

Appeal No. UKEAT/0248/16/LA

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 17-19 April 2018
Handed down 29 June 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

MRS C. BAELZ

MR B. BEYNON

MR E JESUDASON

APPELLANT

ALDER HEY CHILDREN'S NHS FOUNDATION TRUST

RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant

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SUMMARY

Whistleblowing, Protected disclosure, Detriment

Inferring discrimination

Detriment

The Claimant consultant paediatric surgeon brought ET proceedings in relation to claims of whistleblowing and race discrimination following the termination of his employment in December 2012. It was common ground that he had made protected disclosures prior to that date. The claims were all dismissed. He appealed on the grounds that the ET had wrongly rejected his case that he had in 2013/14 (i) made ‘third tier’ protected disclosures within the meaning of s.43G ERA (ii) suffered detriment on the grounds of protected disclosures and/or race. He sought remission of all claims to a freshly-constituted ET. The EAT dismissed all grounds of appeal.

A THE HONOURABLE MR JUSTICE SOOLE

B 1. This is an appeal by the claimant Mr Jesudason from the decision of the Employment Tribunal (Employment Judge Robinson and members) sent to the parties on 26 May 2016 whereby his claims in relation to whistleblowing and race discrimination were dismissed. The case occupied 21 days between 1-26 February 2016 and on 1 April 2016. Mr Jesudason was represented at the hearing by leading and junior Counsel, the respondent Trust by leading **C** Counsel. The Trust has a contingent cross-appeal.

D 2. Mr Jesudason is of Tamil ethnicity, Sri Lankan national origin and British nationality. He was employed by the University of Liverpool as an Academic Consultant Paediatric Surgeon; and also had a contract with the Trust as Honorary Consultant in its Department of Paediatric Surgery (DPS) at Alder Hey from 2006 until his resignation in December 2012.

E 3. This matter has a long and complex background history. The following summary is limited to an outline considered sufficient for understanding the issues in this appeal.

F 4. Between March 2009 and November 2012 Mr Jesudason made a number of protected disclosures raising matters of concern to him relating to the DPS. These included strong criticisms of consultant paediatric surgeon colleagues as to their professional competence and general conduct; allegations of bullying and poor relationships; and of a hostile environment **G** involving racial prejudice, aversive racism and institutional discrimination. A previous attempt at mediation in 2008 (the Braun process) had been unsuccessful. Concurrently with this, another paediatric surgeon with an honorary contract in the DPS, Mr Shiban Ahmed, issued **H** Employment Tribunal proceedings against the Trust and his employer (another Trust) which

A included claims of whistleblowing and race discrimination. Mr Ahmed withdrew his claims shortly before a 4-week hearing was due to start in October 2010 and was ordered to pay a contribution to the costs of both respondents. Mr Jesudason subsequently alleged that the Trust had withheld relevant evidence from that Tribunal, concerning statements allegedly made about **B** Mr Ahmed's mental state by his surgeon colleagues Mr Matthew Jones and Mr Colin Baillie.

C 5. In January 2011 the Trust referred the DPS to the Royal College of Surgeons (RCS) who conducted a 'Review of the paediatric surgery service at Alder Hey under the Invited Review Mechanism'. The resulting RCS Report was completed in August 2011. It concluded that surgical care within the DPS did not fall below the general standard of acceptable practice **D** prevalent within the UK, but that in 5 of the 20 cases identified by witnesses either the care given was sub-optimal or clinical governance appeared to have been weak. The Report considered a range of cultural and work issues, including the allegations of racism. It made many recommendations. Mr Jesudason was not happy with the outcome of this review. **E**

F 6. In March and June 2011, he issued Employment Tribunal proceedings against the Trust and the University relating to whistleblowing and race discrimination. On 19 July 2012 he issued High Court proceedings against the Trust and on 25 July 2012 obtained an interim injunction to prevent the Trust from convening a panel to consider termination of his contract on the grounds of an irretrievable breakdown in relations between him and most of his consultant colleagues in the DPS. The action was set down for trial which began on 17 **G** December 2012. In the course of cross-examination it transpired that Mr Jesudason had provided documents obtained on disclosure to the press. He discontinued his claim and paid £100,000 agreed costs to the Trust. By the terms of a Compromise Agreement he withdrew any **H** outstanding grievances and agreed not to submit any further grievances. He withdrew his three

A Employment Tribunal claims and resigned his employment with the Trust with effect from 19 December 2012.

B 7. The present proceedings were issued on 3 October 2014. In respect of whistleblowing, the agreed List of Issues were under the following relevant heads:

C (1) whether 10 communications (List paras. 2.1-2.10) covering the period March 2009-October 2014 amounted to protected public interest disclosures;

(2) whether each was made to the employer and/or a prescribed person; alternatively to some other third party in circumstances falling within the ‘third tier disclosure’ provisions of s.43G ERA 1996;

D (3) whether C had been subjected to 11 detriments (List paras. 5.1-5.11) as a result of any one or more of the alleged protected disclosures;

(4) whether such claims were in time.

E 8. The alleged public interest disclosures included a letter from Mr Jesudason dated 5 September 2013 to the House of Commons Public Accounts Committee¹ (PAC) and copied to others including the Care Quality Commission (CQC). It was common ground that the CQC, but at that date not the PAC, was a prescribed person (s.43F ERA) for the purpose of protected disclosure. The alleged detriments included letters written in October and November 2013 by the Chairman of Alder Hey Sir David Henshaw to various bodies and individuals including the PAC Chair Mrs Hodge.

F 9. The alleged detriments were then further particularised in a Scott Schedule. Its first item was dated 16.10.13 (matching List para. 5.2), namely a letter from Professor Ian Lewis

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¹ Rt Hon Margaret Hodge MP (Chair), Richard Bacon MP, Steve Barclay MP

A (Medical Director at Alder Hey) to the GMC, concerning the alleged conduct of Mr Jesudason. Its last item was a statement by Mr Matthew Jones to the GMC, concerning Mr Jesudason, dated 27 October 2014.

B 10. As to race discrimination (less favourable treatment), List para.7 identified the issues as:

(1) Was Mr Jesudason subjected to any of the alleged detriments [i.e. as in List para.5] because of his race;

C (2) Would a hypothetical white comparator have been subjected to such detriments;

(3) Was it appropriate to infer by reference to 16 identified allegations that his race was a significant influence in his treatment;

D (4) Was the reason the Trust treated him the way it did in relation to the alleged detriments that it wanted to defend its reputation against unjustified claims by him?

E The 16 items relied on for the drawing of inferences included an allegation concerning the Trust's treatment of Mr Ahmed (para.7.2.14).

F 11. The Tribunal heard evidence from Mr Jesudason and from a number of witnesses for the Trust including Professor Ian Lewis, Sir David Henshaw, Mr Matthew Jones and two other consultant paediatric surgeons at the Trust Mr Rick Turnock and Mr Simon Kenny. The oral evidence was heard over 17 days and there were some 2500 pages of documents.

G 12. Before turning to its findings of fact the Tribunal set out its findings on credibility. It referred to the circumstances in which Mr Jesudason had abandoned his High Court proceedings and stated that his credibility had been thereby damaged. It criticised his evidence in various ways and held that where there was conflict it preferred the evidence of the witnesses for the Trust.

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13. The Tribunal stated that the Trust was itself not beyond criticism. In particular some of the letters written, in particular those by Sir David Henshaw, *'clearly overstate the case in relation to the RCS review'* (para.34; also 36). This was a reference to the statement in a number of letters that *'These allegations, which Mr Jesudason has repeated over a number of years, have been thoroughly and independently investigated by different professional bodies on a number of occasions and found each time to be completely without foundation'*.

