Case: 1806790/2022

EMPLOYMENT TRIBUNALS

Claimant:	**Mr T Bragadeesh**
Respondents:	**(1) Hull University Teaching Hospitals NHS Trust**
	(2) Joseph John
	(3) Makani Purva
	(4) Kumar Chelliah
	(5) Manish Ramlall

AT A HEARING

Heard at: **Hull** **On: 17th, 18th, 19th, 20th, 21st, 24th, 25th, 26th, 27th, 28th, 31st July 2nd, 3rd, 4th, and 22nd August; and at Leeds (parties not required to attend)**
On: 9th, 10th and 11th October 2023

Before:	**Employment Judge Lancaster**
Members:	**G Harker**
	M Taj

Representation

Claimant:	Mr G Menzies, counsel
Respondent:	Mr B Uduje, counsel

The unanimous decision of the Tribunal is:

JUDGMENT

The claims are dismissed.

WRITTEN REASONS

1. The case having exceeded its time estimate it was adjourned part-heard, firstly to hear submissions and then again for deliberations by the Tribunal in the absence of the parties. Written reasons are therefore now required.

Summary

2. The Claimant is a consultant cardiologist based at the First Respondent Trust's Castle Hill Hospital. He is described as a "non-interventionist" or "non-interventional" practitioner, whose speciality is cardiac imaging. The Second, Fourth and Fifth Respondents were at the material times consultant colleagues of his in the cardiology department. They, however, are all "interventionist" practitioners who in particular provide the Trans-Catheter-Aortic Valve Implantation service (TAVI) – a keyhole surgery method to replace the aortic valve to predominately elderly patients, which is therefore by its nature a relatively high risk procedure. The Third Respondent (referred to as Dr Makani throughout, although she is also "Dr Purva") is the Trust's Chief Medical Officer.

3. In essence this case centres around concerns which the Claimant has expressed about the safety of the TAVI process.

4. The claim is solely one of having been subjected to detriments under section 48 (1A) of the Employment Rights Act 1996 (that is on the ground that he had made a protected qualifying disclosure). There is an agreed list of triable allegations, or issues, which identifies 13 alleged protected disclosures made and 29 alleged detriments suffered.

5. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 3rd August 2022 will, on the face of it, not have been brought in time.

6. Only 3 of the 29 acts allegedly leading to a detriment are in fact said to have been after 3rd August 2022.

7. None of those 3 alleged acts which might potentially have constituted the last in a series of similar acts or failures extending over a period, in fact gives rise to a detriment to which the Claimant was subjected on the ground that he had made a protected qualifying disclosure.

8. Those 3 complaints are therefore dismissed on their merits and any earlier complaints, even if they might otherwise have succeeded, are also dismissed as being out of time. It would have been reasonably practicable to have presented such claims within three months of the date of the alleged act or failure to act, but the Claimant did not do so. Or if not so reasonably practicable the claim was not presented within a further reasonable time thereafter.

The Law

9. We have considered so far as material, but have not separately set out, all the authorities referred to in the parties' respective submissions, and in particular direct ourselves in accordance with the following legal principles:-

Time Limits

10. Sections 48 (3) and (4) of the Employment Rights Act 1996 provide as follows:

> (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;

11. Under subsection 4A the extension of time limits to facilitate ACAS early conciliation apply, with the following result. Early conciliation against all respondents started on 2nd November 2022 and ended on 8th December 2022. The claim was presented on 13th December 2022. Anything which happened before 3rd August 2022 is, therefore, potentially out of time.

12. Section 49 deals with remedies and by s.49(1) provides:

"(1) Where an [employment tribunal] finds a complaint [under section 48(1), (1ZA), (1A) or (1B)] well-founded, the tribunal – (a) shall make a declaration to that effect, and (b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates."

13. In Royal Mail Group v Jhuti. UKEAT/0020/16/RN, the President of the Employment Appeal Tribunal, Mrs Justice Simler DBE, on review of these provisions set out the following basic principles.

"31. 'Act' and 'detriment' are different concepts (although in reality they are often the same thing) as Langstaff P observed in Flynn v Warrior Square Recoveries Ltd UKEAT/0154/12 referring to s.47B at paragraph 3:
"3. As to those words: first, cause and effect must carefully be distinguished. The act, or the deliberate failure to act, must be a cause of the detriment. The act, or the failure to act, has to be done on the ground specified by the employer. The detriment, however, is coincidental, or consequent upon, the act, or deliberate failure to act. The distinction between cause and effect is essential to bear in mind because of the terms of section 48 of the ERA 1996."

32. Time runs from the date of the 'act' regardless of whether a claimant has any knowledge of the detriment that the act produces: see Flynn v Warrior Square Recoveries Ltd [2014] EWCA Civ 68 and McKinney v Newham London BC [2015] ICR 495.

33. Employment Tribunals should not confuse a continuing detriment with a continuing act (or cause) as the EAT (endorsed by the Court of Appeal) in Flynn v Warrior Square Recoveries Ltd stated at paragraphs 4 and 5:

"4. Again, some observations: the detriment may last into the period of three months at the end of which Employment Tribunal proceedings are begun. It may even continue until, or indeed after, Employment Tribunal proceedings have been heard, but that has no effect one way or the other upon the time limits. The time limits relate not to when the detriment was suffered but when the act, or deliberate failure to act, which gave rise to the detriment occurred.
5. Accordingly, in any case that considers a question or whether a complaint is out of time, it is incumbent upon an Employment Tribunal to identify carefully the act, or the deliberate failure to act, that the Claimant identifies as causing him a detriment. The date of that act, or the date of that failure to act, must then be established. If at the latest the act, or the deliberate failure to act, is prior to the issue of Employment Tribunal proceedings by more than three months, it is only where the Claimant can show that it was not reasonably practicable for him to present a complaint before the end of that period of there months that he will be permitted to continue. A Tribunal otherwise must not (that is the meaning of the words "shall not") consider his complaint. The Tribunal has no discretion in the matter, having found the facts, except that which is inherent in the judgment as to reasonable practicability which is called for by section 48(3)(b). Such a judgment must be based upon some evidential material. If a Tribunal has no submissions made to it nor evidence that may persuade it that it was not reasonably practicable to make a complaint earlier than was done, then it cannot exercise its power to prescribe a further period under section 48(3)(b), because it has no basis for doing so. It is for the person seeking to avoid the harsh impact of time limits to put that material before the Tribunal."

34. In Arthur v London Eastern Railway Ltd [2007] ICR 193, a case decided under s.48(3) ERA there is a full exposition of the approach to the meaning of "a series of similar acts" at paragraphs 26-36. It is sufficient to quote paragraphs 29-31, and 35: *"29. Parliament considered it necessary to make exceptions to the general rule where an act (or failure) in the short three-month period is not an isolated incident or a discrete act. Unlike a dismissal, which occurs at a specific moment of time, discrimination or other forms of detrimental treatment can spread over a period, sometimes a long period. A vulnerable employee may, for understandable reasons, put up with less favourable treatment or detriment for a long time before making a complaint to a tribunal. It is not always reasonable to expect an employee to take his employer to a tribunal at the first opportunity. So an act extending over a period may be treated as a single continuing act and the particular act occurring in the three-month period may be treated as the last day on which the continuing act occurred. There are instances in the authorities on discrimination law of a continuing act in the form of the application over a period of a discriminatory rule, practice scheme or policy. Behind the appearance of isolated, discrete acts the reality may be a common or connecting factor, the continuing application of which to the employee subjects him to ongoing or repeated acts of discrimination or detriment. If, for example an employer victimised an employee for making a protected disclosure by directing the pay office to deduct £10 from his weekly pay from then on the employee's right to complain to the tribunal would not be limited to the deductions made from his pay in the three months preceding the presentation of his application. The instruction to deduct would extend over the period during which it was in force and the last deduction in the three months would be treated as the date of the act complaint of.*
30. The provision in section 48(3) regarding complaint of an act which is part of a series of similar acts is also aimed at allowing employees to complain about acts (or failures) occurring outside the three-month period. There must be an act (or failure) within the

three-month period, but the complaint is not confined to that act (or failure. The last act (or failure) within the three-month period may be treated as part of a series of similar acts (or failures) occurring outside the period. If it is, a complaint about the whole series of similar acts (or failures) will be treated as in time.
31. The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the three-month period and some outside it. The acts occurring in the three-month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within section 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them. Section 48(3) is designed to cover such a case. There must be some relevant connection between the acts in the three-month period and those outside it. The necessary connections were correctly identified by Judge Reid QC as (a) being part of a "series" and (b) being acts which are "similar" to one another. …….
35. In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the 3 month period and the acts outside the 3 month period. We know that they are alleged to have been committed against Mr Arthur. That by itself would hardly make them part of a series or similar. It is necessary to look at all the circumstances surrounding the acts. Were they all committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? It would also be relevant to inquire why they did what is alleged. I do not find 'motive' a helpful departure from the legislative language according to which the determining factor is whether the act was done 'on the ground' that the employee had made a protected disclosure. Depending on the facts I would not rule out the possibility of a series of apparently disparate acts being shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure."

In other words, a series of disparate acts that are apparently unconnected may be treated as similar and as forming part of a series where the evidence establishes a connection between them. Whether or not there is a relevant connection is a question of fact. All the circumstances surrounding the acts will have to be considered. As Mummery LJ observed (and Sedley LJ agreed at paragraph 41), depending on the facts, that connection may be no more than that they were all done on the ground of a protected disclosure. "

14. The decision in Jhuti concluded:

"41. We have concluded that Mr Gorton's submissions are plainly correct on this issue. A claimant must prove a contravention of s.47B in order to have a claim (s. 48(1A)). In other words, a claimant must prove that he or she was subjected to a detriment by an act or failure to act that the employer does not show to have been done on grounds other than a protected disclosure. If no contravening (or actionable) detrimental act is proven then the issue of time is irrelevant. The reference to "the act or failure to act to which the complaint relates" in s. 48(3)(a) must be to a complaint related to a right under s.47B and this must therefore relate to an actionable act. Further, as s. 49(1A) makes clear an award of compensation may be made in respect of "the act or failure to act to which the complaint relates" and again that must be a reference to an act that contravenes s.47B (and not to any unproven act or failure to act). In other words, it is a reference to an

actionable act and a uniform interpretation must apply. In each case, the act or failure to act must be proven.

42. The harshness of the strict three month time limit is mitigated by s.48(3)(a) (and (b)), recognising (as Mummery LJ explained) that some forms of detrimental treatment can extend over lengthy periods and vulnerable workers may put up with such treatment for a long time before making a complaint to an Employment Tribunal. Inevitably in those circumstances there may be acts of detriment both inside and outside the three-month period with a connection between the two. It seems to us to be implicit in the passages cited from Arthur that in order to count for time purposes there must be at least an in time actionable act established.

43. Accordingly, we consider that (after a substantive hearing) where there is a series of acts relied on as similar or continuing acts, there is no warrant for a different interpretation to be applied and we reject Mr Jackson's argument that in the case of a series of acts none of the acts need be actionable. In our judgment, at least the last of the acts or failures to act in the series must be both in time and proven to be actionable if it is to be capable of enlarging time under s.48(3)(a) ERA. Acts relied on but on which a claimant does not succeed, whether because the facts are not made out or the ground for the treatment is not a protected disclosure, cannot be relevant for these purposes. Were the proper construction to be as Mr Jackson contends, the time limits set out in s. 48(3) for detriment complaints would be rendered meaningless since claimants could rely on any act (regardless of its merits, actionability or whether it was rejected as a matter of fact) as rendering the claim a claim in time. Claims would never be time-barred on this basis. Recognising this difficulty, Mr Jackson submitted that where the final act in the series is relied on solely for the purposes of extending time and not for genuine motivations, then it cannot be treated as an act within the meaning of s.48(3)(a). That is to import a test based on sincerity of intention. There is no warrant for that in the statute and in our judgment it would be unworkable.

45. That does not mean that a claimant must succeed in establishing as actionable each and every act relied on as part of a series. In this regard we agree with and adopt, with one important caveat, the observations of HHJ Hand QC in Ekwelem v Excel Passenger Service Ltd UKEAT/0438/12. At paragraph 31 he said in the context of a series of unlawful deductions from wages, some of which had been held to be lawful deductions:

"*A series does not cease to be a series because on analysis and on judgment it is concluded that some part of it is not unlawful. This was asserted to be a continuing act, and, in my judgment, it was a continuing act. The fact that the claimant cannot succeed on some part of it does not mean that the case was time-barred.*"

The caveat we add is that there must be at least one in-time proven act that infringes the relevant provision.

46. In the circumstances, we have concluded that since the Claimant failed to prove that there were any actionable detrimental acts that post-dated 30 March 2014, there were no ongoing similar acts or failures to act that could form part of a series for the purposes of enlarging time under s.48(3)(a). "

15. In Schultz v Esso Petroleum Co. Ltd [1999] IRLR 488 the appellant employee suffered a disabling illness in the latter part of the 3 month limitation period, which meant that it was

not then practicable for him to instruct solicitors to present his unfair dismissal claim. He might, though, have done so in the seven weeks immediately following the date of termination, at which time his advisers were instead pursuing on his behalf an internal appeal. The Court of Appeal held (at page 173H -174D) that:

> " …whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved. In a case of this kind the surrounding circumstances will always include whether or not, as here, the claimant was hoping to avoid litigation by pursuing alternative remedies. In that context the end to be achieved is not so much the immediate issue of proceedings as issue of proceedings with some time to spare before the end of the limitation period. That being so, in assessing whether or not something could or should have been done within the limitation period, while looking at the period as a whole, attention will in the ordinary way focus upon the closing rather than the early stages. This seems to me to be so whether the test to be applied is that of simple reasonableness or, as here, reasonable practicability.
>
> Thus, while I accept Mr Wynter's general proposition that, in all cases where illness is relied on, the Tribunal must bear in mind and assess its effects in relation to the overall limitation period of three months, I do not accept the thrust of his third submission, that a period of disabling illness should be given similar weight in whatever part of the period of limitation it falls. Plainly the approach should vary according to whether it falls in the earlier weeks or the far more critical later weeks leading up to the expiry of the period of limitation. Put in terms of the test to be applied, it may make all the difference between practicability and *reasonable* practicability in relation to the period as a whole."

