2021 and the purpose was to introduce himself and explain what he was proposing to do to progress the initial assessment (paragraph 21). Professor Fegan added that "*She [the Claimant] wanted the exclusion removed immediately and I explained that I would be reviewing it in line with the UPSW Policy but that my current view was that it should remain in place.".*

368. Professor Fegan's statement also said that as at 30 March 2021 he was not aware of any of the protected disclosures or protected acts relied upon by the Claimant. He added at paragraph 5 when he initially met Dr Skone on 26 March 2021 to take over as case manager:

"I specifically told Dr Skone that I did not want to know about historical disagreements or politics in the paediatric department. I wanted to come to the UPSW as objectively and cleanly as I possibly could without being influenced by anything that had happened before. I had never previously come across the Claimant in work, or worked with her."

369. Professor Fegan's position is that it was not until he met with the Claimant on 30 March 2021 that he was told by her representative that she was a "*whistleblower*", though the representative then accepted that none of those who had given statements about the Claimant's conduct were connected to the events underpinning the Claimant's whistleblowing (paragraph 22). Professor Fegan added *"I had no knowledge of those complaints and my decision to maintain the exclusion was purely based on Ms Khakhar's complaint about the Claimant. That complaint was serious and, in my opinion, warranted investigation. I still think it does."*

370. Professor Fegan went on to state in his statement:

"23. As the minutes of the meeting show, I explained that the concerns raised by Ms Khakhar included (amongst other things) a complaint that the Claimant's behaviour had intimidated her to the point that she had began to change her clinical practice simply to appease the Claimant. It also included a complaint about a specific case involving an NEC baby who had died following the Claimant's decision to delay surgery… I did not feel that I could safely put the Claimant back in to the work environment without further investigation and understanding of these concerns...

24. I made the decision to continue the Claimant's exclusion whilst I considered the matter further and sent my first extension of exclusion letter on 9th April 2021. The letter is on pages (C/B 2233-2234) and the covering e-mail on page (C/B 2232). This was, provisionally, to be a 2-week extension only (from 12th to 26th April 2021) to enable me to complete the Initial Assessment…The allegations were of a serious enough nature that to allow the Claimant back to work at that stage would not have been in the interests of patient or staff safety."

371. The Tribunal reviewed the notes of the meeting of 30 March 2021 [2540, annotated by BMA third bundle 16]. While neither set of notes unambiguously record Professor Fegan refusing on 30 March 2021 to lift the exclusion, by implication that must be what happened as it is recorded by the BMA in particular that Professor Fegan was going to decide what to do in the next fortnight and there was a request to review the exclusion [20 third bundle]. There appears to be no real dispute on this point; the Claimant's account also agrees with this position.

372. What happened next was on 9 April 2021, Professor Fegan wrote to the Claimant [2233], explaining that the exclusion would be continued for a two-week period as he hoped to have completed the initial assessment by 26 April 2021. This was on the basis that "*as the initial assessment process has not yet been completed I have no option but to extend your period of exclusion."* Professor Fegan wanted to speak to Ms Curkovic who was on leave until 11 April 2021 and interview her, before making his decision.

373. Factually, it is correct that on 30 March 2021 Professor Fegan refused to lift the exclusion of the Claimant and required more time to consider the matter. There is no evidence that anyone other than Professor Fegan was involved in that decision. In addition, the Tribunal accepted that continuing to be excluded would be seen by a reasonable employee as a detriment.

374. However, there is no evidence to infer or find that Professor Fegan on 30 March 2021 refused to lift the exclusion due to any protected disclosures or protected act. There is no evidence that he was even aware of any of them until the Claimant's representative told him at the meeting. Professor Fegan went into the meeting with the view that as he had just been appointed, he needed to review the documentation and carry out his own enquiries before reviewing the exclusion as the concerns raised about the Claimant were serious and involved patient safety issues, as shown by the various minutes of the meeting before the Tribunal. The Tribunal considered Professor Fegan's account to be credible; a newly appointed case manager dealing with serious concerns is more likely than not to consider taking time to review the position to be a sensible step.

375. The allegation is dismissed as the action was not materially influenced by a protected disclosure or because of a protected act.

D29 – 25 April 2021 – Professor Fegan, Dr Walker, Professor Jenney and/or Dr Skone extended the Claimant's exclusion

376. As explained above, the evidence before the Tribunal is that Professor Fegan alone made the decision to continue the Claimant's exclusion from the workplace and there is no evidence to rebut this. There is no evidence at all to support the allegation that Professor Jenney or Dr Skone was involved. Dr Walker's evidence was that he left the matter in Professor Fegan's hands to ensure independence.

377. On 25 April 2021, Professor Fegan wrote to the Claimant [2238] and extended the exclusion for 4 more weeks, on the basis that "*I believe that the situation continues to meet the grounds for exclusion as set out under 2.10 of the procedure and that there is both reasonable and proper cause for formal exclusion*." He also confirmed that he had completed the initial

assessment and was moving to formulating specific allegations and the Terms of Reference for a formal investigation by a Case Investigator (not Professor Fegan).

378. The Claimant argues that this decision was materially influenced by or because of her various protected disclosures and protected acts. Professor Fegan himself accepted that he was aware that the Claimant was asserting whistleblower status from the meeting of 30 March 2021. The Tribunal accepts that continuing the exclusion could be reasonably viewed as a detriment, as does the Respondent.

379. Professor Fegan's explanation is set out in his statement:

"30. Given the seriousness of the concerns that, I had found, required further investigation, I felt it was proper to maintain the exclusion whilst consideration of those concerns was ongoing. A significant part of the department's work involves team working and Multi-Disciplinary Team Meetings. Given the allegations that the Claimant was undermining and bullying staff, and the potential impact on patient and staff safety, I considered extension of exclusion appropriate pending a formal investigation…

32. The decision to extend the exclusion was not in any way made on the basis that the Claimant had made protected disclosures/acts. It was purely based on the facts and circumstances. My concerns were purely about the allegations of bullying behaviour, intimidating colleagues to the point they change their clinical practice and try and avoid working with her, for example avoiding taking over from her after she has been on call and concern around the clinical issues identified."

380. Under cross-examination, Professor Fegan did not shift from this position. He said that there had been no change since the immediate exclusion, and he could see no way for her to return to the Respondent. Professor Fegan accepted that he did not call other hospitals to see if the Claimant could undertake a clinical attachment.

381. The Tribunal noted that Professor Fegan on 19 April 2021 had prepared an initial assessment report [2543-2546] about the Claimant's case. He found that there was evidence to support the concerns raised, but dropped one issue as he considered there was nothing to be gained in investigating it further in light of the Claimant's apology. This in the Tribunal's view showed Professor Fegan had carefully reviewed the position, carried out his own enquiries and formed a view about what to pursue further. The Tribunal also considered that it was reasonable for Professor Fegan to reach such conclusions; his position was reasoned with evidence to support it. The

concerns about bullying in particular supported a view that for the time being, the Claimant should remain outside of the workplace.

382. The allegation is dismissed as the action was not materially influenced by a protected disclosure or because of a protected act.

D30 – 20 April 2021 (ongoing) – Professor Fegan, Dr Walker, Professor Jenney and/or Dr Rowntree refused to reconsider the Claimant's exclusion from being a trainer

383. This is factually incorrect as Professor Jenney and Dr Rowntree had no involvement in the matter. There is no evidence at all to support the allegation that Professor Jenney or Dr Rowntree was involved.

384. Professor Fegan and Dr Walker dealt with this matter. Dr Skone in his letter to the Claimant of 13 January 2021 [2575] said he would support the Claimant in continuing academic work, but said she could not access her work email or IT facilities and she was limited as to who she could deal with at the Respondent. On 29 April 2021, the BMA on the Claimant's behalf [2242] wrote to Professor Fegan and asked for clarity about whether the Claimant could engage with HEIW meetings and correspondence "*which pertain to her status as a trainer*". The BMA chased for a response in an email to Dr Walker and Professor Walker of 6 May 2021 [2267], saying that the Claimant was experiencing great difficulties (which were not set out) and if there was no answer by 7 May 2021, the BMA would advise the Claimant to act as if there was no restriction.

385. Dr Walker responded on 7 May 2021 [2265], explaining that Professor Fegan was not working full-time and to deal with the matter by the deadline set by the BMA, he would have to step in. Dr Walker confirmed that his view was that it was standard to exclude someone subject to a UPSW from contact with witnesses. He added that:

"I am willing to agree that, within the confines of the academic work that Mrs Abhyankar has already been given permission to do, that she can undertake the requested academic activity.

However, she must not engage in any communications regarding the UPSW process, nor with any potential witnesses to the case. I would therefore suggest that no one should be contacted unless absolutely necessary for the academic work, and that Mrs Abhyankar would need to seek permission from the case manager before doing so for each person (only once per person). That will prevent any subsequent concerns around interference or coercion and as such be protective to Mrs Abhyankar.

I would though seek some clarity over the need for Mrs Abhyankar to engage with HEIW? That is not necessary for academic research work, and as some of the concerns relate to Mrs Abhyankar's relationship with trainees direct interaction with HEIW about trainees would seem to be potentially relevant to the investigation? Could you therefore please clarify what discussions with HEIW are required?"

386. Professor Fegan responded in a letter of 11 May 2021 [2272]:

"3) Following your letter, we have reconsidered her [the Claimant's] contact with others within her research and academic roles and confirm that the UHB will support this with the exception of those involved as witnesses of the UPSW process, namely:

[List of witnesses redacted by the Tribunal]

You have stated that Mrs Abhyankar is prepared to give a clear and express commitment to the UHB to work within the parameters during the UPSW process. We would reiterate that Mrs Abhyankar is not to make contact at all with the above named individuals and that she should refrain from discussing any matter relating to or arising from her UPSW process with anyone, other than her representative. If, however, she does not comply then the UHB would have no option other than to totally exclude her from work until the process has concluded…

If there are other elements of work that Mrs Abhyankar can undertake remotely without having contact with the named individuals, which would include professional updating then these will of course be considered. Please let me know if Mrs Abhyankar believes that there is work that she can do in this respect and I would be happy to give this due consideration."

