THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr SG Daly	**AND**	**Northumberland Tyne and Wear NHS Foundation Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields **On:** 15 & 16 December 2016
Deliberations: 30 December 2016, 16 February 2017

Before: Employment Judge Hargrove **Members:** Mr M Brain, Mr J Adams

Appearances

For the Claimant: Mr R Owen of Gateshead CAB
For the Respondent: Mr A Webster of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that the claimant was not subjected to detriments for making protected disclosures.

REASONS

1 By an ET1 dated **17 October 2014** the claimant brought claims of being subjected to detriment because of having made public interest disclosures against the respondent. He had been employed by the respondent as a band 5 registered nurse until his resignation on **9 May 2014** with effect from **8 June**

2014. The actual issues which the Tribunal has to decide in this case are not complex but the background facts which it is necessary to recite are complex.

2 The claimant was initially employed by the respondent as a support worker from **14 August 2006** until **August 2008** when he was seconded to nurse training; and in **January 2010** commenced working as a band 5 nurse. On **29 April 2013** the claimant brought Equality Act claims against the respondent in respect of disability in case number 2502179/2013. The impairments upon which he relied to constitute disability were a congenital condition affecting in particular his manual dexterity in the right hand and arm and also a psychiatric condition akin to post traumatic stress disorder. The claims included failure to make reasonable adjustments contrary to sections 20 and 21, discrimination arising from disability contrary to section 15 and harassment contrary to section 26 of the Equality Act 2010. Following a 9 day hearing in **December 2013** the Tribunal adjudged on **8 January 2014** that those complaints succeeded. The full judgment of that Tribunal has been added to this Tribunal bundle at pages 01-047. A first remedies hearing was listed on **12 May 2014** at which the Tribunal awarded substantial amounts of compensation for injury to feelings, aggravated damages and psychiatric injury. A second remedies hearing took place on **23 July 2014** at which the claimant was awarded compensation for loss of earnings and other monetary amounts. The claimant appealed two aspects of the second remedies judgment and at a first hearing in the Employment Appeal Tribunal (EAT) on **5 December 2014** he was successful on one of them which was remitted to the Tribunal (see pages 372-383). The EAT judgment, and the remitted hearing, followed the presentation of the claims in the present case which, as stated above, had been commenced on **17 October 2014**. Originally the present proceedings included claims of unfair constructive dismissal and of a series of detriments to which the claimant submitted he had been subjected as a result of making public interest disclosures. There was a public preliminary hearing before Employment Judge Garnon, who had sat on the original Tribunal hearing with members. At that hearing the claimant was represented by Mr Owen, as he has been today, and the respondent also by Mr Webster. At that preliminary hearing all parts of the claims of detriment for making public interest disclosures were struck out as having no reasonable prospects of success but the claim of unfair dismissal (constructive) was conceded by the respondent and the Tribunal awarded compensation, consisting of a basic award only, of £3,150. The judgment and reasons are at pages 49-58 of the bundle. There was an appeal by the claimant to the EAT against the strike out which was heard by the President on **7 July 2016**. Of the considerable number of detriments claimed by the claimant in the ET1 which had been struck out, counsel for the claimant at the appeal argued that four should not have been struck out – see EAT judgment at page 65 of the bundle. Two only were allowed to proceed, those being detriment 3: “the respondent was uncooperative in agreeing a helpful reference”, and detriment 4, “that in relation to two specific reference requests from two potential employers Gateshead NHS Foundation Trust (hereinafter called “Gateshead”) and Newcastle upon Tyne Hospitals NHS Foundation Trust (hereinafter called “Newcastle”) the respondent was lethargic and uncooperative to reference requests. It is to be noted from that judgment that by that stage the public interest disclosures upon which the claimant relied had not been positively

identified or agreed. At paragraph 11 of the appeal judgment at page 67 of the bundle the EAT stated:-

> "The tribunal proceeded on the basis that since the claimant had done protected acts in relation to his claims under the Equality Act when he lodged grievances during 2011 and 2012 it was likely that he had also made protected disclosures in the course of his grievances. The tribunal was prepared to proceed on this assumed basis and correctly accepted that post employment detriments done on the ground of protected disclosures are actionable".

At the outset of the present hearing we required Mr Owen on the claimant's behalf to identify specifically the disclosures upon which he relied. Following a short adjournment he identified the following:-

2.1 In respect of the **first grievance** the claimant relied upon an investigation meeting with him which took place on **1 September 2011**. It is accepted that the claimant raised various aspects of bullying and harassment of the claimant as a disabled person. This disclosure continued, as the claimant claimed, to an appeal hearing on **24 January 2013** where, fortunately, there are notes in the present bundle at pages 144A-D, see especially at 144C, paragraph 31:-

> "S Hyde (the claimant's RCN representative at the appeal) commented that he was disappointed in the manner in which the Trust had treated a nurse with disability. It appears though that there was no induction to the team and there was exclusion from activities by the nurses (*sic*) Lowry. SD's ability has not been recognised – attempts have been made to evidence that there has been no supervision. He is not surprised that records have gone missing and he smells a rat …".

