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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Dr G M McClure		Central and North West London NHS Foundation Trust

Heard at: London Central **On**: 14 September 2017

Before: Employment Judge Goodman

Representations
For the Claimant: In Person
For the Respondent: Mr S Brittendon, Counsel

JUDGMENT having been sent to the parties on 18 September 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant is a Consultant Child and Adolescent Psychiatrist employed by the Respondent. He presented a claim to the Employment Tribunal on 7 April 2017 that he suffered detriment because of his whistleblowing activity.

2. On the claim form he stated he had:

> "suffered financial detriment due to a unilateral decision by the Trust regarding the NHS bonus system, Clinical Excellence Awards, without the opportunity to appeal. I previously held a level 9 National Award (value £36,000 annually) and was transferred to zero level in the Trust local system. I consider this is part of Trust retribution for my whistleblowing".

3. He clarified at a preliminary hearing on 30 June 2017 that the sole detriment of which he complains is loss of pay. Other matters referred to in his

claim form are background material to support a finding that that detriment was caused by his whistleblowing.

4. The Claimant held a particular role within the Trust, as the doctor nominated for Safeguarding of children. From time-to-time he had expressed critical views about the risk to patients of the content of Trust policies.

5. At the preliminary hearing on 30 June 2017 Judge Lewzey identified two issues to be heard at an open preliminary hearing today.

5.1 The first was whether the claim had been brought in time. The Claimant argues time runs from 30 November 2016, so it was presented in time. The Respondent argues that time ran from 17 November 2015, or at the very latest, from the end of June 2016.

5.2 The second matter for decision today is an application on the part of the Respondent to strike out the claim under Rule 39(1)(a) on the basis that it had no reasonable prospect of success, alternatively that it was scandalous or vexatious.

6. For the purpose of today's hearing the Respond accepts that the Claimant made a number of disclosures which may have – or did - qualify for protection under the Employment Rights Act. The challenge is about the time limit, amd about causation.

7. The Tribunal heard evidence from the Claimant, principally on why he decided to claim when he did, and if he was late, why that was. The Claimant also tabled a number of statements prepared by his colleagues. These were about his quality as a doctor, but did mot discuss pay of clinical excellence awards.

8. There was a bundle of documents of just over 300 pages. The claimant had prepared a supplementary bundle.

9. At the conclusion of the evidence each side made a submission. The Respondent relied on a written submission, amplified orally. The Claimant went through this adding his own points; some of the material in his witness statement is in the nature of a submission and read as such.

Relevant Law

10. The Employment Rights Act 1996 provides protection from detriment for whistleblowers. Section 48(3), on detriment for making protected disclosures, says:

> "an Employment Tribunal shall not consider a complaint under this section unless it is presented –
> (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or where that act or failure is part of a series of similar acts or failures the last of them or

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

11. Section 48(4) says where an act extends over a period the date of the act means the last date of the period, and that a deliberate failure to act shall be treated as done when it was decided on.

11. On the question when time starts to run or whether it is extending over a period there is guidance to Employment Tribunals in the Court of Appeal decisions **Cast -v- Croydon College(1998) IRLR 318** and **Sougrin -v- Haringey Health Authority (1992) IRLR 416. Cast** dealt with where there might be a decision that related back to an earlier decision, and held "a decision may be an act of discrimination whether or not it is made on the same facts as before, providing it results from a further consideration and is not merely a reference back to an earlier decision". In **Sougrin** it was held that a one-off act could have a number of enduring consequences, but that did not mean that it was a series of acts or one which extended over a period, only a one-off decision (from which time ran) with ongoing consequences. In contrast, as exemplified in **Hendricks v Metropolitan Police Commissioner**, there may be an ongoing "discriminatory state of affairs" which enables a claimant to link a series of otherwise disparate discriminatory acts.

12. In relation to the alternative argument, strike-out on the prospect of success on the merits, rule 37(a) of the Employment Tribunal Rules of Procedure 2013 provides that a Tribunal has power to strike-out a claim at any stage if it is scandalous or vexatious or has no reasonable prospect of success.

