JJE

EMPLOYMENT TRIBUNALS

Claimant: **Miss T Young**

Respondent: **Barts Health NHS Trust**

Heard at: **East London Hearing Centre**

On: **8-10, 14, 15, 16, 17 May and 18 May 2018 (in chambers)**

Before: **Employment Judge Ross**

Members: **M Long, Member**
D Ross, Member

Representation

Claimant: **Ms Gilbert, Counsel**
Respondent: **Mr Cheetham QC, Counsel**

JUDGMENT

1. The complaints under Sections 47-48 Employment Rights Act 1996 are not well-founded.

2. The Claim is dismissed.

REASONS

1. The Claimant has been employed by the Respondent and its predecessor since 2000. Having complied with the Early Conciliation requirements, the Claimant presented a Claim on 19 August 2017 bringing complaints under section 47B Employment Rights Act 1996 ("ERA 1996"). The Respondent denied the complaints.

The Issues

2. The parties had produced a list of issues prior to the hearing. Having reminded ourselves that the list of issues is a tool for the parties and the Tribunal, it was amended at various points during the hearing.

3. First, having read the papers, the Tribunal considered that case management was required to particularise what specific words of the various emails relied upon contained the alleged protected disclosures, not least because some of the emails ran to more than one page or had attachments. This had been a requirement of an earlier case management order on 30 October 2017.

4. In addition, in respect of some issues, the Tribunal sought clarification of dates or further particulars of what the alleged disclosures tended to show. The Claimant sought several amendments to the original agreed list in respect of what the disclosures were alleged to show.

5. In the course of the case management exercise, the Tribunal sought clarification of the date in issue 1.4; this was stated to be 2015 at paragraph 114 of the Claimant's witness statement, but 2016 at paragraph 87 of the Particulars of Claim. Originally the list of issues was amended to state August to September 2015.

6. The final list of issues is as set out in the attached List of Issues at Appendix 1, which is taken from the draft prepared by Counsel for the Respondent (received by the Tribunal on 11 May 2018), but as amended with the agreement of the parties at 1.4 (amending the date to add "and/or 2016) and 1.6 (amending the date to 6 January 2017).

7. At the commencement of submissions, Mr. Cheetham QC indicated that jurisdiction was no longer in issue.

The Evidence

8. There was an agreed bundle of documents, consisting of three lever arch files, from pages 1 – 1482. Page references in this set of Reasons refer to pages in that bundle.

9. The Tribunal were also provided with an agreed "List of Key Characters and Glossary of Terms" (marked "R2"). This document was a valuable tool. The abbreviations in that document are the abbreviations used in this set out reasons. In respect of Data Quality Improvement Partners, this company was taken over by Maxwell Stanley in 2016; in this set of Reasons, after that point, they are referred to as "DQIP/MS".

10. The Tribunal read witness statements and heard oral evidence from the following witnesses:

For the Claimant:

10.1. Mireya Duke-Cohan
10.2. Tina Young
10.3. Chris Galea
10.4. Tharani Vijayaratnam

For the Respondent:

10.5. Stuart Butt
10.6. Lucie Jagger
10.7. Chrisha Alagaratnam
10.8. Tony Ewart

11. Mireya Duke-Cohan had been a claimant, with her claim being heard alongside that of Ms. Young. On 10 May 2018, before her cross-examination concluded, her claim was withdrawn on terms agreed by the parties (the Tribunal having permitted her to discuss terms with her advisers). As a result, her evidence concluded with no further cross-examination.

12. The Tribunal read the statement of Jonas Rubiano, a witness for the Claimant, which was taken as read, given that the Respondent did not seek to cross-examine on it.

13. The Tribunal had read the statements of witnesses who the Respondent elected not to rely on in respect of the Claimant's claim, given that Ms. Duke-Cohan's claim had been withdrawn. These were statements from: Sarah Cooper-James, Ian Walker, Betty Yeboah, Kamaljit Kaur-Johal and Alwen Williams.

Findings of Fact

14. The following are the Tribunal's findings of fact. It is important to record that, particularly in a case where there was approximately 300 pages of witness statements and a bundle of some 1500 pages, the Tribunal focussed on the relevant factual issues, and sought to make findings in respect of these. This discipline was particularly important in a case where there were numerous disputes of fact and opinion, some involving third parties who were not present as witnesses or parties. Moreover, allegations of fraud were made against third parties. It would be unjust to determine the factual basis for any such allegation where the third party was not present, particularly where the legal issues in this case did not require us to do so.

Background: the Trust and its financial position

15. There had been a merger of four hospitals management to produce the Respondent Trust; the hospitals were, in addition to St Bartholomew, the Royal London Hospital, Newham University Hospital, and Whipps Cross Hospital.

16. The Respondent is the largest NHS acute Trust in England with a turnover of £1.4 billion.

17. When Ms Alagaratnam joined the Respondent in April 2015, it was in a very difficult financial position, with a recorded deficit of over £79 million. She was recruited to support its financial recovery. We accepted her evidence as to the responsibilities that she had, including her additional role from May 2015 as Interim Director of Delivery and Improvement.

18. The Respondent had had three negative CQC inspections. It was in "special measures". As Mr. Butt explained, by analogy with insolvency in the corporate world, the equivalent of an administrator was in place, in the form of NHS Improvement, an external body. Deloitte were appointed with a view to improving the financial position of the Trust, by identifying areas which were potentially contributing to the deficit. One of these areas included "income".

Role of the Claimant

19. At the time of the events complained of, the Claimant had been employed as Head of Clinical Coding and Data Quality since 2014.

20. At the time of the merger, the Claimant had managed the merger in respect of the clinical coding teams, and had produced new ways of working across the legacy clinical coding teams. She had played a key role in transforming the legacy teams into a cohesive single Clinical Coding Team. Her positive contribution to the Respondent's income capture was recognised by the Respondent's main witness, Mr. Ewart. The successes of the Clinical Coding Team were also noted by the external contractors, DQIP. In its Clinical Coding Service Review, September 2016, it recorded that the Coding Team had been in part responsible for the increase of £2,000,000 in 2015-16; and noted that its successes were not recognised throughout the Trust. We found that the Claimant is an employee who cares a great deal about the NHS.

Clinical Coding and its Significance

21. In 2004, the payment by results system had been introduced into the NHS, but it had been introduced into the Respondent later, shortly before 2015. In this system, a tariff is paid for each activity. This has meant that it is important to ensure that all clinical activities are coded correctly to guarantee that trusts receive the right payment for that activity. Under coding will mean that the Trust does not receive the money to which it is entitled; over coding results in the Trust receiving public money to which it is not entitled.

22. The importance of Clinical Coding was explained by several witnesses and is set out in the Consultation document at 5.0 (p.1018). In short, Clinical Coding is a core function of the Trust.

23. The importance of accurate Clinical Coding is essential to the Respondent as one tool to tackle the large financial deficit noted above.

24. The quality of data has become a matter of high importance in the NHS. As the Claimant explained, data was performance, in the sense that it underpins how a Trust is judged to be performing.

The Respondent's Clinical Coding Department

25. By 2015, the Executive Board of the Trust, having received advice from Deloitte, had concerns over the level of capture and coding of clinical activity.

26. When Ms. Alagaratnam joined the Trust, her remit was to bring the deficit down. The Finance and Investment Committee ("FIC"), a subcommittee of the Board, directed her to urgently look at the capture of income, to include coding of clinical activity and to assure the Board that it was accurate.

27. Anecdotally, Ms. Alagaratnam was told that consultants were writing directly into case notes, rather than using the electronic patient notes ("EPR"). During a visit to the Royal London Hospital, this was confirmed by a Matron for Theatres.

28. The Clinical Coding Team, however, were only coding from the EPR.

29. From Ms. Alagaratnam's experience working at other NHS Trusts, this meant that the Trust's coding was likely to fail to capture the proper tariffs payable for the clinical work carried out. Ms. Alagaratnam was concerned that this could result in potential loss of income. Her concern was that the lack of use of the hybrid system (meaning paper case notes and EPR being considered together) may be causing income to be lost.

The DQIP Audit

30. In about July 2015, Ms. Alagaratnam decided that there should be an audit of Clinical Coding to try to improve income capture. This was one step of a range of steps to maximise income that she was taking in her role of Interim Chief Financial Officer.

31. Ms. Alagaratnam sought a recommendation from Deloitte for a consultancy firm to carry out the audit for the Clinical Coding department. Deloitte recommended DQIP. Neither Ms. Alagaratnam the Claimant nor any other witness had heard of DQIP up to this point.

32. Ms. Alagaratnam needed the audit carried out as soon as possible given the financial position of the Respondent, with a view to presenting to the FIC in September 2015.

33. Ms. Alagaratnam wanted the consultants to be independent, without any prior involvement with the Trust and its Coding department. This is why she did not accept the suggestion of an alternative put forward by Ms. Duke-Cohan.

34. DQIP provide a proposal and were commissioned to prepare the audit.

35. There was no tender process. Ms. Alagaratnam sought a waiver of the applicable procurement rules. The reasons for this were:

35.1. The urgency with which the audit was required, given the financial position of the Trust.
35.2. The only recommendation that Ms. Alagaratnam had received was of DQIP; and this was the only consultancy that she knew of who could do this work.

36. The Standing Financial Instructions ("SFI") of the Respondent, at 16.5.3(n) are at p.302c. The relevant parts provide as follows:

> *"(n) Formal tendering procedures may only be waived in very exceptional circumstances detailed in (a) to (h) below (up to the current Official Journal of The European Union limit for goods and services) in accordance with the procedure defined by the Chief Financial Officer. The full circumstances for the waiver must be detailed in an appropriate Trust record maintained by the Chief Financial Officer and reported to the Trust's Audit committee for scrutiny.*
>
> *(a) where the timescale genuinely precludes competitive tendering. However, failure to plan the work properly is not a justification for a waiver of competitive tendering;*

(b) where there is only one supplier of the goods or services required or where specialist expertise is required and is available from only one source;

….".

37. One reasonable interpretation of the SFI is that obtaining a single tender waiver in these circumstances amounted to a breach of the above SFI. But Ms. Alagaratnam reasonably believed that commissioning the audit was permitted under the SFI, specifically 16.5.3(n)(a).

38. On 6 July 2015, Ms. Alagaratnam emailed Ms Jagger to ask her to ensure that the commission for DQIP went through the procurement process. As standard practice, Ms. Alagaratnam nominated the Claimant (as department manager) to complete the necessary forms required where a waiver of the formal tendering procedures was sought.