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14. The Tribunal split the history of the matter and of Mr Jesudason's criticisms into two periods, namely before and after the High Court hearing in December 2012. In respect of the earlier period it referred to a disclosure document sent by Mr Jesudason to the University HR Department on 30 March 2009. This included sharp criticism of Mr Jones and Mr Baillie in respect of statements allegedly made about Mr Ahmed's mental state.

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15. Turning to the RCS Report, the Tribunal noted its criticism of the DPS. This included criticism for being too defensive and too quick to try to rebut allegations, rather than considering them dispassionately, and criticism of the Trust's whistleblower policy overall. It also noted the Report's conclusion that Mr Jesudason was unwilling to acknowledge the legitimacy of other perspectives and concerns and that was why he would never be able to offer the DPS effective leadership. The Tribunal stated *'The overall conclusion of the report is that the practice of the hospital was safe. The report was thorough and dealt with all the claimant's concerns, although Mr Jesudason did not think so'* (para.68).

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16. The Tribunal recorded the agreement of the parties that all the disclosures before December 2012 were protected public interest disclosures, save for any communication to the GMC or Dr Phil Hammond at Private Eye. Thus the claimant had *'...established himself as a*

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A *whistle-blower within the meaning of the statutory provisions prior to December 2012 and in relation to matters which occurred before that date’ (para.78).*

B 17. As to the second period, the Tribunal noted that the post-2012 disclosures began with Mr Jesudason’s letter to the PAC (5 September 2013, copied to the CQC and others). It noted that the letter to the PAC was not a protected disclosure at the time; but that the letter as copied to the CQC did qualify for protection. The Scott Schedule list of alleged detriments in this period (List paras.5.2-5.10) began in October 2013.

C 18. The Tribunal then noted the five further disclosures (List paras.2.6-2.10) by Mr Jesudason. These were between 10 September 2013 and 19 October 2014 and were to Channel D 4, the BBC, British Medical Association (BMA) and European Academy of Paediatric Societies (EAPS). As was agreed, none of these were disclosures to prescribed persons. Accordingly the question was whether they were protected under s.43G ERA.

E 19. The Tribunal stated that these disclosures repeated the same criticisms that Mr Jesudason had been reporting prior to the High Court proceedings and that *‘There is little if anything new in the information provided’* (para.82). Furthermore *‘The seriousness of the relevant failure the claimant was claiming had diminished because they were old allegations on which the RCS had already reported. In response the Trust had acted on the RCS’s conclusions by preparing an action plan to deal with those suggestions and the action plan was being worked through appropriately. Consequently, the relevant failures of which the claimant complains were unlikely to continue or to recur.’* (para.90).

G 20. The Tribunal continued that Mr Jesudason’s pre-December 2012 criticisms had *‘in part hit home’* and been appropriately dealt with by the Trust. However *‘There was also the issue of protecting the surgeon’s and the trust’s reputations. The Trust was entitled to do that on behalf*

A of its employees. Many of the claimant's allegations were aimed personally at the surgeons.
The response of Alder Hey to the previous disclosures was appropriate in that they followed the
recommendations of the RCS report. The Trust now had to turn its attention to protecting the
B trust's and its employees' reputations' (para.91).

21. The Tribunal concluded that the disclosures (List paras.2.6-2.10) were not saved by
s.43G '*... because the failures to which the claimant referred had been put right and were*
C *unlikely to recur. To make the same disclosures, but to other organisations, given the history*
and background to this case and considering all the elements of section 43G(3) of the Act was
not reasonable (2.6-2.10). Those claims therefore fail' (para.93).

D 22. Mr Jesudason contends that the RCS Report had not reported on all his concerns of
serious failure by the Trust; which in turn vitiates the Tribunal's conclusion that these were
unlikely to continue or to recur and that the disclosures were not reasonable.

E 23. The Tribunal then turned back to the 5 September 2013 disclosure to the CQC. This was
a protected disclosure to a prescribed person. '*Consequently, post December 2012, because of*
that one protected disclosure, the claimant has continued protection as a whistle-blower'.

F 24. Turning to the alleged detriments (List para.5; Scott Schedule) the Tribunal in each case
considered whether it was a detriment and, if so, whether Mr Jesudason had been subjected to it
G on the ground that he had made protected disclosures (s.47B). In this hearing the latter question
has been referred to as the causation issue. The Tribunal answered both questions in the
negative; and accordingly the whistleblowing failed: see the summary at paras. 223-224. In
H essence it held that the communications material to this appeal were putting the opposite view
to individual allegations as they occurred and were genuine attempts to set the record straight

A and to protect the Trust against potential criticism. Thus the communications had no connection to any protected disclosure: see in particular paras. 134, 135, 224, 228.

B 25. As will be seen, one ground of appeal is that the Tribunal failed to take account of Mr Jesudason's case as to the terms and manner of the various communications, namely that this falsely portrayed him as 'irrational vexatious and dishonest'². It is submitted that this itself constituted a detriment and was caused by the Trust's underlying hostility to his whistleblowing activities, including those which predated December 2012.

C 26. The Tribunal rejected the Trust's submission that Mr Jesudason acted as he did not as a whistleblowing ex-employee but as a 'campaigner': para.96. The contingent cross-appeal is from that decision.

D 27. The Tribunal then turned to the race discrimination claim which it dismissed. It concluded: *'In short, if any consultant with the DPS had been so scathing, so critical and so dismissive of colleagues as the claimant has clearly been, both verbally and in writing, that person would have been treated in turn with suspicion, fear, animosity, resignation and disbelief no matter what race or ethnicity. (para.219); and that 'With regard to those claims post 2012 any employee or ex-employee of the Trust, whatever their race, who made the sort of accusations that Mr Jesudason made against his colleagues which had either been dealt with and/or were allegations to which a response was needed (either to the press or some other external body) would have been dealt with in the same way by the Trust whatever their race or whether they have the status of a whistleblower.'* (para.236).

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² Closing submissions to the ET, p.17

A 28. In respect of the allegation concerning the Trust's treatment of Mr Ahmed (List
para.7.2.14), the Tribunal held that no treatment by any of the consultant surgeons was
B inappropriate; and rejected the contention that either Mr Jones or Mr Baillie had suggested that
he might be suicidal. It accepted that Mr Jones had concerns about Mr Ahmed's mental state
and had a right to voice those concerns : paras.207-209.

C 29. The essential complaint is that the Tribunal made a fundamental error of approach in
that it treated the 16 matters identified in List para. 7 as specific claims of direct discrimination;
rather than as matters which are said to give rise to the inference that Mr Jesudason had been
subjected to the detriments identified in List para. 5 because of his race.

D 30. As the parties agreed, the logical starting point in the appeal on the whistleblowing
claim is Ground 6, i.e. against the finding that there was no 'third tier' protected disclosure
within the meaning of s.43G. We will then deal in turn with the Grounds relating to (i)
E detriment (ii) causation, i.e. on grounds of protected disclosure; and then the appeal in respect
of race discrimination.

