RESERVED JUDGMENT **Case Nos. 2404382/2016**
COMBINED CASES **2406078/2016**

EMPLOYMENT TRIBUNALS

Claimant: Mr P Duffy

Respondent: University Hospitals Morecambe Bay NHS Foundation Trust

Heard at: Manchester **On:** 16, 17, 18, 19, 20, 23 and 24 April 2018

Before: Employment Judge Franey
Mrs F Crane
Mr C S Williams

REPRESENTATION:

Claimant: Mr P Gorasia, Counsel
Respondent: Mr B Williams, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of unlawful deductions from pay contrary to Part II Employment Rights Act succeeds.

2. The complaint of detriment during employment on the ground of a protected disclosure contrary to section 47B Employment Rights Act fails and is dismissed.

3. The complaint of unfair dismissal because of a protected disclosure contrary to section 103A Employment Rights Act fails and is dismissed.

4. The complaint of unfair dismissal contrary to section 98 Employment Rights Act 1996 is well founded. The claimant was unfairly dismissed.

5. The remedy for the successful complaints will be determined in due course.

REASONS

Introduction

1. Having resigned his employment as a consultant in Urology with the respondent with effect from 26 September 2016, on 21 October 2016 the claimant presented his first claim form in case number 2404382/2016. He complained that there had been unlawful deductions from his pay since October 2015 when the respondent ceased to honour an agreement that he would be paid £200,000 per annum. By its response form of 22 November 2016 the respondent defended the claim on the basis there had been no agreement to that effect, and that in any event the claim was out of time because the last claim for payment by the claimant had been in April 2016.

2. The claimant presented his second claim on 23 December 2016 under case number 2406078/2016. He complained that his resignation should be construed as a dismissal, and that he had been unfairly dismissed. The allegations of a fundamental breach of contract went beyond the issue in relation to pay. He also complained that he had made a series of protected disclosures during his employment, and had been subjected to a detriment as a consequence. The allegations of detriment in paragraph 60 of the grounds of claim ran to fourteen matters, and again went beyond the failure to pay him as agreed. By its response form of 27 January 2017 the respondent defended the second claim, denying that there had been any breach of contract which could give rise to a dismissal, and denying any detrimental treatment because of protected disclosures.

3. The two cases were combined by order of Employment Judge Holmes on 9 March 2017.

4. Following case management hearings the claimant provided further particulars of his protected disclosures and his detriments on 15 May 2017. He identified twenty-seven occasions on which he claimed that he had made a protected disclosure, but abandoned two of the alleged detriments. The respondent supplied an amended response form on 26 May 2017.

5. Two further alleged detriments were struck out by Employment Judge Slater at a preliminary hearing on 7 September 2017 because she considered that the claimant had no reasonable prospect of success. That left the claimant with ten allegations of protected disclosure detriment as well as his constructive dismissal complaint and unlawful deductions from pay claim.

The Issues

6. At the start of the hearing we discussed the issues with the representatives. In accordance with previous Case Management Orders a List of Issues had been agreed in October 2017.

7. However, on behalf of the claimant Mr Gorasia substantially reduced the scope of the claim. He confirmed that in relation to the complaint of detriment in employment, the claimant relied only on the failure to pay him the agreed monies up to June 2016, and on an email and accompanying report about that matter provided to him on 15 June 2016. All other allegations of protected disclosure detriment were abandoned.

8. Similarly, Mr Gorasia abandoned all allegations of a fundamental breach of contract in the constructive dismissal complaint save for those two matters.

9. The respondent had previously conceded that the claimant made all the protected disclosures in his list save for numbers 1, 2, 3, and 27. Mr Gorasia abandoned any reliance on those disputed matters.

10. Subject to a subsequent application to amend (see below) that left the claimant with twenty-three admitted protected disclosures, two allegations of detriment, and two allegations of conduct amounting either individually or cumulatively to a breach of trust and confidence. Accordingly the issues for determination by the Tribunal were agreed to be as follows:

Unlawful Deductions from Pay Part II Employment Rights Act 1996

1. On any occasion from October 2015 onwards did the respondent pay to the claimant less than the total amount of wages properly payable to him?

2. If so, in so far as any such deduction occurred before 23 May 2016 (three months before presentation of the complaint, allowing for the effect of early conciliation), can the claimant show that:

(a) It formed part of a series of deductions of which the last occurred on or after 23 May 2016, or

(b) It was not reasonably practicable for the claim to have been presented within that three month period and it was presented within such further period as the Tribunal considers reasonable?

3. If the complaint is within time and otherwise well founded, what is the effect of payments subsequently made by the respondent?

Protected Disclosure Detriment section 47B Employment Rights Act 1996

4. It being accepted that the claimant made protected disclosures 4-26 inclusive in his list of 15 May 2017, was the claimant subjected to a detriment by any act or deliberate failure to act by the respondent in the following alleged respects:

(a) Failing in the period up to June 2016 to pay the claimant agreed monies following his agreement to work from Furness General Hospital in March 2015, and/or

(b) The terms of an email and accompanying report of 15 June 2016?

5. If so, can the respondent show that the ground on which any such act or deliberate failure to act was done was not that the claimant had made one or more of the protected disclosures?

Unfair Dismissal Part X Employment Rights Act 1996

Dismissal

6. Can the claimant establish that his resignation should be construed as a dismissal under section 95(1)(c) in that:

(a) The respondent committed a fundamental breach of an express term of the contract as to remuneration, or in the alternative the implied term as to trust and confidence, in the following alleged matters taken individually or cumulatively:

(i) Failing in the period up to June 2016 to pay the claimant agreed monies following his agreement to work from Furness General Hospital in March 2015, and/or

(ii) The terms of an email and accompanying report of 15 June 2016;

(b) That fundamental breach was a reason for the claimant's resignation, and

(c) The claimant had not lost the right to resign by affirming the contract or waiving his rights through delay, giving notice of termination, or otherwise?

Fairness

7. If the resignation was a dismissal, what was the reason or principal reason for the repudiatory breach by the respondent? Was it:

(a) One or more protected disclosures, making dismissal automatically unfair under section 103A, or

(b) Another reason, which in the absence of any pleaded potentially fair reason makes dismissal unfair under section 98?

Application to Amend

11. After two days of reading the Tribunal started hearing oral evidence on Wednesday 18 April 2018. Shortly before lunchtime the claimant answered a question from Mr Williams in a way which caused Mr Gorasia to make an application to amend the list of protected disclosures served on 15 May 2017. The relevant facts had appeared in the claimant's witness statement but had not been separately identified as a disclosure in those further particulars. The application was to add a further disclosure as number 21A in the following terms:

> **"An external disclosure made to the Care Quality Commission on 25 August 2015 regarding 'patient A' as set out in paragraph 86 of the claimant's witness statement."**

12. Having heard submissions from both sides we decided to grant permission for the amendment. We applied the overriding objective set out in rule 2 of the Employment Tribunals Rules of Procedure 2013, and the principles derived from the decision of the Employment Appeal Tribunal in **Selkent Bus Co Limited v Moore [1996] IRLR 661**.

13. The amendment did not seek to introduce any new cause of action, but simply to amplify the basis of the existing complaint of detriment in employment because of a protected disclosure. Nor did it introduce any new factual area of evidence: the evidence about it was already before the Tribunal in the witness statements and documents. In that sense it was a relatively minor amendment seeking to re-label a factual matter as a protected disclosure. It was also a disclosure which arose out of something already levelled as a protected disclosure. The fact that it was made well outside the primary time limit was therefore of much less weight than if this had been a substantial alteration.

14. The Tribunal was concerned at the timing of the application. At the very latest it could have been made when the claimant finalised his witness statement, which had been served on 29 March 2018. The claimant had had legal assistance in preparing the list of disclosures in May 2017. This matter should have been included in that list as it was plainly the claimant's belief that it was the disclosure which materially affected the subsequent issues which arose relating to his pay. The fact there was no good reason for this matter having been raised so late favoured the respondent's position.

15. However, ultimately the Tribunal was concerned with the balance of prejudice on both sides. If we were to refuse permission for the amendment to be made, the claimant faced a risk that he might lose his case on a technicality if the Tribunal subsequently concluded that his approach to the CQC had indeed been a material influence on the stance then taken over his pay. In contrast, the respondent would not be materially prejudiced if permission were granted. Candidly Mr Williams accepted that the respondent had come to the Tribunal ready to give evidence about the reason for the issues raised regarding pay, and therefore that his witnesses and the available documents would enable this matter to be dealt with on its merits. He would have the opportunity to cross examine the claimant about this complaint if permission were granted. The fact that the claimant's case on this point had become clear so late in the day was a matter to which he could return in submissions. It was not disputed that if the amendment were allowed the disclosure to the CQC would be a protected disclosure. Accordingly there would be no material impact on the agreed List of Issues.

16. For those reasons we decided that the balance of prejudice favoured allowing the amendment, despite the lateness of the application, and we granted permission to amend the further particulars of 15 May 2017 so as to introduce disclosure 21A.

Evidence

17. The parties had agreed a bundle of documents in six lever arch files which approached 3,000 pages. Although the abandonment of significant proportions of the claim at the commencement of our hearing meant that much of the documentation was less relevant than had been thought, it was still necessary for the Tribunal to consider a good deal of it in the course of reading the witness statements as both parties wanted the Tribunal to appreciate the background sequence of events leading up to the decision to resign. One additional document was added the bundle

by agreement at the request of the claimant. Any reference to page numbers in these reasons is a reference to that bundle unless otherwise indicated.

18. We heard from four witnesses in person, each of whom gave evidence pursuant to a written witness statement. The claimant gave evidence himself and also called his former colleague, Dr Alison Birtle, a Consultant Oncologist.

19. The respondent called Ameeta Joshi, a Consultant in Maxillofacial Surgery who was the Clinical Director for the Surgery and Critical Care Division in which the claimant was employed, and Gertrude Nic Philib who was the Deputy Director of Workforce who had involvement in the claimant's human resources ("HR") issues.

20. The respondent had also served a witness statement from David Walker, a doctor who was the Medical Director of the Trust from January 2015 onwards. However, the abandonment of parts of the claimant's case meant it became unnecessary for Mr Walker to give evidence in person, and Mr Williams invited the Tribunal to read his witness statement from paragraphs 110-146 which concerned the claimant's resignation and the aftermath. We read those passages and the documents to which Dr Walker referred, but attached less weight to anything he said which was disputed than if he had attended in person to give evidence.

Relevant Legal Principles

Unlawful Deductions

21. The right not to suffer unlawful deductions from pay arises under Part II of the Employment Rights Act 1996 ("the Act"). Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable by her. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1), or exempt under section 14.

22. It was common ground that the Tribunal could construe the contract in order to decide what was properly payable, following **Weatherilt v Cathay Pacific Airways Ltd 2017 ICR 985** rather than **Agarwal v Cardiff University and anor 2017 ICR 967[1].**

23. Under section 23(2) a complaint must be made within three months of the date of the payment of wages from which the deduction was made, unless there has been a series of deductions in which case time starts to run from the last in the series. The Employment Appeal Tribunal ("EAT") suggested in **Bear Scotland v Fulton & others** [**2015**] **ICR 221** that a gap of more than three months between deductions would break the series. The EAT (HHJ Hand QC) in **Ekwelem v Excel Passenger Service Ltd UKEAT/0438/12/GE** (14 October 2013) indicated in

[1] This had been raised earlier in proceedings but was not pursued by Mr Williams in submissions.

paragraph 31 that a series of deductions could encompass those which were lawful and those which were not.

Contract Formation

24. In this case the Tribunal was required to decide whether there was a contract as part of the complaint of unlawful deductions from pay (and, indeed, of constructive unfair dismissal). We were taken to some authorities on that point. The general principles to be applied in determining whether an agreement has been made, what its terms are and whether it is intended to be legally binding, were summarised by Lord Clarke in **RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010] 3 All ER 1**, a decision of the Supreme Court in paragraph 45 as follows:

> **"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."**

25. In **Hooper v British Railways Board [1988] IRLR 517** the Court set out in paragraph 42 some basic principles of the law of contract. Evidence of the action of the parties to a contract was admissible to prove the making of a new contract. The way in which the parties behaved after the agreement can be relevant to determining whether there was in fact a contractual agreement reached or not.

26. Finally, in **Stack v Ajar-TEC Ltd [2015] IRLR 474**, the Court of Appeal indicated (paragraph 30) that the process of contract formation may be partly express and partly by implication. In that case the fact there was no express agreement on remuneration was not fatal to the existence of a contract. A contract could be found in what was said expressly and in what necessarily had to be implied, in the light of the manner in which the protagonists dealt with each other in order to give business reality to a transaction.

Detriment in Employment

27. If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"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."**

28. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2) which provides that

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

29. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work.