13. Tribunals have been warned by the higher courts that some claims before Employment Tribunals – those which relate to discrimination and public interest disclosure – are of significant public interest, are often fact sensitive. Tribunals should be extremely cautious about striking these out before hearing the evidence, and should take the claimant's case at its highest when analysing whether that case had prospects of success. **Anyonwu -v- South Bank University [2001] ICR 391** is the authority in discrimination cases, **North Glamorgan NHS Trust -v- Ezsias [2007] IRLR 603** states the same for whistleblowing, but identifies an exception to taking the claimant's case at its highest:

> "it would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation".

This was repeated in **ED&F Man Liquid Products v Patel [2003] EWCA Civ 472,** that at a preliminary hearing:

"it is certainly the case that under those rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in a position conduct a mini trial… However, that does not mean that the court has to accept without analysis everything said by a party in his statements for the court. In some cases it may be clear that there is no more substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those actual assertions may be susceptible of disposing at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable".

14. The general test when deciding whether to strike out a case without hearing the evidence was restated by the then President of the EAT in **Uzegheson_-v- London Borough of Haringey [2015] ICL 285 ,** that in general a Claimant's case should be taken at the highest as revealed by his claim unless contradicted by plainly inconsistent documents.

15. Finally, the Respondent argues that on the basis of the documents there is no basis for the claimant thinking that the claim of whistleblowing activity caused a material influence on any decisions made about his pay, and the manner in which he has conducted litigation shows a misuse of proceedings to gain a financial advantage peculiar to himself, to which he is not otherwise entitled. Attorney-General v Barker 2000 1FLR 759, a vexatious proceeding was said to be one that has "little or no basis in law (or at least no discernible basis); that was never the intention of the proceeding may be, its effect is to subject the dependent inconvenience, harassment and expense out of all proportion any gain likely to approach the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

Factual Summary

16. Working from the documents and the claimant's witness statement, the Claimant was first employed by the Respondent as a Consultant Psychiatrist from 1 May 1984. In 2008, aged around 60, he retired and took his NHS pension, but, as is not uncommon with health service professionals, he was then re-engaged or re-employed by the Respondent, and continues in employment to this day.

17. NHS terms and conditions for medical staff at various levels are set nationally across the board, but in addition there is provision for additions to pay for high perfomers in the form of clinical excellence awards. These are awarded by the Advisory Committee on Clinical Excellence Awards (ACCEA), which is a national body. Both sides agree that the Respondent is has no involvement in its decision-making. The Claimant said that around 2008 out of 40,000 eligible doctors nationally, there were 600 such awards. Individuals apply for an award by giving evidence of their activities which is then reviewed by ACCEA against its criteria.

18. In addition to this national scheme, local Trusts sometimes operate their own clinical excellence award schemes, but a doctor cannot hold both at once.

19. As of 2008 the Claimant held a bronze award, level 9, worth £34,000 per annum. After 2008 he continued working for a year without drawing his pension; he started to draw pension in 2009. At that stage, he either applied or had renewed his level 9 award for a further five years.

20. On 13 April 2015 ACCEA wrote to the claimant, with confirmation to the respondent, "to inform him that as he is in receipt of part of this pension is a longer entitled his clinical excellence award and we have ceased this from 1 April 2015. Paragraph 2.16 to 2.17 and 7.3.1 of the guides to applicants make clear that CEA awards cease when any part of the NHS/USS pension is taken." It was told he could make an application under the new scheme.

21. This approach is confirmed in the National Awards Scheme document, which provides that once a person is receipt of pension he ceases to be entitled to his award, although he can reapply, in which case the assessment will be made on work done since he has retired.

22. On 13 April 2015 ACCEA published a document announcing the terms of a fresh round of clinical excellence awards in 2015. The Claimant says that the number of awards given in that round was halved, and there are now about 300 only.

23. The Claimant was considered for such an award, with the support of the respondent, but in this round the he was unsuccessful - his evidence is that he was 0.2 points below the minimum. The Claimant says that he accepts this decision and does not challenge it.

24. In December 2015 the Claimant either applied for a review or an appeal of this decision, but was told by ACCEA on 13 January 2016 that the matter was closed and would only be reconsidered if there was new evidence.