The type of wrongdoing relied upon by the claimant in that respect was identified as being belief in the breach of a legal obligation under section 43B(1)(b) of the Employment Rights Act 1996.

2.2 The **second grievance** upon which the claimant relied as being a public interest disclosure was that dated **19 February 2012** of which there is no documentary evidence in the bundle. There was an outcome letter dated **24 July 2012**. That letter is also not in the bundle. However there was an appeal by the claimant in respect of which there was a hearing on **9 November 2012.** Notes of the appeal hearing exist at pages 122-144. At page 122 the Chair noted that the original grievance letter ha asserted " a reasonable belief that the respondent had continually failed to provide him with a safe working environment." At page 127, paragraph 26 – "no individual accountability for discriminatory behaviour", the claimant stated that he was upset that people had not been held responsible for the way they had treated him and at page 128, paragraph 30 "Bullying, harassment, victimisation and unfair treatment had been minimised and

glossed over". These again were identified as being breaches of legal obligations under section 43B(1)(b) of the 1996 Act.

It is to be noted that these are the only two public interest disclosures upon which the claimant relies in the present proceedings. The claimant has not asserted that the bringing of the first set of proceedings, or the pursuit of appeals to the EAT constituted protected acts for the purposes of any victimisation claim, nor has he identified any of those acts as being in themselves public interest disclosures.

The respondent's position throughout this hearing has been that it does not concede that any of the disclosures were qualifying or protected but it is noteworthy that Mr Webster has not cross-examined the claimant to challenge his claims that these now identified disclosures were qualifying and protected.

3 These are the issues (and the statutory basis for them), therefore, which the Tribunal identifies for its consideration in these proceedings:-

3.1 **Did the claimant make disclosures as outlined above which were –**

(a) qualifying; and

(b) protected?

Section 43A defines a protected disclosure as meaning a qualified disclosure as defined by **section 43B** which is made by a worker in accordance with any of **sections 43C to 43H.**

Section 43B, Disclosures qualifying for protection, materially identifies the relevant wrongdoing as follows:-

"(1) A qualifying disclosure means any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following –

(a) …

(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) …

(d) …

(e) …

(f) … (not relevant)".

A qualifying disclosure becomes protected in accordance with **section 43C(1)** if:-

"(1) The worker makes the disclosure … to his employer".

It is not in dispute that at the time of the disclosures the claimant was an employee and worker qualifying for protection. **Section 48** of the Act provides that an employee may present a complaint to an employment **tribunal that he has been subjected to a detriment in contravention of section 47B** of the Act which deals with protected disclosures:-

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

Section 48(2) provides that:-

"(2) On a complaint under section 47B it is for the employer to show the ground on which any act or deliberate failure to act was done."

This subsection has the effect that if the claimant establishes that there was an act or deliberate failure to act which was capable of constituting a detriment, the burden shifts to the respondent to prove that the reason for the act or deliberate failure to act had nothing whatsoever to do with the making of a public interest disclosure.

Detriment is defined in the judgment of Lord Nicholls in **Shamoon v The Chief Constable of RUC [2003] IRLR page 285 House of Lords**:-

"In order for a disadvantage to qualify as a detriment, it must arise in the employment field in that the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work".

But:-

"An unjustified sense of grievance cannot amount to detriment".

3.2 **Was the claimant subjected to a detriment as defined because he had made a PID or PIDs?**

In that respect the two detriments are those which have been referred to from the judgment of the EAT above and consisted of the following. First a claim that the respondent deliberately failed to agree a suitable generic reference to be provided to any employer to whom the claimant approached for a job; and secondly the deliberate failure, as the claimant claimed, to provide a specific reference or a generic reference to the Gateshead Trust in respect of a job application which he originally made for employment with that Trust; and another job application which he made to the Newcastle Trust where the claimant was not given a date until 4 February 2015 to start on 2 March (see page 367). It is to be noted that

the claimant's application for the jobs at these two other Trusts was as a healthcare assistant, whereas he had previously been employed by the respondent as a band 5 nurse in mental health care. No issue arises in the present proceedings as to the reason why he was applying for more junior posts. The claimant says that he withdrew his registration as a band 5 nurse and was only interested in a post as a healthcare assistant.

4.1 The claimant gave evidence first on day 1. The evidence for the respondent of **Claire Shaw**, former head of HR at the respondent Trust who had left in December 2015, was interposed at the end of the day to enable her to travel back to a new job. The claimant's cross-examination was resumed on day 2 and was concluded before the lunch break. The respondent's second witness was **Gail Kay**, who had heard Mr Daly's grievance appeal in **November 2012** but had never worked with, or line managed the claimant, although she had indirectly line managed Mr Gee a former line manager of the claimant. Since **June 2014** her job title was Director and Manager for Community Services and in **July 2014** she asserts that she was asked to be the named point of contact at the respondent Trust and provide references to prospective employers for Mr Daly. She was thus a crucial witness as to what happened and why. Finally the respondent called **Mr T Docking** who was Gail Kay's line manager and who was consulted by Ms Kay concerning the provision of references for Mr Daly from **September 2014**.