30. As to the causation provision in section 48(2), **NHS Manchester v Fecitt [2012] ICR 372** concerned a case where whistle-blowers had been moved due to a dysfunctional working atmosphere. The Court of Appeal confirmed that the correct test to be applied is the same as discrimination test under the Equality Act 2010. If the protected disclosure has any material influence on the mental processes of the decision maker, conscious or subconscious, causation is established. Consequently the Tribunal can proceed by way of an inference as to the real reason for the decision as per the guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**. However, in paragraph 41 of **Fecitt** Elias LJ said this:

> **"Once an employer satisfies the Tribunal that he has acted for a particular reason, here to remedy a dysfunctional situation, that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the Tribunal considers that the reason given is false, whether consciously or unconsciously, or that the Tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the Igen principles."**

Unfair Dismissal - Dismissal

31. The unfair dismissal claim was brought under Part X of the Act. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) provides that an employee is dismissed by his employer if:

> **"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

32. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

33. The claimant relied in this case not only on an express term as to pay but in the alternative on the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

34. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

35. The objective test also means that the intention or motive of the employer is not determinative: **Leeds Dental Team Ltd v Rose [2014] IRLR 8 EAT**. An employer with good intentions can still commit a repudiatory breach of contract.

36. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

37. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> ***"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."***
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in**

> **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach ….."**

38. The importance of pay in the employment relationship was also emphasised by the Court of Appeal in **Cantor Fitzgerald v Callaghan [1999] IRLR 234**. The Court said that it was difficult to exaggerate the crucial importance of pay in any contract of employment (paragraph 35), and quoted an observation of Browne-Wilkinson J, as he then was, in **R F Hill Ltd v Mooney [1981] IRLR 258** that:

> **"The obligation on an employer to pay remuneration is one of the fundamental terms of a contract. In our view, if an employer seeks to alter that contractual obligation in a fundamental way, such as he has sought to do in this case, such attempt is a breach going to the very root of the contract and is necessarily repudiation."**

39. In paragraph 41 of **Callaghan** the Court said this:

> **"…The question whether non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment, depends on the critical distinction to be drawn between an employer's failure to pay, or delay in pay, agreed remuneration, and his deliberate refusal to do so. Where the failure to delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident or unexpected events…If so, it would be open to the Court to conclude that the breach did not go to the root of the contract. On the other hand if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the Court might be driven to conclude that the breach or breaches were indeed repudiatory."**

40. In some cases a breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial.

41. The law relating to the reason for a resignation after a repudiatory breach of contract was reviewed by the EAT (Langstaff P presiding) in **Wright v North Ayrshire Council [2014] IRLR 4.** If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause.

Unfair Dismissal - Fairness

42. Where the employee has made a protected disclosure, dismissal can be automatically unfair under section 103A:

> **"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".**

43. In a constructive dismissal case the reason for dismissal is the reason for the fundamental breach which causes resignation.

44. If the reason or principal reason for that breach is not a protected disclosure, in a case where no other automatically unfair reason arises, the complaint falls to be considered under section 98 which, so far as relevant, provides as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal; and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

45. If the employer fails to show a potentially fair reason for a dismissal it is unfair.

Relevant Findings of Fact

46. This section of our reasons sets out the broad chronology of events necessary to put our decision into context. Any disputes of primary fact central to the resolution of the issues will be addressed in the discussion and conclusions section.

The Respondent

47. The respondent is an NHS Foundation Trust which operates three main hospital sites in the Morecambe Bay area: the Royal Lancaster Infirmary, the Westmorland General Hospital in Kendal, and Furness General Hospital in Barrow-in-Furness. It is a substantial employer with a dedicated HR function. The clinical staff of the Trust are headed by the Medical Director, and the different specialities are organised into a number of Divisions, each with a Clinical Director. This case concerned the Urology Department which was part of the Surgery and Critical Care Division. At the material time Miss Joshi was the Clinical Director of that Division, and each department within it (including Urology) had a clinician identified as the Clinical Lead.

48. In addition to clinical staff each Division had a management hierarchy involving a General and Deputy General Manager, Finance Managers, and a Clinical Service Manager who acted as the line manager for consultants in the organisation of their work.

The Claimant

49. The claimant grew up in north Lancashire and achieved a long held ambition when the respondent employed him as a Consultant Urologist based at Lancaster in 2000. He and his family moved to live nearby.

50. He held the post of Clinical Lead for Urology between 2003 and 2010, when he was replaced by his colleague, Colin Cutting. His pay was reduced by 10% to reflect the loss of Clinical Lead responsibilities, a reduction against which he argued at the time and by which he later said (July 2012 page 309) that he felt "deeply betrayed".

Contract of Employment and Job Planning

51. We were not provided with a copy of the claimant's contract of employment but it was agreed that the relevant parts were accurately reproduced in the witness statement of Mrs Nic Philib. The claimant was employed under the National Terms and Conditions for Consultants issued in 2003, with the addition of an individual contract based on the "Model Contract for Consultants" provided by NHS England. Paragraph 7.1 of that contract stated:

> **"A standard full-time Job Plan will contain Programmed Activities subject to the provisions in paragraph 7.6 to agree up to two extra Programmed Activities."**

52. Paragraph 7.6 made provision for a consultant to agree to do more than ten Programmed Activities ("PAs") each week, in return for payment at nationally specified rates.

53. The terms and conditions made provision in schedule 3 for a Job Plan for each consultant as follows:

> **"The Job Plan will set out all of a consultant's NHS duties and responsibilities and the service to be provided for which the consultant is accountable. The Job Plan will include any duties for other NHS employers. A standard full-time Job Plan will contain ten Programmed Activities. Subject to the provisions in schedule 7 for recognising work done in Premium Time, a Programmed Activity will have the timetable value of four hours. Programmed Activities may be programmed as blocks of four hours or in half units of two hours each."**

54. With the 48 hour limit on a working week provided by the Working Time Regulations 1998, it was common for a standard consultant Job Plan to provide for 12 PAs of 4 hours each. There were some situations, however, in which consultants might have Job Plans with more than 12 PAs, such as where the consultant took on the Clinical Lead role. Any additional PAs would require the approval of the Medical Director. The Job Plan would be discussed and agreed each year and a formal document prepared which all parties would sign.

55. In reality the working week of many consultants exceeded 48 hours. A number of consultants (including the claimant) did private work as well as NHS work. The claimant had signed an agreement under regulation 5 of the Working Time Regulations 1998 to exclude the application of the maximum weekly working time in his case.

Additional Sessions

56. In addition to PAs appearing week after week in the Job Plan, there was also provision for additional sessions of activity. These were variously referred to as

Additional Capacity Sessions, Waiting List Initiative sessions, and Additional Activity Sessions. It is convenient to use the last term, and this judgment will refer to such a session as an "AAS" or an "AAS session". The purpose of an AAS was to help the respondent deal with increases in demand. In principle there was no obligation on the respondent to offer an AAS, and in principle a consultant was free to decline to undertake an AAS. In practice demand was such that AAS sessions were an accepted part of weekly consultant work in the Urology Department.

57. The policy basis for AAS sessions was set out in an "Additional Capacity Agreement" effective from 1 April 2011. It appeared at pages 280-285. An AAS was intended to meet fluctuations in activity for short periods when baseline activity could not match demand. Each AAS would be for an agreed duration with an agreed number of patients on the list, whether it was a clinic or an operating session. Clause 2(a)(iii) provided as follows:

> **"An Additional Capacity Session will usually equate to a 4 hour session of clinical activity e.g. operating or OPD [**outpatient department**] clinic, plus 1 hour pre-op/pre-clinic preparation, post-op visits and clinic reconciliation. Where this is not the case, part-sessions may be worked when agreed in advance on a pro rata basis."**

58. The next paragraph of the policy indicated that where a session was truncated (for example if a patient did not attend) staff should undertake other relevant clinical activities to fulfil the remainder of the session.

59. The policy made clear in clause 2(a)(v) that staff would only be paid for the hours worked. In order to claim payment the consultant had to complete a claim form providing details of the AAS worked. Addendum B to the agreement (page 285) provided that payment for the hours actually worked would amount to £500 for a consultant for a 5 hour AAS involving 4 hours of clinical activity and 1 hour of related work.

60. In her oral evidence Miss Joshi told the Tribunal that practice differed from what appeared in the agreement, and that there were different arrangements for different hospitals. For operations at Lancaster and Kendal an AAS would indeed be four hours in theatre and an additional hour for pre- and post-operative work making a five hour AAS. At Furness, however, she said that the theatre session was 3.5 hours, so even with the pre- and post-operative work the AAS was only 4.5 hours. For outpatient clinics at Furness the session would be 3.5 hours with 30 minutes of additional work, making a total claim of 4 hours. Mrs Nic Philib gave oral evidence to the same effect and said that the written policy was not universally applied across all three sites.

61. We will return to that issue in our conclusions.

Protected Disclosures

62. The respondent had a system of clinical incident forms by which staff could report incidents that caused or might have caused harm to a patient. It was common ground that during his employment the claimant submitted a number of critical incident forms which amounted to protected disclosures. There were a number of

verbal disclosures too. In this chronology it is convenient to refer to these by the initials PD and the number in the further particulars of 15 May 2017. They will be summarised here in date order rather than the order in which they appeared in the further particulars.

2012

63. PD10 was a verbal report in early 2012 to Mr Cutting about a malnourished and dying lady who had not been treated properly. In 2012 the claimant also reported verbally to Mr Cutting four infected obstructed kidney cases which had not been treated as emergencies (PD4-PD7). In late June/early July 2012 the claimant verbally reported to Mr Cutting a consultant colleague, Mr Jain, who appeared to have been doing private work when he should have been on call for his NHS commitments (PD11).

64. PD 8 was made at a departmental meeting in late 2012. The claimant had been off sick for three months with a cardiac episode between April and July 2012. After his return to work he asked for an audit of emergency operative workloads within the department. The figures showed that he had dealt with 50 emergency cases, whilst five consultant colleagues had dealt with between 22 and 7 respectively.

2013

65. PD20 was about an incident in December 2013 when there was an emergency involving an NHS patient at a private hospital. The claimant reported verbally to Mr Cutting that Mr Jain had been on call but had refused to attend, saying that he was 90 miles away. The claimant subsequently completed a report of 15 December 2013 at pages 356-357. The refusal of Mr Jain to attend meant that the claimant had to deal with the matter even though he was not on call, was on sick leave, and was asleep in bed when the incident arose. His report was very critical of Mr Jain.

Validation Work 2013-2014

66. It was at the end of 2013 that the claimant began to undertake what was termed “validation work”. It consisted of reviewing patient records to see whether there were patients who could be safely discharged by letter rather than being called in for a further clinic appointment. The intention was to cancel unnecessary appointments. The validation work continued for some time and was successful in identifying large numbers of patients who need not be seen again. The Clinical Service Manager, Belinda Pharaoh, approved the continuation of this work in an email on 19 January 2014 at page 347.

Spring 2014

67. In March 2014 the tensions between the claimant and Mr Jain resulted in Mr Jain sending an email (page 364) protesting at what he called “random statements/complaints” made against him by the claimant, Mr Cutting and a

colleague. He suggested that they were conspiring against him. The claimant prepared a detailed rebuttal which appeared at pages 365-367. He rejected the allegations and maintained that the concerns he had raised about Mr Jain's practice were well-founded.

68. These and other tensions within the department led to a suggestion by Sue Elliston, then the HR Business Partner for the Division, that there be group mediation. By email of 28 April 2014 (page 370) the claimant said he had real reservations about attending any kind of group mediation session. His email said:

> **"We have a number of very abrasive characters in the department at the moment and, as I'm rapidly learning, speaking out about colleagues' dysfunctional behaviour and/or professional/clinical standards just seems to result in a whole load more abuse, plotting and retribution."**

69. On 25 May 2014 the claimant made PD13 in an email at page 376 in which he reported a clinical incident about a patient who had been brought in and had nearly had the wrong kidney removed. This error was attributable to another consultant urologist, Mr Madhra, and an investigation of Mr Madhra for poor performance began under the NHS procedure for Maintaining High Professional Standards ("MHPS").

August - October 2014

70. On 26 August 2014 the claimant made PD14 in which he alleged that a desperately unwell man had been discharged home by the consultants, Mr Jain and Mr Naseem, to be re-admitted on the claimant's operating list in about six weeks.

71. In September and October 2014 the claimant made three disclosures which related to errors he said had been made by Mr Jain. PD15 related to a missed testicular torsion, where a 16 year old boy lost a testicle after a wrong diagnosis of a sexually transmitted disease. PD16 and PD17 were reported as clinical incidents on 13 October 2014, the former relating to a patient sent home overnight without treatment with instructions to come back on the next consultant's shift, and the latter referring to the deferral of an emergency case until the next day.

72. This led to a confrontation between Mr Jain and the claimant on 17 October 2014. The claimant made a note of it which appeared at pages 1176-1178. Mr Jain accused the claimant of checking up on him; the claimant told Mr Jain that he did not trust his clinical judgment and that Mr Jain had exhibited abysmal levels of responsibility and ownership of acutely unwell patients.