25. An examination of that letter suggests that some of the dispute was whether the Claimant had been entitled to receive an award at all after 2009, and as to whether the Committee had or had not been told that he was already drawing his pension. The Claimant says that he engaged with further correspondence about ACCEA about this, but he abandoned it towards the middle of 2016 on the basis that he was no longer able to recover documents from the Trust which would show what the Committee had or had not been told in 2009. It had certainly petered out by June 2016.

26. The Claimant has not suggested that any absence of correspondence for this period is related to his whistleblowing.

27. The Claimant also accepts that the ACCEA decision not to give him an national award is unrelated to any whistleblowing activity within his own Trust,

which had supported his application for a renewed national award with a glowing reference.

28. Returning to 2015, when the Claimant knew that he did not have a national award he made application for a local award from his own Trust.

29. On 17 November 2015, just before the decisions were due to be announced, the Claimant wrote to the Respondent's HR Manager, Annabel Butcher saying he considered that he should get a Clinical Excellence Award at Level 9. Ms Butcher replied straight away saying that the Committee had just met, and that he would be hearing shortly, and that they had discretion to make awards, based on the evidence, between levels 1 and 9. She added: "unfortunately, as you know, you return to a position of not having any points when you lose your National award. Therefore any points awarded to you will take up the scale from this position".

30. On 19 November the Claimant received an official letter to say that he had been granted a local award of one point on the scale. According to the local terms, he had 14 days in which to appeal that decision. The Claimant did not appeal, and at today's hearing said that he accepted that this assessment was right on the evidence that had been correctly measured against the Trust's own criteria; he did not say that the one point award was wrong.

31. On 20 November the Claimant protested to Ms Butcher saying that "I'd be grateful for copy of Trust policy about this", and he was concerned about his statement about returning to the position of not having any points. He said it was surprising when the Chief Executive had written in support of an award at level 9 which he had only just missed. Annabel Butcher replied on 22 November: "I believe that this is all set out in ACCEA's 2014 report where it details the removal of pay protection for the loss of National Award. I can send you a copy of this you like." The Claimant replied that he would like to see a copy of the *Trust* policy about having to return to zero without points.

32. He repeated this is an email to the Chief Executive, Claire Murdoch on 25 November, and challenged the statement that you returned to a position not having any points as a misinterpretation of ACCEA guidance, and said it was unfair. He then referred to the secrecy inspectors in February 2015 asked him to import unfair treatment following his whistleblowing regarding safeguarding children, so suggesting, without making a specific link, this is what he would be dealing. He concluded: "I will be grateful you would ask that the current HR approach to considering my CEA is reviewed and the currently described approach is unfair".

33. Later that day, Ms Murdoch replied. She said that it had always been her expectation as Chief Executive "that we follow national policy and guidelines in relation to all matters related to doctor's pay and awards… At the heart of this approach is the just commitment to fairness and consistency." She relied on internal expert advice and other expertise appropriate. The advice that she received was given in good faith. It was consistent with national guidance as understood, and applied to all doctors in the same position. She went on: "If that

advice is incorrect than we would always revisit decisions in the light of the consistency with national guidance. Certainly, I myself only been aware of conscientious and diligent personnel doing the best furnish the trust with sound and fair advice. Certainly if you or the BMA representative have other evidence I suspect that the expectation is that will be put forward so that it can be properly considered." She then thanked him for his flagging up concerns and need for improvements.

34. The claimant responded saying that this was reassuring. He would be discussing an appeal against his national award. "Perhaps it is therefore better to defer consideration of my local trust CEA application until it is clear if I can continue with my national appeal".

35. On 17 June 2016, by which time it was clear to the claimant that he was unable to overturn the decision on the national award, the Claimant returned to the correspondence with Annabel Butcher, saying that it was very unfair that he should drop from 9 points to 0 on assessment for a local award; he asked to see that what the local process was so he could provide evidence. He also said: "I recognise that this is a new phenomenon for trusts caused by the recent warming of national awards. Applications should be considered separately from the annual local clinical excellence awards panel meeting which considers awarding additional local CEOs on position at first of April". He concluded, "I would be grateful if you would let me know the process for deciding the appropriate level word for award in April 2015 so that I can provide evidence". The claimant is not explicit in this email whether he disputes the merits of his local award level one, or whether he is also saying that there should be separate local awards to compensate those who have lost national awards. The reference to evidence suggests the former, the reference to the halving of national awards suggests an additional scheme.