39. On 5 August 2015, the Claimant met Ms Jagger in her office. The Claimant's witness statement at paragraph 94 states the following:
"I highlighted that this was a breach of the procurement rules and that I felt extremely uncomfortable about putting my name on the tender waiver"

40. In cross-examination, the Claimant's evidence included:
"*I did not think I had to whistleblow. But had to say I had concerns, other companies, why we pushing through, not want to be involved*."

41. In answer to questions from the Tribunal as to precisely what words she used at the meeting, or what the gist of them was, the Claimant replied:

"Not appropriate for me to sign the single tender waiver, not appropriate as I knew other companies capable of doing this work.

Gist said: "New form as new financial measures, so I had alarm bells and not want to sign off, not appropriate for me to sign, other companies who could do work""

42. We found that the Claimant did not state that there was a breach of the procurement rules. We accepted Ms Jagger's evidence on this, which was corroborated by the extracts of evidence given by the Claimant. We find that it is most likely that the Claimant stated that she felt uncomfortable about signing the single tender waiver because there were other companies who could do the work DQIP was commissioned to do, and that she stated her concern that companies were invited to do bespoke work in the NHS and then stayed much longer, and she would not allow it to happen.

43. In making those statements, the Claimant had a reasonable belief that, in general terms, the procurement rules applicable to the Trust were not being followed by Ms. Alagaratnam in respect of the requirement of a formal tendering process before the use of external contractors, and for the reasons that she gives in her witness statement: she believed the procurement policy required a tender from at least four companies where the project is worth up to £100,000, and that DQIP were planning to do future work and proposing use of their software.

44. In making the statements identified, the Claimant did not believe that her statements tended to show negligence by Ms. Alagaratnam evidenced by the lack of any reference to any lack of duty of care by Ms. Alagaratnam.

45. We found that, in respect of this disclosure, and all the disclosures and statements referred to at issues 1.1 to 1.6, when each was made, the Claimant reasonably believed that they were made in the public interest. Her belief was reasonable because:

45.1. The Claimant is a loyal National Health Service manager. She was acutely aware that she was dealing with public money, and wanted to avoid wastage and maximise efficient use of resources, as explained at paragraph 7 of her witness statement.

45.2. The Claimant experience (which is noted at paragraph 43 and elsewhere in her witness statement) led her to consider that external contractors created a "*dependency dynamic*", by which we understood her to mean that the organisation became dependent on their services, rather than internal staff resources. The Claimant believed that this wasted public money and was not in the public interest.

45.3. In evidence, the Claimant explained that, in her experience, contractors would come in with a specific brief, but then remain in the organisation far longer than the work required under the original brief, costing the NHS money and avoiding the usual procurement process of tendering. This is further explained at paragraph 48-49 of her witness statement. In respect of DQIP, the Claimant believed that the above pattern was happening from July 2015. For example, in respect of DQIP's software, the Revenue Improvement System, this had originally been piloted in the Trust; but then DQIP had used their position to enable them to sell this to the Trust.

45.4. The Claimant's experience was that the larger management consultancy companies used novice contractors within the NHS, which she perceived led to a waste of public funds. In this case, DQIP had been recommended by such a consultancy. DQIP had never previously worked with an Inner London NHS Trust with the case-load and complexity of systems that was in place at the Respondent Trust.

45.5. In this case, DQIP were commissioned to work, and continued to work until 2017, without a tendering process due to the use of waivers of the tender process. No references at all were taken up from other Trusts. The concerns of herself and Ms. Duke-Cohan were not acted upon by senior management by ending the involvement of DQIP, which meant that the Claimant believed that this demonstrated their views were not being listened to. In short, the Claimant believed that a pattern was being repeated.

46. We accepted Ms Jagger's evidence that she did not understand that the Claimant was acting as a whistleblower.

47. On balance, in the absence of direct evidence, we infer from the factual circumstances presented by the evidence that it is likely that Ms. Jagger told Ms. Alagaratnam that the single tender waiver had not been signed. It is likely that Ms Jagger

would want to tell a relevant senior manager that it had not been signed, given the email from Ms. Alagaratnam at p.337, asking that Ms Jagger ensures that the DQIP proposal goes through "*the process*". We concluded, having seen Ms Jagger in evidence, that she would not have left the task undone, especially because it was standard for managers to sign such a waiver and the Claimant had refused. Also, we found that Ms Jagger told the Claimant to leave it with her, and that she would speak to Ms. Alagaratnam leading to the inference that she would take it further.

48. On 5 August 2015, the Claimant went to speak to her line manager, Chris Galea. The gist of her statements to Mr. Galea are at paragraph 96 of the Claimant's statement, which includes the following evidence of the statements made by the Claimant:

> "*I also approached my manager, Chris Galea, on 5 August informing him that I had refused to sign the single tender waiver and raising my concerns that this was being pursued. I said that I would not put my name to a waiver that potentially breached policy."*

49. In cross-examination, the Claimant stated that she was not 100% sure of what exactly she said.

50. At the time that statements were made at that meeting, the Claimant did not reasonably believe that they tended to show negligence or breach of contract by Ms. Alagaratnam The statements to Mr. Galea do not suggest either belief had been formed by the Claimant. We concluded that the Claimant made the statements because she was annoyed at the lack of oversight by the commissioning of DQIP.

51. The Claimant did not tell Mr. Galea that she was whistleblowing, nor did he understand that she was.

52. Mr. Galea was a witness called by the Claimant. He appeared surprised to learn that this conversation contained one or more protected disclosures.

53. There was no evidence that Mr. Galea informed anyone of this conversation; he could not recall doing so.

54. In the event, the single tender waiver was signed retrospectively by Ms Jagger on 26 August 2015 (p834(g)(v)).

The DQIP Briefing paper

55. Over July and August 2015, the Claimant and Ms. Duke-Cohan raised concerns with Ms. Alagaratnam about the DQIP audit. These concerns were communicated to Ms. Alagaratnam, probably in a series of conversations and emails over July and August 2015.

56. For example, the email from Ms Duke-Cohan of 13 July at p.323-325 sets out concerns and queries the credentials of DQIP. Ms. Alagaratnam did not ignore these concerns, but she did not agree with them, for the reasons she explains in her evidence. In response (p.326), Ms. Alagaratnam acknowledged that at least one point was valid (relating to the availability of notes) and passed this to Mr. Galea to action. She addressed the point about alternative consultants, stressing that it had to be an

independent audit. Ms. Alagaratnam recognised that the concerns were understandable because DQIP were checking the work of the Clinical Coding department.

57. It was never put to Ms. Alagaratnam in cross-examination that she ignored the concerns of the Claimant which were set out in the email of 13 July 2015 from Ms Duke-Cohan (and which is not stated to be from the Claimant). The email at p.326 shows that the concerns were not "ignored".

58. We also accepted the evidence of Ms. Alagaratnam that clinical coding was only one area out of several income streams that she had to deal with and that she was extremely busy at that time, overseeing two directorates.

59. The audit was partially carried out between 27 July and 7 August 2015. It could not be completed in full due to lack of case notes.

60. On about 15 August 2015, the Claimant received a service review from DQIP, which took the form more of a briefing note than an audit report. The Claimant was appalled by it, believing DQIP took credit for work done by both the Claimant and Ms Duke-Cohan, and misrepresented the financial benefits that DQIP would bring the Trust.

61. There were aspects of this review which criticised the workings of the Clinical Coding Team. The Claimant believed that it undermined her department.

62. Ms. Alagaratnam arranged an Audit Feedback session on 21 August 2015. Those present included the directors of DQIP (Ms. Sung and Ms. McConnell) and the Coding management team of Chris Galea, the Claimant and Ms Duke-Cohan. The minutes of this meeting are at p.341a-i. We find that those minutes are an accurate record of the meeting. They were compiled by an Assistant Programme Manager, Ms. North; and it was not alleged that Ms. Alagaratnam or anyone else had influenced what was recorded. It was not suggested that they were inaccurate, except by implication during the oral evidence.

63. At the Feedback session, the Claimant and Ms Duke-Cohan disputed certain aspects of the audit findings. The challenges included the sample size used by DQIP, the treatment of comorbidities, the DQIP audit methodology (which was to use case notes and the EPR); and the financial projection under the DQIP method compared to the existing method was disputed.

64. The Claimant alleged that Ms. Alagaratnam accepted DQIP's review report. We did not accept that Ms. Alagaratnam accepted the findings of the review in preference to the views of the Claimant and Ms Duke-Cohan. The fact was that Ms. Alagaratnam was no expert in Clinical Coding. She did not know which set of arguments was to be preferred. She did not accept the DQIP figures without question; she asked the representative from Deloittes to validate the DQIP figures (see 4.16).

65. Moreover, Ms. Alagaratnam asked some questions of DQIP and the Coding Team management where there was dispute. For example, she asked what other NHS Trusts did: see 5.9 and 8.7 (p.341f) of the review.

66. We found Ms. Alagaratnam did not accept the DQIP report uncritically. On key areas of dispute, she sought evidence from the work of other Trusts, evidenced by the questions above and the action plan at 9.1.

67. It was not that Ms. Alagaratnam accepted the DQIP report; rather, she did not agree with all the criticisms of it made by the Claimant and Ms Duke-Cohan.

68. Contrary to the Claimant's recollection, at the Feedback meeting, the DQIP directors did not accuse the Clinical Coding department of fraud or negligence. We prefer Ms. Alagaratnam's clear evidence about this, which is corroborated by the minutes at p.341a – 341ff, which do not include either word or allegation.

69. The Tribunal did not find that Ms. Alagaratnam acted as she did during August 2015 because of the disclosures alleged at issues 1.1, 1.2 or 1.4. We accepted her evidence about this, unchallenged as it was by a specific case being put that the alleged detriments linked to any specific disclosure or disclosures, and because she did not know of the statements made to Mr. Galea in August 2015 in any event.

Conversations during August to September 2015

70. Paragraph 87 of the particulars of Claim states:
"*The Claimant raised her concerns to Paresh Patel, the Head of Finance, Chris Galea, and Mr. Ewart. In particular, she highlighted the disparity in income presented by DQIP and the small sample size used in the audit. This was a protected disclosure. Mr. Galea was supportive of the Claimant. Mr. Patel made it clear that the involvement with DQIP was before his time and he could not comment*."

