THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE K ANDREWS

MEMBERS: Mr A de Launay
Mr M Walton

BETWEEN:

Miss A Arafa
Claimant

AND

Epsom and St Helier
Respondent

ON: 5 – 21 September 2016

26-28 September 2016 and 24 & 25 January 2017 in chambers

Appearances:

For the Claimant: Mr S Rahman, Counsel

For the Respondent: Mr B Cooper, Counsel

JUDGMENT

The claimant was not subjected to any detriments by the respondent on the ground that she had made a protected disclosure or disclosures. Her claim fails and is dismissed.

REASONS

1. In this matter the claimant complains that she was subjected to a significant number of detriments by the respondent, her employer, on the ground that she had made protected disclosures.

Issues

2. An agreed list of issues was before the Tribunal a copy of which is attached at appendix A. In addition the respondent conceded that the disclosures in 2010 were protected. It also clarified that in respect of the 2015 disclosures the only dispute is whether they were made with a reasonable belief that they were in the public interest.

3. There is also a preliminary issue in that the respondent says that the claims arising from events before 15 April 2015 are out of time and should be dismissed.

Evidence & Documents

4. We heard evidence from the claimant. In addition, witness orders were issued at her request on the first day of the Hearing in respect of Mr A Matiluko and Mr O Duroshola, both consultants employed by the respondent, and their evidence was heard after hers. For the respondent we heard from:
    a. Dr R El-Rifai, Consultant Paediatrician & former Clinical Director
    b. Dr R Charlton, Consultant Paediatrician & Joint Medical Director
    c. Mr H Shehata, Consultant Obstetrician & Gynaecologist and Clinical Director
    d. Ms D Sumping, Superintendent Sonographer in Ultrasound, St Helier
    e. Ms C Chapman, Superintendent Sonographer in Ultrasound, Epsom
    f. Ms V Kakumani, Consultant Obstetrician & Gynaecologist
    g. Mr S Simper, Divisional General Manager
    h. Mr P Davies, Director of Strategy, Corporate Affairs & ICT

5. An agreed bundle of documents was also before the Tribunal. Significant numbers of pages were added to that bundle, mainly by the claimant, during the course of the Hearing which led to the cross examination of the claimant being interrupted on day 3 to allow examination in chief on those new documents. That was clearly unsatisfactory but Mr Cooper had the opportunity to address us on any issues arising as a result in his submissions. In the event he did not feel that was necessary.

6. At the conclusion of the Hearing we had the benefit of written submissions from both parties which were supplemented orally. In his submissions Mr Cooper suggested an approach to our deliberations which would start with a decision on whether the alleged detriments that are prima facie in time are found to be unlawful and only if they are to then work back to see if there they connect with earlier events. This approach would have been

entirely logical and was in many ways very attractive. In light of Mr Rahman's strong objections to such an approach, however, and the fact that there is another pending claim from the claimant in respect of an alleged unfair constructive dismissal and further allegations of whistleblowing, we decided to approach our deliberations by working through the matter chronologically and addressing the identified issues in turn.

7. Both parties also submitted lengthy schedules cross referencing documents to each issue. These were extremely helpful however we have not taken into account in our deliberations any documents that were referred to in these schedules but were not referred to at all in the witness statements or during the hearing itself. The document submitted on behalf of the claimant in particular had many references to documents that were not referred to in her statement or put to the respondent's witnesses.

Relevant Law

8. Protections are given to workers that make protected disclosures as defined in the Employment Rights Act 1996 (the 1996 Act).

9. Any disclosure of information which in the reasonable belief of the worker making the disclosure and, if made on or after 25 June 2013, is made in the public interest and tends to show one or more of the matters listed at section 43B(1) will be a qualifying disclosure. That list includes that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and that the health and safety of any individual has been, is being or is likely to be endangered. The disclosure must identify, albeit not in strict legal language, the breach relied upon (Fincham v H M Prison Service EAT 0925 & 0991/01).

10. To be protected a qualifying disclosure has to be made in good faith (if made before 25 June 2013) and in accordance with one of six methods of disclosure which include to the person's employer (section 43C(1)).

11. Whether a worker had a reasonable belief as required by section 43B will be judged by taking into account that worker's individual circumstances. Accordingly those with relevant professional knowledge will be held to a higher standard than laypersons in respect of what is reasonable for them to believe (Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4).

12. The information does not have to be true but to be reasonably believed to be true there must be some evidential basis for it. The worker must exercise some judgment on his or her own part consistent with the evidence and resources available (Darnton v University of Surrey 2003 ICR 615).

13. "Public interest" is not defined in the 1996 Act nor is there any statutory guidance as to its meaning but the worker must reasonably believe the disclosures to be in the public interest.

14. Section 47B gives a worker the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done "on the ground" that he or she has made a protected disclosure. Clearly this imports a causation test but the protected disclosure need not be the only or main reason for the act in question provided it had a material (i.e. more than trivial) influence (Fecitt v NHS Manchester 2012 ICR 372 CA).

15. It is for the claimant to prove that the act or omission complained of caused a detriment. "Detriment" is not defined in the Act but case law has established that it is to be determined from the point of view of the claimant and will exist if a reasonable person would or might take the view that the employer's conduct had been to her detriment. (Deer v University of Oxford 2015 ICR 1213).

16. It is for the employer to show the ground on which any act, or deliberate failure to act, was done (Section 48(2)).

17. In considering whether the evidence supports drawing an adverse inference, the Tribunal should consider the acts complained of individually and also in the round (Qureshi v Victoria University of Manchester 2001 ICR 863).

18. Complaints pursuant to these sections must be presented to the Tribunal before the end of the period of three months (as adjusted by the early conciliation provisions) 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 within such further period as the Tribunal considered reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within that three month period (as adjusted by the early conciliation provisions). Where an act extends over a period of time the date of the act is the last day of that period and a deliberate failure to act is treated as done when it was decided on (section 48(4)). Otherwise, the Tribunal "shall not" consider the complaint (section 48(3)). In applying this section it is important to maintain the distinction between the act which gave rise to the detriment and the effect of that detriment. Time starts to run from the date of that act (Warrior Square Recoveries Ltd v Flynn UKEAT/0154/12).

19. Whether it was reasonably practicable for the Claimant to submit the claim in time is a question of fact for the Tribunal to decide having looked at all the surrounding circumstances and considered and evaluated the Claimant's reasons. It is however a relatively high threshold for a claimant to meet.

20. This summary of the law can be reduced to a number of questions to be answered:

    a. Did the claimant make a protected disclosure?
    b. What is the act/failure to act complained of?
    c. Was that act/failure a cause of a detriment? (burden of proof on claimant)

d. If yes, on what ground did the respondent do that act? (burden of proof on respondent)
e. Was that act/failure (or the last act/failure in a series of similar acts/failures) before the end of the three month period (appropriately adjusted by the early conciliation provisions) prior to the presentation of the complaint to the Tribunal?
f. If not, was it reasonably practicable for the complaint to be so presented?
g. If not, was the complaint presented within a further reasonable period?

Findings of Fact

21. Having assessed all the evidence, both oral and written, we find on the balance of probabilities the following to be the relevant facts. A feature of this case, which is not uncommon, was that a large amount of material was referred to and evidence was given in relation to what was described by the claimant as background matters. We have only recorded our findings of fact in relation to such background matters where we find that they are relevant to the issues.

22. <u>The respondent</u>

23. The respondent is an NHS trust based on two sites – St Helier and Epsom.

24. The management structure in the obstetrics (obs) and gynaecological (gynae) department (O&G) in which the claimant worked, is that consultants report to medical leads who in turn report to clinical directors who report to a medical director. Each consultant can also take on certain managerial responsibilities. Each medical professional also has a responsibility for their overall standards of conduct and skill to the General Medical Council (GMC).

25. There is also a non-medically qualified cohort of managers including general managers and divisional general managers. Ultimately they all report to the chief executive, Mr Elkeles.

26. In practice only elective gynaecological surgery is done at Epsom. If an emergency arises then the patient will if possible be transferred to St Helier for the surgery. Only if that is not possible will emergency gynaecological surgery be carried out at Epsom at which point a second consultant with relevant experience will be called in. A fundamental dispute between the parties is that the claimant says the practice of the respondent in focusing her role on obs, with no routine gynae work, de-skilled her in gynae and this became an issue of patient safety when she was asked to cover emergency gynae work when on call. The respondent's position is there was sufficient specialist consultant on call cover available to support the claimant in such a situation, which was in any event rare, and that the claimant's general obs skills were sufficient in any event. The on-call arrangement was that if the claimant required

specialist assistance she would contact a consultant from a list of those available who would attend within 30 minutes. The claimant's position was that this was inadequate as she was forced to call around a number of consultants to find someone that was available and that in an emergency situation, where time is of the essence, this could result in unacceptable delay. Her position was that a dedicated gynae consultant rota should have been maintained.

27. Having heard evidence from a number of consultants on this issue, it is clear that there is a variety of views as to what is and is not appropriate. The Royal College of Obstetricians and Gynaecologists issued a safety alert dated 8 August 2011 which acknowledged that this was an important patient safety issue. It noted that:

"…there is such an enormous variation in the arrangements at different trusts;…

There are certainly many consultants who do not perform major gynaecology surgery who are on-call for gynaecology. Local arrangements are obviously necessary for the additional support needed in the rare event of major surgery being needed out of hours, or massive obstetric haemorrhage.

We recommend that second consultant should be called in if it seems likely that peripartum hysterectomy may be necessary…

We therefore advise Fellows and Members to discuss their local arrangements within their own clinical directorates."

The claimant agreed that there are a number of possible solutions to the issue but maintained that at Epsom the issue had not been dealt with. Mr Duroshola agreed with the claimant that he felt the arrangements at Epsom were unsafe but said it was for the respondent to satisfy itself as to what system to implement.

28. The respondent's position is that it was aware of that alert, reviewed its practice and concluded that its on-call rota as described above was adequate.

29. It is not for this Tribunal to determine which of these opposing views is to be preferred even though we were referred by the claimant to various expressions of opinion on this by different reviews/investigations.

30. Within the department at the relevant time Ms Kakumani had a lead responsibility for overseeing the allocation of annual leave and also the preparation of the general rotas including the monthly on call rota.

31. In respect of annual leave the policy (unwritten but well known in the department) was that only two consultants could be on holiday at the same time and leave was allocated on a first come first served basis. The exception to this was Mr Shehata who worked across both sites. Leave was approved by Ms Kakumani and written on a wall chart that was displayed in her office. Bank holidays were covered by consultants in turn.

32. In respect of rotas, Ms Kakumani had full responsibility for allocating cover - in particular prospective cover - for labour ward sessions. She performed this role until 2014/15 when it was taken over by Mr H Jan. She allocated these sessions equally amongst the consultants, without any pressure from Mr Shehata who was not aware of the day to day detail although when particular problems arose she would have to allocate sessions to whoever was available. The claimant's case is that labour ward sessions were unpopular especially if too many were allocated in one week because they are particularly stressful. That was supported by Mr Duroshola but refuted by Ms Kakumani. We find that the position is as summarised by Ms Kakumani who said that the position varies from consultant to consultant depending upon whether they are an obstetrician or a gynaecologist.