36. Ms Butcher replied on 24 June. She said that she had sought guidance from NHS employers, from the National Association of Medical Personnel of Specialists, and the Trust's own solicitor and with a careful reading of its own CEA policy and terms and conditions, and "I can confirm that moving you to the bronze award to zero level CEA was the correct process and in line with the terms and conditions of employment and NHS employers and the NAMPS guidance." She had checked whether he could appeal under the CEA policy, attached, but that stated: "appeals could only be accepted where it can be demonstrated the procedure had not been properly applied". If he had any such evidence an appeal would be considered. "However, we cannot accept an appeal based on the fact that you have been moved from a bronze to zero CEAs and then awarded a level 1 in the normal round, as this is correct procedure".

37. The Claimant did not pursue the matter again until 16 November 2016, when he wrote to the Chief Executive about a range of concerns; at paragraph 5 he returned to "appeal regarding my local CEA". Referring back to the email of November 2015 in which Ms Murdoch had said the Trust would be prepared to revisit its decision and if he or the BMA had evidence to put forward, he restated some of the terms of that email and concluded: "I would appreciate confirmation of your continuing support to allow me to appeal regarding the reduction in my

CEA from level 9 National CEA to zero local CEA using a formal appeal process agreed between the Trust and the BMA."

38. The Claimant clarified today that he does not say that there was a formal appeal process agreed at that time between any Trust and the BMA, but that he thought there should be one.

39. Ms Murdoch replied in detail on all his points on 30 November 2016; on paragraph 5 she said that she had revisited the issue carefully. She felt that ACCEA were mistaken not to renew his award, but went on:

"In respect of local CEAs I understand that the clear principles which are consistently applied in this Trust and most or all other Trusts are:

- Consultants who now seek a national CEA do so effectively "at risk" of any entitlement to a local CEA
- where a consultant's national CEA is withdrawn and not renewed, there is no protection for this and the withdrawal will not lead to the automatic reinstatement of any previous or other level of CEA (as Annabel set out in her email of 24 June 2016).
- the award of a new local CEA (irrespective of whether the consultant who has previously filled a withdrawn national CEA) must be subject to a fair and transparent process, as is clearly set out in the trust's local CEA procedure

given the above, my conclusion is that I cannot support an out of process 'appeal' to increase your local CEA. This would effectively be an appeal against the National CEA decision, not against any local process. Whilst you may not agree with the decision of the ACCEA, that decision stands and there is simply no processed you to seek an increased local CEA instead. It would be unfair and an abuse of process for me to support this".

She ended with a statement of support for his valued work.

40. On 30 November 2016 the Claimant contacted a number of colleagues about concerns about changes to the Trust Out of Hours Service for vulnerable young people and a number of them wrote back to say that they would support an independent review being carried out on this. None of them refer to the pay issue.

41. The ACCEA document of April 2015 section headed "effect of submitting an unsatisfactory renewal application". Paragraph 2.5.4 says "following consultation with stakeholders, the Department of Health has asked ACCEA to change the rules relating to pay protection. From first of October 2014, a protection is no longer applicable to any award that is, or pre-or has previously been, withdrawn or not renewed. Consultants due to submit a renewal application in the 2015 round will not receive the financial value of the award after 31st of March 2016 if it is not renewed due to either not achieving the standard all the submission of an application"

42. Perhaps in anticipation of the difficulty of consultants who previously had national awards now losing them, the National Association of medical personnel specialists wrote to its members on 19 February 2015, saying "you may be aware that consultants who have applied for renewal of the national awards are in the process of being told that they had not been successful by ACCEA. In the light of this, some Trusts, under pressure from the BMA and the LNC, are putting in place locally agreed transitional arrangements to allow these consultants to be put back into the local CEA system. For example, some Trusts are putting back at the point of the CEA scale where they left it for the national scale… It is not clear how these arrangements are being funded. NHS employer's guidance states there is no such protection in the terms and conditions of employment so we would urge you to consider any locally agreed transitional arrangements very carefully. If the terms and conditions are applied properly, then the consultant should go back down to "no award" status. The greater the number of trusts that apply locally agreed transitional arrangements the more difficult it is for the rest of us to apply the terms and conditions as they should properly be applied. We would urge you all to hold the line on applying national terms and conditions". Members were asked to report back on how medical staffing departments were dealing with this.