Ground 6 : s.43G

F 31. Section 43G provides as material:

G *(1) A qualifying disclosure is made in accordance with this section if – ... (d) any of the
conditions in subsection (2) is met, and (e) in all the circumstances of the case, it is reasonable
for him to make the disclosure.*

H *(2) The conditions referred to in subsection (1) (d) are - ... (c) that the worker has previously
made a disclosure of substantially the same information – (i) to his employer, or (ii) in
accordance with section 43F.*

A (3) *In determining for the purposes of subsection (1) (e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to – (a) the identity of the person to whom the disclosure is made, (b) the seriousness of the relevant failure, (c) whether the relevant failure is continuing or is likely to occur in the future... ’*

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C 32. The challenge is to the Tribunal’s finding that disclosures 2.6 to 2.10 were not protected pursuant to s.43G because the failures to which they refer had been put right and were unlikely to recur : para.93. This conclusion reflected the reasonableness factor identified in s.43G(3)(c).

D 33. The central contention is that the Tribunal’s conclusion was perverse because ‘*several concerns (including alleged cover-ups e.g. in the Ahmed case) remain uninvestigated and therefore could not have been put right*’ (Ground 6(i)(a)). At the Preliminary Hearing HHJ Eady QC limited permission to appeal on this Ground to two specific concerns which had been disclosed but not investigated in the RCS review, namely the alleged (i) cover-up in respect of Mr Ahmed’s case and (ii) leaking of the RCS report by the Trust placing it on the K-drive, i.e. the public access server open to all staff. Of necessity, the latter allegation could not have been considered in the RCS Report.

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F 34. Dealing first with the ‘Ahmed cover up’ allegation, this was referred to in the speech to the BMA/HSJ (*‘When confronted by my allegation two colleagues admitted their role in the covert suicide claim against Ahmed but the Trust concealed these confessions from Mr Ahmed’s Employment Tribunal’*) and to EAPS.

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H 35. Mr Jesudason had previously raised this allegation within pre-December 2012 protected disclosure to the Trust, e.g. on 4 January 2011. The RCS Report noted the allegations

A concerning the treatment of Mr Ahmed by other colleagues but concluded that *'As Mr Ahmed has now returned to work at both Stoke and Alder Hey following internal investigations and the aborted employment tribunal, the panel did not substantially revisit his case'* (p.10).

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36. Mr Allen submits that, given the RCS decision not to investigate the allegations concerning Mr Ahmed, the Tribunal in this case was wrong to conclude that the RCS report dealt with all of Mr Jesudason's concerns (judgment para.68, 90). This vitiated the Tribunal's conclusion that *'Consequently, the relevant failures of which the claimant complains were unlikely to continue or to recur'* (para.90); and in turn its conclusion that these further disclosures failed the s.43G(1)(e) requirement of reasonableness.

37. The Trust's first response is that the 'Ahmed cover up' allegation was not put before the Tribunal as part of Mr Jesudason's case on s.43G; so that this ground of appeal is seeking to raise a point that was not argued below. On the contrary the allegation was raised in the context of the race discrimination claim and was properly rejected. For this purpose it is necessary to look closely at the agreed List of Issues and the written closing submissions of Leading and Junior Counsel who represented Mr Jesudason at the hearing.

38. In the List of Issues the only direct reference to Mr Ahmed is in paragraph 7 headed 'Race discrimination: less favourable treatment'. Paragraph 7.2 sets out the question *'Is it appropriate to infer that the C's race was a significant influence in his treatment by reference to...'* 16 matters which include *'7.2.14 the treatment of SA'*, i.e. Mr Ahmed. However the identified disclosures (List para.2) include those which contained references to the allegation (e.g. BMA/EAPS).

A 39. In the written closing submissions on behalf of Mr Jesudason, in the first section
relating to his standing as an ex-employee of the Trust to bring claims of whistleblowing and
race discrimination, it was stated *'The alleged detriments flow directly out of C's concerns
B based on information he gained whilst an employee at the Trust. The C's concerns were about
the treatment of a fellow employee, SA, who remains an employee of the Trust and clinical
concerns about his former colleagues and other practices at the Trust, including equipment
failures and a bullying and discriminatory culture.'* (p.2).

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40. The second section headed *'Whistleblowing: alleged protected public interest
disclosures'* identified five broad groups of protected disclosures, including *'cover up of
D dysfunctional department'* and *'victimisation of whistleblowers'*. It then identified *'individual
protected disclosures'* in terms which expanded on List paras. 2.1-2.10. These began with Mr
Jesudason's letter of 30 March 2009 and ended with his EAPS presentation in October 2014.
E The references to Mr Ahmed in the list of points for each document are: 30.3.09 *'suicide claim
made against SA [Mr Ahmed]'*; 4.1.11 misleading Mr Ahmed's tribunal, albeit by reference to
points which do not include a cover up of evidence; 10.12.12 *'mental health claims against SA
by MJ and CB and subsequent cover up'*; 23.6.14 (BMA) and 16-19.10.14 (EAPS) *'the SA
F cover up'*.

G 41. The section then deals in turn with the questions of whether the disclosures were made
to the employer and/or a prescribed person (para.3), alternatively to some other third party in
circumstances which satisfy the requirements of s.43G (para.4). However, on the s.43G(1)(e)
and (3) issue of reasonableness the submission was simply: *'Cs concerns were first raised with
H his employer, then escalated to professional regulators and only then to the media. The CQC,*

A GMC and MPs (PAC) are now all prescribed persons under the 2014 regulations and were therefore appropriate bodies to which to make disclosures’.

B 42. The third section was headed *‘Whistleblowing: alleged detriments’*. It included reference to the Trust’s responses to the ‘suicide claim’, including Sir David Henshaw’s letter to the BMA (23 July 2014). In that letter Sir David disputed the allegation that any of Mr Jesudason’s colleagues were involved in making covert suicide claims against Mr Ahmed; or
C that the Trust had withheld information in the Ahmed Employment Tribunal. The submission was that Mr Jesudason’s concern had not been investigated and that the only purpose was to
‘...cast C in the mind of the reader as irrational, vexatious and dishonest.’

D 43. The section headed *‘Race discrimination: less favourable treatment’* set out the 16 matters said to give rise to an inference that Mr Jesudason’s race was a significant influence in his treatment. As in the List of Issues, these included *‘7.2.14 the treatment of SA’*. The submissions continued: *‘The factors set out above go to the issue whether the R treated the C the way it did because of his race. They also go to the issue mentioned above as to whether the R would have treated a hypothetical white whistleblower in the same way.’*

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F 44. Mr Simon Gorton QC submits that the effect of these submissions was that the matters relating to the alleged cover up in respect of Mr Ahmed’s ET claim, namely the allegation that the Trust concealed the evidence of Messrs Jones and Baillie relating to the suicide claim, were presented only for the purpose of the race discrimination claim. Those allegations did not feature in the short section relating to reasonableness (s.43G(1)(e) and (3)). The focus of the s.43G claim was on the repeated statement in the various responses that Mr Jesudason’s allegations had been found to be completely without foundation and the contrast with the
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A criticisms in the RCS Report. The case had not been put on the basis of the matters which the RCS had not considered.

B 45. In consequence the Tribunal had duly considered the Ahmed allegation only in respect
C of the race discrimination claim, which included the evidence of Mr Jones; and firmly rejected
D it. Thus: “...*the witness statements that we have read of Mr Jones and Mr Baillie in relation to Mr Ahmed’s Employment Tribunal hearing in 2010 were simply responding to Mr Ahmed’s allegations...We did not find that any treatment of Mr Ahmed by any of the consultant surgeons at Alder Hey was inappropriate. We did not accept the claimant’s evidence with regard to Mr Jones or Mr Baillie that they suggested Mr Ahmed might be suicidal...There were concerns, in particular by Mr Jones, about Mr Ahmed’s mental state. From the limited evidence, which was not challenged, Mr Jones had a right to voice those concerns*’: paras.207-9.