33. The respondent, in common with all NHS trusts, operates the Maintaining High Professional Standards in the Modern NHS (MHPS) process. Part I deals with action to be taken when concern arises with the performance of a practitioner. This includes that when serious concerns are raised about a practitioner, the employer must urgently consider whether it is necessary to place temporary restrictions on their practice. Part II deals with restriction of practice and exclusion from work. The purpose of exclusion is stated to be either to protect the interest of patients/other staff or to assist the investigative process where there is a clear risk to the gathering of evidence.

34. A case manager will be appointed and if a formal route is followed an appropriately experienced person is appointed as the case investigator. The investigator must formally involve a senior member of the medical staff where a question of clinical judgement is raised. The investigation should be completed within four weeks and a report submitted to the case manager who will then make a decision as to whether further action should be taken.

35. The respondent also operates a Raising Concerns at Work policy which records the importance of staff raising concerns about any safety, malpractice or wrongdoing at work issue at the earliest reasonable opportunity and being protected from victimisation as a result. It sets out a procedure to be followed when disclosures of serious concern are made. The parties agreed that this procedure was not followed when the claimant raised her various concerns during her employment.

36. <u>The claimant's role</u>

37. The claimant, an experienced professional in her field, commenced employment with the respondent in November 2009 as a locum consultant in O&G at Epsom. Mr Shehata and Dr Charlton were part of the appointments committee that appointed her. She says that she was expecting to do both O<u>&</u>G as a locum but it became clear that she was expected to do just obs. She says that a locum has no control over the work performed but in time she had a conversation with Mr Shehata as she wanted to do gynae as well. An email exchange with Ms Smith,

Service Manager, in early January 2010 demonstrates that at this stage the claimant thought she would get and was trying to get gynae surgery experience.

38. The claimant says that shortly after her appointment as a locum – but she could not say exactly when or whether it pre-dated the first protected disclosure – her gynae work was moved to a consultant colleague Ms K Ammar. The respondent, whose position we accept, says that Ms Ammar was appointed to a substantive role before the claimant and that, as above, the claimant's role was to do obs not gynae.

39. In early 2010 a permanent position as a consultant in O&G with a lead role in fetal medicine was advertised by the respondent. That advert stated that the post is to be based at Epsom and is a 10 programmed activities (PAs) contract with the post holder to take part in a 1:7 on call. The accompanying job description stated that the responsibilities included participation in the labour ward and that the on call duties were as in the job plan. Also that it was a new post and had been created to facilitate an increase in consultant cover on the labour ward. No reference to performing colposcopies, a gynae procedure, appeared in the advert or supporting documents.

40. The proposed job plan, to be discussed with the post holder on appointment and reviewed annually, was attached to the job description. A job plan for a full time role usually comprises 10 PAs including eight clinical sessions and two dedicated to learning and professional development known as supporting professional activities (SPAs). The plans are agreed each year between management and the consultant taking into account service needs and personal preference. If agreement is not possible there is a job planning appeal process. Further, if any changes to a job plan are required the on-line system provides for changes to be proposed by one party and then accepted by another.

41. In this case the job plan issued with the job description during the recruitment process provided for 7.5 PAs of direct care (including unpredictable on call) and 2.5 SPAs. The direct care included 0.5 hysteroscopy (a gynaecological procedure). Mr Shehata made it clear to the claimant that that 0.5 PA was unlikely to remain on the job plan. It also showed 1.5 PAs of labour ward, 2.5 PAs of prospective labour ward cover and 1.5 PAs of unpredictable emergency on call work at variable times.

42. When the job was advertised the claimant had a discussion with Mr Shehata, who at that time was the medical lead for the women's and children's department and would be the line manager of the person appointed. There is a significant dispute between them as to what was said. He says he made it clear that although the role was described as O&G it would in fact be an obs role with no opportunity to do gynae and that that remained his positon. He says that the claimant confirmed on the following day that she had thought about it and had decided to apply for the position. The claimant says that when Mr Shehata told her that the role would be an obs one she said that she would not apply – as she

particularly wanted to continue to do gynae work and would not move to a new role some distance from her home to do a job that she did not want – and that he then agreed that the role would include some gynae work.

43. Ms Kakumani says that at this time it was made very clear by Mr Shehata to all the consultants that there would be no gynae work going forward in the respondent as this had been taken by GPs into the community as a cost saving measure.

44. On balance we prefer Mr Shehata's account of his and the claimant's conversations before she applied for the job. It is supported by the consistency of evidence between him and Ms Kakumani, the terms of the job description and most significantly the very clear terms of his email to the claimant on 27 August 2010 quoted below.

45. In due course the claimant successfully applied for the role with the support of a very positive reference from Ms Kakumani. That reference referred to, among other things, the claimant's "excellent scanning skills".

46. The claimant commenced in role on 1 April 2010.

47. After her appointment a job plan and timetable was issued for the claimant for the period 14 June 2010 – 30 November 2011. This provided that she worked 2.5 sessions on the labour ward with an additional 0.5 prospective cover. The claimant says that that 0.5 session should be covered by all the consultants equally but in reality she did it every day and that the number she did increased after her first protected disclosure.

48. Mr Shehata agreed that the claimant could attend gynae theatre sessions with Ms Ellis, consultant O&G, every other week in order to maintain her skills and she did so attend from June to September 2010. This was stopped by Mr Shehata at the end of August 2010 because trainee doctors had complained that as a result they were not getting enough opportunity for gynae surgery practice. There is a dispute between the claimant and Mr Shehata as to whether he told her that this was the reason at the time. Whether or not he did, we find that that was the reason.

49. It was also agreed that the claimant could attend at Kings College Hospital (KCH) on Tuesdays (not a regular working day for her at the respondent) in order for her to improve her scanning skills. This continued until she moved to St Helier on September 2011.

50. In late 2010 the claimant first asked Mr Shehata if she could perform colposcopies. He refused as this did not appear on her job plan. Emails show that performance of colposcopies was a live issue between the parties in 2012 (where Dr Charlton and Ms Croucher, joint clinical director, considered her request and indicated their agreement for her to do them in her SPA time but outside of the respondent as they had no opportunities) and 2014 (where the claimant repeated that she wanted to do them but Mr Katesmark who was then the lead colposcopist for the respondent indicated that he could not offer her sessions without supervised

confirmation of competence and that he doubted she was certified). The claimant disagrees that these were valid reasons. She says that Dr Charlton, Ms Croucher and Mr Katesmark were all influenced by Mr Shehata as there was no good reason for her offer to do them for free to be refused.

51. We find that the claimant was prevented from doing colposcopies within the respondent in 2010, 2012 and 2014 but there were valid reasons for that on all those occasions and in 2012 she was offered an alternative of doing them elsewhere.

52. Labour Ward 2010-2015

53. By the end of 2010 the claimant had been appointed as the medical lead for the labour ward. According to an email from Dr El-Rifai on 28 June 2011 this meant that the claimant would be present on the labour ward and responsible for direct learning and support for midwives and juniors as well as managing patients directly and contributing to the smooth, safe and efficient running of the ward. This would necessarily involve being present on the ward. The respondent accepts that for the period April 2010 to September 2011 the claimant did more direct labour ward sessions than her colleagues but says that that was because she was the labour ward lead. We accept that evidence. In respect of prospective cover on the labour ward, the claimant raised the issue at the meeting on 25 November 2010 described below and also specifically complained in an email to Dr Charlton on 31 January 2011 that she was doing more prospective sessions than her colleagues. In her cross examination the claimant said that this was because she had made protected disclosures in 2010.

54. In response to that email the claimant had a meeting with Dr Charlton to discuss her issues. Dr Charlton then emailed Dr El-Rifai who replied that in relation to the labour ward issue she had had a discussion with Ms Neale of HR and Mr Briggs, the claimant's British Medical Association (BMA) representative, the previous year (2010) and they had reviewed the rotas and found no evidence of inequity. Nonetheless she said that as the matter was continuing she would ask someone outside the directorate to look at the issue again. Ms Westcott (general manager of women's health) did that and again no evidence of unfairness was found. There was also evidence of a review of on call rotas in September 2011 that concluded they were shared fairly equally. We find that the claimant was not being allocated a disproportionate number of labour ward sessions in the period to September 2011 – either direct or prospective. This finding is despite Mr Duroshola's evidence that in his opinion the claimant was doing too many labour ward sessions and was doing more than anyone else and that this was unfair.

55. In September 2011 the claimant moved to St Helier, as described below, and therefore lost the labour ward lead role. As part of the mediation agreement in October 2012, again described below, it was agreed that the

claimant would return to Epsom and she would resume the lead role after three months. In December 2012 it was agreed that her return to the role would be delayed pending the then investigation. That investigation was expected to last a few weeks but in fact did not conclude until early 2014. The claimant's evidence was that thereafter she requested several times to return to the labour ward lead role but there was no evidence before us to corroborate that allegation. In fact, to the contrary, on 23 May 2013 in an email to Mr Shehata, she stated that she was doing too much labour ward work (this was in the context of restrictions imposed in October 2012 as a result of concerns regarding her scanning abilities). She did not in that email, despite specifically dealing with her work on the labour ward, refer to any outstanding request to be returned to the lead role. In October 2015, following a complaint from the claimant again that she was doing too much labour ward cover, Mr Katesmark emailed her confirming that he had looked carefully at the number of sessions that she and Ms Ammar had been rota-d for in the recent months and that there was no disparity and that it was perfectly reasonable for her to have been asked to cover a specific session. Accordingly we do not find that the claimant expressly requested the return of the lead role.

56. We also find that the allocation of duties to the claimant throughout the period of, and in particular taking into account, the restrictions on her practice from time to time either due to concerns about her abilities or her location, did not result in her carrying out a disproportionate number of labour ward sessions compared with her colleagues. The respondent was entitled to expect her to carry out a certain number of hours work per week in accordance with her contractual obligations.

57. <u>The 2010 Disclosures</u>

58. At a consultants' meeting on 17 June 2010 the claimant raised a concern regarding a trainee doctor that had returned from maternity leave and required further supervision before covering the labour ward. It was agreed at the meeting (including by Mr Shehata) that the trainee would be provided with close supervision. In due course Mr Shehata arranged for that to take place and she was signed off as safe to return to work.

59. At the meeting the claimant also raised her concern that it was unsafe to have obs only consultants on the labour ward with no gynae cover as she believed this could compromise patient safety in the event of a major post-partum haemorrhage. The respondent accepts that her statements at this meeting were protected disclosures.

60. The claimant repeated her concerns about the trainee, together with other matters, in an email dated 12 July 2010 to Ms Kakumani and Mr Shehata. This was her second protected disclosure.

61. Ms Kakumani replied in detail on 13 July 2010 with her response to the other issues and also her view that the trainee was safe. Mr Shehata on 15 July 2010 also emailed the claimant and confirmed what he had done and that the trainee was signed off. In the claimant's opinion this response

by Mr Shehata was not serious enough as two weeks was not long enough to retrain the trainee concerned. Mr Shehata's evidence, which we accept, was that this was a relatively minor and discrete issue that was dealt with at the time.

62. It is clear that the claimant had been expressing her dissatisfaction at her lack of gynae work from the commencement of her permanent role. In his email to her (copied to a number of senior colleagues) dated 27 August 2010 Mr Shehata said:

> "Further to our discussions since you have started this post, I would like to clarify my position as Medical Lead with regard to you acquiring Gynae sessions. I would also like to emphasise that this position was made clear to you prior to you applying for the post.
>
> As I expected, due to the changes in our practice with more of our service moving to Primary Care and the current financial difficulties that the trust is in, I would like to confirm that there will be no possibility for you to do any Gynaecology. I am sure that this will not be a surprise to you I am hoping that you understand my position & the circumstances.
>
> I do not wish to discuss this matter with yourself or any of the other colleagues as the matter for me is now closed."