387. There is an email from the BMA to Professor Fegan in response dated 19 May 2021 [2277]. In it, the BMA suggests various areas of work the Claimant could undertake and says in relation to training, that the Claimant will deal with HEIW on this subject unfettered – "*Given your recent letter, Mrs Abhyankar will now look to write to HEIW, hopefully with a view to setting up another meeting, and undertake any work associated with that/HEIW. There will be, of course, no fetter on Mrs Abhyankar's interactions with HEIW*." There is no suggestion in this email that the Claimant is now prevented from training matters. Professor Fegan responds on 21 May 2021 [2280] dealing with the substantive matters raised and reiterates that "*So just for clarification Mrs Abhyankar can continue to pursue her academic and HEIW roles within the expressed understanding that even through these activities she has no contact with anyone previously identified within this UPSW process."*

388. The Claimant in paragraph 616 of her statement said that the BMA in its email of 19 May 2021 set out the training work she proposed to do; the Tribunal considered this to be an example of the Claimant "*skewing*" the facts. The BMA's proposals were not about training work; it was about substantive medical practice e.g. undertaking bladder and endocrinology clinics and seeing complex cases. There was no proposal about training work.

389. The matter was looked at more than once following various requests from the Claimant. In paragraph 606 of her statement, the Claimant said that she wanted to publish about a new approach (though page 2351 seems to be about her doing a presentation about it, not publish, but Professor Fegan seemed to view this as a request to publish 2350) and advise on a medical project, but there is no record of her making such requests in the evidence before the Tribunal, with the exception of an email of 19 August 2021 [2351] where the Claimant emailed Martin Edwards (not the case manager) about supporting a student about "*service evaluation*" and mentions the operation in question (see D34 below). There is no explanation how supporting a medical student in a project constituted training, but the matter is considered in more depth in D34 below. An academic article is academic work, not training, in relation to the new approach to operations mentioned. D34 describes the issue with the student as academic, not a training matter.

390. The Claimant complained that she could have continued her work as a trainer, but gave no explanation how in her statement. Under cross-examination, it became apparent that the Claimant had been assisting Cardiff University with the practice training and examination of medical students in 2021; the Claimant made no mention of this in a statement totalling 121 pages. Only Professor Fegan dealt with the specifics of training, saying in paragraph 36 of his statement that he understood that the Claimant was a tutor for trainee paediatric surgeons in HEIW (the deanery). It was HEIW who was responsible for organising trainers, not the Respondent.

391. Factually, the Claimant has not established that from 20 April 2021 Professor Fegan (and to a lesser extent Dr Walker) refused to reconsider the Claimant's exclusion as a trainer. On the contrary, the Claimant was told, and was advised by the BMA to act accordingly, that there was no restriction in dealing with HEIW, provided she did not make contact with the witnesses listed. The BMA's letter of 19 May 2021 confirms this. The pleaded case does not limit the period to 13 May 2021, despite Mr Kemp's submission to the contrary.

392. The allegation is dismissed as the Claimant has not factually proved it.

D32 – 16 December 2020-14 January 2022 – Professor Fegan, Dr Walker and/or Dr Skone did not lift, modify or make arrangements to permit the Claimant any form of return to or engagement with clinical and/or academic work including developing, collaborating on and supervising research proposals.

393. Dr Skone was the case manager from December 2020 until Professor Fegan replaced him in March 2021. Dr Walker as Medical Director had overall responsibility for the Claimant's exclusion as set out in the UPSW. As shown above, Dr Skone did not complete the initial assessment and the Tribunal has already found that it was reasonable to complete that assessment before making decisions about the exclusion (and consequently any restrictions on practice).

394. It was Professor Fegan who largely dealt with these matters (with the exception of Dr Walker giving an initial response on 7 May 2021 in his absence). It is correct that the Claimant remains excluded (though the Tribunal understands she was on a clinical attachment in 2022) from the Respondent. It is also correct that Professor Fegan rejected the BMA's proposals [2280] for the Claimant to undertake some work in its email of 19 May 2021 [2277] on the basis that it was not practical for the Claimant for her to try to work without any contact with any other consultant in the directorate, particularly given the concerns about her clinical decisions. Under cross-examination, the Claimant described the BMA's proposal as "*just a suggestion to explore further and drop if not suitable".*

395. However, from January 2021 Dr Skone (and then Dr Walker and Professor Fegan) made it clear that there was no issue with academic work, provided the Claimant did not contact witnesses. It is therefore incorrect factually for the Claimant to assert she was not permitted to engage with academic work. Indeed, the Claimant in August 2021 [2351] intended on attending a meeting with surgeons and discussing an operation she performed and was in contact with medical students.

396. Professor Fegan's evidence was that it was not for him to find clinical attachments for the Claimant to undertake elsewhere. He was not challenged on this. His evidence that it was for the directorate to deal with academic matters was not challenged and indeed supported by the Claimant's email to Martin Edwards in August 2021.

397. Professor Fegan's evidence (paragraph 47) was that in essence nothing materially changed in relation to the Claimant's exclusion – "*The concerns over alleged bullying and her clinical judgement were serious and there was an on-going need to preserve the integrity of the investigation. There had been no change and therefore the terms of the exclusion remained the same and it was, in my opinion, appropriate*." The fact that the Claimant raised a formal grievance on 31 December 2021 [2444] about it changed

nothing in Professor Fegan's view; the matter had to be fully investigated. The amended Terms of Reference were sent to the Claimant on 12 July 2021 and the exclusion reviewed on 20 July 2021 [2330], where the point was made by Professor Fegan that "*During your period of exclusion from the workplace, with the exception of our agreed activities related to your academic and HEIW roles, I remind you that you must not attend your usual workplace".*

398. The evidence before the Tribunal shows that the exclusion was regularly reviewed but continued due to concern about the risk of harm to patients, colleagues and the Claimant and the presence of the Claimant impeding the investigation. In the Tribunal's view, these are matters are reasonably could be viewed as long-lasting. The only specific proposals put forward by the Claimant were impractical and described by herself as merely a suggestion.

399. The Tribunal also bore in mind that the UPSW was suspended, which Professor Fegan said ceased his involvement in the matter (paragraph 88); this was not challenged. The grievance report was not issued until 17 June 2022 [2604] but as at 12 September 2022 the grievance had not concluded (paragraph 90). The grievance was presented on 31 December 2021, but the Tribunal does not know when the UPSW was suspended (despite the agreed chronology). It is likely though this happened after 14 January 2022 as Professor Fegan was still dealing with the issue of the clinical expert for the UPSW after this date (see agreed chronology – 28 January 2022).

400. In conclusion, it is correct that the exclusion continued and the Respondent did not make any arrangements to enable the Claimant to return to practice for it. It is not correct to say the Claimant was not permitted to carry out academic work. The Tribunal accepts that the exclusion from clinical work is a detriment for the reasons given previously. However, it is not persuaded that the reason for the continued exclusion was due to the Claimant's protected acts; Professor Fegan's reasons for continuing the exclusion are plausible, credible and consistent with the contemporaneous evidence. The concerns raised about the Claimant were serious and it was not practicable for her to return to clinical duties without being in contact with witnesses and those involved in the UPSW.

401. The allegation is dismissed as the action was not because of a protected act.

D34 – 26 August 2021 – Professor Fegan applied a higher level of scrutiny to the Claimant's request to conduct academic activity than he otherwise would

402. This allegation relates to an email from the Claimant to Martin Edwards of 19 August 2021 [2351]. The email was about a medical student who wanted to complete a piece of work, which the Claimant said should be seen as "*service evaluation*". The Claimant wanted the directorate to approve the work. In her email, she does not expressly say she wanted to be involved. The Claimant chased Martin Edwards for a response on 26 August 2021 [2350] as to whether the student would be supported.

403. Professor Fegan responded on the same day to the Claimant's representative, making the point that the Claimant should have contacted him about this matter [2350]. He asked:

"In my role as Case Manager, I would first like reassurance that the work Mrs Abhyankar wishes the student to undertake, will in no way involve any cases or staff presently included in the UPSW ToR or the ongoing ET. As the former R&D Director at CVUHB, I will be interes ted to see exactly whatis being proposed just to be certain myself that this is not research being badged for reasons of convenience as Service Evalu ation especially given the references to research and Research Governan ce raised in the Letter sent to me on behalf of Mrs Abhyankar by Redman solicitors. Once I have that reassurance, then the directorate (Rim) can de cide if they are happy to allow the student to undertake this as part of a Se rvice Evaluation which does require directorate approval."

404. The Claimant complains that this response from Professor Fegan showed that he applied a higher standard of scrutiny to her request to carry out academic activity than others would be shown. However, no comparator is cited to enable the Tribunal to make such a comparison. The Tribunal also notes that the Claimant did not expressly ask to supervise the medical student, but that may be a matter of semantics and those involved understood that was the Claimant's goal.

405. Professor Fegan's background is relevant. As his email explained, he was, until about eight months previously, the former research director and had suspicions about people "*badging*" research as "*service evaluation".* In his statement, Professor Fegan explained that this was because by calling it "*service evaluation*", proper approval processes could be avoided and he was concerned by the Claimant's statement to Mr Edwards that "*I have told him to also register it as a service evaluation as that is the way projects I believe are registered*". Professor Fegan said he was concerned to ensure that "*I was not simply being asked to agree the Claimant's request outside the standard approval process."* (paragraph 58). He added that in 7 years

as the research director of the Respondent, he had never heard of the Claimant applying for permission to undertake research.

406. Mr Kemp when cross-examining Professor Fegan highlighted the reference by him in his email to these proceedings; Professor Fegan denied his response was due to the Claimant's PA5 or PA6, explaining that he simply wanted to ensure the Claimant did not contact those connected to the UPSW or the proceedings and it was the reference to "*service evaluation*" concerned him, though the final decision would not be his.

407. The Tribunal bore in mind Professor Fegan's previous role and the failure by the Claimant to provide any evidence of a comparator or that others would not have been subject to the same scrutiny in the same circumstances. It accepted that Professor Fegan would have been as concerned to ensure he was not being asked to approve "*research*" which had not gone through the proper approval process and would have raised the same points with anyone claiming to be undertaking "*service evaluation*" due to his concerns about using this label to avoid the proper process. His email at the time makes this point and his evidence to the Tribunal was articulate and persuasive on this point. It is also plausible that a former research director would have such concerns.