71. No date is provided for this in the particulars of claim.

72. In submissions, Ms. Gilbert explained that the particulars of claim had lacked particulars of the disclosures, but that the Tribunal could look to the further and better particulars of the claim provided. At p.201 of the further and better particulars, number 5 (which correlates to the above alleged protected disclosure) refers to a single conversation which took place in August-September 2016.

73. Paragraph 114 of the witness statement of the Claimant deals with the allegations at paragraph 87 of the particulars of Claim (disclosure issue 1.4). It begins: "*Around that time (from August to October 2015)…*".

74. In answer to the questions from the Tribunal, the Claimant stated in oral evidence:

> *"1.4: one conversation?*
> *More than one; many; speaking to many people.*
>
> *But see p.201: states one conversation – why different?*
> *This is incorrect; oversight. Multiple conversations at several times with these and others."*

75. During the further particularisation of the case, the dates given for this alleged protected disclosure were August-September 2015, not including October 2015.

76. The above inconsistencies and changing nature of this alleged protected disclosure or disclosures, and the vague nature of this part of the evidence, meant that the Tribunal was unable to identify a specific disclosure which could form the basis of this alleged protected disclosure.

77. The Tribunal accepted that the Claimant had different conversations with various people, in or about August-September 2015, which included some or all of the content referred to at paragraph 114 of her witness statement. The content of those conversations was likely to vary to some extent, and without knowing which conversation was relied upon, or to whom, it was not possible to deduce whether a disclosure of information was made, nor whether it had any causative link to the alleged detriments.

78. The Claimant's evidence was confused on the issue of what conversations took place, when and with whom. For example, such a conversation could not have included Mr. Ewart; he did not start working for the Respondent until May 2016.

79. Further, when asked whether she told Mr. Galea that Mr. Ewart was responsible for breach of procurement rules, she replied:

> *"It's a bit mixed up in my head, sorry. His continuing involvement to have DQIP involved without being sorted properly by procurement inappropriate."*

80. We decided that the Claimant's evidence could not be relied upon in respect of these alleged conversations.

Allegation that Stuart Butt ignored complaints raised by the Claimant and Ms. Duke-Cohan in November 2015

81. On receipt of the DQIP audit, Ms. Duke-Cohan prepared a response sent with a cover email of 13 November 2015 to Mr. Butt, whom at that time was Director of Contracts. This email was copied to the Claimant, but neither the response nor the email were signed in the Claimant's name.

82. We accepted the evidence of Mr. Butt on this issue. He could not check whether he responded, because he left the Trust in December 2015, and had no access to his inbox thereafter. We found that he had had regular meetings with the Claimant and we note that after he rejoined the Trust and was copied into the email of 11 November 2016, he did respond even when Clinical Coding was not part of his remit. We find that it is most likely that he did not respond to the email of 13 November 2015 because he did not have a ready answer, and was about to leave his employment with the Respondent. He did not ignore the complaints.

83. Moreover, we find that Mr. Butt was not influenced in any omission to respond because of the disclosures alleged at issues 1.1 to 1.4.

Conversations alleged in August – September 2016

84. We have set out above the vague and confusing evidence and pleading in respect of the alleged protected disclosures during August – September 2015 or 2016.

85. There were further DQIP audits in 2016. The further work of DQIP was commissioned by using single tender waivers. There was no tendering process.

86. After these audits, the Claimant had conversations with Mr. Ewart, Mr. Patel and Mr. Galea in about August – September 2016. These were separate conversations, and we received in evidence no dates nor further particulars as to what these individual conversations consisted of. Again, the content of those conversations was likely to vary to some extent, and without knowing which conversation was relied upon, and with whom, it was not possible to deduce whether a disclosure of information was made, nor whether it had any causative link to the alleged detriments.

87. The Tribunal concluded that the Claimant did not make disclosures of information in these conversations (whether August to September in 2015 or in 2016) which she believed tended to show Mr. Ewart or Ms Alagratnam were guilty of fraud, nor that they were negligent, nor that they acted in breach of the procurement rules because:

87.1. There was a lack of any particulars of these conversations and these words during in 2015 or 2016. For example, asked whether these conversations explicitly stated negligence by CA or Mr. Ewart, the Claimant stated:
"*Yes, I was very clear.*
Those words?
Absolutely: inappropriate, misleading, wrong."

87.2. The Claimant's own evidence that suggested her recollection of these conversations were *"a bit mixed up"* in her head.

Claimant's conversation with Mr. Galea, August 2016

88. In August 2016, DQIP proposed that the Respondent use DQIP's Revenue Improvement Software ("RIS") for more audits. The Claimant sent an email to Chris Galea stating that this software was not appropriate, and asked him to consider 3M software, which the Claimant and Ms Duke-Cohan had been requesting. This email, p.633, is not relied on as containing any protected disclosure.

89. Subsequently, the Claimant had a conversation with Mr. Galea on an unspecified date in August 2016. A summary of this conversation is set out in paragraph 154 of the Claimant's statement:

> "*I also verbally told Mr. Galea in August that I was worried that there was a conflict of interest in DQIP pushing their own software and auditors."*

90. In oral evidence, there were no further particulars of the words used by the Claimant. The Tribunal did not find that any disclosure of information had been made in this conversation.

91. From the evidence, the Tribunal concluded that the Claimant did not have a reasonable belief at the time of this conversation that Ms. Alagaratnam was guilty of negligence or breach of contract, particularly because there was no breach of any legal obligation by Ms. Alagaratnam identified in the summary of this conversation.

92. There was no evidence that Mr. Galea discussed this conversation with anyone at all. He did not address this conversation in his witness statement and it was not addressed in oral evidence.

September - October 2016

93. On 21 September 2016, Mr. Ewart met Ms. Sung and Ms. McConnell again to discuss the key results from the Month 1 to Month 4 audits and how the Respondent could respond. They discussed what could be achieved within the financial spending limits, and agreed that the long-term goal was to agree an investment strategy for Clinical Coding, but that the £1.5 million required was not realistic in the short term.

94. Mr. Ewart summarised the discussions in his email at pp646-648, which highlighted a list of perceived "Short-term quick wins". Key matters were discussed including:

94.1. A further audit, for Month 5.

94.2. Implementation of hybrid coding across all sites (this was only being done at Newham University Hospital and Whipps Cross Hospital).

94.3. Continuity of use of the RIS audits in the short term.

95. Under the heading "Transitional Support", Mr. Ewart records part of the discussion:

> "*We agreed that the senior management arrangements as well as training and audit functions required strengthening to cover the period of consultation relating to the team restructure and recruitment. You mentioned that DQIP had access to senior resources who could fulfil the key roles for a transitional period of up to six months. This approach would also support the transition to full team to hospital site alignment*."

96. Mr. Ewart asked DQIP/MS to prepare a "*time lined operational plan, supported by a phased financial plan*" in advance of the next meeting.

97. When DQIP/MS began the Month 5 audit, it was queried by Ms. Duke-Cohan, who had not been warned another audit would take place. Mr. Ewart responded by email at p.649, informing her that there would be a further audit, and that he would be making time to consider development of the Coding service including revenue improvement options.

98. Mr. Ewart recognised the development of friction and a difficult working relationship between the Claimant and Ms. Duke-Cohan on the one hand, and DQIP/MS on the other. He believed that the Claimant and Ms Duke-Cohan were increasingly reluctant to work with DQIP/MS on audits and reviews.

99. Mr. Ewart set up a meeting on 19 October 2016 between Ms. Sung, Ms. McConnell, Ms. Duke-Cohan, the Claimant and himself. He believed that this would allow the Claimant and Ms. Duke-Cohan an opportunity to set out any issues or queries they had about the work that DQIP/MS were undertaking, with a view to resolving them and improving working relationships.

100. The Claimant and Ms. Duke-Cohan set out concerns that DQIP/MS were overstating the value that they were bringing to the Trust and taking credit for improvement and revenue which were due to the Clinical Coding Team.

101. Mr. Ewart considered that the approach of the Claimant was unprofessional, being argumentative, displaying a lack of regard for the other side of the argument, showing a lack of regard and being dismissive. Furthermore, the Claimant openly accused DQIP/MS of fraud.

102. Mr. Ewart did not believe that the conduct of the Claimant and the allegation of fraud contributed to a constructive discussion or any improvement of the working relationship. He found the use of the word "fraud" shocking in the context and given the purpose of the meeting.

103. Mr. Ewart believed, and we find as a fact, that the fundamental opposition of the Claimant and Ms Duke-Cohan to DQIP/MS did not reduce as a result of this meeting. It was put to him that the Claimant was convinced of fraud, so she was not just reluctant to work constructively. We accepted his evidence on this issue in cross examination which was as follows:

103.1. The Claimant had the "*strongest possible conviction*" that DQIP/MS were guilty of fraud.

103.2. Mr. Ewart did not trivialise her concerns. He had formed a view that she was a person with a passion for data quality and passion for driving the data quality agenda. He was concerned to see evidence to support and substantiate her claims, which is partly why he had set up the meeting, to enable him to understand the opposing views.

104. Mr. Ewart did not agree with DQIP/MS's view of embedded value. He believed it caused confusion and upset, which was the environment it had created in this case. But he was not the client of DQIP/MS, and he could not direct them in this respect.

105. By the end of the meeting, DQIP/MS had agreed to present this value more clearly. The opposing parties agreed to meet to work on the presentation of data in relation to additional income achieved by DQIP/MS, to see if an agreed approach could be reached.

The Clinical Coding Review report

106. On 24 October 2016, DQIP/MS sent to Mr. Ewart and Mr. Patel, the final and agreed version of the "Clinical Coding Service Review" report (at p.675-740). This made a number of key findings.

107. The evidence of Mr. Ewart at paragraphs 50-56 of his witness statement was not disputed. We find that his summary of the findings of the report to be proved. We cannot and do not need to comment on whether the opinion and claims of DQIP/MS were accurate.

108. Of the three options proposed by DQIP/MS, it recommended that the Respondent take Option 3 (p.737):

> "***Option 3*** *provides a Coding Transition Project whereby the Coding Team remains part of the Trust, whilst an external provider manages the immediate improvements that are required, to support the service development and build the foundations of the future-state plan. This option would provide the essential transition, with pre-*

agreed deliverables for the improvement of Clinical Coding Service Delivery, the Data Quality and Validation processes and Trust-wide Engagement. It is anticipated that this project would run 6-12 months after which the Trust should be in a state of readiness to move forward with a Service Transformation Project.