4.2 It is evident from the contents of the claimant's lengthy witness statement that he believes that there was a concerted attempt by the respondent generally to cause him difficulties in applying for other jobs in particular in relation to the provision of references, but he also asserts that there must have been contact between the respondent and the Gateshead and Newcastle Trusts behind the scenes concerning his job applications, he claimed with the motive of frustrating his attempts to obtain further NHS employment; and that there was in particular a delay in the provision to him of the internal e-mail communications between the respondent and the Trusts concerning the references; and that the e-mails were only provided by the respondent trust in response to orders from the Employment Tribunal. The claimant was specifically asked in cross-examination whether he was asserting that any of the respondent's witnesses were involved in a conspiracy against the claimant in respect of the references, against the background that the witnesses Claire Shaw and Tim Docking had played no part whatsoever in the claimant's earlier case and, insofar as Gail Kay had, her involvement was limited to hearing the appeal against the second grievance on **27 February 2012** as to which the earlier Employment Tribunal had concluded at paragraph 3.116, "We agree that this was a fair, acceptably prompt and non discriminatory outcome". The claimant did not expressly adopt the word 'conspiracy' when it was put to him in examination but he did in other responses refer to the fact that, in his belief, he had been blacklisted and he refused to absolve the respondent's witnesses of personal responsibility. He did assert both in relation to Mr Docking and Ms Shaw that they had treated him differently because of his disclosures, suggesting that they may have

been directed by senior management and were afraid for their jobs. He was asked how he knew that Mr Docking was aware of the disclosures to which he responded, "I'm arguing that there was a calculated and coordinated response within the Trust to my reference request". He went on to assert that the e-mails in the bundle of documents proved it. He also made allegations of impropriety against the respondent's solicitors, Beachcrofts.

4.3 We now set out in some detail the history of the provision (or non-provision) of references starting in **July 2014**, and taken from the evidence of the claimant's and respondent's witnesses as well as the contemporary e-mails in the bundle. The respondent's solicitor from Beachcrofts, Rachel Davidson, in advance of the remedies hearing due to take place on **23 July 2014**, e-mailed Susan Lowe of the RCN on **7 July:-**

> "I understand that at the remedies hearing later this month one of the issues which the tribunal will consider is making recommendations for an apology and a reference … It may be possible to avoid the need for the forthcoming remedies hearing if the parties can agree figures for Mr Daly's loss of earnings. To the same end the Trust has also prepared some reference and apology wording for Mr Daly's consideration to see if this can be agreed without the need for a further remedies hearing. I have attached both to this e-mail for consideration".

The initial draft reference at page 238 reads:-

> "Seamus Daly was employed by the Trust between 14 August 2006 and 6 June 2014 when he resigned from his post as staff nurse band 5.
>
> Mr Daly was initially employed as a support worker and after successful completion of nurse training he secured a post of staff nurse which he commenced on 8 January 2010. He worked across a variety of services within the Trust including psychiatric, intensive care (backing working age adults) and older person peoples' services.
>
> While the facts and dates referred to above are true to the best of our knowledge and belief the addressee should be aware that the Trust and the writer of this reference accept no responsibility or liability for any loss or damage incurred …".

Susan Lowe e-mailed a copy to the claimant on **18 July** whose initial response was that the reference did not seem usable as it painted a

> "largely negative picture and almost insinuates employ at your peril ….. I need an assurance that verbal references which will be sought by perspective employers are positive and if they can

> formally agree whose name I am to use on future applications, ie Ian Gee as he was my last line manager".

Susan Lowe's original response to Beachcrofts on **7 July** to the original reference was:

> "My only thoughts on first reading is that the reference is rather sparse. It is possible that Mr Daly will seek an expanded agreed reference". See page 241.

Also on **18 July** Susan Lowe responded having received a communication from the claimant,

> "Mr Daly has indicated he does not feel this is satisfactory he believes it is not positive enough …".

On **14 July** an updated version of the reference was sent to the RCN by Rachel Davidson. See page 248. The last paragraph of the previous reference was deleted and the middle paragraph was extended adding more details of the claimant's employment history up to the date of his resignation.

4.4 On the next day, **15 July** the claimant was invited to a job interview at Gateshead to take place on the **22nd.**

4.5 On **17 July** Susan Lowe sent a form of reference drafted by the claimant to the (see page 251). In the third paragraph he wished to be included:-

> "As an employee his performance and attitude has never been called into question and we are disappointed that he has resigned. Both his previous managers have pointed to his excellent patient focus and professionalism displayed at all times both in and out of work time. In his 8 years with us he has never had any disciplinary or tardiness issues and worked well with his colleagues and a part of a team. He has always shown great flexibility towards service needs.
>
> We have no reasons not to reemploy Mr Daly in the future and would recommend him to other employers …".

On **22 July 2014** Rachel Davidson replied to the claimant's draft stating that the Trust did not agree and attaching a further draft which included at the end of the second paragraph of the work history:

> "He successfully completed his preceptorship period in June 2011"

The respondent did not agree the third paragraph proposed by the claimant, but were willing to include

> "Mr Daly undertook his nursing duties satisfactorily when working with clients and service users".