43. There is no comprehensive information on what Trusts across the country did about pay protection for consultants losing a national CEA, but in the bundle is a December 2016 round of emails which originate from another London NHS Trust (Royal Brompton) which they asked other Trusts what their practice was about transitional protection when consultants lost a national award. Replies from five Trusts all say they did not make transitional arrangements; the bluntest says: "snakes and ladders back to zero at Royal Free".

44. The claimant produces a 2017 document from Public Health England, an NHS body, which sets up a sliding scale reduction from the previous award level back to zero over 3 years, to cushion its employees who have lost national awards.

Discussion – Time

45. The Respondent relies on the 17 November 2015 informing the Claimant that on the ending of his national award he falls back to zero unless given a local award; the time runs from then in respect of any decision not to keep his pay at a level commensurate with the national award. The Respondent's fallback position is that it was 24 June 2016, after the pause while the claimant concentrated on the national award, when Annabel Butcher stated in clear terms the reasons why it was considered that his award should fall back to 0 when the national award ended.

46. The Claimant relies on the 30 November email as going back on a previous commitment to revisit the decision if the evidence showed that their existing HR evidence about this drop was wrong.

47. In deciding when time runs from it is perhaps necessary first to examine what precisely what is act causing financial detriment that the Claimant asserts followed from his whistleblowing. The Claimant does not quarrel with the ACCEA decision about his national award which resulted cessation of payment from 1 April 2015. Nor does he quarrel with the decision of the local committee to award him level 1. He does not assert that his whistleblowing is a factor in either decision. Although the Claimant has stated more than once in the course of today's hearing that he is not seeking pay protection, meaning he should continue to receive level 9 despite the decisions of the national and local committees, perhaps along the lines lines of red circling as understood by employment lawyers, it appears that he does seek is some kind of pay protection, meaning that there should be a transitional provision to cushion him from the loss of the award, whether by maintaining the old level of award or graduating the reduction. His correspondence with Claire Murdoch and Annabel Butcher was designed to challenge the reversion to zero when he lost the national award. If he does not challenge the awards themselves, this must be about preserving his award on a different ground. Pressed on the point, he said the Trust should have a sliding reduction like the one devised by Public Health England document.

48. He also inferred from the AMPS email of February 2015 that some Trusts had made local arrangements. His argument is that his employer should have made such a transitional arrangement for him, and for any other doctor in their employment who had lost a national award (though he is not aware there are any others). He says he did not take this point up with the Trust explicitedly after the invitation in November 2015 because he was without documentary evidence of what such arrangements were.

49. The claimant accepts that his on own terms and conditions were silent as to what would happen if lost his award and also that the arrangements for Clinical Excellence Awards are entirely separate from his individual terms and conditions.

50. In other words, the event causing financial detriment is the decision not to introduce a scheme of transitional protection for those who lost their awards, or the failure to introduce such a scheme.

51. The Claimant argues that the November 2015 correspondence contains a a promise to review the position, (impliedly on transitional protection, because the claimant does not challenge either the national or local award decisions themselves), which promise was withdrawn on 30 November 2016, and that it is that withdrawal of promise which was to his detriment.

52. The Tribunal disagrees. The decision of 17 November 2015 stating that he was getting a level 1 on the local award, coupled with the email from Annabel Butcher saying that he went from 9 back to 0 when he lost his national award, were clear enough. Claire Murdoch's email a few days later was just as clear. Though couched in polite terms about reviewing the decision if he could find evidence that their advice on the point was wrong, it was (1) a statement he was not to get protected pay, and (2) not an offer of a special appeals process, to the contrary, it stated that every doctor in his position should be treated the same.