408. The Claimant in her submissions argued that Professor Fegan was requiring her to obtain a reassurance from him first before the directorate made a decision. This was not squarely put to Professor Fegan in cross-examination, but in any event, this is not "*scrutiny*". The requirement that Professor Fegan made was that there would be no contact with witnesses for the UPSW or these proceedings; this is neither scrutiny nor unreasonable. The additional point he made was that he would not approve research outside of the proper process and was interested to see the details; without the details, it is difficult in the Tribunal's view to see how this is scrutiny; it is simply a request for more information and it is made plain that it is because of Professor Fegan's previous role, not because of any protected disclosure or protected act.

409. The allegation is dismissed as the Claimant has not factually proved a higher standard of scrutiny was applied to her than that would be applied to others, and in the alternative, the action was not because of a protected act. The Tribunal is unconvinced that there is any detriment either as the Claimant was merely reminded she could not contact witnesses and asked to give more information, but it considered that there was no need to make a formal determination on this issue given the other findings.

D35 – 25 November 2021 – Professor Fegan refused to answer a question about Miss Curkovic's access to the Claimant's personnel file and insinuating that the Claimant had not been forthcoming about her whereabouts following the death of her father

410. The Claimant had nothing to say in relation to the personnel file issue in her witness statement. It was not until the hearing had started that it became clear that what the Claimant was concerned about was Miss Curkovic having access to her leave record. It is not clear what detriment was caused to the Claimant in any event as it is not dealt with in her witness statement; the Claimant has not established any detriment.

411. The concern Professor Fegan raised in his email [2384] was about the Claimant not booking leave in the usual manner or ensuring that he knew where she was when she was meant to be taking part in the UPSW process. The Claimant at the time was in India and did not tell the Respondent when she left or her date of return. Professor Fegan knew the Claimant saw her GP on 10 November 2021. Professor Fegan explained that Ms Curkovic was the "*Intrepid lead*" for the directorate, which meant she did receive leave requests from the Claimant, but was sending them onto Dr Al-saman for consideration as it had been agreed with the Claimant Dr Al-saman would deal with such requests. Intrepid is the computer system used to book leave.

412. The Tribunal did not consider it proved factually that Professor Fegan refused to answer questions about this; on the contrary, he gave a full explanation. Instead, the Tribunal considered this to be an example of the Claimant "*skewing*" facts by making allegations about a personnel file, when really she was asking about the leave system.

413. In relation to the part of the allegation about the Claimant's whereabouts, Professor Fegan as case manager for the UPSW was not told exactly when the Claimant would be out of the country. As the leave was not booked through the system, he was unable to check that. Professor Fegan was made aware that the Claimant's father had died in India on 2 November 2021, and in an email of 11 November 2021 to the BMA [2389] he said that the Claimant would not use the Intrepid system to book leave, and the alternative put in place had not worked as the Respondent did not know when she was on sick leave, compassionate leave, annual leave, unpaid leave and so on.

414. Professor Fegan's email of 25 November 2021 did not insinuate but plainly said that it now appeared the Claimant had been out of the country since about the 4 October 2021, despite wanting to take part in a professional activity, and no leave was booked. He made the point no-one had known exactly how long she had been abroad and going forward *"I think we would*

all benefit if Mrs Abhyankar uses the Intrepid system as everyone else has to, as we will all then know where she is and when.”

415. In other words, Professor Fegan did say the Claimant had not been transparent about her whereabouts, but this in the view of the Tribunal was factually accurate. The Claimant had not formally booked leave or notified the Respondent of the dates she was abroad. She remained an employee of the Respondent, subject to its policies. There is no evidence that Professor Fegan’s accurate observation was due to the Claimant’s protected acts, but rather motivated by her failure to properly book leave and ensure the case manager knew when she would be available to meet as required. The Tribunal also does not consider a reasonable employee would consider the accurate observation of Professor Fegan to be a detriment.

416. The allegation is dismissed as the Claimant has not established a detriment and the action was not because of a protected act.

D37 – 20 December 2021 (ongoing) – Professor Fegan and/or Ms Robinson failing to provide the Claimant with the clinical notes for provision to the clinical expert in the UPSW process

417. Factually, it is correct that before the UPSW was suspended, the Claimant was not provided with the full clinical notes to be provided to the clinical expert.

418. The Tribunal is not persuaded that this is a detriment in the eyes of a reasonable employee. The reason for the failure given by Professor Fegan in paragraph 70 of his statement was that some of the notes were kept off-site, while others were still in use treating the patient (either at the Respondent or elsewhere). As the investigation continued, the Case Investigator was identifying new patients and matters to be considered (Fegan paragraph 71). The clinical expert was not identified to the Claimant’s representatives until 3 January 2022, and the UPSW suspended shortly thereafter.

419. Professor Fegan on 31 July 2021 [2334] told the Claimant and her representatives, after setting out that the Terms of Reference had been amended:

“We now have all the notes available and have identified the pertinent parts of the notes for photocopying and distribution. However, I appreciate you may wish to review the notes in their entirety. The notes presently reside in Woodland House and it is simply a matter of asking Kate for access and she will arrange a room for you to come in and review them.”

420. In his statement, Professor Fegan said that after this, "*further information came to light and more documents were required"* (paragraph 72) and the Respondent wanted to give the Claimant access to a complete set of notes (paragraph 73). He added that for personal reasons (the Tribunal notes the ill-health and death of the Claimant's father during this period and she was also unwell), there was minimal contact with the Claimant between August 2021 and January 2022.

421. Ms Robinson on 2 December 2021 [2413] emailed the Claimant's representative when the issue of access to the notes was chased, and said *"We are collating the notes in readiness to send to the clinical expert, once this has been completed we will inform you."*

422. On 3 January 2022, Professor Fegan emailed the Claimant's representative [2494] and said:

"*So, we are expecting the clinical notes to be photocopied in the very near future if not already done so and hopefully we will be able to provide these to all concerned parties in the next couple of week."*

423. The next event was the suspension of the UPSW. Interestingly, Mr Kemp put to Professor Fegan that the suspension of the UPSW was no reason to not provide the notes; Professor Fegan did not accept this and said new allegations were arising as late as November 2021. He remained adamant that the notes were not provided because the investigation was bringing up new matters, and the need to copy a complete set of notes. Professor Fegan felt it was better to give the Claimant access to a comprehensive set.

424. Given the situation, the Tribunal considers a reasonable employee would not have considered it a detriment to have to wait until the comprehensive set of notes were available. The process could not progress to the appointment of the clinical expert without the full notes. In any event, given the Claimant's approach as shown in the voluminous evidence before the Tribunal and her cross-examination answers generally, it is more likely than not she would have considered partial access a detriment and complained about that. In any event, there is no evidence that the notes were withheld or delayed due to the Claimant's protected acts. Professor Fegan's explanation is plausible, credible and consistent with the progress of the investigation as shown in the bundles before the Tribunal. New matters did arise. While Ms Robinson did not attend the hearing, her statement is consistent with Professor Fegan's explanation.

425. The allegation is dismissed as the action was not because of a protected act and detriment has not been established.

D39 – 3 January 2022 – Professor Fegan, Ms Khakhar, Miss Curkovic, Mr Folaramni, Dr Walker, Dr Skone, Professor Jenney, Dr Rowntree and/or Dr Davies informing the Claimant of further unspecified allegations regarding her clinical cases and that these were being investigated

426. The parties agree that on 3 January 2022 Professor Fegan told the Claimant's representatives in an email [2494] that "*The personal interviews undertaken by our independent Case Investigator suggested several other cases of potential concerns which have required further timely investigation including note reviews*." That is all he said about this matter. It is factually correct that the Claimant was told of further unspecified allegations and they were being investigated; the word "*clinical*" was not used but the reference to "*several other cases*" reasonably can in context only mean clinical matters.

427. However, there is no evidence whatsoever that anyone other than Professor Fegan is involved in the sending of this email. The other individuals named had no involvement.

428. The Tribunal agrees that a reasonable employee could regard this as a detriment, though such an employee would understand that the full process had to be conducted to investigate any new matters, including putting the evidence to the Claimant for a response. The Respondent has conceded the point but denies Professor Fegan said it because of the Claimant's protected acts. The Claimant submitted that this showed a breach of the UPSW paragraph 1.5 as no initial assessment had been undertaken as required. This in the view of the Claimant is enough to show the protected acts are the reason the email was sent.

429. Professor Fegan's explanation at cross-examination was that any concerns that arose as part of the UPSW investigation were part of the original UPSW, as otherwise you would have to have a new one. The Claimant's position is that the UPSW process does not say this, and an initial assessment is required. However, the Tribunal considers the Claimant to be stretching a bad point to breaking point. The term "*initial assessment"* is simply an assessment by the Case Manager of the concern raised and whether a formal investigation is required [2913 paragraph 1.5]. It is plain that Professor Fegan reviewed the concern when it was brought to his attention by the Case Investigator and was content to allow it to be formally investigated; that is all an initial assessment requires. Professor Fegan was asked about this under cross-examination and by the Tribunal and he agreed he had done this; he also said it did not require a new initial assessment. He explained that the majority of the concerns that arose during the UPSW investigation were not taken to a formal investigation as he did not think they warranted it or were not in keeping with the original

UPSW. Professor Fegan was clear that the matter had been brought to his attention by parents and the Investigator; in essence, he was satisfied the matter should be investigated.

430. The Tribunal does not conclude that the Claimant has shown Professor Fegan has failed to assess the new concerns or that concerns arising within the UPSW process cannot be investigated. She has not shown that this supports an inference that the protected acts were why Professor Fegan told her representatives of the new concerns; the evidence in the view of the Tribunal shows that he said so as new concerns had arisen, he had assessed them as required by the UPSW process, and had decided to allow formal investigation.