A logical next step to a 'Transition to Transformation' Project is the option to move to a fully Outsourced Management Service whereby staff would TUPE transfer to an external provider who would manage the entire Clinical Coding Service. This option should be considered as a long-term cost saving strategic option, with the clear benefits being realised immediately. This option would eliminate recruitment and retention issues as the external provider would supply the expertise and staffing as required, to achieve high standards of quality, staff development, engagement, improved efficiencies and effectiveness."

November 2016

109. Mr. Ewart found that the friction between the Claimant and Ms Duke-Cohan and DQIP/MS had not eased after the meeting of 19 October. For example, on 8 November 2016, he received an email from Ms. Duke-Cohan requesting that the audit for that month be cancelled on the ground of lack of space. He was concerned because it was in his view essential that the audit take place, and, by inference, did not think the reason raised to be a real basis for cancellation. He proposed an alternative solution.

110. Subsequently, on 8 November 2016, the Claimant sent Mr. Ewart a further email, reiterating her concerns about the financial gains which had been alleged by DQIP/MS. He found that this covered the same ground which he had thought had been resolved at the meeting on 19 October 2016.

111. In response, and partly because the directors of DQIP/MS had indicated at the meeting that they were willing to amend their presentation of data in relation to additional income, on 9 November 2016, Mr. Ewart sent an email to the Claimant (p.667) which asked whether she had had a meeting with the directors of DQIP/MS to work out a presentation of data which both parties could agree upon and whether the space issue for the November audit had been resolved. The Claimant did not reply to this email.

112. On 11 November 2016, the Claimant sent an email (p.672) to Tony Ewart, Patel Paresh, Stuart Butt, CA and others. This began

"The value of the contribution made by the Clinical Coding Team is not necessarily contextually known."

113. These are words alleged to be a protected disclosure, whether taken alone or with her subsequent email of 14 November 2016.

114. The email set out the value that the Claimant considered that the Clinical Coding team was bringing to the Respondent Trust.

115. On receipt of this email, Mr. Butt went to speak to the Claimant. He wanted to understand what the context behind the email being emailed to all those persons was. The explanation he received was that the Claimant wanted the continued use of the

internal auditor credited with delivering the improvement, and her concern over the continued engagement of DQIP/Maxwell Stanley.

116. Mr. Butt was no longer directly involved in this area of work, and his view was that there was a need to agree what would achieve the best outcome, taking the Claimant's points into account, together with the need to try to meet savings targets through improved revenue across the sites. He replied by email on 14 November 2016 (p.671) to this effect.

117. Mr. Ewart had no idea that the email of 11 November 2016 was alleged to be a protected disclosure. He recognised that it would be helpful for the Respondent to design a regular monthly "dashboard" around key income figures, to better track the contribution and value of the team's work. This idea is set out in his email to the Claimant of 14 November 2016, p.671.

118. Later, on 14 November 2016, the Claimant sent a further email (p.669) to mainly the same recipients. This included passages relied upon by the Claimant in the list of issues as containing protected disclosures:

> *"…it does not make explicit the fact that there has been some overlap with the internal clinical coder review & improvement cycle resulting in some spells having been improved prior to the MS/DQIP review. The table below, which is partially collated, makes explicit the value of the "internally improved" coding and offers a new recalculated total which excludes the "overlap" values.*
>
> *"[Maxwell Stanley's figures] do not take into account the associated cost of having MS/DQIP carry out their RIS review.*
>
> *"If, for example, MS/DQIP invoiced the Trust for N20K for the M4 review then the raw gain would be N16K. This estimate does not take into account the cost incurred by the clinical coding team both in terms of time and morale."*

119. This email contained figures which she contended demonstrated her key points:

119.1. There was duplication of work due to DQIP/MS.
119.2. DQIP/MS's claim of embedded value was disputed; and an alternative view of this value was presented in table form.

120. The Claimant accepted that the email did not state expressly that Mr. Ewart, Ms. Alagaratnam or DQIP/MS were guilty of negligence, nor that DQIP/MS were guilty of breach of contract or fraud.

121. In evidence, the Claimant explained that it was implicit in this email that DQIP/MS were acting in a fraudulent way by overstating the income that they were bringing in each month. They were representing that they were achieving £114,000 per month, but, in her view, taking out the embedded value and the value of the internal team, this was only £16,000. She stated that this "*must be fraudulent*".

122. From her evidence, the Tribunal concluded that when this email was sent, the Claimant had a reasonable belief that DQIP/MS was misusing data for its own gain, to over-inflate the value of its own work, whilst not accounting for the value of the internal

Coding team's work. The Tribunal concluded that the Claimant had a reasonable belief that DQIP/MS was guilty of fraud when she sent the emails.

123. The evidence of the Claimant on this point tended to be corroborated by Mr. Ewart. He understood her to be saying that DQIP/MS were being dishonest. He found the email made the concerns of the Claimant more clear than he had heard before; and this email table provided some evidence of what she had meant.

124. The Claimant gave no evidence to explain how and why this alleged disclosure tended to show negligence by Mr. Ewart, Ms. Alagaratnam or DQIP/Maxwell Stanley. We concluded that she did not have a belief that her email showed negligence by these persons or any malpractice by the other recipients.

125. Mr. Butt was not an expert in clinical coding; and he did not know which figures – that of DQIP/MS or that of the Claimant – were correct. He did not have the evidence to enable him to understand this information, and did not understand what the "embedded value" meant in this context. He did not respond on this occasion, leaving it to the other recipients with more direct involvement in this area at that time.

Decision to implement the "Transitional Model"

126. By 14 November 2016, the Transitional Model option proposed by DQIP/MS had been approved by Ms. Alagaratnam and Dr. Peachey. This was clearly not shared with the Claimant: see the email from Mr. Ewart at p.673a. This email, confirming the approval by Ms. Alagaratnam and Dr. Peachey, is timed at 1751. The email of 14 November 2016 from the Claimant, above, is timed at 1802. Therefore, the approval of the Transitional Model from these two managers, and the steps of Mr. Ewart to get it, could not have resulted from the email of 14 November 2016.

127. Having reviewed the emails of 11 November and 14 November from the Claimant, Mr. Ewart became very concerned about what he believed to be Ms. Young's increasingly polarised view of the DQIP/MS work and specifically her focus on their representations of income gain for the Trust, rather than the broader work of trying to bring about improvements in income recovery to the Clinical Coding department. This was particularly because by the end of the meeting of 19 October, the parties had agreed to try to work more constructively together.

128. We accepted Mr. Ewart's evidence that he did not tell the Claimant to "*be professional*". We find that it is likely that there was a conversation between him and the Claimant on 14 or 15 November. The words used were not as recalled by the Claimant. Judging by the contents of the meeting on 19 October 2016, the Claimant was very sensitive to matters involving DQIP/MS' role and in her state of mind, prone to jump to conclusions. We find that she was pre-disposed to interpret what she heard in a negative way, because she believed that DQIP/MS were not behaving in a professional way. We find that Mr. Ewart was likely to have stated to the Claimant that she was not being professional in dealing with DQIP/MS. In context, there was no two word put down of the Claimant as alleged.

129. Moreover, we found that this statement by Mr. Ewart was caused by his frustration that the Claimant as the Head of Clinical Coding took a confrontational approach to

DQIP/MS rather than an approach that facilitated their work. It was not influenced by any disclosures relied upon.

130. After this meeting with the Claimant on 14 November 2016, and after her email of that date was received, Mr. Ewart sent the email at p.673b, timed at 1908. This states:

> *"Dear Chrisha,*
>
> *I met with Lucie today and reviewed Maxwell Stanley's Framework position. The initial view is that a Board level case will be required with the earliest dated 1 December 16, however Lucie will confirm.*
>
> *In the meantime I am worried about the level of 'noise' being generated internally including with Site MD's. I have spoken with Tina this evening asking for a more constructive approach with Maxwell Stanley. I intervened a few weeks ago and facilitated a meeting between Tina, Mireya, Paula and Niki, however as today's emails demonstrate relationships have not improved with Tina's view of Maxwell Stanley now extremely polarised. Basically she feels Maxwell Stanley are misrepresenting income gain by including value added through existing audit processes. On the other hand Maxwell Stanley feel internal auditors are taking lists produced by them and selecting cases for audit from them.*
>
> *I don't believe these difference are reconcilable so if the Trust wishes to implement the 'transitional model' and has confidence in Maxwell Stanley (as I do) then an early decision would be helpful."*

131. The "*noise*" referred to in this email is a reference to the complaints made by the Claimant and MDC about the continued use of DQIP/MS.

132. Mr. Ewart promoted the Transitional Model because it was recommended by DQIP/MS and he saw it as the most realistic option to increase income for the Respondent in the short-term.

133. It is important to note that in the last sentence of the email at p.673b, Mr. Ewart explains that he had reached the conclusion that the differences between the Claimant and Ms. Duke-Cohan on one hand, and DQIP/MS on the other, were "*irreconcilable*". It is for partly this reason (noting the word "*so*" in that sentence) that he proposed the "Transitional Model" is approved by the Trust as soon as possible.

134. On 14 November 2016, Mr. Ewart met with Ms Jagger in respect of the procurement of the work. He was advised to put together a business case for submission to the Trust's Board, which he did.

Failure to disclose the DQIP/MS "Clinical Coding Service Review"

135. On 15 November 2016, Ms Duke-Cohan asked Mr. Ewart for a copy of the "Clinical Coding Service Review" report by DQIP/MS, together with his views on the findings and recommendations. We find that this was the first request for the report by either Ms Duke-Cohan or the Claimant.

136. We accepted Mr. Ewart's evidence in response to the allegation that he withheld the report from Ms Duke-Cohan and the Claimant because of alleged protected disclosures.

137. At that point, in November 2016, Mr. Ewart did not have approval to share the report with the Clinical Coding management team. The commissioning service for the report was the Income and Contracting Directorate, specifically Ms. Alagaratnam and Mr. Patel. On 15 November 2016, Mr. Ewart sent an email asking Mr. Patel if he had shared the report with Ms. Alagaratnam because he wanted to inform the Clinical Coding team of the report findings and the proposed Transitional Model change at the same time. The response from Mr. Patel was that he had not yet done so.