63. Mr Shehata conceded in his evidence that he was frustrated by the claimant at this point and that he could have expressed himself better in this email but said that he had explained to her both before and after her interview for the job that no gynae work would be available yet she was raising it with him on a daily basis.

64. The claimant replied on 10 September 2010 in which she repeated her concern that she believed she should be doing a 0.5 gynae session each week in order to maintain her gynae skills and therefore be safe. She also reported her concerns about the on call arrangements for gynae. This email was a further protected disclosure. Mr Shehata's reply was very short. He said he did not agree with the contents of her email, that it contained inaccurate information and to him the matter was closed but she had the right to take it further if she wished.

65. This led to a meeting on 25 November 2010 attended by the claimant, her BMA representative, Dr El-Rifai, Mr Shehata, Ms Westcott and Ms Neale. During this meeting the claimant repeated her concerns regarding the trainee, her lack of gynae sessions and the gynae on call cover issue. This was a further protected disclosure. Mr Shehata and others confirmed in this meeting what the arrangements were and that they considered them satisfactory. The claimant did not accept this. At the end of this meeting Mr Shehata said that three written complaints from other members of staff had been received about the claimant which he was investigating to see if they were relevant. He gave no evidence of these complaints however at the meeting.

66. On 17 January 2011 the claimant met Dr Charlton as summarised in Dr Charlton's email of 30 January summarising what she understood to be the claimant's concerns. These were the trainee issue, her gynae sessions, her job plan, the on call rota and inequitable sharing of labour

ward sessions together with other issues including her relationship with Mr Shehata and her concern that he had been approaching other members of staff asking about her skills/competencies.

67. Complaints 2010/2011

68. In the meantime, in September 2010 Mr Shehata had received a written complaint about the claimant's behaviour and attitude from the trainee about whom the claimant had made her protected disclosure. He also had received on 4 October 2010 a complaint from Dr Gul, an associate specialist who complained about the claimant's behaviour.

69. On the day after the 25 November 2010 meeting Mr Briggs, the claimant's representative, had asked Ms Neale for details of the written complaints referred to by Mr Shehata. Ms Neale instructed Mr Shehata on 2 December 2010 not to provide Mr Briggs with the complaints themselves as this would breach confidentiality but suggested he provide a brief summary of the complaints instead. This was not in fact done.

70. The claimant further says that after the 25 November 2010 meeting Mr Shehata approached a number of staff named at issue 11(f) plus further unnamed staff to ask them about her practice. There was very little supporting evidence for this allegation. Dr Duroshola expressly did not support it although Mr Matiluko said Mr Shehata "once or twice" raised concerns about the claimant's decisions but that it was not a "regular pattern of behaviour".

71. On 16 December 2010 Mr Shehata emailed Ms Neale with a detailed summary of his concerns about the claimant in a number of areas including her behaviour and clinical performance.

72. On 11 August 2011 Ms Chapman, superintendent sonographer, emailed Mr Shehata complaining about the claimant's behaviour towards patients. She also stated :

"I am only saying this as I know you are trying to gain a more complete picture…"

73. On 12 August 2011 Ms Sivas, head of midwifery, emailed Dr Charlton and Dr El-Rifai. It is a balanced email that refers both to the ongoing SI investigation but also Ms Sivas's concerns regarding a recent separate incident involving the claimant and a member of the midwifery team. She does not give details of the incident but suggests – for the benefit of the claimant and staff at Epsom – that the claimant is moved from Epsom to St Helier. This email was not copied to Mr Shehata and there is nothing within it to suggest that Ms Sivas was at all influenced by him when she wrote it.

74. Also on 12 August 2011 Ms Lewis, senior midwife, emailed Mr Shehata complaining about the claimant in very strong terms. He then forwarded that complaint to Mr Clarke, director of medical standards, and Dr Charlton for their action. We note that Ms Lewis did not send this complaint to her

line manager but Mr Shehata had found her crying, asked her what was the matter and then asked her to put what she told him into an email to him which she did.

75. Also on 12 August 2011 Mr Katesmark emailed Dr Charlton with a complaint about an unnamed consultant but who he understood to be the claimant. He said her behaviour was "intolerable". He also said:

> "I fully support the action of Mr Shehata in taking the matter to the Directorate management."

This email was later referred to by Ms Westcott to Dr Charlton saying:

> "Not sure if you have them already but you might need them for your collection."

76. On 16 August 2011 Ms Ellis emailed Mr Shehata with a detailed list of concerns and complaints about the claimant.

77. On 17 August 2011 Mr Shehata emailed Mr Clarke another summary of his concerns and complaints about the claimant. They included allegations that the claimant had behaved in a racist way and made racist comments to colleagues with examples. He also said that moving her to St Helier was the wrong approach as the problem lay with her abilities and professionalism.

78. On 25 August 2011 Ms G Bambridge emailed Mr Shehata with a lengthy complaint about the claimant.

79. The claimant says that Mr Shehata sought these individuals out and instructed them to put their complaints in writing. She had no corroborating evidence for this allegation, apart possibly from the "complete picture" comment in Dr Charlton's email and the statement by Ms Westcott to Dr Charlton re a "collection" referred to above. She says however that the coincidence of dates makes this very likely. Mr Shehata denies this and says the complaints were all genuine. We note that a number of the complaints received were put in some detail and do not read as if made reluctantly.

80. <u>Portland Investigation</u>

81. In February 2011 an issue arose as to whether the claimant had been working for a private hospital, the Portland, while she was on paid sick leave from the respondent. A fax had been received by the respondent which seemed to indicate this was the case and this was referred by the secretary to Mr Shehata. He referred the matter to Dr El-Rifai and Dr Charlton who, in conjunction with HR, made the decision to refer the matter for investigation by the London Audit Consortium. It was investigated but ultimately (in September) it was found that no further action should be taken. This was a proper response by the respondent to the fax received. Internal disciplinary proceedings however were commenced subsequently as referred to below.

82. The claimant's principal complaint is that Mr Shehata should have first approached her about this situation before escalating it.

83. Further on 12 August 2011 Ms Ottaway of HR emailed Dr Charlton recommending that disciplinary proceedings be commenced against the claimant with regard to fraud arising out of the Portland issue. An investigation officer was appointed on 18 August. We were given no indication as to the outcome of that process although there are emails that suggest the matter was not formally taken any further.

84. Claimant's return from sick leave April 2011

85. The claimant was absent on sick leave in February, March and April 2011. She returned to work full time from 12 April 2011. She referred herself to the respondent's occupational health service (OH) whose advice was sent to Ms Westcott on 28 April 2011. We did not have a copy of this advice in the bundle but references to it suggest that it recommended a phased return to work with no more than two labour ward sessions per week. There was no evidence before us to indicate that this advice was available to any of the claimant's managers before that date. Ms Westcott emailed the claimant on 18 May 2011 referring to the recommendations that she had "just received". By this time the claimant had been back at work on full duties for more than a month. At about the same time, and a few days before she was due to be on call, Mr Shehata also became aware of the OH recommendations. Mr Shehata rang OH and was advised that the advice was a recommendation only. He decided that the rota would stand.

86. Job planning session June 2011

87. A job planning session was undertaken by the claimant with Mr Shehata, Dr El-Rifai and Ms Westcott on 16 June 2011. Job planning sessions are usually scheduled for one hour but this one was for three. The claimant queried with Ms Westcott why this was the case and in an email dated 7 June 2011 she explained that the meeting would cover not only job planning but also the unresolved issues around the claimant's return to work, her annual leave and any other issues she wished to raise.

88. When that job planning session took place it was clearly a very difficult meeting between the unaccompanied claimant and three managers. By that stage both the claimant and Mr Shehata held very different and strong opinions on a number of matters. They are both also clearly individuals who are not afraid to make their views known very robustly.

89. The claimant says that during this meeting she was intimidated by Mr Shehata. Dr El-Rifai's evidence was that she has no recollection of aggression from either party. The claimant also specifically says that during the meeting she was told that she could not have any gynae theatre, no colposcopy and had to stop going to KCH to do scanning on Tuesdays as she had to be available on Tuesdays to cover the labour ward.

90. Mr Shehata says that during this meeting he repeated his positon regarding the claimant not doing gynae work or colposcopy. He denies saying anything about working at KCH on Tuesdays as that only became an issue when she later (in September) transferred to St Helier when she was asked to work a 5-8 pm session which she agreed to and therefore stopped going to KCH.

91. The claimant went to see Ms Sherriff, another O&G consultant, after this meeting. Ms Sherriff's email to Dr Charlton the following day describes the claimant as "clearly quite upset by the whole process" and said that she had agreed to accompany the claimant to any future meetings. The claimant's own email to Ms Sherriff on 20 June 2011 also shows that she was upset by this meeting.

92. Given that the meeting was some five years ago and no notes were produced, it is difficult to make conclusive findings of fact as to exactly what was or was not said. We do find however that Mr Shehata did repeat his earlier responses to the same issues that the claimant herself was repeating – her lack of gynae and colposcopies and the sufficiency of the on call rota. We find that he did not state however that she could not continue to go to KCH given that this was not at that stage an issue for the respondent and she in fact continued to go there until September 2011.

93. We also find that whatever the intention of Mr Shehata, Ms Westcott and Dr El-Rifai, the claimant clearly felt intimidated at this meeting and we understand why given its length, the matters discussed and the fact that she was unaccompanied.

94. <u>The claimant's requests for leave</u>

95. In the meantime, in April 2011 the claimant had requested leave for August that year. Mr Katesmark and Ms Kakumani had already requested and been granted leave for the same period. In accordance with the respondent's policy that only two consultants (with the exception of Mr Shehata) could be absent at any time, the claimant's request was refused by Ms Kakumani. The claimant raised this issue in July 2011 with Dr Charlton, renewed her request and subsequently Mr Shehata approved it.

96. In addition, the claimant objected to being on the bank holiday cover rota on 29 August 2011. Ms Kakumani had prepared that rota before the claimant's other leave in August 2011 was granted. Ultimately the claimant was replaced by Ms Ammar on this day and the claimant took the day off.

97. <u>Postpartum Haemorrhage</u>

98. On 5 August 2011 a patient suffered a postpartum haemorrhage. The claimant was on call and at 8pm was asked to attend. She arrived at the hospital at 9.45pm. The policy is that when called consultants should arrive within 30 minutes. The claimant was delayed due to severe traffic difficulties. Whilst en route she had called the hospital and spoken to the

team giving instructions for care of the patient. She was asked whether they should call another consultant to attend but she said not to.

99. The senior midwife referred this to Mr Shehata who asked the claimant about it the following day. Mr Shehata emailed Dr El-Rifai on 9 August with a detailed account of his view of the incident together with a recommendation that the claimant be suspended pending investigations. This email was not written in neutral terms but expressed very strong concerns about the claimant. Emails written at the same time by members of the midwifery team involved in the incident were not in such strong terms. In her response to Mr Shehata Dr El-Rifai said that Mr Clarke was responsible for designating such issues to Serious Incident (SI) level. (The criteria for SIs in maternity are set by NHS England and are considered within the respondent by its SI panel following an established process. Dr Charlton's evidence was that she made that decision. Whoever did, it is clear that it was not Mr Shehata. The matter was treated as an SI and an investigation was launched. That investigation was internal to the respondent and was conducted by Dr Lim, clinical director – medicine. His conclusion was that the claimant had not breached the on call policy and no further action was required. Dr El-Rifai gave us an example of another similar incident a month earlier at St Helier that was also treated as an SI.