431. The allegation is dismissed as the action was not because of a protected act.

D40 – 3 January 2022 – Professor Fegan, Professor Jenney, Dr Walker and/or Dr Skone informing the Claimant that a fifth clinical expert had been appointed with no explanation given for the removal of four previous clinical experts selected by the Respondent

432. This also relates to the email from Professor Fegan of 3 January 2022 [2494] to the Claimant's representatives, in which he said *"However, that has all been completed, the final draft ToR produced along with a Letter of Instruction to an independent Clinical Expert (Mr Bruce Jaffray - Newcastle) drafted."*

433. The background to this allegation is that before Mr Jaffray was proposed by Professor Fegan in this email as the clinical expert advising on the clinical decisions of the Claimant, four other experts had been proposed. It is factually correct that this email was when the Claimant was told of the proposal to instruct Mr Jaffray and within the email there was no explanation about the earlier proposed experts not being instructed.

434. However, the context to this email does not appear to be seriously disputed between the parties. The first expert proposed by the Respondent was Mr Wheeler, who had been part of the RCS review into the department in 2017. The Claimant objected to his appointment through her advisers [2323] on 2 July 2021 because of his involvement in the RCS review. The Tribunal notes that it is not an issue for it whether Mr Wheeler was in reality conflicted. As a result of the Claimant's objection, the Respondent proposed Professor Anderson [2325]. The Claimant through her representatives objected to him [2326/2602] on 16 July 2021 on the grounds that Professor Anderson was a cardiothoracic surgeon, not a paediatric surgeon. The Claimant's

representative said that he did not think it was appropriate for him to suggest an expert, but indicated hospitals likely to be able to assist.

435. In the view of the Tribunal, the Claimant was well aware of the reasons the first two experts were not ultimately appointed as it was due to her objections. The Tribunal cannot identify any detriment in Professor Fegan not reminding the Claimant about why those two experts were not appointed.

436. Mr Lander was next approached. The Claimant was told of his proposed appointment in an email from Professor Fegan of 28 July 2021 [2333]; in her statement she confirmed that there was no objection on her part to his appointment (paragraph 644), though she accepted he had been involved in the earlier external review from the nurse-led review. Mr Lander was originally acceptable to the Respondent until it realised that he was referred to within the papers as he had some involvement with a patient subject to the review. Accordingly, he was told that the Respondent "*believe we should instruct someone that is entirely impartial who has not had any previous involvement*" in an email from the Respondent's legal representatives on 24 August 2021. The Claimant's representatives were notified on 26 August 2021 that "*information has come to light which means that I no longer feel Mr Anthony Landers can act as the clinical expert in the UPSW case involving Mrs Abhyankar and I am actively searching for a suitable replacement.*" [2352]. The email above is redacted in the hearing bundle. The Claimant gave no evidence about whether the matter was queried by her representatives in her statement. Under cross-examination, the Claimant accepted that she was told about the issue with Mr Lander and agreed. The Tribunal cannot identify any detriment to the Claimant in Professor Fegan not repeating in his email of 3 January 2022 why Mr Lander was conflicted; her statement does not assist.

437. The Claimant made the same concession about the fourth proposed expert, Mr Gee, and that he was subject to a conflict of interest (though the Tribunal noted Professor Fegan's statement was silent about this matter); she accepted that Mr Gee was conflicted as he had been involved with one of the relevant cases. Professor Fegan told the Claimant on 28 September 2021 that Mr Gee had agreed to act as the clinical expert [2359]. It was not until 28 January 2022 that it was explained to the Claimant's representatives that Mr Gee had a conflict of interest [2505].

438. While the Claimant's statement does not assist the Tribunal, as a matter of logic it accepts that a reasonable employee would feel disadvantaged in a change of proposed clinical expert without explanation. The Claimant does not articulate such a disadvantage, but the Tribunal felt that it was not

necessary to dwell on this issue as the Claimant accepted that Mr Gee was conflicted.

439. Was the reason for Professor Fegan failed to explain to removal of Mr Gee on 3 January 2022 because of the Claimant's protected acts? The Claimant's submissions simply say that it must be, but there is no evidence to base such a finding upon in the view of the Tribunal and most of the submission is based on incorrect facts. Professor Fegan's evidence that he was trying to find an expert acceptable to both sides is accepted by the Tribunal and is supported by the immediate acceptance of the rejection of Mr Wheeler by him, despite the arguably weak basis of that objection, and the willingness to consider the appointment of Mr Lander. There was no challenge that Mr Gee needed to check if he was conflicted and the Claimant accepted that ultimately he was; this meant the expert had to be someone else. The complexity was that the field of potential experts was limited and this area of practice saw such experts attending other hospitals or giving advice on patients from elsewhere, and it was not always immediately apparent that this had happened for a particular patient.

440. The Tribunal noted that there was no question about why specifically Mr Gee's removal was not explained in the email of 3 January 2022; a more generic question under cross-examination obtained the response that a full explanation was given later. This is correct - a full explanation for each expert was given on 28 January 2022 [2505] in response to the Claimant's representative seeking it on 20 January 2022 [2506] by Professor Fegan. This demonstrates that Professor Fegan was willing to explain, but as at 3 January 2022 was more focussed on finding an expert, rather than explaining how he had reached the position of appointing Mr Jaffray. It is also difficult for the Tribunal to find any detriment in a short delay in providing an explanation that ultimately the Claimant accepts.

441. The allegation is dismissed as the action was not because of a protected act and detriment has not been established.

D41 – 3 January 2022 – Professor Fegan, Professor Jenney, Dr Walker and/or Dr Skone were "shopping around" for an expert that the Respondent believes would most support its position and undermining the Claimant's professional reputation and good standing in a process that is meant to be confidential

442. The findings of the Tribunal in respect of D40 apply here. An additional finding is that Mr Jaffray who is based in Newcastle, was approached by Professor Fegan on or around 3 December 2021 [2416].

443. There is no evidence showing that anyone other than Professor Fegan and those assisting him were involved in identifying and dealing with the

proposed clinical experts; certainly there is no evidence that Professor Jenney, Dr Walker and/or Dr Skone were involved. The allegations against them are dismissed.

444. In light of the Claimant's objections to the first two experts and the conflict affecting the third and fourth proposed experts, the evidence does not support the allegation made by the Claimant. There is no evidence that the Respondent was shopping around for a supportive expert, particularly given the willingness to consider Mr Lander who the Claimant trusted.

445. The Claimant points to some evidence regarding the undermining of her professional reputation. The field of paediatric surgery is small, and the Claimant argues that naming Cardiff risked her reputation; however, the Claimant by 2021 was not the only female consultant in the department. Cardiff is within the name of the Respondent. It is therefore difficult for the Tribunal to see how naming Cardiff was an act of detriment in the eyes of a reasonable employee.

446. Mr Lander was given the Claimant's name by the Respondent's legal representative [2346] in an email of 26 July 2021. This was part of the conflict check being carried out by a lawyer, as accepted in the submission of the Claimant. Professor Fegan said very little in his statement about the matter, simply saying in paragraph 82 "*we always respected the confidentiality of the matter when approaching individuals*". Under cross-examination, he explained that the lawyers had dealt with the first three experts, and then he took over. Professor Fegan said he had never mentioned the Claimant to Mr Gee or Mr Jaffray and his emails showed this was correct; it is correct that the emails before the Tribunal do not show Professor Fegan naming the Claimant to either of the later experts.

447. There are no emails to which the Tribunal was referred between the Respondent's legal representatives and the first two experts, showing whether the Claimant's name was given, and no evidence given by the lawyer involved. The Tribunal finds that it is more likely than not that the Respondent did give the Claimant's name to the first and second experts as part of conflict checks as this is what happened with Mr Lander, the third proposed expert, and is common practice. There is no evidence that the fourth and fifth expert was given the Claimant's name as the matter was dealt with by Professor Fegan personally.

448. The experts approached are all consultants. The Tribunal considered that the Claimant in her evidence had made a number of assumptions, but a reasonable employee would not consider carrying out a conflict check by confidentially giving the Claimant's name to a senior consultant to be a detriment. There is no evidence before the Tribunal of any effect on the Claimant's professional reputation and the UPSW process requires the

involvement of a clinical expert. In order to be able to comment on the Claimant's work, the expert would have to be a senior consultant, aware of the requirement for confidentiality. The Claimant's submissions simply say that she is concerned, but nothing more.

449. The Claimant has not shown her professional reputation has been undermined. She has not shown any expert has passed on her name or commented about her adversely. In any event, the Tribunal is not persuaded that carrying out a conflict check, which would be necessary to proceed, would be viewed by a reasonable employee as a detriment.

450. The allegation is dismissed as the Claimant has not factually proved it and in the alternative, it has not been found to be a detriment.

Time

451. The Tribunal did not deal with the issue of jurisdiction and time limits as no act that was potentially out of time was found in the favour of the Claimant.

Employment Judge C Sharp
Dated: 16 January 2023

JUDGMENT SENT TO THE PARTIES ON 16 January 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche

Appendix 1 – agreed list of issues -to be updated

An amended Schedule of alleged Protected Disclosures and Detriments is annexed to the Second Re-Amended Grounds of Complaint dated 9 August 2022 ("**The Second Re-Amended Annexe**")

Claims

1. The Claimant brings the following claims:

A. protected disclosure detriment under s.47B Employment Rights Act 1996 ("**ERA**");

B. victimisation under s.27 of the Equality Act 2020 ("**EqA**")

Liability

A. Protected disclosure detriment

2. It is admitted that the following were protected disclosures:

a) PID1-4
b) PID6-7
c) PID8 as set out in paragraph 93c of the Re-Amended Grounds of Response[1]

d) PID9-10
e) PID12-13

Qualifying disclosures

3. Did the Claimant make the disclosure alleged in PID5?

[1] In the interests of proportionality at trial, the Claimant does not seek to go beyond the scope of the Respondent's admission.

4. It is admitted that the Claimant made the disclosure alleged in PID11 and that this was a qualifying disclosure subject to it satisfying the public interest test.