In response the respondent repeated the version at page 254.

4.6 There was a meeting in Counsel's Chambers between then Counsel for the claimant, Mr Menon, accompanied by Susan Lowe; and Mr Webster of Counsel for the respondent and instructing solicitor from Beachcrofts; and Claire Shaw in Chambers some time during working hours on **22 July**, which must have been to discuss the resumed remedies hearing which was to take place the next day. There are no notes of what was agreed or not agreed at that hearing. However, there is an internal e-mail between the respondent's HR and Claire Shaw at 17:04, page 255.

> "Gail (Gail Kay) has asked that we keep the reference as factual as possible and suggested that the attached she would be happy to sign".

This may be the version at page 254 At 7:52pm that night (page 260) the claimant responded to Susan Lowe:-

> "I do not agree with the Trust reference. Do I need to print my proposal and their two versions for the panel to decide? I am quite angry about this. My work was not criticised and even witness were commending me on it. There is no justification for anything other than a reference that reflects this and may expedite and improve my chances of employment. I am satisfied with Gail Kay".

4.7 The final remedies judgment took place the next day on **23 July** and, as stated above, various sums were agreed for compensation for loss of earnings and other financial loss. Curiously, the Tribunal recorded, "We make no recommendations". We are particularly surprised that the dispute which has now broken out between the parties was not capable of some form of resolution at a hearing in which the issue was clearly outstanding and on the agenda, and does not appear even to have been raised with the full panel sitting. There is an absence of information provided to us as to why it was not resolved, but it was certainly open to the claimant and his then counsel to have raised it Instead, during this hearing the claimant has asserted that some kind of impropriety must have taken place in the Chambers meeting, but he is unable to identify what that was.

4.8 On **25 July** Susan Lowe e-mailed Rachel Davidson asking for notification of the appropriate address for Gail Kay because the claimant had some job applications to complete. Rachel Davidson responded on **28 July** asking whether Mr Daly had any further comments on the proposed reference she had e-mailed ahead of the remedies hearing (that at page 254). On the same day, **28 July**, Susan Lowe responded:-

> "I can confirm that the apology (*sic*) letter is accepted as it is. Mr Daly had no comments …".

At 11:22 Rachel Davidson asked Susan Lowe:-

> "For clarity do you mean the reference is accepted as it is?".

Reply at 11:22 from Susan Lowe:-

> "Yes that is correct".

4.9 On **8 August 2014** Gateshead wrote to the claimant offering him a job as a full time nursing assistant without at that stage allocating an area or place of work. Gateshead sought to take up a reference from another referee for the claimant and received it on **19 August.** On the same day Gateshead applied to Gail Kay who had by now been appointed to deal with references for prospective employers (see page 293). On the same day, **19 August,** at 12:10pm Susan Lowe e-mailed Rachel Davidson (see page 267):-

> "Apologies for contacting you again about this matter. I appear to have given you incorrect information. Mr Daly does not agree the reference. I recall at the round table meeting prior to the final remedy hearing that it was indicated an amended reference would not be a problem for your client. I have asked Mr Daly what he seeks in his reference and will contact you further with that. I would be pleased if you could raise with your client and move towards an agreed reference".

Rachel Davidson responded at 16:56 (page 299):-

> "My understanding at the meeting prior to the final remedies hearing was that the reference was not agreed by Mr Daly and that you would be coming back to me with proposed changes. However in the subsequent chain of e-mails below you confirmed that the reference was agreed, and my understanding from that is that Mr Daly was not in fact seeking to make any further changes. The Trust has therefore been working on the basis that the reference attached to my e-mail of 28 July below was agreed.
>
> If you have alternative proposed wording for the reference please send it through and I will take instructions. However I do not anticipate the Trust will agree to any further amendments to the reference".

At 17:39 that day Susan Lowe responded:-

> "Mr Daly wishes to retain wording that he proposed. I have attached again to assist you. I know the Trust said they would not accept that wording, but at the discussions prior to the remedy

> hearing on 23 July it was said not to be an issue for the Trust to amend the reference. Please take instruction and revert to me as soon as possible".

The form of reference which Susan Lowe attached at that point was the reference originally drafted by Mr Daly himself at page 251 (referred to above).

4.10 On **26 August 2014** (page 271A Davidson replied):-

> "I have taken instructions regarding the proposal to amend the reference wording. The Trust do not agree to the wording proposed by Mr Daly and maintain that the wording in the reference as previously agreed is appropriate".

On **27 August** Susan Lowe e-mailed the claimant:-

> "I have heard further from the Trust. They indicate that they will not amend the reference to the wording you have proposed.
>
> Do you wish to prepare another form of words? It is clear they will not put in the matters you have proposed. There ought to be a middle ground. Perhaps you could give it some thought?" (See page 304).