53. The Claimant has not produced evidence as invited to show that their interpretation of any national guidance or policy on cutting from 9 to 0 when a national award is lost is wrong, and there is no reason to think that if he did produce some evidence they would not consider whether their earlier interpretation was mistaken. This is different from deciding not to introduce a scheme of transitional protection.

54. Having regard to **Sougrin**, the 30 November 2016 email is not a reversal of an earlier promise of a special appeal process but a blunter restatement of the 24 November 2015 position that the Trust believes it is right about having to cut the clinical excellence award pay back to zero when a national award is lost, and that there is no appeal process for this. There is no assertion that if he produces evidence that the Trust has interpreted its policy (applying to all doctors) wrongly it will not be reconsidered. It is not a new act. It is a restatement of the decision notified to him in November 2015.

55. As to the decision to cut his pay, if indeed the Claimant was in any doubt as to the November 2015 decision being final, as it is was subject to him producing evidence about a contrary interpretation of the policy, it would and should have been clear to him by 24 June at the latest, when he got the email from Annabel Butcher restating it, and pointing him to the ACCEA document of April 2015 stating that there were no transitional arrangements. He had protested on 17 June 2016 it was unfair to go from 9 to 0, and this was the prompt reply. He was being told there was no pay protection or preservation.

56. By 24 June 2016 it was clear to the Claimant what the Trust based its decision on, and if he disputed it, or if he thought that the decision not to preserve his award was in any way related to his whistleblowing activity, he could present a claim to an Employment Tribunal. He did not present a claim within three months (subject to early conciliation) and it is out of time, unless it was not reasonably practicable for the Claimant to bring a claim within time.

57. The Claimant had previously consulted the BMA his representative body about employment disputes; he had also held senior positions within the BMA, and he knew where to get advice, even if he did not know what the time limit was, he would have been aware in general from the BMA's advisory role that time limits apply in Employment Tribunals, and that it might be wise to check what they were. There was no practical impediment preventing him from bringing a claim. The only reason advanced by the Claimant for not considering an Employment Tribunal claim then was that he pursuing a national appeal through correspondence through the first half of 2016, so he put local issues on hold. Pursuing an appeal is not usually a reason why it is not reasonably practicable to present a claim to a Tribunal, but even so, in January 2016 the national appeal was unsuccessful, and by June 2016 he had abandoned the search for material to challenge that information on drawing his pension in 2008/9 was in some way responsible for the decision not to renew his award, though that would not have altered the decision not to make a new award in 2015, which was based on evidence of post-retirement activity. The Claimant

knew that neither line of attack on the national award was going anywhere, he knew the Trust was refusing to retreat from the view that he had to go from 9 to 0 without any special or transitional procedure, and if he believed that there was any unfairness related to his whistleblowing activity (and he said as much in his 14 July 2016 email), he could present a claim. in the event

58. The Tribunal concludes that the claim was out of time; that it was reasonably practicable for the Claimant to have presented a claim in time, and that there is no jurisdiction to hear the detriment claim.

Strike Out - Prospects of Success

59. In case I am wrong about the 30 November 2016 email and the nature of the act that constitutes the detriment, I have gone on to consider the Respondent's application to strike out the claim on the basis that it has no reasonable prospect of success.

60. The Respondent relies on causation of the loss of the award, or the failure to provide transitional protection, arguing that it is plain from the reasons the Trust gave at the time and now why the Claimant was not entitled to retain any part of his national award pay, but must go back to zero when being considered for a local award that this decision was neither caused nor materially influenced by his whistleblowing activity.