Section 43B Disclosures

5. In respect of PID5, did such disclosure (if made) tend to show, in the Claimant's reasonable belief that:

   a) the healthy and safety of the patient has been, was being or is likely to be endangered because of the exposure to risk or harm by the surgical practices and/or;

   b) the Respondent (and its employed doctors AD, OJ, RH, JE) had failed, was failing or was likely to fail to comply with its duty of care in tort that is owed to its patients to perform surgical procedures and /or advise patients as to medical procedures with reasonable skill and care;

   c) AD, OJ, RH, JE had failed, was failing or was likely to fail to comply with the regulatory duties that they owed as doctors to the GMC to act at all times in the best interests of the patient.

6. Whether PID5 and/or PID 11 was made, in the Claimant's reasonable belief, in the public interest?

GMC Disclosures

7. It is admitted that the Claimant made GMC1-3.

8. It is admitted that GMC1-3 contained protected disclosures save for GMC2f and as set out in paragraphs 93A-C of the Re-Amended Grounds of Response.[2]

9. It is admitted that the Claimant made GMC2b.

10. In respect of GMC2e, the following issues arise:

    a) did such disclosure tend to show, in the Claimant's reasonable belief, that the Respondent was failing, had failed or was likely to fail to comply with its duty of care in tort that is owed to its patients and to its staff when provide management oversight of the Department by failing to provide safe and consistent mentorship to the surgeons including the Claimant?

    b) whether GMC2e was made, in the Claimant's reasonable belief, in the public interest?

11. In respect of GMC2f, the following issues arise:

    a) did such disclosure tend to show in the Claimant's reasonable belief that Dr Walker had breached a legal obligation to which he was subject namely an obligation to protect employees who make protected disclosures from detriment under s.47B ERA.

    b) whether GMC2f was made, in the Claimant's reasonable belief, in the public interest?

12. In respect of GMC2b, GMC2e and GMC2f, whether the Claimant believed that any such information disclosed, and any allegation contained in it, are substantially true.

[2] In the interests of proportionality at trial, the Claimant does not seek to go beyond the scope of the Respondent's admission save in respect of GMC2b, GMC2e, GMC2f and to the extent that they were repeated by GMC3.

Detriments

13. In the interest of proportionality at trial, the following detriments are withdrawn by the Claimant: D8, D11, D12, D19A, D20, D27, D31, D33, D36 & D38.

14. The Respondent admits D4, D5, D24, D26, D29 & D39 amount to detriments (as per paragraph 3A of the Second Amended Grounds of Response).

15. Did D1-D3, D6, D7, D9, D10, D13-D19, D21-D23, D25, D28, D30 & D32 alleged by the Claimant take place?

16. Did D34 & D35 amount to detriments within the meaning of s.47B ERA (it being admitted that all bar those detriments could constitute detriments if occurred as alleged)?

17. If the Claimant was subject to detriment, were such detriments done on the ground that the Claimant had made a protected disclosure?

18. The relevant date on which primary limitation expired is 5 December 2020. In respect of D1-D6, D7, D9, D10, D13-D19 & D20A has the Claimant proved that detriments were a "*series of similar acts*" the last of which was brought in time?

19. In respect of any acts under s.47B ERA 1996 that are found to be made out of time was it reasonably practicable for the Claimant to have brought the claim within the statutory limitation period and, if not, did she bring the claim within a reasonable period of time thereafter.

B. Victimisation

20. In the interests of proportionality at trial, the Claimant no longer pursues PA1.

21. It is admitted that the Claimant did PA2-PA6 and that they were protected acts.

22. The Respondent admits D24, D26, D29 and D39 amount to detriments (as per paragraph 3A of the Second Amended Grounds of Response).

23. Did D19, D21-D23, D25, D28, D30, D32, D34-D35, D37, D40-D41 alleged by the Claimant take place?

24. Did D34-D35 amount to detriments within the meaning of s.27 EQA (it being admitted that all bar those detriments could constitute detriments if they occurred as alleged)?

25. If the Claimant was subject to detriment, were such detriments done because she did one or more of the above PAs? [The reference to fear of a protected act was removed at the outset of the hearing]

26. In respect of D19 & D20A has the Claimant proved that detriments were part of a continuing act the last of which was brought in time?

27. In respect of any detriments that are found to be out of time, is it just and equitable to extend time?

<u>ISSUES ON REMEDY</u>

[REMOVED BY TRIBUNAL AS THIS IS A LIABILITY ONLY HEARING]

Date: 23 September 2022

ANNEXE

Protected Disclosures (PIDs) / Protected Acts (PAs)

No.	Date	§ GoC	Details	Detriments Arising
PID1	20 September 2016 (18:10), 4 October 2016 (17:20) and 20 October 2020 (14:19)	4	C disclosed information by email to Dr Thomas as to AB's inadequate consenting	D1, D3, D5, D6, D7, D8
PID2	4 January 2017 (18:46) email, (18.17-22.00) texts	7	C disclosed information by email and by text to Dr Thomas that AB had not sought adequate consent from the family of a patient in respect of a thoracotomy procedure and that AB intended to perform the case on his own	D2, D3, D4, D5, D6, D7, D8
PID3	16 January 2017	16	C disclosed information by letter to Dr Shortland in respect of inadequate consent on the ward.	D5, D6, D9, D10, D12, D13, D14
PID4	17 May 2017	17	C disclosed information by letter to Dr Shortland in respect of practices of potential consent violations and potential or real patient harm on the ward in January 2017 to March 2017	D9, D10, D11, D12, D13, D14
PID5	17 January 2019	27	C disclosed information by letter to Miss Maria Battle and Len Richards as to clinical concerns in respect of AD's operations on patients with patients being harmed or misled by inconsistent recording of comments and outcomes on DATIX	D15A
PID6	24 February 2019	28	C disclosed information by letter to Miss Battle and Mr Richards as to unsafe clinical practices by RH during the period May 2017 to December 2018	D15A

PID7	24 February 2019	28	C disclosed information by letter to Miss Battle and Mr Richards to unsafe clinical practices by RH in respect of patient TT in October 2018 and patient TA in October 2017	D15A
PID8	22 March 2019	30	C disclosed information by email to Dr Skone in an attachment entitled "*OJ and Meriel*" unsafe clinical and surgical practices by OJ in a range of cases	D15A, D15B, D16, D17, D21, D22, D23, D24, D26-D30, D31
PID9	8 April 2019 (16:44) [Amended time during the hearing]	31	C disclosed information by email to Dr Skone that there had been astoundingly suboptimal management by OJ of a child patient's abscess cavity	D15A, D15B, D16, D17, D21, D22, D23, D24, D26-D30, D31
PID10	5 September 2019 (17:53)	33 & 34	C disclosed information by email to Dr Skone that a child had been put through unindicated cystovaginoscopy. C repeated this disclosure verbally to Dr Walker in October 2019.	D16, D17, D18-D19, D19A, D21,D22, D20A D24, D24A D25, D26-D30, D31
GMC PID1	16 December 2019	38	By email to the GMC, C disclosed information about the clinical assessments and decision making OJ detailing 17 separate clinical incidents	D18-D30, D31, D19A, D20A, D24A
~~PA1~~	[Withdrawn prior to hearing]			
GMC PID2	14 August 2020	39	By email to the GMC attaching an Excel spreadsheet, C disclosed information as to:	D19A, D20A D20-D30, D24A, D31

			a) A list of 9 separate clinical incidents in respect of AD which individually and/or cumulatively raised concerns as to patient safety; b) A clinical incident in respect of RH which raised concerns as to patient safety (suboptimal management of child patient with worsening abscess cavity); c) A clinical incident in respect of JE which raised concerns as to patient safety (ignored warnings given by the Claimant as to risk of leak and not to prepare a child patient for a hasty blood transfusion for third time closure. No reflection by JE after leak occurred as had been predicted by the Claimant); d) A list of a further 14 separate clinical incidents in respect of OJ which individually and/or cumulatively raised concerns as to patient safety; e) Further, and in light of the context of the aforesaid disclosures in paragraphs a)-d)	

			above, Professor Jenney had not ensured a safe and consistent mentorship that ensured delivery of a quality of care that patients deserved; f) Dr Walker had subjected the Claimant to detriment treatment as a result of her raising patient safety concerns which included false allegations against her in February 2020 and July 2020 and had falsely described her patient safety concerns as vexatious.	
GMC PID3	1 October 2020	40	By email to the GMC with an attached revised Excel Spreadsheet, C repeated GMC PID3	D19A, D20A, D20-D30, D24A, D31
PA2	30 October 2020	47	C alleged to Dr Frank Atherton race discrimination affecting medical grades and consultants within R and that several BME doctors had been removed through disciplinary actions in Child Health and female BME surgeons had been undermined.	D19A, D20A D20-D30, D24A, D31

PID11	22 November 2020	48	By letter to R's Chair, C disclosed information as to her detrimental treatment by the Respondent to date which tended to show endangerment to her own health and safety and breach of the duty of care that the Respondent owed to her as her employer.	D19A, D20A, D20-D30, D24A, D31, D22A & D22B
PA3	22 November 2020	48	By letter to R's Chair, C alleged there had been a plan for preferential selection of certain middle grades for enforced deployment by two Caucasian colleagues	D19A, D20A, D20-D30, D24A, D31, D22A & D22B
PA4	22 November 2020	48	By letter to R's Chair, C alleged overseas fellows with documented issues or who had raised concerns have been targeted with adverse treatment whereas a reported bullying and unprofessional email by Caucasian colleagues had not been disclosed formally for months	D19A, D20A, D20-D30, D24A D31, D22A & D22B
PA5	13 May 2021	63	First ET1 and Grounds of Complaint	D32-41
PA6	9 June 2021	63	By a letter from C's Instructed Solicitors to R's Human Resources Department, Professor Fegan, the BMA and GMC, C put R on further notice that she had filed a claim for detriment for protected disclosures and victimisation	D32, D34-41

PID12	10 December 2021	63(d)	By letter to R's lawyers, C's lawyers disclosed information that R was in breach of its legal obligations to respond to C's Subject Access Request dated 24 June 2021 and that the matter had been raised with the ICO.	D38-41
PID13	31 December 2021	63(e)	Claimant's grievance letter	D32, D39-41

Detriments (Ds)