Mr Daly came back on **31 August** with a revised version which is common to the respondent's final version in respect of the work history; deleted the last paragraph in Mr Daly's original version referring to the Trust's willingness to employ him again; and proposing the addition of:-

> "As an employee his performance and attitude has never been called into question and we are disappointed that he has resigned. All his previous managers have pointed to his excellent patient focus and professionalism displayed at all times both in and out of work time. In his 8 years with us he has never had any disciplinary or tardiness issues and worked well with his colleagues as part of a team. He has always shown great flexibility towards service needs.
>
> We are disappointed Mr Daly has left his employment".

The claimant voluntarily disclosed a reply which he had received from Susan Lowe on **2 September 2014** (page 321). She referred to the fact that the claimant had been for an interview for the job at the Newcastle Trust the day before and continued:-

> "As you know the Trust did not agree to providing the reference you drafted. The amended one you sent me in an e-mail of 31 August 2014 does not differ from the earlier one and the Trust have already indicated they cannot agree to that. As you have applied for roles

> recently the Trust are sending out the reference they prepared rather than put you to a disadvantage by not sending a reference".

She then referred to the differences between the two side's drafts. Referring to the claimant's version she continued:-

> "These are perhaps seeking more than any employer would write in a reference in today's climate. References tend to be factual to avoid any repercussions on the maker of the reference.
>
> I know you will not be satisfied with the above but I am of the professional opinion that the Trust have given a reference that is fit for purpose and truthfully factual".

4.11 In the meantime, there were internal e-mails between HR and Gail Kay referring to the dispute that had arisen with regard to the terms of the reference (see page 301-303). Gateshead were chasing up the reference. On **26 August** Gail Kay asked to be sent the sample reference tabled at the remedies hearing so she could respond (see page 303). There was a 'final' reminder from Gateshead of the request for the reference on **29 August** (see page 309). Gail Kay forwarded this to HR and Lynn Shaw on the same day noting

> "Pressure is mounting, I know solicitor is trying to agree reference Content as part of remedies hearing but ongoing delay is concerning. Any ideas? Should I send a very short response to say he worked here from XX to XX and was support worker, student and staff nurse during this period and his clinical work was good. I am worried he will be getting notification that we are not providing a reference and this will be seen as punitive (sic)! Alternatively if I send something that is not agreed it may cause problems. Ultimate Catch 22. Any suggestions welcome".(Tribunal's underlining).

On **2 September** HR responded to Gail Kay,

> "I've just had the go ahead from Rachel to use the reference that we believe is agreed".

That was the version at page 254. On **2 September 2014** Gail Kay responded referring to the standard format NHS job reference to which she had been referred by Gateshead originally on **19 August**, then on **24 August** and finally on **29 August** (page 309). Gail Kay attached a partially completed form of the NHS job reference which is to be found at pages 314-320. She noted that the "agreed" reference did not cover quite a few fields, "Do you want to check with Rachel how we should respond (I am not willing to be dishonest".

On **11 September** there was a yet further request for a reference from Gateshead referring to the NHS jobs format (page 322). Gail Kay

responded internally to HR stating that she had submitted the standard reference "as agreed at remedies hearing".

4.12 At this point in the chronology, on **23 September 2014,** the **Newcastle** Hospitals administrator wrote to Mr Gee the claimant's former line manager to find that he had been offered the post of healthcare assistant and had given his name as a referee. (Page 327) The e-mail refers to completion of "the attached reference request form", but that is not included within the bundle. Mr Gee immediately referred the request to HR (see pages 327-326). Gail Kay referred it up to others including Mr Docking at 5:00pm that day (see page 325). She said:-

> "The agreed reference (from the remedies hearing) does not cover a number of points on this request. This problem also occurred with the NHS jobs reference. My concern is that we could be accused of affecting his ability to secure a future role if references are returned with sections incomplete. However if I complete the sections in the reference I will need to be honest and say he has been off sick for the whole time I have worked here, that I have never worked with him (I only met him at the grievance and subsequent tribunal hearing) and obviously I need to cover his reason for leaving NTW. I understand that Seamus has already raised a constructive dismissal claim in an appeal so I think that we need to revisit the reference issue which Rachel as there is a risk that continued provision of incomplete references will be challenged in the future. Please can this be followed up?".

This was passed to Claire Shaw who responded on **24 September** (page 324):-

> "We are quite entitled to provide a reference in a format we are happy with; a lot of organisations do this. Rachel and I discussed this matter a week or so ago and both agree we should continue to reply to reference requests with the standard reference that we are happy with".

Mr Docking responded on the same day:-

> "You may want to have some oversight on this matter? Clearly with the train of events relating to this man we need to be sure we get this right to be fair to him and represent the organisation appropriately. Welcome your views".

On 4 October another 'final' reminder letter from Gateshead was again sent to Mr Gee (see page 331). He forwarded it to Gail Kay who said, "I will sort this".

On **7 October** the claimant was sent a conditional offer of employment for the full time post of healthcare assistant at **Newcastle**, subject to

satisfactory pre employment checks. No date of commencement was identified. (see page 333).