This case did not decide that the fact that there were ongoing discussions between legal representatives, and certainly not in the absence of a physical impediment, would necessarily mean that it was not reasonably practicable to present a claim In time.

Protected qualifying disclosure

16. Sections 43A and 43B (1) of the Employment Rights Act 1996 provide as follows:

43AMeaning 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

43BDisclosures 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.

17. Although the Claimant has referred to Bilsborough v Berry Marketing Services ET1401692 as indicating that the protection can be claimed in case of anticipated disclosure, this does not reflect the statutory language. Bilsborough is a first instance decision, so not binding upon us and the point has not otherwise been specifically argued before us.

18. In Simpson v Cantor Fitzgerald Europe [2020] ICR 236 the Court of Appeal reviewed a number of the relevant considerations which arise in context in this case, essentially concluding that these are matters of fact for the tribunal properly addressing the issues. In particular it was held as follows in the judgment of Bean LJ:

"- aggregation

40. …Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540. This was a case of alleged protected disclosures in a health and safety context, but the principles are the same. At paragraph [22] Slade J said:-

"… an earlier communication can be read together with a later one as "embedded in it", rendering the later communication a protected disclosure, even if taken on their own they would not fall within section 43B(1)(d). … Accordingly, two communications can, taken together, amount to a protected disclosure. Whether they do is a question of fact."

41. This is no more than common sense. As Henderson LJ observed in the course of argument, whether two communications are to be read together is generally a question of fact; there is nothing unusual in this respect about the law on protected disclosures the distinction between information and allegations or queries."

– the distinction between information and allegations or queries

51. We now know from the judgment of Sales LJ in Kilraine that it is erroneous to gloss section 43B(1) of the 1996 Act to create a rigid dichotomy between "information" on the one hand and "allegations" on the other. In order for a communication to be a qualifying disclosure it has to have "sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)". Whether it does is a matter for the ET's evaluative judgment.

- failure to consider the "insider" context of the disclosure of information

56. In Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 at [62] the EAT, Judge McMullen QC presiding, said:
"… many whistle-blowers are insiders, that means that they are so much more informed about the goings on of the organisation of which they make complaint than outsiders

and that that insight entitles their views to respect. Since the test is their reasonable belief, that belief must be subject to what a person in their position would reasonably believe to be wrongdoing."

57. In answer to this ground of appeal Ms Mayhew rightly submits that the "insider knowledge" point mentioned in Korashi works both ways. Just as someone with experience in the field has information and insight which should be taken into account in his favour, so too he should know better than (say) a lay person who happened to overhear a conversation, whether it does tend to show that something is amiss.

As the ET said:-
"40 The point is well made by the respondent that if the claimant genuinely and conscientiously believed that there had been regulatory breaches it was his duty as an FCA approved professional to report this to Compliance. That was never done. ….

…58. These were findings of fact involving no error of law."

Causation

19. Section 47B (1) of the Employment Rights Act 1996 provides as follows:

47BProtected 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.

(1B)Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C)For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

20. Sections 48 (1A) and (2) of the Employment Rights Act 1996 provides as follows:

(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.

21. Whilst , as in any “victimisation” type case, the motivation of the person alleged to have done the act in question may be conscious or unconscious, the question for the tribunal is primarily to ask what precisely the act was so that it can then determine why it was in fact done. Harrow London Borough v Knight [2003] IRLR 140 (per Mr Recorder Underhill QC):

“15….The authorities clearly establish that the question of the “ground” on which an employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which caused him to so act. Mr. Patten referred us to the decision of this Tribunal in *Nagarajan v. London Regional Transport [1994] IRLR 61* , and in particular to Knox J's citation of the well-known passage from the judgment of Cairns LJ in *Abernethy v. Mott, Hay & Anderson [1974] ICR 323* . Without suggesting that those passages are not apposite as far as they go, we think it is better to rely on the decision of the *House of Lords in Nagarajan [1999] ICR 877* , esp. per Lord Nicholls at p. 884 E–G, as further explained in *Chief Constable of the West Yorkshire Police v. Khan [2001] ICR 1065* . (The section outlawing victimisation which was in issue in Nagarajan — s. 2 (1) of the Race Relations Act 1976 — used the phrase “by reason that” rather than, as in s. 47B , “on the ground that”; but Lord Nicholls explicitly equated the test to that under s. 1 (1) (a) of the 1976 Act, which uses the very terminology of “grounds” with which we are here concerned.)

16. It is thus necessary in a claim under s. 47B to show that the fact that the protected disclosure had been made caused or influenced the employer to act (or not act) in the way complained of: merely to show that “but for” the disclosure the act or omission would not have occurred is not enough (see Khan). In our view, the phrase “related to” imports a different and much looser test than that required by the statute: it merely connotes some connection (not even necessarily causative) between the act done and the disclosure. On any view the failure of Mr Redmond to answer Mr. Knight's letters was related to the protected disclosure: after all, the disclosure was the fundamental subject matter of the letters and they would never have been written but for the fact that the disclosure had been made. Likewise any failure on the part of the Council to look after Mr Knight related to the disclosure: the awkward situation created by the disclosure was the very reason why he needed help. But that does not answer the question whether that formed part of the motivation (conscious or unconscious) of Mr. Redmond or Mr Esom. Mr Redmond, for example, might have failed to answer the letters because he was annoyed by the original report and regarded whistleblowers as disloyal and a nuisance: that would indeed be a deliberate omission “on the ground that” he had made the protected disclosure. But he might in principle equally have failed to do so for one of a number of other reasons.”

22. The Supreme Court in Royal Mail Group v Jhuti [2019] UKSC 55, a dismissal case, answered the specific question before it as follows:

“62. The answer to the question of law identified in para 1 above is therefore as follows: yes, if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.”

In giving the judgment of the court Lord Wilson did, however, generally also agree with the observations of the Court of Appeal as to cases where a disciplinary decision was manipulated by someone with an improper motive:

"53. While in the present case he correctly acknowledged that the Court of Appeal was bound by its majority decision in the *Orr* case, Underhill LJ identified, at [2018] ICR 982, para 62, a different situation in which, so he suggested, it might be appropriate for a tribunal to attribute to the employer knowledge held otherwise than by the decision-maker. He was referring to the knowledge of a manager who, alongside the decision-maker, had had some responsibility for the conduct of the disciplinary inquiry. It was a suggestion which he had first made in his judgment in *Co-operative Group Ltd v Baddeley [2014] EWCA 658* . There, in para 42, he had referred to a situation in which the decision-maker's beliefs had "been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation". "For short," Underhill LJ had added (perhaps questionably), "an Iago situation". He had proceeded:

> *"[Counsel] accepted that in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation; and for my part I think that must be correct."*

I respectfully agree that in the situation there identified by Underhill LJ it might well be necessary for the tribunal to attribute to the employer the knowledge of the manipulator; but, as Underhill LJ accepted, the proposition in no way helps to resolve the present case because Mr Widmer cannot be taken to have had responsibility, alongside Ms Vickers, for any part of the conduct of the inquiry."

23. It is now well established that section 47B is infringed where the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the individual concerned: see Fecitt and others v NHS Manchester *[2011]* EWCA Civ 1190, [2012] ICR 372 (Elias LJ at [45]).

24. Applying Fecitt the Court of Appeal in Kong v Gulf International Bank UK Ltd. [2022] EWCA Civ 941addressed the question of "seaparability", in the judgment given by Lady Justice Simler, as follows:

"53. In *Fecitt* , a number of nurses employed at a walk-in centre in Wythenshawe, operated by the NHS Trust, made protected disclosures about a colleague of theirs, who, they alleged, was claiming to be more qualified than he actually was. Those disclosures were found to be correct. Nonetheless the colleague's employment continued, and the whistle-blowers, dissatisfied with this outcome, continued to press their concerns. Grievances and counter-grievances were pursued, and the NHS Trust ultimately concluded that the only feasible way of resolving the workplace conflict was to redeploy two of the whistle-blowers and remove the third. The tribunal criticised the management response to the situation but concluded, nonetheless, that the reason for moving the nurse claimants was not the making of the protected disclosures but the dysfunctional workplace situation that could not feasibly be resolved without moving the whistle-blowers. The EAT allowed an appeal against that conclusion but this court restored the tribunal's decision.

54. There was no challenge in this court to the proposition that, in an appropriate case, an employer can take action against a worker who makes a protected disclosure in what is regarded as an unreasonable or unacceptable manner, or who acts in an unacceptable way in relation to a protected disclosure; and in such cases it is legitimate for tribunals to find that although the reason for dismissal is related to the disclosure, it is not in fact because of the disclosure itself. However, it was argued that where whistle-blowers make proper disclosures in the public interest and do nothing untoward or improper, it would be unjust and contrary to the legislation's protective purpose to deny them protection. The dysfunctional situation and the making of the protected disclosures were so inextricably inter-linked that it was not possible for the employer to take action to resolve the former without necessarily engaging the latter.

55. The argument was rejected by Elias LJ (with whom Davis and Mummery LJJ agreed):
"51. … I entirely accept that, where the whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical - indeed sceptical - eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistle-blower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer.
52. The consequence of Ms Romney's submission, however, is that there could be no explanation which the employer could offer in these circumstances which would relieve him from liability. The need to resolve a difficult and dysfunctional situation could never provide a lawful explanation for imposing detrimental treatment on an innocent whistleblower. I do not think that can possibly be right. It cannot be the case that the employer is necessarily obliged to ensure that the whistleblowers are not adversely treated in such a situation. This would mean that the reason why the employer acted as he did must be deemed to be the protected disclosure even where the tribunal is wholly satisfied on the facts that it was not."

56. I would endorse and gratefully adopt the passages I have cited as correct statements of law. They recognise that there may in principle be a distinction between the protected disclosure of information and conduct associated with or consequent on the making of the disclosure. For example, a decision-maker might legitimately distinguish between the protected disclosure itself, and the offensive or abusive manner in which it was made, or the fact that it involved irresponsible conduct such as hacking into the employer's computer system to demonstrate its validity. In a case which depends on identifying, as a matter of fact, the *real* reason that operated in the mind of a relevant decision-maker in deciding to dismiss (or in relation to other detrimental treatment), common sense and fairness dictate that tribunals should be able to recognise such a distinction and separate out a feature (or features) of the conduct relied on by the decision-maker that is genuinely separate from the making of the protected disclosure itself. In such cases, as Underhill LJ observed in ***Page*** , the protected disclosure is the context for the impugned treatment, but it is not the reason itself.

57. Thus the "separability principle" is not a rule of law or a basis for deeming an employer's reason to be anything other than the facts disclose it to be. It is simply a label that identifies what may in a particular case be a necessary step in the process of determining what as a matter of fact was the real reason for impugned treatment. Once the reasons for particular treatment have been identified by the fact-finding tribunal, it

must evaluate whether the reasons so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn. Were this exercise not permissible, the effect would be that whistle-blowers would have immunity for behaviour or conduct related to the making of a protected disclosure no matter how bad, and employers would be obliged to ensure that they are not adversely treated, again no matter how bad the associated behaviour or conduct.

58. Likewise, what was said in *Martin* , about being slow to allow purported distinctions between a protected complaint and *ordinary* unreasonable behaviour, is also not a rule of law. There is no objective standard against which behaviour must be assessed to determine whether the separability principle applies in a particular case, nor any question of requiring behaviour to reach a particular threshold of seriousness before that behaviour or conduct can be distinguished as separable from the making of the protected disclosure itself. The phrases used in the authorities (in the context of trade union activities, victimisation and whistleblowing) capture the flavour of the distinction, but were not intended to be treated as defining, and do not define, those cases where separability would or would not apply. They cannot properly be read in this way. In the wide spectrum of human conduct that might be relied on by decision-makers, each end of the spectrum is easy to identify as Phillips J observed in *Lyon* : gross misconduct or conduct that is "wholly unreasonable, extraneous or malicious" at one end; and wholly innocent, blameless conduct at the other. Between those two ends of the spectrum difficult questions of fact arise, and the conduct and circumstances of the particular case will require close consideration. But the authorities provide no factual precedent or objective standard against which to assess the conduct relied on in a particular case.

59. The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way. This factual question is easy to state; but it can be and frequently is difficult to decide because human motivation can be complex, difficult to discern and subtle distinctions might have to be considered. In a proper case, even where the conduct of the whistle-blower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant's conduct that is distinct from the protected disclosure and is the real reason for impugned treatment."

Detriment

25. In Jesudason v Alder Hey Children's NHS Trust [2020] ICR 1226, the Court of Appeal reviewed the authorities and confirmed (per Sir Patrick Elias):

"27. In order to bring a claim under section 47B , the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases. In *Derbyshire v St. Helens MBC [2007] UKHL 16; [2007] ICR 841* , paras. 67-68 Lord Neuberger described the position thus:
"67. *… In that connection, Brightman LJ said in Ministry of Defence v Jeremiah [1980] ICR 13 at 31A that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".*

68. That observation was cited with apparent approval by Lord Hoffmann in Khan [2001] ICR 1065 , para 53. More recently it has been cited with approved in your Lordships' House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 . At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"."

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."

26. On the facts of Jesudason, which were that the Trust sought in a series of letters to rebut damaging and in part false allegations specifically identified as having been made by the Claimant, the Court of Appeal held that the Claimant had suffered a detriment, but that this was not on the grounds of his having made any protected qualifying disclosure:

"61. I reject that submission. In my judgment the analysis of the ET, and its acceptance by the EAT, reveals some confusion amounting to an error of law. The concluding sentence of para.224 suggests that the appellant's standing cannot be affected if the only purpose of the Trust was to put the record straight. In my view that is manifestly wrong; a detrimental observation about a whistle-blower, claiming for example that he is a liar or a troublemaker, may be made in a letter whose purpose is to put the employer's side of the story. It does not cease to be a detriment because of the employer's purpose or motive. That purpose – why the letter was written in that way - will be relevant at the later causation (in the sense of the "reason why") stage when the question is whether the detriment was by reason of the protected disclosures, but it is irrelevant to the question whether a detriment was suffered at all.