E 46. Mr Allen submits that this is an incorrect reading of the List of Issues and the closing submissions, pointing in particular to the several references in the ‘whistleblowing’ sections referred to above.

F 47. We accept that the allegation of a cover up in respect of Mr Ahmed’s Tribunal claim is
G repeatedly referred to under the whistleblowing sections and is not confined to the race
H discrimination claim. However it is not referred to in the specific context of the issue of reasonableness (i.e. s.43G(1)(e) and (3)). On the contrary the ‘reasonableness’ section is very brief and makes no such reference to the point now raised, namely whether the RCS had considered all the other matters of concern. In an exceptionally heavy case with a mass of detail and representation by Counsel the Tribunal was entitled to expect all relevant points to be made explicitly at the relevant stages of the argument. We find it quite understandable that the Tribunal (i) did not address a point which had not been raised on the issue of reasonableness

A and (ii) determined the issue in the context of the race discrimination claim: paras.207-209. In all the circumstances we are not persuaded that the Tribunal can be criticised for not taking the point into account when considering the application of s.43G.

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C 48. In any event, having considered the rival submissions of Mr Allen and Mr Gorton as to the evidence on the alleged 'cover up' and the Tribunal's conclusions on the issue in the context of the race discrimination claim, we conclude that there is no basis to believe that the point might have assisted Mr Jesudason's case on the issue of s.43G reasonableness.

D 49. In order to deal with this aspect it is necessary to look at the underlying complaint in some detail. On 29 January 2009 Mr Jones in a statement to Mr Kirby, the clinical director for surgery at North Staffordshire Hospital, expressed concerns about his colleague Mr Ahmed. These included the statement *'I have concerns about his health and state of mind'*.

E 50. On 30 March 2009 Mr Jesudason made a disclosure statement which included reference to the treatment of Mr Ahmed. It stated that Mr Jones had expressed concern about Mr Ahmed being a suicide risk *'despite providing no evidential basis at all'* and that Mr Baillie had been spreading rumours that Mr Ahmed had mentioned suicide.

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G 51. On 11 September 2009 Mr Ahmed commenced a claim in the Employment Tribunal which included allegations relating to his mental health. His ET1 included reference to information received from Mr Jesudason that he had heard Mr Jones say that another person (Mr Kirby) had informed him that he (Mr Ahmed) *'had mental health issues'* (para.94, also 95); and to a report from Mr Jesudason of *'allegations made against me that I was about to commit suicide'*; and of bullying and hostility from Mr Jones (para.105). In the sections of the subsequent Scott Schedule (29 April 2010) which related to mental health issues, the relevant

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A allegation against Mr Jones (and Mr Kirby) was *'56. Asserting that the Claimant had mental health issues and that he would be subjected to psychiatric assessment (paragraphs 94-5)'*.

B 52. In the course of his proceedings Mr Ahmed disclosed a redacted version of Mr Jesudason's statement of 30 March 2009. The Trust then showed the full version to Mr Jones and Mr Baillie. Mr Jones responded with a statement to the HR Department in September 2010. In this he stated *'I am accused of having concerns that Shibban might be a suicide risk. This is true: I certainly did. I had heard from Mr Baillie that Shibban had repeatedly expressed such sentiments to him in a prior conversation. I was naturally concerned about this...'*

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D 53. On 5 September 2010 Mr Baillie responded with a statement which included *'It was on one of these visits that Shibban mentioned that he had considered suicide. I have no doubt this was what was said because I asked him to repeat himself. I shared this with the clinical director (Matthew Jones) in the strictest confidence in view of the loss of a colleague in the consortium to suicide. I maintain this was the correct course of action and would do it again.'* The statements were disclosed to Mr Jesudason in the course of the High Court proceedings which concluded in December 2012.

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F 54. Mr Jones' witness statement (13 September 2010) in the Ahmed proceedings responded to each of the allegations made against him in the ET1 and Scott Schedule. This included Schedule item 56 and its cross-reference to paragraphs 94-5 of the ET1. Mr Ahmed withdrew his Tribunal claim shortly before it was due to start in October 2010.

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H 55. On 5 September 2013 Mr Jesudason wrote to the PAC in terms which included reference to the *'suicide claim against Mr Ahmed'*. He stated that *'Mr Baillie and Mr Jones eventually admitted their role in the suicide claim against Ahmed in September 2010 in letters*

A to their HR Director, Ms Shaw. Remarkably, the trust then allowed him to conceal this information from their witness statements to Mr Ahmed's Employment Tribunal in 2010.'

B 56. On 11 October and 20 December 2013 Professor Lewis wrote to the GMC raising concerns about Mr Jesudason. The latter included matters relating to Mr Jones. In consequence the GMC asked Mr Jones to provide a statement. This he did by the statement dated 27 October 2014. This exhibited (as MJ/3) what he said was his letter of September 2010 to the HR
C Department in response to Mr Jesudason's statement of 30 March 2009. However the exhibited letter contained material differences from the original. In particular it excluded a sentence referring to '*documents submitted to these proceedings*', i.e. the Ahmed Employment tribunal
D claim; and the words '*I certainly did*' in the cited passage. A substantial new section was inserted, containing a list of alleged '*derogatory and defamatory*' statements made about him by Mr Jesudason, followed by a paragraph which stated that these involved a clear breach of GMC guidelines with regard to respect for colleagues. A further section (5), which included
E reference to '*the eve of Mr Ahmed's proceedings*', had been deleted and replaced by two new sections. In the body of the witness statement (27.10.14), Mr Jones said that to the best of his recollection he had completed the letter of September 2010 after the conclusion of Mr Ahmed's
F employment tribunal and that it only mentioned Mr Ahmed in passing.

G 57. In item 9 in the Scott Schedule for the present proceedings, Mr Jesudason particularised that allegation as follows: '*The statement makes false and misleading claims and is supported by an exhibit MJ/3 that R substitutes into the evidence trial in place of two original documents that were concealed from the GMC and Mr Ahmed's ET (namely Mr Jones' letters of 29/1/09 and his letter to Ms Shaw, admitting he 'certainly did' feel that Mr Ahmed was 'suicidal'). The substitution with MJ/3 serves to: (a) cover-up that R had hidden material evidence of its*

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A misconduct during Mr Ahmed's ET (by doctoring out phrases that referred to 'these
proceedings'); (b) doctor from the original letter the phrase 'I certainly did', to allow Mr Jones
B now to suggest his concerns about Mr Ahmed were 'low-key' (to absolve himself of not taking
the urgent steps required had his concerns been genuine); (c) undermine C's concerns and his
standing with the GMC."

C 58. In his witness statement dated 8 December 2015 in the present proceedings Mr Jones
responded to this allegation. He said that his statement of 27 October 2014 had followed a
written request from the GMC. A representative of the GMC took a statement from him and
D sent him a draft which he amended in accordance with advice from the Medical Protection
Society. He accepted that the exhibit MJ3 was "*slightly different to the document which I sent
to the Trust on or around October 2010*". The version attached to his statement to the GMC
had been modified by him for the purpose of the various reviews into his Department which
E took place in 2011 and 2012. The version which he had sent to the GMC in 2014 was that
which remained on his computer at that time. By oversight he had failed to mention that this
document had been revised. He rejected the allegations of 'doctoring' the September 2010 letter
F or of concealing the 'suicide issue' from Mr Ahmed's employment tribunal. His statement in
the Ahmed proceedings was responding to each of the itemised allegations against him in that
claim. Mr Jones restated that he had had genuine concerns about Mr Ahmed's mental state. As
to the removal of the words '*I certainly did*', he saw no consequent difference in meaning.