Also on **7 October** Gail Kay e-mailed stating she was having IT trouble on a return from leave and asked for the approved reference to be resent (following response to the communication she had received from Mr Gee on 4 October on receipt of the final reminder from Gateshead). The "approved reference" copy was sent to her on **10 October** and she says in her evidence that she resent it to Gateshead on approximately the same date. In her witness statement she also says that she completed the questionnaire on the NHS jobs portal using the wording in the "agreed pro forma reference" to respondent to each question, and, on the advice of HR, stated "as above" where she was unable to respond. See the format of that document at pages 483-486. She cannot state when she sent that document. The respondent's case is that no further communication was received from Gateshead until **February 2015.**

4.13 There is no evidence of any communication between the respondent and Gateshead or vice versa, between about **10 October 2014** and **10 February 2015**. On that date Gateshead e-mailed the respondent on the subject of a reference request from the claimant - see page 388 (the same version is at page 386, which bears the claimant's handwritten date of 10 January 2015 but we accept that that is an innocent error by the claimant probably caused by the letter from Gateshead to the claimant dated 25 **August 2015** at page 464). The letter of **10 February** stated:-

> "We recently requested and received completed references via NHS Jobs 2 from Gail Kay office manager and Ian Gee ward manager in respect of your former employer (the claimant) who has applied for and been conditionally offered a post as healthcare assistant at Gateshead. However both referees have not supplied essential information required in order that we can complete pre employment reference checks. I would be grateful therefore if these could be supplied by HR. The information requested –
>
> - Details of attendance/sickness absence.
> - Reason for leaving employment.
> - Whether you would reemploy and if not the reason.
> - Whether Mr Daly was subject to any disciplinary or fitness to practice investigations".

There was then internal correspondence between the respondent and their solicitors and a format of words for the completion of a reference was agreed with the claimant's RCN representative which included the following as an explanation for the claimant's sickness absences:-

> "In the last 24 months Mr Daly had 432 days sickness absence. The reason for absence was due to stress caused by his work situation".

The reference form was signed by Mr Docking on **2 April 2015** and sent to Gateshead (see pages 434-438). The Gateshead Trust wrote to the claimant much later, on **19 August,** indicating that references had been accepted.

4.14 **Separate details of the applications to Newcastle, and history of references provided.**

At the beginning of **September 2014** the claimant had attended interview for two HCA jobs at Newcastle at the Freeman Hospital. As stated above, the claimant received written notification of an offer on **7 October 2014** (page 333). Prior to that on **23 September** (page 327) Newcastle had requested a reference from Mr Gee. This was referred to Gail Kay who expressed some concerns (see above). On **24 September** Claire Shaw indicated that they were entitled to provide a reference in the format that they were happy with being the standard reference in the format which they had previously thought had been agreed. When asked about this letter in cross-examination the claimant said that he did not accept that Ms Kay's approach was entirely benign. When asked what her motives were he said that he believed it was 'coordinated.' The matter was referred up to Mr Docking who referred it up further to the executive director on **27 September**. Gail Kay returned Newcastle's reference request on **4 November 2014**. She did not fill in the boxes at page 341 and at page 342 she filled in the final box stating "Please note that I have never worked with or directly line managed Mr Daly. Please see attached document". We conclude that the document to which she referred was the document which it was believed had been agreed (see 254). It is unclear how that form of the reference with its handwritten comment was sent and it may be that it was sent by post. In any event on **6 November** there was a second request from Newcastle (page 344) to which Gail Kay responded on **11 November** by e-mail and on this occasion the reference request was prefaced by the version which had originally been thought to have been agreed (page 254) incorporated into it with the following added, "I have not worked with or directly line managed Mr Daly".

There then follows Gail Kay's name. The second version sent on **11 November** also did not answer any of the standard questions relating to quality of work, quantity of work, application to job, honesty, relations with others, team worker, punctuality, timekeeping, working unsupervised, motivation or initiative. There was however no follow up query from Newcastle concerning the provision of a further reference reference, but it appears that there <u>were</u> occupational health enquiries being made as to the claimant. This was entirely separate from the reference issue. On **9 December 2014** the claimant eventually attended an occupational health appointment at the Freeman Hospital and was informed that he would be passed as fit to commence duties. On **23 December 2014** the claimant states that he received a telephone call from Ward 27 at the Freeman Hospital from a nursing sister stating that they were "ready to go" but that the claimant would need to pester HR. This, it appears, has nothing to do with the chasing up of a reference. It appears that as a result of delays

relating to the provision of Occupational health information, the claimant was not able to attend the next healthcare academy due at the end of **January 2015**. On **8 January 2015** the claimant received a further telephone call from Occupational Health (Team Prevent – the respondent's OH provider) checking whether it was OK to release occupational health records. The claimant asserts that this was more harassing behaviour on the part of the respondent but that has not been pleaded as part of his detriment case. The claimant missed the January healthcare academy but on **4 February 2015** the claimant received a message from Newcastle informing him of a start date on **2 March 2015** at the next healthcare academy. On that date the claimant then commenced employment with Newcastle, and remained employed there at the time of this Tribunal hearing.