138. On 17 November 2016, Mr. Ewart sent full copies of the review of the Clinical Coding service to Dr. Peachey, Ms. Alagaratnam, Ms Jagger and Mr. Patel. His email (p749) explains that he proposes the Transitional Model project to be implemented in December 2016; but he asked for time-scales, because a number of steps, including managing role change for one senior manager, needed to be worked on.

139. This email explained that Mr. Ewart did not want to arrange feedback meetings with the Clinical Coding team unless and until the Trust (that is, its Executive Committee) had agreed to proceed with the Transitional Model. He believed that there was no point sharing the details if the Transitional Model were not approved.

140. Ms Duke-Cohan followed up her initial request for a copy of the report on 22 November 2016. By this stage, Mr. Ewart had not heard back from Ms. Alagaratnam or Dr. Peachey in response to his email of 17 November.

141. Mr. Ewart made presentations to Directors in December 2016, including to Ms. Alagaratnam, to get their views on it. It was clear to Ms. Alagaratnam that he would need to make a business case to the Trust Executive Committee. She agreed that there was no point sharing the details until approval for the Transitional Model was granted.

142. Ms. Alagaratnam was then absent sick from January 2017. By March 2017, she was receiving treatment. She did not check emails in her absence.

143. In addition, the Claimant went on annual leave to New Zealand for a five week holiday, on 17 January 2017. The day before she left, Mr. Ewart had a conversation with her. He asked whether she would like DQIP/MS to come in and present the service review report findings at briefings in her absence, or after she returned from leave. She stated that she would rather this was done after she returned from leave.

144. After the Claimant returned from leave, there was a period of delay in disclosing the findings.

145. We accepted that a key reason for the delay to the end of March 2017 was because Mr. Ewart was under pressure of other work, due to a Winter crisis within the Respondent's hospitals; as a result, this issue did "*drop off his radar*", as he put it.

146. Further, Mr. Patel had still not responded to agree to the report being shared. Consequently, Mr. Ewart did not follow up his earlier request for authority until 30 March 2017 (confirmed by the email at p.992). His proposal was then granted.

147. We found that Mr. Ewart's explanation was likely to be true because otherwise he would not have explained the matters that he did to the Claimant in the meeting with her on 16 January 2017, before she went on leave. We deal with this meeting further below.

148. We find as a fact that, insofar as there was any delay in the disclosure of the report, this was not materially influenced by any of the disclosures listed at 1.1 to 1.7 of the list of issues.

Disclosures in January 2017

149. The work of DQIP/MS continued with further audits. Issues continued to arise between the respective parties, with Mr. Ewart in the middle.

150. The Claimant received a further audit from DQIP/MS on 9 December 2016. The audits were being done monthly in a rolling manner.

151. This prompted the Claimant to respond in an email on 13 December 2016 (p.810 – 811). At the commencement of the hearing, as particulars of the precise words relied upon were sought, the Claimant stated that this was not relied upon as containing a protected disclosure.

152. DQIP/MS responded to this email.

153. In response, on 6 January 2017 (p813), the Claimant sent an email to the directors of DQIP/MS copied to Mr. Ewart and others. The parts of this which are alleged to be a protected disclosure are:

> *"…the presentation of benefits and bottom line return on investment to our organisation is misleading…*
>
> *The presentation of embedded value, back to the Trust does not take into account:*
>
> *i.Improvement work that was commenced prior to input from RIS/DQIP/Maxwell Stanley (I have evidence of years of improvement work with significant associated financial gains)*
>
> *ii. The on-going benefits in terms of quality and depth of coding that we continue to embed across our team as a result of the point above (please see graphs below)*
>
> *iii.The solid progress that we have been making as a Team, over time that is not directly related to input from RIS/DQIP/Maxwell Stanley (please see graphs below)*
>
> *iv.The training and review programme that was put into place for the year, independent of any input from RIS/DQIP/Maxwe\l Stanley*
>
> *v. The extensive clinical engagement work that has taken place as well as the improvements in clinical system capability (details can be provided if required)*

> *…the data shows that not only as a team have we coded more discharges this year, but that we have also increased the depth of diagnoses capture as well, as indicated by the two graphs below provided by CHKS:*
>
> *… it is both inaccurate and misleading for MS to claim that as a result of their audits, the identified errors and associated improvements are a direct result of the input of MS when there is documented evidence to the contrary."*

154. At the time of this email, the Claimant reasonably believed that DQIP/MS had made misleading statements of the financial benefit generated by the work of DQIP/MS, not that they had been negligent.

155. The Claimant's belief at the time those statements were made was that the statements in this email showed that DQIP/MS was guilty of fraud in overstating their value and guilty of misrepresentation.

156. This belief was based on her experience, knowledge and opinion after heading up the Clinical Coding service of the Respondent. This belief was reasonable in those circumstances.

157. The Claimant also believed that her statements in the email were tending to show a breach of contract in a general sense; she did not hold a reasonable belief that a specific contractual obligation had been breached. She did not know the terms of the contracts between DQIP/MS and the Respondent.

158. Mr. Ewart understood the complaints that the Claimant was making in that email, because they were complaints that she had made before. In cross examination, he stated:

> *"Understand why said by her?*
> *Reasons well-rehearsed and understood.*
> *The argument about misrepresenting value; duplication of records: waste of time and money as effort and inclusion of data from Barts Health.*
>
> *So without evidence from TY, was it your view not to stop MS from carrying out audits, even if had own concerns?*
> *If I had been end customer, I may have acted differently. The income directorate was customer. I know he met regularly with Paula and Nicky.*
> *Most exchanges copied to SB and Paresh. I shared those concerns with my line. I had not reached view on relative merits of arguments.*
>
> *So in determining who right or wrong, or whether grey area, I could not determine."*

159. We accepted that evidence. Mr. Ewart had not reached any view of which side's arguments had the most merits. This was not a matter for him given his role.

160. We find that this disclosure had no material influence on any subsequent alleged detriment. We accepted Mr. Ewart's evidence on this point.

161. By a subsequent email, sent on 13 January 2017 (p.830), to Chris Galea and Tony Ewart, the Claimant questioned what "*we as a Trust intend to submit … via the IG toolkit*

as our Clinical Coding Audit". In this context, "IG" meant information governance. The words relied upon by the Claimant as containing a protected disclosure were as follows:

> *"…this year due to not having any audit software In place we are unable to complete this requirement.*
>
> *In addition our internal auditors are in a compromised position In terms of maintaining their professional status due to the Trust not having any provision for them to conduct audits & apply error keys."*

162. This was a disclosure of information sent to both Mr. Galea and Mr. Ewart. It tended to show that the Trust may be failing in some way, which is unspecified.

163. The Claimant reasonably believed that this disclosure was in the public interest; as a diligent manager, she wanted to ensure the Clinical Coding service complied with all audit requirements.

164. The Claimant did not reasonably believe that this disclosure showed negligence by Mr. Ewart because:

164.1. There is nothing to suggest this is from the wording of the email.

164.2. There is no evidence in the email or elsewhere that the Claimant felt the failing referred to was down to the fault or breach of duty of Mr. Ewart.

164.3. The email concludes "*We would be grateful for your steer on this matter*". It is difficult to see why any steer would be sought from a manager believed to be negligent in relation to this matter.

165. Moreover, Mr. Ewart was not cross-examined about this disclosure. It was never put to him that he could have been negligent in respect of the software, nor was it suggested to him what the breach of obligation or duty may have been.

166. In any event, given the nature of this disclosure, which did not identify any legal obligation and which did not raise any suggestion of blame or fault, we concluded that this disclosure had no effect on Mr. Ewart's subsequent decisions in respect of the alleged detriments.

Detriments alleged from January to 11 June 2017

167. As we have found, Mr. Ewart spoke with the Claimant on 16 January 2017. He told her that he needed to let her know what was going to occur in her absence, that it was his intention for a consultation to be in full swing when she returned in mid-February, that he had decided to split the line management for Data Quality and Clinical Coding for the benefit of the trust; and to move her away from the responsibility of managing the Clinical Coding service, and to use her expertise and skills in Data Quality, to transform the way the team worked and interacted with the Trust, which was too big a task to be done with Clinical Coding also as part of her remit.

168. We found that Mr. Ewart stated this when he did because he did not want the Claimant to find out about the consultation and his proposal for her role from a third party,

whilst she was on holiday, and he still did not have the relevant management approval to disseminate the DQIP/MS review report.

169. We preferred the Claimant's clear evidence that Mr. Ewart did say to her not to "*fight this*" at that meeting. In the circumstances, this would not have been inconsistent given the context of the meeting, where he was to explain what would happen, and because he explained to her that this proposal was likely to get the approval of the Trust Executive Committee, given his presentations of the business case to directors.

170. In respect of the detriment alleged at issue 4.8, we accepted the evidence of Mr. Ewart at paragraphs 143 to 145 of his statement and his candid oral evidence on this issue. He admitted he did block the recruitment. In the circumstances, it was obvious to Mr. Ewart that he would not seek to recruit ahead of a proposed restructure, and the Respondent was a short period away from consultation on the restructure.

171. It was not put in evidence nor to Mr. Ewart in cross-examination that he had not addressed the Clinical Coding structure, nor that he had withdrawn budgetary responsibilities. In any event, we find that at the time he was taking steps to try to consult upon and implement the Transitional Model.

172. We found that Mr Ewart's refusal to permit recruitment into the posts and the other matters complained of at issue 4.8 had nothing to do with any disclosure.

Consultation and the meeting on 3 April 2017

173. Over March 2017, Mr. Ewart worked on various versions of the consultation documents. Once they were completed, he met with the Claimant on 3rd April 2017.

174. On balance, we preferred Mr. Ewart's account of that meeting. We found it very unlikely that, given the tension of the situation and the history and degree of strong feeling of the Claimant about the role of DQIP/MS, that he would have smiled or smirked as she alleged, or bluntly told her that she was to be demoted or downgraded and that her role would be replaced with external consultants. We consider that the Claimant was likely to have been extremely sensitive at that time to communications from Mr. Ewart on the topic of re-structure and the use of the DQIP/MS consultants and that she was very unhappy to learn the details of the proposed re-structure.