62. I therefore accept Mr Allen's submission that both the ET and the EAT erred in law in bringing issues of causation into the factual question whether the appellant had been subjected to a detriment or not. In my view there was clearly a detriment to the appellant in the way in which these letters were framed and it was not open to the ET to conclude otherwise. If the letters had said in terms that the appellant had in his original disclosures acted in a vexatious or irresponsible and irrational way, or in bad faith, it would be impossible to say that this was not capable of constituting a detriment. There can be no difference where this is the natural inference to be drawn from the words used. Mr Gorton points out that an unjustified sense of grievance is not enough to constitute a detriment. Perhaps if the letters had accurately stated how the appellant's complaints had been assessed in the RCS report, that would be a convincing argument. The appellant could have no legitimate grievance at the Trust responding, even in a robust way, to his damaging and, in part, false communications. But the Trust's communications did not fairly or accurately reveal the fact that some of his complaints were justified, and in my view the only sensible inference from the offending passages is that the appellant had made specious, unjustified and unsubstantiated complaints, with perhaps some suggestion of bad faith resulting from the use of the phrase "weakening genuine whistle-blowing". Any worker could reasonably treat these comments as damaging to his

reputation and integrity and could reasonably believe that they might bring him into disrepute with his peers. These detriments were caused by the acts of persons acting on behalf of the Trust when they chose to send the various letters with the offending observations. The only question, therefore, is why the Trust, through these individuals, made the observations which gave rise to the detriment.

…… 73. In short, the Trust's objective was, so far as possible, to nullify the adverse, potentially damaging and, in part at least, misleading information which the appellant had chosen to put in the public domain. This both explained the need to send the letters and the form in which they were cast. The Trust was concerned with damage limitation; in so far as the appellant was adversely affected as a consequence, it was not because he was in the direct line of fire.

74. The ET was manifestly entitled to reach that conclusion. So whilst I accept that, contrary to the finding of the ET and the EAT, sending letters in the way they were drafted did constitute a detriment to the appellant, it was not a detriment on the grounds that the appellant had made a protected disclosure or disclosures."

The time limit point:

27. The three allegations which if proved would be in in time are:

    [x] Failure to investigation C's grievance against Dr John dated 17.03.22 -26.09.22[1]

    [z] Failure to interview C for the purposes of MHPS investigation – 25 August 2022

    [bb] Continued pursuit of MHPS investigation – up to November 2022

28. In respect of each of these allegations, after establishing the material facts we have primarily considered the "reason why" question. That is as it is put in Kong:

    "The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way."

29. Contrary to what is submitted on behalf of the Claimant, there is in our view nothing in Kong or any of the other authorities which suggests that we should simply take a broad and non-technical to this issue of causation. Quite the opposite. In Knight any dilution of the statutory test, such as by equating "on the ground of" with "related to", is expressly deprecated.

[x] Failure to investigation C's grievance against Dr John dated 17.03.22 -26.09.22
Facts

30. The Claimant's grievance against Dr John, submitted on 17th March 2022, was dealt with by Simon Nearney, the Director of Workforce and Organisation Development and a member of the Trust Board. Mr Nearney is not a named Respondent, and this complaint is brought only against the Trust.

[1] It was only in the course of the final hearing that this detriment was expressly framed by reference to the date of the 26th September letter.

31. The grievance was summarised by the Claimant as:

    "I am being subjected to a continuing campaign of complaints, usually made anonymously, to 4 separate organisations with whom I work, including his Trust…I believe that Dr John has sought to seriously undermine my reputation and damage my career, repeatedly complaining about me."

32. Mr Neaney met with the claimant and his BMA representative, together with Lindsey Harding, Head of Workforce from the Trust's HR department, by Teams on 12th April 2022. This was firstly to discuss the Claimant's health and his potential return to work form a period of sickness absence. It then clarified the terms of the grievance, recorded as:

    "You explained that you believed Dr John to be responsible for the multiple complaints made against you since 2019, to us at HUTH, to the Spire, to the DVLA, and to insurers. You suggested there had been approximately 10 separate complaints. These complaints you believe were made maliciously and although proved to be unfounded, have had a negative effect on your health, your income, and your professional reputation. You are seeking 'support and protection' from the Trust given the considerable impact the complaints have had."

33. By letter dated 22nd April 2022 Mr Nearney explained in detail his rationale for declining to investigate the Claimant's historic grievance any further but instead proposed mediation:

    "I do not accept that the Trust has been inactive or has condoned vexatious conduct. As a Trust, we were the recipient of two complaints in 2019 and 2020, both raised anonymously, and neither upheld through preliminary enquiries. We only know of the concerns raised at the Spire because you have told us. We accept you firmly believe Dr John is at the root of all the complaints made.
    As I am sure you appreciate, the Trust must review every concern raised as if it has been made in good faith – we cannot assume otherwise. Even though the volume of complaints may suggest a targeted campaign, the Trust cannot ignore concerns raised where they appear to have been raised in the interests of patient safety. On this basis there is a limit to what the Trust can do in response to any future complaints.

    As an example, you will be aware of the current concerns raised in relation to the management of a 67 year old patient that sadly died on 6th January 2021. Although we didn't discuss this in our meeting, you will know that Pete Sedman, Deputy CMO has been asked to make preliminary enquiries and his finding will influence what may happen next. I believe Pete has already spoken with you directly about this.

    You were understanding of this predicament and suggested that the Trust could consider working collaboratively with the Spire, or contact with the Regional GMC Liaison Officer, or seek advice from the PPA. Whilst this would not necessarily prevent future complaints being presented, it would provide for greater transparency and potentially demonstrate a pattern of vexatious behaviour that then could potentially be managed as a misconduct issue. Whilst this is something that I am willing to consider, there remains the issue that Dr John may hold the view that you have made complaints about him and his practice. I appreciate you disagreed with this statement and Marion was angry at the suggestion but I cannot ignore the dynamics between you and Dr John. You were heavily involved in the numerous complaints (addressed formally under MHPS) made against Dr John. I

appreciate you may have raised these in your leadership role or in the interests of patient safety, but nevertheless, your involvement has seemingly contributed to a deteriorating relationship with Dr John. I am not blaming you nor Dr John, but I cannot ignore the breakdown in the relationship between you both.

We discussed loosely the efforts that can be made to remind consultants of the importance of cordial and respectful behaviours, remind individuals of their GMC code of conduct and that incivility has the potential to cost lives, and even impose a system of escalation of concerns that require resolution face to face at the first and earliest opportunity. Whilst I am happy to do this, I am still of a view that this will not resolve the hostilities that appear to exist between yourself and Dr John.

In terms of moving forward and enabling a positive return to work, it is important that we are honest. We will of course implement actions that are addressed to the cardiology consultant body as a whole, but in order to break the cycle, there needs to be an acknowledgement that the relationship between yourself and Dr John has broken down and needs targeted action to resolve. I say this with good intentions Brags. The current situation you are in is having a devastating impact on your health and wellbeing and we want to work with you to resolve that.

We could commission another investigation in to Dr John's conduct as you have requested, however the last complaint we received in HUTH was made 2 years ago. That length of time would hinder the reasonableness and the effectiveness of any investigation and what would we investigate? We could explore the data Dr John accessed that you say may have been. inappropriate, but if we consider these complaints were raised in 2019 and 2020 and we don't know the source of the information, it would be like looking for a needle in a haystack. I genuinely do not think it would be possible to do or achieve the outcome you are seeking. We could directly ask that Dr John to not make any further complaints about you, but as already stated, the complaints we received were made anonymously, and additionally, in law, we cannot prevent anyone from raising a concern."

34. By reply dated 24th April 2022 the Claimant however immediately declined the suggestion of mediation, reasoning that it was "too little too late".

35. The Claimant then, on 7th June 2022, learned through a subject access request that it was Dr John who was recorded as having on 15th February 2022 first requested a Structured Judgment Review (SJR)[2] into the circumstances of the death of Patient D (the 67 year old patient referenced in Mr Nearney's letter of 22nd April). On 8th September 2022 the Claimant therefore asserted that he was now "escalating his grievance" to include this more recent complaint against Dr John where he assumed that because Mr Nearney had been aware as at 22nd April of the concerns regarding Patient D, he was also aware at that time of Dr John's involvement. He stated his view that :

"The Trust has not only unjustifiably refused to investigate my grievance but appears to be complicit in the reprisal I face for raising patient safety concerns."

[2] This is not, in fact, correctly recorded. On 17th January Dr John requested of Dr Ramlall that Patient D's death be discussed at a Morbidity and Mortality (M & M) Review Meeting. Dr Ramlall then undertook an SJR on 15th February which he, not strictly accurately, reported as having been requested to be carried out by Dr John.

36. On 16th September 2022 Mr Nearney replied confirming that he had not in fact been aware of the 15th February request from Dr John. He then responded in detail to the request to reinstitute the 17th March grievance on 26th September 2022.

> "With regard to the current investigation I can confirm that James Heaney, Case Investigator has conducted all his planned interviews (with the exception of yourself) and will be meeting with the Case Manager (Pete Sedman) to evaluate the findings and ascertain if the investigation can be concluded without interviewing you - which I know was your preference. A decision in this regard will be made by Friday 30 September, 2022.
>
> After carefully considering your request to investigate Mr John for vexatious complaints against you based upon this latest investigation, I cannot do this. My rationale for the decision is that Professor Makani, Chief Medical Officer sought two external opinions on this case before proceeding with the investigation. Both external experts recommended that an investigation was appropriate and warranted. Clearly this does not suggest any wrong doing only that the matter did warrant review to understand events leading up to the death of the patient. Having two experts recommending an investigation suggests the person raising the concern was right to raise the matter. On that basis, even if it was confirmed that Mr John was the initiator of the concern, it cannot reasonably be alleged that he raised it vexatiously."

Conclusion:

37. The decision by Mr Nearney not to proceed with the Claimant's 17th March grievance against Dr John by way of any formal investigation was clearly taken on 22nd April 2022. That is the date of the failure to act and it is not continuing, even though the effects of that decision impacted on the Claimant after that date.

38. The further decision not to proceed with the "escalation " of that grievance, which was taken on 26th September 2022 is a separate act, but one which is clearly part of the same factual matrix so that it may be the last in a series of similar acts or failure to act.

39. It is only therefore if the decision on 26th September 2022 is itself the actionable subjecting of the Claimant to a detriment on the ground that he had made a protected qualifying disclosure that the earlier alleged detriment arising out of the decision on 22nd April 2022 could also be in time.

40. We accept the evidence of M Nearney that the rationale for his decision as set out in his letter of 26th September 2022 is genuinely the reason why he declined to proceed with a grievance investigation at that stage.

41. That is that an investigation into the death of Patient D was already underway, and in fact nearing completion, and that irrespective of any earlier involvement on the part of Dr John that investigation had been predicated on the opinion of two external experts and that it was, in those circumstances, warranted. What therefore motivated M Nearney to take his decision, "the reason why" he acted, is that the Claimant's conduct in 2021 had independently been considered to warrant investigation, and that treatment by him of Patient D was wholly unconnected to any "raising patient safety concerns", even if as he believed his doing this was what had motivated Dr John's request on 15th February.

42. We also accept that the rationale given for the earlier decision on 22nd April 2022 is entirely genuine. Depending on the circumstances it is not appropriate that every grievance be allowed to go forward: indeed not every complaint made against the Claimant had progressed to the point where he had even been informed of an accusation. Although Mr Nearney alludes to the context of allegation and counter-allegation having been made by the Claimant and Dr John, and the possibility of that happening again, that is not in our view any indication that the Trust was predisposed to dismiss the Claimant's concerns as simply "tit-for-tat" and not take them seriously. Rather it is analogous to the situation in Fecitt where it had to be acknowledged that there was a dysfunctional workplace situation that could not feasibly be resolved without acting in this particular way. This is, we are wholly satisfied, a separate feature of the circumstances of this case properly distinct from any purported whistleblowing. See the citation from Fecitt in Kong above:

> *"52. The consequence of Ms Romney's submission, however, is that there could be no explanation which the employer could offer in these circumstances which would relieve him from liability. The need to resolve a difficult and dysfunctional situation could never provide a lawful explanation for imposing detrimental treatment on an innocent whistleblower. I do not think that can possibly be right. It cannot be the case that the employer is necessarily obliged to ensure that the whistleblowers are not adversely treated in such a situation. This would mean that the reason why the employer acted as he did must be deemed to be the protected disclosure even where the tribunal is wholly satisfied on the facts that it was not."*

43. There is no evidential basis therefore for finding that Mr Nearney was in any way at all, let alone materially influenced by anything which the Claimant had done and which is alleged to constitute the making of a protected qualifying disclosure. The reason why there was no investigation was because of the inherent evidential and practical difficulties in seeking to do so long after the events in question. Even if that claim were in time it too would fail on the issue of causation, notwithstanding that the Claimant might reasonably perceived the refusal to process his grievance against Dr John in the manner he would have wished placed him at a disadvantage.

[z] Failure to interview C for the purposes of MHPS investigation – 25 August 2022
Facts:

44. On 9th May 2022 Dr James Haeney was appointed to conduct the Maintaining High Professional Standards in the Modern NHS (MHPS) investigation concerning the Claimant's actions in relation to the circumstances surrounding the death of Patient D.

45. The Claimant had been off sick with stress since 23rd February 2022 and was therefore absent from work throughout the whole of this MHPS investigation.

46. When Dr Haeney first contacted the Claimant on 17th May 2022 to invite him to talk, either face-to-face or via Zoom, he received an out-of-office reply because at that time the Claimant was on leave.