73. On 19 October 2014 Mr Naseem submitted a clinical incident form regarding the claimant (pages 418-419).

November – December 2014

74. In November 2014 two urology consultants, Mr Rowbotham and Mr Douglas, resigned. The claimant sent an email to Miss Joshi on 17 November 2014 saying that he was "worried sick" about the state of the department.

75. In very early December 2014 an anonymous letter was sent to Lancaster Police (page 434) asking the police to investigate the claimant for racism. The letter alleged that he had caused much difficulty for urology consultants. The police Passed the letter to the respondent. Mrs Nic Philib expressed the view that the claimant should be told (page 435); a response from the then Medical Director, Mr Nasmyth, of 10 December 2014 showed that he thought Mr Jain was the author of the letter. The claimant was not informed of this letter by anyone in management, although he did hear about it informally from a colleague.

76. On 15 December 2014 the claimant made PD24 about Mr Naseem. It was a clinical incident where an elderly frail patient with infected obstructed kidney had been left for a week or more without emergency surgery; national guidance was that such surgery should be undertaken within three hours. At around the same time he also made PD23 which was about a young girl with an infected obstructed kidney who was sent home by Mr Jain rather than treated as an emergency procedure.

77. At the end of December 2014 the claimant made clear his concerns about the provision of services at Furness (pages 438-439). Mr Cutting took up those concerns.

"Patient A" 2014 - 2015

78. In December 2014 there occurred an incident which led to the death of "patient A". The patient had a blocked and infected stent which had caused an infected obstructed kidney. The claimant believed that Mr Jain and Mr Naseem had both missed an opportunity to take emergency action to change the stent. He did it 48 hours later, but it was too late and the patient died on 2 January 2015.

79. The death of patient A was the subject of a coroner's inquest in May 2015. The claimant prepared a report to the coroner on 12 May 2015 at pages 512-516. During the inquest the coroner asked him to report it internally as a serious incident so there could be a discussion. That report (PD21) was done on 28 May 2015 (pages 521-523). The matter was to be discussed at a Morbidity and Mortality meeting on 9 June 2015, but Mr Jain and Mr Naseem refused to discuss it. Instead the department jointly prepared a Root Cause Analysis report ("RCA report") following contact between the Head of Legal Services and the coroner.

80. The RCA report was sent to the coroner at the end of July 2015. It appeared at pages 696-73). The claimant prepared a response of 31 July 2015 (page 736), saying that the report was unbalanced, out of context and that ignored the substantive service failings that probably contributed to the death of the patient. He put more detail in an email of 3 August 2015 at pages 739-740. He suggested that

the respondent should unconditional and immediately withdraw the RCA report for fear of misleading the coroner and the family of the deceased patient.

81. The claimant spoke to the General Medical Council about this issue in July 2015, although he swiftly withdrew his complaint, but he also telephoned the Care Quality Commission ("CQC") on 25 August 2015. That contact was recorded in a CQC timeline at page 1898, and was PD21A.

February – March 2015 Pay and Job Plan Discussions

82. By February 2015 the claimant was considering leaving the respondent and moving to a post with the Highlands and Islands NHS Trust in Scotland. He was also in discussions with Mr Cutting about possible changes to his Job Plan which would have the benefit of getting him out of Lancaster given all the interpersonal conflict that he had experienced.

83. By late February emails were in circulation about the possibility of the claimant covering Furness. Mr Cutting identified a number of advantages to such an arrangement in an email of 23 February 2015 at page 455. Doing so would help maintain an emergency service at Furness as well as prevent the claimant from leaving altogether.

84. It was a fundamental part of the claimant's case that as part of these discussions an agreement was reached with Mr Cutting as Clinical Lead that if he moved to Furness a Job Plan would be devised which would result in him earning approximately £200,000. We will return to that key issue in our conclusions.

85. Behind the scenes during early March Mr Cutting was trying to get approval for a Job Plan which gave the claimant as many PAs as possible. Initially he proposed 15.5 PAs (pages 465-468). He asked Emma Stewart in Finance to cost out a 15.5 PA Job Plan. He thought it would still be cheaper than a long-term agency locum. The costing was done the same day (page 469). The email read as follows:

> **"Currently we have that Peter Duffy is on 11 PAs and his cost (incl on-cost) would be £158,186.**
>
> **If this is increased to 15.5 PAs this would increase to £214,847 so an additional £56,661.**
>
> **Are we able to employ someone on a 15.5 PA contract as wouldn't this breach Working Time Directive? Thought the maximum was 13PAs and that additional PA was only for 12 months?**
>
> **I've not caught up with yourself or Julie in a while – is this offsetting other costs elsewhere if it was possible? Also is there a risk we're going to lose Mr Duffy?"**

86. The 15.5 PA Job Plan was declined by Ms Joshi (page 473).

87. On 9 March Mr Cutting proposed a 14.5 PA Job Plan (page 473) and on 12 March a Job Plan of 14.2/14.3 PAs (pages 478-489). Later that same day after speaking to Ms Joshi he proposed a 13.5 PA Job Plan (pages 492-495). He also

prepared a document which set out the rationale for this at pages 490-491. The claimant was to be at Furness Monday, Tuesday, Wednesday and Friday, with travel time and expenses paid for. He would spend Thursdays in Lancaster where he did some private work in the morning. There were a number of benefits to the department from that arrangement as well as it taking the claimant out of a stressful working environment at Lancaster.

88. Confirmation came from Lyn Hadwin on 19 March (page 498) that the Job Plan should be 12 PAs and Ms Joshi confirmed on 26 March she would not approve more than that (page 497). Mr Cutting responded to that email as follows:

> **"We are all doing 11 or 12 PAs with an additional 60 PAs between us each month i.e. we are all doing nearer 14+ PAs.**
>
> **I will put together another alternative Job Plan for Peter which is at 12 PAs and then I suggest that we offer him the additional work and pay it at AAS rate (which is more expensive!!)."**

89. He then put together a Job Plan of 12 PAs together with two weekly sessions of additional work at AAS rate, which he pointed out was more expensive.

90. All of this went on without any direct involvement of the claimant. He knew Mr Cutting was seeking approval for a Job Plan. His perspective was evidenced by emails to the NHS Trust in Scotland. In an email at page 472A (which was not dated) he said:

> **"Needless to say, there's been a lot of fallout, including complaints from relatives and other members of staff. The upshot is that there was a meeting late last week between myself and three of the senior managers. It was a lot more frank and constructive than I expected. I told them that I felt I'd gone past the point of no-return with the current job. We worked through a lot of the issues that have troubled me and (very provisionally and with nothing formally agreed) I have been offered a radical overhaul of my Job Plan.**
>
> **In essence, I will be based in Furness General Hospital (rather than Lancaster), offered travel time and expenses, taken off the on call rota, and given a substantial pay rise (they were talking £200K!)**
>
> **Rather reluctantly, this is all very much to my liking…being seven years from possible retirement and being a late-comer to medicine, the pay rise would help enormously with retirement plans and being taken off the on call rota would also be a major step forward with my quality of life…"**

91. On 9 March the claimant sent a further email to the Scottish NHS Trust (page 472A). He said:

> **"The Trust here (for once) are moving quite quickly and are keen to move me predominantly to Barrow with a pay rise and no on call. It is a position that I'd be rather foolish to turn down, especially as the travelling time and costs are included and the new package incorporates a sizeable pay rise. I'll know more over the next seven days or so…"**

<u>Westmorland Hospital Meeting Late March 2015</u>

92. In late March 2015 the move to Furness became significantly more urgent because the claimant received what he considered to be an offensive and abusive phone call from Mr Naseem. He had to get out of Lancaster without delay. He had discussions with the BMA about his resignation and then a meeting with Colin Cutting, Christine Winder and the interim Clinical Services Manager, Julie Armitage, at Westmorland General Hospital on a date in late March 2015. No notes were kept of this discussion but it was at this meeting that the claimant maintained there was agreement reached that he would move to Furness in return for annual remuneration of about £200,000. We will return to that issue in our conclusions.

Move to Furness

93. The claimant began work at Furness a couple of days before the official start date of 1 April 2015.

94. On 16 April Mr Cutting updated the claimant. His email appeared at page 501. He said:

> **"I'm trying very hard to sort out your formal Job Plan at FGH. Divisional Management Team i.e. Ameeta [**Joshi**], Neil Berry and Lyn Hadwin – are not making it easy. They are now wanting an options appraisal/business case etc…**
>
> **However, I suggest that we just proceed and pay you additional sessions for the additional time you do and I will just take the flack if they don't like!**
>
> **Thank you so much for being willing to cover Barrow; it will be so much better for patients than having the on call consultant trying to cover both sites at the same time!"**

17 April 2015 – Job Plan Finalised

95. There was a meeting between the claimant, Mr Cutting and Ms Pharaoh on 17 April. A Job Plan was agreed which was 12 PAs plus two AAS sessions. The Job Plan itself appeared at page 1558. Ms Pharaoh confirmed to Miss Joshi what had been agreed in an email of 18 April at page 505:

> **"Just to confirm that Colin and myself met with Peter on Friday 17 April 2015 and did a Job Plan review. His Job Plan is a 12 PA contract for six months. He will however still pick up AAS within the week just like the rest of the team. Peter is aware that he will lose his on call allowance? 5% just checking what this is.**
>
> **Colin and I have put comments in as agreement of comments in his Job Plan [**sic**] regarding stress/department etc., etc. We have included travel in his Job Plan, but two of the other consultants will now reduce travel. Plus the on call consultant of the week travel should now reduce with Peter being on site, so it will even itself out with travel. He has signed his Job Plan and I have it with me for you to then sign off.**
>
> **I have asked Susanne to increase his PA from 11-12 PA through TRAC and ESR forms."**

96. Formal confirmation came by letter of 27 April 2015 from Mrs Hadwin at pages 506-507. The letter confirmed that in accordance with clause 6 of his main contract, the claimant had agreed to undertake two additional PAs over the ten PAs

that would be standard contractual duties. The contract was for a fixed period of one year from 1 April 2015 but could be terminated upon three months' notice. The requirement to undertake additional PAs would be reviewed annually. The claimant signed the letter to confirm acceptance of it, and the letter ended with a statement that the offer and acceptance constituted a contract between the parties. His 12 PAs were therefore formalised for a period of one year unless terminated earlier by notice.

97. The Job Plan itself at page 1558 was the same for each week. In addition to the 12 PAs, it identified two times in the week when an AAS would be offered. The first was on a Monday for a clinic between 13:30 and 17:00, and the second was a theatre session on Friday morning between 09:00 and 12:30. These sessions were both 3.5 hours long.

April – July 2015

98. The claimant began working these sessions in April.

99. At the end of April he was paid under his old contract (11 PAs) but Ms Pharaoh assured him that the new arrangements would be reflected in May. The claimant submitted his claim for payment for two AAS sessions at £500 each week through the paper system in early May, early June and early July 2015, and payments were authorised and made at the end of each month.

100. That reflected his understanding of the agreement he believed had been reached. Including his salary for 10 PAs, his payment for the two additional PAs, and his clinical excellence awards, he earned just over £130,000. Although entitled to six weeks of annual leave each year he generally only took four, and he did not tend to take his six days of study leave. This meant that he anticipated working for 46 weeks in the year, resulting in an additional £1,000 of gross pay each week (2 AAS's each week at £500) taking him to just under £180,000. That was still short of the agreed figure of £200,000, but he anticipated that the arrangement would be reviewed after six months and adjusted. He was conscious that if he worked three AAS sessions each week for the whole year he would exceed £200,000 in gross terms.

August – September 2015

101. There were some changes during the summer. Belinda Pharaoh, who had been party to the original discussions with Mr Cutting and the claimant, was replaced by Louise Slee as Clinical Service Manager. That broadly coincided with the introduction of a new electronic system for claiming additional payments, known as ePay. That system came into effect in August 2015.

102. On 4 August 2015 Louise Slee sent an email which appeared at page 777. It was to her deputy, Pam Athersmith, who had been there longer than she had. The email said she had received a claim on ePay from the claimant and she said:

> **"Are the five sessions attached correct – five at £500 a time?"**

103. It was unclear whether she was questioning the number of sessions or the amount claimed for each one. Nevertheless the claimant was paid at the end of the month.