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H 59. In his witness statement (7 January 2016) Mr Jesudason again focused his allegations in
respect of Mr Jones' statement to the GMC on the Ahmed suicide issue, the alterations to Mr

A Jones' original letter of September 2010 and the absence of its disclosure until the High Court proceedings in 2012.

B 60. In his written closing submissions to the Tribunal on this point, Counsel for Mr
Jesudason submitted that the alterations had been made to make the original letter more
measured, to give the appearance that the original had not necessarily being created before the
C Ahmed proceedings were concluded; and, by reference to breach of GMC guidelines, to make it
more likely that regulatory action would be taken against Mr Jesudason. He cited an answer of
Mr Jones in cross-examination in which he had referred to *'trying to up the ante'*.³

D 61. This narrative shows that the relevant allegation to which the Trust (through Mr Jones'
witness statement) was responding in the Ahmed proceedings were alleged statements about
'mental health issues' which did not include alleged statements about suicide (Item 56; cross-
referenced to paras.94-95 of Mr Ahmed's ET1). The Tribunal clearly accepted this when
E considering the point in the context of the race discrimination claim: see paras.207-9. Within its
findings the Tribunal then accepted the unchallenged evidence of Mr Jones that he had concerns
about Mr Ahmed's mental state; and concluded that he had a right to voice his concerns
F (para.209), and rejected the allegation that he or Mr Baillie had suggested he might be suicidal
(para.208). We add that Mr Ahmed withdrew his claim which was thereupon dismissed.

G 62. In our judgment the claim of a cover up in respect of the evidence given by the Trust in
the Ahmed proceedings was unfounded and the Tribunal in the present case so held. Even if it

H ³ *Q: ...This second version is design, part with ref to good med practice, to increase probability of regulatory action being taken. A: Agree motive true. Increasingly angry with EJ, maliciously trying to destroy careers, trying to up the ante but incorrect that I made alterations for GMC referral. Timing incorrect, long before GMC referral.'*

A had been raised on the issue of s.43G reasonableness there is no basis to conclude that the Tribunal might have reached a different conclusion.

B 63. As to the alleged leak of the RCS Report, Mr Allen submits that this was a concern raised by Mr Jesudason. Of necessity, it was not considered in the RCS Report. He points to the documents which show information received by Mr Ahmed and his BMA representative (Ms Nora Cox) that the whole Report had been placed by the Trust on the K-drive and accessed by a member of staff; he and Mr Jesudason raising their concerns as to breach of confidentiality; the subsequent information from Professor Ian Lewis that material submitted to the RCS review (but not the Report itself) had been placed on the K-drive; Mr Jesudason's account in his witness statement (para.125); and reference in the closing submissions (p.16). He contrasts the absence of reference in the Tribunal's judgment.

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E 64. In response Mr Gorton points in particular to the evidence of Mr Simon Kenny where he stated in cross-examination that the Report was never put on the K-Drive, cf. Nora Cox's note of a conversation with him in December 2011; and the absence of a specific reference in Mr Jesudason's list of outstanding grievances in May 2012. Furthermore the closing submissions again made no reference to the point in the protected disclosure section (including s.43G and reasonableness), only making a reference in the section concerning 'detriment'.

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G 65. In our judgment there is no basis for complaint. Whatever the state of the evidence, the point was not ultimately raised as a matter relevant to s.43G. The closing submissions dealt with it on the issue of detriment and in very limited and passing terms. In consequence there can be no criticism of the Tribunal for not taking this into account under s.43G; nor is there any basis to conclude that it might have reached a different conclusion if it had done so.

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66. The appeal under Ground 6 is accordingly dismissed.

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Ground 1: Detriment

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67. The essence of the complaint is that, in finding that Mr Jesudason had suffered no detriment in the ways alleged in List items 5.3-5.6 and 5.8-5.10 the Tribunal failed to address his fundamental complaint as to the manner in which the Trust expressed its rebuttals of his concerns. These tended to cast him as ‘irrational, vexatious and dishonest’; which would in turn irrevocably damage his professional status and future employability.

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68. As to alleged detriments 5.3-5.6, these concerned Sir David Henshaw’s letters to Stephen Dorrell MP and Margaret Hodge MP (each 22.10.13), the Chair of the CQC (24.10.13), David Davis MP (29.11.13) and the internal e-mail from Louise Shepherd (Chief Executive) to all the consultants (23.10.13). They all contained the phrases referred to above.

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69. The Tribunal concluded that no reasonable worker/employee would consider these comments to be detrimental: para.224. The comments in these documents were made ‘...in an attempt to protect the Trust against potential criticism from the press or other bodies, or wanting to put the record straight. Consequently they had no link to the claimant as a whistleblower’ (para.224). The letters ‘...were written in the way they were because of the intense interest at that time from Parliament and the media in Alder Hey Hospital.’ (para.113). Ms Shepherd’s e-mail was in particular stimulated by her concern that Channel 4 reporters were going to suggest that Mr Jesudason had been dismissed for being a whistleblower: ‘The

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A *information that went out to the press put right that incorrect assessment and is not a detriment to the claimant. The Trust was simply passing information to outside bodies’*: para.120.

B 70. As to alleged detriments 5.8-5.10, these related to letters to the Chair of the BMA (23.7.14) in response to Mr Jesudason’s speech at a BMA representatives’ meeting; to EAPS in response to a poster prepared by Mr Jesudason; and to Mr Jones’ statement to the GMC (27.10.14), provided to the GMC at its request. The response to EAPS contained the phrases referred to above.

C 71. The Tribunal concluded that nothing in this correspondence constituted a detriment to D Mr Jesudason. The letters *‘...sought to give the opposing view to Mr Jesudason’s allegations. These were genuine attempts by the Trust to put the record straight and reply to interested parties outside the Trust and had no connection to a protected disclosure.’* (para.135).

E 72. Mr Allen pointed first to the recurring phrases in the Trust’s various statements of F purported rebuttal that Mr Jesudason’s allegations had been investigated and found to be *‘completely without foundation’* and that they *‘weakened genuine whistleblowing’*: see para.13 above. Given the terms of the RCS Report, the Tribunal had found that such statements *‘clearly overstated the case’* : paras.34, 36.

G 73. He submitted that the test for detriment was very light, citing Ministry of Defence v. Jeremiah [1980] ICR 13 that it simply meant *‘putting under a disadvantage’* (Brandon LJ at p.26B-C) and that a detriment *‘exists if a reasonable worker would or might take the view that [treatment] was in all the circumstances to his detriment’* (Brightman LJ at p.31A-B); and H subsequent approval by decisions of the House of Lords. Mr Gorton in turn pointed to the

A observations of Baroness Hale in Derbyshire v. St Helens MBC [2007] ICR 841 that *'As...Lord Hope of Craighead observed in Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285... 'An unjustified sense of grievance cannot amount to 'detriment'...' 'There are some things that an employer might do during a discrimination claim which cannot sensibly be construed as a detriment or adverse treatment. Ordinary steps in defending the claim and ordinary attempts to settle or compromise the claim do no one any harm and may even do some good': para.37.*

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74. Mr Allen further submitted that the Tribunal's conclusion that the Trust was seeking to answer criticism and put the record straight provides no adequate basis for the conclusion that D Mr Jesudason did not suffer a detriment. An untrue defence was capable of being detrimental. It was not true to say that all his allegations had been investigated and found to be without E foundation. It was at least reasonably arguable that the overall effect of these statements was to portray Mr Jesudason as vexatious, irrational and dishonest, as he had contended. The Tribunal had not addressed that contention, which should be remitted (to a fresh Tribunal) for consideration.