47. At no time after his return from leave did the Claimant ever seek to make arrangements to speak to Dr Haeney.

48. On 13th July 2022 Lindsey Harding wrote to Dr Haeney as follows:

    "In terms of sequencing, please will you leave your interview with TB to the end.
    At the point that all interviews have been conducted except for TB, please will you pause the investigation to review your findings so far.
    If the information gathered at that point suggests TB is unlikely to have a case to answer, it may not be necessary to interview TB at all.
    I appreciate that in not interviewing TB, not all the terms of reference can be answered, however given the sensitivities of this case and the impact an interview will possibly have on TB's health, if we can avoid doing so, we should.
    Please can I be involved in the interim review of the case? "

49. On 27th July 2022 Dr Haeney provided a progress report to the case manager Dr Peter Sedman and observed:

    > "I haven't managed any contact with TB and have been asked by Lindsay not to speak with him until the rest of the report has been completed and reviewed by you. A number of those we have spoken with have raised concerns about his mental health and the stress this issue is causing him."

50. On 28th July 2022 Ms Harding chased up Dr Haeney for a progress report and was told that he hoped to have spoken to everyone apart from the Claimant and to have a draft report by the end of August.

51. On or about 24th or 25th August 2022 (the specifically alleged date of the act subjecting him to detriment) the Claimant says that he was informed by Ms Harding that the MHPS investigation was likely to be concluded within in the next couple of weeks without having to interview him. We accept that this happened because it is entirely consistent with Ms Harding's communications at about this time. We do not however accept that this suggestion that he might not need to be interviewed caused the Claimant concern as he alleges. When he wrote to Mr Nearney and Ms Harding on 8th September 2022 he did not make any reference to his not being interviewed: his only concern was that the investigation had not yet been concluded, as he had been told it would have been by then.

52. In his reply on the same day, 8th September 2022, Mr Nearney stated:

    > "With regard to the investigation, I'm unsure if the information you received on 24th August was accurate as Sarah Allison, the HR Support for the investigation, was on leave for 2 weeks. However in terms of an update Sarah has confirmed the internal witnesses have been interviewed. However the Case Investigator is seeking an external review from two other general cardiologists and will then be able to feedback to the Case Manager. I have asked Sarah Allison to ensure this is a priority and completed asap.
    > If there is anything further you need from me please let me know."

53. The evidence from Mr Nearney that this was typographical error and that he intended to say that Dr Haeney wished to interview "two further consultants at an external venue", and not to interview "two external consultants" is nonsense. Mr Nearney was repeating precisely what he had in fact himself been told only the day before in an email from Ms Allison, namely:

> "James wanted to meet a couple of general cardiologists from other Trusts to gain a balanced view before we feedback to Lindsey and Peter Sedman. I've been on leave the past 2 weeks so I've not had chance to catch up with him as yet to determine if he's been able to meet with them so things may have moved on in my absence."

In actual fact this was incorrect: Dr Haeney was not at that stage intending to interview external consultants and did not do so, although he had considered doing this at an earlier stage of his investigation.

54. In Mr Nearney's letter of 26th September 2022, already quoted, it was recorded that it was understood to be the Claimant's preference not to be interviewed. That assertion was never challenged at the time by either the Claimant or his advisors.

55. Also on 26th September 2022 Ms Harding asked Dr Haeney:

> "Are we able to discuss later this week (ideally before Friday) as we will need to have an auditable CI/CM view as to whether the TOR can be answered without interviewing TB."

56. Dr Haeney considered that he did need to ask questions of the Claimant and these were forwarded to him by Dr Sedman on 29th September 2022, stating:

> "Further to my telephone conversation yesterday I am writing to let you know that we are nearing the conclusion of the mhps investigation for which I am the Case Manager.
> I know how stressful you have found this process and as you know we have tried to avoid involving you directly at this time; but as we near completion it is clear that there are a number of questions that only you can answer and in order to be as comprehensive and fair as possible I am inviting you to consider these and to give you an opportunity to answer.
> When you have considered them we will talk again, perhaps in the middle of next week.
> The questions are authored by my Case Investigator and your responses to them could be either in written form to him or by interview with him, which ever you choose.
> I hope we can conclude this in the not too distant future. I realise how stressful this has been for you.
> Please do not hesitate to contact me if clarification is needed or if I can be of any support."

57. The Claimant elected to provide written answers and his solicitors were also involved in this process. Neither he nor they raised any suggestion that they should take up the repeated offer of a face-to-face interview, and the written response came on 2nd November 2022.

Conclusion:

58. It is not reasonable for the Claimant to consider that he has been subjected to any detriment in these circumstances. He did not ever raise as an issue at the time the fact that he had not been interviewed.

59. It is in our view evidently not correct that there were such simple facts which the Claimant could have pointed out had he been interviewed earlier that this would necessarily have exonerated him. This was clearly a more nuanced decision than the Claimant would have it, where there is scope for a difference of medical opinion as to what is best or acceptable

practice and where that practice may alter over time: that is apparent from the fact that Dr Ramlall and two external experts, one entirely unconnected with the Respondent Trust, has raised potential concerns about the Claimant's actions. There was, on any view, irrespective of the appropriateness of the decision on medical grounds, a potentially valid criticism of the Claimant's failure to communicate at all with Dr John about the fact that he had radically amended the care plan that he, Dr John, had initially put in place. Even though he was, no doubt rightly, held after full investigation to have no disciplinary case to answer in respect of his professional judgment that in no way supports the assertion that those involved knew these proceedings to be illegitimate and therefore did not engage in any transparent fact-finding which involved the Claimant. Although the investigation was in the event overlong, a number of witnesses had to be spoken to as and when it could be arranged as well as considering what evidence, if any, was required from the Claimant. These people would still have had to be interviewed even if the answers from the Claimant had not been left to the end.

60. The reason why Dr Haeney did not interview the Claimant was that he was initially requested not to by HR. The reason for that request was to seek to avoid stress to the Claimant. That rationale was accepted by Dr Haeney, in large part because of independent corroboration from others he had spoken to as to the effect on the Claimant's mental health.

61. Ms Harding who gave that initial advice was the person who had at first advised strongly against the commencement of MHPS proceedings. In an email of 14th March 2022 she had pointed out:

> "My reasons for caution and not jumping straight in to an MHPS process with TB are:
> a) TB has previously blown the whistle, and I would not want him to be able to claim that any steps taken by us now are a detriment for him having blown the whistle. Any challenge in this regard could see us tied us up with an injunction for months.
> b) TB is currently off work with work related stress. We need to approach him with these concerns carefully and considerately. We would do this for anyone struggling health-wise.
> c) TB has been subjected to previous complaints that further enquiries found to be unsubstantiated/potentially vexatious. He has already suggested the Trust is not protecting him in this regard. It would be helpful to have more verifiable facts before laying formal allegations at his door.
> d) There may be others that have not conducted themselves properly, clinically or professionally.
> e) If there is a case to answer, it is possible it may include some capability concerns. Capability management is notoriously difficult to manage and are often irrecoverably damaging in terms of relationships. If this can be avoided or managed in some other way, we should try to."

62. Once the MHPS process had however been commenced Ms Harding also advised on 20th June 2002 that:

> "a delay (sc. by adjourning to explore further any possible resolution between the Claimant and Dr John, following Mr Nearney's letter of 22nd April 2022 regarding the grievance) to the 'serious concern' requiring investigation could suggest we are not treating it seriously in accordance with the timescales laid down in MHPS, and it could be argued that the delay could cause further stress."

63. Ms Harding was clearly therefore acutely conscious of the need both to have the concerns properly investigated but also to avoid causing stress to the Claimant if the matter could possibly be resolved in his favour without interviewing him. That is the reason why she gave her initial advice to Dr Haeney.

64. We therefore agree with the Respondent that in this instance it is "nonsensical" to suggest that the reason why Dr Haeney, acting initially on advice from Ms Harding, did not interview the Claimant in person, and did not ask him questions until the very end of the enquiry was in any way whatsoever to do with his having done something which is alleged to qualify as a protected qualifying disclosure.

[bb] Continued pursuit of MHPS investigation – up to November 2022
Facts:

65. On 10th December 2021 the Claimant drafted a document which described itself as a collective whistleblowing complaint signed by seven of the non-interventionist consultants, and which was sent on 13th December 2021.

66. Because this raised issues which potentially might require the immediate cessation of TAVI operations, Dr Simon Thackray, the Associate Medical Director, with the agreement of Dr Makani Purva initiated a rapid response which involved an independent review of all TAVI related deaths within the previous twelve months, four in total.

67. That review was conducted by Dr Zaman on 17th December 2021.

68. A second external review into those same fur deaths was also commissioned by Dr Makani, which was carried out by Dr Khogali on 31st December 2021 with a written report dated 18th January 2022.

69. Regular Morbidity and Mortality (M & M) Review Meetings had not been undertaken for some considerable time during the Covid pandemic. Although there is a reference to one being scheduled for 24th December 2021, there is no evidence of it ever actually having been scheduled nor of it ever taking place. Manish Ramlall had only taken over as Clinical Governance Lead, with responsibility for M&Ms in December 2021.

70. Patient D had died on 6th January 2021 and their case had never been reviewed. We accept that Dr John had earlier raised this issue with the previous Clinical Governance Lead, but that it had not been pursued.

71. On 17th January 2022 Dr John emailed Dr Ramlall:

> "I would be grateful if you could arrange for this gentleman's case to be discussed at M&M meeting urgently. A number of colleagues have raised concerns about his hospital management ultimately leading to his tragic death.
> There are a number of issues to be discussed and I wonder if you could arrange a discussion ASAP."

72. Dr Ramlall decided on receipt of further documentary information from Dr John in connection with this death, to prepare to present this case at an M&M meeting by preparing

an SJR. This he did on 15th February 2022. We find that, notwithstanding the heading which states that this was an "SJR requested by Dr Joseph John", given the actual content of the 17th January email, Dr Ramlall was not, though, ever specifically directed and nor did he ever undertake to act only within the SJR procedure, and the title that was given by him to his investigation is, in our view not material. In his report Dr Ramlall found:

"Overall Conclusion:

1. Sufficient evidence of avoidability of death.
2. Evidence of unsolicited interference from another consultant colleague.
3. Inconsistencies surrounding timing of MDT and patient discussion.
4. MDT and surgical decision-making not in line with evidence, guidelines and established practice

Recommendation:

1. There is sufficient evidence of poor care and improper behaviour.
2. A formal investigation into the death of above patient is warranted.
3. Cardiothoracic CABG SOP needs to be reviewed and/or updated specifically relating to coronary artery assessment with CTCA prior to surgery.

73. Dr Ramlall then together with Dr Raj Chellah, took these concerns to Dr Makina and Dr Thackray, and sent them each a copy of the SJR on 27th February 2022. Dr Makina's immediate response was that Dr Thackray should review the matter to consider whether this met the criteria for a Serious Incident (SI) investigation.

74. There was from 28th February 2022 extensive email correspondence initiated by Dr Thackray with a view to establishing the circumstances around the decision making and in particular, by logging into the records, who had in fact attended the Multi Disciplinary Team meeting (MDT) where this patient's care had been discussed. This logging in to see who had come and gone from the meeting is the express context in which Dr Thackray asks Dr Ramlall if he can "keep chipping away at this" whilst I'm away".

75. Dr Thackray commissioned a report from Dr John Caplin, a retired consultant cardiologist. His report is dated 2nd March 2022. He concludes:

"Patient D. was a 67 year-old with multiple risk factors for the development of coronary artery disease. He had a short history of anginal type chest pain, and was appropriately referred for a cardiology opinion. The consultation with Dr John correctly made a diagnosis and appropriate management plan, including invasive coronary angiography. Subsequently one of Dr John's colleagues, Dr Bragadeesh, got involved in care, the mechanism by which this occurred is unclear. Dr Bragadeesh organised two CT coronary angiogram procedures and subsequently cancelled the invasive coronary angiogram without informing Dr John. This does not accord with the General Medical Councils recommendation contained in the document "Good Medical Practice". Dr Bragadeesh then referred to Mr Chaudhry again without informing Dr John. Mr Chaudhry's letter back to Dr Bragadeesh suggests that case was discussed at a revascularisation MDT, when, in fact, it was presented at a heart valve MDT. Since Dr John was documented as being at that MDT, but did not appear to know about the changes in his management plan, it seems unlikely that the case was presented to the whole meeting. In addition, it seems likely to me that the decision to go ahead with CABG, whilst undoubtedly the correct decision, without prior invasive coronary angiography would have been discussed in detail at the meeting, and documented as such. I also have concerns that if the management plan, outlined by Dr John following his initial consultation, with invasive coronary angiography,

had been followed, it could well have resulted in a recommendation for an inpatient stay after the coronary angiogram and urgent CABG. This might have prevented subsequent death"

76. On 4th March Dr Haeney was approached by Dr Peter Sedman to ask if he potentially would act as case investigator, but no details were provided to him. On 10th March 2021 Dr Thackray communicated to Dr Ramlall the view that there was sufficient concern to commence an MHPS investigation in the Claimant, but we nonetheless find, in the context of the subsequent correspondence, that the final decision had not in fact been taken at that stage.

77. On 11th March 2022 Dr Makani referred the documentation to HR, Ms Harding. Her response dated 14th March 2022 and the extreme caution she raised is quoted above.

78. On 13th March Dr Makani also sought advice from the General Medical Council (GMC).

    "In a further twist to the long standing issues between 2 cardiologists, one of them has accused the other of taking away one of his patients and offering him a different treatment option which caused his death. So we did a SJR internally and an external report was obtained –both attached. I am not sure where to go from here and was hoping to do a few more interviews perhaps (as this issue is historical and I am not sure why the accusation has come only now!) but as GMC has been mentioned in the external report I thought I better share it with you for an informal opinion of what I am needed to do-is this really a GMC issue/do I need to refer or can I wait till I undertake further investigations. Your advice would be appreciated."