61. The Respondents argue that all the necessary material is in the documents, oral evidence cannot upset them.

62. Reviewing the arguments, the respondent said at the time it relied on the ACCEA document published in April 2015 abolishing pay protection following consultation with stakeholders. This was an NHS-wide policy, and applied to all in the claimant's position. There was also the Association of Medical Professionals document, 25 February 2015, which suggests that some Trusts had made local arrangements, urging National Health Service employers generally to hold the line against transitional provisions. This puts the Respondent's decision in November 2015 (that the claimant went from 9 to 0, then got the local award at level 1) in context of a national picture where lack of protection was said to be the norm, and transitional arrangements were patchy and to be resisted. The document was sent by people unconnected with the Respondent Trust, and without knowledge of the Claimant's whistleblowing activity. There is no evidence that transitional arrangements were common. The only scheme known to the Claimant is the 2017 Public Health England document about a temporary cushion. While he may have limited access to material about other Trusts, this is presumably something where the BMA could collect evidence. The only other evidence in the emails of December 2016 showing that a number of other London Trusts had not transitional protection, and that those who lost national awards reverted to zero. These all point to the failure to provide pay protection being common across many NHS employers, in no way unique to the Respondent. It is not even shown that the Respondent is in a minority on this. As a matter of speculation it could be concluded that the Respondent would have

decided to operate transitional protection but for the claimant and his whistleblowing being a thorn in their flesh, but there is no evidence before the Tribunal from which it could reasonably be concluded that this is what happened. All the documents point to this being a standard position, encouraged by the Department of Health, and followed by other Trusts. This is sufficient and convincing evidence why the Respondent did not provide transitional protection. There is nothing the claimant can point to other than the inference that some Trusts have provided pay protection, and the evidence that at least one has a three year scheme. This will not establish that the reason why the Respondent did not provide pay protection was because of the whistleblowing.

63. In addition to the clarity of the documents there is the fact that the Trust supported him with a glowing reference (as the Claimant said in his application to renew his national award). The Claimant's background material includes complaints of delayed appraisals, and a proposal to remove from him a special responsibility, which he believed to be related to whistleblowing activity, but both were resolved satisfactorily by negotiation. Neither is conclusive, and if the documents were not so clear would have to be tested, but this material at first sight does not indicate ill will.

64. The Tribunal concludes that there is no reasonable prospect of success in proving that the decision that he should go from 9 to zero when moving from a national to a local award when ACCEA policy changed in 2015 was caused or materially influenced by his whistleblowing activity, or that any decision not to introduce a scheme of pay protection was motivated by that. The Trust considered it to be unfair to make special arrangements for him which did not apply to colleagues or across the board. If he is in a category of one (the only employee of the Respondent to have had a national award and lost it) this is beside the point, but it demonstrated that they had regard to NHS wide policy, not his own position.

Strike Out - Scandalous or Vexatious

65. The final leg of the Respondent's application is that the Claimant's actions in bringing this claim was scandalous or vexatious. It is argued that he made sure that threats to blow the whistle and make trouble for the Respondent accompanied his demands for special treatment in relation to his own financial position. Specifically it is said that he knows that he has no legal entitlement to a protection, but uses 56 disclosures postdate the decision not to award pay protection, and that is at times he discloses an improper motive in bringing these proceedings, such as in 2017 threatening media publicity in the public arena "if we cannot resolve these issues internally".

66. It is the case that in some of the correspondence addressed in this hearing there are veiled threats that if not given what he wants he will go public on matters the Trust will find unpleasant, for example the reference to CQC inspectors, (Ms Murdoch in her November 2015 reply told him to go ahead), and so might be the raising of appeal rights as one paragraph in the long letter of November 2016, sandwiched between many others devoted to whistleblowing matters past and future, and the timing of his round robin email to colleagues on

30 November 2016. If he was threatening further whistleblowing activity so as to cow the Trust into granting him a special scheme, that was improper - whistleblowing is protected because it is in the public interest that wrongdoing is exposed, and whistleblowing should not be manufactured to further a private advantage - and if he knows full well he has no right to expect pay protection but expects a settlement so the Trust can avoid adverse publicity, that is vexatious. That said, in the light of the other decisions made, it is not necessary to examine this in detail. The Claimant acts in person, and although a senior doctor could be expected to be able to reason and assess evidence, it is always human to find it difficult to be objective about your own case. What may look very like veiled and improper threats to an outsider may in the Claimant's own mind, especially if there is some history, be a genuine assertion that the only reason he has not been given pay protection is because he has made trouble for his employer. The Tribunal does not find that the claim is vexatious and scandalous.

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Employment Judge Goodman
20 October 2017