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75. We accept Mr Gorton's submissions that this was a pure question of fact for the Tribunal to determine and that there is no basis to consider that it approached its task in the wrong way or otherwise reached a conclusion which was perverse. The Tribunal applied the G correct legal principles which included the proposition that it had to be treatment that no reasonable employee would or might consider to be detrimental; and concluded that *'no reasonable worker/employee would consider the comments referred to in paragraph 5 of the list of issues as detriments'*: para.224. As appears from its finding of 'overstatement', the H Tribunal had firmly in mind the criticism of the language used by the Trust. It had the particular

A advantage of hearing and considering all the evidence over the course of a lengthy hearing. As
to the reliability of the evidence which it heard, it formed a favourable view of the evidence
given by the witnesses called on behalf of the Trust; and an unfavourable view of Mr
B Jesudason. In our judgment its conclusion is an unimpeachable finding of fact.

Ground 3 : Detriment 5.10

C 76. Detriment 5.10 is: *'27.10.14 MJ [Matthew Jones] provides a false and misleading
statement against C to the GMC'*.

D 77. The essential complaint is that the Tribunal failed to make findings as to whether Mr
Jones had made a false and misleading statement in relation to the 'Ahmed cover up' in his
statement to the GMC dated 27 October 2014. We refer to the narrative set out in our
E consideration of Ground 6.

F 78. The Tribunal described Mr Jones' statement as *'...a defence against the allegations that
have been made by Mr Jesudason. In part those documents were prepared at the request of
Lucy Galbraith, who was a senior investigating officer in relation to the referral of Mr
Jesudason to the GMC by Professor Lewis.'* : para.132.

G 79. In respect of this (and certain other List para. 5 documents), it continued that *'... the
documentation confirmed that the Trust was defending itself against the continued allegations
made to the press and on television by Mr Jesudason'* (para.134) and that *'Nothing in that
correspondence caused a detriment to Mr Jesudason. The letters sought to give the opposing
H view to Mr Jesudason's allegations. These were genuine attempts by the Trust to put the record*

A *straight and reply to interested parties outside the Trust and had no connection to a protected disclosure...'* : para.135.

B 80. Mr Allen submits that the Tribunal thereby failed to address the central question of whether Mr Jones had in fact made a false and misleading statement to the GMC. Having failed to make that necessary finding of fact, the Tribunal was not in a position to conclude that Mr Jesudason had thereby suffered no detriment.

C 81. Furthermore, in describing his statement as a defence against the allegations that have been made by Mr Jesudason, the Tribunal must have confused two different statements by Mr Jones. The statement of 27 October 2014 was not written to defend himself but was in support of the investigation by GMC against Mr Jesudason. The Tribunal must have confused this statement with another (not in the bundle) made to the GMC by Mr Jones in defence of allegations made against him by Mr Jesudason.

D 82. Mr Gorton accepts that there is no express finding on this allegation but submits that it was rejected by necessary implication from the Tribunal's acceptance of Mr Jones' evidence when considering the 'Ahmed suicide issue' within the race discrimination claim: see paragraphs 207-209 cited above. As in Ground 6, the allegation of a cover up was baseless.

E 83. We accept that the Tribunal did not make an express finding on the contention that Mr Jones had made the alleged 'false and misleading witness statement'. However the Tribunal's unequivocal acceptance of Mr Jones' evidence on the alleged suicide claim in the context of the race discrimination claim (paras.208-209) is consistent only with the conclusion that he was a reliable and honest witness who had neither 'doctored' the September 2010 letter nor otherwise

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A made a false or misleading statement. This is all consistent with and supportive of the Tribunal's finding of fact that nothing in the letter of 27 October 2014 was a detriment to Mr Jesudason.

B 84. Nor are we persuaded that the Tribunal must have confused two different statements made by Mr Jones. The cited paragraph (132) identifies List item 5.10, i.e. Mr Jones' statement of 27 October 2014 and its attachment, and correctly continues that *'In part those documents were prepared at the request of Lucy Galbraith, who was a senior investigating officer in relation to the referral of Mr Jesudason to the GMC by Professor Lewis'*.

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Grounds 2 and 4 : causation

E 85. By Ground 2, Mr Jesudason contends that the Tribunal reached a perverse conclusion that alleged detriment 5.3 was connected to a non-protected disclosure. This relates to two letters dated 22 October 2013 from Sir David Henshaw to, respectively, Stephen Dorrell MP and Margaret Hodge MP. The primary contention is that these were evidently written in direct response to Mr Jesudason's letter to the PAC dated 5 September 2013; which, by virtue of the copying of that letter to the CQC, the Tribunal had held to be a protected disclosure : para.79.

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G 86. Mr Allen submits that the Trust should have held that these communications were connected to a protected disclosure. It was wrong to conclude that this and other⁴ alleged detriments *'... were not connected to any whistle-blowing by the claimant but were all*

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⁴⁴ 5.4, 5.5, 5.8-5.10

A *connected to the non-prescribed information sent to the likes of the BBC, Channel 4 and the Right Honourable David Davies MP.*': para.228.

B 87. Furthermore the Tribunal's conclusion was at odds with its finding in respect of Sir David Henshaw's letter dated 29 November 2013 to David Davis MP (detriment 5.6). Ground 2 states that this letter '*...was also written in response to the same letter [i.e. 5.9.13 to PAC/CQC] and was not found to have been made in connection with a non-protected disclosure*'.

C 88. Ground 4 raises a wider point on the grounds for the rebuttals by the Trust in these various letters. In concluding that the Trust acted as it did in order to set the record straight and to protect its reputation (see e.g. paras.124, 228), the Tribunal '*...failed to address Mr Jesudason's fundamental case which was not why the rebuttals had been made but why they had been made in terms that included unfounded criticism of [him].*' This ground returns, now in the context of causation, to the contention that the Trust's identified communications tended to cast him as 'irrational, vexatious and dishonest'. Having concluded that some of the letters, in particular from Sir David Henshaw, '*clearly overstate the case in relation to the RCS review*' (para.34), the Tribunal should have gone on to ask why the rebuttals were written in such terms. Saying something which was untrue was not '*putting the record straight*'.

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F 89. Mr Allen submits that the Tribunal should in each case have asked itself whether the relevant letter or statement would have been written had it not been for a protected disclosure; and in doing so should have considered the potential connection with the admittedly protected disclosures made before November 2012. It was at least arguable that, had it done so, the Tribunal might have concluded that the true reason for these communications was the Trust's underlying hostility to Mr Jesudason as a whistleblower who had made protected disclosures going back to 2009. In other words, the Tribunal might not have held that the letters '*...did not*

A *undermine the claimant's concerns or his standing with his peers but sought simply to put the*
record straight. (para.228; see also paras.134-5) or that they were sent '*... to protect its own*
B *staff, to confirm to its patients within the catchment area that the Trust is a safe place for them*
to bring their children and to try to quell the media interest that was in danger of overwhelming
the Trust.' (para.124). If so, the matter should be remitted to a fresh tribunal.

Conclusion on Ground 2

C 90. In our judgment Ground 2 rests on the fallacy that the letter of 5 September 2013 is, by
virtue of being copied to CQC, to be treated as if it were a protected disclosure to all its other
recipients. As the judgment makes clear, the letter is only a protected disclosure to the extent
D that it was sent to the CQC: para.79. Conversely it is clear that the two letters dated 22 October
2013 were respectively responses to the letter of 5 September 2013 (i) as addressed to the PAC
(via its Chair Mrs Hodge) and (ii) as copied to Mr Dorrell. Thus each begins '*It has been*
E *brought to my attention that Mr Jesudason has sent you a letter in which he makes a number of*
allegations about [the Trust]'.