    This email was evidently followed up with a conversation with The GMC's Senior Employer Liaison Advisor, Dr John Powell

79. Dr Powell replied on 25th March 2022.

    "We discussed the report by Dr Caplin, dated 2 March 2022. The events in question happened during the latter part of 2020. It appears from the report, that Dr Bragadeesh did not follow the standard protocol in relation to imaging, and did not utilise the MDT directly. As you indicated, the author of the report might not be seen as entirely objective, so you are minded to consider TOR for a formal MHPS process. You have considered any need for ongoing processes to contain and mitigate any risk. We can discuss the progress of this MHPS process, perhaps next month."

    The reference to Dr Caplin possibly not being entirely objective is because, although not considering himself to have any conflict of interest thereby, he had been a colleague of known and had therefore known the people involved in the cardiology department at Hull.

80. In the meantime on 15th March 2022 Dr Makani had decided to seek to commission a further report from an external consultant, and therefore unconnected with Hull, Dr Stephen Wheatcroft. This was so that she and Dr Sedman, the designated case manger and responsible officer might decide if here was in fact a case to answer. She therefore contacted Dr Thackray:

"Pete and I are going to make our prelim enquiries to decide if there is case to answer. With that in mind, I will need to email Dr Wheatcroft could you provide me an email summary of the case and the relevant attachments that I can forward to him please. The questions I was thinking of posing to him for answering are 1) Clinically, was the pathway implemented by JJ the only appropriate route for management of this type of case? 2) Clinically, was the decision taken by TB a valid pathway even though others may have chosen a different route? Are there any additional questions we need to ask him to address?"

81. Dr Thackray replied on 16th March 2022:

"I agree, those seem the relevant questions to me I guess the threshold we are looking at is the Bolam test that the action taken by an individual reflects what a group of reasonable minded cardiologists may have done in a similar situation: Would a reasonable cardiologist have cancelled the angiogram and moved to a CT pathway. Would a reasonable cardiologist have made an out patient referral to a surgeon without going through a formal MDT. Would a reasonable cardiologist and surgeon have accepted a patient for cardiac surgery in the absence of a coronary angiogram. That will allow Steve to give fairly short pithy answers without getting too bogged down in the detail. If what was done was reasonable then there is really only the issue around communication between TB and JJ to consider which can be done much less formally. If it's unreasonable then we have a problem."

82. Dr Weatcroft was accordingly instructed on 16th March 2023 and he reported on 11th April 2022. His conclusion was:

"If the original plan of investigation had been followed, it is likely that would have been admitted to hospital immediately following invasive coronary angiography, assuming this confirmed severe ostial left main coronary artery disease. This would have facilitated earlier coronary revascularisation and may have prevented his death."

83. Throughout this period, Dr Makani had also, however been actively considering the possibility of mediation being offered to the Claimant and to Dr John. This was first referred to HR for advice on 9th March 2022. Ms Harding responded on 16th March 2022, expressly advising against such a course as it may indicate that the respective concerns raised, necessarily including those which were currently being explored in respect of Patient D, did not have merit.

"I suspect both parties will insist it isn't personal and these allegations that keep arising are only about their genuine concern for patient safety. If you are going to suggest that you think this is a relationship issue that may be helped by mediation, you are effectively saying we don't believe the allegations had merit and were possibly made vexatiously. I think this may be a difficult path to tread."

84. Dr Makani's position , following receipt of the second expert report, is summarised in her email to Ms Harding of 12th April 2022.

"I have talked to Pete this morning. We have had 2 reports that has been critical of our approach in managing this patient who died. I think we have no choice but to start a MHPS and Pete agrees too. We need to consider the impact this may have on the consultant

concerned and the family-regarding the family I think we could wait to see what our MHPS comes up with before we inform them? Would that be acceptable? Regarding the impact on consultant concerned, we need to be supportive of his health. However I am not sure, having received 2 reports which are clearly critical of the approach, we could ignore it. I would value a conversation regarding next steps."

85. There then followed extensive correspondence between various people as to the form of an MHPS investigation. In the course of this discussion Ms Harding in particular continued to voice her great disquiet as to the appropriateness of this course of action being taken at all, and others advised caution or expressed concerns as to the suggested TORs. So for instance in an exchange between Ms Hardng and Mr Nearney on 19th April 2022:

"Hi Simon I am really nervous about this lot. If we already have the answers to the questions (from the preliminary enquiries and the 2 reports provided) what is the point of the investigation? We need to be setting TOR that respond to questions we don't already have the answers to. And we need some sense of where this will go depending on the findings. I'm still not sure we (or maybe just me) are clear what we are alleging. What is the wrongdoing we are suggesting occurred? Helppppp! "

"Hi Lindsey, I've been tied up all day so just catching up on emails. I agree with the points you make. We need to be clear on the allegation we'd be putting to the Dr. I've read all the emails including Pete's which is helpful. Pete is focussing the allegation on failing to communicate with a fellow Consultant who the patient was under. Did TB know and if he did why didn't he talk to him. That's the MDT in Dec which Pete is looking into. Also, taking the other route which involved a surgeon did that cause harm? Purva may feel we are being obstructive, but we're not. We're just being cautious, understanding the context and being clear on the allegation. If Purva doesn't like it, then I'm sorry but we will continue to put in our constructive challenge. Simon "

86. Similarly on 28th April 2022 the Trust's Chief Executive Officer, Chris Long, whilst considering that an MHPS investigation was justified proposed a change to the wording of the allegation to reflect concerns which he had:

"I've had a look at the investigation reports, the MHPS guidance and the investigation summary sheet. I think we can justify the MHPS based upon local precedent and what the guidance says. Having said that I don't like the details of the allegation as spelled out: "That Dr. Bragadeesh inappropriately intervened in the management of . and that intervention led away from a clinical pathway which would have otherwise prevented death before surgery could be undertaken." I think I would prefer this to read: "That Dr. Bragadeesh intervened in the management of and that intervention led away from a clinical pathway which could have otherwise prevented s death before surgery could be undertaken." My reasons:

- We don't know yet if the intervention was inappropriate, even if the communication with the primary physician was.
- We will never know if the original plan would have prevented death – it may have occurred under different circumstances."

Dr Makani did openly share these concerns of Mr Long in this email with both Ms Harding and Dr Sedman, but the suggested rewording of the allegation was never in fact incorporated..

87. Dr Makani's final position is summarised in her email of 27th April 2022 in response to Ms Hardng's concerns.

    "I think there are serious concerns. We have 2 independent reports commissioned, claiming that the patient may not have died if a different approach to their care had been taken. There may be elements that may not agree within the report but I don't think we should ignore these reports or investigate the concerns raised in an informal manner."

88. Dr Haeney was for the first time provided with any case details on 22nd Aril 222 and was confirmed as case investigator by letter dated 9th May 2022. His terms of reference were:

    "As discussed, the details of the incident are that Dr Bragadeesh intervened in the management of Patient D and that intervention led away from a clinical pathway, which would have otherwise prevented Patient D 's death before surgery could be undertaken.
    The terms of reference I would like you to investigate are:
    1. Did Dr Bragadeesh have the clinical authority to oversee the cardiological investigations for and how did he become involved? Was he aware of Dr John's involvement in this case at that time?
    2. Should an invasive coronary angiogram have been performed before this case was presented to Mr Chaudry and presented at the MDT?
    3. Did Dr Bragadeesh cancel the invasive coronary angiogram organised by Dr John and what communication took place around this? When and how did Dr John become aware of the fact that the invasive coronary angiogram he had scheduled had been cancelled? 4. Is it normal for more than one consultant to be involved in the pathway of investigation of a patient with chest pain and if so, what are the formal protocols for transfer of episodes of care within the cardiology department? Was there any breakdown of transfer of care protocols on this occasion?
    5. Should Dr Bragadeesh have admitted to a hospital bed in order to expedite his surgical treatment? Is it normal practice in HUTH to admit a patient to an acute care bed on the basis of angiography findings alone? What are the normal criteria for an acute admission for this purpose?
    6. In so far as can be ascertained, when was the MDT meeting held, and is the record an accurate and comprehensive record of the discussions which took place? If not, what steps are in place to ensure quality compliance with the documentation of MDT discussions?"

    On the same day, following a preliminary telephone call a week earlier, Dr Sedman also formally notified the Claimant of the commencement of an investigation.

89. On 17th May 2022 when Dr Haeney made contact with the Claimant he described he remit of his investigation as:

    "I have been asked by the trust to collect some additional information regarding a patient care episode involving Patient D. When you are well enough it would be very useful to be able to talk through this case with you so I can better understand the events and decisions made."

    It was not, however, until 27th May 2022 in response to a specific request from the Claimant's BMA representative that he was copied into the specific terms of reference which Dr Haeney was working to.

The wording of the allegation itself was not actually provided to the Claimant until 8th September 2022

90. Dr Haeney produced his provisional report on 27th September 2022. As at 7th October, MS Harding - who had been chasing up the completion of the investigation, who had hoped that it might be concluded without needing to interview the Claimant and who had by then had sight of this provisional report - apparently believed that the Claimant had been "told the investigation has pretty much concluded there is no case to answer in terms of his clinical decision making; it was more about his communications (or lack of)". On 29th September 2022, however, Dr Sedman forwarded the Claimant the questions which Dr Haeney still wished to be asked in order to conclude the investigation. The answers were provided on 2nd November 2022. The Final report was submitted immediately thereafter and it was forwarded to the Claimant on 10th November 2022.

91. The formal conclusion of the investigation, without any further action being taken (notwithstanding the finding that there were deficiencies in the Claimant's documenting and communication of his decision radically to depart from the original treatment pathway prescribed for Patient D, even though that was clinically justified in the circumstances) was effected by letter dated 28th November 2022.

92. During this closing stage of the investigation, on 6th October 2022, the Claimant had whilst waiting to answer the questions also forwarded to Dr Sedman a recent communication from Dr Thackray, addressing the crisis situation at that time where a shortage of hospital beds created risk for those awaiting admission and challenging therefore the practice of defensive medicine in prematurely admitting some patients pending surgery. He stated: "I would challenge anyone to prove that there are 'anatomical features' that must be kept in – such as a pinhole left main, because if that patient didn't meet any of the above criteria, they are little different" . The Claimant evidently therefore believed therefore endorsed his clinical decision in 2021 not to admit Patient D to Hospital. Dr Sedman's personal opinion was that he agreed with this interpretation of Dr Thackray 's comment:

> "To me, Simon exonerates Brags from the main charge. Anatomy does not mandate the need to admit."

93. The Claimant could have chosen, if he wished and if he thought it relevant, to reference Dr Thackray's recent communiqué within his answers to Dr Haeney.

Conclusion:

94. The decision to commence an MHPS investigation was taken on 9th May 2022. There was no actual decision taken thereafter either to continue the process, nor not to discontinue it. However, where the terms of reference of that investigation were only disclosed piecemeal to the Claimant and where the specific allegation was not communicated to him until 8th September 2022 and where it was unclear until 29th September 2022 whether or not he would be required actively to participate that is sufficient to constitute this as an evolving process, an act extending over a period and not just a finite event at the point it was first set in motion.

95. Although the eventual outcome resulted in no further action being taken against him, the Claimant is reasonably entitled to consider that his being subject to the ongoing MHPS process constituted a detriment.

96. Even if the request by Dr John for review of Patient D's death within an M& M meeting, or the subsequent preparation of an SJR by Dr Ramlall were materially influenced, either as to their timing or their substance, by the fact of the collective grievance, nether of them was (per the Supreme Court decision in Jhuti) either in any position of hierarchical superiority over the Claimant, nor actively involved in the MHPS process. In any event the chronology clearly demonstrates that the actual decision to initiate that process was at many stages of removal from their involvement.

97. It is also clear, particularly from her correspondence with the GMC, that D Makani was fully cognisant of the involvement of Dr John in initiating this inquiry and of the potential risk of his being motivated by some personal antagonism towards the Claimant. She was, therefore, in nowise unwittingly manipulated by an "Iago" figure.

98. Dr Makani did not in any way accept uncritically the suggestion from Dr Ramlall that this case warranted a formal investigation on evidence of poor care and improper behaviour. We find that her motivation for commencing an MHPS investigation was that after careful review of the primary facts and the commissioning of two external reports, and after consideration of the options, after seeking input from colleagues, from HR form the GMC and from the Trusts executive – much of it prepared to be challenging and questioning – was that a formal process had to be undertaken in the light of credible evidence of potential serious misconduct and the fact that a patient had died.

99. That had been her provisional opinion after receipt of Dr Caplin's report, and it was reinforced by the report of Dr Wheatcroft. It was not, however, a predetermined outcome. Dr Makani was not initially averse to the idea of informal resolution through mediation, she was initially looking a managing the investigation through SI process rather than focussing allegations against an individual, the Claimant, and she was alert to the possibility that the preliminary determination of whether or not there was a case to answer may well have disclosed evidence only of miscommunication, which might have been dealt with less formally. It was however only as at 27th April, in the light of all the information then available that she crystalised her position in what we accept genuinely explains what was in her mind at that time.

100. It is extremely strong corroboration for our finding that this eventual decision was not at all materially influenced by any potential protected disclosure that it was clearly made despite the fact that the Claimant was perceived as a "whistleblower". Given the clear cautionary advice from Ms Harding it would have been extraordinary if the decision was nonetheless taken on the ground that the Claimant had made any protected qualifying disclosure. Because Dr Mankani would necessarily therefore have had to engage consciously with the implications of the Claimant being a "whistleblower", it militates strongly against any suggestion that this may in fact have been her unconscious motivation, and we find that it was not. We repeat that this decision was clearly taken not because the Claimant may have blown the whistle, but in spite of it.