No.	**Date**	**§GoC**	**Decisionmaker**	**Details**
D1	4 January 2017	9	Dr Thomas	Instructing C to speak to AD about his inadequate consent despite knowing the risk of a reprisal from AD and/or deliberately failing to support C by intervening and managing the issue directly with AD
D2	4 January 2017	10	AD	Threatening C that "*there will be personal consequences for you*" when C raises a legitimate clinical issue as to inadequate consent
~~D3~~	[WITHDRAWN AT SUBMISSION STAGE]			
D4	11 January 2017	13	AD	Raising a Dignity at Work complaint against C
D5	12 January 2017	14	Dr Shortland	Asking C to step aside as Clinical Director
D6	From May 2017	20	Dr Shortland and/or Dr Thomas and/or Mr Durning	Deliberating failing to offer C any options for managerial career rehabilitation

D7	20 October 2017 [Amended date during hearing]	21	Dr Thomas	While C was away and suffering a bereavement informing C that the Clinical Board had received a serious concern from a patient's family and that the full report from RCS had been received, apparently having no regard for C's grief
~~D8~~	[WITHDRAWN PRIOR TO HEARING]			
D9	25 October 2017	22	Dr Shortland	C's removal from clinical work without explanation
D10	25 October 2017	22	Dr Shortland	Decision to escalate matter to UPSW without any proper assessment or verification of the evidence
~~D11~~	[WITHDRAWN PRIOR TO HEARING]			
~~D12~~	[WITHDRAWN PRIOR TO HEARING]			
D13	January 2018	23	Dr Shortland	Deliberately failed to notify RCS that C could be identified in the report by her gender pronouns and seek any further correction of the report until August 2018
D14	From January 2017 (ongoing)	25	Dr Thomas Dr Shortland Dr Walker	Deliberate failure to conduct any or any adequate or timely investigation into Disclosures 1-4
D15A	April / May 2019	29	Len Richards Dr Shortland Dr Walker	Deliberate failure to adequately address the surgical concerns that the Claimant had raised in respect of the practices of AD and RH
D15B	3 May 2019	32	Prof Jenney	Seeking to silence C and brush her protected disclosures under the carpet and deliberately failing to provide a safe working environment for her in which protected disclosures could be made without the risk of reprisal from colleagues

D16	25 October 2019	35	Prof Jenney	Adopting an aggressive, defensive position that challenged C's reasons for opening concerns on the DATIX system; referring to relationships rather than engaging with C's concerns as to patient safety in respect of OJ; mentioning that she had made "*unofficial enquiries*" about C and sought to close DATIX without due process
D17	March 2019 (ongoing)	36	Prof Jenney and /or Dr Walker	Deliberately failing to conduct any adequate or timeous investigation into Disclosures 8-10
D18	February 2020	43	Dr Walker	Raising a series of generalised and unfounded concerns including as to her mental state against C
D19	July 2020	45	Dr Walker	Raising further unspecified concerns against C; informing C that R had taken legal advice and that she could either agree to a referral to NHS Resolutions and apologise to Mr Jackson or face a UPSW
~~D19A,~~	[WITHDRAWN PRIOR TO HEARING]			
~~D20~~	[WITHDRAWN PRIOR TO HEARING]			
D20A	7 December 2020	51	Dr Walker and/or Mr Driscoll	The Chair forwarding the Claimant's correspondence directly to Mr Driscoll, Ms Walker and Mrs Robinson without discussing with the Claimant first
~~D21~~	[WITHDRAWN AT SUBMISSION STAGE]			

D22	16 December 2020	53	Dr Walker and/or Dr Skone and/or Prof Jenney and/or Dr Rowntree and/or Mr Driscoll	Escalation of Curkovic complaint to UPSW
D22A	December 2020	53	Dr Walker and/or Dr Skone and/or Prof Jenney and/or Dr Rowntree and/or Mr Driscoll	Immediate exclusion and UPSW was escalated before C's formal grievance had been resolved / addressed or even acknowledged
D22B	From 22 November 2020 onwards	53	Dr Walker and/or Dr Skone and/or Prof Jenney and/or Dr Rowntree and/or Mr Driscoll	Failure to investigate or substantively respond to C's formal grievance
D23	16 December 2020	53	Dr Skone	Making an unjustified comment that C not abiding by NHS Resolutions referral parameters but referral had not been made by R
D24	16 December 2020 (ongoing)	54	Dr Walker and /or Prof Jenney and/or Dr Rowntree and/or Ms Curkovic	C's exclusion from work
D24A	1-16 December 2020	55	Dr Walker and/or Dr Skone and/or Mr Driscoll	Prior to excluding the Claimant from work, Dr Walker and/or Dr Skone sought advice from Dr Steve Boyle of NHS Resolutions without informing the Claimant

D25	Prior to 16 December 2020	55	Dr Walker	Using false allegations in an NHS Resolutions referral to procure advice from NHS Resolutions to justify decision to exclude C
D26	13 January 2021 [Amended year during the hearing as typo]	56	Dr Walker and/or Prof Jenney and/or Dr Rowntree and/or Dr Skone	Four areas of Concerns raised against C
~~D27~~	[WITHDRAWN PRIOR TO HEARING]			
D28	30 March 2021	59	Professor Fegan/Dr Walker / Prof Jenney and/or Dr Rowntree	Refusal to reconsider C's exclusion
D29	25 April 2021	60	Professor Fegan and/or Dr Walker and/or Prof Jenney and/or Dr Rowntree	Extending C's exclusion
D30	29 April 2021 (ongoing)	61	Professor Fegan and/or Dr Walker and /or Prof Jenney and/or Dr Rowntree	Refusal to reconsider C's exclusion from being a trainer
~~D31~~	[WITHDRAWN PRIOR TO HEARING]			
D32	16 December 2020 – 14 January 2022	63(a)	Professor Fegan and/or Dr Walker and/or Dr Skone	In relation to C's ongoing exclusion, not lifting and/or modifying it and/or any no arrangements made at 4 week intervals so as to permit C any form of return to or engagement with C's clinical and/or academic work, including developing, collaborating on and supervising research proposals.

~~D33~~	[WITHDRAWN PRIOR TO HEARING]			
D34	26 August 2021 [Amended date during hearing]	63(b)(ii)	Professor Fegan	Applying a higher level of scrutiny to the Claimant's request to conduct academic activity than he otherwise would.
D35	25 November 2021	63(b)(iii)	Professor Fegan	Refusing to answer a question about Miss Curkovic's access to C's personnel file [defined at the hearing by the Claimant as a reference to her annual leave computerised record]
				and insinuating the C had not been forthcoming about her whereabouts following the death of her father.
~~D36~~	[WITHDRAWN PRIOR TO HEARING]			
D37	20 December 2021 and ongoing	63(c)	Professor Fegan and/or Nicole Robinson	Failing to provide C with the clinical notes for provision to the clinical expert in the UPSW process.
~~D38~~	[WITHDRAWN PRIOR TO HEARING]			
D39	3 January 2022 [Amended date during hearing]	63(f)	Professor Fegan and/or Dr Khakar and/or Miss Curkovic and/or Mr Folaramni and/or Dr Walker and/or Dr Skone and /or Professor Jenney and/or Dr Rowntree and/or Dr Davis	Informing C of further unspecified allegations regarding her clinical cases and that these were being investigated.

D40	3 January 2022 [Amended date during hearing]	63(f)	Professor Fegan and/or Professor Jenney and/or Dr Walker and/or Dr Skone	Informing C that a fifth clinical expert had been appointed, with no explanation given for the removal of four previous clinical experts selected by R.
D41	3 January 2022 [Amended date during the hearing]	63(f)	Professor Fegan and/or Professor Jenney and/or Dr Walker and/or Dr Skone	R "shopping around" for an expert that it believes would most support its position in consequence of which C's professional reputation and good standing in a UPSW process that is meant to be confidential has been undermined.

Appendix 2 – agreed chronology

ABHYANKAR V CARDIFF & VALE UNIVERSITY LOCAL HEALTH BOARD (CASE NO: 1600708/21)

AGREED CHRONOLOGY

Document/Letter/Event	Date	PID or Detriment
2005 - 2016		
Dr Graham Shortland appointed Executive Medical Director	02-Jul-05	
Maria Battle appointed Respondent's Chair	Jun-11	
Claimant commences employment at the Respondent as a Consultant Paediatric Surgeon[3]	Jan-12	
Dr Jenny Thomas appointed Clinical Board Director[4]	Aug-14	
Claimant raised complaints about Mr Huddart's conduct	Aug-14	
Report published by Welsh Government regarding the handling of concerns in NHS Wales	Jun-14	
Claimant appointed as Training Programme Director for Paediatric Surgery	Nov-14	
Mr Huddart and Mr Milanovic retire	late 2014	
The Freedom to Speak up independent review was published	Feb-15	
The Hooper Review on handling of whistleblowing cases by the GMC was published	Mar-15	
Mr Ahmed Darwish appointed as locum consultant	Apr-15	
Respondent issued a Dignity at Work policy	Sep-15	
Claimant email correspondence with Dr Thomas about Mr Darwish	13-Mar-16	

[3] R asserts this date is 16 December 2012

[4] C believed this date was August 2016 but accepts the R's position

Claimant to Dr Thomas letter concerning surgery	26-Apr-16	
Dr Jenny Thomas appointed Claimant's line manager [Check date with AA]	01-Aug-16	

Kim Hutton stepped down as clinical lead of Paediatric Surgery	15-Aug-16	
Claimant becomes Child Health Clinical Director	15-Aug-16	
Claimant emails Dr Thomas regarding Mr Darwish's inadequate consenting practices	20 September 2016 (18.10)	PID 1
Claimant's letter to Dr Thomas about patient's family concerns	23-Sep-16	
Claimant emails Dr Thomas regarding Mr Darwish's inadequate consenting practices	4 October 2016 (17.20)	PID 1
Claimant emails Dr Thomas and Dr Jenney regarding Mr Darwish's inadequate consenting practices	20 October 2020 (14.19)	PID 1
Dr Thomas emails Claimant and Mr Darwish about locum consultant contract extension	09-Nov-16	
2017		
Dr Jennifer Evans and Rajesh Krishnan held posts as "lead of Paediatric surgery" and Dr Richard Skone (anaesthetist) became line manager	Jan-17	
Claimant discloses Mr Darwish's alleged inadequate consent re proposed thoracotomy with Dr Thomas	04 January 2017	PID 2/DET 14
Claimant emails Dr Thomas regarding Mr Darwish's alleged inadequate consenting practices	4 January 2017 (18.46)	PID 2
Claimant texts Dr Thomas regarding Mr Darwish's alleged inadequate consenting practices and Dr Thomas replies	4 January 2017 (18.17-22.00)	PID 2