100. <u>Dr Radford review & December 2011 grievance</u>

101. By the end of August 2011 Mr Clarke decided that there should be a review as there were a significant number of issues being raised. Dr Charlton commissioned Dr P Radford to investigate the various concerns - both about the department and the claimant. The terms of reference for the review were shared with the claimant's representative but only after he requested them, the claimant having already been asked to attend an interview with Dr Radford. The claimant accepted in cross examination that it was sensible and reasonable to appoint someone independent to look at both sides of the issue. This investigation stood as the investigation stage under MHPS.

102. On 14 August 2011 Ms Westcott emailed "Karen" indicating that the claimant was very stressed and would be willing to work at St Helier.

103. In September 2011 Dr Charlton decided that the claimant would transfer to St Helier. This was a sensible move in all the circumstances at the time as accepted by the claimant in cross examination. Also, in her grievance raised on 1 December she stated:

> "I now work at St Helier hospital and I am far more comfortable"

104. On 1 December 2011 the claimant submitted a grievance regarding her treatment. Dr Charlton took the view that the Radford investigation that was then underway subsumed the matters raised by the grievance and therefore did not deal with the latter separately. She failed to analyse the position satisfactorily however and overlooked that the terms of the grievance were not completely on all fours with the terms of the review.

Even if it had been, however, the claimant should have been informed of her decision and there is no evidence before us that she was. Indeed her representatives were chasing for an outcome to the grievance as late as April 2012.

105. Dr Radford conducted a thorough review, considering 300+ pages of documents and interviewing 18 members and former members of staff. He sent a final report to Dr Charlton on 27 January 2012. No copy was sent to the claimant or Mr Shehata at that stage and in fact neither received a full copy prior to these proceedings despite requesting one.

106. In his conclusion Dr Radford stated:

> "Mr Shehata's strong management style is regarded as bullying by Miss Arafa. Two other consultants and one general manager were clear in their view that he had treated Miss Arafa unfairly…. On balance, I believe that Mr Shehata should stop being the clinical lead if only because he has divided his senior medical team instead of uniting them."

107. On 19 April Mr Shehata attended a case review meeting with Dr Charlton, Dr El-Rifai and others. They discussed the key findings of Dr Radford but agreed that no meeting with the claimant would be arranged until they had an agreed way forward. Mr Shehata was clear in his view that the report was defective and that he still had very serious concerns about the claimant. He referred to the possibility of referring her direct to the GMC. At the end of the meeting it was agreed that mediation for the department was the way forward.

108. The claimant and her representative attended a meeting on 28 May 2012 with Dr Charlton and Ms Neale in which she was given feedback on Dr Radford's report, namely that no issues needed to be formally addressed using MHPS. The purpose of the mediation which had already started was explained namely to improve relationships within the team. The claimant agreed to this way forward. She was also told at this stage that she would not be given a copy of the report.

109. On 7 December 2012 the claimant submitted to Dr Charlton a subject access request specifically asking for a copy of Dr Radford's report and correspondence held by Dr Charlton and others including Mr Shehata. Dr Charlton replied on 18 February 2103 refusing to disclose the report on the ground of confidentiality but enclosing copies of the correspondence requested. The Medical Defence Union (MDU) replied on the claimant's behalf stating that they were considering further action (although none was taken) and seeking clarification as to why a redacted version of the report could not be disclosed. No reply was given by the respondent.

110. One of the claimant's complaints is that she also asked in this subject access request for access to medical records. The respondent says that on the face of her email she did not. However the preamble in her request states:

> "… I wish to have copies of all the information collected by the Trust in relation to discussions about my clinical performance and conduct since beginning of January 2012 till date. This includes, but may not be limited to:…"

111. In the context of events at the time this must have included a reference to medical records relating to the scanning issue described below. Further, on 12 November 2012, the MDU's medico-legal adviser had written to Dr Charlton requesting site of the original scan image and contemporaneous clinical notes. In her reply on 13 November, Dr Charlton said:

> "… Please be assured that any formal investigations undertaken within the Trust are conducted in accordance with MHPS. We agree it is critically important clinicians under investigation have the opportunity to review relevant documentation as part of an investigation…."

112. In the event nothing was provided to the claimant or her advisers. Our finding is that the claimant was requesting copies of the medical records under investigation and they were not provided to her until mid-August 2013 (she accepted in cross examination that she was then given an opportunity to review and comment on the medical records) and there was no good reason for that delay.

113. <u>Complaints 2012</u>

114. On 10 April 2012 Mr Shehata emailed various members of the respondent's senior management referring back to his complaint about the claimant more than 6 months before (which we assume to be a reference to his email dated 17 August 2011) and reminding the medical director (Dr Charlton) of serious issues including his allegation of the claimant's racist behaviour and expressing his clear frustration at the lack of a response or action. At the conclusion of his email he stated that he was considering reporting his concerns to the GMC.

115. We heard extensive and contradictory evidence from a number of witnesses as to whether the claimant made racist comments or not. Only one of the 36 alleged detriments directly relates to this. The claimant confirmed in her evidence that the 'issue' referred to at issue 11(p) was Mr Shehata's allegation above that she was guilty of racist behaviour. Her case was that this issue is very important as the allegation itself was groundless, that Mr Shehata was "out to get her" and that he made the allegation "tit-for-tat" because of her protected disclosures. We were not referred to any independent corroborating evidence that Mr Shehata had when he wrote his email on 10 April 2012 but given the consistency between that and his 17 August 2011 complaint we find that he genuinely believed that she had made racist comments. This is supported by our findings below regarding the mediation sessions.

116. <u>Mediation</u>

117. The mediation sessions were held on 11 & 12 September 2012 and facilitated by two senior HR directors. The outcome was a wide ranging settlement agreement signed by all those involved including the claimant

and Mr Shehata. It sought to address all of the issues that had arisen in the department. It provided for the claimant to return to Epsom from 1 October 2012, and after 3 months to resume leadership of the labour ward. It also recognised that the claimant had in the past caused significant upset to her colleagues for which she apologised. She also agreed to attend diversity training and an effective communication course.

118. Again there was extensive and contradictory evidence from several witnesses as to exactly what was said at the mediation about alleged racist comments and events in the meeting. This is not entirely surprising given the time that has since passed. Taking all the evidence into account we find that the allegation that the claimant made racist comments was made and discussed. The claimant's apology and agreement to attend the training demonstrates that again, whatever exactly happened, it was a live issue. We do not find, as alleged by the claimant, that she only signed the agreement because Mr Shehata threatened otherwise to withdraw.

119. It seems that all parties felt at that stage that the mediation had been successful.

120. <u>Scanning/MHPS</u>

121. Sonographers and consultants carry out nuchal translucency (NT) scans, 20 week anomaly scans and third trimester growth scans. In an NT scan the nuchal fold in the back of the baby's neck is measured as an indicator of whether the baby has Down's syndrome. For an accurate result the baby must be in a particular position when the scan is taken. Practitioners must be licensed by the Fetal Medicine Foundation (FMF) to carry out NT scans. The claimant was so licensed and carried out these scans from the beginning of her employment. There are systems in place, both nationally and locally within the respondent, to monitor scans. In 2012 the national systems were that the Down's syndrome screening quality assurance support service (DQASS) monitored each practitioner licensed by the FMF by comparing the results of their individual scans against the national average. At least 25 scans had to be conducted each month in order for a reliable result and each practitioner was graded accordingly. If a practitioner received a red flag this would result in them stopping scanning (no red flag has been notified in respect of St Helier). If they received an amber flag in two consecutive periods this meant they were trending towards not performing against the required standard and they would be reviewed locally. A green flag indicated no concerns. In addition the respondent was expected to submit three images per annum per practitioner for independent audit by the FMF. If they were deemed of good quality then the practitioner would be licensed. It was put on behalf of the claimant that this was a relaxed system. We do not share that view. It appeared to be robust and in line with national expectations at the time. There was no compelling evidence before the Tribunal that there were any systemic problems with scanning at either site of the respondent.

122. At issue 11(t) the claimant alleges that in May or June 2012 whilst at St Helier, she wrote to Ms Sumping raising concerns in the fetal medicine department regarding scanning equipment and time allocation for scanning which were not investigated and that these concerns were set out in an email from Mr Matiluko to Ms Sumping and Ms Croucher at around this time. There was no corroborating evidence before us to support this allegation and we do not find it to be the case.

123. A sonographer at St Helier approached Ms Sumping in August 2012. He showed her a nuchal image produced by the claimant as he was concerned about its quality. In particular it appeared the measurement was not correct and that the claimant had measured a structure within the baby, possibly the oesophagus, rather than the fold as required. This would result in an incorrect result in relation to the risk of Down's syndrome. Ms Sumping discussed this with Ms Croucher who asked her to pull a random sample of scans from the claimant's files which they looked at together. Mr Matiluko was asked to review 12 of the claimant's NT scans which he did and he confirmed that there were errors. Ms Croucher then arranged for a sample of the claimant's scans to be analysed externally. This was done by a team from KCH who completed their report on 30 October 2012. In summary they found that of 12 scans reviewed all 12 were substandard to some degree.

124. In the meantime, Mr Shehata and Mr Simper had met the claimant on 17 October 2012 and agreed with her that she would continue to do fetal medicine with the exception of NT scans until the review was completed. On 18 October 2012 the medico-legal adviser of the MDU wrote on the claimant's behalf to Mr Shehata suggesting an alternative approach. Also on 19 October 2012 the BMA wrote on her behalf to Dr Stockwell, joint medical director, complaining about the claimant's treatment generally and related it to matters she had previously raised about her working environment.

125. Ms Croucher was informed by the KCH team on 25 October 2012 of their preliminary findings and she suggested that the claimant should not perform any scans (which therefore precluded her from doing fetal medicine) until the investigation was completed. Mr Marsh agreed with that suggestion and notified Mr Shehata the following day. It was also agreed that the claimant's two scanning sessions in her job plan would be replaced with other work that the service needed.

126. Mr Shehata in reply agreed with the action but also said:

> "This could not have come at a worse time as we just started planning for Miss A's return…"

127. At a meeting on 6 November 2012 between Dr Charlton, Mr Shehata, Ms Croucher, Mr Simper and Ms Neale it was agreed that an external, formal investigation into the claimant's abilities would be conducted within the MHPS. Mr Shehata pushed for the scope of that investigation to be widened to include not only the claimant's competency but also her probity

and conduct. He also asked about a GMC referral and referred again to the allegations that the claimant had made racist comments at the mediation meeting.

128. The claimant was informed by Dr Charlton at a meeting on 6 December 2012 of the situation and that there would be an MHPS investigation and her duties would be restricted until it was complete. It was agreed, at the claimant's representative's request, that the claimant's return to be labour ward lead could be delayed. At the conclusion of the meeting the claimant was told that the terms of reference for the investigation would be defined and the investigation would start the following week.

129. The claimant is critical of Dr Charlton for seeking Mr Shehata's approval of the terms of reference for the MHPS investigation. In all the circumstances it was reasonable for her to do this. The terms of reference had been drafted in the first place by Ms Hill of Capsticks, the respondent's legal advisers, who was originally intended to be the case investigator. In the event the matters relating to the claimant's probity and conduct were not included within the scope of the review indicating that there was a limit on Mr Shehata's influence.