101. It is the Claimant' s case that the decision to undertake the MHPS investigation was because he was perceived as a trouble maker, and that it was part of a concerted effort to get rid of him. That bald assertion is, however, flatly contradicted by the clear contemporaneous documented evidence as to what in fact motivated Dr Makani's decision. That reason, not materially influenced by any protected disclosure, continued to be the operative reason for the MHPS investigation continuing to its final and proper

conclusion. Having determined that a formal process had to be undertaken in the light of credible evidence of potential serious misconduct and the fact that a patient had died, there was a strong presumption that it ought then to be allowed to run its full course, so that whatever the eventual outcome the decision would be transparent.

102. Dr Thackray, in contradistinction to Drs John and Ramlall, was involved in the decision making process prior to commencing the MHPS nvestigation. Subsequently in November 2022 he expressed the personal opinion that:

> "A rolling power struggle between key individuals has dragged in much of the time and energy that normally individuals would put into service development. From a personal perspective a huge amount of time has been spent investigating retaliatory complaints, dealing with rudeness and incivility, and trying to bring a sense of direction to teams pulling in opposing directions. Under the guise of protected disclosures however the greatest damage has been done. They bring disproportionate fear to the accused, subvert the normal clinical governance process, and entrench division. They are a weapon of mass destruction that have harmed patient care in my department to further personal grievances. These allegations also require many hours of clinician time to resolve, which is time spent not improving the cardiology service. I sincerely wish they would stop."

Whilst Dr Thackray acknowledges that he is prone to the use of "flowery analogies", the reference to "weapons of mass destruction" in the context of the consultant's letter of December 2021 has not been helpful.

103. It is not, however, any sufficient indication that Dr Thackay's opinion displaced the clear evidence as to what in fact motivated Dr Makani's independently reached decision so that it is to be attributed to her. In any event the specific criticisms of Dr Thackray's involvement which are identified by the Claimant do not, on proper analysis, support the assertion that he was in some way manipulating the process. When Dr Thackray asked Dr Ramlall to continue investigating what happened at the MDT meeting, it was in order to obtain clear facts before making any decision. Similarly, in context, his reference to the Bolam test for clinical negligence is perfectly appropriate in terms of framing the questions to be asked before determining the scope of any further inquiry. If a potential clinical misjudgement was to be identified, as opposed to flawed communication, that was perceived as a "problem" for the Respondent as much as for the Claimant, but not one to be shied away from, and it did not amount to any illegitimate prejudging or targeting.

Reasonable practicability

104. Having concluded, as we must following Jhuti ("the Simler judgment"), that since the Claimant has failed to prove that there were any actionable detrimental acts that post-dated 3rd August 2022, there were no ongoing similar acts or failures to act that could form part of a series for the purposes of enlarging time under s.48(3)(a). Any alleged earlier acts can only be in time if an extension is granted under s 48(3) (b).

105. The Claimant accepted in evidence that there was no practical reason why he could not have brought his claims earlier, and therefore if within 3 months of the act complained of, in time. He did, however, refer to not having brought the claim earlier because there

were possible settlement discussions and subsequently has sought to rely on the case of Schultz as authority for the proposition that this meant that it was not therefore reasonably practicable to have presented the ET1 in time.

106. Although the Claimant was off sick from 23rd February 2022, there is no suggestion that this resulted in any incapacity which meant that he could not have commenced proceedings. He was , of course, represented by solicitors throughout and was certainly capable of giving instructions.

107. Indeed, as at 10th May 2022 when Mr Nearney referred to the possibility of a meeting between the First Respondent and the Claimant's legal advisers, this was expressly in the context of the Claimant having already made clear his intention to "seek legal counsel and go externally". Subsequently "without prejudice" discussions did take place, though we of course do not know the subject matter. Schultz is therefore not relevant: this is not a case where the Claimant would have been able to present a claim prior to the commencement of any settlement discussions but was then physically incapacitated whilst those discussions took place and at a time when the limitation period would otherwise have expired. Even if this had been the position, it would only potentially have salvaged any allegations from after 11th February 2022, at the earliest, which is three months before the first intimation of possible negotiations.

108. Even if in those cases where it may be arguable that the Claimant did not have actual knowledge of the alleged detrimental act until after the time limit had expired, so that it would not have been reasonably practicable to have brought the claim in time, it was then incumbent upon him to act promptly but he did not do so. For instance in respect of the complaint against Dr John that he requested that Dr Ramlall conduct an SJR into the care provided by the Claimant to Patient D, because time runs from the date of the act (which was in fact 17th January 2022) the claim should have been brought by 16th April 2022. Even allowing for the Claimant's initial incorrect dating of the act, time would have expired on 14th May 2022 (the same date that would apply to the complaint against Dr Ramlall in respect of his carrying out the SJR.) The Claimant had knowledge of these acts on 7th June 2022, at which point it would have been apparent that any complaint would on the face of it already have been out of time. The claim brought on 13th December 2022 was in these circumstances self-evidently not brought within a reasonable time after 14th May which was seven months before, more than twice the primary limitation period.

109. We therefore find that it would have been reasonably practicable for the Claimant to have presented his claim in respect of any or all of the earlier 26 allegations within 3 months of the act complained of or within a reasonable time afterwards, but that he did not do so. All such claims are therefore out of time and the Tribunal has no jurisdiction to hear them.

The out-of-time claims

110. The actual substance of the first 26 complaints which are out-of-time is not therefore in any way material to our decision, but we have nonetheless considered them. We also deal, in this context, with the substance of the identified alleged disclosures. The summary of our conclusions, had we been required to determine any point, may however therefore be dealt with relatively shortly.

Alleged Protected qualifying disclosures

1.19.07..20 Email to Dr Smithson, Ms Page, Ms Ryabov and Ms Addleshaw re treatment of Patient A

2. 23.07.20 WhatsApp message to Wendy Page re treatment of Patient A

***3.* 23.07.20 Conversation with Dr Smithson in car park re treatment of Patient A**

111. These three alleged disclosures can as a matter of fact properly be aggregated together.

112. Although we are not required to, and in any are not competent to make any finding on this, nor indeed any other medical issues which have arisen in this case this is an alleged disclosure regarding the TVI procedure carried out on Patient A on 9th July 2020 which does need to be summarised.

113. The insertion of the valve in a TAVI procedure may be by either the right or the left femoral artery, and patients give their consent without specifying which. The procedure is not therefore to be equated with other operations, for instance on a bone in a leg, where identifying the correct side of the body is critical. The data from a scan initially carried out on Patient A in December 2019 had been analysed in two separate reports. The internal hospital report did not preclude using the right artery. The technical report from the equipment manufacturers (the "mensio3 report") did clearly identify that the right artery was unsuitable. Immediately prior to the operation an angiogram was carried out, referred to as the "gold standard", and this also was interpreted at the time as not ruling out the use of the right side. The proposed treatment plan was however for access via the left artery. Complications arose, which may have been avoidable, which resulted in the right artery already having been perforated so that a decision was taken at the operating table to change to using that artery also for insertion of the valve. There were further complications when carrying out the TAVI procedure.

114. The Claimant as Clinical Director was made aware of concerns regarding this operation, particularly that the clear recommendation in the mensio3 report had not, in the event been followed, that is was unclear how the decision to change plan had been taken and that the nature and extent complications encountered were not properly recorded. The Claimant therefore requested to and did attend the TAVI morbidity review meeting on 17th July 2020. This meeting concluded that although were learning points it did not merit a Serious Incident (SI) investigation. On 18th July 2020 Patient A died.

115. In sending his initial email to senior management and HR ("The Health Group") and in his subsequent intimations that he intended to escalate his concerns to require an SI to be registered the Claimant was disclosing information obtained by him which tended to show that the health of Patient A had been endangered so that in his opinion, based upon that information, the proper course was to carry out an SI. That was in the circumstances a reasonable belief and given the fact that a patient had died, was in the public interest. That is the position irrespective of the fact that there was also, to a greater or lesser degree, a history of mistrust by the Claimant of the members of the TAVI team and that

knowledge he would have been aware of inherent risks in the TAVI procedure which meant that outcomes such as this were not unforeseen.

116. Whilst determining that these disclosures do qualify for protection under the statute, we note that the Respondent is right to point out that the context was not that there was any reference to the whistleblowing policy. Rather this was reasonably understood at the time to be a legitimate difference of professional opinion as to whether or not an SI was warranted.

117. By 24th July 2020 Dr Jacqueline Smithson had in fact already agreed to refer the case for an SI. The Claimant was then charged with drafting the formal documentation to initiate that process, which he did to a large extend by cutting and pasting from his email of 19th July 2020. When informing the TAVI consultants Drs Challiah and Davison of her decision Dr Smithson did say: “Please be assured this is not a “witch hunt” but is about supporting the service to learn and grow. In my experience as this is a coroners case it is much better to have the SUI report in place and also supports the service”. In context we consider that this is in fact affirming of the Claimant’s approach, because it asserts the propriety of the SI being carried out and expressly refutes any suggestion that here is any malign motivation behind it.

118. Similarly on 26th July 2020 Dr Makani confirmed her agreement to an SI being conducted, and whilst at the same time stating “I have heard a different version of events”, we again consider that this is a recognition that there is a genuine difference of clinical opinion and that the Claimant is not being criticised in any way for the stance he has taken – and which has in fact been supported.

4. 04.08.20 Conversation with Clare Allanson (legal department) re treatment of Patient A

119. We consider it highly unlikely that the Claimant did in fact disclose any relevant information to Ms Allanson. Her email to the Claimant following their meeting is, unsurprisingly, focussed primarily on purely procedural aspects of the SI process and upon the legal protocols to be observed where the coroner had become involved. This question as to whether proper procedure had been followed with the coroner was then the sole focus of her subsequent documented discussion with Dr Makani . Even if this communication ought to be also to be aggregated to the previous three disclosures it does not add anything.

5. 07.08.20 Meeting with Teresa Cope re treatment of Patient A

120. We are not satisfied on the evidence that the Claimant did in fact reiterate his protected disclosure by showing Ms Cope a copy of the 19th July email. Dr Hobson, the Claimant’s witness, who was also present at this meeting does not corroborate this account and Ms Cope does not recall it happening.

6. 05.03.21 53 Grievance against Makani Purva re treatment of C for having made protected disclosures

121. Part of the grievance does clearly articulate a complaint that the Claimant has been victimised for having raised patient safety concerns. That would be the disclosure of

information tending to show a breach of a legal obligation in the public interest and so qualifies for protection.

"I believe the current crisis, that resulted in the removal of the entire cardiology leadership team, was precipitated by the concerns raised about a serious incident during a TAVI procedure dated (09/07/2020) (SI 2020 14485). I felt enormous pressure from other Consultant colleagues not to escalate the incident further up the organization. I followed due process and recommended that a serious incident is declared. I also sought professional advice about this to check that my understanding of our obligations was correct as this was not in line with others' thinking. It is upsetting and ironic that I am now receiving a letter from the CMO essentially quoting possible patient safety as the reason for removing me from my role as clinical director and those clinicians who asked me not to escalate the issue and failed to comply with the duty of candour continue their roles in Governance. If this is the case, then my standing and income have been reduced to my detriment, which I believe is victimizing me for having made this concern known outside the Directorate. Without any discussion, I feel upset, disrespected and undermined by the whole situation."

7. 28.05.21 61 Conversation with Wendy Page re Trust's response to concerns raised about treatment of Patient A

122. We prefer the evidence of Ms Page that although the Claimant clearly expressed the fact that he was unhappy with the content of the final SI report, he did not articulate - as is now alleged - any of the specific claims that there had thereby been a breach of any legal obligation.

123. This conversation was only cited as an alleged protected disclosure long after the event. In the immediate aftermath to this conversation as contemporaneously recorded The Claimant only refers to Ms Ryabov contacting him as follows:

"Brags I understand from Wendy (Nursing Director) that you still have a problem with the TAVI case. It has been investigated thoroughly and completed. If you have new evidence you need to bring it in otherwise you need to let it go.
It leaves you in a difficult position and leaves us in a difficult position as well".

This confirms that the immediate concern as reported by Ms Page to Ms Rabov was that the Claimant did not accept the finality of the report, not that he was making any specific protected disclosures. And indeed when complaining about this contact from Ms Ryabov to Ms Mcleod the Claimant does not repeat any allegedly made disclosures.

The Claimant did subsequently, however, go on to identify such concerns directly to Ms Mcleod.

8. 8/9/29.06.21 WhatsApp/Webex calls/email to Una McLeod re cover up by Trust of treatment provided to Patient A

124. Whilst this chain of correspondence can properly be aggregated it is only in the final email of 29th June 2021 (a complaint added by amendment in the course of this hearing) that any information tending to show a breach of legal obligation is made. It does not matter that this email is itself the response to a summary by Ms McLeod of her

conversation with the Claimant where these concerns crystallized: it is still the disclosure of information, and it qualifies for protection.

9. 09.07.21 Meeting with Chris Long re treatment of Patient A, the Trust's alleged cover-up, and the Trust's response to C's protected disclosures about Patient's A's treatment and the alleged cover-up

125. There are no notes of this meeting. It is however likely that the substance of the complaints to Ms McLeod were repeated and it can therefore be aggregated with these disclosures.

10. 10.12.21 Cardiologists' (including C) letter to Mr Long and Dr Makani re treatment of Patients B and C

126. This is clearly a protected qualifying disclosure recording genuine concerns about the safety of the TAVI process and mortalities, and was initially admitted by the Respondents to be so.

127. Although the statistical information about the TAVI mortality rates does not seek to compare the performance at Hull with other TAVI units at a similar early stage of the development of the service, where it in fact compares favourably, rather than with the nationwide figures, it is nonetheless accurate information.