104. By then he had contacted the CQC about patient A (PD 21A) and was interviewed by the CQC on 4 September 2015.

105. On 1 September 2015 the claimant sent an email regarding his pay. It appeared at page 819. It was addressed to Belinda Pharaoh and Pam Athersmith. Its subject was "outstanding salary". The email said:

> **"I've dropped quite a lot behind the agreed annual salary, possibly because of the ePay system, and I don't want to fall too far behind in case I can't make the ground up.**
>
> **The new job started at the end of March so by the end of September I'll have been in post 6/12 [**months**].**
>
> **Gross pay to end Aug = £75,252.**
>
> **Basic gross pay for next month, plus clinical excellence awards and extra PA = £11,064.49, added to the gross pay to date (£75,252) = £86,316.49.**
>
> **I have also done two evening lists (23 June and 26 August), 23 July Thursday one stop and all day Saturday clinic 13 June, an extra £2,500 of work. Don't think there's been any other WLI's.**
>
> **Total agreed earnings for this six months, plus the WLI's that I've done therefore ought to come to £102,500.**
>
> **By my calculations, I'll have actually been paid £86,316.49 by the end of next month, as above. That leaves (eeek) £16,183.51.**
>
> **Shall I spread this out over 32 clinical sessions, making sure that I include the WLI's on the correct dates and invoicing for other WLI's when I've been in doing clinical activities?**
>
> **Thanks. Sorry it's all a bit confusing. Hope I've done my maths right…"**

106. The claimant followed that up with two further emails that day in which he made clear that he was suggesting he would submit claims for payment for thirteen AAS sessions for July, six for August (because he had been on annual leave) and thirteen for September. There was no immediate reply.

107. On 22 September the claimant sent a further email (page 818), this time sending it to Louise Slee as well as Ms Pharaoh and Ms Athersmith. He said:

> **"I've just completed an ePay form for the month, to include the extra WLI's that I did as well as the agreed salary from earlier this year. We (I) had got a long way behind but, if my calculations are ok, then I think I'm back to where I ought to be now…**
>
> **Hope this is ok and that I've done the ePay stuff correctly…"**

108. We concluded from this email that the claimant had submitted an ePay claim for AAS sessions retrospectively identifying as AAS sessions that were also allocated to PAs. This was a mechanism to get his salary up to what he believed was the agreed level. He was working at least 60 hours a week at Furness and in his view this method simply enabled him to claim for the work that had been done in line with the agreement reached when he moved.

October – December 2015

109. Louise Slee replied on 6 October 2015 at page 818. She said:

> **"Am I correct in that you have put all outstanding claims into September? If so these need to be separated out according to the months (you can edit ePay to find the correct month). Apologies, but we would need this for audit purposes.**
>
> **Also, having spoken with Belinda [**Pharaoh**] I would be authorising two additional PAs per week and then anything else you do extra would be put as waiting list sessions.**
>
> **Am around today if you want to chat."**

110. No discussion took place at this stage. The claimant explained that he was extremely busy around this period. The CQC had come into the Trust and there was an engagement meeting on 16 October (pages 864-867). Mr Cutting had stepped down as Clinical Lead, and the claimant and Mr Dickinson jointly acted as interim Clinical Leads pending an appointment. In addition the claimant made PD18 and PD19 in mid October about two cases involving Mr Jain.

111. The effect of these exchanges about pay was that Louise Slee did not approve the payments for the AAS sessions, and no payments for AAS sessions were made from October onwards. Indeed it was to be a further 12 months (after he had resigned) that the claimant received payment.

112. However, there was no trace of him chasing the matter up during October and November. In addition to the matters summarised above, he was also facing two grievances lodged against him by Mr Naseem (23 November 2015 pages 931-932) and Mr Jain (30 November 2015 pages 926-927). In an email of 2 December 2015 (pages 941-942) he made clear his view that practice of some surgeons at Lancaster continued to be deficient. Mr Cutting forwarded that email to Ms Joshi (page 941) making a reference to the ongoing investigation into allegations of racism against himself.

113. The question of pay surfaced again in early December. On 6 December Louise Slee forwarded to Pam Athersmith the ePay claims submitted by the claimant (and others). There were nine claims for November 2015 marked as "extra PA" at £500 each. Ms Slee spotted that they should be marked as WLI/AAS payments not extra PAs, and there was discussion by email behind the scenes about whether they should be resubmitted. For the first time Louise Slee raised a query about the hours in an email to Ms Athersmith of 9 December at page 976:

> **"Can I also check if these additional claims shouldn't be 3.5 hours as per Job Plan? They are coming through as 5 hours."**

114. She asked Pam Athersmith to check this. There was no apparent progress by the end of the year.

January – February 2016

115. Early January was a busy time because the Royal College of Surgeons came in to review the Urology Department. The report appeared at pages 1045-1084, and this resulted in an action plan at the end of February 2016 at pages 1401-1409. Mr Naseem and Mr Jain were separately interviewed about their grievances by Louise Slee.

116. Ms Slee took up the issue of the claimant's claims for pay again in early February 2016. An email of 8 February 2016 at pages 1130-1131 said that she was conscious she had not yet signed off the ePay claims, and she asked him to send him a copy of the authorised agreement for her claim of an additional two WI claims per week.

117. The claimant sent two emails in response. The first was a brief one the same morning (page 1130). It said:

> **"There isn't any written agreement, just a verbal agreement which was made at the last minute, just over a year ago when I was already to pick up my toys and go and play in Oban instead…**
>
> **I'll do a more detailed email re the negotiations this eve, but it was all done v quickly and I think that it was an informal suggestion from within the Division that my salary be made up to £200,000 annually with WLIs, rather than paying me 16-18 PA's."**

118. The more detailed email came the following day at pages 1129-1130. The claimant recorded that Colin Cutting had said that getting a locum consultant into Furness was costing more than £200,000 per year with little back for the investment. There was discussion about offering the same amount to a senior non locum consultation. The claimant explained that he had contacted the BMA about possible resignation and had started discussions about a dream job in Oban. Following the telephone call from Mr Naseem in late March 2015 he told Mr Cutting he was resigning with immediate effect, but things moved quickly. His email said:

> **"I had a discussion with Colin, Christine [**Winder**] and the Urology interim line manager of the time (I forget her name, she was only in post for a few months) at WGH. We agreed that I would be pulled out of RLI with immediate effect and transferred to FGH on the above agreed salary. I started a day or two before April 1st (!). We agreed that I would be at FGH each day with the exception of Thursdays when I would do my private work and admin at Lancaster.**
>
> **I understand that the Division accepted this arrangement but were unhappy about offering me sufficient PAs to extend the salary to the agreed £200,000 (presumably as it would set a precedent). Hence, it was agreed that I would submit sufficient WLIs to make my base salary (inc clinical excellence awards, seniority etc) up to the above sum. I think (but am not certain) that Ameeta [**Joshi**] was part of these arrangements.**

> **Nothing was put in writing, presumably as the job requires me to work well in excess of EWTD hours (which I can confirm that I am happy to do). Initially, Pam and Belinda were good enough to sort these things out for me but with ePay I now need to do this myself. ☹…**
>
> **I hope that this helps to clarify a very complex situation where the current arrangements were cobbled together in just a few days in order to head off my absolute commitment to resign. I very much hope that my commitment is worth the investment and I remain determined to continue to provide value for money."**

119. Louise Slee sent a brief reply the same day. She said she wanted to ensure she was signing off the correct amounts as per what was agreed and was not trying to dispute anything. She apologised for not meeting the deadline this month due to checking it, but hoped it would be done on an agreed monthly basis from next month.

120. Ms Slee was consulting the Deputy Divisional Finance Manager for the Division, Ian Fleming. She forwarded the emails to him on 10 February (page 1133). In reply he said that there were two issues to be resolved. One was about travel, but the other was the additional two AAS sessions per week. His email said:

> **"Can you please not approve any of these claims until SMT [**Senior Management Team**] have agreed how to take this forward. It sounds like there was a verbal agreement to increase Peter's salary to £200K without the service gaining any additional capacity and it appears that didn't follow any approval process, is most likely outside of T & Cs, and it is certainly unfunded expenditure. Please do not share this with anyone wider than those included in this email."**

121. Ms Slee forwarded to Mr Fleming a copy of the agreed Job Plan. Her email said:

> **"With regard to the two AAS sessions per week these are down in the Job Plan as Monday afternoon 3.5 hours (clinic) and Friday morning 3.5 hours (theatre) which are regular sessions and are being claimed as WLI (5 hours) through ePay. In addition to this Peter has been assisting in the Thursday afternoon one stop clinics and I have claims for these (not sure how this works as this is already allocated as one PA for admin in the Job Plan) but I am sure he will be doing his admin at another time…I would appreciate some support on this as Peter is definitely of the understanding that this was agreed and so for him I would like to resolve this as soon as we can."**

122. The Deputy Divisional General Manager, Sue Ellison, met with Louise Slee on 11 February. During that meeting she sent an email to Ms Joshi at page 1136. They had been going through the ePay claim forms and the Job Plan. There were queries about sessions down as 3.5 hours where 5 hours had been claimed; that time when he did his private work on Thursdays was identified as supportive professional activity ("SPA") time; where there was occasionally an AAS claimed in what should be administration time, and sections where he was meant to be doing a clinic but it was not within the work plan. Advice was sought as to how to proceed.

123. Ms Joshi responded the same day. Her email appeared at page 1139. It said:

> **"I have only today met with Colin [**Cutting**] and asked for all emails pertaining to any agreement with Peter. Colin has become very concerned about Peter's attitude and**

> **becoming isolated from the team. As soon as I get the emails from Colin, I will forward."**

124. In her oral evidence Ms Joshi told us that she was asking Mr Cutting about the Job Plan agreement, not about any agreement regarding salary. She said he had no authority to enter into an agreement regarding salary and therefore it was irrelevant. We rejected this evidence. There was no need to ask for emails about the agreement over the Job Plan because the Job Plan was a separate signed document. Ms Joshi was clearly asking Mr Cutting what had been agreed with the claimant, albeit seeking written evidence rather than confirmation of what had been agreed verbally.

125. Mr Cutting supplied the Job Plan and also some emails from April 2015 which concerned the failure to pay the claimant correctly that month (pages 1152-1153). Those emails were forwarded by Ms Joshi to Ms Slee, and she responded asking whether she was to hold off signing off on the claims or whether that was confirmation the agreement was ok. No confirmation that she could approve the claims was given.

March 2016

126. Around this time the post of Clinical Lead for Urology was being filled. The claimant and Mr Dickinson jointly applied for it, but withdrew that joint application (page 1161). They were persuaded to re-apply individually. The claimant was unsuccessful. He was told by Mr Nasmyth on 8 March 2016 that he had been unappointable because of the grievances brought against him by his ethnic minority colleagues.

127. On 8 March 2016 the claimant was also interviewed by Louise Slee and Jodie Brownlie of HR about the grievances from Mr Jain and Mr Naseem. The notes of that meeting appeared at pages 1282-1285.

128. The following day Ms Slee sent the claimant an email about a claim he had made back in September 2015. His response the same day appeared at page 1183. He said:

> **"It was a Saturday so I'm guessing that it was for an all day clinic or list. [**By the way**], there's several thousand pounds of extra WLIs that I've done over and above the agreed £200,000 for the year April-April. I'm afraid that we're going to miss my agreed salary by a v big margin (on top of everything else that's going on)."**

129. Ms Slee forwarded that to Sue Elliston saying that she would need some support. She had rejected the claims as per the Job Plan but agreed to meet the claimant regarding it and was not sure how to proceed.

130. Once again no meeting with the claimant took place at that stage. Ms Elliston became more involved. On 13 March she sent an email to Ms Joshi copied to Louise Slee (page 1196) which said:

> **"Need to think about how this is going to be progressed and advice and guidance given to Louise, as she has now rejected all of the ePay claims for Peter and so she is now in a difficult position. Rejecting the claims was the right thing to do, but it does mean that Peter now feels that he is not being paid what he was previously promised and [**along**] with not being appointed as Clinical Lead, this situation is only going to escalate.**
>
> **I've asked Louise to**
>
> - **Ask Peter which of the two Job Plans he feels he is signed up to, as there are two floating around and this needs to be clarified first;**
> - **Ask Belinda [**Pharaoh**] what she remembers of the situation at the time as she was the interim CSM between Julie leaving and Louise starting and seems to have signed off the ESR forms.**
>
> **Thought that if we did some informal investigations first to see if this clears up the situation then we can see where we are and take it from there."**

131. Ms Joshi told us in her oral evidence that in March she gave an instruction for the claimant to be paid for the undisputed element of his claims (i.e. 3.5 hours for each 5 hour session claimed). In order for those payments to be made, however, the claimant would have to resubmit his claims for 3.5 hours not for 5 hours as the electronic system did not allow the Clinical Services Manager to change the claim when approving it. It appeared that no-one explained this to the claimant. From his perspective the claims he had made continued to be unpaid.