175. Mr. Ewart informed the Claimant that he was consulting with her on a proposed restructure of the Business Intelligence Unit, following the earlier conversation with her. At the meeting, he did tell her that he proposed to disestablish her post, the Head of Data Quality and Clinical Coding, which was graded 8B, and to appoint her to a vacant post previously created by her, Data Quality Team Manager, which was graded as 8A. He advised her that she would be slotted into the 8A role and would receive pay protection under the Trust policy for 18 months. He asked the Claimant to consider the proposals, despite her unhappiness which was clear from the tone and volume of her language.

176. In respect of issue 4.10, the Claimant knew that the staff consultation would be going out in April 2017. The Tribunal accepted the evidence of Mr. Ewart about the time line of events on this issue. It is likely that he told the Claimant on 3 April 2017 that the consultation documents were going out the following week.

177. Consequently, the Claimant had had prior warning that the consultation documents would be going out. We accepted Mr. Ewart's evidence that this was the reason for the meeting on 3 April 2017, to save her the upset of learning about the role change in a generic communication to all in the Coding team.

Consultation Outcome

178. On 11 June 2017, Mr. Ewart circulated the outcome to the consultation. The response to the consultation is at pp 1177-1201. This contains a detailed proposal. There is no real evidence of a sham consultation process. Mr. Ewart had no authority to pre-determine the outcome. The Trust Executive Committee agreed to his proposals for the Business Information Directorate.

179. Mr. Ewart did take account of the Claimant's counter-proposals. The fact that he did not agree with them is not proof that they were ignored. He explained in cross-examination why they were not ignored, and agreed that he had not addressed some points, and explained why. A reason why he did not address each point made in the counter-proposal was that he did not want to offend the Claimant, given her high degree of sensitivity to the proposals.

180. As for the decision to move the Claimant from an 8B post to a post graded at 8A, we found that Mr. Ewart decided the 8B post held by the Claimant was going to be removed in the re-structure. He wanted to move the Claimant to the post of Data Quality Manager, graded 8A, for the following reasons:

180.1. It was not the disclosures of the Claimant which caused this decision. He deleted the post and slotted her into the vacant 8A post because of her ongoing, strongly felt, opposition to the use of DQIP/MS, and her very strong belief that they were guilty of fraud. Within the Transitional Model, DQIP/MS would clearly have a major role to play within the management of the Clinical Coding service and, by January 2017, he had formed the view that the differences between the Claimant and DQIP/MS could not be resolved between them and they were unlikely to be able to work together in a constructive way. He wanted to remove Clinical Coding from the remit of the Claimant to facilitate the Transitional Model.

180.2. There was a genuine vacancy as Data Quality Manager. This was already graded 8A. Mr. Ewart did nothing to affect the grading of that role.

180.3. He wanted to retain the Claimant's skills in the organisation.

181. It is important to recognise that the Claimant's case was not that the Respondent's policy on change management or reorganisation prevented a manager being moved to a post which was graded as one grade below their previous post where there was pay protection. It was not suggested that Mr. Ewart had acted outside the Trust's policy by acting as he did in moving the Claimant to a post graded one grade below her existing grade, with a period of pay protection.

The Law

Employment Rights Act 1996 Part IVA

Protected disclosures: statutory definition:

182. We directed ourselves to the relevant statutory provisions of the ERA 1996, and considered the statutory wording. We were conscious of the importance of not adding any form of gloss to the statutory wording. We also considered guidance from the EAT in a number of cases.

183. For a qualifying disclosure to be protected, it must be made in accordance with any of Sections 43C – 43H: Section.43A ERA. These subsections set out various categories of person to whom a disclosure may validly be made, and the conditions attached to disclosures made to each of them.

184. Section 43B(1) includes, where relevant:

> "In this Part, a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed;
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;"

185. We recognised that "disclosure" for the purpose of Section.43B means more than mere communication. It requires a revelation or disclosure of facts: *Cavendish Munro Risks Management Ltd v Geduld* [2010] ICR 325 at paragraph 27.

Section 43B(1) does recognise a distinction between "information" and "an allegation": see *Geduld* at paragraph 20. But we were cautious about approaching *Geduld* as if there was a clear dichotomy between information and allegations. As explained by Mr. Justice Langstaff in *Kilraine v Wandsworth LBC* [2016] IRLR 422 at paragraph 30:
"The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point."

186. Whether the words used amount to a disclosure of information will depend on the context and the circumstances in which they are used: *International Petroleum v Osipov* UKEAT 0229/16.

187. A pure allegation, statement of position, opinion or complaint will not amount to information: see *Goode v Marks and Spencer plc* UKEAT/0442/09; *Smith v London Metropolitan University* [2011] IRLR 884.

188. We accepted Ms. Gilbert's submission that a disclosure of information need not necessarily arise from a single communication but may be established through a collection of communications if the earlier communications can be said to be embedded into the latter. This is the case even if the communications or emails collectively also include

requests for advice and expressions of opinion: see *Norbrook Laboratories v Shaw* [2014] ICR 540 (which also confirmed the law as in *Geduld* and *Goode*).

189. We noted *Blackbay Ventures v Gahir* [2014] IRLR 416 was a case referred to by the Respondent. It advised Tribunals to follow a structured approach, which we have sought to do. It included the following guidance: the source of the failure or likely failure to comply with a legal obligation should be identified.

190. The "wrongdoing" provisions of s.43B(1) were subject to some examination in *Babula v Waltham Forest College [2007] EWCA Civ 174, [2007] ICR 1026* . Two points in particular are emphasised in that case:

(1) The definition has both a subjective and an objective element: see in particular paras. 81-82 of the judgment of Wall LJ (pp. 1045-6). The subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed in sub-section (1). The objective element is that that belief must be reasonable.

(2) A belief may be reasonable even if it is wrong.

Test of Causation

191. Under section 47B:

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

192. It was common ground that section 47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower: see *Fecitt v. NHS Manchester [2012] IRLR 64*, an approach that mirrors the approach adopted in unlawful discrimination cases and reinforces the public interest in ensuring that unlawful discriminatory considerations are not tolerated and should play no part whatsoever in an employer's treatment of employees and workers.

193. Under section 48(2) ERA 1996 where a claim under section 47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done".

Jurisdictional points

194. Section 48 (3) provides that an employment tribunal shall not consider a complaint under section 48 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."

195. Section 48(4) provides that-

"For the purposes of subsection (3)-

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

Submissions

196. Counsel produced helpful written submissions, supplemented by oral argument. The fact that we do not address each submission in this long set of Reasons is not to be taken as evidence that each was not taken into account; each and every submission was taken into account.

197. Given the number of cases generated by the above provisions, we were directed to relatively few. Ms. Gilbert produced *Serco Ltd v Dahou* [2017] IRLR 81 and Mr. Cheetham QC set out a brief summary of the law in his written submissions.

Conclusions

198. Applying the above findings of fact and the law to the issues outlined in the List of Issues, the Tribunal reached the following conclusions.

Jurisdiction: Issues 5-8

199. We directed ourselves to Section 48(3) ERA 1996. We applied the terms of section 48(3)(a).

200. We concluded the complaints of the Claimant were of a continuing act. We noted that our focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs: *Hendricks v Commissioner of Police for Metropolis* (2003) ICR 530 at para 54. Applying this test, the act extended over the period to end on 11 June 2018.

201. In any event, the Claim was presented before the end of the period of three months beginning with the date of last act in a series of similar acts or failures, applying the extension provided by compliance with the Early Conciliation provisions. The last act complained of was 11 June 2017

Conclusions on alleged protected disclosures: Issues 1 and 2

202. In general terms, the Tribunal accepted the submissions that the Claimant had proceeded with a lack of specific information in respect of the legal obligations alleged to have been broken.

203. Moreover, the Tribunal found that the Claimant's case suffered from a lack of adequate particularisation in other respects as we explain.

Disclosure 1.1

204. There was not the disclosure of information relied upon: the Claimant did not state that there was a breach of the procurement rules.

205. Moreover, the Claimant did not believe that the statements that she did make tended to show negligence or breach of contract by Ms. Alagaratnam

206. The Claimant's statements at the meeting with Lucie Jagger on 5 August 2015 did not amount to a protected disclosure.

Disclosure 1.2

207. The Tribunal accepted that the Claimant made a disclosure of information to Chris Galea on 5 August 2015, specifically that she had refused to sign the single tender waiver.

208. The Claimant did not make a protected disclosure in this instance. We found that the Claimant did not have a reasonable belief that the disclosure tended to show any of the alleged malpractices, either negligence or breach of contract, by Ms. Alagaratnam.

209. The provision of the contract of employment which the disclosure was alleged to show to be breached by Ms. Alagaratnam was not identified.

Disclosure 1.3

210. The Claimant did not make the alleged protected disclosure to Chris Galea on the unspecified date in August 2016. There was no disclosure of information to him in the conversation relied upon.

211. If the Tribunal are wrong about this, when the disclosure was made, the Claimant did not have a reasonable belief that it tended to show that Ms. Alagaratnam was guilty of breach of contract or negligence for the reasons given in our findings of fact.

Disclosure 1.4

212. As Mr. Cheetham QC noted, it is an unpromising start for any Claimant seeking to show a protected disclosure to be unable to particularise the year or month in which it was made.

213. This allegation was hopelessly vague. As the case progressed, no more clarity was provided. The list of issues was amended to accommodate the fact that in oral evidence the Claimant stated that there were multiple conversations that she sought to rely upon in both 2015 and 2016.

214. Ms. Gilbert conceded that the particulars of claim had originally lacked particulars of the disclosures, but that this had been remedied by the Further and Better Particulars provided which the Tribunal could rely upon. In respect of this allegation, however, the further particulars at p.201 made it clear that there was only <u>one</u> conversation relied upon. When this was put to the Claimant in evidence, she stated:

> *"Multiple conversations at several times with these and others".*

215. The Claimant probably did have conversations with various employees during August to September 2015. Mr. Ewart was not at the Trust at this time, so none of them could have been with him.

216. We accepted Ms. Gilbert's submission that it was possible for a disclosure of information to emerge from a series of conversations or correspondence. This was not possible on the facts in this case, however: the Claimant has failed to prove when the alleged conversations took place or what these conversations consisted of.

217. In respect of this alleged disclosure (or disclosures) it is quite impossible for the Tribunal to discern precisely when any disclosure took place, to whom, in what context, what was said, and what was the precise belief of the Claimant in respect of the matters within Section 43B(1)(a)-(f) ERA if any such disclosure was made.

218. We have concluded that the Claimant has failed to prove any protected disclosure over the dates specified in the further particulars (August or September 2016) or in the list of issues at 1.4. We have considered separately above the conversation identified at issue 1.3 .