128. In so far as the letter refers to Patient C it is not however worded by the Claimant in a way which clearly identifies the concern. This patient sustained an aortic dissection during the TAVI procedure. This is not however recorded in the patient's notes, although it was evident from the scans. Working only from the patient notes the registrar had therefore recorded that the cause of death was unknown, which would have resulted in a coroner's referral. However, a death certificate was then prepared, where the counterfoil records the cause of death as acute MI (myocardial infarction, or heart attack) post TAVI, and that there was not to be any referral to the coroner. There is no satisfactory explanation as to why that counterfoil has gone missing. Equally however we frankly do not believe the Claimant and Dr Clark, who both saw it at the time, when they claim not to have noted the name of the doctor signing that off. The sequence of events thereafter is not at all clear, but the case was indeed referred to the coroner who directed a post-mortem and the death certificate actually then issued did record the aortic dissection. The disclosure of information, properly understood is therefore that the notes were not accurate resulting in the aortic dissection not being promptly identified to the coroner.

11. 17.03.22 Grievance against Dr John for making false and malicious allegations against C

129. This grievance is not the disclosure of information in the public interest, but relates to the Claimant's personal issues with Dr John:

" It is with considerable regret that I need to write to you on this occasion to ask for your urgent support and protection. I am currently unable to attend work because of stress and anxiety which I am suffering in relation to my work situation."

130. It does not become a matter of public interest because the Claimant references a separate dispute at the Spire Hospital, but of which he admits he has no actual knowledge only an "understanding".

"In addition, I understand complaints has been sent to the DVLA which had serious impact on patient care. I undertake (or have done so until recently) scans for patients who are required to have these tests to establish a fitness to drive. Some patients have had to return to be scanned again because of the concerns raised which is unreasonable on the patients and damages my standing. I have formally raised my concerns with the Medical Director at Spire where these scans have been undertaken. In October 2021, Mr. Harris (Hospital Director) concluded that the complaints were raised by a" vexatious colleague".

12. 08.09.22 116 Letter to Sean Lyons, Chairman of Trust re treatment of Patient A, the Trust's alleged cover-up, the Trust's response to C's protected disclosures about Patient A's treatment and the alleged cover-up including the investigation into C's treatment of Patient D

13. 17.10.22 119 C's Grievance

131. These are admitted to be protected qualifying disclosures, but within the chronology are not material.

Alleged detriments

(a) 04.08.20 30 Decision to require C to stand down from clinical director role, and d) 14.08.20 Request by Dr Makani that C step down from clinical director role

132. We find as a fact that over a period of years the cardiology department had become severely dysfunctional . Most significantly that was the expressed opinion of Dr Makani, which we accept. That general assessment is corroborated both by the review carried out by the Royal College of Physicians and by the IQ4U report. Central to that dysfunctionality was the antipathy which had developed between the Claimant and Dr John. It is, however , not necessary nor helpful to embark on an attempted minute investigation as to how many actual complaints the one had registered against the other over time. By August 2020 it was clear that senior management, having failed to address these issues satisfactorily up to that time determined that "enough was enough" and that more drastic action had to be taken immediately, even though not all the new arrangements going forward had by any means yet been completely finalised.

133. On 11th August 2022 Dr Makani confirmed to Ms Harding that having met with Dr Thackray, with the Chief Operating Officer, Theresa Cope and with the Health Group that a decision had been taken that the current leadership team in cardiology, including the Claimant, who had held previous leadership positions and had been Clinical Director since May 2020, should be requested to stand down temporarily. Even though this decision did not affect only the Claimant, it is clearly a detriment to him.

134. The principal trigger for the taking of action at this point in time, was the escalation of complaints from cardiologists about each other addressed to the Freedom To Speak Up Guardian, Carla Ramsay. These came from the Claimant, Dr John, Dr Challiah and another consultant, Dr Ali. Ms Ramsay had verbally reported the substance of these complaints to Dr Makani on 5th August 2020. At this time Dr Makani was also of course aware that the SI had been directed at the instigation of the Claimant. Even if she had not in fact seen the disclosure email of 19th Jul 2020 she was aware of its subject matter,

and the Health Group with whom she consulted were of course the direct recipients of that first communication and had engaged individually with the Claimant about it.

135. The principal purpose of the action was to address the dysfunction in the department, as expressed in Dr Makani's email to the team of 12th August 2020:

"Dear All
I am emailing you about the recent and serious concerns that exist in the cardiology service, most of which I suspect you will be aware of.
These escalating issues are being raised to me on a far too frequent basis and are causing me grave concerns.
I am aware that some of you are equally concerned and have raised your worries about the impact on patient safety to members of the Exec Team.
The dysfunction that appears to exist within our team is becoming damaging to our colleagues, possibly patients, but certainly to our reputation, and I am sure you will agree that we cannot continue in this way.
I have arranged a meeting to be held on Friday 14th August at 1430 to discuss this further.
I have invited Teresa Cope and Jacquie Smithson to the meeting and my expectation is that you will be there too."

136. The Respondent has not, however, satisfied us that the fact of the Claimant having made his recent disclosure was not, in all the circumstances a more than trivial influence on both the timing and the substance of the decision taken.

(b) 07.08.20 Statements made by Teresa Cope including "the time has come for a divorce"

137. The Claimant and Dr Neil Hobson, the clinical lead, had gone to speak to Ms Cope to express their concerns with the management style of Dr Smithson, the Medical Director. Ms Cope was party to the discussions at around this time which culminated in the decision to invite the Claimant, and also Dr Hobson to stand down from their leadership roles. Ms Cope emphatically refutes the suggestion that this was something which she would have said. If she did make the comment alleged, whatever the context may in fact have been, it being said is not in itself reasonably construed as subjecting the Claimant to a detriment. Ms Cope also does not recall being shown by the Claimant a copy of the 19th July email as he alleges. There is however on the face of it no obvious link between that letter being shown to her, if it was, at a time when the SI investigation had already been sanctioned and Ms Cope allegedly saying "the time has come for a divorce". If she made this observation, it was not said on the ground that the Claimant had made protected qualifying disclosure. In any event this does not add anything to the detriment in fact suffered when the Claimant was then invited to step down.

c) 10.08.20 Compliant against C made by Dr John

138. The history of Dr John's recent individual interactions with Ms Ramsay, the Freedom To Speak Up Guardian, are summarised in her note of 14th August 2020 recording her involvement also with the claimant, D Chellah and another more junior consultant. She reports that:

"Consultant 1 contacted me in February 2020 about some long-standing concerns….

the current issues regarding behaviours and relationships between Consultant colleagues, which have been looked into before by the Health Group, but are not resolved.
…

Consultant 1 contacted me again in July 2020, as he had seen no progress with this service review process. He stated that the poor behaviours and bullying culture still existed within the service and he wished to raise a complaint about this. I provided advice as to the formal routes Consultant 1 could pursue this complaint through.

On 4 August 2020 Consultant 1 contacted me to state he had taken time to reflect on the information I provided to him and sought further advice. He wishes to pursue a formal complaint under the Trust's Bullying and Harassment Policy and has put his concerns in writing.
His principal concerns are bullying, harassment and exclusion that he has experienced from the Clinical Lead, and cites several examples of this. This has been raised with the Health Group Medical Director previously but not satisfactorily addressed from Consultant 1's perspective…..

A meeting was arranged between the Chief Operating Officer,
Consultant 1 and the Freedom to Speak Up Guardian on Monday 10 August 2020.
At this meeting, Consultant 1 spoke through his concerns, about behaviours particularly of the Clinical Lead and the ways in which the management team of the service have not successfully addressed these issues. He felt that too much influence was invested in a few individuals who do not manage the department well and that the Trust needed to address these behavioural issues."

139. It is clear therefore that Dr John's complaints raised on 10th August 2020 were the culmination of a long-standing sense of grievance and were not made on the ground that the Claimant had made the particular recent protected qualifying disclosure. The summary of his concerns in writing following the 10th August 2020 meeting makes no reference to any events around the treatment of Patient A.

e) 14.08.20 Statement by Dr Smithson that C's raising of concerns was no more than "tit for tat"

140. Dr Smithson denies making any such comment, The Claimant's own actual evidence was that Dr Smithson reported that "other people had expressed the view that this was "tit-for-tat"". Even taking the Claimant's evidence at its highest, her reporting of such observations is not an act subjecting him to a detriment.

f) 21.08.20 Statement by Dr Makani that C should think about his family and step down from the clinical director role, and
g) 24.08.20 Threat by Dr Makani to move C to a MHPS investigation if he did not step down clinical director role

141. We prefer Dr Makani's evidence that any discussion about the Claimant's family was initiated by him.

142. By referring to the possibility of instituting an MHPS investigation she was , however, clearly putting pressure on the Claimant to agree to step down voluntarily from his role. Had proceedings been commenced he would have been obliged to step down until they

had concluded. Under this pressure the Claimant did then agree to stand down on 27th August 2020. That is a detriment to him.

143. However matters had by this time progressed from the initial request made on 14th August 2020. The initial approach to the Royal College to carry out a review of the cardiology department had been made and the driving imperative was now to facilitate that process outside of the previous leadership, so as to address the dysfunction. That is clearly expressed in the joint letter from D Makani and Ms Cope dated 17th August 2020:

"Dr Purva outlined that there has been a number of concerns raised regarding the behaviours and culture in the Cardiology Department and that there is increasing concern that if this is not addressed there may be an impact on patient safety. We are also very concerned about the stress this is placing on you and your colleagues within the department.
The Executive Team has considered what actions are felt necessary to address the concerns and have acknowledged that a number of actions and interventions have been put in place over recent years, without success.
I outlined that the Executive Team have decided to commission an Independent External review of the department. A further action that the Executive team felt is necessary, is to temporarily appoint a new clinical leadership team and to that end, we asked you to consider stepping down from your Clinical Lead role for a 6 month period. We felt it was necessary for all of the Clinical Leads / Clinical Directors to step down temporarily."

144. The actions in pressurising the Claimant to accede to this proposal are therefore now separable from the fact that his protected disclosure had been a more than trivial influence upon the original decision to embark on this course of action. Again, referring to the citation from Fecitt which we have already quoted in another context, the need to resolve a difficult and dysfunctional situation would and does, we are satisfied, here provide a lawful explanation for imposing detrimental treatment even on an innocent whistleblower.

h) 17.02.21 Decision to remove C from clinical director role on 3 months' notice

145. Similarly we are satisfied that by the time came when the Claimant's temporary removal from his position was made permanent, the reason for this act is also properly separable from the making of the earlier protected disclosure. By this stage the Royal College had produced their interim report and a restructuring of the department was in contemplation. The report, whilst not going so far as to specifically recommend permanent removal did state :

"We support the decision to stand down the existing clinical leadership team"
It also endorsed the continuation in role of Dr Sedman and supported a move to a separate cardiology directorate, recognising "weaknesses in the previous management".
It was on the back of this report that the Claimant was given notice, and not on the ground that he had made a protected qualifying disclosure,

i) 24.02.21 Deliberate untruth told by Kate Southgate about conclusions of Serious Incident Report

146. We have not heard evidence from Kate Southgate, the Deputy Director of Quality Governance, who chaired the SI investigation panel.

147. There is therefore nothing to contradict the Claimant's account that he was led to believe in discussion with Ms Sothgate that the final report would "be damning". On sight of the final report the Claimant was therefore entitled to form the view that MS Southgate had been less that candid with him, telling him what she thought he wanted to hear. Such a lack of openness with a senior clinician is reasonably understood to amount to a detriment.

148. However even allowing for the fact that the Respondent has not provided a reason for that detrimental treatment, there is nothing whatsoever to suggest that it was in fact on the ground that the Claimant had made a protected qualifying disclosure.

j) 05/08.03.21 Request to Dr Shrivastava for urgent opinion without provision of crucial evidence

149. Dr Vivek Shrivastava is a consultant interventional radiologist. He was instructed by the SI investigation panel to comment specifically upon the "gold standard" angiogram for Patient A. He was asked to do so because of his specialist expertise, and not on the ground that the Claimant had made a protected qualifying disclosure.

150. His conclusion on that specific point in isolation was, it appears, entirely in accordance with his evidence given to this Tribunal when called by the Claimant. That is that the junior doctor reporting to the MDT meeting before the TAVI operation only upon that recent angiogram had not identified any material difference between the two arteries, but that his, Dr Shrivastava's, expert second opinion after the event was that that interpretation of the results had been incorrect. It is clear from his email to D Makani of 10th March 2021 that D Shrivastava was also aware of the CT scan from December 2020 which showed significant iliac disease on the right side, confirming his analysis of the angiogram. His coming to this conclusion was not any detriment to the Claimant.

k) 22.02.21 Reinstatement of Ben Davison to SI panel

151. Dr Ben Davison, although himself partly involved in the operation upon Patient A, and therefore removed from the panel at an earlier stage was not in fact "reinstated" but was requested to give technical advice because of the difficulty in finding anyone else with his particular and specialist expertise: it was not done on the ground that the Claimant had made a protected qualifying disclosure.

l) 10.03.21 Finalisation of SI panel review without reference to independent person

152. There is no requirement for the report to have been rereferred to an independent person for review. Not doing so was neither a detriment to the Claimant nor was it done on the ground that he had made a protected qualifying disclosure.

m) 10.03.21 Material changes made to the SI Panel report between 24 February 2021 and 10 March 2021, which had the effect of significantly toning down the criticisms of human error in the treatment of patient A

153. The Claimant had initially disclosed information tending to show that the health and safety of Patient A had been endangered so that an SI investigation was warranted. That

had been promptly acceded to, and Ms Southgate's panel was convened. The Claimant's case is that because he disagreed with the decision and considered it incomplete it was an attack upon his personal reputation and integrity, he having put his name to the SI referral.

154. This is not however the situation as in Jesudason where the detrimental document was a direct repudiation of the whistle-blower's complaints. In our view this is more properly to be equated with an "unjustified sense of grievance" which per Shamoon is not a detriment.: the Claimant interprets this as a personal attack rather than the outcome of an impersonal formal process

155. Having said that, the tracked changes which show that any references at all to the Mensio3 report were deliberately omitted from the final version of the report is understandably concerning. That is so, even though a fair representation of the conclusion might well have been that the conclusions in this report were considered in the urgent circumstances where a change of plan fell to be considered to be outweighed by the reported analysis of the angiogram.