Dr Thomas instructs Claimant to speak with Mr Darwish directly	04 January 2017	DET 1
Claimant calls Mr Darwish and felt threatened by his response	4 January 2017 (22.19)	DET 2
Claimant's diary entry about phone call	05 January 2017	
Claimant speaks to Mr David Scott-Combes who allegedly called the case a near miss	05 January 2017	
Dr Thomas informed Claimant that she had spoken with Mr Scott-Combs about concerns and agreed it was a 'potential near miss'	06 January 2017	
Mr Darwish writes letter to MD Dr Shortland about the Claimant bullying and intimidating him[5]	06 January 2017	DET 4
Claimant wrote to Dr Thomas and Mr Scott-Coombes	09 January 2017	
Meeting between Mr Darwish, Mr Aronson and Dr Thomas	10 January 2017	
Mr Darwish meets with Dr Shortland to raise bullying allegations against the Claimant[6]	12 January 2017	DET 3
Claimant instructed to step down as Clinical Director of Paediatric Surgery by Dr Shortland[7]	12 January 2017	DET 5
Claimant is notified verbally by Dr Shortland that an investigation into Mr Darwish's complaint had commenced[8]	12 January 2017	
Fact Finding investigation begins, led by Mike Stephens	16 January 2017	
Letter from Claimant to Dr Shortland disclosing information as to inadequate consenting practices	16 January 2017	PID 3

[5] Listed as 11 January 2017
[6] R asserts the correct date was 12 January 2017
[7] Date incorrectly referenced as 11 January 2017 in GoC, also Raj Surana and Sarah Evans present
[8] R asserts C was verbally advised on 12 January 2017 and by letter on 17 January 2017

Dr Shortland wrote to RCS to request an invited clinical record reviews	19 April 2017	
Letter from Claimant to Dr Shortland disclosing information as to consent violations and patient harm	17 May 2017	PID 4

A report of Dr Mike Stephen's investigation into Mr Darwish's Dignity at Work complaint was provided	26 May 2017	
Royal College of Surgeons investigators commence review	25-26 July 2017	
Respondent receives preliminary report from RCS	Aug-17	
Mike Stephens investigation is formally closed in a meeting with Mr Durning, AMD. Claimant is not rehabilitated into CD role	07 September 2017	DET 6
Claimant wrote to Dr Shortland to clarify information from the RCS review	29 September 2017	
RCS report formally issued	04 October 2017	
Claimant travels to India to see mother	13 October 2017	
Claimants mother dies	16 October 2017	
Email from Sarah Evans regarding complaint against the Claimant and receipt of the RCS report	20 October 2017	DET 7
Claimant informed of exclusion from work	25 October 2017	DET 9
Claimant meets with Sarah Evans and Dr Thomas in which she was informed that Dr Shortland would be escalating the complaint to a UPSW	01 November 2017	DET 9/10
2018		
Claimant met with Dr Shortland and Ruth Walker to discuss comments on RCS report and gender pronouns	08-Jan-18	DET 13

Dr Thomas ceases being Clinical Board Director	Mar-18	
Claimants CD role was advertised elsewhere	20-Mar-18	

Dr Thomas ceases being Claimant's line manager and Dr Raj Krishnan took over	Apr-18
Dr Meriel Jenney is appointed Clinical Board Director	Apr-18
UPSW investigation confirmed that there was "no case to answer" in reference to the complaint from TA's parents.	18-May-18
Claimant wrote to Dr Shortland to provide him with evidence to challenge the RCS report	23-Jul-18
Claimant again wrote to Dr Shortland to provide him with evidence to challenge the RCS report	1 and 2 Aug 2018
Claimant was given a draft letter from Dr Shortland containing comments in response to her RCS cases	28-Aug-18
Claimant contacted the Respondent's chair, Maria Battle	17-Sep-18
Maria Battle met with Claimant and Claimant provided Miss Battle with all the correspondence with Dr Shortland	18-Sep-18
RCS responded to Dr Shortland and it was agreed to remove the claimants gender pronouns from the report	20-Sep-18
Respondent published incident reporting procedure	20-Sep-18
Claimant met with Maria Battle and Len Richards and they agreed to commission an external legal review	late Sept/early Oct 2018
Dr Richard Skone became Claimants line manager	Oct or Nov 2018
Claimant raised issue with Professor Jenney regarding her access to the Datix system which should have been withdrawn	Oct-18
Claimant filed a Datix about 2017 UPSW	08-Oct-18
Claimant emailed Maria Battle about concerns with Mr Darwish	13-Oct-18
In an email Claimant flagged to Professor Jenney that she was still appearing as the CD on the Datix system	15-Oct-18

Angela Hughes commences investigation with Claimant into outstanding concerns	Late 2018

2019		
Letter from Claimant to Respondent's CEO, Len Richards and Maria Battle, disclosing information regarding unsafe clinical practices of RH from May 2017 to December 2018	24-Feb-19	PID 6
Letter from Claimant to Respondent's CEO, Len Richards and Maria Battle, disclosing information regarding unsafe clinical practices of RH in respect of patient TT and TA	24-Feb-19	PID 7
Claimant filed a Datix about Mr David Scott-Combes management of the UPSW	08-Mar-19	
Claimant emails DR Skone re "OJ and Meriel" about unsafe clinical and surgical practices by OJ	22-Mar-19	PID 8
Dr Skone emails Claimant to confirm that her concerns (PID 8) had been raised with Dr Jenney	25-Mar-19	
Claimant inadvertently disclosed Patient Identifiable Information to the GMC and then notified the Respondent and GMC of her mistake	01-Apr-19	
Dr Richard Skone appointed Claimant's line manager[9]	Apr-19	
Claimant emails DR Skone about the mismanagement of an abscess cavity on a child	08-Apr-19	PID 9

[9] GoC mistakenly states this date as April 2018 – the correct date is April 2019

Dr Skone wrote to Meriel Jenney attaching the email chain between himself and the claimant	09-Apr-19	
Meeting with Professor Jenney and Angela Hughes	12-Apr-19	
Dr Shortland retires from role of Medical Director	18-Apr-19	
Claimant raised issues with the CEO (Richard)	01-May-19	
Claimant attends a meeting with Professor Jenney	03-May-19	DET 15 B
Dr Stuart Walker is appointed as the Respondent's Executive Medical Director	Sept/Oct 2019	
Maria Battle ceases being Respondent's Chair	Jun-19	
Charles (Jan) Jancezwski is appointed Chair	Jun-19	

Claimant emails Dr Skone about an unindicated cystovaginoscopy procedure for a child	05-Sep-19	PID 10
Claimant wrote to Dr Skone about mismanagement of ano-rectal malformations by Mr Jackson	05-Sep-19	PID 10
Claimant's Datixs about Mr Jackson were raised	3 - 22 October 2019	
Anjli Khakhar joined the respondent	01-Oct-19	
Claimant repeats PID 10 to Dr Walker by email following a lack of response from her 5th September email to Dr Skone	14-Oct-19	
Claimant sent Dr Walker a copy of PID 8, the letter sent to Dr Skone on 22 March 2019	15-Oct-19	
Claimant wrote an email with two documents attached, including a timeline about Jackson	16-Oct-19	
Walker contacted Claimant to ask her to channel her new concerns through Dr Krishnan and Professor Jenney	16-Oct-19	
Claimant attends a meeting with Professor Jenney (including Nicola Robinson, Carol Evans, Erica Stamp of the BMA)	25-Oct-19	DET 16/17
Professor Jenney wrote to Mr Scott-Coombes, copying Dr Krishnan and Dr Walker	27-Nov-19	
Mr Scott-Coombes investigation outcome	04-Dec-19	Det 17

Professor Meriel Jenney ceases being Clinical Board Director. Dr Rowntree appointed CBD	Dec-19	
Professor Jenney phoned Claimant and informed her that Scott-Coombes had been appointed for a surgical review of her Datixes.	12-Dec-19	
Claimant writes a letter to the GMC about her concerns regarding the clinical assessment and decision-making of Mr Jackson	16-Dec-19	GMC Disclosure 1
Claimant informed that Tony Lander report had been received by Respondent	17-Dec-19	
Claimant's email to middle grades re data collection	20-Dec-19	
2020		

Angela Hughes and Ruth Walker Nurse- led review is concluded	Jan-20	DET 15A
Claimant has meeting with Angela Hughes, in which Claimant advised her that there was misinformation used to close the concerns	07-Jan-20	
Claimant Steps down as Training Programme Director for Paediatric Surgery	11-Jan-20	
Claimant writes to Angela Hughes expressing concerns with Tony Lander's Report	12-Jan-20	
Neonatal Morbidity and Mortality meeting	16-Jan-20	
Mr Sekkaran raised a complaint with Professor Jenney regarding Claimant's email from 20 Dec 2019	16 and 21 Jan 2020	
Ruth Walker updates letter to request that Professor Jenney conducts an investigation into Mr Darwish	20-Jan-20	
Mr Sekkaran complaint to Professor Jenney	21-Jan-20	
Dr Ieuan Davies made a complaint against the Claimant to Professor Jenney and Dr Walker	22-Jan-20	
Mr Jackson complaint about the Claimant	22-Jan-20	
Claimant had a meeting with Dr Walker in which he referred to GMC disclosure 1	03-Feb-20	DET 18
Prof. Jenney wrote to Dr Walker, Mr Durning, Dr Krishnan and Nicola Robinson from	04-Feb-20	