219. In respect of both these sets of conversations (August-September 2015 and August-September 2016), without having particulars of them, it was impossible to know if the statements made identified the source of any particular legal obligation.

Disclosure 1.5

220. The email of 11 November 2016 does not contain a disclosure of information. It is a statement of opinion or an allegation, highlighting an uncertainty.

221. The email of 14 November 2016, whether read with the email of 11 November or alone, does contain a disclosure of information in the words identified in the list of issues, including that there has been "*some overlap with the internal clinical coder review and improvement cycle*" and that DQIP/MS figures "*do not take into account the associated cost of having MS/DQIP carry out their RIS review*..."

222. When this email was sent, the Claimant had a reasonable belief that DQIP was guilty of fraud and that this email tended to show that the criminal offence of fraud had been or was being committed. We note that the e-mail refers to what would be more "*honest and transparent*". We do not consider that the Claimant needed to be more specific in identifying the type or nature of the fraud.

223. The Claimant did not have a reasonable belief that this disclosure tended to show negligence by Mr. Ewart, Ms. Alagaratnam or DQIP/MS or breach of contract by DQIP/MS.

Disclosure 1.6

224. At paragraph 105 of the particulars of claim, the Claimant alleged that she emailed Mr. Ewart and others on 13 December 2016, pointing out that the presentation of the bottom line by DQIP was misleading.

225. The further and better particulars at paragraph 37, p.202, also refer to an email on 13 December 2016.

226. The 13 December 2016 was the date that was originally within the list of issues. This date was only corrected during the hearing to 6 January 2017.

227. There was no formal application to amend the Claim. We treated the agreed amendment of the list of issues, which was not just consented to by the Respondent but pointed out as necessary by Mr. Cheetham QC, as implicitly an application to amend the claim to correct this date which was consented to. We granted that application.

228. We considered our conclusions in respect of this allegation.

229. The email at p.813 does contain disclosure of information including:

229.1. The Clinical Coding team has coded more discharges in the year.

229.2. A training and review programme had been put into place for the year, independent of DQIP/MS.

230. The remainder of the email is largely the opinion of the Claimant, expert though it may be, setting out what in her view the DQIP/MS figure for embedded value does not take into account.

231. The Claimant's belief at the time the email was sent was that the statements in this email showed that DQIP/MS was guilty of fraud in overstating the value of their work and guilty of misrepresentation (not breach of contract). This belief was based on her experience, knowledge and opinion after heading up the Clinical Coding service of the Respondent and given the matters set out at paragraph 45 above. This belief was reasonable in those circumstances, because her opinion was underpinned by her expertise and experience. It is irrelevant for our decision whether this belief was right or wrong.

232. The Claimant also believed that her statements in the email were tending to show a breach of contract in a general sense; but she did not hold a reasonable belief that a specific contractual obligation had been breached. She did not know the terms of the contracts between DQIP/MS and the Respondent.

Disclosure 1.7

233. The Tribunal found that the words identified from the email of 13 January 2017 did contain a disclosure of information.

234. The Claimant did not have a reasonable belief that this disclosure of information tended to show that a legal obligation had been breached, is being breached or was likely to be breached, nor did it show any other matter set out in Section 43B(1)(a)-(f) ERA 1996. The Claimant did not have a reasonable belief that it tended to show negligence by Mr. Ewart.

235. Moreover, this disclosure of information did not tend to show any breach of a duty of care by Mr. Ewart, nor what that duty was.

236. Accordingly, this disclosure of information was not a protected disclosure.

Issue 3: Did the Claimant reasonably believe that the disclosures were in the public interest?

237. For the reasons that we have set out in our findings of fact, the Claimant reasonably believed that each of the alleged disclosures was made in the public interest.

Issue 4: Was the Claimant subject to detriment on the ground that she made the alleged protected disclosures?

238. There were no particulars alleging specific disclosures linked with specific detriments. There was no attempt in the evidence or submissions of the Claimant to link any particular disclosure with any particular detriment. We recognised that the burden of proof is on the Respondent to show the ground on which any act or omission is done. We found, however, that the Claimant's case was not assisted by this lack of focus on the issue of causation.

Detriment 4.1

239. The Claimant's case as presented in the list of issues does not reflect her pleaded case or her witness statement.

240. The witness statement does not state that Ms. Alagaratnam ignored the Claimant's concerns in August 2015.

241. The particulars of claim state, at paragraph 60 (p.104):

> *"On 13 July 2015 Mireya passed her concerns on from that conversation to Ms Algaratnam, cc'ing in the Claimant. The CFO replied the same day, acknowledging the concerns raised, however in essence she ignored the concerns raised and made no further inquiries. This was to the Claimant's detriment, as it was known that she agreed with and encouraged Ms. Calderbank's protected disclosures."*

242. The Claimant is not a co-signatory of this email; she is merely copied in to it. It does not purport to come from the Claimant at all.

243. It is a misconception for the Claimant to rely on a protected disclosure by another, even if she did agree with it, to found a complaint under Section 47B ERA.

244. In any event, as we have explained in our findings of fact, Ms. Alagaratnam did not ignore these concerns but did not agree with them. The alleged detriment was "ignoring". Ms. Alagaratnam did not ignore the concerns. No detriment is proved.

Detriments 4.2 – 4.3

245. As the Respondent argued, it is correct that it was never put to Ms. Alagaratnam that she did what is alleged in detriments 4.1 - 4.3 because of the first or second alleged disclosures. We accepted her evidence that she did not act as alleged because of those alleged disclosures.

246. Further, the Tribunal concluded that the conversation between the Claimant and Ms. Jagger (disclosure 1.1) had no effect on the subsequent acts and omissions of the more senior managers. Ms. Jagger did not understand the complaint to be a "whistle-blowing" complaint. More to the point, we accepted the Respondent's witness evidence that this had no effect on their treatment of the Claimant.

247. Disclosures 1.2 and 1.3 could not have had any influence on the treatment of the Claimant by other managers, because there was no evidence that Mr.Galea told anyone about them.

Detriment 4.4:

248. Mr. Butt did not ignore the concerns raised by Ms Duke-Cohan in the email of 13 November 2015, for reasons we have explained. We concluded that the Claimant suffered no detriment in this respect.

249. Moreover, Mr. Butt was not influenced by the alleged disclosures 1.1 to 1.4. He did not reply for the reasons we have explained: he had no ready answer and was about to leave his employment with the Respondent.

Detriment 4.5

250. We note that Mr. Ewart did not join the organisation until May 2016. We found it most unlikely that he knew of disclosures alleged to have been made before he joined. It was not suggested to him in cross-examination that he did. We concluded that any disclosures which occurred prior to May – June 2016 were not known to him and could not have had any influence on his subsequent acts or omissions.

251. We have found that he did not tell the Claimant to "*be professional*". We find that the Claimant did not suffer the alleged detriment.

252. In any event, we concluded that whatever was said in that conversation was caused by the Claimant's continued very strong opposition to DQIP/MS.

253. The disclosure (or disclosures) in the emails of 11 and 14 November 2016 did not materially influence the Respondent's treatment of the Claimant in respect of the alleged detriments which arose after these emails were received.

254. We accepted Mr. Ewart's evidence on the issue of causation. Moreover, he shared some of the Claimant's concerns about the figures relied upon by DQIP, which make it unlikely that he would subject her to detriment because of her disclosures.

255. In addition, Mr. Ewart did not understand that the emails of 11 and 14 November 2016 were or were meant to be protected disclosures, which tends to suggest he did not act or fail to act in a detrimental way because of them.

Detriment 4.6

256. The first request for the report (which came from Ms Duke-Cohan) was on 15 November 2016. Thereafter, there was a delay in the DQIP report being provided to the Claimant. It was not provided until about 30 March 2017. This in itself could amount to a detriment to the Claimant, applying the test in *Jeremiah*.

257. Ms. Alagaratnam became aware of the report on 17 November 2016; and was off sick from January 2017. It is apparent that she had no role in the failure to disclose the report. Disclosure of the report was down to Mr. Ewart. The Tribunal accepted the

evidence of the Respondent as to the reasons for this delay, as explained in our findings of fact.

258. In terms of causation, in view of the dates and our conclusions above, detriments 4.6 to 4.11 could not have been caused by alleged disclosures 1.1 to 1.5.

259. We concluded that the delay in the disclosure of the report was not materially influenced by the disclosures listed at 1.5, 1.6 and 1.7 of the list of issues.

Detriment 4.7

260. The Particulars of Claim (at paragraph 111, p.114) alleges that the meeting of the 16 January 2017 was to the Claimant's detriment. The detriment alleged is not Mr. Ewart's restructure proposal in itself, but his communication of it to the Claimant. We do not find that all the content of that meeting was to the Claimant's detriment. We have explained why Mr. Ewart held the meeting: to ensure that he found out about the proposed consultation and the new role from him before she went on holiday, and not via a third party during her holiday.

261. Mr. Ewart told the Claimant not to "*fight this*" proposal. Given the Claimant's sensitivity by this stage to changes in the Clinical Coding service, she perceived it as a detriment. We did not find that, in the context in which those were made, that these words were a detriment applying the test in *Jeremiah*.

262. In any event, this statement was not materially influenced by any of the alleged disclosures. This is for the reasons that we have given in our findings of fact. We note that, given our findings, only disclosures 1.5, 1.6 and 1.7 could be relevant in any event.

Detriment 4.8

263. We find that the alleged detriment was a detriment for the purposes of Section 47 ERA 1996.

264. In respect of causation, we accepted the evidence of Mr. Ewart. We found that Mr Ewart's refusal to permit recruitment into the posts and the other matters complained of at detriment 4.8 had nothing to do with any disclosure. His refusal was due to his management proposal to implement the Transitional Model and restructure in the near future. It was not suggested to him in cross-examination that these management proposals were made due to the alleged disclosures.

Detriment 4.9

265. The alleged detriment (at paragraph 123 of the Claim, p.116) is pleaded to be:

> "*This entire conversation and its effects*…"

266. We have accepted Mr. Ewart's account of the meeting on 3 April 2017 for the reasons that we have given. We do not accept that he smiled or smirked in the manner alleged.

267. A fair reading of the Claim at paragraph 119 indicates that the Claimant includes the notification of her demotion as a detriment. We find that the decision to place her in a role one below her existing grade was clearly a detriment to her.