156. Even if this were properly a detriment, as in Jesudason the claim would fail on causation. The SI report was intended to present the conclusion of an inquiry explaining the Trust's findings, not to subject the Claimant to a detriment on the ground that he had made a protected qualifying disclosure.

n) 10.06.21 Threat by Ellen Ryabov to C that he should "let go" of his concerns about the SI review or "it will leave you in a difficult position"

157. The Claimant's full version of what was allegedly said is recorded in a contemporaneous email from him to Una Mcleod, a Non Executive Director of the Trust:

"Brags I understand from Wendy (Nursing Director) that you still have a problem with the TAVI case. It has been investigated thoroughly and completed. If you have new evidence you need to bring it in otherwise you need to let it that go.
It leaves you in a difficult position and leaves us in a difficult position as well".

158. The Claimant was not prevented from adducing new evidence. Indeed he did then provide copies of the documentation which he said should have been referenced in the SI report, but was not, and when he did these were, on 12th July 2021 immediately forwarded By Dr Makani to the Coroner for further consideration.

159. It is perfectly clear that the context for any such comments made by Ms Ryabov was the perceived imperative to achieve finality once the SI report had been concluded, and they were not said on the ground that the Claimant had made a protected qualifying disclosure.

160. Although the Claimant claimed to have been intimidated by this observation the saying of these words does not reasonably constitute a detriment to him in all the circumstances.

o) 13.12.21 Circulation of consultants' letter to Dr Chelliah and Dr Davison and others in breach of protected disclosure policy

q) 13.12.21 – 26.01.22 Appointment of two external clinicians to review cases

the concerns raised by the signatories' letter of 10 December 2021 and the failure to consult with the signatories in the preparation of their reports

161. The seven consultants' letter of 13th December 2022 was expressly headed as being made under the protected disclosure policy (CP169). That policy provided for the anonymity of complainants to be preserved in most circumstances.

"The Hull University Teaching Hospitals NHS Trust will treat all such disclosures in a confidential and sensitive manner. The identity of the individual making the allegation may be kept confidential so long as it does not hinder or frustrate any investigation. It is possible that the investigation process may reveal the source of the information and the individual making the disclosure may need to provide a statement as part of the evidence required."

162. In the context of this complaint that reference to CP 169 was, however, only part of the story. The fact that this complaint was to be raised was not a secret. Dr Lakshimnaray was certainly told about it and did not consider himself under any embargo from the seven consultant's involved, so that he passed on this information to Dr Makani in advance of the letter actually being received. Dr Makani was therefore anticipating it coming and had evidently already discussed this with Dr Thackray, so that when it was in fact received she immediately forwarded it to him in order to discuss the next steps Also the seven consultants themselves also disclosed the letter to the coroner.

163. Dr Thackray forwarded the letter to Dr Davison (the clinical governance lead for carfdiolgy), Dr Balerdi (the clinical lead for cardiology and the Claimant's line manager) and Carole Joyce (the divisional general manager for cardiology) but not to Dr Chelliah.. He also prepared a "rapid response "plan:

"Dear Purva,
Thank you for this letter which has come to you and Chris
With your agreement may I suggest the following series of actions.
1) I will commission an external review of the 4 patients who suffered mortality this calendar year (out of 55 patients). Needless to say we have undertaken internal review, but there will always be value in getting independent external review. I will aim to have this completed by the end of December, but will be somewhat at the mercy of the availability of appropriate TAVI clinicians.
2) I will organise proctoring of the TAVI lists for a period of time to be determined by the proctor, the service was due to have further input from the Proctor having been up and running for two years and planning to increase the number of Edwards cases. I will do this forthwith.
3) We are having a mortality meeting on the 24th December which is the departments opportunity to assess the service outcomes in detail and the appropriate forum to raise any further concerns and to share in the learning."

164. On 16th December 2021 Dr Makani and Mr Long informed the Claimant that an independent review of the four deaths mention in the letter had been arranged.

165. On 17th December 2021 the Claimant met with Ms Harding and discussed the whistle blowing complaint with her, following which she responded to Dr Makani and flagged up the potential breach of confidentiality under the policy.

166. On 22nd December 2021 Dr Makani told the Claimant that two independent experts had been commissioned and that the first of those, who was Dr Zaman, had already prepared his findings and would be happy to meet with the Claimant to present his conclusions if he wished. The Claimant was also at this stage given the opportunity not to have his identity disclosed to Dr Zaman, although he had also been reminded that Trust policy expressly provide that e identity of a complainant may have to be revealed if not to do so would otherwise hinder the investigation, and particularly if that person were required to make a statement.

167. The second reviewer, that is Dr Khogali, reported on 18th January 2022. The seven consultants then declined to meet with him on the grounds that there was no value in doing so as the reported conclusions from the two experts were already said to have provided sufficient assurance as to the safety of the TAVI process, a conclusion with which the Claimant did not agree.

168. We accept the evidence of Dr Thackray that the circulation of the 13th December letter amongst certain senior management and clinicians was done to ensure a swift and appropriately serious response to a situation where the immediate suspension of the whole TAVI service was otherwise potentially necessary pending investigation. This was also the reason for the speedy commissioning of two expert reports. The response was therefore not on the ground that the Claimant had made a protected qualifying disclosure but in order to seek to ascertain whether and to ensure that the TAVI service was in fact running in a safe and efficient manner.

p) 13.12.21 Simon Thackray's comments to Professor Clark

169. This was a private discussion where apparently Dr Clark reported back to the Claimant that the Trust were not happy with what the Claimant had done, and that DR Chelliah was out for revenge. This hearsay allegation is not , however confirmed by the actual evidence of Dr Clark. We therefore prefer the evidence of Dr Thackray that he did not use the phrases alleged.

170. Whilst whatever Dr Thackray did say on this occasion about the continued dysfunctionality in the department was no doubt influenced by the fact of the recent seven consultant's letter, the expression of his personal views in these circumstances is not the subjecting of the Claimant to any detriment.

r) 17.01.22 Dr John's request that Dr Ramlall conduct a SJR into care provided by C to Patient D

171. The resurrection of the request to discuss this case at an M & M review meeting came shortly after the seven consultants' "whistleblowing letter of 13th December 2021. However on balance we find that the motivation for Dr John making this request was a genuine concern about the Claimant's actions in the case of Patient D, albeit coloured by the fact that their personal animosity no doubt meant that he to an extent relished the prospect of the Claimant being potentially criticised. That general antipathy is not, however, connected to the making of any specific protected disclosure.

172. In this case as in all the other complaints about matters peripheral to the MHPS investigation the distinction between act and detriment must be maintained. The request for an M& M review did not necessarily lead to any finding which was potentially adverse to the Claimant, so that he might reasonably consider himself disadvantaged. The separation of the initial request by D John from the eventual decision to institute an MHPS investigation is fully explored in our analysis of allegation **[bb] Continued pursuit of MHPS investigation – up to November 2022.** The act of Dr John did not result in the Claimant being subjected to the detriment of the ongoing MHPS investigation.

s) 15.02.22 SJR carried out by Dr Ramlall

173. We are satisfied that the conclusion reached by Dr Ramlall was genuinely and honestly reached. Although his findings went beyond the scope of what would ordinarily be dealt with at a first sage SJR, he was entitled to reach that conclusion if satisfied that it was appropriate and having done so he properly referred the matter for a decision as to what if any further action should in fact be taken.

174. The separation of the initial conclusion by Dr Ramlall from the eventual decision to institute an MHPS investigation is fully explored in our analysis of allegation [**bb] Continued pursuit of MHPS investigation – up to November 2022**. The act of Dr Ramlall did not itself result in the Claimant being subjected to the detriment of the ongoing MHPS investigation.

175. The reason why Dr Ramlall conducted an SJR was that he was requested, in his capacity as Clinical Governance Lead to discuss the case of Patient D at an M& M review, and he decided that it was appropriate to prepare to do that using the structure of an SJR. He did not act on the ground that the Claimant had made protected qualifying disclosure.

t) 27.02.22 -02.03.22 Appointment of Dr Caplin to review Patient D's care

u) 03.2022 The failure to inform C of Dr John's complaint and/or Dr Ramlall's SJR and/or the report commissioned from Dr Caplin and Prof Wheatcroft until after the decision was made to undertake a MHPS investigation

aa) 27.02022 & 16.03.22 Decision to obtain two external reviews for purposes of MHPS investigation

176. These matters have already been fully considered under our decision on allegation **[bb] Continued pursuit of MHPS investigation – up to November 2022** which we rejected.

177. Dr Makani, in conjunction with others, carried out preliminary inquiries to determine, following Dr Ramlall's SJR, whether there was any case for the Claimant to answer. Firstly Dr Caplin and then Professor Wheatcroft were instructed because independent opinion was considered appropriate as part of that inquiry. The decision to seek their advice was not taken on the ground that the Claimant had made a protected qualifying disclosure.

178. It did not necessarily follow that ether expert would reach the conclusions which they in fact did. That giving of instructions in itself did not subject he Claimant to any detriment.

The reason why this inquiry was not disclosed to the Claimant earlier was that its sole purpose was to determine if there was potentially a case to answer and until that question had been answered in the affirmative the Claimant did not need to be informed: it was not a failure to act on the ground that the Claimants had made a protected qualifying disclosure

v) 27,02.22 – 10.03.22 Decision to undertake MHPS investigation into C's treatment of Patient D

179. This has already been fully considered under our decision on allegation **[bb] Continued pursuit of MHPS investigation – up to November 2022** which we rejected.

w) 26.07.20 - 02.08.20 Dr Chelliah's attempts to recruit individuals to complain about C

180. Dr Chelliah raised concerns about the Claimant with the Freedom to Speak Up Guardian on 4th August 2020. This included a complaint that the Claimant had adopted a bullying and undermining attitude not only towards himself but also towards another more junior consultant, in particular by belittling them when they were presenting a patient safety audit. The two consultants concerned had both already approached Carla Ramsay on 27th February 2020 long before the making of any alleged protected qualifying disclosure, but had not pursued their concerns at this time. The junior consultant did then himself approach Ms Ramsay again on 2nd August 2020.

181. This was not an attempt to recruit individuals (sic) to complain about the Claimant. Nor was the approach made on the ground that the Claimant had made a protected qualifying disclosure: it was because from February 2020 he was perceived to have acted inappropriately In a context completely removed from the issues around Patient A.

y) 22.04.22 Use of concerns over C's treatment of Patient D to justify non-investigation of C's grievance against D John

182. This is not at all obviously distinct from allegation [**x] Failure to investigation C's grievance against Dr John dated 17.03.22 -26.09.22** which has already been considered and rejected.

183. In any event the allegation of detriment is wholly unclear. Mr Nearney used the ongoing investigation into Patient D as an example of a situation where future concerns, if and when raised, would also necessarily have to be investigated as appropriate and could not simply be prohibited in advance, not as a justification for not investigating the alleged grievance against Dr John. And he clearly did not include this reference on the ground that the Claimant had made a protected disclosure:

184. " As I am sure you appreciate, the Trust must review every concern raised as if it has been made in good faith – we cannot assume otherwise. Even though the volume of complaints may suggest a targeted campaign, the Trust cannot ignore concerns raised where they appear to have been raised in the interests of patient safety. On this basis there is a limit to what the Trust can do in response to any future complaints.

As an example, you will be aware of the current concerns raised in relation to the

management of a 67 year old patient that sadly died on 6th January 2021. Although we didn't discuss this in our meeting, you will know that Pete Sedman, Deputy CMO has been asked to make preliminary enquiries and his finding will influence what may happen next. I believe Pete has already spoken with you directly about this."

cc) 26.07.20 Dr Cheliah's complaint about the Claimant made on 26th July 2020

185. Dr Cheliah drafted a document dated 26th July 2020 which identified, amongst other concerns about his allegedly bullying behaviour, a specific complaint against the Claimant in respect of the escalation of the investigation into the treatment of Patient A to an SI.

"I wish to raise a formal complaint against Dr Bragadeesh, of bullying, harassment and undermining behaviour that I have been victim to.
Evidence 1
Bullying and undermining behaviour
As TAVI lead, we recently had a complication where the patient's iliac artery ruptured during the procedure, requiring stenting of the iliac on the table and open vascular repair. She unfortunately died over the course of a week or so with hospital acquired pneumonia. During the complication, the entire tavi team worked extremely well to ensure the patient survived the initial insult. We had both vascular and IR on site and they were very complimentary of how the entire cath lab dealt with the situation.
As is usually the case, we had our own review and debrief of events to learn. In addition to the cath lab debrief, we had a virtual debrief, minuted, with the wider TAVI team of vascular surgery and interventional radiology.
However very soon after the case, there was a discrete attempt by Dr Bragadeesh, who was not even directly involved in the case, to have this registered as a never event. When it was apparent this did not fall under the definition of a never event, he tried to raise this as an SI.
Dr Bragadeesh never attempted to discuss the case or understand the complication with any member of the TAVI team. Instead, as is usually the case, he discretely pressurised the nurses in the cath lab to gather information, to enable him to register it as a never event.
This represents undermining behaviour and we feel is an attempt to discredit me and the TAVI team."

186. Whilst this is primarily a complaint about the manner in which the Claimant addressed his concerns, it cannot sensibly be unravelled from the fact that he had raised these matters in respect of patient safety. There is no evidence however that Dr Challiah was actually aware of the content of the specific alleged protected disclosures made, so that the Claimant seeks to rely on Bilsborough , which is not however authority that we may permit a claim on the basis of anticipated rather than actual disclosure.

187. When Dr Challiah met with the Freedom to Speak Up Guardian on 4th August 2020, although he read from parts of his prepared document, it is clear that he did not refer at all to the passage cited above. We accept that this was because by this stage Dr Challiah was accepting of the fact that an SI had been duly authorised.

188. This uncommunicated "complaint" which was never in fact pursued is not a detriment to which the Claimant was subjected.

EMPLOYMENT JUDGE LANCASTER

DATE 30th November 2023