130. Dr Charlton wrote to the claimant on 28 December 2012 confirming the outcomes of the meeting and informing her of the terms of reference. She also confirmed that she would be the case manager and the case investigator would be Ms Hill (although in due course Ms Pawsey was appointed). Further that an external clinician specialising in O&G and fetal medicine would be appointed shortly. She also confirmed that the claimant would not be undertaking any scanning whilst the investigation was underway and that those sessions would be replaced with work that the service required.

131. There was then a period of unexplained inactivity and Dr Charlton wrote to the claimant's representative on 5 April 2013 apologising for the delay and confirming that Ms Hutt, consultant O&G, had been appointed as the external clinical expert.

132. The claimant says that Ms Hutt was an unsuitable appointee as she had previously been employed by the respondent and therefore was not independent and furthermore she was a friend of Mr Shehata. Ms Hutt had been employed by the respondent but had left in the late 1990s. Mr Shehata denied that they were friends – he said that he last saw her some 8 years ago. The claimant provided no evidence to corroborate her allegation. The claimant also said that Ms Hutt was not a suitable specialist. In fact Ms Hutt's expertise in the area was extensive as set out by Dr Charlton. There was no evidence before us that the claimant raised any objection to the appointment of Ms Hutt when she was first informed of it or at any time during her investigation. We find that the appointment of Ms Hutt to this role was entirely appropriate.

133. It is clear however that the investigation by Ms Hutt took far longer than it should have done and this was conceded by the respondent. Dr Charlton

first expressed her concern internally about delay in May 2013. The MDU expressed their concern in August 2013. Mr Poulton, the designated board member, expressed his increasing concern in September 2013. Dr Charlton wrote to Ms Hutt at the end of October 2013 and her report was finally delivered on 2 February 2014.

134. Dr Charlton was disappointed with the quality of the report but noted that it was critical of the claimant's scanning abilities. She sent a copy to the claimant on 4 March 2014 asking for her comments within 2 weeks. This delay of many months in producing the report undoubtedly caused anxiety to the claimant and should have been avoided by the respondent.

135. It had also been agreed to ask KCH to review a further random set of 12 scans of other operators to ensure that there were no equipment errors and identify the possible failure rates. In due course, although that exercise was started and the claimant was told at the 6 December 2012 meeting that this would happen and she had raised concerns on 28 December 2012 - which Dr Charlton had no recollection of seeing - it was not completed and the respondent was unable to explain properly why that was. It seems to have simply petered out. We find it surprising and unfair to the claimant that this was not done. It was also very unhelpful as it would have addressed one way or another a key complaint of the claimant, namely that she was singled out.

136. We also note that on 28 March 2013 Ms Chapman had provided a report to Mr Shehata at his request on the claimant's scanning ability. Given that the MHPS investigation had commenced at this time this was a surprising request and no explanation was given to us for it.

137. The claimant commissioned her own report from Dr L Kean to provide an opinion on her practice. This was produced on 8 October 2014. Dr Kean's report commented both on Ms Hutt's report – which she found in some respects to be unfair – and on the claimant's scanning skills which she found to be in line with the majority of practitioners at St Helier. Dr Kean's report was provided to Dr Charlton in October 2014 who decided that – given its variance with Ms Hutt's report – both should be considered by Ms Pawsey.

138. A job planning meeting took place on 17 July 2014 between the claimant and Mr Simper and Mr Katesmark (who during 2013 had become the clinical lead for O&G replacing Mr Shehata who had become clinical director). A proposal to fully use her PAs was put to her which she did not accept but it was agreed to review it in 3 months. This led to a request from the claimant for a job plan mediation. She requested to do colposcopies but Mr Katesmark indicated she could not as she did not have enough experience.

139. Mr Katesmark met the claimant again on 8 August 2014 and went through the offer regarding use of her spare PAs and asked for clarification of the ban on her scanning – whether it was all or just NT.

140. In September 2014 Mr Katesmark and the claimant discussed her position and he arranged for her to return to growth scanning under the supervision of a senior sonographer. This was put in place in October 2014 with the claimant supervised by Ms Chapman and others all of whom provided feedback on her performance from time to time to Mr Ganapathy, fetal medicine consultant, and Mr Shehata. This arrangement was with a view to Mr Ganapathy later confirming whether she was competent to pursue independent scanning. It was anticipated that that would be within a few weeks. In fact the arrangement continued through to July 2015.

141. Ms Pawsey produced her final report on 17 February 2015. Her conclusions were that as she had conflicting experts' reports, albeit with some shared areas of concern, it was for the case manager (Dr Charlton) to decide on next steps.

142. Dr Charlton reviewed both reports and gave the claimant an opportunity to comment on Ms Pawsey's report. Ultimately she decided that the best way forward was to offer the claimant the opportunity of refresher training and an assessment of her competencies to which the claimant agreed on 6 October 2015. Dr Charlton's preference was for this training to be conducted externally but this proved impossible to arrange. Ultimately it was provided by Mr R Ganapathy who, having assessed the claimant, concluded that she was not competent to scan independently. This was after the claimant had commenced these proceeding and therefore does not form part of this claim.

143. On 18 June 2015 both Ms Viswanatha and Ms Chapman had emailed Mr Ganapathy reporting concerns about the claimant's scanning practices in relation to one patient. Mr Ganapathy forwarded both emails to Mr Shehata who in turn forwarded them to Dr Charlton and others. Mr Ganapathy discussed the matter with the claimant and formed the view that it was a "near miss". He reported this to Mr Shehata who again forwarded it to Dr Charlton saying that it raised concerns and he would like to discuss as a matter of urgency and that he had concerns about her ability to practice.

144. On 21 July 2015 Mr Shehata emailed the claimant referring to the same matters saying he would like to discuss them with her. Ms Chapman had raised her concerns with Mr Katesmark who in turn raised it with Mr Shehata.

145. Ms Chapman also emailed Mr Shehata on 28 July 2015 confirming her various complaints about the claimant and asking that she be removed from their department. She said:

> "I have spoken to my team Colleagues and they are all in agreement with me that we do not want her scanning in our department or to supervise her scanning…"

146. We find that Ms Chapman raised these concerns first with Mr Katesmark and then with Mr Shehata in response to her own genuine concerns and those expressed by her colleagues. It was not at the behest of Mr

Shehata. We also find that Mr Shehata was increasingly and understandably frustrated by the apparent failure by the respondent to deal effectively with his and others' concerns regarding the claimant.

147. Ms Croucher met the claimant on 4 August 2015. It was agreed that the claimant would do her supervised scanning with Mr Matiluko at St Helier from then until the end of the year rather than with the sonographers at Epsom. In her reply dated 11 August the claimant said that she was "delighted" to start scanning with Mr Matiluko and that it was a pleasure to help colleagues at St Helier. She also said on 14 August, after she had started with Mr Matiluko, that it was valuable and thanked them both for the arrangement. It is clear therefore that the claimant's practice was restricted at this time but this was for a valid reason and measures had been put in place to enable her to achieve a return to full practice.

148. <u>Dr Uwins's complaint/disciplinary action</u>

149. In the meantime, on 26 May 2013, Dr Uwins a trainee emailed Mr Shehata with a lengthy and detailed complaint about the claimant's behaviour on 23 May having discussed it with him on that day. Mr Shehata forwarded it on to Dr Charlton and Ms Neale asking for their input.

150. The claimant says that Mr Shehata asked Dr Uwins to make this complaint and that she felt forced to do so. We note that the complaint is lengthy and detailed. It does not read as a reluctant complaint. Given the detail of the complaint even if Mr Shehata encouraged Dr Uwins to complain, there is nothing to suggest that it was not genuine.

151. Mr Duroshola however did say in a much later email on 11 January 2016:

> "I was involved myself as a direct witness in one of her investigations where a trainee was subjected to pressure by a consultant colleague and was persuaded to raise an unnecessary concern against Miss AA."

His evidence was that Dr Uwins told him that Mr Shehata encouraged her to put in her complaint and chased her when she did not. He did not however say this when he was interviewed by Mr Wishart at the time (referred to below).

152. The complaint led to investigation interviews on 20 June 2013 between Mr Shehata and Dr Charlton with each of Dr Uwins, Mr Duroshola and Dr Osman. In her interview Dr Uwins gave further details of her complaints and also stated that the claimant had asked Dr Osman to ask her (Dr Uwins) to withdraw her complaint which he did not do. Also that Mr Duroshola had put pressure on her to consider the consequences of her actions. Mr Duroshola denied that he had said this and said that he simply wanted to support Dr Uwins. Dr Osman confirmed that the claimant had asked him to ask Dr Uwins to withdraw her complaint.

153. Ms Ottaway then took advice from the National Clinical Assessment Service (NCAS) who confirmed that immediate exclusion was appropriate as the claimant's presence was likely to hinder the investigation.

Accordingly the claimant was excluded on 21 June for up to two weeks. This was later extended to 4 weeks at a case conference attended by Dr Charlton, Mr Wishart (of Capsticks who was appointed as the investigator - we observe in passing that it is perhaps undesirable for an investigation of this nature to be carried out by a representative of a firm that has a very established commercial relationship with the respondent - although ultimately on this occasion no action was taken) and Ms Ottaway. The exclusion was lifted either on 1 or 2 August once the investigating manager had confirmed that all necessary statements had been gathered.

154. The matter proceeded to investigation of the allegation of coercion and Mr Wishart produced his report on 23 November 2013. A disciplinary hearing into the coercion allegation was held by Dr Marsh in June 2014. His conclusion was that the allegation was unsubstantiated and not proven. Therefore, there was no case to answer. We observe that again there was a considerable and unjustifiable delay in concluding this process and we do not underestimate the adverse impact this would have on the claimant.

155. <u>Job plan change</u>

156. The claimant alleges that in April 2014 Mr Shehata, whilst she was on annual leave, unilaterally changed her job plan by changing her sessions from 10 PAs to 7.5 PAs and removed her sessions in gynae and the early pregnancy unit. There was no other evidence, oral or written, to corroborate the allegation. It was denied by Mr Shehata and we do not find that the allegation is proved.

157. <u>Specialist clinics 2015</u>

158. By February 2015 a decision had been made by Mr Shehata, but supported by the management team generally, to restructure provision of antenatal care within the department into specialist clinics rather than a general one. This was with view to more efficient running of the department and better provision of care.

159. The claimant was first allocated to the obesity and hypertension clinic to which she objected to in an email dated 13 February 2015 as she believed her expertise was in fetal medicine and that she did not have the right skillset nor training for this clinic. She specifically said that she believed this amounted to a patient safety issue. That clinic was therefore allocated to someone else and she was allocated the mental health clinic. She objected to that in her email dated 30 March 2015 (an alleged protected disclosure) which attached a copy of her 13 February email, saying that she only wanted to lead in the fetal medicine clinic which was her speciality area as conveyed on several occasions. She stated that this was an alarming issue and that she felt treated differently to everybody else and that it could affect patient safety. She was supported by the BMA on the issue.

160. The respondent's view, which was explained to her by Mr Simper's email on 30 April was that any member of the team could lead in any clinic as no specialist skills were required but that in any event expertise would develop in time.

161. The claimant replied to this on 8 May 2015 (another alleged protected disclosure) setting out in detail why she disagreed with the respondent's position and referring to a confidential enquiry into maternal death that raised awareness of mental health problems in pregnancy and also guidance for commissioners of perinatal mental health services from December 2012.