April 2016

132. The matter moved on into April. On 1 April the claimant spoke to Louise Slee. He told her he had taken legal advice. In an email of 12 April 2016 at page 1220 to Sue Elliston and Ms Joshi she set out her concerns about the discrepancies between the Job Plan and what was being claimed on ePay. Her email said:

> **"Of course, if there has been a previous agreement to pay Peter this salary I would appreciate confirmation on what I am expected to approve via ePay as I feel in an extremely difficult situation at present."**

133. By that stage 32 AAS claims for January to mid March were still awaiting approval.

134. On 4 April 2016 the claimant emailed Pam Athersmith (page 1232) to say that he had been underpaid by £35,000 over the first 12 months at Furness:

> **"So we'll probably be discussing breach of contract and constructive dismissal too."**

135. That same day the Deputy Divisional Finance Manager, Ian Fleming, looked at the information supplied by Louise Slee. He did an email seeking to reconcile the January claims with the job sheet. He identified occasions on which the claimant had claimed a Thursday afternoon AAS when he was being paid for an administration session, and the Friday morning theatre AAS had not been included on the theatre reutilisation spreadsheet. There was one AAS on a Wednesday which could not be

found on any spreadsheet. There followed an exchange of emails that day between Louise Slee and Ian Fleming (pages 1234-1236). They concluded with an email in the following terms from Louise Slee:

> **"Until all this came to light (end of last year) I openly admit I hadn't seen his agreed Job Plan or been fully aware of the timetable anomalies on a Tuesday. So, as it stands no clinical activity scheduled in on a Tuesday despite what the Job Plan states which is why I have redrafted.**
>
> **When I have raised this with Peter he has been clear that the agreement was clinic or validation and that he continues to do validation. I know he does regularly do validation however, this should not be a one day per week job. He was then made Clinical Lead so I put that in his diary for a while.**
>
> **He is also very clear that despite Job Plans the agreement was a salary of what he has stated which is why I got to the point where my discussions with him are not getting anywhere fast."**

136. Late that afternoon (page 1240) Mr Fleming costed the additional sessions in terms of lost PAs, and the figure came out at £112,340 per annum.

137. Managers discussed this on the morning of 5 April 2016 without the involvement of the claimant, and on 8 April (page 1272) Sue Elliston sent an email recommending that there be a formal investigation to find out what had been agreed with him. She said someone independent, not Louise Slee, should carry out the investigation. A further exchange of emails between managers on 11 April recorded that the claimant was saying he was going to lodge a grievance, and on 13 April (page 1316) Louise Slee informed him that there were a number of outstanding questions about what had been agreed and the Job Plan which would be looked at by an independent person.

138. Following a discussion with Louise Slee in April 2016 the claimant stopped submitting ePay claims for his extra sessions. She told him that there was no point making the claims because they were being blocked by the Division, so he said he would stop doing the extra sessions. She told him to keep doing them and that because they were on his timetable as AAS sessions he would have to be paid. Nevertheless the ePay claims stopped at that point.

139. Ms Joshi approved the appointment of an independent person to look into the pay situation. Katie Sharp of HR suggested that this he undertaken "as a desktop exercise" to ensure there was nothing untoward before going into formal proceedings. A Clinical Services Manager from a different Division, Diane Smith, was identified, and on 27 April she was tasked with undertaking that review (pages 1481-1482). Mr Fleming collated the information to be sent to Diane Smith (page 1366).

140. Around this time there was a departmental meeting. There was discussion about a change of base meaning the claimant would no longer be paid for travel time to Furness each day. We were told that the notes of this meeting did not record that discussion. The claimant felt that this was a discussion about him, whereas managers felt that it was a general discussion about looking at where people were

based. Either way, the claimant took it as a further indication that what he believed had been agreed in 2015 was now under threat.

May 2016 - Grievance

141. The claimant had had only the briefest indication from Ms Slee of what was happening. On 19 May he lodged a formal grievance (pages 1415-1416). He made clear he had already waited over six months for a resolution. He summarised the agreement reached in 2015. He said that the extra payments had been made for several months and then stopped. He said that an alternative Job Plan had been circulated showing his base hospital as Furness, and with other changes with which were unacceptable. He said there was a breach of contract and an unlawful deduction.

142. The claimant followed that up with an email on 20 May 2016 at page 1417. He had received his P60. Over the year he had been working at Furness his gross annual income had been £151,945, almost £50,000 less than he had agreed. He said:

> **"As I have repeatedly warned, to deduct such a huge amount of money from my agreed salary package without discussion and to then keep me uninformed about this decision with a series of vague reassurances is appalling behaviour from an employer…"**

June 2016

143. In early June the claimant had still heard nothing about a resolution of the pay issue. On 7 June he had an exchange of emails with Louise Slee (page 1511). She said he would be getting a response "by the end of next week".

144. In fact the plan had changed because Diane Smith had not had capacity to undertake the review. It was done instead by Katie Sharp and Sue Elliston. They reviewed the position on 6 June (page 1481).

145. On 8 June Ms Joshi sent an email to staff generally about AAS sessions and ePay seeking to provide further clarity. It made clear that payment could only be claimed for the actual hours worked, and that part hours should be rounded up to the next whole hour. Where a session was reduced due to operational factors (e.g. not enough patients on the list) the clinician had the option to redeploy and fulfil other useful work to complete a full session, or simply to claim a part session. The existing AAS agreement was being reviewed.

Review Outcome 15 June 2016

146. The review report was provided to the claimant under cover of an email from Katie Sharp of 15 June 2016. The covering email said:

> **"As discussed, myself and Sue [**Elliston**] have met with Ameeta [**Joshi**] this afternoon, thank you for your patience whilst this was undertaken.**

> **Having done a thorough review, we have come to the conclusion that you are owed monies and would like to reach settlement as soon as possible. We would like to meet with you to talk through the report and perhaps understand some of the elements more fully from your perspective.**
>
> **I have attached a copy of the report that Sue and myself have pulled together and key documents that we referred to in undertaking the review. Please be reassured that this is an informal meeting, with the intention of reaching an amicable outcome. I will liaise with Vicki and Pam [**Athersmith**] to set up a meeting as soon as possible so that there is no unnecessary delay."**

147. The claimant opened and read this email on the afternoon of Friday 17 June. He had a look at the report attached (pages 1547-1557) and read it properly over the weekend. Even from a quick look at the report he formed the view that it made clear that he would not be paid for the vast majority of the work he had done. In his oral evidence to our hearing he described it as a "thoroughly horrible document which made my position impossible". After considering it in more detail over the weekend he saw that there was a "sting in the tail": a suggestion that the claims already made and paid prior to the end of September 2015 would be retrospectively reviewed.

148. The report itself was headed "Review of Job Plan". It was based on a review of the Job Plan, the AAS claims since October, clinic and theatre records, and email and letter correspondence. On the question of whether there had been an agreed salary of £200,000, it quoted Christine Winder as saying that:

> **"My understanding at the time was that we would endeavour to keep your remuneration as close as possible to what you were previously earning."**

149. The report went on to say:

> **"There is no dispute that discussions took place regarding the renewal of Mr Duffy's Job Plan and temporary move to Furness. There is however a clear lack of evidence, without any notes of meetings or discussions that took place, neither is there written confirmation of the outcome, contract changes, or any agreement made in those meetings."**

150. It went on to calculate that even with two AAS sessions each week for a 42 week working year that would only come to a total of £137,860 given the base salary of £95,860, falling a long way short of £200,000. There was no formal contractual document recording a change, and the agreed Job Plan made provision for sessions for 3.5 hours so that payment of more than that would be a double payment.

151. There followed in the report an analysis of claims between October 2015 and mid-March 2016, the conclusion being reached that the claimant was owed 58.5 hours. The position was summarised as follows on page 1556:

> **"Of the 55 claims made in this period 1 October 2015 – 10 March 2016:**
>
> - **51% of claims (x28) are for full AAS session, when a part session was worked.**
> - **27% of claims (x15) are when it appears that no clinic or theatre took place.**

- **21% of claims (x12) are claims where payment is already in the baseline Job Plan.**

We would recommend that the claims from 1 April 2015 – 30 September 2015 are reviewed as there may be a potential overpayment."

152. There was also a recommendation that the SPA time on the Job Plan should be reduced to take account of the private work on a Thursday morning, and that there should be a review of the position with Tuesday clinics.

20 June - 7 July 2016 - Resignation

153. Having considered the report in detail over the weekend the claimant reported sick on Monday 20 June. He was referred to Occupational Health the same day (pages 1591-1596).

154. On 5 July 2018 Ms Joshi confirmed that the claimant should be paid for the hours he was owed (page 1630). For reasons not explained to us that did not happen and in fact no payment was made until October 2016.

155. Due to his illness the claimant was not able to attend a meeting to discuss matters. He saw Occupational Health on 6 July. At the request of Pam Athersmith he had refrained from submitting his resignation until after he had seen Occupational Health and his GP. Having done that he resigned by email of 7 July at page 1650 enclosing a letter at pages 1651-1653.

156. The letter included the following passages:

"I feel I have been left with no option but to leave. There are so many contributing factors to my decision including my physical and mental health, but the deciding issue has been the failure of the Trust to adhere to the salary and conditions which were agreed in March 2015 as a part of my revised Job Plan and transfer to FGH. Having persuaded me (as a result of the improved terms and conditions) to withdraw from applying for a job in Scotland in 2015, I believe that it was utterly wrong for the Division to then block payment of the extra sessions that were agreed as part of the pay package. These extra sessions were to compensate me for the long and arduous hours including travel that the new FGH post would entail. Furthermore, I believe that the decision to stop paying the extra sessions (seemingly taken around the end of the year) should at the very least have been discussed and negotiated with me and preceded by a job planning meeting. It is entirely unacceptable that I was left working 60+ hours/week whilst being kept in the dark about the Division's change of heart over my pay and conditions. It is also unacceptable that I should have to demand a grievance to find this out…

At the last departmental meeting it was announced separately by both [Ameeta Joshi**] and [**Sue Elliston**] that the Division will move my base hospital to FGH with the consequent loss of both travel time and the lease car. This directly contradicts the assurances that I was initially given in 2015, will further extend the gap between real hours worked and hours remunerated and will further reduce my income…**

The report stated that of the sessions that I was advised to claim, roughly a quarter were not worked, another quarter were done in time when I was already employed and the remainder were invoiced at the full sessional rate whilst only working part of it. The report even threatened to claw back monies that I have already earned. This was the

> **last straw and I feel that these wholly unjustified assertions were designed to intimidate me and ruin any chance of rebuilding an already very fragile and badly damaged employee/employer relationship (see below).**
>
> **On top of the recent events detailed about, I feel that I have been the long-term recipient of much unwarranted and abusive behaviour from individuals employed by the Trust (both clinicians and managers) with this abuse stretching back many years. I believe the common factor to be my unswerving commitment to hard work and probity and my opposition to low standards and poor care, something which has made me vulnerable and which has not always gone down well with both managers and fellow clinicians. As you know, despite being quite a reserved and quiet individual with a marked aversion to conflict, I have spoken out on many occasions about some of the unsafe practices within the Trust with my concerns going back well over a decade. I believe that this commitment to high standards has in turn led to many of the unpleasant outcomes that I have suffered. I do not feel that the Trust has supported me in this and feel that I have been treated very differently from other members of staff…**
>
> **I believe that the bond of trust that ought to exist between an employer and employee has been irretrievably broken with my health impaired as a result of the above actions and feel that the Trust has left me with no option other than to resign with immediate effect.**
>
> **I am mindful of my obligations to the patients and, if my health recovers sufficiently then I will do my best to return and work out three months' notice to allow a successor to be appointed to FGH. However, this will of course be dependent on my feeling and being judged fit to practise, something that is certainly not the case currently and I should make it clear that such an offer is purely an attempt to discharge my responsibilities to patient care and under no circumstances reflects any acceptance of the changes in my terms and conditions laid out in the email of June 15th, or the allegations contained within the email."**

<u>After Resignation</u>

157. There were discussions amongst managers about whether to seek to persuade the claimant to withdraw his resignation. On 19 July 2016 Mr Cutting emailed Ms Joshi and Ms Elliston asking to meet them to discuss whether an acceptable Job Plan could be identified. In a subsequent email (page 1678) he asked whether any other consultants in the Trust were receiving any special dispensation for working at Furness, and on 21 July (page 1706) he emailed Katie Sharp saying the following:

> **"Thank you for sending through the previous Job Plan which does basically fit with what I thought had been agreed with Peter and by the Division (i.e. 12 PAs and two AAS's per week – including a flexible CPD session – not specifically on a Thursday am, when he was doing private work – and regular additional sessions of AAS on a Monday pm and Friday am).**
>
> **Personally I think that we should do all that we can to retain Peter in his post as I believe he provides an excellent service to the patients and staff at FGH. A step towards retaining him might be if we offered him some kind of acknowledgement of the very hard work he has been doing and I feel that if we paid him 12 PAs as well as 2 x regular AAs per week (as previously agreed) up to this time, that would go a long way to regaining his trust."**

158. The claimant had a return to work meeting with Belinda Pharaoh and Pam Athersmith on 2 August. He recorded that meeting just in case any of the managers with whom he was at odds came in to it. The transcript appeared at pages 1717(1)-1717(34). He made clear what had been agreed about salary when he moved to Furness. He should have been told when a decision was made not to pay any further sessions. He made clear he had completely lost confidence in senior management. He said the BMA had advised him that he had an obligation to his patients which was why he had not left immediately.