5 Overview and discussion

5.1 The claimant's attempt to find alternative employment with Gateshead thus began with the invitation to interview on **22 July 2014**. On **8 August 2014** Gateshead wrote offering a job as an HCA, but not identifying where or what it was to be. It is noteworthy that the claimant was not applying for any specific vacant post. It is accepted by the parties there would have been a significant number of HCA posts which the Gateshead Trust was seeking to fill at that time, and over a period of time. The same applies to the claimant's application to the Newcastle Trust. An issue concerning the format of the reference became apparent soon after the remedies hearing on **23 July 2014**. Gateshead first sought a reference from the respondent on **19 August 2014**. Correspondence went back and forth between the claimant's representative and the RCN and the respondent until early September. This was complicated by the fact that on **28 July** the claimant's representative wrongly indicated that the form of reference at page 254 was agreed by the claimant, and then indicated on **19 August** that she had made a mistake. In addition, it is apparent that Gateshead were asking for a reference in the format set out in the portal. Mr Daly produced a version of the generic reference which was unacceptable to the respondent, on **31 August 2014**. On **2 September**, significantly in our view, the claimant's own representative commented adversely on that version to the claimant in the terms set out in paragraph 4.10 above. Communications between the claimant or the claimant's representative, and the respondent ceased at that point concerning the Gateshead application. However internal communications within the respondent continued. By **10 October 2014** forms of reference had been provided to Gateshead by Gail Kay and, it seems, Ian Gee. Gateshead did not follow it up with any further queries concerning the contents of references at that stage. It was not until **10 February 2015** that Gateshead resumed enquiries – see paragraph 4.13 above for details. On **2 April 2015** Mr Docking provided a further reference, in response to Gateshead's request of **10 February**.

5.2 Meanwhile, having been offered employment by Newcastle on **4 February 2015**, on **2 March 2015** the claimant had taken up that employment with

Newcastle. He does not appear to have followed up his application to Gateshead after that date (although he told this Tribunal that he would have preferred to work at Gateshead rather than the Newcastle Trust because of his previous experience of working for the respondent, which was Newcastle based). In addition, Gateshead did not follow up the receipt of the reference in **April 2015** with a notification that the references had been accepted until **19 August 2015**. The claimant did not at that stage either, follow this up any further and remained working for Newcastle. The circumstances of the Newcastle job application are set out in paragraph 4.14 and need not be repeated.

6.1 We are satisfied that the two PIDs upon which the claimant relied and which are identified in paragraphs 2.1 and 2.2 above were qualifying and protected disclosures. The misconduct to which we find the claimant reasonably believed he had been subjected by the respondent was of ill treatment by the respondent of him related to his disability constituting a breach of a legal obligation. The first Tribunal found that there were breaches of the Equality Act in that respect. The respondent has not asserted that these disclosures were not made by the claimant in the public interest.

6.2 The fundamental issues for us to decide are whether the circumstances of the provision or non-provision of the references to Gateshead from **August 2014 onwards** and to Newcastle from **23 September onwards** constituted a detriment to the claimant which was causally linked to the making of the PIDs in the period **2011 to early 2013**. That involves first the consideration of upon whom the burden of proof lies in a detriment case. The provisions set out in section 48(2) of the Employment Rights Act (at paragraph 3.1 above) are in play. Secondly, what is the proper test for causation encapsulated in the phrase "on the ground that he had made a protected disclosure" in section 48(1)?

There have been a series of authorities on this topic ending with **Fecitt & Others v NHS Manchester (public concern at work intervening) [2012] ICR page 372 Court of Appeal**, which also cites some of the earlier authorities including:-

Nagarajan v London Regional Transport [1999] ICR page 877;
Chief Constable of West Yorkshire v Khan [2001] ICR page 2065;
London Borough of Harrow v Knight [2003] IRLR page 140.

In **Fecitt** the Employment Tribunal had found that the burden of proof under section 48(2) was reversed to the respondent in a case where the whistle-blowing claimants had been assigned to a different workplace following their making of PIDs allegedly because of a breakdown in the working relationships between staff at their original workplace; and in the case of one of the claimant's, a bank nurse, she was not offered any more shifts. The Employment Appeal Tribunal upheld that finding and it was not pursued further in the Court of Appeal. The second issue which was pursued in the Court of Appeal and is relevant to the present case was

whether the appropriate causation test required the employer to prove that the adverse treatment was "in no sense whatsoever" on the grounds that the claimants had made a PID, or merely that the employer had to prove that the making of the PID was not the reason or principal reason for the adverse treatment. (There was also a vicarious liability issue which does not arise in this case).

The Court of Appeal judgment of Elias LJ clearly establishes that the correct test is the "in no sense whatsoever test" - see paragraph 40 and also paragraph 43:-

> "I agree with (counsel for the claimants) that liability arises if the making of the PID is a material factor in the employer's decision to subject the claimant to a detrimental act".

In that context Elias LJ adopted the test in the Equal Treatment Directive relating to discrimination cases:-

> "… unlawful discriminatory consideration should not be tolerated and ought not to have any influence on employers' decisions. In my judgment, that principle is equally applicable where the objective is to protect whistle-blowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing".

Another way of putting the causation test is that derived from the judgment of Lord Nicholls in the **Khan** case:-

> "A tribunal should ask –
>
> > 'Why did the alleged discriminator act as he did? What consciously or unconsciously was his reason?"