162. Mr Shehata emailed the claimant on 27 May 2015 thanking her for her emails regarding the antenatal restructuring and stating that the aim of the change was to improve the quality of care to pregnant women and their babies. Further that there were no particular training criteria requirements for the clinics and that as these patients were seen in the clinics on a daily basis they were just streamlining the care bundle.

163. On 15 June 2015, in a further and final alleged protected disclosure, the claimant escalated the matter to Mr Ireland, Trust secretary. She forwarded the previous exchange of emails to Mr Ireland and repeated her concerns about being requested to lead in the area of perinatal mental health an area in which she had no training or expertise. She repeated her reference to the confidential enquiry and guidance for commissioners referred to above and stated that she felt her allocation to the clinic was completely inappropriate and a real threat to patient safety.

164. It is not for us to determine which view was correct. We do find however that on this occasion the claimant's motivations in declining the clinics she was offered were both her strong personal preference for a fetal medicine clinic and a genuine belief that there were potential patient safety issues if she led a clinic for which she was not specifically trained. Her evidence was that when she contacted the GMC she was advised not to do the clinics. We do not agree with her interpretation of their reply which is more in the nature of the general statement of a doctor's professional responsibilities.

165. The claimant's refusal to undertake the clinics ultimately led in July 2016 to commencement of disciplinary proceedings against her.

166. <u>Mr Shehata's request for information</u>

167. On 26 March 2015 Mr Shehata emailed the claimant asking her to advise him which sessions she did that and the previous week. He re-sent the email on the following day when she did not reply and copied in the senior management team. This was a reasonable management enquiry especially in circumstances where the claimant was on restricted scanning duties and had refused the specialist clinic allocated to her and it was not clear what she was doing.

168. Appointment of Miss Viswanatha - May 2015

169. In May 2015 Miss Viswanatha, who had previously been a locum, was appointed to a permanent role as consultant obstetrician with an interest in fetal medicine and miscarriages. The job plan for that role showed that she would have 0.75 PAs on fetal medicine which equates to 3 hours. In contrast the claimant's job plan provided for 2 PAs of fetal medicine which equates to 8 hours. The claimant's case is that this was a move by Mr Shehata to replace her. His evidence, which we accept, was that he received specific funding to increase labour ward cover which was the main focus of this new role and the 0.75 PA on fetal medicine was a "sweetener" and that it would have no impact on the claimant's position. Nor did it.

170. 2015 grievance

171. On 22 May 2015 the claimant submitted a lengthy second grievance a further alleged protected disclosure. In the preamble to the grievance she stated that she had previously submitted a similar grievance in December 2011 but that was not in her view dealt with properly and most of the issues were continuing to date and remained unresolved.

172. Commencement of proceedings

173. On 14 July 2015 the claimant commenced the early conciliation process and the certificate was issued on 28 August 2015. She submitted her claim to the Tribunal on 25 September 2015.

174. Events on 30 September 2015 were therefore outside the scope of this claim notwithstanding that it was in the list of issues. Mr Rahman asked us to consider it as he says it is indicative of the behaviour of Mr Shehata to the claimant. We have therefore considered it. Our view is that there was a miscommunication between Mr Shehata and Mr Duroshola regarding the composition of an interview panel that day. As a result, the claimant attended expecting to be on the panel as did Mr Ganapathy and Mr Jan together with Mr Duroshola. We heard conflicting evidence as to what was said between Mr Shehata and Mr Duroshola. The end result was that Mr Shehata in direct terms instructed the claimant to leave which she did. We have no doubt that the claimant was genuinely upset and felt somewhat humiliated by this treatment. However, in our view this was at its root the result of the miscommunication between Mr Shehata and Mr Duroshola. We considered Mr Duroshola's later description of this incident in his own grievance. We do not accept that as reliable, however, given that he accepted in cross examination that he had received but not read emails about the arrangements for the interview from Mr Shehata. If he had read them and acted accordingly the incident would almost certainly have been avoided. It remains the case however that Mr Shehata, when faced with choosing one person to send away, chose the claimant. Regardless of how the situation arose this was perhaps heavy-handed on his part and caused her understandable annoyance. Unfortunately it

seems to be in keeping with the relationship issues that had clearly developed between them.

Conclusions

175. Jurisdiction - Time

176. At its heart, the claimant's case is that Mr Shehata commenced a sustained period of detrimental treatment of her after she made her first protected disclosure on 17 June 2010 starting with him reneging on their alleged agreement that she would do gynaecological work and continued all the way through to his treatment of her in connection with the recruitment interview in September 2015. Therefore, the claimant says, there was a series of similar acts or failures throughout the whole period from June 2010 to September 2015 and her claims of detriment on the ground of protected disclosures are in time.

177. The respondent accepts that the claimant made protected disclosures in 2010 but says there was no such overarching period of detrimental treatment. It says there were isolated acts/events, some of which had continuing consequences and some of which were detriments, but with no causal link to the disclosures. It accepts that the claim arising out of issues 11(gg)-(jj) incl are in time.

178. On the first question of whether there was a series of similar acts or failures from 2010 to 2015, we conclude that there was not. The claimant's alleged starting point, namely that Mr Shehata breached their agreement regarding the nature of her work, is not supported by our findings fact. Further, our findings of fact do not support the allegation of a sustained campaign by him against the claimant. Rather they support the respondent's position that there were isolated events over a 5 year period, notwithstanding that it is clear that at times those events were mismanaged by the respondent collectively and, at times, Mr Shehata and Dr Charlton in particular could have better managed the situation.

179. We observe at this point that we agree with Mr Rahman that in order properly to answer that question it was necessary to consider the whole sequence of events from September 2010 onwards. If we had worked backwards from 2015 as suggested by Mr Cooper, there would have been a significant risk of our approach being flawed.

180. Having answered that question we then ask whether there was any other series of similar acts or failures that ended after 15 April 2015. We conclude that the respondent's concerns regarding the claimant's scanning abilities and its response to those concerns resulted in a series of similar acts or failures that commenced in August 2012 and continued beyond 15 April 2015. Accordingly the claims arising out of those acts or failures are in time (issues 11(m) (n – in part) (q) (t) - (v) (hh) & (ii). Similarly, the issue regarding the allocation of the claimant to the mental health antenatal clinic and the respondent's management of that resulted in a series of similar acts of failures that commenced in February 2015 and

was ongoing at the time proceedings were commenced. The claim arising out of those acts or failures therefore is also in time (issue 11(ee).

181. The final question to ask is whether there are any other acts or failures relied upon by the claimant that ended before 15 April 2015 but in respect of which it was not reasonably practicable for her to commence Tribunal proceedings before the deadline.

182. In answering this question, we are particularly mindful of answers given by the claimant in cross examination regarding her 2011 grievance. She expressly confirmed she knew at that stage that if she was a whistleblower and as a result had been treated unlawfully she could bring a claim in the Tribunal. She also confirmed that she had access to the MDU and the BMA (and it is clear that both organisations intervened in detail on her behalf on several occasions over a number of years and in particular on 19 October 2012 the BMA had written on her behalf expressly relating her treatment to her protected disclosures). Further she confirmed that there was nothing in practice to prevent her from bringing a claim other than that it was never her intention to do so, it was the last thing she ever imagined or thought of and that she had first tried to resolve the issues internally.

183. In light of these answers and the fact that the claimant is clearly extremely intelligent, articulate and capable we have no hesitation in finding that it would have been reasonably practicable for her to bring Tribunal proceedings within the appropriate time period at any time that she felt she had suffered an unlawful detriment.

184. In light of this conclusion it follows that the only claims brought in time of those identified at issues 11(m) (n – in part) (q) (t) - (v) (ee) & (gg)-(ii).

185. In the event that we are wrong about that, however, and in view of the continuing dispute between the parties we have expressed below our conclusions on the remaining issues.

186. <u>Did the claimant make protected disclosures?</u>

187. The 2010 disclosures are accepted by the respondent to be protected.

188. The only issue in respect of the 2015 disclosures is whether the claimant reasonably believed that they were in the public interest and tended to show a risk to health and safety. The respondent says that in respect of those disclosures that repeated issues the raised in 2010, she cannot reasonably have considered it was in the public interest to resurrect them as they were settled matters and that her only reason for doing so was to support her own desire for an amended job plan.

189. As far as the disclosures relating to the allocation of the claimant to the mental health clinic are concerned, again the respondent says that this was raised in the context of an ongoing dispute about her how her time

should be spent, that she was being uncooperative and that her concerns about her mental health clinic were a continuation of that uncooperative approach rather than a genuine belief that she would not be safe leading the clinic.

190. We conclude on balance however that the claimant did have a reasonable belief that raising this issue was in the public interest. Undoubtedly there was some self interest at play as she very clearly had a strong preference to practice within her own field of fetal medicine, but the content of the disclosures themselves show her genuine belief that there were issues of patient safety and referred to external sources that – in her view at least – supported her in that position.

191. <u>Was the claimant subjected to detriments and if so on what grounds?</u>

192. On the issue of the reason why the claimant was treated as she was, the core of her case is that her protected disclosures in 2010 triggered an unreasonable response in Mr Shehata leading him to subject her to a campaign comprising the various alleged detriments and to coordinate others to do likewise. It is useful therefore to consider Mr Shehata's reactions to the various protected disclosures.

193. We have found above that his reaction to the 17 June 2010 and 12 July 2010 disclosures regarding the trainee was first at the June meeting to agree that the trainee should receive close supervision. Then on 15 July he replied to the claimant confirming what actions he had taken and that the trainee was signed off. For Mr Shehata this was a relatively minor and discrete issue that had been dealt with. We find nothing in his reactions/actions at the time to suggest that he harboured any ill will to the claimant as a result of her raising these issues. In fact to the contrary, he took on board her concerns and they were dealt with.

194. His reaction to the September 2010 protected disclosure was a reasonable and measured one in all the circumstances. They had discussed the issue several times and he had already put his position in writing to the claimant. When he advised her that he regarded the matter as closed he expressly pointed out that she had the right to take it further if she wished. Although he was clearly frustrated with her there is nothing to suggest that her protected disclosures on this topic either triggered the kind of response from him that she alleges. When he made the allegations of racist comments by the claimant we conclude that, whether he was correct or not, he genuinely believed the allegations to be true and accordingly had valid reasons to make them. It was not in response to any protected disclosures.

195. Further, where we have found others were responsible for detriments we note that they were themselves experienced professionals and there was nothing to indicate that they behaved in any way at Mr Shehata's behest. We note that Drs Charlton and El-Rifai were more senior than Mr Shehata and are not at all persuaded that they acted as they did because of pressure from him. We have in forming this view taken into account the

comments made by Dr Radford regarding Mr Shehata's management style and also our own view formed of Mr Shehata that he has a strong personality and believes passionately in his professional responsibilities.

196. We have also noted that the respondent did not follow its own whistleblowing policy either in 2010 or 2015. Arguably they should have done – and perhaps doing so would have helped resolve the claimant's concerns at an earlier stage saving the respondent a great deal of time and expense – but we do not find that their failure to do so was in any way sinister or indicated an unwillingness to engage with her.

197. Conclusions on specific issues

198. In light of those findings and in accordance with the findings of fact our conclusions on whether the acts alleged at paragraph 11 of the list of issues happened, if so whether they amounted to detriments, and if so on what grounds are as follows.