268. We have concluded that this decision was not materially influenced by any of the alleged disclosures relied upon. The reasons for that decision are set out at paragraph 180 of the findings of fact.

Detriment 4.10

269. We concluded in our findings of fact that Mr. Ewart told the Claimant at the meeting on 3 April 2017 that the consultation documents were going out the following week.

270. Accordingly, the Claimant did have prior warning that the consultation documents were going out during the week which included 10 April 2017. We concluded that the Claimant suffered no detriment by the consultation documents going out on 10 April 2017.

271. In any event, we concluded that there was no evidence to suggest that the failure to tell the Claimant the precise date on which the consultation documents were going out was connected with alleged disclosures 1.5, 1.6 or 1.7. We find that that these alleged disclosures had no material influence on when the consultation documents were sent out.

Detriment 4.11

272. On 11 June 2017, Mr. Ewart did circulate the outcome to the consultation. We did not find that it was a sham exercise. Mr. Ewart had formulated the proposed re-structure, but he had no authority to pre-determine whether it would be accepted.

273. Mr. Ewart did take account of the Claimant's counter-proposals. The fact that he did not agree with them is not proof that they were ignored. We accepted his evidence about this. The alleged detriment is not proved and this complaint fails.

Employment Judge Ross

29 May 2018

APPENDIX – FINAL LIST OF ISSUES

The paragraph numbers referenced refer to the paragraph numbers of the Second Claimant's Particulars of Claim.

Protected Disclosures and Detriments

1. Did the Claimant make a disclosure of information in accordance with section 43B ERA 1996? The Claimant relies on the following as alleged disclosures:

1.1 On 5 August 2015, approaching Lucie Jaggar in her office to say that she was concerned that the forms she had been asked to sign were a breach of procurement rules. [40] (~~professional conduct~~, failure to comply with a legal obligation (negligence, ~~likelihood of fraud~~, breach of the procurement rules), ~~conflict of interest and unethical conduct~~).

- Negligence: Alagaratnam
- BoC: Alagaratnam

1.2 After that, on 5 August 2015, approaching Chris Galea to say that she was concerned that the forms she had been asked to sign were a breach of procurement rules [41] (~~professional conduct~~, failure to comply with a legal obligation (negligence, ~~likelihood of fraud~~, breach of the procurement rules) ~~and unethical conduct~~).

- Negligence: Alagaratnam
- BoC: Alagaratnam

1.3 In August 2016, after the email conversation on 24 August 2016, telling Chris Galea verbally that there was a conflict of interest in DQIP pushing their own software and auditors. [81] (~~professional conduct~~, failure to comply with a legal obligation, negligence, breach of contract, ~~likelihood of fraud~~, breach of the procurement process) ~~and unethical conduct~~).

- Negligence: Alagaratnam, Ewart
- BoC: DQIP
- Procurement: CA

1.4 In August/September/~~October 2016~~ <u>2015 and/or 2016</u> verbally highlighting the disparity in income presented by DQIP and the small sample size used in the audit ~~in emails~~ to Paresh Patel, Chris Galea, and Tony Ewart [87] (~~professional conduct~~, failure to comply with a legal obligation (negligence, breach of contract, likelihood of fraud, ~~likely misrepresentation~~, breach of the procurement rules) ~~and unethical conduct~~).

- Negligence: Alagaratnam & DQIP in engaging DQIP; Ewart for continuing to engage DQIP
- BoC: DQIP
- Procurement: CA, Ewart
- Fraud DQIP

1.5 On 11-14 November 2016, highlighting in emails the disparity in income

presented by DQIP and the small sample size used in the audit to Paresh Patel, Chris Galea, Tony Ewart, Jackie Sullivan and Stuart Butt [87] (~~professional conduct~~, failure to comply with a legal obligation (negligence, breach of contract, likelihood of fraud, ~~likely misrepresentation, breach of the procurement rules) and unethical conduct~~).

- Negligence: Alagaratnam & DQIP in engaging DQIP; Ewart for continuing to engage DQIP
- BoC: DQIP
- Fraud DQIP

(page 669 and 672)

11 November

"The value of the contribution made by the Clinical Coding Team is not necessarily contextually known."

14th November

"…it does not make explicit the fact that there has been some overlap with the internal clinical coder review & improvement cycle resulting in some spells having been improved prior to the MS/DQIP review. The table below, which is partially collated, makes explicit the value of the "internally improved" coding and offers a new recalculated total which excludes the "overlap" values.

"[Maxwell Stanley's figures] do not take Into account the associated cost of having MS/DQIP carry out their RIS review.

"If, for example, MS/DQIP invoiced the Trust for N20K for the M4 review then the raw gain would be N16K. This estimate does not take into account the cost incurred by the clinical coding team both in terms of time and morale."

1.6 On ~~13 December 2016~~ 6 January 2017, emailing DQIP, Maxwell Stanley, Chris Galea and Tony Ewart pointing out that the presentation of the bottom line in DQIP's report was misleading and inaccurate, which amounted to misrepresentation of financial benefits [105] (~~professional conduct~~, failure to comply with a legal obligation (negligence, breach of contract, likelihood of fraud, ~~likely misrepresentation, breach of the procurement rules) and unethical conduct~~).

- Negligence: Ewart & DQIP
- BoC: DQIP
- Fraud: Ewart

(page 813)

"…the presentation of benefits and bottom line return on investment to our organisation is misleading…

The presentation of embedded value, back to the Trust does not take into account:

i Improvement work that was commenced prior to input from RIS/DQIP/Maxwell Stanley (I have evidence of years of improvement work with significant associated financial gains)

ii. The on-going benefits in terms of quality and depth of coding that we continue to embed across our team as a result of the point above (please see graphs below)

iii. The solid progress that we have been making as a Team, over time that is not directly related to input from RIS/DQIP/Maxwell Stanley (please see graphs below)

iv. The training and review programme that was put into place for the year, independent of any input from RIS/DQIP/Maxwe\l Stanley

v. The extensive clinical engagement work that has taken place as well as the improvements in clinical system capability (details can be provided if required)

…the data shows that not only as a team have we coded more discharges this year, but that we have also increased the depth of diagnoses capture as well, as indicated by the two graphs below provided by CHKS:

… it is both inaccurate and misleading for MS to claim that as a result of their audits, the identified errors and associated improvements are a direct result of the input of MS when there is documented evidence to the contrary."

1.7 ~~On 17 January 2017, as a follow up to~~ an email sent on 13 January 2017, emailing Chris Galea and Tony Ewart, asking about the Trust's information governance. She pointed out that the Trust had not had any of its own software (as DQIP used its own) and that this meant they were unable to complete all information governance requirements. She also raised that many of the internal auditors were compromised in terms of maintaining their professional status as there was no software provision [107] (~~professional conduct~~, failure to comply with a legal obligation (negligence, ~~breach of contract, likelihood of fraud, likely misrepresentation) and unethical conduct~~).

- Negligence: Ewart

(page 830)

"…this year due to not having any audit software In place we are unable to complete this requirement.

In addition our internal auditors are in a compromised position In terms of maintaining their professional status due to the Trust not having any provision for them to conduct audits & apply error keys."

2. Did those disclosures of information, in the Claimant's reasonable belief, tend to show the alleged malpractices identified?

3.. Did the Claimant reasonably believe that the above disclosures were in the public interest (s43B(1)ERA)?

4. Was the Claimant subject to detriment on the grounds that she made the above protected disclosure(s)? The Claimant contends the following are detriments:

4.8 In August 2015, Ms Alagaratnam ignoring the Claimant's concerns raised with Ms Calderbank (Duke-Cohan) [61].

4.9 In August 2015, Ms Alagaratnam accepting DQIP's report which undermined the Claimant's department [68].

4.10 In August 2015, Ms Alagaratnam not supporting the Claimant by challenging and correcting DQIP's representation that some of the department's coding was fraudulent or negligent [69-70].

4.11 In November 2015, Stuart Butt ignoring the concerns raised by the Claimant and Mireya Calderbank (Duke Cohan) [78].

4.12 On 14/15 November 2016, Tony Ewart telling the Claimant to be professional [89].

4.13 From October 2016 to 30 March 2017, by the Respondent (Tony Ewart, Ms Alagaratnam. Mr Peachey) delaying the disclosure of DQIP's report to the Claimant [92].

4.14 On 17 January 2017, Tony Ewart stating that he intended to remove the Claimant's clinical coding role and in that meeting, Mr Ewart warning her not to 'fight this' [110- 112].

4.15 From that date and thereafter, Tony Ewart stopping the Claimant's attempts to progress her teams, stopping her from recruiting for Data Quality, not addressing the inadequate Clinical Coding structure and withdrawing budgetary management responsibilities [114].

4.16 On 3 April 2017, without consultation, Mr Ewart telling the Claimant that she was to be removed form Clinical Coding and that her role was being disestablished [118] and in that meeting, Mr Ewart informing the Claimant with a smile/smirk on his face that she was to be downgraded/demoted [119] and that her role would be backfilled/ replaced with external consultants [121].

4.17 On 10 April 2017, Tony Ewart sending out the official staff consultation without prior warning to the Claimant [125].

4.18 On 11 June 2017, Tony Ewart circulating the outcome to the sham/predetermined consultation process which ignored the Claimant's counter-proposal [126-127].

Jurisdiction

5 Was the Claimant's claim presented to the Tribunal before the end of the period of three months beginning when the act complained of was done?

6 In so far as the Claimant is complaining that the Respondent omitted to act, when did the Respondent make the decision not to act?

7 Did the matters complained of amount to conduct extending over a period ending within the period of three months prior to the presentation of the claim?

8 To the extent that any of the Claimant's complaints under the ERA 1996 are out of time, was it reasonably practicable for her to present her claims in time?

Remedy

If the Tribunal finds that any of the Claimant's claims above are well founded:

9 What, if any, loss has the Claimant suffered, and what, if any, loss will she suffer in the future? The Claimant has set out her alleged losses in her Schedule of Loss.

10 Has the Claimant acted reasonably in mitigation of loss?

11 Is an injury to feelings award or an injury to health award appropriate in the circumstances?

12 If so, how much should this injury to feelings award be taking into consideration the bands as set out in *Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102 (EWCA* as clarified in *Da'Bell v NSPCC UKEAT/0227/09)?*

13 Is it appropriate for the tribunal to make an appropriate declaration?