F 91. In paragraph 228 the Tribunal concluded that all the alleged detriments identified in that
paragraph were connected to the '*non-prescribed information sent to the likes of the BBC,*
Channel 4 and the Right Honourable David Davies MP.' (our emphasis). In respect of
detriment 5.3 this obviously meant that each letter was a response to the non-protected
G disclosure to the addressee. That was clear from the face of the letter.

H 92. Nor do we accept that there is any conflict with the Tribunal's conclusion in respect of
the letter from Sir David Henshaw to Mr Davis. True it is that paragraph 228 of the judgment
refers to non-prescribed information sent to Mr Davis and others, but does not include that letter

A in its list of detriments '*connected to the non-prescribed information*'. However it is clear from
earlier sections of the judgment (paras.110-124) that the Tribunal was not placing the letter to
B Mr Davis in any different category nor otherwise suggesting that it had been written in response
to a protected disclosure. The opening paragraphs of the letter demonstrate that it was written in
response to a Parliamentary speech by Mr Davis. It contains no reference to Mr Jesudason's
letter of 5 September 2013 to the PAC/CQC. The Tribunal did not conclude that the letter was
C connected to the 5 September 2013 protected disclosure to the CQC, nor was there any basis to
do so.

Conclusion on Ground 4

D 93. For the reasons essentially advanced by Mr Gorton, we do not accept that the Tribunal
failed to give consideration to the manner and terms in which the Trust presented its rebuttals.
The motivation and purpose behind these documents were at the heart of the proceedings. For
E that purpose the Tribunal had to consider the credibility and reliability of the evidence from the
Trust. In contrast to its assessment of Mr Jesudason's evidence, the Tribunal found the
witnesses from the Trust to be reliable. Whilst accepting that there had been overstatement in
F some of the responses the Tribunal accepted their evidence as to their motivation and purpose:
see in particular paras.110-135 and 226-234. The core finding is that the comments were made
'...in an attempt to protect the Trust against potential criticism from the press or other bodies,
G *or wanting to put the record straight. Consequently they had no link to the claimant as a*
whistle-blower.' (para.224) and was elaborated in the detailed consideration of each alleged
detriment.

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A 94. That finding is consistent only with the rejection of any case that the true motivation and
purpose were to disparage and discredit Mr Jesudason by presenting him as irrational vexatious
and dishonest and/or that this all stemmed from a hostility born of Mr Jesudason's pre-
B December 2012 history of whistleblowing. We see no basis to conclude that the Tribunal did
not ask itself the right questions nor that any different formulation might have produced any
different answer.

C **Ground 5: race discrimination**

D 95. The essential ground of appeal is that the Tribunal misdirected itself in its approach to
the race discrimination claim and in consequence failed to address Mr Jesudason's case or
therefore to make necessary findings of fact. We refer to the List of Issues (para.7) recorded
above.

E 96. When turning to the claim of race discrimination, the Tribunal began its analysis by
reference to 'the 16 specific claims of direct race discrimination and less favourable treatment'
(para.171), i.e. the 16 allegations identified in paragraph 7.2 of the List. The Tribunal
F considered each allegation in turn (paras.176-217). In respect of the evidence of the NHS
surgeons it held that it inferred no aversive racism from anything that they said or did during
the period in issue (para.185) and found no discriminatory culture (para.190).

G 97. As to comparators, the Tribunal stated that '*...overall our view was that the claimant
was not treated in any way differently from a comparator (although the claimant did not
specifically mention someone) nor differently from a hypothetical comparator. The comparator
we chose would be a consultant surgeon in the DPS who was not of the same ethnicity as the
H claimant.*' (para.219).

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98. The Tribunal observed that *'At no point, and this is a consistent theme with regard to all the issues we have already dealt with in relation to race discrimination, did Mr Jesudason lodge a formal grievance.'* (para.212).

99. Having considered each matter, the Tribunal concluded that *'there is no race discrimination claim that can succeed and we dismiss all such claims'*. (para.222). In reaching that conclusion it also noted that, save for Professor Lewis who reported Mr Jesudason to the GMC, none of the Trust's witnesses were questioned about their motivation for what they did (para.212). The Tribunal also held that some of the claims were out of time and that there was no good reason to extend time in those cases: para.172.

100. The Tribunal then added that *'If paragraphs 7.2.1-7.2.16 of the list of issues are to be read not as specific allegations but to be used to infer race discrimination in a more general sense, (an all-pervading antagonism towards the claimant because of his protected characteristic) we could not see that from the evidence. In short, if any consultant with the DPS had been so scathing, so critical and so dismissive of colleagues as the claimant has clearly been, both verbally and in writing, that person would have been treated in turn with suspicion, fear, animosity, resignation and disbelief no matter what race or ethnicity.* (para.219).
Furthermore *'With regard to those claims post 2012 any employee or ex-employee of the Trust, whatever their race, who made the sort of accusations that Mr Jesudason made against his colleagues which had either been dealt with and/or were allegations to which a response was needed (either to the press or some other external body) would have been dealt with in the same way by the Trust whatever their race or whether they have the status of a whistleblower.'* (para.236)

A 101. Mr Allen submits that the Tribunal wrongly treated the 16 items as if they were 16
B specific claims of direct discrimination (see para.171) rather than matters relevant to the
C questions identified in List para.7. These required the Tribunal to consider by reference to the
D 16 identified allegations whether it was appropriate to infer that his race was a significant
E influence in his treatment as identified in the List para.5 detriments; and whether a hypothetical
F white comparator would have been subjected to such detriment. The Tribunal had made no
G findings on this allegation, save potentially in relation to Professor Lewis referring Mr
H Jesudason to the GMC (paras.220-221).

D 102. The Tribunal had also failed to use the available evidence to construct a relevant
E comparator. Mr Jesudason's witness statement had set out a number of evidential comparators
F where questions of probity had been raised but who had been treated differently; and had
G provided detailed evidence in support. In the one example where an actual comparator had been
H chosen, i.e. in respect of Professor Lewis (alleged detriments 5.2/5.7), it was the wrong
I comparator. Mr Kenny was an inappropriate comparator as his case concerned clinical
J governance, not probity (para.222).

F 103. The Tribunal had also been wrong to say that Mr Jesudason had never lodged a formal
G grievance in respect of race discrimination (para.212). He had alleged discrimination going
H back to 2011 at the latest.

G 104. Further the Tribunal had drawn an erroneous division between academic and non-
H academic surgeons. Thus in relation to the allegation of an 'in/out club' (7.2.1) the Tribunal
I concluded that *'if there were any differences between the consultants working in the DPS those
J differences were between the academics and the NHS surgeons, not between surgeons of colour
or different ethnicity'* (para.176). However the Tribunal's list of academic surgeons (Jesudason,

A Ahmed, Losty) wrongly included Mr Ahmed; but more importantly neither Mr Jesudason nor Mr Losty were white British. Mr Losty was white but not British. They were in the ‘out group’.

B 105. Mr Allen submitted that, whilst the race discrimination claim was to a considerable extent parasitic on the whistleblowing claim, the Tribunal’s approach to the race discrimination claim was so wrong that it needed to be started afresh in any event.