199. (a) (b) (c) & (d) – it is correct that the claimant was restricted to obs work from 16 November 2009 onwards and on 27 August 2010 Mr Shehata did make the alleged statement or words to that effect as reflected in his email of the same date. Given that the claimant had no contractual entitlement to do gynae (including colposcopies) such a restriction, any allocation of gynae to Ms Ammar (who was appointed before the claimant) and the statement by Mr Shehata were not detriments. In any event, the reason for these acts was that they reflected the role for which the claimant applied and was appointed to from 1 April 2010. They were not on the ground of any of the claimant's protected disclosures. Further, the first protected disclosure was made on 17 June 2010. Any alleged detriments prior to that date cannot have been on the ground of that or subsequent disclosures.

200. (e) – it is correct that Mr Shehata made this allegation with no evidence produced at the time. This did amount to a detriment as clearly to be told complaints have been made but no evidence to be provided (both at the meeting and subsequently when requested) puts the individual at a disadvantage. It is unfortunate that Mr Shehata raised the matter in this way. The reason why he did so is unclear. On balance we find that he raised it when he did as a reaction to what the claimant had been saying during that meeting which included a protected disclosure. Accordingly we find that the detriment was on the ground of a protected disclosure but as the claim in this respect was submitted out of time, it fails in any event.

201. (f) – there was no evidence before us in respect of Mr Shehata approaching any of the named individuals other than Mrs Ping who was one of the individuals asked to provide feedback regarding the claimant's scanning in October 2014. Given that this was with a view to the claimant being assessed to be competent to do independent scanning, that did not amount to a detriment. The allegation is also however that "others" were also approached by Mr Shehata. Our conclusion in respect of the, at times, significant number of complaints about the claimant that reached Mr

Shehata (as clinical lead) is that he was not approaching people to make complaints, nor creating complaints nor putting pressure on people to raise them, but he was collecting any complaints that were made. He also occasionally sought an opinion from his senior colleagues (e.g. Mr Matiluko and Ms Chapman). In reaching this finding we have taken into account that a very considerable number of complaints and/or concerns were raised about the claimant in a short period of time (not exclusively to Mr Shehata) but we find that the complaints themselves were genuine. Accordingly we do not find this allegation proved. In any event the reason for Mr Shehata's actions was not on the ground that the claimant had made protected disclosures but was due to genuine concerns about her competence and conduct as evidenced by his email to Ms Neale dated 16 December 2010.

202. (g) – it is clear that Mr Shehata reasonably referred this matter to Dr El-Rifai and Dr Charlton after it had been referred to him by a secretary. This in turn led to an investigation which amounts to a detriment. However it is clear that the decision to escalate was not made by him and the reason for that decision was that there was a serious allegation and it was entirely proper, indeed necessary, to investigate that without first discussing it with the claimant. These decisions were not made on the ground that protected disclosures had been made.

203. (h) –Mr Shehata did decide to ignore the recommendation of OH when considering whether he could reallocate the rota. He should at the very least have actively considered whether the rota could be adjusted to accommodate the claimant's needs which he then knew about. His failure to do so amounted to a detriment. We have considered the reason for this very carefully but on balance conclude that it was not on the ground of the protected disclosures of five months previously but was the operational need at the time. The fact that he specifically telephoned OH to establish whether it was a requirement or a recommendation, indicates that he would have taken into account if it had been a requirement. This is perhaps in keeping with the description of his management style by Dr Radford.

204. (i) & (j) – it is clear that this three-hour session took place but equally clear that the claimant was informed of it in advance and why, namely that it had been extended to address issues raised by her. In those circumstances the length of the meeting was not a detriment and the reason for its length was not on the ground of the previous protected disclosure. We have found however the claimant felt intimidated during the meeting and find that that was a detriment. That however was not on the ground of her previous protected disclosures but rather the ongoing relationship issues between the parties and ill-advised slightly heavy handed management during the meeting.

205. (k) – this allegation is factually incorrect but in any event the decision to treat the incident as an SI was not made by Mr Shehata, even though he had strong views on the matter, but by Mr Clarke in accordance with nationally set criteria. Categorisation as an SI was not a detriment but in

any event it was so categorised in response to valid issues raised at the time rather than on the ground of any protected disclosure.

206. (l) – the initial refusal of leave was by Ms Kakumani in accordance with the respondent's policy but it was later approved by Mr Shehata. There was no detriment and in any event the initial refusal was not on the ground of any protected disclosure.

207. (m) – the claimant was moved from Epsom to St Helier in September 2011. This decision was made by Dr Charlton and in December 2011 the claimant confirmed that she felt "far more comfortable" there. The reason for the transfer was that the Radford review was ongoing, the claimant was stressed and in August 2011 she had had conversations that indicated she would be happy to move to St Helier. It was not a detriment. In any event, for the same reasons we find that the transfer was not on the ground of any protected disclosure.

208. (n) – it is correct that the claimant's performance was investigated by Dr Radford between September 2011 January 2012 and this did amount to the detriment. The terms of the investigation were wider than just focused on the claimant however; it incorporated issues generally within the department. The reason for the investigation, however, was not on the ground that the claimant had previously made protected disclosures but because there were significant unresolved issues regarding the claimant and the whole department. The claimant accepted in cross-examination that an investigation was sensible and reasonable in all the circumstances.

209. (o) – it is correct that the claimant's grievance submitted in December 2011 was not responded to or fully addressed. Dr Charlton's decision was flawed for the reasons set out above and this therefore did amount to a detriment. This was not however on the ground of a previous protected disclosure but rather an error of judgment on Dr Charlton's part.

210. (p) – It is correct that Mr Shehata sent an email on 10 April 2012 that threatens to escalate an allegation of racist behaviour and also states that he was considering reporting his concerns to the GMC. This was a detriment. The content of the email, however, shows that it was his frustration with the respondent's delay in dealing with the issues that he had brought to their attention that led to him making these statements rather than any previous protected disclosure.

211. (q) – this allegation was initially made by a sonographer to Ms Sumping in August 2012. This led first to internal reviews, then an external review by KCH and ultimately to Dr Charlton's decision to start the MHPS process on 6 December 2012. These did amount to detriments but was a reasonable and appropriate reaction to the circumstances and was not on the ground of previous protected disclosures. As to the allegation that no one else was investigated, there was a failure to ensure that the review of the scans of other operators was completed. This was a detriment and we are critical of the respondent for that. We conclude, however, that the

reason for that failure was lacklustre management rather than any previous protected disclosure.

212. (r) & (s) – The claimant did request a copy of Dr Radford's report but was refused on the grounds of confidentiality. A redacted version was also refused. This was a detriment although we note that Mr Shehata was also denied a copy. We find that with a little effort or imagination a way could have been found to let both the claimant and Mr Shehata have a copy suitably amended to protect confidentiality. The failure to do this was not on the ground of any previous protected disclosure however but rather, again, lacklustre management. The claimant also requested in December 2012 the medical records under investigation and these were not provided until mid-August 2013. This delay was also a detriment. The reason for that delay, however, was not on the ground of any previous protected disclosure but management inertia.

213. (t) – this allegation has not been proved on the facts.

214. (u) & (v) – the claimant was excluded from fetal medicine for this period and this did amount to a detriment. The reason for the exclusion, however, were genuine and reasonable concerns about her practice and patient safety. It was not on the ground of any previous protected disclosure. As for the claimant's return to scanning under supervision, this was put in place by Mr Katesmark with a view to enabling her to resume a full practice in due course. This did not amount to a detriment notwithstanding its duration.

215. (w) & (x) – the allegation regarding the inappropriateness of the appointment of Ms Hutt has not been proved on the facts. The delay of one month in disclosing the report after receipt by the respondent was not a detriment. The delay by Ms Hutt in producing the report, however, was a detriment as it clearly took far too long. That delay was on the part of Ms Hutt however rather than the respondent and we have noted that the respondent chased for it on several occasions. The respondent, through Dr Charlton, may not have managed this aspect of the investigation sufficiently proactively, but such failure was not on the ground of any previous protected disclosure. It was poor management and inertia.

216. (y) & (z) – the underlying complaint that led to the ultimate disciplinary action, was made by Dr Uwins to Mr Shehata who referred it to Dr Charlton who ordered an investigation. The allegation of coercion was made by Dr Uwins to Dr Charlton during that investigation and there was certainly sufficient grounds to then investigate the allegation. This was a detriment but was an entirely proper response to the allegation made. It was not done on the ground of any previous protected disclosure. In due course it led to the claimant's suspension between 21 June and 1/2 August 2013, which again is a detriment, but this was done entirely in accordance with the principles of MHPS and on the advice of NCAS. It was not on the ground of any protected disclosure.

217. (aa) – this allegation was not proved on the facts.

218. (bb) & (cc) – the allocation of duties at various times to the claimant was a product of operational need, her appointment as labour ward lead and the restrictions from time to time on her practice (either because of capability concerns or her location) and her refusal to do the mental health clinic. Even if this on occasion resulted in her undertaking a higher proportion of labour ward work than she was expecting or in comparison with her colleagues or at times meant that her duties did not exactly fit her job plan, this was not a detriment taking into account her specialism. Furthermore the allocation of duties was not done on the ground of any protected disclosure but rather operational need.

219. (dd) – the removal of the labour ward lead role from the claimant in October 2012 was part of the mediation agreement signed by the claimant. It was not a detriment. It is correct that the return of her lead role was not effected within the expected time period. This was first because her representative asked for it to be delayed, then the scanning issue arose and then she moved to St Helier in August 2015. The claimant did not request the return of the labour ward lead role thereafter and in fact complained about being given too much labour ward work. It is unclear exactly why the lead role was not returned to her after January 2013 or that it was given any express consideration by the respondent. There is no evidence to suggest however that that was on the ground of protected disclosures dating back to 2010.

220. (ee) – the allocation of this clinic to the claimant in February 2015 was, from the point of view of the claimant, a detriment. It was not allocated to her however on the ground of a protected disclosure (the most recent protected disclosures having been in 2010). Rather it was a reasonable managerial decision on a restructure the claimant already having refused an alternative clinic.

221. (ff) – the emails sent by Mr Shehata in March 2015 were not a detriment. They were a perfectly reasonable managerial enquiry. In any event they were not on the ground of a protected disclosure but because he was not sure what she was doing.

222. (gg) – this allegation was not proved on the facts.

223. (hh) – the sonographers' complaints and request for the claimant to be moved were highlighted first by Ms Chapman to Mr Shehata and confirmed by her email dated 28 July 2015. To be told that you are not wanted in a department is a detriment but this was not on the ground of any protected disclosure (acknowledging that by this stage the 2015 protected disclosures had been made) but for the reasons set out in Ms Chapman's email. In dealing with that request Mr Shehata was responding in a perfectly appropriate way.

224. (ii) – the claimant was instructed to undertake scans at St Helier rather than Epsom from August 2015 but her own emails from the time show that she did not regard this as a detriment. In any event, this action was not

linked to any previous protected disclosure but was for the same reasons set out at (hh).

225. Accordingly, we conclude that the claimant's claims fail and are dismissed.

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Employment Judge K Andrews
Date: 8 February 2017

APPENDIX A – AGREED LIST OF ISSUES

IN THE EMPLOYMENT TRIBUNAL **CASE NO. 2302743/2015 E**
(LONDON SOUTH)
BETWEEN:

MISS ALIAA ARAFA

Claimant

AND

EPSOM AND ST HELIER UNIVERSITY HOSPITALS NHS TRUST

Respondent

AMENDED LIST OF ISSUES

Background

1. The Claimant commenced Early Conciliation on 14 July 2015 and an ACAS Certificate was issued on 28 August 2015.
2. The Claimant submitted her Claim on 25 September 2015.
3. The Respondent submitted the Response on 20 November 2015.