HR with an attachment of claimant's PID 8 to Dr Skone		
Krishnan emails Dr Walker referring to the claimant's Datix as "vindictive"	10-Feb-20	
Dr Ieuan Davies met with Dr Walker and Prof. Jenney about a complaint about the Claimant	26-Feb-20	
Formal meeting between Dr Walker and GMC's employment liason service	25-Mar-20	
Mr Jackson again complained about Claimant to Dr Rowntree and Dr Al-Samsam	14-May-20	
Cath Heath replies to Ruth Walker letter of 20 Jan 2020	28-May-20	
Email sent out entitled "Baseline Questions"	08-Jun-20	
Claimant received an email from Dr Walker following on from meeting on the 13th of February	22-Jun-20	

Claimant and Dr Walker meeting	28-Jul-20	DET 19
Claimant writes to GMC	14-Aug-20	GMC DISCLOSURE 2
Results of the 360 degree feedback were made available	24-Aug-20	
Claimant notified that GMC had opened an informal investigation into the issues she had raised	07-Sep-20	
Claimant's letter to Dr Walker attaching feedback and stating clinical concerns	22-Sep-20	
Claimant sent an email to Dr Walker and Mr Durning articulating the clinical concerns	30-Sep-20	
Claimant was on an on-call ward round with registrar Raef Jackson, when she saw a child in the presence of an interpreter, who was Miss Khakhar's patient.	17-Oct-20	
Claimant made a diary entry about the events that occurred on the 17 oct	20-Oct-20	
Claimant sends draft apology to Dr Walker before she flew to India	23-Oct-20	

Claimant wrote a letter to Dr Frank Atherton, Chief Medical Officer for Wales, alleging race discrimination[10]	30-Oct-20	PA 2
Claimant flew to India to be with her dad in late October	late October	
Claimant had submitted GMC disclosures 1-3 to GMC	end of October	
Dr Skone sends referral to NHSR for advice	Oct-20	
Claimant returned from India	early November	
Formal meeting between Stuart walker and GMC's employment liason service	17-Nov-20	
Claimant sends letter to the Respondent's Chair, Charles (Jan) Jancezwski, as to detrimental treatments she had experienced (PID 11); enforced deployment of ethnic minority doctors (PA 3) and an express allegation of race discrimination (PA 4).	22-Nov-20	PID 11, PA 3 and PA 4, Grievance
Consultant's zoom call - training issues	23-Nov-20	

Claimant and Dr Walker meeting	28-Jul-20	DET 19
Claimant writes to GMC	14-Aug-20	GMC DISCLOSURE 2
Results of the 360 degree feedback were made available	24-Aug-20	
Claimant notified that GMC had opened an informal investigation into the issues she had raised	07-Sep-20	
Claimant's letter to Dr Walker attaching feedback and stating clinical concerns	22-Sep-20	
Claimant sent an email to Dr Walker and Mr Durning articulating the clinical concerns	30-Sep-20	
Claimant was on an on-call ward round with registrar Raef Jackson, when she saw a child in the presence of an interpreter, who was Miss Khakhar's patient.	17-Oct-20	
Claimant made a diary entry about the events that occurred on the 17 oct	20-Oct-20	

[10] This letter was sent by email on 1 November 2020

Claimant sends draft apology to Dr Walker before she flew to India	23-Oct-20	
Claimant wrote a letter to Dr Frank Atherton, Chief Medical Officer for Wales, alleging race discrimination[11]	30-Oct-20	PA 2
Claimant flew to India to be with her dad in late October	late October	
Claimant had submitted GMC disclosures 1-3 to GMC	end of October	
Dr Skone sends referral to NHSR for advice	Oct-20	
Claimant returned from India	early November	
Formal meeting between Stuart walker and GMC's employment liason service	17-Nov-20	
Claimant sends letter to the Respondent's Chair, Charles (Jan) Jancezwski, as to detrimental treatments she had experienced (PID 11); enforced deployment of ethnic minority doctors (PA 3) and an express allegation of race discrimination (PA 4).	22-Nov-20	PID 11, PA 3 and PA 4, Grievance
Consultant's zoom call - training issues	23-Nov-20	

Claimant met with Miss Curkovic for the weekly consultants meeting	30-Nov-22
Dr Skone communications with NHSR	01-Dec-20
Miss Khakhar sent a complaint email about the Claimant	06-Dec-20
Claimant writes to Chair, who circulates the letter to Mr Driscoll and Dr Walker	06-Dec-20
Email from Ms Walker to Sarah Evans and others about disclosure 11 and subsequent correspondence	07-Dec-20
Prof. Jancezwski wrote to the claimant informing her that a fact finding investigation, limited to the events of 2020, would take place	09-Dec-20
Initial Meeting between Dr Skone, Ms Khakhar, Miss Curkovic regarding complaint.	10-Dec-20
A meeting with Richard Skone, Martin Driscoll , Stuart Walker and Kate Evans discussing the complaint	11-Dec-20
Claimant informed about a meeting had been scheduled on Wednesday 16 December to discuss a concern.	14-Dec-20

[11] This letter was sent by email on 1 November 2020

Dr Skone received advice from Dr Boyle of NHSR	14-Dec-20
Claimant meeting with Dr Skone re UPSW escalation and NHSR allegations	16-Dec-20
Claimant excluded from work by Dr Walker under UPSW	16-Dec-20
2021	
Dr Skone sends a letter to the BMA setting out four areas of concern regarding the Claimant and that he would support C.'s continuing to do her academic work	13-Jan-21
Scheduled Neonatal M&M meeting	25-Jan-21
BMA received the draft NHSR referral dated 28 Aug 2019	10-Feb-21

Letter (following up email from the 10th) from the BMA to the Respondent requesting an amended referral be provided for consideration.	23-Feb-21	
Claimant was notified by Dr Walker that Dr Skone had been replaced as the Case Manager by Professor Fegan	12-Mar-21	
Claimant had an initial assessment meeting with Prof. Fegan	30-Mar-21	DET 28
Dr Walker writes the GMC to comment on the concerns the Claimant had raised with the GMC	31-Mar-21	
Claimant's exclusion is extended to 24 May 2021	25-Apr-21	DET 29
BMA writes to Professor Fegan about the Claimants status as a trainer - Claimant remains excluded from her professional activities as a trainer	29-Apr-21	DET 30

Claimant filed her ET1 and Grounds of Complaint	13-May-21	PA 5
Professor Fegan letter re academic work	21-May-21	DET 32
Claimant instructs Redmans Solicitors to send a letter to the Respondent regarding the Employment Tribunal claims	09-Jun-21	PA 6
Professor Fegan wrote to Claimant, the MDU and the BMA proclaiming that he had been able to secure the services of a "*fully independent external paediatric surgical clinical expert*."	28-Jun-21	
UPSW concerns against the Claimant were clarified in the terms of reference (TOR) sent to the Claimant by Professor Fegan	28-Jun-21	
A conflict of interest was immediately pointed out to Professor Fegan by the MDU	02-Jul-21	
Professor Fegan identified a Professor David Anderson, Congenital and Acquired Heart Disease surgeon, to undertake the role of clinical expert.	12-Jul-21	
The MDU pointed out in an email that Professor Anderson is not a paediatric surgeon and his speciality is cardiothoracic work not urology	16-Jul-21	

Claimant received the third iteration of the ToR, with the comment that Mr Lander had agreed to be the clinical expert	28-Jul-21	
The fourth and final amendment to the TOR for the UPSW investigation	30-Jul-21	
Professor Fegan wrote to Claimant to inform that the clinical notes for the UPSW were available	31-Jul-21	
MDU wrote to Ms Evans to ask her for the bundle that had been collated by the Respondent, of what it considered pertinent documents.	16-Aug-21	
Claimant asked Martin Edwards to ask the directorate to approve medical student's research	19-Aug-21	

Professor Fegan writes to the BMA in response to the Claimant's enquiry	26-Aug-21	DET 34
Claimant notified that Mr Lander is no longer the clinical expert	26-Aug-21	DET 40
Claimant is informed that Mr Oliver Gee has been appointed as Clinical Expert	28-Sep-21	DET 40
Claimant informed that her application for study leave had been accepted and was approved by Miss Curkovic	04-Oct-21	
Beginning of approved study leave	11-Oct-21	
Claimant sent middle grades feedback to Dr Walker	22-Oct-21	
Claimant's father dies – Claimant is in India	26-Oct-21	
MDU emailed Ms Robinson asking again for the notes for the clinical cases to be made available to Claimant.	12-Nov-21	
BMA email to Professor Fegan regarding Miss Curkovic's access to the Claimant's personnel file	24-Nov-21	DET 35
Claimant not informed Miss Curkovic's access to Intrepid not cancelled	17-Nov-21	DET 36
Professor Fegan advises Christopher Saunders that Dr Rim Al-Samsam is approving Claimant's leave	25 Nov 21	
Ms Nicole Robinson responded saying that the clinical notes were being collated/ also advises Christopher Saunders of the change in intrepid approver	02-Dec-21	DET 37

Professor Fegan refers the Claimant to occupational health without consulting her	07-Dec-21	
Claimant files grievance letter with Respondent's Chair, Professor Jancezwski	31-Dec-21	PID 13
2022		
Professor Fegan sends Claimant a letter/email about further clinical concerns and the details of the fifth clinical expert (Mr Bruce Jaffray) to	03-Jan-22	DET 39 and DET 40 and DET 41

be appointed under the UPSW and the Claimant's professional reputation and good standing has allegedly been undermined by a constant search for new clinical experts [12]		
MDU wrote to Professor Fegan asking how the Claimants confidentiality was being maintained	20-Jan-22	
Professor Fegan explained that Mr Gee believed he had a conflict of interest	28-Jan-22	
Professor Fegan wrote back to the MDU confirm that no documents or verbal information provided containing the Claimants name had been provided	28-Jan-22	
Claimant filed a supplemental grievance	04-Feb-22	
Claimant met with Miss Hicks on 4 separate occasions	18 March - 8 April	
MDU made Rachel Gidman aware that the Claimant had the opportunity to attend a rare operation, but it was allegedly ignored and the Claimant lost the opportunity	Apr-22	
Claimant gained access to her work emails	May-22	
Claimant was told she could do the clinical attachment	Jul-22	
Respondent provided the Claimant with the outcome of the grievance fact finding investigation	01-Aug-22	

[12] GoC incorrectly refers to this as 5 January 2022 – the correct date is 3 January 2022