159. With some leave prior to the end of his notice period the last day the claimant worked was 23 August 2016. His employment ended on 26 September 2016.

After Employment Ended

160. Efforts were being made to arrange a meeting to discuss his resignation with the claimant, but this was delayed by the respondent and did not take place until 5 October, after his employment had ended. The notes of that meeting appeared at pages 1754-1766, together with a transcript of a recording kept by the claimant at pages 1767-1787.

161. During the meeting the claimant said that the “Review of Job Plan” document had made his resignation inevitable (page 1755) and there was also discussion of the racism allegations. Page 1759 recorded Mr Cutting saying that he had sat through a meeting where three of his colleagues were very vocal about the claimant's racism. He said that the meeting was documented, minuted and circulated, and then two years later one allegation against him had been found to be unfounded. This came as news to the claimant. He said he had been aware of the police letter but not of the internal allegations of racism. He asked why he had not been given a chance to clear his name.

162. There was discussion about the possibility of cancelling the resignation but the claimant declined to do so and confirmed that in an email of 7 October at pages 1791-1792. His email made clear that being told that there had been internal allegations of racism had left him stressed and a bit disorientated by the end of the meeting.

163. On 11 October the claimant prepared his comments on the Elliston/Sharp report (pages 1795-1809) and sent them to Belinda Pharaoh (page 1794). He made the point that none of the individuals involved in the verbal agreement had been interviewed, and that errors had been made about his salary calculations and the number of weeks each year that he worked. He sought to rebut each point made in the original report.

164. After these proceedings began the claimant received a payment of £5,850 gross on 27 October 2016, which was the 58.5 hours due to him from the report of 15 June 2016.

165. On 31 January 2017 he received a further payment of £17,450 gross based on calculations which the respondent had undertaken when completing the response form.

Submissions

166. Each of the advocates had taken the trouble to prepare a written submission which the Tribunal read before oral submissions. Reference should be made to those written submissions for details of the position taken. What follows is a broad summary. There was no significant dispute as to the law to be applied.

Respondent's Submission

167. Mr Williams began by suggesting that the changes in the claimant's case undermined its cogency. It began as an unlawful deductions complaint, became a whistle-blowing and constructive unfair dismissal complaint, and on the first morning of our hearing a good proportion of the case was abandoned. On the third day there was a successful application to amend to rely on a disclosure not previously pleaded.

168. As to the alleged verbal agreement., Mr Williams submitted that the claimant had failed to prove there was a binding contract. The formulation of what was agreed had fluctuated over time, and in February 2016 (page 1130) the claimant himself had described the salary figure as an "informal suggestion". There was no clarity even as to the value of what the claimant said had been agreed. In any event, the mechanisms necessary to result in a payment of that level were not in place even on the claimant's own evidence. He agreed a job plan that would fall short. There was no clear evidence about the precise moment the verbal agreement was reached, and it was plain that Mr Cutting did not have authority to enter into a salary negotiation with an individual consultant. Applying contract law, Mr Williams submitted that even if there had been an offer and acceptance, which was denied, there was still no intention to create legal relations beyond those which would be recorded in the Job Plan. The vagueness of the claimant's case showed that it could not be correct.

169. It followed, therefore, that there had been no unlawful deductions from pay. The claimant ceased to make any claims in April 2016. The evidence from the respondent's witnesses about limitations on the amount that could be claimed for an AAS at Furness should be accepted. The claimant had never resubmitted his erroneous claims.

170. Turning to the whistle-blowing complaint, Mr Williams reminded us of the claimant's evidence that it was PD21A (speaking to the CQC in late August 2015 regarding patient A) which caused the issues with his pay that arose shortly thereafter, yet there was still now a suggestion from his representative that it was the other disclosures too. He invited us to prefer what the claimant said in his own evidence. As to that, he submitted the respondent had shown that the queries about pay were a consequence of factors unrelated to any protected disclosure. They

were related to the introduction of the new ePay system at the time when the new manager, Louise Slee, started, and the claimant's own email of 1 September 2015 at page 819 where he raised for the first time the alleged agreement on salary. Paragraph 45 of the written submissions set out the factors in support of that contention. It followed, submitted Mr Williams, that any automatic unfair dismissal claim must fail as well, since even if there had been a fundamental breach of contract it had nothing to do with any protected disclosure.

171. As to the unfair dismissal complaint, Mr Williams submitted that in the absence of any binding agreement regarding salary levels there was no breach of contract, let alone a fundamental breach. In any event, the claimant could not rely on the email of 15 June 2016 in the attached report as a final straw because it was entirely innocuous. The email made plain that it was an initial review of the position intended to provoke discussion with a view to reaching an "amicable resolution". The fact the claimant resigned following it was a consequence in truth of the other factors which he mentioned in his resignation letter, including relationship difficulties and his dissatisfaction with not being appointed for the Clinical Lead role. The reality was that his resignation was not a consequence of the pay issue. In any event even if there had been a breach he had affirmed the contract by delaying his resignation until after he had seen Occupational Health, and by serving out his notice. He had also been contemplating a return to work if the financial package was right. We were therefore invited to reject all the complaints on their merits.

Claimant's Submission

172. After emphasising that the test for whistle-blowing detriment was equivalent to the discrimination test, save that the burden of proof falls on the respondent without the claimant having to show a prima facie case as to causation, Mr Gorasia emphasised that there was an evidential lacuna as to why the claimant ceased to be paid for his AAS sessions in October 2015. He suggested that in the absence of any witness who could deal with matters orally there was no explanation for that before the Tribunal and therefore the whistle-blowing detriment claim should succeed. Mr Gorasia argued that it was not open to the Tribunal to form a view about the mental processes of the relevant managers based upon emails alone. The temporal connection between the disclosure to the CQC about patient A and the querying of pay issues was sufficient to give rise to success on that point in the absence of any evidence to counter the link.

173. Turning to unlawful deductions, Mr Gorasia submitted that even without proof of an agreement there was still plainly an unlawful deduction. The claimant was entitled to £500 per session: he was working 3.5 hours of clinical work with 1 hour of work added, and that 4.5 hours could be rounded up to 5 hours. He claimed and was paid on that basis for six months. The respondent was stuck with that agreement.

174. Turning to the question of the initial agreement as to salary, Mr Gorasia submitted that the reference to the locum benchmark on page 469 corroborated the claimant's case as to what was discussed. It was not fatal that he left the mechanism

of how to achieve that figure to Mr Cutting. There could be an intention to create legal relations even though the precise figure was not expressly agreed (**Stack**).

175. Finally, the failure to pay the claimant for AAS sessions he had worked, and the failure to explain why that was to him and to delay it for eight months before telling him the position, was plainly a fundamental breach of contract. The entitlement to be paid is of fundamental importance, and the longer the failure to pay went on without a proper explanation the greater the significance of the breach of contract. Mr Gorasia therefore invited us to find for the claimant on all aspects of the case.

Discussion and Conclusions – Contractual Agreement for £200,000?

176. Before addressing the agreed list of issues it was convenient to resolve the underlying issue at the heart of this case, namely whether the claimant had a contractual right to be paid a sum in the region of £200,000 per annum. We began by making findings of fact about the discussions around the move to Furness before applying the law.

Factual Findings

177. Although Mr Williams invited us to treat some aspects of the claimant's evidence with caution in the light of the late changes to his case (the withdrawal of the non-pay matters and the introduction of PD21A) and some press coverage during our hearing (which quoted something in neither the claimant's witness statement or his oral evidence), we found the claimant to be a truthful and reliable witness whose account of the primary facts was generally consistent and in accordance with the contemporaneous documentation.

178. We accepted the account the claimant gave in his email of 9 February 2016 at page 1129 that a figure of £200,000 was mentioned in a departmental discussion in late 2014:

> **"[**Mr Cutting**] pointed out that getting a locum consultant in to FGH was costing £200,000+++YR and we were getting v little back for this investment. He suggested offering the same amount to a long-term senior non-locum NHS consultant who might be prepared to base themselves at FGH for 5-10 years and take ownership and responsibility for the service."**

179. We noted that the first of these two sentences quoted the figure as the cost to the Trust. Mr Cutting's first approach to the Job Plan was consistent with this: on 25 February 2015 he put forward a proposed Job Plan 15.5 PAs, for which (page 469) the total cost to the Trust (including on costs) would be £214,847.

180. The claimant's perspective on these ongoing discussions was evident from an email he sent to Oban some point between 27 February and 9 March (page 472A-B). His email said that there had been discussions working through a lot of the issues that had troubled him and:

> **"(Very provisionally and with nothing formally agreed) I have been offered a radical overhaul of my Job Plan. In essence, I will be based in Furness General Hospital (rather than Lancaster), offered travel time and expenses, taken off the on call rota and given a substantial pay rise (they were talking £200K!)."**

181. The email went on to say that his plan at the moment was to "sit tight and see what firm offers are made".

182. Assuming that this exchange took place at the very end of February or early in March, it was clear that nothing had been agreed by that point. The terms of the claimant's email to Oban showed that he regarded these as provisional discussions which might result in a formal agreement.

183. Behind the scenes Mr Cutting was trying to get approval for a Job Plan which gave the claimant as many PAs as possible. He began in late February with 15.5 PAs (page 467), but faced with management resistance was whittled down to 14.5 PAs (9 March page 473), 14.2/14.3 PAs (12 March pages 478-489), 13.5 PAs (12 March pages 492-495) and finally on 26 March 12 PAs and 2 AAS sessions (page 497).

184. The claimant was not involved in these discussions behind the scenes. However, the matter became significantly more urgent for him in late March when the telephone call from Mr Naseem and discussions with the BMA about his resignation resulted in the meeting with Colin Cutting, Christine Winder and the interim Clinical Services Manager, Julie Armitage, at Westmorland General Hospital. In his email of 9 February 2016 at page 1130 - almost a year later - the claimant summarised that discussion in these terms:

> **"We agreed that I would be pulled out of RLI with immediate effect and transferred to FGH on the above agreed salary. I started a day or two before April 1st (!). We agreed that I would be at FGH each day with the exception of Thursdays when I would do my private work and admin at Lancaster."**

185. That email was written in good faith and set out the claimant's genuine understanding looking back a year later of what had happened. He was the only person who gave evidence to our hearing about what was said in the discussion at Westmorland General Hospital in late March 2015. Even so, his evidence fell short of identifying the words used by Mr Cutting which he took to be a commitment to pay him £200,000. Further, he made no reference to that agreement in his email of 30 April 2015 about being paid on the old Job Plan (page 530); and the first reference he made to an agreed salary was in his email of 1 September 2015 at page 819. That email was not entirely in line with what he told us was his understanding of the agreement. He said it was agreed there was to be a review after 6 months and an increase in AAS sessions so income would be greater in the second half of the year, but the email sought to claim retrospectively for AAS sessions so as to equalise the income at the half year point.

186. The other person primarily involved in the key discussion was Mr Cutting. Neither side called him as a witness. We could not infer from that alone that his evidence would have supported one side or the other. However, the Tribunal did

have access to emails sent by Mr Cutting in February, March and April 2015. There was no evidence that Mr Cutting ever put to the senior managers in the department in that period that a figure of £200,000 was to be paid. Instead he was seeking to obtain approval for a Job Plan to get to that figure. For example, his rationale for the 14.2/14.3 Job Plan (pages 490-491) made no mention of an agreement with the claimant to pay him £200,000. His justification to managers was to do with the provision of care and the saving in other costs.

187. We also had Mr Cutting's emails from July 2016 as part of his efforts to persuade the respondent to get the claimant to retract his resignation. In an email of 21 July 2016 at page 1706 he said that there had been agreement on 12 PAs and two regular AAS per week. He followed that up in an email the same day (page 1705) as follows:

> **"Can I clarify that there was agreement, as clearly stated in the Job Plan sent through from Katie [**Sharp**] that the Division and Peter had agreed to him doing a 12 PA Job Plan with two regular AASs (on a Mon pm and Fri am)?"**

188. Once again he made no reference to it having been agreed that the claimant would receive £200,000 or a figure close to that. Mr Cutting never said that such an agreement had been reached. We regarded that as significant.

Applying the Law

189. The **RTS Flexible Systems** case shows that even if there is offer, acceptance and consideration (the claimant agreeing to move to Furness), there must still viewed objectively be an intention to create legal relations on both sides. In this case we concluded that the respondent (acting through Mr Cutting) did not intend to create legal relations through these verbal discussions. Whilst we did not doubt that the claimant believed there had been an agreement as to the gross remuneration level, which had clearly featured in the ongoing discussions, the Tribunal concluded that for Mr Cutting this was an aspirational figure. The formal binding agreement would be embodied in the Job Plan. In effect the amount to which the claimant would be entitled was to be contractually determined by the Job Plan process, not by the verbal discussions about the level at which it was anticipated the Job Plan process would reach. That explained why Mr Cutting's emails about the agreement were always about the Job Plan, not the gross figure.