C 106. In response, Mr Gorton accepted that the Tribunal was wrong to identify the 16 matters in List para. 7 as allegations of less favourable treatment; and that the question was whether those matters gave rise to an inference that race was a significant influence in the alleged detriments. However the underlying question of ‘the reason why’ the Trust had acted as it did in respect of the alleged detriments was dealt with by the Tribunal. Its essential conclusion was that the Trust’s purpose was to set the record straight in respect to highly misleading statements. That having been found, the reason could not be race.

D 107. In any event the Tribunal had also considered the listed matters on that alternative basis and had rejected any such inference: para.219. The Tribunal had expressly considered each of the matters identified in paragraph 7.2, made findings and in its conclusion rejected any inference of race as a cause of the Trust’s conduct towards Mr Jesudason: paras. 219, 236. His case was based entirely on inferences to be drawn from the 16 matters: see the written Closing Submissions. Accordingly, and however the Tribunal had approached the matter at the outset, the results would necessarily have been the same.

E 108. In this respect it had also considered the question raised in issue 7.3, i.e. whether the reason that the Trust treated Mr Jesudason in the way it did was because it wanted to defend its reputation against his claims. That question concerned what was going on in the mind of those at the Trust; and the Tribunal’s answer expressly excluded a racial motivation.

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109. Furthermore it had not been suggested to any of the Trust's witnesses, save Professor Lewis, that their motivation had been on grounds of race. As the judgment made clear, they had not been so questioned: paras.220-222. The rule of law in Court proceedings was that an adverse finding could not be made in respect of a significant matter on which the relevant witnesses had not been challenged: see Chen v. Ng [2017] UKPC 27; considering Browne v. Dunn (1893) 6 R 67; also Markem Corpn v. Zipher Ltd [2005] RPC 31. A modified version of that principle should apply in Tribunal proceedings. At the very least if such a case had not been put to witnesses below, it should not be entertained by the EAT.

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110. As to the appropriate comparators, the list of issues had directed the Tribunal to a hypothetical white comparator (List of issues, para.7.1) and it had proceeded accordingly: paras. 219, 220. Indeed it had gone further than Mr Jesudason's closing submissions in its consideration of the comparator. Having done so it had concluded that race played no part in the treatment of Mr Jesudason.

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111. In reply, Mr Allen submitted that the Tribunal's error of approach was no mere technicality. It was necessary for it to ask, quite separately from the whistleblowing questions, why Mr Jesudason was treated in this way and was it different to the appropriate comparator. There was some overlap between whistleblowing and discrimination claims, but they were not the same.

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112. As to cross-examination of the witnesses, establishing a prima facie case of race discrimination did not require the claimant to put an accusation to any individual; nor was that necessary if and when the burden shifted to the respondent. For that reason the principles from Browne v. Dunn had no application to such a claim; nor any event should they be applied to Tribunal claims where claimants were often unrepresented.

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Conclusion on Ground 5

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113. We accept that the Tribunal in the first stage of its consideration of the claim of race discrimination approached it on the erroneous basis that the 16 matters identified in List para. 7 were individual claims of less favourable treatment on the ground of race. At that stage the Tribunal did not ask itself the question whether Mr Jesudason was subjected to any of the alleged detriments (List para. 5) because of race; and whether the 16 listed allegations gave rise to an inference to that effect.

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114. However we consider that the Tribunal did consider that argument in the alternative. Having made its consideration of the 16 allegations, the Tribunal turned to the question raised in List para. 7.3, namely *'Was the reason the respondent treated the claimant the way it did in relation to the alleged detriments that it wanted to defend its reputation against unjustified claims by the claimant?'*: para. 218. In the following paragraph the Tribunal then considered the 16 matters on the alternative basis that *'If paragraphs 7.2.1-7.2.16 of the list of issues are to be read not as specific allegations but to be used to infer race discrimination in a more general sense...'*. For that purpose it noted that the List of Issues directed it only to a hypothetical white comparator; but also went on to consider a suggestion of discrimination by Professor Lewis by reference to an identified comparator Mr Kenny. The Tribunal concluded that the Trust would have dealt with anyone making such allegations as were made by Mr Jesudason in the same way, whatever their race or whether or not they had the 'status' of a whistleblower: para.236, also 219.

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115. In our judgment the effect of this alternative analysis was sufficient to consider whether the 16 individual allegations gave rise to an inference that Mr Jesudason had been subjected to

A the alleged detriments because of his race. The Tribunal emphatically concluded that they did not.

B 116. As to the appropriate comparator, the List of Issues and the closing submissions (in each case, para.7.1) were on the basis of a hypothetical comparator. The Tribunal identified this as a consultant surgeon in the DPS who was not of the same ethnicity as the claimant. In fact it went further than Mr Jesudason's case in the closing submissions in connection with the allegations against Professor Lewis: paras. 220-221. Whilst Mr Jesudason's witness statement identified particular white comparators, the ambit of the case was identified in the List of Issues and confirmed in the closing submissions. This is not strictly a separate ground of appeal, but in any event we see no basis for criticism of the Tribunal.

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E 117. In any event, and whatever the precise approach of the Tribunal, we see no basis to contend that any different conclusion might have been reached if the race discrimination claim had been addressed solely by reference to the issues identified in paragraph 7 of the list of issues. The overall effect of the Tribunal's findings was that the actions taken by the Trust in the ways identified in the list of alleged detriments were in no way motivated by race.

F 118. Furthermore, in reaching that conclusion the Tribunal was entitled to take account of the fact that, save for Professor Lewis, none of the witnesses for the Trust were questioned about their motivation for what they did. This is not the case to determine the potential application of the principles in Browne v. Dunn to Tribunal hearings in general or to discrimination claims in particular. We see force in the points made on each side. However the fact that there was no such questioning is something the Tribunal could properly take into account.

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H 119. This was a case where the Tribunal, hearing very detailed evidence over many days was in the best position to gauge whether race had been a factor in the Trust's treatment of Mr

A Jesudason. We are satisfied that the Tribunal ultimately asked itself the right questions; and in the alternative that there is no good reason to consider that they might have reached a different decision if they had asked the question differently.

B 120. We add that, if we had thought it necessary to remit this (or any) question for further consideration, we would have remitted it to the same tribunal. Taking full account of the matters identified in Sinclair Roche and Temperley v. Heard [2004] IRLR 763, we would have
C seen no reason to remit to a freshly constituted tribunal.

121. For all these reasons the appeal must be dismissed.

D 122. The Trust's cross-appeal is contingent on the success of the appeal and therefore will be dealt with briefly. The first ground is that the Tribunal failed to address the issue raised by the Trust as to his status following his resignation in December 2012. The second ground is that the Tribunal did not deal with its contentions that the claims were out of time.

E 123. As to the latter, this reflected the fact that the claims had failed on the merits. It is common ground that if the appeal had been allowed it would be necessary for those issues to be considered by the Tribunal.

F 124. As to status, the Trust's argument was that, following the termination of his employment, Mr Jesudason was making disclosures not as an ex-employee whistleblower (see
G e.g. Onyango v Berkeley Solicitors [2013] IRLR 338) but as a 'campaigner'. The complaint is that this was dismissed by the Tribunal in three sentences which did not deal with the arguments (para.96) and that these reasons were inadequate. In the context of all the other issues in this case and the Tribunal's overall conclusions, we understand why this issue was
H taken very shortly in the judgment. We question the use of the word 'status', whether in the

A context of campaigning or whistleblowing. However if the appeal had been allowed and the case remitted, we would have allowed the cross-appeal and remitted it for the purpose of providing fuller reasons for rejecting the Trust’s argument.

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