Jurisdiction (time limits)
Claim for Detriment on the grounds of Whistleblowing (Section 47B of the Employment Rights Act 1996)

4. The Respondent contends that all acts and failure to acts occurring on or before 14 April 2015 are out of time and the Tribunal does not have jurisdiction to hear these claims. To the extent that the Claimant relies on acts or failures to act occurring on or before 14 April 2015:
   a. Do those acts or failures to act constitute part of continuing act(s) of detriment which ended after that date?

b. Was there a series of similar acts? If so, what is the date of the last of them and is it after that date?

c. Where the Claimant relies, for the purposes of her section 47B Employment Rights Act ("ERA") 1996 claim, on allegations of a failure to act:

    i. when was each deliberate decision not to act made; or

    ii. when did the Respondent do an act inconsistent with the failed act; or

    iii. If the Respondent has done no such inconsistent act, when did the period expire within which it might reasonably have been expected to do the failed act if it was to be done? (section 48(4) ERA 1996)

5. If out of time:

    a. Is the Tribunal satisfied that it was not reasonably practicable for the Claimant to present her complaints within the three month period (as extended by the ACAS conciliation period)?

    b. Did the Claimant submit her complaints within a further reasonable period?

    [For the avoidance of doubt, if any of the alleged detriments are held to be out of time, the Claimant will nevertheless seek to rely on them insofar as they are relevant to credibility and/or background.]

Claim for Detriment on the grounds of Whistleblowing (Section 47B of the Employment Rights Act 1996)

6. Has the Claimant made a qualifying disclosure?

    a. *The Claimant contends that on 17 June 2010 she raised her concerns about a particular junior trainee and patient safety at Epsom. In particular the Claimant contends that she raised concerns regarding the supervision of junior trainees and the lack of gynaecology skills in cases of major obstetric haemorrhage. The Claimant raised this at a local consultants' meeting on this date. Those present included Hassan Shehata, Mr Duroshola, Cheryl Ellis, Katy Ammar, Vijayasree Kakemono and Mike Katesmark.*

b. *The Claimant contends that she made a further disclosure on 12 July 2010, regarding the trainee and patient safety, to Vijayasree Kakemono.*
c. *The Claimant contends that she made a further disclosure on 10 September 2010 in an email to Mr Shehata, concerning gynaecological work and cover.*
d. *The Claimant contends that she made a further disclosure about the same issue, raising the possibility of a risk to patient safety, on 25 November 2010 in a meeting with Mr Shehata, Rim El-Rifai, Rosemary Wescott and Cheryl Neale.*
e. The Claimant alleges that she made further disclosures on 30 March 2015, 8 May 2015, 22 May 2015 and 15 June 2015. The contents of these concerns were:
    i. Concerns regarding a particular junior trainee and lack of supervision of trainees.
    ii. Changes made to her job to remove gynaecology completely which breached RCOG and compromised health and safety of patients.
    iii. Claims that concerns raised by Dr Arafa in 2012 with the fetal medicine department were not investigated.
    iv. A disclosure about the allocation of an antenatal mental health clinic to the Claimant, namely that she is not experienced or trained in mental health or substance abuse which she contended caused a risk to patients.

7. If the disclosure was made before 23 June 2013, was the disclosure made in good faith?

8. If the disclosure was made after 23 June 2013, did the Claimant have a reasonable belief that the disclosure was in the public interest?

9. Did the Claimant have a reasonable belief that the disclosure tends to show one or more of the following within in section 43B(1)(a)-(f)?
    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.

10. Has the Claimant made a protected disclosure?
    a. Was the qualifying disclosure made in accordance with sections 43C to 43H ERA 1996?

11. Has the Claimant been subjected to a detriment? The Claimant relies on the following acts and/or failures to act:
    a. The Claimant contends that on 27 August 2010 Mr Hassan Shehata removed all gynaecology work from her and stated that "whilst I am medical lead you will do no gynaecology".
    b. The Claimant contends that from 16 November 2009 onwards, her gynaecology sessions in line with her job description were given to a colleague Dr Katy Ammar by Mr Shehata.
    c. The Claimant contends that from 16 November 2009 onwards, she was prevented from doing colposcopy, even though she understood this was a requirement that she was specifically recruited to fulfil in line with her job descriptions.
    d. The Claimant contends that she was unfairly restricted to Obstetrics work only from 16 November 2009 onwards.
    e. The Claimant contents that on 25 November 2010 Mr Shehata raised an allegation that there had been complaints about the Claimant's behaviour and clinical practice without any evidence being produced.
    f. The Claimant alleges that after 25 November 2010, Mr Shehata approached the following staff (and others) to ask them about her practice: Nicola Sheppard (Labour Ward Manager), Stephanie Walsh

(Senior Midwife), Mr Raizia (Senior Staff Grade Nurse), Mrs Kaui Ping (Sonographer). The Claimant's case is that this was an on-going state of affairs and Mr Shehata continued to ask staff generally about her practice later in the year, though she cannot specifically recall when or whom.

g. *The Claimant alleges that in February 2011, an allegation was made that the Claimant had carried out private work whilst off sick and that Mr Shehata escalated this to a full fraud investigation with the London Audit Consortium.*

h. *The Claimant alleges that she was refused a phased return to work as recommended by occupational health following her operation and sickness absence in 2011.*

i. *The Claimant alleges that on 16 June 2011 she was subjected to a 3 hour job planning session by Mr Shehata. The Claimant alleges that her colleagues' job planning sessions were only arranged for an hour.*

j. *The Claimant alleges that she was intimidated by Mr Shehata during the job planning session on 16 June 2011. In particular, the Claimant alleges that she was told she could not have any gynaecology theatre, no colposcopy and had to stop going to Kings College Hospital to do scanning on Tuesday as she had to be available on Tuesdays to cover the labour ward.*

k. *The Claimant alleges that on 5 August 2011 Mr Shehata tried to escalate an incident of post partum haemorrhage (PPH) involving the Claimant to SUI London.*

l. *In August/September 2011 Dr Arafa alleges that she was refused annual leave.*

m. *The Claimant claims she was moved from Epsom Hospital to St Helier Hospital in September 2011.*

n. *The Claimant complains that her performance was investigated by Dr Patrick Radford between September 2011 and September 2012.*

o. *The Claimant complains that a grievance submitted by her in December 2011 was not responded to or addressed.*

p. *The Claimant alleges that on 10 April 2012 Mr Shehata emailed senior management threatening to escalate an issue and inform the GMC without any supporting evidence,*

q. *The Claimant alleges that Mr Shehata made an allegation on 17 October 2012 regarding the Claimant's fetal scanning which was escalated to an investigation on 6 December 2012. The Claimant alleges that oblique images and compromised measurements were happening every day in the department due to time allocation, poor machinery or babies' positioning and yet no one else was investigated.*

r. *The Claimant alleges that 7 December 2012 the Claimant's union representative requested disclosure of Dr Radford's report however this was denied in February 2013.*

s. *The Claimant alleges that copies of the medical records under investigation were requested by her by email to Ruth Charlton on 7 December 2012, however these were not disclosed for 9 months (until August 2013) despite repeated requests.*

t. *The Claimant alleges that in May or June 2013 whilst at St Helier, she wrote to Diane Sumping raising concerns in the fetal medicine department regarding scanning, equipment, time allocation for scanning which were not investigated, having already raised these concerns with Ms Sumping orally. These concerns are set out in an email from Mr Matiluko to Mrs Sumping and Mrs Croucher at around this time.*

u. *The Claimant alleges that she was excluded from fetal medicine for 2 years (October 2012 to October 2014) as a result of the ongoing investigation into her practice.*

v. *The Claimant contends that she was permitted to return to fetal medicine under supervision working with a sonographer and Mr Shehata is controlling the work she can do and restricting her practice.*

w. *The Claimant alleges that appointment of Renata Hutt as the clinical expert appointed to carry out the clinical review in the ongoing investigation amounted to a detriment. The Claimant alleges that Dr Renata Hutt, was a friend of Mr Shehata, an ex-employee of the Respondent and not a subspecialist consultant in fetal medicine.*

x. *The Claimant alleges that Dr Hutt's report was not released to her until March 2014.*

y. *The Claimant alleges that on 17 June 2013 Mr Shehata made a false allegation against Dr Arafa that she tried to coerce a member of staff into retracting her statement against Dr Arafa.*

z. The Claimant alleges that she was suspended for the first six weeks of the third conduct investigation, from 18 June 2013 to 12 August 2013.

aa. The Claimant alleges that in April 2014 Mr Shehata unilaterally changed her job plan sessions whilst she was on annual leave.

bb. The Claimant alleges that from 1 April 2010 until her resignation, she was not provided with a 75% DCC (direct clinical care), 25% SPA (supportive professional activities) split in her job plan. Although the Claimant accepts that there was some SPA and DCC, she alleges that it was never in accordance with her job plan from the beginning. She asserts that this issue was highlighted and explained in an email dated 17 October 2014 at page 829 of the Hearing Bundle.

cc. The Claimant alleges that she was carrying out a disproportionate number of labour ward sessions compared with her colleagues (2.5 compared with 1 for others) and her job plan was for a lower grade doctor.

dd. The Claimant alleges that the labour ward lead was removed from her by Mr Shehata on or about 1 October 2012 upon the Claimant's return from St Helier Hospital following completion of the mediation process, and she was the only consultant without a management post.

ee. The Claimant complains that in February 2015 she would be allocated the mental health clinic for which she had no experience or training.

ff. The Claimant alleges that in March/April 2015 Mr Shehata made repeated requests for the Claimant to timetable her activities. The Claimant alleges that she was being treated differently from her consultant colleagues, namely Mike Katesmark, Vijayasree Kakemono, Katy Ammar, Mr Jan and Ramesh Ganapathy.

gg. The Claimant alleges that in May 2015, at the behest of Mr Shehata she was replaced by a new consultant (Radhika Viswanatha) in her roles in fetal medicine, clinics and scan sessions. The Claimant alleges that Mr Shehata achieved this in two way, firstly through the appointment of Miss Viswanatha and then by amending Miss Viswanatha's job description to encompass these aspects of the Claimant's role.

hh. The Claimant alleges that on 21 July 2015, Mr Shehata made an allegation that sonographers refuse to work with the Claimant.

ii. The Claimant alleges that on 10 August 2015 she was instructed to undertake scans at St Helier Hospital rather than Epsom Hospital.

jj. The Claimant alleges that, on 30 September 2015, she was one consultant member of a three person interview panel for a SHO doctor grade position at Epsom General Hospital. While sitting in the panel preparing for the interview to start, the Claimant alleges that she was forced to leave the room and the whole interview panel by Mr Shehata.

12. Were the acts and/or failures to act listed in paragraph 10 above on the ground that the Claimant has made a protected disclosure?

13. Insofar as any of the acts and/or failures to act listed in paragraph 10 above are held to amount to detriments on the grounds that the Claimant had made one or more protected disclosure(s) before 25 June 2013, were such acts/failures to act done by individuals for whom the Respondent is liable in all the circumstances prior to the coming into force of subsections 47B(1A)-(1E) pursuant to the transitional provisions in section 24(6) of the Enterprise and Regulatory Reform Act 2013?

Capsticks Solicitors LLP

26 July 2016