190. The claimant knew that Mr Cutting would have to negotiate the Job Plan with the Division. He made reference to that in his subsequent email of 9 February 2016 at page 1130. Mr Cutting's efforts to gain approval for a Job Plan taking the claimant to something like that figure (beginning with 15.5 PAs) were consistent with that figure being discussed as an aspiration rather than contractually guaranteed. As matters transpired the Job Plan eventually agreed with the claimant was different from that initially proposed by Mr Cutting, but it remained his position (as evidenced

in his emails in July 2016) that the Job Plan represented the contractual arrangement, not the verbal discussions.

191. For those reasons the Tribunal unanimously concluded there was no binding contract entitling the claimant to remuneration of £200,000 or thereabouts come what may. His legal entitlement was to the remuneration produced as a consequence of the Job Plan which was signed and agreed in mid-April 2015, as recorded by the letter from the respondent of 27 April 2015 at pages 506-507.

Discussion and Conclusions - Unlawful deductions from pay – Issues 1-3

192. Having made that determination the Tribunal then turned to the unlawful deductions from pay complaint. Determining the amount properly payable to the claimant (issue 1) had three elements to be determined.

Which Sessions were Worked?

193. The first element was the identification of the additional sessions the claimant actually worked. The claimant's evidence was that he worked the sessions in accordance with his schedule analysing those matters attached to his first claim form (page 14). That showed a regular pattern of Monday and Friday AAS sessions from October 2015 through to August 2016, with sessions in November 2015 having been paid. There were also some additional Thursday afternoons and a Wednesday evening session. We accepted that the claimant was doing AAS sessions as he said and in principle was entitled to be paid for each sessions.

194. However, there were issues with a few of those sessions where according to contemporaneous emails the claimant was on holiday or was not working AAS sessions at the time (e.g. pages 1375 and 1723). The claimant accepted he had prepared that schedule from memory. Mrs Nic Philib attached to her witness statement a schedule showing the respondent's analysis. Any such discrepancies about individual sessions will be resolved at the remedy hearing (which may require further evidence) if the parties are unable to agree them.

Length of AAS?

195. The second element was the number of hours for which he was entitled to be paid.

196. The respondent's position was that he was entitled to be paid only for 3.5 hours, or (according to the desktop review in June 2016) for 4 hours to the extent that he would be taken to have worked through what would have been a 30 minute lunch break. That was based on the fact that in the Job Plan (page 1138) the regular AAS sessions on Monday afternoon and Friday morning were scheduled for 3.5 hours. Ms Joshi and Mrs Nic Philib told us in oral evidence that it was understood that at Furness an AAS would be 3.5 hours, not 4 hours of clinical time as at Lancaster.

197. However, this was not something evident from the policy at page 280. The policy created the clear impression that an AAS would result in payment for 5 hours, being 4 hours of clinical time plus 1 hour of work generated by that clinical activity. There was no evidence that this difference had been brought to the attention of the claimant or that it had been agreed with him that AAS sessions at Furness would be claimed at a lower rate than at Lancaster. He was not cross-examined on this point by Mr Williams, doubtless because the point only arose in the respondent's oral evidence.

198. Further, the claimant claimed and was authorised payment of £500 for each of those sessions between April and September 2015, suggesting that the same view had been taken by the Clinical Service Manager in that period. The desktop review report recorded Christine Winder's understanding that remuneration would remain the same as before (paragraph 148 above).

199. Noting that Ms Joshi sought to clarify the position in a subsequent email of 8 June 2016 by making clear that part hours would be rounded up to the nearest full hour (page 1512), we concluded that the claimant was entitled to be paid £500 for each AAS session worked at Furness. Although from the Job Plan it appeared that he would be engaged in only three hours 30 minutes of clinical work, in practice that invariably occupied more than 4 hours and could therefore be rounded up to a total of 5 hours for payment purposes. It was on that basis, we concluded, that the Clinical Services Manager authorised payments of £500 per session to him in the period up to the end of September 2015, and indeed for a period in November 2015.

Absence of ePay Claim?

200. The third element was whether the claimant was entitled to be paid in respect of sessions for which no electronic claim was made. This affected time limits (issue 2).

201. His evidence was that he stopped making those claims in April 2016. In his comments on the desktop review which the claimant provided after resignation (page 1809) the claimant said that the claims were not submitted as it became clear they would not be paid. In his oral evidence he expanded upon this and said that he was told by Louise Slee that there was no point putting the claims in because they were being blocked by the Division. He said he would stop doing the extra sessions but she told him to keep doing them; as they were on his timetable as AAS sessions the Division would have to pay him.

202. We accepted that evidence and found as a fact that the claimant continued doing the work but refrained from submitting the claims on instruction from his line manager. Accordingly we rejected the proposition that the fact no claims were submitted after this point deprived him of entitlement to payment.

203. For those reasons the Tribunal concluded unanimously that on the monthly payroll dates between October 2015 and the last payment after employment ended (September 2016), with the exception of November 2015, the respondent failed to pay to the claimant the total amount of wages properly payable to him in respect of

AAS sessions which he had worked and for which he was entitled to be paid at £500 per session.

Time Limits (issue 2)

204. We turned to the question of time limits. It was plain that there was a series of deductions. There was no gap of more than three months between two unlawful deductions, and the reason for the deductions was the same: a query about whether the claimant was entitled to be paid and if so at what level. That series continued after 23 May 2016 and therefore this complaint was within time.

Payments by the Respondent (issue 3)

205. Under section 25(3) of the Act the Tribunal cannot order the respondent to pay to the claimant any amount in respect of a deduction insofar as it appears to the Tribunal that the amount has already been paid. Accordingly, when the question of remedy for the unlawful deductions is determined, credit will be given for the gross payments made to the claimant of £5,850 on 27 October 2016 and £17,450 on 31 January 2017.

Discussion and Conclusions - Protected Disclosure Detriment – Issues 4 and 5

Detriments (Issue 4)

206. Issue 4 concerned whether the claimant had been subjected to a detriment. The test for whether an act or deliberate failure to act amounts to a detriment is whether a reasonable employee could see it as a detriment: **Shamoon**.

207. We were satisfied that the decision to stop authorising the claims for payment of AAS sessions at £500 per session could reasonably be seen as a detriment, particularly given our conclusion that the claimant was entitled to be paid at that rate. Although the terms of the email of 15 June 2016 were not detrimental, the attached report resulting from the desktop review could reasonably be seen in that way. It queried the entitlement of the claimant to be paid the amount which he had claimed and it also suggested that there should be a review of claims retrospectively to see whether anything should be recouped. The decision to prepare and provide that report to the claimant was plainly detrimental to him.

Causation (Issue 5)

208. According we turned to issue 5, which raised the question of causation. The Tribunal reminded itself that following **Fecitt** the test is whether any of the protected disclosures had a material influence on the act or deliberate failure to act which resulted in the detriment. It requires consideration of the mental processes, conscious or subconscious, of the decision makers. The burden is on the respondent under section 48(2) to show the ground for any act or deliberate failure to act, and therefore in effect it was for the respondent to show that the ground for the challenge to the claimant over pay was not in any material way influenced by any of the protected disclosures.

209. The claimant explained clearly in his oral evidence that the key disclosures were those relating to patient A. He relied on PD21 which was his original report of the death of the patient, and most particularly on PD21A which was his verbal report to the CQC of 25 August 2015. From the claimant's point of view the challenges to his pay came shortly after his report to the CQC, and he maintained that the two were linked.

210. The witnesses called by the respondent were unable to shed much light on the decision to question the claimant's entitlement to be paid. Neither of them was directly involved. We did not hear any evidence from Louise Slee, who was the Clinical Services Manager who first raised a concern about the claims made by the claimant, and who was his immediate point of contact about such matters.

211. Mr Gorasia submitted that as a matter of principle in the absence of any oral evidence or written witness statement from the principal people involved, the respondent was unable to discharge the burden placed on it to show the ground for the decision. We rejected that. There was no challenge by the claimant to the authenticity of the emails which appeared in the bundle, a number of which were sent by Louise Slee and other managers who were not called as witnesses. The Tribunal concluded unanimously that it was able to gain some insight into the mental processes of the relevant individuals from what they were saying at the time even without witness evidence verifying those emails.

212. The question was therefore whether taking into account the oral witness evidence, the written witness evidence and the documents in the bundle, the respondent had shown the ground for the challenge to the claimant's pay and that it was in no sense whatsoever related to a protected disclosure.

213. We noted that the controversy regarding patient A was probably at its height in May, when the claimant gave evidence to the inquest and the coroner requested that he report it as a serious incident (28 May 2015 pages 521-523), and at the end of July when the claimant made clear that he did not agree with the RCA review prepared by the department. There was no indication of any issues with the claimant's pay around this time.

214. On page 777 there appeared an email of 4 August 2015 from Louise Slee, who was then new to her role as Clinical Services Manager, to Pam Athersmith asking if the claimant was correctly claiming five sessions at £500 a time. This was not a query made known to the claimant and it was unclear whether it was anything other than entirely routine for a manager new in post.

215. In contrast the first indication of any issues about the way the claimant was bringing his ePay claims occurred when Ms Slee had sight of the claimant's email of 1 September 2015. He copied her in to that chain of emails on 22 September at pages 818-819. The 1 September 2015 email made clear that he believed he should have been paid £100,000 plus additional work for the first six months of the year from April, and he was proposing to retrospectively designate work he had done in previous months as AAS sessions. It was clear that this caused some concern for Louise Slee: her reply of 6 October 2015 at page 818 indicated that she had spoken

to Belinda Pharaoh and would be authorising two additional sessions each week. Anything else would have to be put as a waiting list session. Although the chain of events after that was not entirely clear to us, the effect of this was that the claimant was not paid for his ePay claims at the end of October. Those payments were restored in November but ceased to be paid once again in December.

216. Putting these matters together the Tribunal was unanimously satisfied that the respondent had discharged the burden of showing that the protected disclosures had no influence whatsoever on this decision. The queries were raised because of three factors: (1) Louise Slee being new in post, (2) the introduction of the ePay system, and (3) the claimant making Louse Slee aware in mid September of what he maintained was the agreement regarding salary and of his proposal to retrospectively claim AAS sessions in order to equalise matters halfway through the year. The respondent had shown that these were the factors which triggered the query about pay, and that the failure to approve those claims (and ultimately the content of the report and email in June 2016) was because of the discrepancy between the hours allocated by the Job Plan and the number of hours claimed. The protected disclosures had no impact on the pay issue and therefore the detriment complaint under section 47B of the Act failed and was dismissed.

Discussion and Conclusions – Unfair Dismissal – Issues 6 and 7

Dismissal – Fundamental Breach? - Issue 6(a)

217. The next matter the Tribunal considered was whether the resignation could be construed as a dismissal.

218. We reminded ourselves of the legal framework. Not every breach of contract amounts to a fundamental breach. The breach must be serious enough to show, when viewed objectively, that the employer no longer intends to be bound by the contract. Insofar as that is put as a breach of the implied obligation of trust and confidence, the **Malik** test must be applied. The Employment Appeal Tribunal emphasised in **Frenkel Topping Ltd v King** that simply acting unreasonably is not sufficient: the conduct must be such as is likely to destroy or seriously damage trust and confidence.

219. However, the entitlement to be paid for work done is a crucial part of the contract of employment. In **Buckland** Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. Comments to similar effect were made in **Cantor Fitzgerald v Callaghan**, particularly where a failure to pay or delay in payment was repeated and persistent and perhaps also unexplained. Ultimately whether a breach of contract amounts to a fundamental breach must be determined on an objective basis taking account of all the relevant circumstances.

220. We dealt first with the argument that there had been a breach of an express term of the contract. For reasons set out above the Tribunal concluded that there was no express contractual term entitling the claimant to £200,000 per annum. However, there was an express term of the contract relating to pay contained in the

Job Plan and in the agreement that he would be paid £500 for each AAS. Accordingly the claimant was entitled to be paid £1,000 per week on top of his salary for his 12 PAs as long as those sessions were actually worked by him. The Tribunal explained above that it accepted the claimant's evidence about this as contained in the schedule attached to his first claim form.

221. It follows that the failure to pay the claimant for the AAS sessions he worked and claimed was a breach of that express term in the months between October 2015 and June 2016, save for November 2015 when those payments were made. Was that breach sufficiently serious to amount to a repudiatory breach?

222. It was convenient to consider that at the same time as considering whether there was a breach of the implied term of trust and confidence. A breach of contract serious enough to destroy or seriously damage trust and confidence will be a repudiatory breach.

223. The respondent's case was that although the process was not handled perfectly, it was fundamentally reasonable for there to be an enquiry into the claims the claimant was making, and for an initial position based on an analysis of the papers to be put to him with an invitation to meet to discuss it to reach an amicable resolution.

224. Whilst there was some force in that submission, we rejected it. The delay and failures of communication were important. The respondent was entitled to look into matters following receipt of the claimant's email of 1 September 2015, but it was not entitled, having decided to cease authorising payment of the AAS sessions, to allow matters to drift and to fail to keep the claimant informed about what was happening. The claimant was heavily busy with other matters at the time and did not pursue the pay issue as assiduously as others might have done, but that did not absolve management of the responsibility to resolve matters quickly given that the claimant was not being paid in the meantime. In the chronology of events there were periods when there appeared to be no effort by managers to resolve the situation. For example, following an exchange of emails in early December (pages 976-978) nothing further appeared to happen until early February 2016 when Louise Slee asking the claimant to provide a copy of the authorisation for the agreement. The claimant provided detailed information promptly, but there was still no progress made. Ms Joshi said that in early March she had authorised the claimant to be paid for what appeared to be outstanding, but that authorisation was not acted upon and no payment was made. The claimant remained in the dark, knowing only that matters were being looked at but having no idea of the timescale or who was involved. The fact that Diane Smith was unable to carry out the work due to other commitments resulted in a further delay of over two months, a delay which was not explained to the claimant.

225. Eventually in early June Katie Sharp and Sue Elliston carried out the desktop review, which appeared to be completed within a single day. The outcome of that review was also a factor which contributed to the fundamental breach. Although the

covering email from Ms Sharp was in conciliatory terms and invited the claimant to a meeting to discuss, the report itself was fundamentally flawed.

226. Firstly, it was apparent from February 2016 that the claimant was relying significantly upon a verbal agreement yet the review was restricted to a desktop exercise on paper alone. Save for brief reference to an earlier email from Christine Winder, there appeared to have been no effort made to gain direct input from the individuals involved in the original agreement (most importantly, the claimant) to find out what had been agreed as a starting point.

227. Secondly, the report was primarily authored by Katie Sharp, who was in HR and new to the role. Although Sue Elliston as Deputy Divisional General Manager also signed it, it betrayed a lack of understanding about how job planning actually worked for consultants. For example, on page 1556 an issue was raised about when SPA time was actually carried out, exemplified by the reference to the fact that the claimant was doing private work rather than SPA time on Thursday mornings (page 1556). Informed clinical input (such as later provided by Mr Cutting in his email of 21 July 2016 at page 1706) would have shown that the SPA session could be regarded as "flexible", meaning that the consultant was free to carry out that activity whenever he was able to fit it into the week, whether the working week or at weekend.

228. Thirdly, the absence of any input from the claimant to the review and the way in which it was written, viewed objectively, showed that there was a strong undercurrent of suspicion that the claimant had been making false claims. Mrs Nic Philib explained in her evidence that it was policy not to speak to individual clinical members of staff if there was an investigation into suspected fraudulent activity. Although she personally disavowed any suspicion against the claimant, the way in which this report was written showed that the authors considered it possible that the claimant was deliberately making false claims. For example, in relation to Friday 6 November 2015 (page 1550) the report baldly stated that:

> **"There is no evidence that there were any theatre sessions undertaken on these days."**

229. Objectively this invited the reader to infer that the claimant had claimed for a session which had simply not happened.

230. Fourthly, that suspicion was evident in the suggestion at the end of the report that claims already authorised and paid between 1 April and 30 September 2015 should be reviewed and a decision reached on whether there was an overpayment and whether it should be recouped. The claimant was entitled to see that as a further significant attack on his probity.

231. We considered carefully whether the negative aspects of the report were outweighed by the positive terms in which the covering email was couched. We concluded not. Although the email made clear that the claimant was owed money, the fact remained that he had not been paid a substantial part of his overall remuneration package for almost eight months by that stage. The email spoke in brief terms of an informal meeting to reach an amicable outcome, but it was reasonable of the claimant to pay more heed to what appeared in the report itself.

The production of a flawed report impugning the claimant's integrity after so long a delay without proper explanation to him was a breach of the **Malik** implied term: there was no reasonable cause for such an approach and viewed objectively it was likely to seriously damage (if not destroy) trust and confidence.

232. Taking into account, therefore, our conclusion that the claimant was contractually entitled to be paid £500 for each of the two AAS sessions in his Job Plan each week (because he had worked them as planned), the Tribunal concluded that the failure of the respondent to pay him what was due from October 2015 onwards, coupled with the long delay and failure to update the claimant and the conclusions of the report resulting from the desktop review (i.e. the "last straw"), cumulatively amounted to a fundamental breach of contract, both of the express term as to pay and of the implied term as to trust and confidence. The content of the report, even with the covering email, was not an innocuous or trivial act (**Omilaju**). The last straw was a heavy one.

Dismissal – Reason for Resignation? – Issue 6(b)

233. The second question was whether that fundamental breach was a reason for the claimant's resignation. Mr Williams argued strongly on behalf of the respondent that the real reason for the claimant's resignation was the interpersonal issues in the department. He relied on the terms of the resignation letter at pages 1651-1653.

234. We noted that there is no requirement that the fundamental breach be the sole or main reason for resignation. However, we concluded that the decision of the claimant to resign on 7 July 2016 was primarily a consequence of the fundamental breach of contract in relation to pay. The resignation letter recognised that there were many other contributing factors. However, it clearly said that the "deciding issue" was the failure of the Trust to adhere to the salary and conditions agreed in March 2015, and then to block payment of the extra sessions that were agreed as part of the pay package. The claimant described this in his resignation letter as "utterly wrong", and said:

> **"It is entirely unacceptable that I was left working 60+ hours/week whilst being kept in the dark about the Division's change of heart over my pay and conditions."**

235. We therefore unanimously concluded that the fundamental breach of contract was part of the reason the claimant resigned on 7 July 2016. In reaching that conclusion we rejected Mr Williams' contention (written submissions paragraph 51) that the claimant said in cross-examination that he resigned in order to avoid a retrospective review of his claims. His answer was that he hoped that his resignation would head off a retrospective review but that he had already decided to resign before he read the report properly and became aware of that possibility. The claimant was giving evidence about what he hoped would be the effect of a decision already made for a different reason.

Dismissal –Affirmation/Waiver? – Issue 6(c)

236. The final question was whether the right to resign had been lost through affirmation of the contract or waiver by delay in resigning or the fact the claimant resigned on notice. The position as to affirmation once a fundamental breach has occurred was considered by the EAT in **Chindove v William Morrisons Supermarket PLC** UKEAT/0201/13/BA (26 March 2014). We applied the principle that what matters is whether the employee has demonstrated that he has made the choice that the contract should continue despite the repudiatory breach of his employer.

237. It was convenient to deal first with Mr Williams' argument that the claimant had not in fact lost trust and confidence because he was clearly minded to return. He relied in particular upon paragraph 176 of the claimant's witness statement, where the claimant said:

> **"I continued to make clear my availability for further meetings in the hope-against-hope that UHMB could somehow come up with some kind of package that might enable me to resume work for them."**

238. He also relied upon the claimant's email of 14 September 2016 at page 1748 where the bullet points for the forthcoming meeting (5 October) included "reasons for staying".

239. We rejected that contention. We concluded that trust and confidence had been lost. The claimant's "hope-against-hope" that there could be a package simply reinforced the fact that the treatment of his pay was a significant reason in his decision to resign. The fact that the claimant cooperated with the proposal to have a meeting to discuss matters was more a reflection of his long service with the organisation and his personal loyalty to Mr Cutting who was keen for him to retract his resignation and come back to work. The claimant explained that the bullet points in his email of 14 September 2016 reflected what he thought the respondent wanted to discuss, not what he wanted to discuss at the meeting itself. The claimant also clearly explained in his evidence to our hearing his disappointment that the meeting only took place after his resignation had taken effect, meaning that in practice there was no prospect of him returning. We were satisfied that none of this was inconsistent with a situation where the claimant's trust and confidence in the respondent had been seriously damaged, and the efforts of the respondent to repair that damage, such as they were, fell well short of being effective.

240. We turned to the delay in resignation. The claimant explained it as a consequence of a discussion he had with his manager, Pam Athersmith. He said that he communicated to her that he would have to resign after the weekend in late June 2016 during which he read the report properly, but she asked him not to take a precipitate decision until he had seen his General Practitioner and the Occupational Health department. He explained that he agreed to do this out of courtesy to her as she was a longstanding colleague and friend. His Occupational Health appointment was on 6 July 2016 (page 1631) and the claimant resigned the following day by email at page 1650. However, although the claimant would have been entitled to have resigned immediately upon receiving the email and report, we were satisfied that he had not affirmed the contract or waived the breach by this brief period during

which he refrained from resigning at the request of a manager. He was off sick during that period and it was sensible to await his medical appointments before taking the final step. It did not show that he had decided to continue with the contract.

241. The next issue was notice: had the claimant affirmed the contract or waived his rights through giving three months' notice of his resignation rather than accepting the repudiatory breach as bringing the contract to an end immediately? In his resignation letter the claimant said:

> **"I am mindful of my obligations to the patients and, if my health recovers sufficiently then I will do my best to return and work out three months' notice to allow a successor to be appointed to FGH…I should make it clear that such an offer is purely an attempt to discharge my responsibilities to patient care and under no circumstances reflects any acceptance of the changes in my terms and conditions laid out in the email of June 15th, or the allegations contained within the email."**

242. In his oral evidence he explained that the BMA had advised him that serving out his notice period may be appropriate given his professional obligations to patients.

243. We accepted that evidence from the claimant as to why he resigned on notice. We noted that section 95(1)(c) expressly recognises that there can be a constructive dismissal where the employee gives notice as long as the employee would be entitled to terminate the contract without notice. The claimant made very clear in his resignation letter that he was prepared to work out his notice because of concern for patients, not because he in any way condoned the actions of the respondent or wished the contract to continue.

244. In those circumstances we unanimously rejected the contention that his decision to honour his contractual notice period amounted to a waiver of his rights or to affirmation of the contract following the fundamental breach by the respondent.

245. It therefore followed that the Tribunal concluded that the claimant had been constructively dismissed by the respondent.

Reason for dismissal/Fairness – Issue 7

246. The respondent did not plead a potentially fair reason for dismissal, and therefore it followed from our conclusion that there was a dismissal that it was unfair under section 98 of the Act.

247. However, there remained the question of whether it was automatically unfair because the reason or principal reason for the repudiatory breach of contract was one or more of the claimant's admitted protected disclosures.

248. The test under section 103A is a more stringent test than the test for detriment in employment under section 47B. The protected disclosures must be the reason or principal reason for the (constructive) dismissal.

249. We explained above the reasons for our conclusion that the protected disclosures had no material influence on the decision to challenge the claimant's pay claims, or in the preparation of the report in June 2016 which fundamentally breached his contract and was the trigger for his resignation. It followed inevitably, therefore, that the protected disclosures could not be seen as the reason or principal reason for those actions, and therefore the automatic unfair dismissal complaint under section 103A failed and was dismissed.

Summary

250. The Tribunal's unanimous conclusions can be summarised as follows.

251. Although the figure of £200,000 was mentioned and it was anticipated that the Job Plan to be agreed would take the claimant towards or to that figure, those discussions were not contractually binding. They were essentially aspirational. The contractually binding arrangement was found in the Job Plan itself.

252. However, that arrangement entitled the claimant to payment for each AAS session in the Job Plan at the rate of £500 per session, not a lower figure.

253. The failure of the respondent to honour that agreement from October 2015 onwards, and the length of time it took for the provisional conclusions to be issued without any explanation to the claimant of what was happening, the flawed approach to the review and the nature of the provisional conclusions contained in the report, resulted in a fundamental breach of contract.

254. The claimant resigned in response to that breach and therefore he was constructively unfairly dismissed.

255. However, the position taken by the respondent on pay was not influenced to any extent by the protected disclosures which the claimant had made and therefore the complaints of detriment in employment and of automatic unfair dismissal failed and were dismissed.

Remedy

256. There will be a remedy hearing on **27 July 2018** with a time estimate of one day to determine the appropriate awards for the unlawful deductions from pay and for the "ordinary" unfair dismissal.

257. The parties should agree proposed directions for preparation for that hearing and supply these to the Tribunal within 21 days of the date on which this judgment is sent to the parties.

258. If there is any dispute about the appropriate Case Management Orders a telephone case management hearing will be convened.

259. The claimant should also indicate within those 21 days whether he seeks compensation for any pension loss to be assessed on a complex actuarial basis

rather than a contributions based method. If a complex approach is sought, a telephone case management hearing will be convened to consider how best to manage that in the light of the Presidential Guidance on the Principles for Compensating Pension Loss issued in August 2017.

_____

Employment Judge Franey

18 May 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON
08 June 2018

FOR THE TRIBUNAL OFFICE