It is to be noted that the whistle-blower is protected from post employment detriment on the grounds of the making of a protected disclosure and Mr Webster has not submitted to the contrary.

7 Conclusions

We accept that there were delays, particularly in the provision of references to Gateshead between late August and October 2016 and with hindsight we accept that the form of the reference could have been resolved earlier. There was also some shorter delay between 10 February and 2 April 2015. Although we have some doubts whether or not that is capable of constituting in itself a detriment to the claimant, we have decided to assume for the purposes of this hearing that the burden of proof did shift to the respondent under section 48(2) of the Employment Rights Act to prove that the said conduct was not because the claimant had made the two public interest disclosures which we have identified, some three years before.

We note the terms of the respondent's first version of the reference which is set out at paragraph 4.3. We asked ourselves whether we accepted the format "presented a largely negative picture and almost insinuates employ at your peril .." according to the claimant. We do not accept this. We accept that there was and is a practice amongst employers of providing neutral factual reports concluding with a sentence seeking to exempt the employer from potential negligence claims if they are inaccurate. In any event, the claimant's suggested version by way of response at 4.5 went much further than it would be reasonable for the respondent to have agreed and provided and would be very unusual in terms of the policy of caution which we accept was applied in many organisations. In any event, the respondent was prepared to move – see the version at the bottom of page 8 in paragraph 4.5 which they put forward. We have already noted that the claimant failed to raise the matter at the remedies hearing the very next day. Initially thereafter, on 28 July the claimant's representative agreed to the reference in a format which included that last comment which Mr Daly undertook as "nursing duties satisfactorily when working with clients and service users" and did not dissent from that position until 19 August. The respondent cannot be blamed for that delay. Thereafter the respondent was awaiting a further revised draft from the claimant which he returned to his representative on 31 August and is set out in full at paragraph 4.10 on page 11. The claimant effectively wanted a fulsome tribute about his performance and an indication from the respondent that they were "disappointed that he had resigned". The claimant has not provided any evidence from any independent source to back up his high opinion of himself.

We noted that the claimant has asserted what in reality was a widespread conspiracy to prevent him from obtaining alternative employment. He continues to assert, without any evidence to back it up, that there were undocumented communications between the senior management of the respondent and both of the Trusts to whom he had applied for employment, and that the three witnesses called by the respondent were involved for fear of their jobs. We broadly accepted the accuracy of the evidence given by those witnesses which is entirely consistent with the contents of the e-mail traffic which we have documented in some detail above. There is not only no evidence of any back channel communication between the respondent and either of the Trusts, we find that there was no such communication. If there had been the claimant would not have been offered any employment by either Gateshead or Newcastle; and there is no evidence of any hesitation by either in offering jobs at least when reference information was provided. The claimant was, we accept, innocently mistaken that the Gateshead follow-up for information commenced on 10 January. It was in fact 10 February. It took some seven weeks for the respondent to respond. As to the delays, we are conscious that the respondent was genuinely concerned about affecting the claimant's ability to secure a further role; and not providing potentially misleading or inaccurate information to a proposed employer. This was particularly evidenced in Gail Kay's e-mail of 29 August cited at paragraph 4.11 above. We accept that this was a genuine dilemma – it was one which was not dissimilar to that faced by the respondent in **Khan** referred to above. We find that it was however a genuinely felt dilemma. Any delay was not consciously or unconsciously engaged in by the respondent in any way in order to disadvantage the claimant. On the basis of this finding of fact, the claimant's claim is bound to

fail. It would also in our view have failed even if the claimant had relied upon as a protected act his actual successful bringing of the original Employment Tribunal proceedings, which would have provided a far more cogent motive for any victimiser. In any event, it is also unclear that the delays caused any actual disadvantage to the claimant constituting a detriment except that Gateshead might have offered the claimant a job earlier than they later did – in August 2015, namely in late 2014, we note that Gateshead did not pursue any request for further information between the last information given by Gail Kay in October and 10 February 2015. It is possible that Gateshead resumed interest in employing the claimant because the claimant may have contacted them again sometime between 4 February, when he was offered and eventually took up the Newcastle job, and 10 February, when Gateshead resumed enquiries. It took the respondent until 2 April 2015 to provide that further information, but at sometime between 4 February and 2 March the claimant had clearly accepted the alternative job available in Newcastle.

There are a number of other points raised by the claimant which he claims support his conspiracy allegation; including the time on an e-mail at page 439 (which he now accepts as mistaken); and the claimed late disclosure of the internal e-mail traffic which we have described in detail above. The claimant claimed in his evidence that the late disclosure thwarted his case. They did not in fact do so in any way. The internal e-mails clearly support the respondent's case that their treatment of the claimant had nothing to do with his having raised public interest disclosures between September 2011 and November 2012, or for that matter brought discrimination proceedings against the respondent which were successful at a later stage. The claimant appears to have believed that because the respondent had been found guilty in those proceedings of some acts of discrimination, that it should therefore provide him with glowing references as some form of recompense.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
24 February 2017
JUDGMENT SENT TO THE PARTIES ON

27 February 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL